UNC SCHOOL OF GOVERNMENT

2017 New Misdemeanor Defender Training

September 12 – 15, 2017 / Chapel Hill, NC

ELECTRONIC MATERIALS*

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UNC SCHOOL OF GOVERNMENT

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Cosponsored by the UNC-Chapel Hill School of Government
& Office of Indigent Defense Services

Tuesday, September 12

12:15-1:00	Check-in
1:00-1:30	Introduction
1:30-2:45	**Basics of Driving While Impaired:** **Elements, Sentencing, and Motions Practice** (75 min.) Shea Denning, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
2:45-3:00	Break *(light snack provided)*
3:00-3:45	**Basics of Driving While Impaired**, cont'd. (45 min.) Shea Denning, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
3:45 to 4:00	Break
4:00-5:15	**Reading Driving Records and Getting Your Client Back on the Road** (75 min.) Michael Paduchowski, Attorney Law Office of Matthew Charles Suczynski, Chapel Hill, NC
5:30	Adjourn

*IDS employees may not claim reimbursement for lunch

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Wednesday, September 13

9:00-9:45	**Problems with Pleadings** (45 min.) John Rubin, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
9:45-10:30	**Client Interviewing** (45 min.) Toussaint Romain, Assistant Public Defender Office of the Public Defender, Charlotte, NC
10:30-10:45	Break
10:45-12:30	**Interviewing Workshops** (105 min.) Rooms: 2500 Hall
12:30-1:30	Lunch *(provided in building)**
1:30-3:00	**Introduction to Structured Sentencing** (90 min.) Jamie Markham, Associate Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
3:00-3:15	Break *(light snack provided)*
3:15-4:15	**Probation Violations** (60 min.) Jamie Markham, Associate Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
4:15-5:15	**Introducing Evidence** (60 min.) Jon Donovan, Attorney Charns and Donovan, Durham, NC
5:15	Adjourn

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Thursday, September 14

9:00-9:30	**Negotiating Effectively** (30 min.) Elizabeth Hopkins Thomas, Attorney Mannette & Thomas, Chapel Hill and Raleigh, NC
9:30-11:00	**Negotiating Workshops** (90 min.) Rooms: 2500 Hall
11:00-11:15	Break
11:15-12:15	**Pretrial Release Advocacy** (60 min.) Mani Dexter, Assistant Public Defender Office of the Public Defender, Hillsborough, NC
12:15-1:15	Lunch *(provided in building)**
1:15-2:15	**Suppressing Evidence in District Court** (60 min.) John Rubin, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
2:15-3:15	**Ethical Issues in District Court** (ETHICS) (60 min.) Whitney Fairbanks, Assistant Director/General Counsel North Carolina Office of Indigent Defense Services, Durham, NC
3:15-3:30	Break *(light snack provided)*
3:30-4:15	**IDS' Resources and Policies** (45 min.) Thomas Maher, Executive Director North Carolina Office of Indigent Defense Services, Durham, NC
4:15	Depart for Durham
4:45-6:00	Tour of TROSA (Triangle Residential Option for Substance Abuse) and Discussion with Residents

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Friday, September 15 (Mini Bench Trial School Using Hypotheticals)

9:00-10:00	**Theory of Defense/Emotional Themes** (60 min.) Tucker Charns, Regional Defender North Carolina Office of Indigent Defense Services, Durham, NC
10:00-10:30	**Cross Examination** (30 min.) Phil Dixon, Jr., Defender Educator UNC School of Government, Chapel Hill, NC
10:30-10:45	Break
10:45-12:15	**Cross Examination Workshops** (90 min.) Rooms: 2500 Hall
12:15-1:15	Lunch *(provided in building)**
1:15-1:45	**Direct Examination** (30 min.) Susan Brooks, Public Defender Administrator North Carolina Office of Indigent Defense Services, Durham, NC
1:45-3:15	**Direct Examination Workshops** (90 min.) Rooms: 2500 Hall
3:15-3:30	Break *(light snack provided)*
3:30-4:15	**Rules of Evidence Refresher** (45 min.) Jonathan Broun, Attorney North Carolina Prisoner Legal Services, Raleigh, NC
4:15-4:30	Wrap-up
4:30	Adjourn

CLE HOURS: 21.50
Includes 1 hour of ethics/professional responsibility

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Excerpt from chapter 2 of *The Law of Impaired Driving and Related Implied Consent Offenses in NC*, 2014, by Shea Riggsbee Denning, published by the School of Government.

Chapter 2

Implied Consent Offenses

This chapter sets forth the elements of and the punishment and license revocation for each of the twelve implied consent offenses identified in chapter 1.

I. Driving While Impaired

A. Elements

Driving while impaired under G.S. 20-138.1 is the most commonly charged implied consent offense.[1] A person commits this offense if he or she

(1) drives
(2) a vehicle
(3) while impaired
(4) on a street, highway, or public vehicular area.

Each of these elements is discussed in further detail below.

1. Drive

The term "driver" is defined in G.S. 20-4.01(7) as being synonymous with the term "operator," defined in G.S. 20.4.01(25). Cognates of both words (such as drive, driving, operate, operating) also share the same meaning. An operator is "[a] person in actual physical control of a vehicle which is in motion or which has the engine running."[2]

A defendant's purpose for taking actual physical control of a car is not relevant to consideration of whether he or she was driving.[3] Thus, in the criminal prosecution of defendants for offenses of which driving is an element, there is no requirement that the State establish that the vehicle was in motion with the defendant behind the wheel or that the defendant started the car for purposes of driving it.[4] In *State v. Fields*,[5] for example, a law enforcement officer came upon a vehicle sitting in the right

1. There were 51,131 charges for this misdemeanor offense in 2013 (statistics from N.C. Administrative Office of the Courts, on file with author).
2. G.S. 20-4.01(25).
3. State v. Fields, 77 N.C. App. 404 (1985).
4. *Id.*
5. *Id.*

hand lane of the road. The vehicle was motionless and the defendant was seated behind the wheel. The vehicle's owner was seated on the passenger side. Both the defendant and the passenger testified at trial that the passenger had been driving and stopped the vehicle on the street so that they could use the bathroom. The defendant got back into the driver's seat of the car and started it because he was cold. The court found that this constituted sufficient evidence of driving in the prosecution of defendant for the offense of driving while impaired.

Driving can be established by circumstantial as well as direct evidence. In *State v. Dula*,[6] the court found sufficient evidence to justify the inference that the defendant was driving where the driver of another car saw black tire marks on the highway, dust in the air, and a car, with its headlights on, lying on its top in a field near the highway. The driver of the other car stopped at the scene and found the defendant in the overturned car, the doors of which were closed and the windows rolled up. He did not see anyone else in the area. The investigating officer saw tire marks leading from the black marks on the highway across the highway shoulder and into the field where the overturned car was located. The officer could not open the car doors. Testimony from a witness for the defendant that the witness was driving the car and fled the scene did not render the State's evidence insufficient.

Likewise, in *State v. Riddle*,[7] the court found circumstantial evidence of driving sufficient to warrant submission of the case to the jury where the defendant was seen getting out of the car immediately after the collision and no one else was seen in or near the car. The defendant said that his friend had been driving and left the scene of the accident, running through the woods. A witness and law enforcement officers checked the woods and discovered no evidence to support the defendant's claim. The defendant in *Riddle* claimed that the driver of the car left through the driver's side door, but an investigating law enforcement officer was unable to open the door because of the damage it sustained during the collision. When the wrecker driver arrived, the defendant pulled the keys to the car out of his pocket and handed them to the wrecker driver.[8]

The court reached a different conclusion in *State v. Ray*,[9] finding insufficient evidence to support the impaired driving charge where the only evidence that the defendant was driving was that he was sitting "halfway [in] the front seat."[10] In *Ray*, an officer responded to an accident call and saw the defendant seated in a car that had hit two parked cars. There was no evidence that the car had been operated recently or that the motor was running.

2. Vehicle

The term "vehicle" is defined in G.S. 20-4.01(49) as "[e]very device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon fixed rails or tracks." There are several exceptions to this general definition. First, despite the exclusion from the definition for devices moved by human power, bicycles are

6. 77 N.C. App. 473 (1985).

7. 56 N.C. App. 701 (1982).

8. *See also* State v. Mack, 81 N.C. App. 578, 579, 583 (1986) (defendant's admission that he fell asleep driving and "ran over there to the fence," combined with officer's observation of the defendant's car sitting on top of a chain link fence approximately forty-five feet from the road with the headlights on, the "key in the ignition, the warm hood, the defendant asleep in the driver's seat, and the near-empty bottle of Canadian Mist on the floorboard" were "sufficient to allow a reasonable jury to infer that defendant drove the vehicle on a public street").

9. 54 N.C. App. 473 (1981).

10. *Id.* at 475.

deemed vehicles for purposes of G.S. Chapter 20.[11] Second, several other devices that would satisfy the general definition are excepted, and thus are not vehicles for purposes of Chapter 20, including G.S. 20-138.1. The term "vehicle" does not include certain devices used as a means of transportation by a person with a mobility impairment. To qualify for the exception, the device must be "designed for and intended to be used as a means of transportation for a person with a mobility impairment, or who uses the device for mobility enhancement, [be] suitable for use both inside and outside a building, including on sidewalks, and [be] limited by design to 15 miles per hour when the device is being operated by a person with a mobility impairment, or who uses the device for mobility enhancement."[12] The court of appeals in *State v. Crow*[13] rejected an argument by the defendant, a healthy 25-year-old man who had no mobility impairment, that the motorized scooter he was driving was not a "vehicle" in that it was a device used for mobility enhancement. The scooter the defendant was driving "was powered by an electric motor and was likened at trial to a skateboard with handlebars on the front."[14] It had two wheels, six to eight inches in diameter, that were arranged in tandem. The court held that the device did not qualify for the mobility impairment exception, explaining that the legislature's addition in 2001 of the term "mobility enhancement" to the sentence concerning "mobility impairment" "was a technical change that did not substantively expand the existing mobility impairment exception to the term 'vehicle.' "[15] Thus, the court concluded that the defendant's use of the scooter solely for "recreational purposes," did not except the device from the definition of vehicle.[16]

Electric personal assistive mobility devices also are excluded from the definition of vehicle.[17] These are self-balancing, non-tandem, two-wheeled devices that are designed to transport one person and have a propulsion system that limits their maximum speed to 15 miles per hour or less.[18] The "Segway Human Transporter"[19] is an example of such a device. The court in *Crow* concluded that the defendant's scooter did not qualify for this exception, as it was not self-balancing and its wheels were arranged in tandem.[20]

Horses are not vehicles for purposes of the impaired driving statute, G.S. 20-138.1,[21] though they apparently may be considered vehicles for other Chapter 20 offenses.[22]

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11. G.S. 20-4.01(49) further provides that "every rider of a bicycle upon a highway shall be subject to the provisions of this Chapter applicable to the driver of a vehicle except those which by their nature can have no application."

12. *Id*. § 20-4.01(49).

13. 175 N.C. App. 119 (2009).

14. *Id.* at 121.

15. *Id.* at 124.

16. *Id.*

17. G.S. 4.01(49).

18. *Id.* § 20-4.01(7a).

19. *Crow*, 175 N.C. App. at 124.

20. *Id.* The court also rejected the defendant's argument that electric scooters should be excepted from the definition of "vehicle" since "in light of the express exception for bicycles and electric personal assistive mobility devices, an average person might infer that small, lightweight, low-speed devices such as scooters would also fall outside the reach of the statute." *Id.* at 126. The court explained that while it was "wary of requiring the legislature to be overly specific in drafting exceptions to the statute," the General Assembly had deliberately defined "a small number of very specific exceptions," to G.S. 20-138.1. *Id.* The court concluded that "the absence of a motorized scooter from the list of exceptions is indicative of the General Assembly's intent to include such devices in the statutory definition of vehicle." *Id.* at 126 (citations omitted).

21. G.S. 20-138.1(e).

22. In *State v. Dellinger*, 73 N.C. App. 685 (1985), the court upheld the defendant's conviction for impaired driving based upon his riding of a horse on a street with an alcohol concentration of 0.18. The court reasoned that G.S. 20-171 renders traffic laws applicable to persons riding an animal or driving an animal pulling a

3. Street, Highway, or Public Vehicular Area

The third element of driving while impaired is that a person must drive on a street, highway, or public vehicular area.

a. Street, Highway

G.S. 20-4.01(13) defines the term "highway" as "[t]he entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter or right for the purposes of vehicular traffic." The provision further specifies that "[t]he terms 'highway' and 'street' and their cognates are synonymous."[23] There is no requirement that the street be part of the state highway system.[24]

b. Public Vehicular Area

"Public vehicular areas" (or PVAs) are defined to include four broad types of areas: (1) areas "used by the public for vehicular traffic at any time," (2) beach areas used by the public for vehicular traffic, (3) roads used by vehicular traffic within or leading to a gated or non-gated subdivision or community, whether or not the subdivision or community roads have been offered for dedication to the public, and (4) portions of private property used by vehicular traffic and designated by the private property owner as a public vehicular area in accordance with G.S. 20-219.4.[25] G.S. 20-4.01(32)a. sets forth several illustrative examples of areas satisfying the first type. Thus, public vehicular areas include drives, driveways, roads, roadways, streets, alleys, or parking lots upon the grounds or premises of any of the following:

1. Any public or private hospital, college, university, school, orphanage, church, or any of the institutions, parks or other facilities maintained and supported by the State of North Carolina or any of its subdivisions.
2. Any service station, drive-in theater, supermarket, store, restaurant, or office building, or any other business, residential, or municipal establishment providing parking space whether the business establishment is open or closed.
3. Any property owned by the United States and subject to the jurisdiction of the State of North Carolina.

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vehicle on a highway. The legislature defined the term "vehicle" in broad terms in G.S. 20-4.01(49). This broad definition reflects the legislature's intent that horses are vehicles within the meaning of G.S. 20-138.1, the statute prohibiting impaired driving. Whatever the view of the legislature pre-*Dellinger*, that body acted a few years later to express its then-current determination that a person *should not* be convicted of impaired driving for riding a horse (or a bicycle or lawnmower) while impaired. 1989 N.C. Sess. Laws, ch. 711 enacted G.S. 20-138.1(e) excepting the aforementioned conveyances from the definition of "vehicle" as that term is used in the DWI statute. In 2006, the legislature removed the bicycle and lawnmower exceptions. S.L. 2006-253.

23. G.S. 20-4.01(13); *see also id.* § 20-4.01(46) (providing that the "terms 'highway' and 'street' and their cognates are synonymous").

24. *Cf.* State v. Hopper, 205 N.C. App. 175 (2010) (rejecting defendant's argument that the provisions of G.S. 20-129 requiring lighted headlamps and rear lamps during certain conditions did not apply because the street on which he was driving was not part of the state highway system; concluding that officer's testimony that the street on which the defendant drove was within an apartment complex owned by the City of Winston-Salem that the officer was assigned to patrol and that there were parking spots on the street with cars parked in them at the time of the stop was sufficient to support the trial court's finding that the defendant was traveling on a street "open to the use of the public as a matter of right for the purposes of vehicular traffic" per G.S. 20-4.01(13)).

25. G.S. 20-4.01(32).

North Carolina's appellate courts have adopted a broad view of the term "public vehicular area," noting on several occasions that their interpretation accords with the legislature's desire to protect people in parking lots from the dangers posed by those who drive while impaired.[26] The court of appeals has deemed the following locations to be public vehicular areas:

- the parking lot of a car wash, notwithstanding a town ordinance prohibiting parking on the premises unless the facilities were being used[27]
- a privately maintained paved road in a privately owned mobile home park[28]
- a wheelchair ramp in the parking lot of a hotel[29]
- an area of a public park occasionally used for public parking[30]
- the parking lot of a private nightclub[31]

4. While Impaired

The offense of impaired driving under G.S. 20-138.1 is a single offense that may be proven in one of three ways:[32] (1) by showing that the defendant was under the influence of an impairing substance; (2) by showing the presence of an alcohol concentration of 0.08 or more; or (3) by showing the presence of a Schedule I controlled substance. In many cases, more than one theory of impairment may be proven. The State is not required to elect a single theory, nor must it specify its theory in the charging instrument. All impairment theories for which sufficient evidence exists may be presented to the fact finder. If the case is being heard by a jury, the judge is not required to instruct the jury to indicate which theory or theories it relied upon,[33] and the fact that jurors may have relied upon different theories of impairment in finding a defendant guilty does not render the verdict nonunanimous.[34]

a. Under the Influence of an Impairing Substance

A person is "under the influence of an impairing substance" when his or her physical or mental faculties are appreciably impaired by an impairing substance.[35] This theory of impairment frequently is referred to as "appreciable impairment." An impairing substance is (1) alcohol, (2) a controlled

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26. *See* State v. Robinette, 124 N.C. App. 212 (1996); State v. Turner, 117 N.C. App. 457 (1994); State v. Mabe, 85 N.C. App. 500 (1987); State v. Carawan, 80 N.C. App. 151 (1986).

27. *Robinette*, 124 N.C. App. 212.

28. *Turner*, 117 N.C. App. 457.

29. *Mabe*, 85 N.C. App. 500.

30. *Carawan*, 80 N.C. App. 151.

31. State v. Snyder, 343 N.C. 61 (1996). The definition of a public vehicular area at the time of the offense in *Snyder* was significantly narrower than the current one and consisted of areas "generally open to and used by the public for vehicular traffic," including parking lots upon the grounds of a business establishment "providing parking space for customers, patrons, *or* the public." *Id.* at 67 (referencing former G.S. 20-4.01(32)). *Snyder* explained that "even if an establishment is cloaked in the robe of being a private club, it is still a 'business establishment providing parking space for its customers, patrons, *or* the public' and cannot escape liability simply because a membership fee is required." *Id.* at 69. *See also* Shea Denning, *Private Clubs and Public Vehicular Areas*, N.C. Crim. L., UNC Sch. of Gov't Blog (Dec. 11, 2012), http://nccriminallaw.sog.unc.edu/?p=4002 (explaining that in most circumstances the parking lots of private social clubs qualify as public vehicular areas).

32. *See* State v. Oliver, 343 N.C. 202 (1996) (describing impaired driving under former G.S. 20-138.1 as a single offense that may be proven in one of two ways).

33. *Oliver*, 343 N.C. at 215; State v. Garvick, 98 N.C. App. 556, 567 (1990).

34. *Oliver*, 343 N.C. at 215.

35. G.S. 20-4.01(48b).

substance under G.S. Chapter 90, (3) any drug or psychoactive substance capable of impairing a person's physical or mental faculties, or (4) any combination of these substances.[36]

(i) Alcohol

Alcohol is defined as any substance containing any form of alcohol, including ethanol, methanol, propanol, and isopropanol.[37]

(ii) Controlled Substance under G.S. Chapter 90

Article 5 of G.S. Chapter 90 categorizes numerous controlled substances into Schedules I through VI.[38]

(iii) Drug

The term "drug" is not defined in G.S. Chapter 20, but it is defined in G.S. Chapter 90 as follows:

> . . . a. substances recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; b. substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; c. substances (other than food) intended to affect the structure or any function of the body of man or other animals; and d. substances intended for use as a component of any article specified in a, b, or c of this subdivision; but [the term "drug"] does not include devices or their components, parts, or accessories.[39]

Thus, prescription as well as illicit drugs may qualify as impairing substances, as may over-the-counter medications and other psychoactive substances like inhalants, depending upon their potential effect on the body. The fact that a person is legally entitled to use a particular drug is not a defense to a charge of impaired driving,[40] though it may be a mitigating factor at sentencing.[41]

The model jury instructions direct the judge to determine whether a particular substance is an impairing substance and to so instruct the jury.[42] The state's appellate courts have not considered whether an instruction from a judge that a particular substance is an impairing substance is proper or whether it improperly permits the judge to resolve a material fact. In most circumstances, the instruction likely is proper. For example, a judge's instruction to the jury that "alcohol" or "a controlled substance under Chapter 90" is an impairing substance would not invade the province of the jury. That sort of instruction simply defines the term "impairing substance." Likewise, an instruction that "a drug or psychoactive substance capable of impairing a person's physical or mental faculties is an impairing substance" is not objectionable. Furthermore, there would appear to be no problem with a judge instructing the jury that any of the specific substances listed in Chapter 90 is an impairing substance. Thus, the judge could properly inform the jury that a substance such as cocaine, alprazolam (Xanax), or zolpidem (Ambien) is an impairing substance.[43] In some drugged driving cases,

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36. *Id.* § 20-4.01(14a).
37. *Id.* § 20-4.01(1a).
38. *See* G.S. 90-89 (Schedule I); 90-90 (Schedule II); 90-91 (Schedule III); 90-92 (Schedule IV); 90-93 (Schedule V); 90-94 (Schedule VI).
39. *Id*. § 90-87(12).
40. *Id.* § 20-138.1(b).
41. *Id.* § 20-179(e)(5).
42. N.C. Pattern Jury Instructions—Crim. 270.00 (Replacement June 2011) (suggesting that the judge instruct the jury in such cases that "((Name substance involved) is an impairing substance").
43. *See* G.S. 90-90(1)c.; 90-92(a)(1)a.; 90-92(a)(1).

however, the substance that a defendant is alleged to have consumed is *not* a controlled substance under Chapter 90. The State may contend, for example, that a defendant is impaired from inhalants or from prescription medication that is not a scheduled controlled substance. In this circumstance, it arguably is improper for the judge to instruct the jury that the specified drug (such as, for example, sertraline (Zoloft)) is a controlled substance.[44]

b. Proving Appreciable Impairment

Neither a chemical analysis nor a field sobriety test is required to establish appreciable impairment. A chemical analysis that reveals an alcohol concentration below the per se threshold does not create a presumption that a person is not appreciably impaired.[45] Substantial evidence of impairment may exist to prove appreciable impairment even when a person's alcohol concentration does not reach the per se threshold.[46]

(i) Opinion Testimony

North Carolina's courts have long held that a lay witness who has personally observed a person may express an opinion as to whether the person was impaired by an impairing substance.[47] Though officers frequently base such opinions in part upon their training and experience regarding the physical manifestations of having consumed alcohol or some other impairing substance in addition to their personal observations, courts have considered such opinions to be those of a lay rather than an expert witness.[48]

During trial in an impaired driving prosecution, an exchange similar to the following often occurs.

Prosecutor: Did you form an opinion, satisfactory to yourself, that the defendant had consumed a sufficient amount of some impairing substance so as to appreciably impair his mental or physical faculties or both?

Arresting Officer: Yes, I did.

Prosecutor: What was that opinion?

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44. There is at least one other circumstance in which our state appellate courts have permitted judges to instruct the jury as to its determination on a material fact. In *State v. Torain*, 316 N.C. 111 (1986), the state supreme court determined that the trial court did not err in instructing the jury in a first-degree rape trial that "a utility knife is a dangerous or deadly weapon." *Id.* at 116. The court relied on earlier opinions stating that when "the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly . . . *is one of law, and the Court must take the responsibility of so declaring.*" *Id.* at 119 (internal citations, quotation marks omitted) (emphasis in original). Even were this reasoning to be applied in the drugged driving context, however, it likely would authorize no more than instructing the jury that a specific substance scheduled under Chapter 90 is an impairing substance. Those substances are *per se* impairing in much the same way that certain weapons are *per se* deadly. The judge still must leave to the jury the determination of whether other types of "drugs or psychoactive substances" are impairing substances. *Cf.* Jessica Smith, North Carolina Crimes 120–21 (7th ed. 2012) (distinguishing circumstances involving weapons that "are deadly by their very nature" from those in which the jury must be permitted to decide whether the weapon is deadly).

45. State v. Sigmon, 74 N.C. App. 479, 482 (1985) (officer's observation of defendant's driving, odor of alcohol, and inability to perform certain sobriety tests was substantial evidence of impairment regardless of 0.06 breath test result).

46. *Id.*

47. *See* State v. Lindley, 286 N.C. 255 (1974).

48. *See id.*

Arresting Officer: It was my opinion that the defendant had consumed a sufficient quantity of an impairing substance so that his/her mental and physical faculties were both appreciably impaired.

Prosecutor: Did you have an opinion as to what the impairing substance was?

Arresting Officer: I believed it to be some type of alcohol [drug] [psychoactive substance].

This line of questioning is both proper and prevalent. Perhaps because this line of questioning is so common and the answers so typically uniform, defendants sometimes argue that the State's evidence is insufficient as matter of law if an officer does not testify as to his or her opinion that the defendant was "appreciably impaired" by an "impairing substance." Such opinion testimony is not, however, essential to proving the elements of impaired driving, even under the appreciable impairment theory.

Instead, an officer's testimony regarding his or her observations, which might include faulty driving; an odor of alcohol; red, glassy eyes; poor performance on field sobriety tests; and slurred speech, among other observations, often is legally sufficient, without the opinion based on those perceptions, to prove impairment. Thus, while the arresting officer's opinion often will be helpful to the jury or finder of fact,[49] it is not essential to the State's case.

(ii) Proving Impairment by Drugs

Proving impairment by an impairing substance other than alcohol can be more challenging for the State than proving impairment from alcohol. No particular form of evidence is required, and there is no requirement that the State prove the specific drug or impairing substance that the defendant consumed.[50] There are several ways in which the State may seek to prove impairment in such cases.

(A) Drug Recognition Expert Combined with Chemical Analysis

In the State's ideal case, it would elicit testimony from an officer certified as a Drug Recognition Expert (DRE)[51] regarding the defendant's impairment and its cause,[52] along with testimony from a chemical

49. *See* State v. Adkerson, 90 N.C. App. 333, 338 (1988).

50. *See* State v. Lindley, 286 N.C. 255 (1974) (State established prima facie case based in part on patrol officer's testimony that the defendant was under the influence of "some drug"); State v. Cousins, 152 N.C. App. 478 (2002) (unpublished) (evidence of defendant's poor performance on field sobriety tests, his refusal to submit to a blood test, and his admission to taking Lortab, a painkiller, were sufficient to show that he was impaired and that his impairment was caused by an impairing substance; the State was not required to produce expert testimony on the impairing effects of Lortab or as to whether defendant's condition was consistent with someone who had taken Lortab). In a jury trial in which the State's proof fails to identify a particular impairing substance, the court arguably should instruct the jury on the definition of "impairing substance" but should refrain from identifying any particular substance for which the State has failed to establish a prima facie case. See *supra* note 44.

51. DREs are trained to administer a twelve-step protocol designed to determine whether a person is impaired by drugs, and, if so, what category of drug (central nervous system depressant, central nervous system stimulant, hallucinogen, dissociative anesthetic, narcotic analgesic, inhalant, or cannabis) caused the impairment. *See* Shea Denning, *Expert Testimony Regarding Impairment*, N.C. Crim. L., UNC Sch. of Gov't Blog (June 9, 2010), http://nccriminallaw.sog.unc.edu/?p=1335; *see also* Shea Denning, *Daubert and Expert Testimony of Impairment*, N.C. Crim. L., UNC Sch. of Gov't Blog (July 1, 2014), http://nccriminallaw.sog.unc.edu/?p=4834 (analyzing admission of DRE testimony under amended N.C. R. Evid. 702).

52. *See* N.C. R. Evid. 702(a1)(2) (providing that a certified DRE may give expert testimony on the issue of whether a person was under the influence of one or more impairing substances and on the category of such impairing substance or substances).

analyst corroborating the DRE's conclusions.[53] In many cases, however, no DRE will be available to examine the defendant. The results of a chemical analysis, standing alone, may be inconclusive. The analysis may not reveal how recently the substance was ingested or the level of concentration of a particular drug. In addition, the chemical analyst may lack the necessary expertise to testify about the impairing effects of a particular substance. Fortunately for the State, it can establish impairment by drugs in a less ironclad way.

(B) Opinion Testimony from Experienced Officer

The North Carolina Supreme Court held in *State v. Lindley*[54] that the trial court in an impaired driving case properly allowed a patrol officer with five years' experience to testify that in his opinion the defendant was under the influence of some drug. The officer in *Lindley* stopped the defendant for erratic driving. When the defendant got out of his car, the officer saw that he was unsteady on his feet, the pupils of his eyes were contracted nearly to pinpoints, and there was a white substance on his lips. Two passengers in the car were in the same condition. The officer smelled no alcohol on the defendant, who subsequently performed poorly on dexterity tests and appeared to be in a mental stupor. The officer asked the defendant if he had diabetes, had physical defects, was sick, limped, had been injured, had recently seen a doctor or dentist, or had taken any medication. The defendant answered no to all of these questions. Based on these responses, the officer ruled out other causes of the defendant's condition and concluded that he was under the influence of a drug. The state supreme court held that the officer was competent to express that opinion as he was "better qualified than the jury to draw inferences and conclusions from what he saw and heard."[55] The court also held that the State's evidence, which consisted solely of the officer's testimony, was sufficient to establish a prima facie case.

(C) Defendant's Admission Corroborated by Expert Testimony

State v. Highsmith[56] illustrates another manner in which the State might establish impairment by drugs. After an officer stopped the defendant in *Highsmith* for erratic driving, the defendant said he was on the way home from the dentist and had taken a pain medication known as Floricet. The officer testified that the defendant's movements were sluggish and his speech was slurred but that he did not smell alcohol. At trial, the officer testified to his observations and the defendant's statements. The State also elicited testimony from an expert in pharmaceuticals, who testified that Floricet was an impairing substance and that a healthcare professional should have warned the defendant of its effects. The North Carolina Court of Appeals held that this evidence was sufficient to establish that the defendant drove while under the influence of an impairing substance.

c. Per Se Impairment

G.S. 20-138.1(a)(2) prohibits a person from driving a vehicle upon a highway, street, or public vehicular area after having consumed sufficient alcohol that the person has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. This type of impairment generally is referred to as *per se*

53. The final step in the DRE evaluation protocol is to obtain a blood or urine specimen, which is sent to a laboratory for chemical analysis. *See* State of North Carolina, Forensic Tests for Alcohol Branch, Division of Public Health, Department of Health and Human Services, North Carolina Drug Evaluation & Classification (DEC) Program, "The 12 Steps of the Drug Evaluation Process," www.ncdistrictattorney.org/dwi/dre/dre_info_app.pdf, at 4.

54. 286 N.C. 255 (1974).

55. *Id.* at 259.

56. 173 N.C. App. 600 (2005).

impairment. An outwardly sober person is impaired under this theory if his or her alcohol concentration reaches or exceeds the threshold level. G.S. 20-138.1(a)(2) further provides that "[t]he results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration."

(i) Alcohol Concentration

A person's alcohol concentration may be expressed either as grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.[57] These formulas are based on the average ratio that the concentration of alcohol in an individual's blood bears to that in his or her breath: 2,100 to 1. The court of appeals in *State v. Cothran*[58] held that it is immaterial that this formulation is based only on an average blood to breath ratio and that breath test results based on this formula may thus overstate (in the case of an individual with a lower blood to breath ratio) or understate (in the case of an individual with a higher ratio) the person's blood-alcohol concentration.[59] The defendant in *Cothran* sought to introduce testimony from a chemist that the defendant's blood to breath ratio was 1,722 to 1, which meant that his breath test result was 18 percent higher than his blood-alcohol concentration. The appellate court upheld the trial court's exclusion of this testimony, explaining that the legislature adopted a breath-alcohol concentration per se offense as an alternative method of committing the offense of impaired driving. Thus, the court deemed irrelevant the relationship of a particular defendant's breath-alcohol concentration to his or her blood-alcohol concentration.

(ii) Relevant Time after Driving

Every state and the District of Columbia prohibits driving with an alcohol concentration of 0.08 or more, though state laws vary regarding whether to establish a violation of the per se impaired driving law an alcohol concentration of 0.08 or more must exist at the time of driving[60] or, instead, at the time of testing.[61] Some of the states that base the per se offense on the time of driving presume, subject to rebuttal by the defendant, that a 0.08 result from a chemical test performed within a designated time period after the driving establishes that the person drove with an alcohol concentration of 0.08. Some states have a hybrid system, prohibiting driving with a 0.08 alcohol concentration at the time of driving or within a specified time period after driving.[62]

These distinctions in the time of measurement can be significant given that a person's alcohol concentration, which depends upon the rate at which alcohol is absorbed into the bloodstream and at which it is eliminated from the body, changes over time. Alcohol absorption rates vary depending upon many individual factors, including gender,[63] whether a person consumes food with alcohol,[64] whether a person is a heavy or light drinker,[65] the concentration of the alcohol[66] in the beverage,

57. G.S. 20-4.01(1b).

58. 120 N.C. App. 633 (1995).

59. *Id.* at 635.

60. *See, e.g.*, Ala. Code § 32-5A-191; Ark. Code Ann. § 5-65-103; Cal. Veh. Code § 23152(b); Fla. Stat. § 316.193; Iowa Code § 321J.2; Ind. Code § 9-30-5-1; Va. Code Ann. § 18.2-266.

61. *See, e.g.*, Ariz. Rev. Stat. Ann. § 28-1381; D.C. Code § 50-2206.01.

62. *See, e.g.*, Colo. Rev. Stat. § 42-4-1301; Ga. Code Ann. § 40-6-391.

63. Martin S. Mumenthaler et al., *Gender Differences in Moderate Drinking Effects*, 23 Alcohol Research 55 (1999), http://pubs.niaaa.nih.gov/publications/arh23-1/55-64.pdf.

64. J. B. Saunders & A. Paton, *Alcohol in the Body*, 283 Brit. Med. J. 1380, 1380 (1981), www.ncbi.nlm.nih.gov/pmc/articles/PMC1507801/pdf/bmjcred00686-0036.pdf.

65. Neil R. Wright & Douglas Cameron, *The Influence of Habitual Alcohol Intake on Breath-Alcohol Concentrations Following Prolonged Drinking*, 33 Alcohol & Alcoholism 495, 497–99 (1998), http://alcalc.oxfordjournals.org/content/33/5/495.full.pdf.

66. Saunders & Paton, *supra* note 64, at 1380.

and even whether the beverage is mixed with regular or diet soda.[67] On an empty stomach, alcohol concentration peaks about an hour after consumption,[68] depending on the amount drunk. Alcohol is removed from the blood at a rate of about 15mg per 100ml per hour, though this rate likewise varies.[69]

In a state that measures its per se impaired driving violations based on a person's alcohol concentration at the time of driving, a defendant might successfully argue that he or she consumed a large quantity of an alcoholic beverage just before being stopped by police and that the alcohol had not been absorbed into his or her body at the time of the driving. Termed the "big gulp," or delayed absorption, defense, this argument gave rise to 2004 amendments to Alaska's impaired driving laws, which now provide that a person is guilty of impaired driving if a chemical test conducted within four hours of driving detects an alcohol concentration of at least 0.08, regardless of the person's alcohol concentration at the time of driving.[70]

North Carolina neither requires the State to prove a defendant's alcohol concentration at the time of driving nor sets a specific hourly limit in which a chemical analysis must be performed. Instead, G.S. 20-138.1(a)(2) provides that a person commits the offense of impaired driving by driving after having consumed sufficient alcohol such that he or she has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. A "relevant time after . . . driving" is defined as "[a]ny time after the driving in which the driver still has in his body alcohol consumed before or during the driving."[71] As the state supreme court explained in *State v. Rose*,[72] "[a] person whose blood-alcohol concentration, as a result of alcohol consumed before or during driving, was at some time after driving 0.10 or greater must have had some amount of alcohol in his system at the time he drove. The legislature has decreed that this amount, whatever it might have been, is enough to constitute an offense."[73] Thus, the big gulp defense is no defense at all to a charge of impaired driving based upon an alcohol concentration of 0.08 or more in North Carolina.

To prove impaired driving based upon a per se alcohol concentration, the State must demonstrate that at least 0.08 of the defendant's alcohol concentration was based on alcohol consumed before or during the driving. Such proof is made more complicated when there is evidence that the defendant consumed alcohol after driving. In *State v. Ferrell*,[74] the court of appeals rejected the defendant's argument that breath test results were inadmissible given the defendant's admission that he drank several big swallows from a Jack Daniels bottle given to him by the person who picked him up after the accident where defendant also admitted that he had consumed three beers before the accident. The court, however, granted the defendant a new trial based on the prosecutor's improper questioning of the defendant regarding his failure to testify in district court as part of the State's effort to establish that the defendant fabricated his post-accident drinking after learning that it was a defense to the impaired driving charge. In *State v. Mumford*,[75] the court likewise held that the State's evidence was

67. Keng-Liang Wu et al., *Artificially Sweetened Versus Regular Mixers Increase Gastric Emptying and Alcohol Absorption*, 119 Am. J. Med. 802, 803 (2006), www.sciencedirect.com/science/article/pii/S0002934306001823#.

68. Alex Paton, *Alcohol in the Body Clinical Review*, 330 Brit. Med. J. 85, 86 (2005), www.bmj.com/content/330/7482/85.pdf%2Bhtml.

69. Saunders & Paton, *supra* note 64, at 1381.

70. *See* Valentine v. State, 215 P.3d 319 (Alaska 2009).

71. G.S. 20-4.01(33a).

72. 312 N.C. 441 (1984).

73. *Id.* at 447. The per se threshold was reduced from 0.10 to 0.08 for offenses committed on or after October 1, 1993. 1993 Sess. Laws, ch. 285.

74. 75 N.C. App. 156 (1985).

75. 201 N.C. App. 594, *rev'd in part on other grounds by* 364 N.C. 394 (2010).

sufficient for a reasonable juror to conclude that the defendant was impaired at the time of the incident where a breath test administered three hours after the accident revealed a blood-alcohol concentration of 0.09 and defendant admitted to drinking one 32-ounce beer, having a few swallows of another beer, and drinking a shot of liquor in the hours before the accident, despite the defendant's contention that his alcohol concentration resulted from his drinking of part of a beer after the accident.[76]

(iii) Results Shall Be Deemed Sufficient

As noted earlier, G.S. 20-138.1(a)(2) provides that "[t]he results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration."[77] The court of appeals in *State v. Narron*[78] upheld the provision as constitutional, explaining that it did not establish a mandatory presumption that compels the jury or fact finder to find that the results of a chemical analysis accurately reflect a defendant's alcohol concentration. Instead, the provision sets forth the prima facie standard for proof of impairment under the per se prong of G.S. 20-138.1. Thus, the "results of a chemical analysis are sufficient evidence to submit the issue of a defendant's alcohol concentration to the factfinder," who "may find [them to be] adequate proof."[79]

(iv) Per Se Impairment Sufficient as a Matter of Law

One argument made with some frequency by defendants prosecuted under the per se impairment theory is that the defendant showed no outward signs of impairment. That is, he or she drove well and satisfactorily performed field sobriety tests. This, the defendant argues, casts doubt on the veracity of the alcohol concentration results reported from the chemical analysis. This sort of argument is proper and supported in law. Determining whether the evidence establishes the defendant's guilt beyond a reasonable doubt unquestionably is the province of the finder of fact.[80] Moreover, "[t]he State's introduction of evidence supporting the statutory elements in a per se criminal statute does not endow the evidence with infallibility."[81]

There's a variant on this argument, however, that is not supported in law. Defendants sometimes argue that the State's evidence is insufficient as a matter of law to establish impaired driving under the per se prong unless, in addition to proving the defendant's alcohol concentration, the State also proves that the defendant was appreciably impaired. This argument may be a hold-over from the statutory scheme that preceded the Safe Roads Act of 1983, which defined a per se violation of the impaired driving laws as a lesser-included offense of driving under the influence and under which the results of a chemical test yielding a result of 0.10 or more created a presumption that the person was under the influence.[82] Whatever its origins, this argument reflects a misunderstanding of the impairment

76. *See also* State v. George, 77 N.C. App. 470 (1985) (evidence was sufficient for conviction where defendant testified that he drank additional alcohol subsequent to driving; a test taken three hours and forty-five minutes after the driving was admissible, and jury could consider delay in determining the weight afforded to the test results).

77. G.S. 20-138.1(a)(2). This provision was added by S.L. 2006-253, effective for offenses committed on or after December 1, 2006.

78. 193 N.C. App. 76 (2008).

79. *Id.* at 81, 84.

80. *See, e.g.,* State v. Finch, 244 P.3d 673, 679 (Kan. 2011) (stating that proof of the elements of a per se criminal statute will not compel conviction as a matter of law, as "[t]he defense may still attack the State's proof and attempt to discredit its witnesses, their machines, and their methods during the State's case-in-chief or later" and "[t]he jury may finally agree that reasonable doubt prevents a conviction").

81. *Id.*

82. *See* G.S. 20-138 (Cum. Supp. 1981); 20-139.1 (Cum. Supp. 1981); State v. Shuping, 312 N.C. 421 (1984).

element of impaired driving as a single element that may be proved in any one of three ways.[83] As the court of appeals clarified in *State v. Arrington*,[84] "it is not necessary for the State to prove that the defendant was appreciably impaired, uncooperative, or driving in an unsafe manner in order to prove that defendant is guilty of a violation of [G.S. 20-138.1(a2)]. To prove guilt, the State need only show that defendant had an alcohol concentration of .08 or more . . . ."[85]

(v) Margin of Error

Another argument sometimes made by defendants is that the "margin of error" for the breath-testing instrument renders the State's proof of per se impairment based on a breath-alcohol concentration of 0.08 unreliable. The argument generally points to one of two sources for the margin of error. First, administrative regulations deem a breath-testing instrument to be accurate if the control sample used to verify instrument accuracy before the defendant's test measures at the expected result of 0.08 or 0.01 less than the expected result.[86] Second, G.S. 20-139.1(b3) deems admissible results of a chemical analysis consisting of "two consecutively collected breath samples [that] do not differ from each other by an alcohol concentration greater than 0.02" and provides that "[o]nly the lower of the two . . . can be used to prove a particular alcohol concentration."[87] Under the first basis, the margin of error is 0.01 (though any such variance engenders a lower alcohol concentration result than actually is present); under the second, the margin of error is 0.02. While alleged unreliability based upon a margin of error, like other questions about the reliability of a reported alcohol concentration result, is fair game for the fact-finder's consideration,[88] an alleged margin of error does not render the State's evidence of impairment insufficient as a matter of law.[89]

(vi) Proving Per Se Impairment with a Chemical Analysis

The usual way for the State to establish that a person drove while impaired under the per se prong of G.S. 20-138.1 is to introduce the results of a chemical analysis demonstrating that the person had an alcohol concentration of 0.08 or more at any relevant time after the driving. Not only are the results of a chemical analysis "deemed sufficient evidence to prove a person's alcohol concentration," but they also may be admitted at trial without the foundation required for similar types of scientific evidence.[90] Not just any test of a person's breath, blood, or bodily fluid, however, constitutes a "chemical analysis."[91] To qualify, the test must be performed in accordance with G.S. 20-139.1.

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83. *See* State v. Coker, 312 N.C. 432, 440 (1984); *Narron*, 193 N.C. App. at 79.

84. 215 N.C. App. 161 (2011).

85. *Id.* at 165.

86. *See* Title 10A of the North Carolina Administrative Code (hereinafter N.C.A.C.), Subchapter 41B, Section .0101.

87. G.S. 20-139.1(b3).

88. *See, e.g.*, State v. Finch, 244 P.3d 673, 679 (Kan. 2011).

89. *See* State v. Shuping, 312 N.C. 421, 430 (1984) (rejecting defendant's challenge to the sufficiency of the evidence based on an alleged margin of error and characterizing the 0.01 deviation allowance below the expected reading as "a safeguard to insure that when the actual test is subsequently run, any possible error during actual testing is in favor of defendant"); *Arrington*, 215 N.C. App. at 164 (rejecting defendant's contention that since his reported alcohol concentration of 0.08, the result from both breath tests, was the lowest for which he could be convicted of a per se violation, the "margin of error of the [instrument] should be taken into account to undermine the State's case against him"; determining that the testing satisfied statutory requirements, was reliable, and accurately identified the defendant's level of impairment).

90. G.S. 20-139.1 (quoted language from *id.* § 20-138.1(a)(2)).

91. *Id.* § 20-4.01(3a).

A breath test "administered pursuant to the implied-consent law" and performed in accordance with rules of the Department of Health and Human Services (DHHS) by a person with a current DHHS permit for the type of instrument employed is an admissible chemical analysis.[92] In addition, the results of a chemical analysis of blood or urine reported by the North Carolina State Crime Laboratory; the Charlotte, N.C., Police Department Laboratory; or any other laboratory approved for chemical analysis by DHHS, including a hospital laboratory, are admissible without further identification.[93]

(A) Confrontation Clause and Notice and Demand

The Sixth Amendment to the United States Constitution, made applicable to the states via the Fourteenth Amendment,[94] provides, in a portion of its text known as the Confrontation Clause, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[95] The United States Supreme Court in *Ohio v. Roberts*[96] interpreted the right as allowing the admission of an unavailable witness's statement against a criminal defendant if the statement bore "adequate 'indicia of reliability.'"[97] To meet that test, evidence had to either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness."[98]

The Supreme Court overruled *Roberts* in the landmark case of *Crawford v. Washington,*[99] in which it rejected the view that the application of the confrontation right to out-of-court statements depended on the "vagaries of the rules of evidence" or "amorphous notions of 'reliability.'"[100] Instead, the Court reasoned that the protection applied to those who "bear testimony"[101] against an accused and requires that reliability be assessed "by testing in the crucible of cross-examination."[102] *Crawford* held that the Confrontation Clause bars the admission of testimonial hearsay statements against the defendant unless the witness who made the statements testifies at trial or the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.[103] *Crawford* declared the statements at issue in that case—statements made in response to formal police interrogation—to be testimonial but "le[ft] for another day . . . a comprehensive definition of 'testimonial.'"[104]

It was thus unclear for several years post-*Crawford* whether the affidavits issued by chemical analysts in implied consent cases were testimonial for purposes of the Confrontation Clause. Indeed, the North Carolina Supreme Court concluded in *State v. Heinricy*[105] that they were not, reasoning that such affidavits were limited to "objective analysis of the evidence and routine chain of custody information."[106] Though noting that such affidavits were prepared with the understanding that their

92. *Id.* § 20-139.1(b).
93. *Id.* § 20-139.1(c1).
94. Pointer v. Texas, 380 U.S. 400, 403 (1965).
95. U.S. Const. amend. VI.
96. 448 U.S. 56 (1980).
97. *Id.* at 66.
98. *Id.* (footnote omitted).
99. 541 U.S. 36 (2004).
100. *Id.* at 61.
101. *Id.* at 51 (citation omitted).
102. *Id.* at 61.
103. *Id.* at 53–54.
104. *Id.* at 68 (footnote omitted).
105. 183 N.C. App. 585 (2007), *overruled by Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).
106. *Id.* at 591.

use in court was probable, the court characterized the analysts as "ha[ving] no interest in the outcome of the trial."[107] Post-*Crawford*, the General Statutes continued to permit the admission in an implied consent trial of affidavits prepared by chemical analysts without requiring the analyst to testify as a witness.[108]

But five years after *Crawford,* the U.S. Supreme Court held in *Melendez-Diaz v. Massachusetts*[109] that certified forensic analyses prepared for purposes of prosecution by employees of a state crime lab were testimonial statements within the meaning of *Crawford*. The Court further held that a defendant's ability to subpoena analysts—a right then afforded by North Carolina's implied consent statutes—did not obviate the prosecution's duty to present at trial the witnesses whose statements it sought to introduce.[110] The Court signaled its approval, however, of notice and demand statutes that "require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial."[111] The North Carolina legislature responded to the ruling by amending G.S. 20-139.1 to incorporate notice and demand provisions, which are discussed below.

(1) Chemical Analysis of Breath in District Court

In a hearing in trial in district court, the State may introduce a chemical analyst's affidavit reporting information related to the administration of a breath test or the collection of blood or urine samples for analysis without calling the analyst as a witness at trial if it provides proper notice to a defendant and the defendant fails to file a timely written objection.[112] To avail itself of this provision, the State must (1) notify the defendant at least fifteen business days before the proceeding at which the affidavit would be used of its intention to introduce the affidavit and (2) provide a copy of the affidavit to the defendant. To prevent the introduction of the affidavit without an appearance from the chemical analyst, the defendant must, at least five business days before the proceeding at which the affidavit would be used, file a written notification with the court, with a copy provided to the State, stating that the defendant objects to the introduction of the affidavit into evidence.[113] A properly executed affidavit from a chemical analyst is admissible in evidence without further authentication and without the testimony of the analyst in any hearing or trial in district court with respect to: (1) the alcohol concentrations or the presence or absence of an impairing substance; (2) the time of the collection of the blood, breath, and/or bodily fluid for testing; (3) the type of chemical analysis administered and the procedures followed; (4) the type and status of any permit issued by DHHS that the analyst held when he or she performed the chemical analysis; and (5), if the chemical analysis is performed on a breath-testing instrument for which regulations require preventative maintenance, the date the

107. *Id.*

108. G.S. 20-139.1(c1) (2008) (rendering affidavit reporting results of a chemical analysis of blood or urine by an approved laboratory admissible in any court); 20-139.1(e1) (2008) (rendering affidavit by chemical analyst admissible in district court without testimony from analyst unless defendant subpoenaed analyst); *see also* State v. Smith, 312 N.C. 361 (1984) (determining pre-*Crawford* that a defendant's right to confrontation was not violated by the procedure that permitted the affidavit of an analyst who did not testify at trial to be introduced into evidence in district court).

109. 557 U.S. 305 (2009).

110. *Id.* at 324.

111. *Id.* at 326 (citations omitted).

112. G.S. 20-139.1(e1).

113. *Id*. § 20-139.1(e2).

most recent preventative maintenance procedures were performed as shown on the maintenance records for the instrument.

(2) Chemical Analysis of Blood or Urine in District or Superior Court

The State may introduce the certified results of a chemical analysis of blood or urine without further authentication and without the testimony of the analyst in cases tried in district and superior court and in adjudicatory hearings in juvenile court if (1) the State (a) notifies the defendant at least fifteen business days before the proceeding at which the evidence would be used of its intention to introduce the report into evidence and (b) provides a copy of the report to the defendant; and (2) the defendant fails to file a written objection with the court, with a copy provided to the State, at least five business days before the proceeding at which the report would be used stating that he or she objects to the introduction of the report.[114] If the defendant timely files a written objection, the admissibility of the report is determined by the appropriate rules of evidence.

(a) Remote Testimony

The General Assembly enacted in 2014 a provision allowing an analyst, with the defendant's acquiescence, to testify remotely regarding the results of a chemical analysis of the defendant's blood or urine.[115] To utilize this provision, the State must provide (1) notice to the defendant at least fifteen business days before the proceeding at which the evidence would be used that it intends to introduce the evidence using remote testimony and (2) a copy of the analyst's report to the defendant at least fifteen business days before the proceeding.[116] If the defendant fails to object to the remote testimony by filing a written objection with the court at least five business days before the proceeding at which the testimony will be presented, the analyst may testify remotely.[117] The method used for remote testimony must allow the trier of fact and all parties to observe the demeanor of the analyst as the analyst testifies in a similar manner as if the analyst were testifying in person.[118] The court must ensure that the defendant has a full and fair opportunity to examine and cross-examine the analyst.[119] While the statutory provisions for remote testimony became effective September 1, 2014, the legislative act further provided that its provisions did not obligate the Administrative Office of the Courts or the State Crime Laboratory to incur expenses related to remote testimony absent an appropriation of funds for this purpose.[120] Given that no such funds have yet been appropriated, no analysts were testifying remotely as of the date of this publication.

(3) Chemical Analysis of Blood or Urine in Administrative Hearings

Certified results of a chemical analysis may be introduced in an administrative hearing before the North Carolina Division of Motor Vehicles (NC DMV) without the testimony of the analyst, regardless of whether the State notifies the defendant in advance of its intent to introduce such results. The protections of the Confrontation Clause apply only to criminal prosecutions, and thus are not implicated in administrative license hearings conducted by NC DMV.

(B) Proving Per Se Impairment Without a Chemical Analysis

The State is not limited to proving a defendant's alcohol concentration by means of a chemical analysis performed in accordance with G.S. 20-139.1. Instead, the State also may prove a defendant's alcohol concentration by introducing the results of other reliable tests showing the presence of a controlled

114. *Id.* § 20-139.1(c1).
115. S.L. 2014-119, sec. 8.(b).
116. G.S. 20-139.1(c5).
117. *Id.*
118. *Id.*
119. *Id.*
120. S.L. 2014-119, secs. 8.(b), (c).

substance.[121] One circumstance in which the State might rely upon a test that is not a chemical analysis occurs when a defendant is hospitalized after an incident of suspected impaired driving and his or her blood or urine is analyzed for purposes of medical treatment. In such a case, testing is performed pursuant to hospital laboratory procedures rather than the procedures required by G.S. 20-139.1. In *State v. Drdak*,[122] the state supreme court determined that the trial court did not err by denying the defendant's motion to suppress blood test results from a hospital laboratory proffered by the State at the defendant's trial on impaired driving charges to prove his alcohol concentration. The court characterized the defendant's contention that the blood test results were inadmissible because the test was not performed in accordance with the procedures set forth in G.S. 20-16.2 and 20-139.1 as "fl[ying] squarely in the face of the plain reading of [G.S.20-139.1(a)],"[123] which states that "[t]his section does not limit the introduction of other competent evidence as to a person's alcohol concentration or results of other tests showing the presence of an impairing substance, including other chemical tests."[124]

Of course, results of tests performed outside the scope of implied consent laws are not afforded the presumptive admissibility of chemical analyses satisfying the requirements of G.S. 20-139.1. Instead, the State must provide a proper foundation for the introduction of such results, which may require that the State demonstrate their reliability.[125]

The *Drdak* court determined that the State established a proper foundation for introduction of hospital blood test results by showing, among other facts, that "the hospital's blood alcohol test was performed less than an hour after the defendant's car crashed into the tree, that an experienced phlebotomist withdrew the blood sample under routine procedure pursuant to the doctor's orders, and that a trained laboratory technician analyzed the blood sample using a Dupont Automatic Clinical Analyzer which was capable of testing either whole blood or serum."[126] The court of appeals in *State v. Mac Cardwell*[127] likewise concluded that the trial court, in denying the defendant's motion to suppress evidence of hospital blood test results in an impaired driving trial, did not abuse its discretion in determining that the Dupont ACA Star Analyzer ("Analyzer") used by the hospital to measure the defendant's alcohol concentration was a "reliable scientific method of proof."[128] The *Mac Cardwell* court further noted that the trial court properly allowed the defendant to present evidence to the jury attacking the reliability of the Analyzer and the defendant's results.[129]

Hospital laboratories sometimes calculate a patient's plasma-alcohol concentration rather than the alcohol concentration in whole blood. To prove a specific alcohol concentration based on such results, the State must provide testimony from an expert capable of converting the results to grams of alcohol per 100 milliliters of blood in order to prove that the defendant had a specific alcohol concentration.[130]

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121. G.S. 20-139.1(a).

122. 330 N.C. 587 (1992).

123. *Id.* at 592.

124. G.S. 20-139.1(a).

125. Hospital records are business records for purposes of the business records hearsay exception in North Carolina Rule of Evidence 803(6). Yet, as described below, North Carolina's appellate courts have indicated that some greater foundational showing may be required to support the introduction of a defendant's alcohol concentration as contained in such records. That mode of analysis comports with a trend of distinguishing among opinions in business records. *See generally* Imwinkelreid et al., 1 Courtroom Criminal Evidence § 1220 (5th ed. 2011).

126. 330 N.C. at 592.

127. 133 N.C. App. 496 (1999).

128. *Id.* at 506.

129. *Id.* at 507.

130. *See* G.S. 20-4.01(1b) (requiring that the concentration of alcohol be expressed either as "a. Grams of alcohol per 100 milliliters of blood; or b. Grams of alcohol per 210 liters of breath").

The *Mac Cardwell* court held that the trial court did not abuse its discretion in finding the conversion ratio of 1 to 1.18 utilized by a forensic chemist at the State Bureau of Investigation laboratory reliable.[131] As it had with respect to the test results, the court noted the propriety of permitting the defendant to present evidence attacking the conversion ratio used by the State.[132]

(C) Retrograde Extrapolation

Retrograde extrapolation is a methodology used to estimate a person's alcohol concentration at some earlier point in time based upon a later reported alcohol concentration.[133] The calculation of a person's earlier alcohol concentration is based upon the time that elapsed between the specified earlier event (such as a vehicle crash) and the time of the chemical analysis and the average rate of elimination of alcohol from a person's blood. North Carolina's appellate courts have, on numerous occasions, recognized retrograde extrapolation as a reliable method of proving a person's alcohol concentration and have allowed qualified experts to testify about alcohol concentration results derived from such calculations.[134]

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131. *Mac Cardwell*, 133 N.C. App. at 506–07.

132. *Id.* at 507.

133. *See generally* Justin Noval & Edward J. Imwinkelried, *Retrograde Extrapolation of Blood Alcohol Concentration*, 50 Crim. L. Bull., no. 1, art. 7 (Winter 2014) (describing the technique of retrograde extrapolation).

134. *See, e.g.*, State v. Green, 209 N.C. App. 669 (2011); State v. Taylor, 165 N.C. App. 750 (2004); State v. Davis, 142 N.C. App. 81 (2001); State v. Catoe, 78 N.C. App. 167 (1985); *but see* State v. Davis, 208 N.C. App. 26 (2010) (holding that expert testimony as to the defendant's blood-alcohol concentration at the time of the crash was improper and prejudicial, where that testimony was founded solely on the fact that an officer who talked to the defendant more than ten hours after the accident smelled alcohol on her breath).

Courts in other states have viewed retrograde extrapolation testimony with skepticism. The Texas Court of Criminal Appeals in *Mata v. Texas*, 46 S.W.3d 902 (Tex. Crim. App. 2001) (en banc), summarized its view of the limitations of retrograde extrapolation as follows:

> Initially, we recognize that even those who believe retrograde extrapolation is a reliable technique have utilized it only if certain factors are known, such as the length of the drinking spree, the time of the last drink, and the person's weight. . . . In addition, there appears to be general disagreement on some of the fundamental aspects of the theory, such as the accuracy of Widmark's formulas, . . . whether a standard elimination rate can be reliably applied to a given subject, . . . and the effect that food in the stomach has on alcohol absorption. . . . Nevertheless, given the studies, other concepts seem indisputable, including that multiple tests will increase the ability to plot a subject's BAC [blood-alcohol concentration] curve, a test nearer in time to the time of the alleged offense increases the ability to determine the subject's offense-time BAC, and the more personal information known about the subject increases the reliability of an extrapolation. . . .
>
> We believe that the science of retrograde extrapolation can be reliable in a given case. The expert's ability to apply the science and explain it with clarity to the court is a paramount consideration. In addition, the expert must demonstrate some understanding of the difficulties associated with a retrograde extrapolation. He must demonstrate an awareness of the subtleties of the science and the risks inherent in any extrapolation. Finally, he must be able to clearly and consistently apply the science.

Id. at 915–16 (footnotes omitted). *See also* Burns v. State, 298 S.W.3d 697, 702 (Tex. App. 2009) (trial court abused its discretion by admitting retrograde extrapolation testimony where expert "admitted he knew none of the factors required by *Mata*"; such testimony was unreliable); State v. Dist. Ct. (Armstrong), 267 P.3d 777, 783 (Nev. 2011) (citing *Mata* favorably and finding that, while retrograde extrapolation evidence was relevant, the trial court did not abuse its discretion by precluding such evidence where significant personal characteristics of defendant were unknown to expert). *But see* Bigon v. State, 252 S.W.3d 360, 368 (Tex. Crim. App. 2008) (trial court did not abuse its discretion by admitting retrograde extrapolation testimony where expert clearly explained the underlying theory and explained the specific methodologies utilized as required by *Mata*; fact that two tests were administered diminished the importance of expert's lack of knowledge of defendant's personal characteristics); Kennedy v. State, 264 S.W.3d 372, 381 (Tex. App. 2008) (same); United States v. Tsosie, 791 F. Supp. 2d 1099, 1113 (D.N.M. 2011) (trial court did not abuse its discretion by admitting

As a general matter, the admissibility of retrograde extrapolation evidence tends to turn on traditional evidentiary analyses related to expert testimony rather than on jurisdiction-specific views of the reliability of retrograde extrapolation as a scientific technique in the abstract.[135] In determining the admissibility of such evidence courts tend to consider an expert's qualifications,[136] the particular methods employed in a given case,[137] and a jurisdiction's statutory scheme[138] rather than the soundness of retrograde extrapolation as a scientific theory.[139]

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retrograde extrapolation testimony where expert used assumptions favorable to defendant to account for certain unknown personal factors); People v. Ikerman, 973 N.E.2d 1008, 1019 (Ill. App. Ct. 2012) (retrograde extrapolation evidence admissible through testimony of qualified expert; no mention of personal factors).

See also United States v. DuBois, 645 F.2d 642, 644, 645 (8th Cir. 1981) (evaluating sufficiency of the evidence, "emphasiz[ing] that this was a criminal trial," and finding expert's extrapolation based on a test taken two and one-half hours after the accident and after the undisputed consumption of an unknown amount of beer subsequent to the accident insufficient to establish intoxication at time of accident); *Cf.* Weinstein v. Siemens, No. 2:07-CV-15000, 2010 WL 4825205 (E.D. Mich. Nov. 22, 2010) (finding retrograde extrapolation testimony from expert with Ph.D. in toxicology admissible to prove driver's alcohol concentration at the time of accident where expert relied on three consecutive blood draws to determine the driver's rate of elimination and applied that rate in his extrapolation analysis to conclude that driver's alcohol concentration was in the range of 0.36 to 0.39, depending upon whether his alcohol concentration was increasing or decreasing). *See generally* A.W. Jones, "Disposition and Fate of Ethanol in the Body," in Medical-Legal Aspects of Alcohol 95 (James C. Garriott ed., 4th ed. 2003) ("Requests to back extrapolate [blood-alcohol concentration] from time of sampling to time of driving are common in DUI litigation although this is a dubious practice with many variables to consider.").

135. *See generally* Noval & Imwinkelried, *supra* note 133 (asserting that "[e]ven if the courts are generally receptive to retrograde extrapolation testimony, post-*Daubert* the testimony should be admitted only if the scientific theory underlying such testimony is empirically valid").

136. *Compare* People v. Barham, 788 N.E.2d 297, 308–09 (Ill. App. Ct. 2003) (state failed to lay proper foundation for expert testimony regarding rate at which alcohol is eliminated from the human system where there was no evidence of the expert's relevant education, training, or experience), *with Ikerman*, 973 N.E.2d at 1019 (retrograde extrapolation evidence admissible through testimony of qualified expert).

137. *Compare Davis*, 208 N.C. App. 26 (finding retrograde extrapolation based on a "smell test" which lacked independent verification, had never been submitted to peer review, and had never been previously utilized by the expert to be an insufficiently reliable method of proof), *with Green*, 209 N.C. App. at 680 (finding retrograde extrapolation testimony based on the results of a test performed with an Intoxilyzer 5000 to be admissible).

138. *Compare* State v. Day, 176 P.3d 1091, 1098 (N.M. 2008) (retrograde extrapolation admissible to prove defendant's blood-alcohol concentration (BAC) at the time of driving), *with* People v. Emery, 812 P.2d 665, 667 (Colo. App. 1990) (retrograde extrapolation evidence should not have been admitted because it was irrelevant where test results were statutorily deemed to relate back to the offense by virtue of "within a reasonable time [of the offense]" language), State v. Tischio, 527 A.2d 388, 395 (N.J. 1987) (legislative intent precluded defendant's extrapolation evidence meant to show a lower BAC at the time of driving than at the time of testing; a reliable breathalyzer test administered within a reasonable time after driving which reported a BAC exceeding statutory limit was sufficient to prove the offense notwithstanding the fact that a strict reading of statute suggested that crime was in the nature of an "at the time of driving" offense), *and* State v. Daniel, 979 P.2d 103, 105 (Idaho 1999) (statute explicitly prohibiting prosecution where test shows BAC less than 0.10 (now 0.08) precluded extrapolation evidence; statute meant to incentivize submission to testing and allowing extrapolation would eliminate incentive); *see also* Noval and Imwinkelried, *supra* note 133 (indentifying "weaknesses in the popular method of applying the retrograde extrapolation technique" and suggesting improvements for more accurate results).

139. *But see* State v. Burgess, 5 A.3d 911, 916 (Vt. 2010) (noting that "Vermont courts have accepted evidence regarding retrograde extrapolation for a number of decades" and determining that trial court "went too far in holding that the test results . . . were unreliable as a matter of law").

d. Schedule I Controlled Substance

The third way in which a person may be deemed impaired is if there is any amount of a Schedule I controlled substance or its metabolites in his or her blood or urine. Schedule I controlled substances are listed in G.S. 90-89, a provision of the Controlled Substances Act.[140] This schedule includes specified opiates, opium derivatives, hallucinogenic substances, central nervous system depressants, and stimulants. Some of the more commonly known substances included on this schedule are heroin,[141] lysergic acid diethylamide (LSD), [142] and MDMA (ecstasy).[143] Cocaine is a Schedule II,[144] not a Schedule I, controlled substance. Hydrocodone and oxycodone likewise are Schedule II rather than Schedule I controlled substances.[145] Thus, the presence of cocaine, hydrocodone, oxycodone, or the metabolites of any of these substances in a person's blood or urine does not establish per se impairment pursuant to G.S. 20-138.1(a)(3). The State may, however, establish that a person was appreciably impaired by a controlled substance not included on Schedule I.[146]

B. Pleading Requirements

A pleading charging misdemeanor impaired driving in violation of G.S. 20-138.1 "is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant drove a vehicle on a highway or public vehicular area while subject to an impairing substance."[147] The State is not required to allege the specific hour and minute that the offense occurred.[148] Nor must the State allege the theory of impairment under which the defendant is charged.[149] A defendant who feels he or she may be surprised at trial by the pleadings' lack of specificity may request a bill of particulars.[150]

Moreover, while the State must provide the defendant with notice of any aggravating sentencing factor it intends to use for an impaired driving conviction appealed to superior court, no such notice requirement applies in district court.[151]

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140. G.S. Chapter 90, Article 5.

141. G.S. 90-89(2)j.

142. *Id.* § 90-89(3)m.

143. *Id.* § 90-89(3)c.

144. *Id.* § 90-90(1)d.

145. *Id.* § 90-90(1).

146. *See, e.g.*, State v. Norton, 213 N.C. App. 75, 80 (2011) (evidence that the defendant drove recklessly and that he consumed alcohol and cocaine was sufficient to establish his guilt on charges of driving while impaired).

147. G.S. 20-138.1(c).

148. State v. Friend, 219 N.C. App. 338 (2012).

149. State v. Coker, 312 N.C. 432, 434 (1984).

150. *Id.* at 437.

151. G.S. 20-179(a1)(1). *See infra* chapter 5 for a detailed discussion of this requirement. The notice provisions of G.S. 20-179(a1)(1) were crafted to protect a defendant's Sixth Amendment right to be informed of the charges against him or her—as contrasted with a defendant's Sixth Amendment right to confront witnesses.

For a thorough analysis of the impetus for imposing similar notice requirements upon the State in structured sentencing cases post-*Blakely v. Washington*, see Jessica Smith, *North Carolina Sentencing after* Blakely v. Washington *and the* Blakely *Bill* (UNC School of Government, Sept. 2005) (hereinafter *Blakely Bill*), 10–13, www.sog.unc.edu/sites/www.sog.unc.edu/files/Blakely%20Update.pdf.

It is well settled that all of the constitutional protections that apply in superior court need not be afforded a defendant at the first level of a two-tier trial system. *See* Ludwig v. Massachusetts, 427 U.S. 618 (1976) (defendant's Fourteenth Amendment right to jury trial not violated by bench trial at first tier of two-tier system where defendant had right to trial by jury at second tier). Thus, there is some questions as to whether *Blakely v. Washington,* 530 U.S. 466 (2000), applies to non-Structured Sentencing Act misdemeanors tried in district court. The issue has been stated this way:

C. Aiding and Abetting

A defendant may be convicted of impaired driving in violation of G.S. 20-138.1 under the common law concept of aiding and abetting. A defendant aids and abets impaired driving when he or she knowingly advises, instigates, encourages, or aids another person to drive while impaired and his or her actions cause or contribute to the commission of the crime.[152]

One situation clearly covered by the aiding and abetting theory is that in which a person knowingly gives control of his or her vehicle to an impaired person who then drives the vehicle on a street, highway, or public vehicular area while the owner rides along as a passenger.[153]

> One view is that *Blakely* is not simply a ruling on the constitutional right to a jury trial, but also rests on rights (such as notice and proof beyond a reasonable doubt) that flow from a sentence that exceeds the statutory maximum as defined in the ruling. Therefore, requirements of a criminal pleading providing notice (either by specific allegations or a statutory short-form pleading) and proof beyond a reasonable doubt apply . . . in district court . . . just as they apply in superior court—except that a district court judge, not a jury, decides whether these factors have been proved beyond a reasonable doubt. . . .
>
> Another view is that *Blakely* rests squarely on the constitutional right to a jury trial. The United States Supreme Court ruled in *Ludwig v. Massachusetts*, 427 U.S. 618 (1976), that there is no federal constitutional right to a jury trial at the first level of a state's trial de novo system. If *Blakely* is based solely on the protection of that right, then it apparently does not apply to the first level of a system, such as North Carolina's, where jury trials are provided only on de novo appeal.

See Smith, *Blakely Bill*, at 28.

As Smith discusses in the article cited above, the North Carolina Supreme Court held in *State v. Speight*, 359 N.C. 602 (2005), *vacated and remanded*, 548 U.S. 923 (2006) (remanding case for reconsideration in light of *Washington v. Recuenco*, 548 U.S. 212 (2006) (reversing lower court's determination that *Blakely* violations could never be harmless)), that grossly aggravating and aggravating factors in an impaired driving case need not be alleged in an indictment. However, the state supreme court in *State v. Hunt*, 357 N.C. 257 (2003), recognized that the Sixth Amendment imposes a notice requirement on the State. In *Hunt*, the short-form murder indictment combined with an exclusive statutory list of aggravating circumstances was held to provide sufficient notice. G.S. 20-138.1(c) provides for a short-form criminal pleading for impaired driving, though as previously noted, G.S. 20-179(a1)(1) requires additional pleadings in superior court. *Hunt* can be read to suggest that in district court this short-form pleading combined with the exclusive list of grossly aggravating factors in G.S. 20-179(c) provides sufficient notice as to grossly aggravating factors. The same argument could be made regarding the aggravating factors in G.S. 20-179(d), with the exception of the catch-all aggravating factor in G.S. 20-179(d)(9). *Hunt* might be read to suggest that some sort of additional notice would be required for this factor, if, in fact, *Blakely* applies in district court. However, given that this catch-all aggravating factor must be based on conduct that occurs during the same transaction or occurrence as the impaired driving offense, it may be sufficiently circumscribed so as to place the defendant on notice. *Contrast* G.S. 15A-1340.16(d)(20) (listing as a catch-all "[a]ny other aggravating factor reasonably related to the purposes of sentencing").

152. *See* State v. Goode, 350 N.C. 247, 260 (1999).

153. *See* State v. Gibbs, 227 N.C. 677, 678 (1947) (citations omitted) ("When an owner places his motor vehicle in the hands of an intoxicated driver, sits by his side, and permits him, without protest, to operate the vehicle on a public highway, while in a state of intoxication, he is as guilty as the man at the wheel."); State v. Whitaker, 43 N.C. App. 600, 605 (1979) (citations omitted) ("[W]e hold that when a death results from the operation of a motor vehicle by an intoxicated person not the owner of that vehicle, the owner who is present in the vehicle and who with his knowledge and consent permits the intoxicated driver to operate the vehicle, is as guilty as the intoxicated driver."); *see also* Story v. United States, 16 F.2d 342, 344 (D.C. Cir. 1926) (owner of and passenger in vehicle convicted as aider and abettor where impaired passenger asked defendant for and was given permission to drive); State v. Satern, 516 N.W.2d 839, 840 (Iowa 1994) (owner of and passenger in vehicle convicted as an accomplice where he "turned over" the driving to a person who was impaired); State v. Stratton, 591 A.2d 246, 248 (Me. 1991) (owner of and passenger in vehicle convicted as an accomplice where he asked his impaired employee to drive because employee was "soberer"); State v. Lemacks, 996 S.W.2d 166, 172 (Tenn. 1999) (owner of and passenger in vehicle convicted as an accomplice where evidence uncertain if

It is somewhat less clear whether a person may be convicted of aiding and abetting impaired driving if he or she knowingly gives control of his or her vehicle to a person who is impaired, but does not himself/herself accompany the driver. No North Carolina appellate court cases consider this circumstance, though it seems likely that such conduct would support a conviction for aiding and abetting DWI. The vehicle owner's presence in the car in the aiding and abetting cases previously cited[154] was probative of his or her consent to the driving as well as his or her knowledge of the driver's impairment. Yet a vehicle owner who hands over his or her keys to an impaired driver but does not himself/herself ride along has provided the same degree of assistance and appears no less culpable than the owner who elects to accompany the driver. Indeed, the Court of Appeals of Georgia concluded in *Guzman v. State*[155] that the owner of a vehicle who was neither the driver nor a passenger in the car aided and abetted driving under the influence where he gave beer and his car keys to the 14-year-old driver.

A person may not be convicted of aiding and abetting impaired driving based on nothing more than his or her failure to stop from driving a person he or she knows to be impaired.[156] The North Carolina Court of Appeals considered such a claim in *Smith v. Winn-Dixie Charlotte, Inc.*[157] *Smith* was a civil action in which the plaintiff, who was injured when a 17-year-old impaired driver struck her vehicle, alleged negligence by the grocery store who sold beer to the driver's underage friend and negligence per se by the driver's friends whom she contended aided and abetted the underage driver in violating G.S. 20-138.1.

The record in *Smith* established that the driver's friends drank with him on the evening of the accident and that they saw the driver consume six beers in a short period of time. They did not attempt to stop him from driving his own car afterwards. The court of appeals determined, for purposes of the defendant-friends' motions for summary judgment, that this evidence was not sufficient to establish that the friends aided and abetted the driver in committing the offense of driving while impaired. The court noted the lack of evidence that the friends intended to aid the driver or that they communicated any such intent. Moreover, the court stated that even assuming the friends knew or should have known the driver was impaired, they had no duty to prevent him from getting into his car and attempting to drive.

The Supreme Court of Vermont wrestled with more difficult facts in *State v. Millette*.[158] There, the evidence established that the defendant and his friend left a night club in the early morning hours after a day and night of drinking. The defendant, whose car was parked in the parking lot, suggested to his friend that they pull the car behind the night club and sleep. The defendant's friend removed the keys from the defendant's pocket and said he would drive the defendant home. The friend wrecked the car on the way home and was killed. The court concluded that these facts failed to establish that the defendant aided and abetted driving while impaired, noting that cases predicated on this theory of criminal liability rested on "more active participation" by the defendant than was present in *Millette*.[159]

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he was driving but where, in any event, he gave keys to impaired co-defendant); Williams v. State, 352 S.W.2d 230, 230 (Tenn. 1961) (owner of and passenger in vehicle convicted as aider and abettor where he had no valid license and had impaired friend drive).

154. See *supra* note 153.

155. 586 S.E.2d 59 (Ga. Ct. App. 2003).

156. *See* State v. Sanders, 288 N.C. 285, 290 (1975) (citations omitted) ("The mere presence of the defendant at the scene of the crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense.")

157. 142 N.C. App. 255, 264 (2001).

158. 795 A.2d 1182 (Vt. 2002).

159. *Id.* at 1184.

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The Story of Dudley Do-Right

Dudley gets a ticket for a seatbelt violation…

Dudley gets a court date . . .

Dudley Should Take Care of the Ticket, but…

- Dudley blows off his court date

OR

- Dudley forgets

OR

- Dudley comes to court but does not pay his fines . . .

The Process Continues…

The clerk puts Dudley's file in "Called and Failed" or "20 Day Failure" or "Failure To Comply" if he failed to pay within the statutory 40 days…

Dudley continues to drive and not address the ticket…

DMV Attempts to Notify Dudley

DMV sends a letter to Dudley's last known address, warning that his license will be suspended/revoked in 60 days if he does not address his ticket . . .

Dudley either does not receive or ignores the letter…

Dudley Loses His License

Dudley gets his license revoked… § 20-24.1

Dudley keeps driving. He is pulled over again, gets a ticket for speeding 81/65 AND, this time, a charge of Driving While License Revoked (DWLR) for a Non-Impaired Revocation

Dudley Needs Your Help

Dudley Is Your Client

Dudley is charged with:
1) Speeding 81 mph in 65 mph zone ┐ *and*
2) Driving While License Revoked

IF Dudley gets any moving violation while his license is in a state of suspension AND he is subsequently CONVICTED of the moving violation…..

If Dudley ends up getting convicted of:

1) Speeding 81 in 65;
OR
2) Any lesser-included speed
OR
3) Driving While License Revoked (offense date before 12/1/15)

HIS LICENSE WILL BE REVOKED
FOR *AT LEAST ONE YEAR*

(see N.C.G.S. N.C.G.S. § 20-28.1)

2 Types of Suspension

- (1) N.C. Gen. Stat. § 20-24.1 (Indefinite Suspension)
  - Revocation (INDEF) for FTA or FTP/FTC
  - Remains in effect until the FTA case is disposed or FTC case is paid

  (2) N.C. Gen. Stat. § 20-28 (a) and N.C. Gen. Stat. § 20-28.1
  (Definite Suspension)
  - Any Moving violation conviction requires additional suspension of 1 year, 2 years or permanently if the moving violation was committed while in a state of suspension (20-28.1).
    - Same with any conviction of DWLR-Impaired or DWLR-Non-Impaired with an offense date before 12/1/2015

Other Possible Causes of a Revocation

North Carolina General Statute § 20-16 provides, that the Division of Motor Vehicles has the authority to suspend the license of any driver, if a driver has:

- Accumulated twelve or more points within a three year period;
- Been convicted of Driving While Impaired;
- Been convicted of Speeding more than 80 MPH in a 70 MPH zone;
- Been convicted of Speeding more than 75 MPH in a less than 70 MPH zone;
- Been convicted in 12 months of Speeding 55 to 80 MPH and:
  - Speeding 55 to 80 MPH; or
  - Careless and Reckless Driving; or
  - Aggressive Driving;
- Committed Fraud involving a Driver's License or Learner's Permit;
- Been Convicted of Illegally Transporting Alcohol; or
- Been Ordered Suspended as part of a Court Order.

Moving vs. Non-Moving Violations

Moving Violations

- DWLR (Impaired)
- Speeding
- Stop Sign/Stoplight
- No Insurance
- Unsafe movement
- Reckless Driving (C&R)
- Move Over Law
- DWLR Non-Impaired**
- No Operator's License (NOL)**
  - **Offense Date Before 12-1-2015
- Driving While Impaired (DWI)
- Open Container
- Following Too Closely
- Left of Center
- Passing a Stopped School Bus
- Failure to Yield to Emergency Vehicle
- Illegal Passing
- Child Seat/Child Seatbelt (<16 years)

Moving vs. Non-moving

Non-moving Violations

- Improper Equipment
- Adult Seatbelt (≥16)
- Exp./Rev./Fict. Registration
- Exp. Inspection
- Fictitious Info to Officer
- Parking in a Handicapped Space
- Failure to Notify DMV of Address Change
- Window Tint
- All City Ordinance Violations
- DWLR (Non-Impaired)*
- No Operators License*
  - *Offense 12/1/15 of later

Alternatives to a Moving Violation Conviction

- Dismissal or Acquittal
- Reduce or Amend to Non-Moving Violation
- Prayer for Judgment Continued (PJC)

Dismissal/Acquittal

- Acquittal (i.e. a NG verdict) usually impractical route in these cases (exceptions apply)
- Outright dismissal of moving violations (rare)
  - Exception: Defendant agrees to plea to another moving violation, a non-moving violation, a criminal charge, etc. (Dismissal per plea)
  - Exception: Unsafe movement, Failure To Reduce Speed, etc resulting from a vehicle collision – Defendant presents a letter from his insurance company
  - Exception: Expired DL – renew and show valid DL
- BUT, a dismissal of CHARGED non-moving violation is quite common – FIX IT and show proof!
  - Expired Inspection, Registration
  - Improper Equipment, Window Tint – Fix It!

Reduce or Amend to Non-moving Violation

- Speeding → Improper Equipment-Speedometer
  - Exception: IE is NOT available if speed > 25mph over
- Stoplight/Stop Sign → City Code Violation (or Improper Equipment-Brakes)
- DWLR/NOL → A non-moving violation for offense dates on/after Dec 1, 2015

Prayer for Judgment Continued (PJC)

- PJC is unique to North Carolina
- Guilty but not a "conviction" (court agrees to continue the judgment indefinitely)
- NOTE: **only 2 PJCs per *driver* every 5 years for DMV purposes**
- **BUT only 1 PJC per *household/policy* every 3 years for insurance purposes**
  - See N.C. Gen. Stat. § 58-36-75(f)

- DMV will not honor a PJC for the following:
  - DWI
  - Passing Stopped School Bus
  - Speed > 25mph over
  - Any offense committed while driving a commercial vehicle OR possessing a commercial drivers license

Extraordinary Relief

- (1) FTA Sent In Error
- (2) Nunc pro tunc
- (3) Motion for Appropriate Relief (MAR)
- (4) Chapter 14 criminal charge of FTA

FTA Sent In Error

- Judge orders the Clerk to transmit to the DMV that the Clerk sent the FTA in error.
- If the FTA is removed (on the original charge), the moving violation no longer occurred while in a state of suspension. Dudley now can plead to the current moving violation. This effectively removes the FTA INDEF Suspension (and the FTA fee).
- Practical Tip: Prepare an order saying the FTA is "Stricken and Sent In Error by no fault of the clerk"

Nunc Pro Tunc (now for then)

- Rewrite history by changing the date a conviction, PJC or other action is entered. Has a retroactive legal effect. It is as though the action had occurred at an earlier date.
- Can use on an open or closed case. BUT, if want to Nunc Pro Tunc a date on a closed case, you need a way to open the closed case (see MAR…)
- VERY Difficult to do in most counties

Motion for Appropriate Relief (MAR)

- N.C. Gen. Stat. § Section 15A-1415
- Allows an old case to be opened and change what happened in the past. Use when:
  - PJC was used improperly and need to get it back to use today
  - PJC was available and was not used
  - Pled to speed when IE was an option
  - Change a Speeding plea to Exceeding a Safe Speed in a situation where there are two speeds greater than 55mph within a year

Chapter 14 Criminal Charge of FTA

- Ask DA to amend the Chapter 20 traffic ticket (DWLR or moving violation) to the *criminal* charge of Failure to Appear (Chapter 14).
- Chapter 14 is not a traffic charge. If person pleads Guilty to a Chapter 14 charge of Failure to Appear, their DL will NOT be revoked because this is NOT a Chapter 20 moving violation.

Limited Driving Privilege

- N.C. Gen. Stat. § 20-20.1 Petition and Order (2 step process)
- COURT order allowing a person with a revoked license to drive on a limited basis. Prior to implementation of this statute, a DMV hearing was the only way to obtain a driving privilege.
- License is still revoked but Judge grants a limited driving privilege (work, school, household maintenance, religious worship)

Limited Driving Privilege (cont'd)

- Does not need a DMV hearing (issued by Judge).
- The person's license must be currently revoked under N.C. Gen. Stat. § G.S. 20-28.1 and this must be the ONLY revocation currently in effect.
- Cannot be granted if person currently has any Indefinite Suspensions, has pending traffic charges or a suspension was a result of a DWI.

Limited Driving Privilege Cont'd

- Eligible to file petition in district court in the county of the person residence:
  - 90 days after 1 year revocation period begins
  - 1 year after 2 year revocation period begins
  - 2 years after Permanent revocation period begins

  If Judge issues, clerk of court sends copy of the limited driving privilege to DMV.

  After one year of driving on a limited driving privilege for a Permanent Revocation, the license must be reinstated (but, for some reason, a hearing is still required)

Misdemeanor Reclassification

- DWLR – Impaired Revocation is still a Class 1 misdemeanor where counsel may be appointed
- DWLR – Non-Impaired Revocation is a Class 3 misdemeanor with a cost/fine disposition therefore eliminating the ability to apply for appointed counsel
  - Exception: Where a defendant has 4 or more previous convictions, a disposition other than a cost/fine is possible so the defendant may apply for court appointed counsel
  - Practical Tip: Courts will often appoint counsel on DWLR Non-Impaired if the defendant already has appointed counsel on other charges

NC Drivers License Restoration Act

What Does the NC DL Restoration Act do?

•The Act provides some weapons in the fight against the License Revocation Cycle

•The Act made great strides in ending additional license suspensions from “Driving While Poor”

In a Nutshell…

- The Act makes DWLR (Non-Impaired) a NON-MOVING violation
  - This eliminates any suspensions for DWLR (as they currently stand…like moving violations while suspended)
  - Applies to anyone who is charged with DWLR on or after December 1, 2015
    - NOTE: “Charged” not “Convicted” – Changed in the Technical Corrections phase of the law
    - Practical Tip: DMV is not currently issuing suspensions for convictions after 12/1/2015 regardless of offense date

What Will This Do?

- You can now enter a plea to DWLR to (hopefully) get the accompanying moving violation (speeding, etc) dismissed ➔ No Additional Suspension (Stops the DWLR Cycle)
- The Act WAS INTENDED TO encourage those with old charges to add them on to a docket and resolve them by plea. They can enter a plea of guilty to DWLR charges, pay off what they owe, and get a license back. Now it encourages new charges first.
- Get more licensed, insured drivers on the road (or reduce the amount of unlicensed/uninsured drivers)

Potential Pitfalls

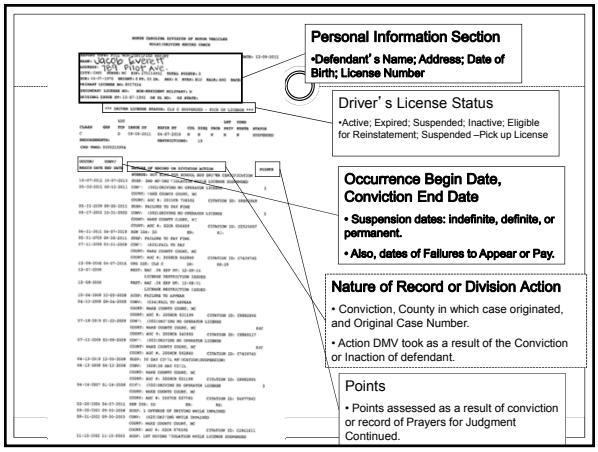
- DMV may still view any pleas to non-moving violations as evidence of driving.
  - Even though a non-moving violation will not make a defendant ineligible for a hearing, it can be used against them as evidence of driving during the suspension (very common)
    - Practical Solution: Evidence of driving is irrelevant in consideration for the limited driving privilege and after successfully having the privilege for 1 year, the license is reinstated (although a hearing is still required for a perm susp)

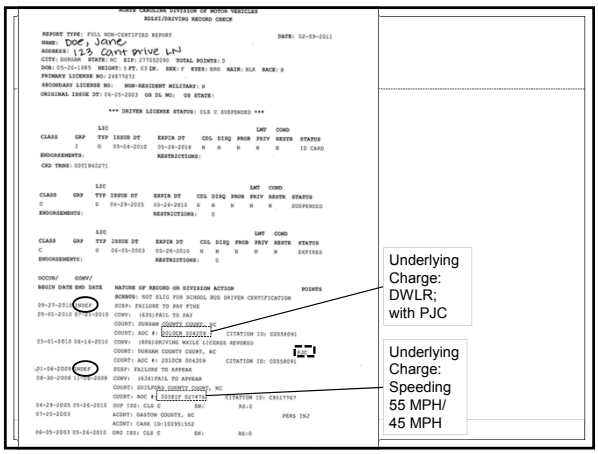
Potential Pitfalls

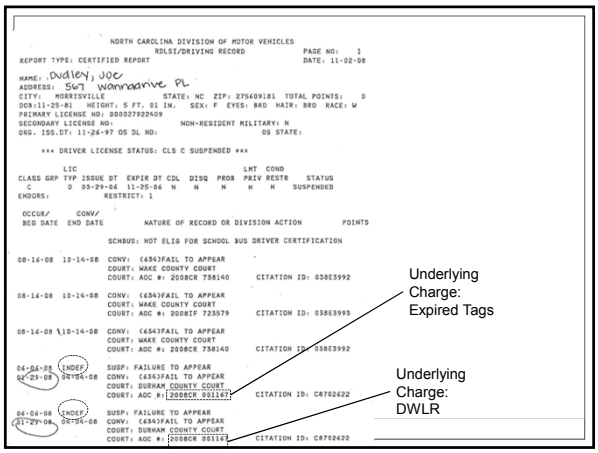
- The Act encourages pleas that will result in a criminal record
  - DWLR (misdemeanor) will not suspend you further…Speeding 1mph over the limit (infraction) will suspend you for 1 year, 2 years, or permanently
  - There is a strong motivation to enter a plea of guilty to a Misdemeanor (creating a criminal record if otherwise clean) instead of a Traffic Infraction to avoid a license suspension

How To Read a NC Driving Record

- Be familiar with abbreviations
  - PERM – Permanent Revocation
    - Permanently means forever?!? Yes, but that is where you come in
  - INDEF – Indefinite Revocation
    - Revoked until the revocation is ended
  - PJC – Prayer for Judgment Continued
    - Shows when a PJC was used
  - ACDNT – Accident
    - If an accident was reported, then it is on the record. This does not mean the person was at fault, just that they were involved.
  - CLS – Class
    - Describes the class of license to let you know if a Commercial Drivers License (CDL) is in play (Class C is a typical non-CDL)







NORTH CAROLINA DIVISION OF MOTOR VEHICLES
RDLSI/DRIVING RECORD PAGE NO: 1
REPORT TYPE: CERTIFIED REPORT DATE: 11-02-08

NAME: Dudley, Joe
ADDRESS: 567 Wannaarive PL
CITY: MORRISVILLE STATE: NC ZIP: 275409181 TOTAL POINTS: 0
DOB:11-25-81 HEIGHT: 5 FT. 01 IN. SEX: F EYES: BRO HAIR: BRO RACE: W
PRIMARY LICENSE NO: 000027922409
SECONDARY LICENSE NO: NON-RESIDENT MILITARY: N
ORG. ISS.DT: 11-26-97 OS DL NO: OS STATE:

*** DRIVER LICENSE STATUS: CLS C SUSPENDED ***

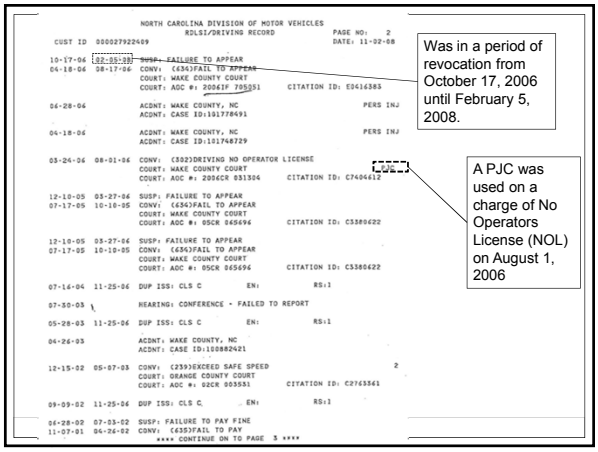
CLASS	GRP	TYP	ISSUE DT	EXPIR DT	CDL	DISQ	PROB	LMT PRIV	COND RESTR	STATUS
C		D	03-29-04	11-25-04	N	N	N	N	N	SUSPENDED

ENDORS: RESTRICT: 1

OCCUR/ BEG DATE	CONV/ END DATE	NATURE OF RECORD OR DIVISION ACTION	POINTS
		SCHBUS: NOT ELIG FOR SCHOOL BUS DRIVER CERTIFICATION	
08-16-08	10-14-08	CONV: (634)FAIL TO APPEAR COURT: WAKE COUNTY COURT COURT: AOC #: 2008CR 758140 CITATION ID: 058E3992	
08-16-08	10-14-08	CONV: (634)FAIL TO APPEAR COURT: WAKE COUNTY COURT COURT: AOC #: 2008IF 725579 CITATION ID: 038E3995	
08-16-08	10-14-08	CONV: (634)FAIL TO APPEAR COURT: WAKE COUNTY COURT COURT: AOC #: 2008CR 758140 CITATION ID: 038E3992	
04-04-08	(INDEF.)	SUSP: FAILURE TO APPEAR	
02-29-08	04-04-08	CONV: (634)FAIL TO APPEAR COURT: DURHAM COUNTY COURT COURT: AOC #: 2008CR 001147 CITATION ID: C8702622	
04-04-08	(INDEF.)	SUSP: FAILURE TO APPEAR	
01-29-08	04-04-08	CONV: (634)FAIL TO APPEAR COURT: DURHAM COUNTY COURT COURT: AOC #: 2008CR 001148 CITATION ID: C8702622	

Underlying Charge: Expired Tags

Underlying Charge: DWLR



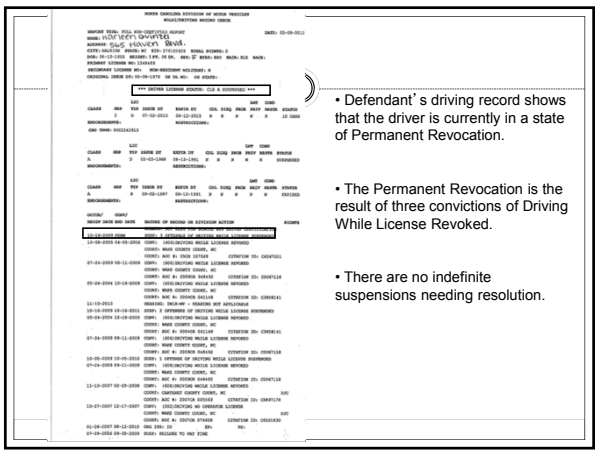
NORTH CAROLINA DIVISION OF MOTOR VEHICLES
RDLSI/DRIVING RECORD PAGE NO: 2
CUST ID 000027922409 DATE: 11-02-08

10-17-06	02-05-08	SUSP: FAILURE TO APPEAR	
04-18-06	08-17-06	CONV: (634)FAIL TO APPEAR COURT: WAKE COUNTY COURT COURT: AOC #: 2006IF 795051 CITATION ID: E9416385	
04-28-06		ACDNT: WAKE COUNTY, NC ACDNT: CASE ID:101778491	PERS INJ
04-18-06		ACDNT: WAKE COUNTY, NC ACDNT: CASE ID:101748729	PERS INJ
03-24-06	08-01-06	CONV: (302)DRIVING NO OPERATOR LICENSE COURT: WAKE COUNTY COURT COURT: AOC #: 2006CR 051304 CITATION ID: C7404612	LVOL
12-10-05	03-27-06	SUSP: FAILURE TO APPEAR	
07-17-05	10-10-05	CONV: (634)FAIL TO APPEAR COURT: WAKE COUNTY COURT COURT: AOC #: 05CR 065696 CITATION ID: C5380622	
12-10-05	03-27-06	SUSP: FAILURE TO APPEAR	
07-17-05	10-10-05	CONV: (634)FAIL TO APPEAR COURT: WAKE COUNTY COURT COURT: AOC #: 05CR 065696 CITATION ID: C5380622	
07-14-04	11-25-04	DUP ISS: CLS C EN: RS:1	
07-30-03		HEARING: CONFERENCE - FAILED TO REPORT	
05-28-03	11-25-04	DUP ISS: CLS C EN: RS:1	
04-26-03		ACDNT: WAKE COUNTY, NC ACDNT: CASE ID:100882421	
12-15-02	05-07-03	CONV: (239)EXCEED SAFE SPEED COURT: ORANGE COUNTY COURT COURT: AOC #: 02CR 005531 CITATION ID: C2763561	2
09-09-02	11-25-04	DUP ISS: CLS C EN: RS:1	
04-28-02	07-03-02	SUSP: FAILURE TO PAY FINE	
11-07-01	04-26-02	CONV: (635)FAIL TO PAY	

**** CONTINUE ON TO PAGE 3 ****

Was in a period of revocation from October 17, 2006 until February 5, 2008.

A PJC was used on a charge of No Operators License (NOL) on August 1, 2006



• Defendant's driving record shows that the driver is currently in a state of Permanent Revocation.

• The Permanent Revocation is the result of three convictions of Driving While License Revoked.

• There are no indefinite suspensions needing resolution.

Tips For License Restoration

- Always keep the DL in mind when resolving criminal cases. Even if unrelated, you can often help get a license back by getting charges dismissed with the same plea you were going to enter anyway. Always check CIPRS (NC Public Criminal & Infraction Records) before a plea!
- You can never have a license if you don't resolve the INDEF suspensions!
  - If indefinite suspensions exist you will be in a revoked status
  - If definite/permanent suspensions exist you have an end date

Tips for License Restoration

- Keep money in mind! Your client definitely will.
  - An FTA can cost $200 extra.
  - Before the new NC DL Restoration Act, entering plea to old cases (that caused the revocation) to avoid additional suspension was/is common.
  - Post- Act, you can save the $200 fee and avoid the additional suspension by entering a plea on the new DWLR charge (non-moving violation)
    - Remember: It is a criminal charge

Tips for License Restoration

- Use and Build Your Network!
  - Call around and find out how a client can reset an old case in another county and if that is feasible to do without an attorney
  - Some counties will really try to help those who are trying to help themselves obtain a valid license
  - You will be surprised how many people will volunteer to help and can often just get an old case dismissed by showing what the client has done/paid so far

Questions, Comments, Concerns?

Feel free to contact me at any point in the future if I can help you out in any way.

Mike Paduchowski – Partner
Law Office of Matthew Charles Sucyznski PLLC
Chapel Hill, NC & Durham, NC
www.MatthewCharlesLaw.com
mike@matthewcharleslaw.com
919-619-3242

Challenging the Pleadings

John Rubin
UNC School of Government
Misdemeanor Defender Training
September 2017

Pleading Basics

- Is it a pleading?

Pleading Basics

- What kind of pleading is it?
  - Citation
    - *S v. Allen*, __ N.C. App. __, 783 S.E.2d 799 (2016)
  - Magistrate's order
  - Summons
  - Warrant
  - Statement of charges

Drafting Defects

- Failure to charge offense or element of offense under GS 15A-924(a)(5)
  - Does the charge of "assault officer" fail to charge an offense?
  - What relief should you seek?
  - If you win, does double jeopardy apply?
  - When should you seek relief?
    - Hint: When can the prosecutor amend or do a statement of charges? GS 15A-922(d)

Spot the Defect

- John Jones did assault and strike a child 8 years of age and thus under 12 years of age
  - Name of victim omitted

Spot the Defect

- John Jones did unlawfully and willfully resist, delay, and obstruct William Smith, a public officer holding the office of deputy sheriff.
  - Duty omitted

Spot the Defect

- John Jones did unlawfully and willfully assault Jane Jones with a deadly weapon
  - Weapon omitted

Spot the Defect

- John Jones did unlawfully and willfully steal, take, and carry away a Duke t-shirt, the personal property of Belk's Department Store
  - Omission of entity capable of owning property
  - But, defect may not be apparent until after trial begins

More Drafting Defects

- Other offenses
  - For ordinance violations, technical rules on alleging section, caption, and body of ordinance
    - GS 15A-924(a)(6), 160A-79(a), 153A-50
  - Prior convictions elevating offense to higher grade, such as shoplifting and mj possession
    - GS 15A-924(a)(5), 15A-928

Still More Drafting Defects

- Other potential issues
  - Is the failure to list the time fatal?
  - Is the failure to specify the location fatal?

Proof Problems

- You object that assault on an officer is a defective charge, and the judge rules . . . .

Proof Problems

- Judge overrules your objection that assault on officer is a defective charge
- The evidence then shows only that the defendant delayed the officer
  - What relief should you seek? When?
  - Can the prosecutor amend the pleading to charge RDO?
  - Does double jeopardy apply? To what?

Examples of Variance

- Change in offense
  - Ex.: charge is assault, proof is resist only
- Change in victim
  - Ex.: victim of assault alleged to be Gabriel Hernandez Gervacio, actual name of victim is Gabriel Gonzalez

More Variance Examples

- For larceny and related offenses, property owner misidentified
  - Ex.: one person identified as owner when another person is owner
  - Ex.: Belk's Department Store identified as owner when Belk's, Inc. is owner

Jurisdiction on Appeal

- The defendant is convicted in district court of assault on an officer despite your objections about pleading defect (no duty) and variance (RDO)
- On appeal to superior court, the prosecutor seeks to amend the pleading to charge RDO.
  - May the prosecutor proceed on the RDO charge in superior court? GS 7A-271(b)
  - What relief should you seek? When?
- Beware charges dismissed per plea agreement

Examples of Lack of Jurisdiction

- Defendant was tried and convicted for DWI in district court, but state dismissed other misdemeanor charges
- District court judgment showed DWI conviction but judgment was silent on whether defendant was convicted of DWLR or other offenses

Double Jeopardy

- In addition to being charged in district court with assault on an officer, the defendant is charged with felony assault on an officer based on the same act. The misdemeanor case is called in district court, and the defendant pleads guilty.
  - May the state thereafter proceed on the felony charge?
  - What relief should you seek? When?
- Beware exceptions to double jeopardy rules

Due Process

- Assume that the defendant is convicted in district court of assault on an officer. The defendant appeals, and the prosecutor obtains an indictment for felony assault on the officer based on the same act.
  - May the state proceed on the felony assault charge?
  - What relief should you seek? When?

Joinder

- Assume the following:
  - The evidence in district court shows that the defendant delayed but did not assault the officer
  - The district court does not allow the prosecutor to amend to charge RDO
  - The district court acquits the defendant of assault
  - The prosecutor later initiates a new case charging RDO

Joinder

- May the prosecutor proceed on RDO notwithstanding the acquittal of assault based on the same conduct?
  - GS 15A-926(c)(2)

Summary

- Drafting
  - If the allegations are insufficient to charge an offense, move to dismiss at the start of trial (unless there are reasons to wait).
- Proof
  - If there is a variance between the charge alleged and the offense proved, move to dismiss for insufficient evidence and variance at the close of the State's evidence and all the evidence.

Summary-2

- Appeal
  - If the offense is different than the offense for which the defendant was charged and convicted in district court, move to dismiss in superior court before trial for lack of jurisdiction.
- Double Jeopardy
  - If after conviction or acquittal the State brings the same, greater, or lesser charge within the meaning of the "same elements" test, move to dismiss before trial in the court where the case is pending.

Summary-3

- Due Process
  - If after an appeal for trial de novo the State brings a greater charge arising out of the same facts, move to dismiss before trial in superior court.
- Joinder
  - If after conviction or acquittal the State files a related charge arising out of the same facts, move to dismiss before trial in the court where the case is pending.

Chapter 8
Criminal Pleadings

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B. Chapter Summary
C. References

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B. Requirements for Misdemeanor Pleadings
C. Types of Misdemeanor Pleadings
D. Amendment of Misdemeanor Pleadings
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8.1 Importance of Criminal Pleadings

A. Purposes of Pleadings

Pleadings are the tools that the State uses to charge criminal offenses. In cases tried in district court and on appeal for trial de novo in superior court, pleadings include arrest warrants, criminal summonses, citations, magistrate's orders, and statements of charges. In cases initially tried in superior court, the State must obtain an indictment or information. For a discussion of the pleading in juvenile cases (the petition), see Chapter 6 of the North Carolina Juvenile Defender Manual, available at www.ncids.org (select "Training & Resources," then "Reference Manuals").

A properly-drafted criminal pleading fulfills three main functions. It:

- provides the court with jurisdiction to enter judgment on the offense charged;
- provides notice of the charges against which the defendant must defend; and
- enables the defendant to raise a double jeopardy bar to a subsequent prosecution for the same offense.

See generally State v. Greer, 238 N.C. 325 (1953) (stating above purposes).

Proper pleadings protect important constitutional entitlements, such as the Sixth Amendment right to fair notice of the charge and the Due Process protection against double jeopardy. *See Hamling v. United States*, 418 U.S. 87 (1974) (recognizing these constitutional requirements); *Russell v. United States*, 369 U.S. 749 (1962) (to same effect); s*ee also* N.C. CONST. art. 1, §23 (right to be informed of accusation). Also, under North Carolina law, certain pleading defects strip the court of jurisdiction to enter judgment against the defendant. *See State v. Wallace*, 351 N.C. 481 (2000) (where an indictment is invalid on its face, it deprives the court of jurisdiction); *accord State v. Lawrence*, 352 N.C. 1 (2000); *State v. Sturdivant*, 304 N.C. 293 (1981). Thus, it is critical to examine the pleadings closely, compare the allegations in the pleadings to the State's proof at trial, and be prepared to raise timely objections to deficiencies in the pleadings.

B. Chapter Summary

Section 8.2 below summarizes the different types of pleadings that may be used in district court and common pleading problems that arise in that forum. Section 8.3 addresses pleading issues that may arise on appeal from district to superior court. Sections 8.4 and 8.5 address pleading requirements and issues that arise in superior court. Section 8.6 addresses posttrial challenges involving pleadings, including double jeopardy and due process bars to successive prosecutions for the same offense. And, section 8.7 discusses the need for the State to plead what were formerly characterized as sentencing factors to avoid *Blakely* error.

C. References

Consult the following materials from the School of Government for additional information about some of the issues discussed in this chapter:

JEFFREY B. WELTY, ARREST WARRANT AND INDICTMENT FORMS (6th ed. 2010) (contains form language for charging criminal offenses); *see also* JEFFREY B. WELTY, UPDATE TO ARREST WARRANT AND INDICTMENT FORMS (June 2012), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/awif2012update.pdf

Jessica Smith, *North Carolina Sentencing after* Blakely v. Washington *and the* Blakely *Bill* (UNC School of Government, Sept. 2005), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/Blakely%20Update.pdf

Daniel Shatz, *Beyond Blakely* (Spring Public Defender Conference, May 2006), *available at* www.ncids.org/Defender%20Training/2006%20Spring%20Conference/Dan%20Shatz.pdf

Jeff Welty, *North Carolina's Habitual Felon, Violent Habitual Felon, and Habitual Breaking and Entering Laws*, ADMINISTRATION OF JUSTICE BULLETIN No. 2013/07 (UNC School of Government, Aug. 2013), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1307.pdf; *see also infra* § 8.4E, Habitual Felon Pleading Requirements.

Jessica Smith, *The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/03 (UNC School of Government, July 2008) [Smith, *Criminal Indictment*] (reviews general pleading requirements, such as allegation of victim's name, date of offense, etc., and specific pleading requirements for particular types of offenses, such as arson, robbery, drug offenses, etc.), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0803.pdf.

Jessica Smith, *Criminal Procedure for Magistrates*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/08 (UNC School of Government, Dec. 2009) (summarizes criminal procedure for magistrates, including criminal process and pleadings), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0908.pdf

Robert L. Farb, *The "Or" Issue in Criminal Pleadings, Jury Instructions, and Verdicts; Unanimity in Jury Verdict* (UNC School of Government, Feb. 2010) (discusses disjunctive pleadings and jury instructions), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/verdict.pdf; *see also infra* § 8.6G, Disjunctive Pleadings.

Robert L. Farb, *Criminal Pleadings, State's Appeal from District Court, and Double Jeopardy Issues* (UNC School of Government, Feb. 2010), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/pleadjep.pdf

John Donovan and Amanda Maris, *District Court Pleadings to Go* (Spring Public Defender Conference, May 2011) (checklist), *available at* www.ncids.org/Defender%20Training/2011SpringConference/DistrictCourtPleadings.pdf

8.2 Misdemeanors Tried in District Court

A. Process as Pleading

The criminal process issued to the defendant—that is, the citation, criminal summons, magistrate's order, or arrest warrant—usually doubles as the criminal pleading in a misdemeanor case in district court. *See* N.C. GEN. STAT. § 15A-922(a) (hereinafter G.S.) (listing types of process that may serve as pleading in misdemeanor case); Official Commentary to G.S. Ch. 15A, Article 49.

An order for arrest is the one form of criminal process not considered a criminal pleading. An order for arrest can be issued in conjunction with a criminal pleading. By itself, however, it does not charge a crime. *See infra* § 8.2C, Types of Misdemeanor Pleadings.

B. Requirements for Misdemeanor Pleadings

Generally. Misdemeanor pleadings are subject to the general requirements for valid pleadings in G.S. 15A-924(a), which states that a pleading must contain:

- a plain and concise factual statement supporting every element of the offense charged;
- a separate count addressed to each offense charged;
- a reference to the statute or other provision of law that the defendant allegedly violated;
- the name or other identification of the defendant;
- the county where the offense took place; and
- the date on which, or time period during which, the offense took place.

G.S. 15A-924(a) also requires in felony cases that the State allege in the pleading certain aggravating factors if it intends to use them. *See infra* § 8.7B, Notice and Pleading Requirements after *Blakely*. This requirement does not apply to misdemeanor impaired

driving cases tried in district court; however, if the defendant is tried for an impaired driving offense in superior court, including in a trial de novo following appeal of a district court conviction, the State must give written notice of its intent to use any aggravating or grossly aggravating factors. G.S. 20-179(a1)(1).

Courts may be more lenient in permitting amendments or tolerating technical mistakes in misdemeanor pleadings than in superior court pleadings. (For a discussion of application of these requirements in superior court, see *infra* § 8.4C, Sufficiency of Pleadings.) Nevertheless, every pleading must be sufficient to serve the basic purposes listed at the beginning of this chapter. Common errors in district court are addressed *infra* in § 8.2F, Common Pleading Defects in District Court; errors in superior court are addressed *infra* in § 8.5, Common Pleading Defects in Superior Court.

Pleading rules for certain offenses. There are specific statutory pleading requirements for some offenses, such as larceny, forgery, and receiving stolen goods. *See* G.S. 15-148 through G.S. 15-151. Some examples are discussed *infra* in § 8.2F, Common Pleading Defects in District Court and § 8.5C, Common Pleading Defects in Superior Court.

Short-form pleadings. The North Carolina General Assembly has enacted statutes permitting abbreviated forms of pleadings for some misdemeanors. *See* G.S. 20-138.1(c) (pleading requirements for impaired driving); G.S. 20-138.2(c) (pleading requirements for commercial impaired driving); *see also* G.S 20-179(a1)(1) (requiring State to file written notice of intent to use aggravating factors in impaired driving cases in superior court). For a discussion of pleading requirements for aggravating factors in implied consent cases, see *infra* "Misdemeanors, including impaired driving offenses" in § 8.7B, Notice and Pleading Requirements after *Blakely*.

Probable cause. A criminal charge must be supported by probable cause that a crime was committed and that the person in question committed the crime. Probable cause must exist to support each element of the offense and must be established by an affidavit or by oral testimony under oath or affirmation. Jessica Smith, *Criminal Procedure for Magistrates*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/08, at 5 (UNC School of Government, Dec. 2009), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0908.pdf.

C. Types of Misdemeanor Pleadings

Citation. A citation is a written charge issued by a law enforcement officer. The principal difference between a citation and other forms of process is that a law enforcement officer rather than a judicial official issues it. An officer may issue a citation for any misdemeanor or infraction for which the officer has probable cause. *See* G.S. 15A-302(b). An officer may arrest a person for a misdemeanor if grounds exist for a warrantless arrest under G.S. 15A-401(b), but has no authority to arrest for an infraction. *See* G.S. 15A-1113; ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 82 (4th ed. 2011). A person arrested without a warrant must be taken before a

magistrate. If the magistrate finds probable cause that a crime has been committed, the magistrate may issue a magistrate's order, discussed below.

Under G.S. 15A-922(c), the defendant has the right to object to being tried on a citation. Upon the defendant's objection, the prosecution must prepare a separate pleading. Usually the new pleading is a statement of charges, discussed below. (If a magistrate signs a citation, it becomes a magistrate's order, and it is no longer considered a citation and is not subject to this objection.) Objecting to trial on a citation may not be advisable because the objection gives the prosecution an opportunity before trial to correct errors or add new charges in a statement of charges. If the defendant wishes to object to being tried on a citation, he or she must do so in district court; the objection may not be raised for the first time in superior court on a trial de novo. *See State v. Monroe*, 57 N.C. App. 597 (1982).

Legislative note: For offenses committed on or after December 1, 2013, S.L. 2013-385 (H 182) amends G.S. 15A-1115 to delete subsection (a), which provided defendants with the right to appeal to superior court for a trial de novo when the defendant denied responsibility for an infraction in district court and was found responsible.

In addition to the requirements of G.S. 15A-924(a), the citation must:

- identify the crime charged, including the date and, where material, the property and other people involved;
- list the name and address of the person cited or provide other identification if that information cannot be determined;
- identify the officer issuing the citation; and
- direct the person cited to appear in a designated court at a designated time and date.

See G.S. 15A-302(c).

If a person fails to appear in court on an *infraction* charged in a citation, the person may not be arrested for failing to appear or for criminal contempt; instead, the court must issue a criminal summons. *See* G.S. 15A-1116(b); *see also* G.S. 15A-302 Official Commentary (since citation is issued by officer and not judicial official, failure to appear is not contempt of court). G.S. 15A-305(a)(3), however, permits the court to issue an order for arrest if a person fails to appear for a *misdemeanor* charged in a citation.

Magistrate's order. A magistrate's order is used when a person has been arrested without a warrant. A magistrate may issue an order for any criminal offense (felony or misdemeanor) for which the magistrate finds probable cause. *See* G.S. 15A-511(c) (describing procedures magistrate must follow). If an officer issues a citation for a misdemeanor and arrests the person, the magistrate may convert the citation into a magistrate's order by signing the citation, or he or she may prepare a separate magistrate's order on a form similar to an arrest warrant. A magistrate sometimes will issue an arrest warrant instead of a magistrate's order when a person has been arrested without a warrant. Although technically improper (since the person already is under

arrest), the error is probably inconsequential. *See generally State v. Matthews*, 40 N.C. App. 41 (1979) (failure of magistrate to issue magistrate's order after defendant was cited and arrested for traffic offenses did not render arrest unlawful).

Criminal summons. A judicial official may issue a criminal summons for any criminal offense or infraction for which probable cause exists. *See* G.S. 15A-303. A summons may charge a felony, but it is typically used for misdemeanors only. If a judicial official issues a summons, the person is not taken into custody or placed under pretrial release conditions; he or she is only directed to appear in court. A criminal summons must contain a statement of the crime or infraction charged and must inform the defendant that he or she may be held in contempt of court for failure to appear as directed. A court date must be set within one month of issuance of the summons unless the judicial official notes cause in the summons for setting a later court date. *Id.*

Arrest warrant. A judicial official may issue an arrest warrant for any criminal offense supported by probable cause when the person has not been taken into custody previously for the charge. *See* G.S. 15A-304. The warrant must include a statement of the crime charged. *Id.* The law expresses a preference for the use of a criminal summons, discussed above, but many counties continue to rely heavily on arrest warrants. *See* G.S. 15A-304(b); Official Commentary to G.S. 15A-303 and G.S. 15A-304 (expressing preference for summons when circumstances do not necessitate taking person into custody).

Statement of charges. A misdemeanor statement of charges is a criminal pleading prepared by the prosecutor, charging a misdemeanor. A statement of charges supersedes all previous pleadings in the case. Only those charges alleged in the statement of charges (not those in the original warrant or other process) may proceed to trial. *See* G.S. 15A-922(a).

Before arraignment in district court, a prosecutor may file a statement of charges adding new charges or amending charges that are insufficient. *See* G.S. 15A-922(d); *State v. Madry*, 140 N.C. App. 600 (2000). If a prosecutor files a statement of charges before arraignment in district court, the defendant is entitled to a continuance of at least three working days unless the judge finds that the statement of charges does not materially change the pleadings and that no additional time is necessary. *See* G.S. 15A-922(b)(2).

After arraignment in district court, the prosecutor may file a statement of charges only if it does not change the nature of the offense. *See* G.S. 15A-922(e). If the judge finds that the original warrant or other pleading is insufficient and that a statement of charges would not impermissibly change the offense, the judge may permit the prosecutor to correct the pleading by filing a statement of charges. However, the judge's order must set a time limit on filing—ordinarily, three working days. The order also must provide that if the statement of charges is not filed within the time allowed, the charges must be dismissed. *See* G.S. 15A-922(b)(3). If the prosecutor files a statement of charges, the defendant is entitled to a continuance of at least three working days unless the judge finds that a continuance is not required under G.S. 15A-922(b)(2).

A statement of charges adding new offenses or amending charges that are insufficient must be filed within the statute of limitations. *See Madry*, 140 N.C. App. 600; *State v. Caudill*, 68 N.C. App. 268 (1984).

Order for arrest. An order for arrest is an order issued by a judicial official directing law enforcement to take the named person into custody. *See* G.S. 15A-305. An order for arrest is the one form of criminal process that is not considered a criminal pleading. An order for arrest is often issued for a defendant's failure to appear in court after a pleading has been issued, but it may be issued in conjunction with a pleading, as when a judge issues an order for arrest after a grand jury returns a true bill of indictment. *See* G.S. 15A-305(b) (listing circumstances in which an order for arrest may be issued). The order for arrest standing alone does not charge a crime, however.

D. Amendment of Misdemeanor Pleadings

A prosecutor may not amend a warrant or other process if the amendment changes the nature of the offense charged. *See* G.S. 15A-922(f); *see also infra* § 8.4D, Amendment of Indictments (discussing restrictions on amendments to superior court indictments). *But cf. infra* § 8.3B, Required Pleadings in Superior Court (discussing statute allowing amendment of warrant in superior court to change name of rightful owner of property). Thus, even before trial the prosecution may not amend a warrant if the amendment changes the nature of the charged offense. *See State v. Madry*, 140 N.C. App. 600 (2000). Any amendment must be in writing; otherwise, it is not effective. *See State v. Powell*, 10 N.C. App. 443 (1971).

A prosecutor may prepare a statement of charges that changes the nature of the offense alleged in a warrant or other process, but only before arraignment and if the statute of limitations has not run. *See* G.S. 15A-922(d); *see also supra* § 8.2C, Types of Misdemeanor Pleadings.

E. Timing and Effect of Motions to Dismiss in District Court

There are two basic grounds for moving to dismiss based on the pleadings: (1) the pleading fails to charge an offense properly—in other words, the pleading is fatally defective; and (2) the proof does not support the allegations in the pleading—in other words, there is a fatal variance between the pleading and proof.

Motion to dismiss for defective pleading. The remedy for a defective pleading is a motion to dismiss under G.S. 15A-952. *See* G.S. 15A-924(e). A motion to dismiss is the equivalent of a motion to quash under pre-15A practice. *See State v. Brown*, 81 N.C. App. 281 (1986). Some defects, including the failure to include an element of the offense or the misidentification of the victim, may strip the district court of jurisdiction over the offense. A defendant may move to dismiss for a jurisdictional defect "at any time." *See* G.S. 15A-952(d); G,S. 15A-954(c); *see also State v. Wallace*, 351 N.C. 481, 503 (2000) ("where an indictment is alleged to be invalid on its face, thereby depriving the trial court

of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court").

Generally, defense counsel should move to dismiss for a defective pleading at or after arraignment in district court. Thus, when the court or prosecutor calls the case and asks the defendant how he or she pleads, counsel may say, "Mr. Jones pleads not guilty and moves to dismiss the pleading as fatally defective because [state ground]." Unless the defect concerns a matter on which an amendment is allowable, the court "must" dismiss. *See* G.S. 15A-924(e). If the motion to dismiss is made before arraignment, the State can correct the error by filing a statement of charges. *See supra* § 8.2C, Types of Misdemeanor Pleadings. If counsel does not move to dismiss until after the State has presented its evidence, the judge may be less receptive to the motion; the judge may be more invested in the case, having spent time on it and heard evidence of guilt.

If the pleading error involves "duplicity"—that is, the pleading alleges more than one offense in a single count—counsel should make a motion to require the State to elect (in effect, a motion to require the State to dismiss all but one of the offenses alleged in the particular count). *See* G.S. 15A-924(b); *see also infra* § 8.2F, Common Pleading Defects in District Court.

Motion to dismiss for variance. Even if the pleading properly charges a crime, the proof may vary from the pleading. "The State's proof must conform to the specific allegations contained in the indictment [or other pleading]. If the evidence fails to do so, it is insufficient to convict the defendant." *State v. Pulliam*, 78 N.C. App. 129, 132 (1985); *see also State v. Miller*, 137 N.C. App. 450 (2000) (Due Process precludes convicting defendant of offense not alleged in warrant or indictment); *State v. Bruce*, 90 N.C. App. 547, 550 (1988) ("defendant must be convicted, if he is convicted at all, of the particular offense with which he has been charged in the bill of indictment").

A challenge to a variance between pleading and proof should be raised by a motion to dismiss for insufficient evidence at the close of the State's evidence and at the close of all of the evidence. *State v. Faircloth*, 297 N.C. 100, 107 (1979) (explaining that a fatal variance between the indictment and the proof is properly raised by a motion to dismiss). When moving to dismiss, counsel should specifically allege a fatal variance between the pleading and proof to alert the judge to the nature of the problem. For example, if the pleading charges assault on an officer, and the proof shows resisting an officer but not an assault, move to dismiss for insufficient evidence of assault and for fatal variance between the crime alleged in the charging instrument and the State's evidence. In superior court, the failure to specifically assert fatal variance when moving to dismiss waives the error on appeal. *See State v. Mason*, ___ N.C. App. ___, 730 S.E.2d 795 (2012) (by failing to assert fatal variance as a basis for his motion to dismiss in superior court, defendant failed to preserve the argument for appellate review).

A related problem arises when the pleading charges one offense and the prosecution seeks conviction of a greater offense—for example, the pleading charges simple assault and the prosecution seeks to prove assault with a deadly weapon. The prosecution is

bound by its pleading, and defense counsel should object to judgment on the greater offense. *See, e.g.*, *State v. Moses*, 154 N.C. App. 332 (2002) (State could not amend indictment alleging misdemeanor eluding arrest to add allegation of aggravating factor and charge felony eluding arrest; amendment substantially altered charge).

Effect of dismissal on subsequent charges. When the court dismisses a charge on the ground that the pleading is defective, double jeopardy ordinarily does not bar a second trial of the offense based on a proper pleading. *See, e.g., State v. Goforth*, 65 N.C. App. 302, 306 (1983) (where indictment failed to allege element of offense, court arrested judgment but noted that "[t]he State may proceed against the defendants if it so desires, upon new and sufficient bills of indictment"). In some instances, however, jeopardy may be a bar. *See, e.g., Moses*, 154 N.C. App. 332 (indictment charging assault with deadly weapon inflicting serious injury failed to identify weapon and so was insufficient; but, indictment adequately alleged and evidence supported lesser offense of assault inflicting serious injury, and court remanded for entry of judgment for that offense). Double jeopardy is discussed further *infra* in § 8.6A, Double Jeopardy.

When the court dismisses a charge on the ground that there was a fatal variance between pleading and proof, double jeopardy bars a second trial on the charge alleged in the pleading but does not necessarily bar a subsequent prosecution on offenses that were proven but not pled. *See, e.g., State v. Stinson*, 263 N.C. 283 (1965) (no bar to subsequent prosecution where indictment charged defendant with breaking and entering with intent to steal property of shop's corporate owner, but evidence showed the property was owned by an individual instead); *State v. Wall*, 96 N.C. App. 45 (1989) (no bar to subsequent prosecution for sale and delivery to intermediary when there was fatal variance between indictment charging defendant with sale and delivery to undercover officer and evidence showing sale and delivery to intermediary). Jeopardy may bar a subsequent prosecution, however, if the new charge is a greater offense of the charge that was properly pled. *See infra* § 8.6A, Double Jeopardy.

As a practical matter, a successful motion to dismiss may end a misdemeanor prosecution whether or not Double Jeopardy would constitute a bar.

Effect of statute of limitations. There is a two-year statute of limitations for most misdemeanors. *See* G.S. 15-1; *see also supra* § 7.1A, Statute of Limitations for Misdemeanors. When the misdemeanor pleading is defective, or the offense proven at trial was not the offense alleged in the pleading, the statute of limitations is not tolled. It continues to run. *See State v. Hundley*, 272 N.C. 491 (1968) (statute of limitations not tolled by issuance of void warrant). Thus, if a defendant successfully moves to dismiss, and the statute of limitations has run on the offense the State wishes to charge, the State cannot refile the charges. Even though it is permissible as a matter of pleading practice for a prosecutor to issue a statement of charges in place of a void warrant, such a statement of charges is barred if it is issued after the statute of limitations has expired. *See State v. Madry*, 140 N.C. App. 600 (2000).

G.S. 15-1 provides that if an indictment obtained within the statute of limitations period

is found to be defective, the State has one year from the time it abandons the indictment to correct the error and re-indict the defendant. This provision applies only to defective indictments; it does not apply to defective warrants. *Madry*, 140 N.C. App. at 603.

F. Common Pleading Defects in District Court

Below are common pleading problems you may see in district court. Similar problems may arise in indictments in superior court. *See infra* § 8.5, Common Pleading Defects in Superior Court. As discussed in the preceding section, if the pleading is defective you should file a motion to dismiss at or after arraignment. If the problem is a variance, move to dismiss on the ground of variance at the close of the State's evidence and at the close of all the evidence.

Failure to charge offense or element of offense. Like other pleadings, misdemeanor pleadings must state all of the essential elements of the crime. *See* G.S. 15A-924(a)(5); *State v. Palmer*, 293 N.C. 633, 639 (1977) (both indictments and warrants must "allege lucidly and accurately all the essential elements of the offense endeavored to be charged" (citation omitted)); *State v. Camp*, 59 N.C. App. 38 (1982) (stating these requirements for warrants); *see also State v. Cook*, 272 N.C. 728 (1968) (reference to statute allegedly violated was insufficient to cure failure of warrant to allege element of offense of driving without a license, namely, that the offense was committed on a public highway). *But cf. State v. Martin*, 13 N.C. App. 613 (1972) (warrant was not fatally defective where it failed to allege highway was a "public" highway).

If an essential element is missing, or if the charging language is too vague to identify an offense clearly, the defendant should move to dismiss. Any attempt to revise the charge may constitute a change in the nature of the offense and therefore be impermissible. *See State v. Moore*, 162 N.C. App. 268 (2004) (in pleading for possession of drug paraphernalia, State must apprise defendant of item State contends was drug paraphernalia; State could not amend indictment to change alleged item, which would constitute substantial alteration of charge); *State v. Madry*, 140 N.C. App. 600 (2000) (warrant that charged "taking bears with bait" too vague to charge offense where statute prohibited possessing, selling, buying, or transporting bears); *State v. Wells*, 59 N.C. App. 682 (1982) (citation that charged resisting arrest was fatally defective for omitting duty that officer was performing); *State v. Wallace*, 49 N.C. App. 475 (1980) (citation that charged unlawfully operating vehicle for purpose of hunting deer with dogs did not clearly and properly charge violation of deer hunting statute); *State v. Powell*, 10 N.C. App. 443 (1971) (the words "resist arrest" in citation were insufficient to charge offense). *But see State v. Mather*, ___ N.C. App. ___, 728 S.E. 2d 430 (2012) (when charging carrying a concealed gun under G.S. 14-269, the exception in G.S. 14-269(a1)(2) (having a permit) is a defense, not an essential element, and need not be alleged in the indictment); *State v. Ballance*, ___ N.C. App. ___, 720 S.E.2d 856 (2012) (statute governing the taking of black bears with bait does not create a separate offense for each type of bait listed; the crime may be established by evidence showing any one of various alternative elements); *State v. Bollinger*, 192 N.C. App. 241 (2008) (description of

weapon in pleading for carrying concealed weapon was surplusage), *aff'd per curiam*, 363 N.C. 251 (2009).

Misidentification of victim. A pleading must correctly identify the victim of the alleged offense. Failure to identify the victim constitutes grounds to dismiss. *See State v. Powell*, 10 N.C. App. 443 (1971) (failure to name officer who was victim of assault on officer rendered warrant invalid); *see also State v. Banks*, 263 N.C. 784 (1965) (warrant charging peeping into room occupied by female was fatally defective because it failed to name female); *In re M.S.*, 199 N.C. App. 260 (2009) (juvenile petitions alleging first-degree sexual offense that did not name the victim or give the victim's initials, but simply stated "a child under the age of 13 years," were fatally defective and deprived the court of jurisdiction to accept the juvenile's admission of delinquency); *State v. McKoy*, 196 N.C. App. 650 (2009) (use of initials "RTB" with no periods to identify victim upheld in second-degree rape and sexual offense case).

Sometimes the pleading will name a victim but misidentify him or her, which will not become apparent until the State puts on its evidence. If the State's proof of the identity of the victim varies from the allegation in the pleading, the variance constitutes grounds to dismiss the charge. *See State v. Call*, 349 N.C. 382 (1998) (judgment arrested on court's own motion because of fatal variance between name of victim alleged in indictment—Gabriel Hernandez Gervacio—and victim's actual name—Gabriel Gonzalez); *State v. Abraham*, 338 N.C. 315 (1994) (error to allow State to amend assault indictment to change name of victim from Carlose Antoine Latter to Joice Hardin, which fundamentally altered nature of charge).

A misspelling or incorrect order in the victim's name, if it does not mislead the defendant as to the identity of the victim, will not provide grounds for dismissal. *See, e.g.*, *State v. Williams*, 269 N.C. 376 (1967) (indictment sufficient where victim's name "Madeleine" was stated in indictment as "Mateleane"); *State v. Hewson*, 182 N.C. App. 196 (2007) (no error in allowing State to amend murder indictment to change victim's name from "Gail Hewson Tice" to "Gail Tice Hewson"; no indication defendant was surprised or confused about identity of victim); *State v. McNair*, 146 N.C. App. 674 (2001) (no error where State was allowed to change "Donald" to "Ronald" on two of seven indictments; defendant could not have been surprised or misled); *State v. Wilson*, 135 N.C. App. 504 (1999) (no fatal variance between indictment naming victim "Peter M. Thompson" and evidence at trial indicating victim's name was "Peter Thomas" where defendant's testimony revealed that he was aware of the identity of the victim); *State v. Isom*, 65 N.C. App. 223 (1983) (indictment adequate that named victim as "Eldred Allison" when actual name was "Elton Allison"; names were sufficiently similar to fall within doctrine of idem sonans, which means sounds the same).

For a further discussion of these principles, see Smith, *Criminal Indictment*, at 9–12, *available at* www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0803.pdf; Jessica Smith, *What's in a Name?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 17, 2012), http://nccriminallaw.sog.unc.edu/?p=3211; Jeff Welty, *Use of Initials in Charging*

Documents, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 23, 2009), http://nccriminallaw.sog.unc.edu/?p=5.

Allegation of ownership of property for larceny and related offenses. A pleading for theft offenses must correctly name the owner of the stolen property. *See State v. Greene*, 289 N.C. 578 (1976) (indictment in larceny case must allege person who has property interest in property stolen, and State must prove that alleged person is owner); *State v. Biller*, 252 N.C. 783 (1960) (judgment arrested where superior court judge denied defendants' motion to quash warrants that did not sufficiently name owner of stolen property) (per curiam); *State v. Thompson*, 6 N.C. App. 64 (1969) (warrant charging theft from "Belk's Department Store" was fatally defective for failure to allege owner of property was either a natural person or a legal entity capable of owning property).

The failure to identify the owner, or to identify an entity capable of owning property, makes the pleading defective and subject to dismissal. *See, e.g., State v. Patterson*, 194 N.C. App. 608 (2009) (indictment charging larceny of church property was fatally defective where it did not indicate that church was a legal entity capable of owning property); *State v. Woody*, 132 N.C. App. 788 (1999) (indictment alleging conversion was fatally defective and could not support conviction because it failed to allege that victim, P & R Unlimited, was a legal entity capable of owning property; court declines to extend holding of *Wooten*, below); *State v. Hughes*, 118 N.C. App. 573 (1995) (error to allow amendment to indictment that changed alleged victim of embezzlement from individual, "Mike Frost, President of Petroleum World, Inc.," to corporation, "Petroleum World, Inc."). *But see State v. Wooten*, 18 N.C. App. 652 (1973) (State need not allege corporate status of store in shoplifting prosecution).

Misidentification of the rightful owner is grounds for dismissal if the State's evidence on ownership varies from the allegations in the pleading. *See State v. Eppley*, 282 N.C. 249 (1972) (fatal variance when person named in indictment as owner of shotgun testified that gun was property of his father). *But cf. State v. Warren*, ___ N.C. App. ___, 738 S.E.2d 225 (2013) (no fatal variance in embezzlement case where indictment named Smokey Park Hospitality, Inc., d/b/a Comfort Inn; while evidence showed Smokey Park Hospitality never owned the hotel, it acted as a management company and ran the business and thus had a special property interest in the embezzled money); *State v. Lilly*, 195 N.C. App. 697 (2009) (no fatal variance in injury to real property case where indictment named townhome tenant as owner of property; sufficient to name lawful possessor); *State v. Holley*, 35 N.C. App. 64 (1978) (no fatal variance where larceny indictment named owner of gun and lawful possessor while evidence was presented only as to identity of lawful possessor); *State v. Robinette*, 33 N.C. App. 42 (1977) (no fatal variance where indictment alleged ownership of stolen property in father, but evidence showed that it belonged to his minor child and was kept in the father's residence where father had custody and control of minor child's property).

Some offenses involving theft do not require that the owner of the property be alleged. *State v. Thompson*, 359 N.C. 77 (2004) (indictment for armed robbery need not name subject of robbery); *State v. Jones*, 151 N.C. App. 317 (2002) (not necessary to allege

name of owner of goods in prosecution for possession of stolen goods); *State v. Burroughs*, 147 N.C. App. 693 (2001) (indictment for robbery need not name actual legal owner of property).

A statutory exception allows the State to amend a warrant in superior court to change the name of the rightful owner of property if the amendment does not prejudice the defendant. *See* G.S. 15-24.1; *State v. Reeves*, 62 N.C. App. 219 (1983).

For a further discussion of alleging ownership in larceny and other cases, see Smith, *Criminal Indictment*, at 32–38, *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0803.pdf.

Misidentification of defendant. All criminal pleadings must name or otherwise identify the defendant. *See* G.S. 15A-924(a)(1). Omission of the defendant's name constitutes grounds to dismiss. *See State v. Simpson*, 302 N.C. 613 (1981) (failure to name or otherwise identify defendant was fatal defect in indictment). A criminal pleading that identifies the defendant by a nickname or street name may be acceptable. *See State v. Spooner*, 28 N.C. App. 203 (1975) (pleading that named Michael Spooner as "Mike Spooner" acceptable); *State v. Taylor*, 61 N.C. App. 589 (1983) (warrant that included only defendant's street name "Blood" was not invalid; warrant had correct address, and State knew defendant's street name only); *see also State v. Young*, 54 N.C. App. 366 (1981) (in superior court, defendant waived objection to misnomer regarding his name by entering plea and going to trial without making objection), *aff'd*, 305 N.C. 391 (1982).

Date, time, and place of offense. A pleading must allege the time and place of an offense with enough specificity to enable the defendant to defend against the charge. *See* G.S. 15A-924(a)(3), (a)(4); *see also State v. Smith*, 267 N.C. 755 (1966) (per curiam) (pleading alleging breaking and entering was fatally defective where it did not identify building with particularity); *State v. McCormick*, 204 N.C. App. 105 (2010) (no fatal variance where burglary indictment alleged defendant broke and entered house located at 407 Ward's Branch Road, Sugar Grove Watauga County" but evidence at trial was house number was 317). A defendant who objects to the lack of specificity in the date of a pleading must demonstrate that the vagueness impaired his or her defense. *See* G.S. 15A-924(a)(4) ("Error as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice."); G.S. 15-155 ("No judgment upon any indictment . . . shall be stayed or reversed . . . for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly . . . ."). The N.C. Supreme Court has stated that the requirement of temporal specificity diminishes in cases of sexual offenses on children; it remains a requirement, however. *See State v. Everett*, 328 N.C. 72 (1991) (child sex offense indictment where date could have been February or March was not too vague to support conviction); *State v. Custis*, 162 N.C. App. 715 (2004) (explaining that a variance as to time, even in child sexual abuse cases, is material and of the essence if the variance deprives the defendant the opportunity to adequately present a defense).

The North Carolina courts have often permitted amendments of pleadings to correct

errors in the date or place of an offense. *See, e.g., State v. Grady*, 136 N.C. App. 394 (2000) (allowing amendment of indictment to change address of dwelling where controlled substance was used); *State v. Campbell*, 133 N.C. App. 531(1999) (allowing amendment of dates alleged in indictment where defendant was not misled as to nature of charges). However, variance between the State's proof as to the date or time of an offense and the date and time alleged in the pleading is material, and grounds for dismissal of the charge, when it deprives the defendant of an opportunity to present his or her defense, such as when the defendant relies on an alibi defense. *See State v. Christopher*, 307 N.C. 645 (1983) (fatal variance where defendant prepared alibi defense based on conspiracy to commit larceny indictment alleging a specific date, but State offered evidence showing crime might have occurred over a three-month period); *State v. Avent*, ___ N.C. App. ___, 729 S.E.2d 708 (2012) (no error to allow State to amend date of offense from December 28, 2009, to December 27, 2009 in first-degree murder indictment; defendant was not deprived of his opportunity to present alibi defense because alibi testimony covered Dec. 27, and other pieces of State's evidence cited Dec. 27 date).

Ordinance violations. Generally, the failure to cite the statute violated is not grounds for dismissal. *See* G.S. 15A-924(a)(6). For violations of city or county ordinances, however, the rule appears to be different. *See* G.S. 160A-79(a) (requiring for city ordinance violations that codified ordinance be identified in pleading by section number and caption, that uncodified ordinance be identified by caption, and that uncodified ordinance without caption be set forth in pleading); G.S. 153A-50 (requiring same for county ordinance violations); *State v. Pallet*, 283 N.C. 705, 714 (1973) ("In a criminal prosecution for violation of a rule or regulation of a government board or commission, the indictment should set forth such rule or regulation or refer specifically to a permanent public record where it is recorded and available for inspection"; State failed to plead and prove contents of ordinance that had no section number or caption, and warrant therefore failed to allege facts sufficient to identify crime with which defendant was charged); *In re Jacobs*, 33 N.C. App. 195 (1977) (motion to quash juvenile petition granted where pleading did not allege caption of ordinance or set forth ordinance itself).

Resist, obstruct, or delay. "A warrant or bill of indictment charging a violation of G.S. 14-223 must identify the officer by name and indicate the official duty he was discharging or attempting to discharge, and should point out, in a general way at least, the manner in which the defendant is charged with having resisted, delayed, or obstructed such officer." *State . Smith*, 262 N.C. 472, 474 (1964); *see also State v. Wells*, 59 N.C. App. 682 (1982) (citation that charged resisting arrest was fatally defective for omission of duty officer was performing); *State v. Powell*, 10 N.C. App. 443 (1971) (the words "resist arrest" in citation were insufficient to charge offense).

Assault on officer. In contrast with a prosecution for resisting arrest, in a prosecution for assault on an officer under G.S. 14-33(c)(4) it is not necessary to allege the specific duty being performed by the officer at the time of the assault. *See State v. Noel***,** 202 N.C. App. 715 (2010) (indictments alleging malicious conduct by a prisoner and assault on a governmental official do not have to allege the duty officer was performing; where the duty was alleged it was surplusage and variance between allegations and proof was not

material); *State v. Bethea*, 71 N.C. App. 125 (1984) (sufficient to state that officer was performing a duty of his or her office when the assault occurred; not necessary to allege the particular duty in the indictment).

As in other assault cases, however, the victim must be identified correctly. *See State v. Powell*, 10 N.C. App. 443 (1971) (the words "assault on an officer" were insufficient because the victim—that is, the officer allegedly assaulted—was not identified); *see also State v. Thomas*, 153 N.C. App. 326 (2002) (indictment did not need to allege that defendant knew or had reasonable grounds to believe that named victim was officer where indictment alleged defendant "willfully" committed assault on law enforcement officer). For a further discussion of this issue, see *supra* "Misidentification of Victim" in this subsection F.

Other assaults. *See, e.g.*, *State v. Palmer*, 293 N.C. 633 (1977) (not necessary for indictment to describe size, weight, or particular use of potentially deadly weapon, but it must (i) name weapon, and (ii) state that weapon was used as "deadly weapon" or allege facts demonstrating deadly character of weapon); *State v. Moses*, 154 N.C. App. 332 (2002) (indictment failed to allege assault inflicting serious injury with deadly weapon because it did not name weapon); *State v. Garcia*, 146 N.C. App. 745 (2001) (arrest warrant charging assault by show of violence was insufficient where it omitted facts showing reasonable apprehension of immediate bodily harm on part of victim). *See also supra* "Misidentification of Victim" in this subsection F (fatal variance results from failure to correctly identify victim in pleading).

Duplicity. Each separate offense charged against a defendant must be pled in a separate pleading or a separate count within a single pleading. *See* G.S. 15A-924(a)(2). A pleading may be challenged for duplicity if it contains more than one charge in a single count. When a pleading is challenged on this ground, the State must elect between the offenses charged; if the State fails to elect, the court may dismiss the entire count. *See* G.S. 15A-924(b); *State v. Rogers*, 68 N.C. App. 358 (1984) (with leave of court, prosecutor may amend indictment to state in separate counts charges that were initially alleged in single count); *State v. Beaver*, 14 N.C. App. 459 (1972) (stating same principle but finding that in circumstances presented defendant was entitled to have prosecutor elect). The problem of duplicity often arises where the initial pleading is a Uniform Citation. (Sometimes a magistrate will sign the citation, converting it to a magistrate's order). A Uniform Citation contains two counts *only*. The first count (numbers 1 through 15 on the citation) may be used to charge one offense only; and the second count (number 16) likewise may charge one offense only. If the citation charges more than one offense in either count, the defendant may move to require the State to elect a single offense alleged in the particular count.

Ordinarily in district court, defendants may make motions addressed to the pleadings at or after arraignment. *See* G.S. 15A-953 (motions in district court ordinarily should be made upon arraignment or during trial); *see also supra* § 8.2E, Timing and Effect of Motions to Dismiss in District Court. To be safe, however, counsel should make a duplicity motion before the defendant enters a plea. *See* G.S. 15A-924(b) (duplicity

motion must be "timely"); *cf.* G.S. 15A-952(b)(6) (in superior court, certain motions addressed to pleadings must be made before arraignment); *State v. Williamson*, 250 N.C. 204 (1959) (in pre-15A case involving appeal for trial de novo in superior court, court states that motion to quash for duplicity is waived if not made before defendant enters plea).

Prior convictions of charged offense and other enhancements. North Carolina law raises a number of offenses to a higher class, subject to increased punishment, based on the defendant's prior convictions of the charged offense. *See, e.g.*, G.S. 14-72(b) (habitual misdemeanor larceny); G.S. 14-33.2 (habitual misdemeanor assault); G.S. 14-72.1 (shoplifting); G.S. 14-107 (worthless check); G.S. 14-56.1 (breaking into a coin operated machine); G.S. 90-95(a)(3) (possession of marijuana). The pleading must allege the prior conviction to subject the accused to the higher penalty. *See* G.S. 15A-928; *State v. Miller*, 237 N.C. 427 (1953); *State v. Williams*, 21 N.C. App 70 (1974); *cf. State v. Stephens*, 188 N.C. App. 286 (2008) (charge against defendant was not substantially altered where State amended indictment for stalking by striking the allegation of the prior conviction, which was included in single count of indictment with current offense, and making allegation into separate count in indictment in compliance with the requirements of G.S. 15A-928). North Carolina law requires generally that all essential elements of an offense be alleged (G.S. 15A-924(a)(5)) and requires specifically that prior convictions raising an offense to a higher class be alleged. *See* G.S. 15A-928; *see also supra* "Failure to charge offense or element of offense" in this subsection F.

Practice note: G.S. 15A-928 contains procedures specific to superior court for alleging and proving prior convictions that increase an offense to a higher class. Essentially, the statute requires that prior convictions be alleged in a separate indictment or other pleading to limit disclosure of the information to the jury during a trial of the current offense. The requirement of a separate pleading does not apply to cases tried in district court, but a district court pleading still must allege any prior conviction that raises an offense to a higher class. G.S. 15A-928(d) implicitly recognizes this basic pleading requirement in cases tried in district court, stating that on appeal for a trial de novo the State must replace the district court pleading with superseding statements of charges alleging separately the current offense and any prior convictions.

In addition to the defendant's prior convictions, there are a number of statutory factors that may subject a defendant to higher punishment. These factors are elements of the offense carrying the higher punishment and must be alleged in the pleading. *See* G.S. 15A-924(a)(5); *see also supra* "Failure to charge offense or element of offense" in this subsection F., and *infra* § 8.7, *Apprendi* and *Blakely* Issues. Examples of such enhancements for misdemeanors include: G.S. 14-72.1(d1) (shoplifting using lead-lined or aluminum-lined bag or clothing); G.S. 14-50.22 (committing misdemeanor at direction of, for benefit of, or in association with criminal street gang); G.S. 14-3(c) (committing misdemeanor because of victim's race, color, religion, nationality, or country of origin); G.S. 14-3(b) (committing certain misdemeanors in secrecy, with malice, or with deceit and intent to defraud); *see also State v. Bell*, 121 N.C. App. 700 (1996) (superior court had no jurisdiction over misdemeanor that State wanted to elevate to a felony under G.S.

14-3(b) where indictment failed to charge that offense was "infamous," "done in secrecy and malice," or done "with deceit and intent to defraud").

8.3 Misdemeanor Appeals

A. Scope of Jurisdiction on Appeal

Generally. On appeal of a misdemeanor conviction, the general rule is that the superior court's jurisdiction is "derivative" of the district court's jurisdiction. *See* G.S. 7A-271(b). Thus, the superior court ordinarily has jurisdiction on appeal only if: (1) the charge in superior court is the same as, or a lesser offense of, the charge alleged in the pleading in district court; *and* (2) the defendant was convicted in district court.

Requirement of same or lesser charge. On appeal of a misdemeanor conviction to superior court, the prosecution may not amend the pleadings or file a statement of charges alleging additional or different misdemeanors. *See State v. Caudill*, 68 N.C. App. 268 (1984) (superior court did not have jurisdiction to try defendant on statement of charges filed in superior court for nonsupport of illegitimate child where case arose on defendant's appeal from district court conviction for nonsupport of legitimate child; prosecution could not file statement of charges alleging new offense); *State v. Killian*, 61 N.C. App. 155 (1983) (prosecution may not file statement of charges in superior court alleging acts of nonsupport that occurred after district court trial); *State v. Clements*, 51 N.C. App. 113 (1981) (allowing amendment in superior court that did not change nature of offense).

The superior court ordinarily does not have jurisdiction over any offenses that are not strictly lesser included offenses of the conviction below. *See State v. Hardy*, 298 N.C. 191 (1979) (defendant was charged with and convicted of assault on officer in district court; on appeal, superior court did not have jurisdiction to try defendant for resisting arrest); *State v. Caldwell*, 21 N.C. App. 723 (1974) (defendant was charged with and convicted of assault on officer in district court; on appeal, superior court did not have jurisdiction to try defendant for assault by pointing gun). If the prosecution wants to charge a new misdemeanor, it must start again in district court except in the rare circumstance in which the grand jury initiates a misdemeanor prosecution by presentment in superior court. (Presentments are discussed *infra* in § 8.5B, Types of Pleadings and Related Documents.) For a discussion of potential Double Jeopardy and Due Process concerns involved in charging greater offenses in superior court following a district court proceeding, see *infra* § 8.6, Limits on Successive Prosecution.

Requirement of conviction. To confer appellate jurisdiction on the superior court, the defendant ordinarily must have been convicted of the offense charged in district court; it is not enough that a defendant was charged with the offense in district court. *See State v. Reeves*, ___ N.C. App. ___, 721 S.E.2d 317 (2012) (where defendant was charged with impaired driving and reckless driving and State took voluntary dismissal of reckless

driving in district court that was not pursuant to a plea agreement, reckless driving charge was not properly before superior court on appeal for trial de novo); *State v. Guffey*, 283 N.C. 94 (1973) (district court judgment indicated that defendant was convicted of impaired driving and was silent on whether defendant was convicted of charge of driving while license revoked; superior court did not have jurisdiction over charge of driving while license revoked); *State v. Phillips*, 127 N.C. App. 391 (1997) (in district court, defendant was tried and convicted of impaired driving, but State took voluntary dismissal of speeding charge; superior court lacked jurisdiction to try speeding charge on appeal of impaired driving conviction where voluntary dismissal was not pursuant to plea agreement); *see also State v. Joyner*, 33 N.C. App. 361 (1977) (reviewing court may assume procedural regularity in district court and may examine entire record to determine whether there was conviction that would support derivative jurisdiction of superior court); *State v. Wesson*, 16 N.C. App. 683 (1972) (sufficient evidence of conviction where district court judge sentenced defendant and set superior court bond, even though judge failed to fill in the disposition "guilty" on the judgment sheet).

Exceptions. There are two exceptions to the above rules. First, if the defendant appeals a district court judgment imposed pursuant to a plea agreement, the superior court has jurisdiction over any misdemeanor that was dismissed, reduced, or modified pursuant to that agreement. *See* G.S. 15A-1431(b); G.S. 7A-271(b).

Second, on appeal of a misdemeanor conviction, the superior court has jurisdiction to accept a guilty plea (but not to try the defendant) on any "related charge." G.S. 7A-271(a)(5). To utilize this provision, the prosecution must file an information in superior court charging the related misdemeanor, to which the defendant then enters a guilty plea. *See State v. Craig*, 21 N.C. App. 51 (1974) (on appeal of impaired driving conviction, superior court accepted plea to reckless driving; if reckless driving is "related charge" for which superior court may accept guilty plea, prosecution must file written information); G.S. 15A-922(g) (when misdemeanor is initiated in superior court, prosecution must be on information or indictment). If the defendant pleads guilty or is found guilty in superior court, the defendant also may request permission to enter a guilty plea to other misdemeanor charges pending in the same or other districts if certain procedural rules are followed. *See* G.S. 15A-1011(c); *see also infra* "Waiver by certain guilty pleas" in § 11.2D, Waiver (venue waived in this instance).

B. Required Pleadings in Superior Court

The pleading in district court may be used as the pleading in superior court on a trial de novo. *See State v. Chase*, 117 N.C. App. 686 (1995) (information or indictment not required on appeal of misdemeanor because the case was not initiated in superior court within meaning of G.S. 15A-923(a)). Although the prosecution need not obtain an indictment or information, the warrant or other district court pleading still must meet the rules for proper pleadings (discussed *supra* in § 8.2, Misdemeanors Tried in District Court). *See also State v. Jones*, 157 N.C. App. 472 (2003) (like other pleadings, citation may not be read to jury). Thus, the defendant may move to dismiss in superior court if the

warrant or other pleading is defective. *See State v. Biller*, 252 N.C. 783 (1960) (judgment arrested where superior court judge erroneously denied defendants' motion to quash fatally defective warrants) (per curiam)*; State v. Madry*, 140 N.C. App. 600 (2000) (motion to dismiss for failure to charge an offense was permissible in superior court on appeal for trial de novo); *see also* G.S. 15A-952(d) (defendant may move to dismiss for a jurisdictional defect "at any time").

If the defendant objects to the sufficiency of a warrant or other criminal process in superior court, the prosecution may file a statement of charges curing the defect as long as it does not change the nature of the offense alleged in district court. *See* G.S. 15A-922(e); *State v. Martin*, 46 N.C. App. 514 (1980) (stating rule); *see also State v. Killian*, 61 N.C. App. 155 (1983) (prosecution may not file statement of charges in superior court unless defendant objects to sufficiency of pleading); *State v. Clements*, 51 N.C. App. 113 (1981) (allowing amendment of warrant in superior court that did not change nature of offense). Thus, even if the defendant files a motion to dismiss before trial commences in superior court, the prosecution may not amend the pleading or file a statement of charges changing the nature of the offense alleged.

A statutory exception allows the State to amend a warrant in superior court to change the name of the rightful owner of property if the amendment does not prejudice the defendant. *See* G.S. 15-24.1; *State v. Reeves*, 62 N.C. App. 219 (1983).

In an impaired driving case, if the defendant appeals to superior court and the State intends to use an aggravating or grossly aggravating factor, the State must provide the defendant with written notice no later than 10 days before trial. G.S. 20-179(a1)(1).

C. Refiling of Misdemeanor Charges

If the prosecution takes a voluntary dismissal in superior court of a misdemeanor appealed for a trial de novo, the prosecution may not refile the charge in superior court except in limited circumstances. The prosecution may do so if: (1) the case falls within one of the categories of misdemeanors that may be filed initially in superior court under G.S. 7A-271(a) (allowing misdemeanor to be filed initially in superior court if joined with related felony or if initiated by presentment) and the statute of limitations has not run; or (2) the earlier dismissal was with leave under G.S. 15A-932 (allowing reinstitution of case after dismissal with leave based on failure to appear or deferred prosecution agreement).

D. Due Process Limits

Under the Due Process clause, if the defendant is convicted of a misdemeanor in district court and appeals for a trial de novo, the State may not initiate felony charges arising out of the same incident. Such charges are considered presumptively vindictive. *See infra* § 8.6D, Due Process.

8.4 Felonies and Misdemeanors Initiated in Superior Court

A. Scope of Original Jurisdiction

The superior court has original jurisdiction over all felonies and over misdemeanors joined with felonies. The superior court also has original jurisdiction over misdemeanors initiated by presentment. *See* G.S. 7A-271. Jurisdiction over an offense gives the court jurisdiction over all lesser included offenses of the crime charged. So, where the defendant is indicted for a felony, the superior court can accept a plea of guilty to a lesser included offense that is a misdemeanor, or it can enter judgment on a jury verdict for a lesser included misdemeanor.

B. Types of Pleadings and Related Documents

In superior court, a prosecution must be initiated by indictment or information. *See* G.S. 15A-923(a). A bill of particulars may be used to supplement, but it does not replace an indictment or information. A presentment, described below, is not a formal charging document but may lead to the initiation of charges.

Indictment. An indictment is a written accusation by a grand jury stating that it has found probable cause to believe that the defendant committed a specific crime. A prosecution in superior court must be by an indictment, although a noncapital defendant may waive the right to an indictment and be tried on an information. Indictments typically charge felonies. Misdemeanors may be charged in an indictment only if the charge is initiated by presentment or if the offense is joined with a charged felony. *See* G.S. 15A-923; G.S. 7A-271.

Information. An information is an accusation drafted by the prosecutor and filed in superior court, charging one or more criminal offenses. It permits the prosecution of a felony without an indictment by grand jury where the defendant and the defendant's attorney sign a waiver of indictment, consenting to have the case tried on the information. *See* AOC Form AOC-CR-123, "Bill of Information" (Jan. 2013), *available at* www.nccourts.org/Forms/FormSearch.asp. An information may be filed only if the defendant waives indictment. Defendants who are unrepresented or who are charged with capital crimes may not waive indictment. *See* G.S. 15A-642(b).

A defendant might agree to waive indictment and proceed on an information to permit immediate disposition of the case. For example, a plea bargain may involve a defendant pleading guilty to an offense for which he or she has not been indicted, thus requiring a waiver of indictment and filing of an information if the case is to be resolved promptly.

Presentment. A presentment is a written accusation by the grand jury, filed in superior court, charging a defendant with one or more crimes. A presentment is initiated by the grand jury. It does not commence a criminal proceeding and is not a pleading. The district attorney is statutorily required to investigate the allegations in a presentment and to submit a bill of indictment to the grand jury if appropriate. A misdemeanor prosecution

that is not joined to a related felony may not be commenced in superior court except by presentment. *See* G.S. 7A-271(a)(2); G.S. 15A-641(c); G.S. 15A-644; G.S. 15A-922(g); G.S. 15A-923(a).

Bill of particulars. A bill of particulars is prepared by the prosecutor and filed with the court. It is not a pleading, but it supplements an indictment or information by providing the defendant with additional information. *See* G.S. 15A-925. The defendant must file a motion for a bill of particulars before arraignment. *See* G.S. 15A-952. In the motion, the defendant must request specific information and allege that the defendant cannot adequately prepare or conduct his or her defense without such information. *See* G.S. 15A-925(b); *State v. Garcia*, 358 N.C. 382 (2004) (trial court did not abuse discretion in denying bill of particulars specifying underlying felony in felony murder prosecution; concurrence finds no error but observes that North Carolina law regarding bill of particulars contains more promise than substance; dissent would have found error); *State v. Randolph*, 312 N.C. 198 (1984) (trial court must order State to respond to motion for bill of particulars when defendant shows that requested information is necessary to adequately prepare defense; denial of motion is error if lack of timely access to information significantly impaired defendant's preparation and conduct of case; trial court did not abuse discretion in denying motion in this case); *see also State v. Tunstall*, 334 N.C. 320 (1993) (trial court granted motion for bill of particulars requiring State to provide date, time, and location of murder and certain information about theory of crime).

A bill of particulars does not cure defects or omissions in an indictment or information. *See* subsection C., Sufficiency of Pleadings, below. It does, however, limit the scope of the case against the defendant. The State may not vary in its proof at trial from the allegations stated in a bill of particulars. *See* G.S. 15A-925(e) (so stating but allowing amendment at any time before trial). This limitation applies only if the State files a formal, written bill of particulars. If the State responds to a defendant's request for additional details by orally supplying information in court, such a response is not the same as a bill of particulars, and the State's proof at trial will not have to conform to its earlier in-court representations. *See State v. Stallings*, 107 N.C. App. 241 (1992) (prosecutor's oral statements were not a bill a particulars; statute requires that a bill of particulars be in writing). Counsel should therefore request that the court order the State to file a written bill of particulars in order to "marry" the State to facts that the prosecutor has stated orally.

C. Sufficiency of Pleadings

General Requirements. G.S. 15A-924(a) states the general requirements for criminal pleadings. All superior court pleadings must contain:

- a plain and concise factual statement supporting every element of the offense charged;
- a separate count addressed to each offense charged;
- a reference to the statute or other provision of law that the defendant allegedly violated;

- the name or other identification of the defendant;
- the county where the offense took place; and
- the date on which, or time period during which, the offense took place; and
- a statement that the State intends to use certain aggravating factors, with a plain and concise factual statement indicating the factors it intends to use.

The last requirement about aggravating factors applies to felony cases only. *See infra* § 8.7B, Notice and Pleading Requirements after *Blakely*. It does not apply to misdemeanor impaired driving cases; however, in impaired driving cases in superior court, the State must give written notice of its intent to use any aggravating or grossly aggravating factors. G.S. 20-179(a1)(1).

An indictment or information must be sufficient in itself. The State may not rely on allegations in a warrant or bill of particulars to cure defects or omissions. *See State v. Benton*, 275 N.C. 378 (1969) (allegations in warrant may not cure defects in indictment); *State v. Stokes*, 274 N.C. 409 (1968) (allegations in bill of particulars do not cure defects in indictment); *accord State v. Banks*, 263 N.C. 784 (1965). Consent to amendment does not cure an indictment that lacks an essential element. *State v. De la Sancha Cobos*, 211 N.C. App. 536 (2011) (error to amend indictment by adding amount of the cocaine, an essential element of the offense; indictment may not be amended by consent).

Some pleading errors may be subject to amendment or not be of consequence. *See, e.g., State v. Jones*, 110 N.C. App. 289 (1993) (incorrect statutory reference was not fatal defect where body of indictment properly charged elements of offense). *But see State v. Blakney*, 156 N.C. App. 671 (2003) (in prosecution for felony, pleading must charge that defendant acted "feloniously" or reference statutory section making crime a felony). *See also* subsection D., Amendment of Indictments, below.

Pleading errors that may affect the ability of the State to proceed are discussed *infra* in § 8.5, Common Pleading Defects in Superior Court. Generally, if a case is dismissed because the indictment is fatally defective, the State is not barred from refiling the charges in an appropriately-worded pleading. In some circumstances, however, refiling may be barred. *See supra* § 8.2E, Timing and Effect of Motions to Dismiss in District Court (effect of dismissal on subsequent charges); *see also infra* § 8.6, Limits on Successive Prosecution (discussing double jeopardy and other limits on successive prosecution).

Short-form indictment. The North Carolina General Assembly has enacted statutes permitting abbreviated forms of indictment for certain offenses, known as "short-form" indictments. Short-form indictments are permitted for murder (G.S. 15-144); forcible rape (G.S. 15-144.1(a)); statutory rape (G.S. 15-144.1(b)); forcible sex offense (G.S. 15-144.2(a)); and statutory sex offense (G.S. 15-144.2(b)). A short-form indictment does not allege the elements that elevate these offenses to the first-degree level. For example, where the State contends that the defendant committed first-degree murder, the indictment need not state that the murder was committed in the course of a felony, after premeditation and deliberation, or in any other manner that would increase the level of

the offense. It is sufficient for the indictment to allege that the named defendant, with malice aforethought, murdered the victim. *See* Smith, *Criminal Indictment*, at 16–18, 29–32, *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0803.pdf.

North Carolina courts have continued to uphold the adequacy of short-form indictments against constitutional challenges. *See, e.g.*, *State v. Wallace*, 351 N.C. 481 (2000) (upholding short-form indictment for rape and murder); *State v. Avery*, 315 N.C. 1 (1985); *State v. Hasty*, 181 N.C. App. 144 (2007).

Pleading rules for certain offenses. Certain offenses and certain elements of crimes have specific pleading requirements, either as a matter of statute or case law. Counsel should review the pleading requirements for each offense charged. *See* Smith, *Criminal Indictment*, at 16–53, *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0803.pdf.

D. Amendment of Indictments

Generally. G.S. 15A-923(e) states that indictments may not be amended. Despite the literal language of this statute, courts have permitted the amendment of indictments where the amendment does not *substantially* alter the charge. *See State v. Price*, 310 N.C. 596 (1984). The meaning of "substantially" in this context is ambiguous. Typically, prosecutors have been allowed to amend indictments to change the date or place of an offense or to correct "technical" errors, such as misspellings (although the motion to amend should be denied where time is of the essence to the defense or when the defendant is surprised and prejudiced by the change. *Id.* at 598–99). Amendments that change the name of the defendant, the identity of the victim, or the nature of the offense have not been allowed.

The following cases are a sample of decisions that have ruled on amending pleadings. Counsel should review the pleading requirements for the particular offense with which the defendant is charged.

Decisions permitting amendment of indictment. In the following cases, the court permitted amendment of the indictment:

State v. Hill, 362 N.C. 169 (2008) (per curiam) (trial court did not err by allowing State to correct a statutory citation where indictment incorrectly cited a violation of G.S. 14-27.7A (sexual offense against a 13, 14, or 15 year old) but body of indictment correctly charged violation of G.S. 14-27.4 (sexual offense with a victim under 13))

State v. Tucker, ___ N.C. App. ___, 743 S.E.2d 55, 58 (2013) (trial court did not err by allowing State to amend embezzlement indictment, where indictment originally stated "the defendant . . . was the employee of MBM Moving Systems, LLC . . . ," to add the words "or agent" after the word "employee"; court rejected defendant's argument that the nature of his relationship to the victim was critical to the charge and held that the terms "employee" and "agent" "are essentially interchangeable" for purposes of this offense)

State v. White, 202 N.C. App. 524 (2010) (trial court did not err in allowing State to amend habitual impaired driving indictment to allege that prior impaired driving convictions, which were accurately identified in indictment, occurred within ten years of the current offense rather than seven years). *Cf. State v. Winslow*, 360 N.C. 161 (2005) (per curiam) (error, under prior version of statute, to allow State to amend habitual impaired driving indictment to correct the date of a prior conviction, thereby bringing it within the seven-year look-back period)

State v. Coltrane, 188 N.C. App. 498 (2008) (no error in allowing State to amend date and county of prior conviction in possession of firearm by felon indictment; time is not an essential element of the crime)

State v. Stephens, 188 N.C. App. 286 (2008) (no error in allowing amendment to indictment for stalking that originally included allegation of prior stalking conviction in same count to separate out the allegation regarding prior conviction that elevated punishment to a felony, as required by G.S. 15A-928)

State v. Hewson, 182 N.C. App. 196 (2007) (no error in allowing State to amend murder indictment to change victim's name from "Gail Hewson Tice" to "Gail Tice Hewson"; no indication defendant was surprised or confused about identity of victim)

State v. McCallum, 187 N.C. App. 628 (2007) (no error in allowing State to amend indictments to remove allegations concerning the amount of money taken during the robberies because allegations as to value of property were surplusage; amended indictments alleged that defendant took an unspecified amount of U.S. Currency)

State v. Whitman, 179 N.C. App. 657 (2006) (State was entitled to amend the alleged dates for statutory rape and statutory sexual offense of a 13, 14, or 15-year-old from "January 1998 through June 1998" to "July 1998 through December 1998"; victim would have been fifteen under either version of indictment and defendant was on notice that if he wished to present an alibi defense, he was going to have to address all of 1998 because an incest indictment, which was not amended, alleged dates from "January 1998 through June 1999")

State v. Van Trusell, 170 N.C. App. 33 (2005) (no error in allowing amendment from attempted armed robbery to armed robbery; offenses are punished the same)

State v. May, 159 N.C. App. 159 (2003) (no error in allowing State to amend date in false pretenses indictment; time was not an essential element of the crime)

State v. Grady, 136 N.C. App. 394 (2000) (permissible to amend address of dwelling in prosecution for maintaining dwelling for use of controlled substance)

State v. Hyder, 100 N.C. App. 270 (1990) (permissible to change name of county from which grand jury issued indictment)

State v. Marshall, 92 N.C. App. 398 (1988) (permissible to amend name of victim where three of the indictments stated victim's name correctly and victim's last name had been inadvertently left off fourth indictment)

Decisions not permitting amendment of indictment. In the following cases, the court found that amendment was not permissible:

State v. Silas, 360 N.C. 377 (2006) (error for State to amend felony breaking or entering indictment to reflect that defendant broke with intent to commit assault where State had indicted on theory that defendant broke with intent to commit murder)

State v. Winslow, 360 N.C. 161 (2005) (per curiam) (error, under prior version of statute, to allow State to amend habitual impaired driving indictment to correct the date of a prior conviction, thereby bringing it within the seven-year look-back period)

State v. Abraham, 338 N.C. 315 (1994) (error for State to amend felonious assault indictment to change name of victim from Carlose Antoine Latter to Joice Hardin; court notes that error in name of victim may be more serious than error in name of defendant)

State v. Abbott, __ N.C. App. __, 720 S.E.2d 437 (2011) (error for State to amend owner of property in indictment alleging larceny by employee by striking the word "Incorporated" from "Cape Fear Carved Signs, Incorporated"; change from corporate entity to sole proprietorship was substantial alteration)

State v. Morris, 185 N.C. App. 481 (2007) (trial court erred in allowing State to amend indictment charging kidnapping to change purpose from facilitating a felony to facilitating inflicting serious injury where amendment was "obviously intended to elevate the crime to the first degree")

State v. Cathey, 162 N.C. App. 350 (2004) (error to allow amendment to felony larceny indictment regarding owner of property to reflect that owner was corporation)

State v. Hughes, 118 N.C. App. 573 (1995) (error to change name of alleged victim in embezzlement prosecution from "Mike Frost, President of Petroleum World, Incorporated" to "Petroleum World, Incorporated"; amendment changed ownership from individual to corporation, substantially altering offense)

In re Davis, 114 N.C. App. 253 (1994) (error for court to allow amendment of juvenile petition that alleged unlawful burning of public building to allegation of unlawful burning of personal property within building)

E. Habitual Offender Pleading Requirements

Generally. The following discussion focuses on the pleading requirements in habitual felon cases under G.S. 14-7.1 through G.S. 14-7.6. It does not discuss the substantive requirements for conviction as a habitual felon—for example, the timing of prior

convictions. For a further discussion of habitual felon cases, see Jeff Welty, *North Carolina's Habitual Felon, Violent Habitual Felon, and Habitual Breaking and Entering Laws*, ADMINISTRATION OF JUSTICE BULLETIN No. 2013/07 (UNC School of Government, Aug. 2013) [hereinafter Welty, *Habitual Felon Laws*], *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1307.pdf; Robert L. Farb, *Habitual Offender Laws* (UNC School of Government, Feb. 2010), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/habitual.pdf; Jamie Markham, *Changes to the Habitual Felon Law*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 10, 2011), http://nccriminallaw.sog.unc.edu/?p=3042.

Charging a person as a violent habitual felon is subject to similar pleading requirements. *See* G.S. 14-7.7 through G.S. 14-7.12. The charge of habitual breaking and entering, enacted in 2011, is likewise subject to similar pleading requirements. *See* G.S. 14-7.25 through G.S. 14-7.31; Jamie Markham, *Habitual Breaking and Entering*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 22, 2011), http://nccriminallaw.sog.unc.edu/?p=3077.

Legislative note: Effective for offenses committed on or after October 1, 2013, S.L. 2013-369 (H 937) adds new Article 3D in G.S. Ch. 14 (G.S. 14-7.35 through G.S. 14-7.41) creating the status of armed habitual felon, which applies to a person who commits a firearm-related felony after having previously been convicted of a firearm-related felony as defined in the new statutes. The procedures for charging armed habitual felon status is similar to the current habitual felon procedures, discussed above.

Other enhancements for prior convictions. In addition to the habitual offender cases described above, North Carolina law raises a number of offenses to a higher class, subject to increased punishment, based on the defendant's prior convictions. *See, e.g.*, 14-33.2 (habitual misdemeanor assault); G.S. 14-56.1; (breaking into a coin operated machine); G.S. 14-72(b)(6) (habitual misdemeanor larceny); G.S. 14-72.1 (shoplifting); G.S. 14-107 (worthless check); G.S. 90-95(a)(3) (possession of marijuana). Such offenses are subject to the pleading requirements in G.S. 15A-928, which requires that the pleading allege the prior convictions that subject the accused to the higher penalty. *See also State v. Miller*, 237 N.C. 427 (1953) (reaching same result before adoption of G.S. Ch. 15A); *State v. Williams*, 21 N.C. App 70 (1974) (to same effect); G.S. 15A-924(a)(5) (requiring that all essential elements of offense be alleged). For cases in superior court, the prior conviction must be alleged in a separate indictment or other pleading. G.S. 15A-928(b) (indictment and information); G.S. 15A-928(d) (superseding statement of charges for misdemeanors appealed for trial de novo); *cf. State v. Stephens*, 188 N.C. App. 286 (2008) (charge against defendant was not substantially altered where State amended indictment for stalking by striking the allegation of the prior conviction, which was included in single count of indictment with current offense, and making allegation into separate count in indictment in compliance with the requirements of G.S. 15A-928).

Felon in possession of firearm. Possession of a firearm by a felon is a criminal offense in its own right. For reasons similar to the requirement that prior convictions be separate from allegations of other offenses, an indictment for possession of a firearm by a felon must be charged in a separate indictment from other charges. G.S. 14-415.1(c); *State v.*

Wilkins, ___ N.C. App. ___, 737 S.E.2d 791 (2013) (indictment for felon in possession of a firearm was fatally defective because the charge was included as a separate count in a single indictment charging the defendant with assault with a deadly weapon).

Other enhancements. In addition to the defendant's prior convictions, there are a number of statutory factors that subject a defendant to higher punishment and must be alleged in the pleading. *See, e.g.*, G.S. 14-72.1(d1) (shoplifting using lead-lined or aluminum-lined bag or clothing); G.S. 15A-1340.16C (wearing or possessing bullet-proof vest during commission of felony). For a discussion of these enhancements, see *infra* "Firearm and Other Enhancements" in § 8.7B, Notice and Pleading Requirements after *Blakely*. *See also supra* "Prior convictions of charged offense and other enhancements" in § 8.2F, Common Pleading Defects in District Court.

Timing of challenge in habitual felon cases. Counsel ordinarily should raise objections to habitual felon charging errors after the trial has commenced on the principal felony or at the commencement of the habitual felon proceedings. If the charging error is raised before attachment of jeopardy on at least the principal felony (when the jury is empanelled and sworn), the State conceivably could dismiss the case altogether and seek new indictments. (If the defendant is challenging the validity of a prior conviction, the basis of the challenge will determine whether the defendant may challenge the conviction in the current case or must file a motion for appropriate relief to vacate the conviction in the original proceeding. *See* Welty, *Habitual Felon Laws*, at 25–26, *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1307.pdf; *see also infra* § 12.2A, Suppressing Prior Uncounseled Conviction.

Pleading requirements in habitual felon cases. Below are the basic requirements for habitual felon pleadings.

1. *State must obtain separate habitual felon charge.* To charge a defendant as a habitual felon, the State should prepare a separate indictment from the indictment for the principal felony being tried. *See* G.S. 14-7.3 (habitual felon); *State v. Patton*, 342 N.C. 633 (1996); Welty, *Habitual Felon Laws*, at 16–17. *But see State v. Young*, 120 N.C. App. 456 (1995) (not error to charge habitual felon status in separate count of indictment for principal felony; if it was error, defendant was not prejudiced). The State is not required to obtain a separate habitual felon indictment for each principal felony; one is sufficient for all pending felony indictments. *See Patton*, 342 N.C. at 635.

2. *State must obtain timely habitual felon indictment.* Three principles limit the timing of a habitual felon indictment.

   First, the N.C. courts have held that being a habitual felon is not an offense—it is a status that elevates the punishment for the felony with which the defendant is charged. Consequently, habitual felon charges are necessarily ancillary to a felony charge and may not stand alone. *See State v. Cheek*, 339 N.C. 725, 727 (1995) (habitual felon law does not authorize "an independent proceeding to determine

defendant's status as a habitual felon separate from the prosecution of a predicate substantive felony"). Thus, the State may not wait until the defendant is convicted and sentenced for a felony and then obtain a habitual felon indictment. *See State v. Allen*, 292 N.C. 431 (1977); *see also State v. Davis*, 123 N.C. App. 240 (1996) (trial court could not sentence defendant as habitual felon after arresting judgment on all principal felonies). The courts have not been picky, however, about which indictment is obtained first—the habitual felon indictment or the indictment for the principal felony—as long as there is a felony prosecution to which the habitual felon indictment may attach. *See State v. Ross*, ___ N.C. App. ___, 727 S.E.2d 370 (2012) (in reliance on *Flint* [discussed next], court vacates habitual felon plea and remands for sentencing on principal felony because habitual felon indictment was returned before commission of principal felony); *State v. Flint*, 199 N.C. App. 709 (2009) (habitual felon indictment may be returned before, after, or simultaneously with a principal felony indictment, but it is improper if issued before substantive felony occurred; there were other substantive felonies to which the habitual felon indictment attached, however); *State v. Bradley*, 175 N.C. App. 234 (2005) (trial court lacked jurisdiction to sentence defendant as habitual felon for subsequent charges absent new habitual felon indictment where defendant had already pled guilty to original charges to which habitual felon indictment attached, although sentencing was still pending for original charges); *State v. Blakney*, 156 N.C. App. 671 (2003) (habitual felon indictment that predated indictment for principal felony by two weeks was not void where notice and procedural requirements for habitual felon cases were satisfied); *State v. Murray*, 154 N.C. App. 631 (2002) (State obtained felony indictment, then habitual felon indictment, then superseding felony indictment for which defendant was ultimately convicted; court holds that State could proceed on habitual felon indictment even though it predated superseding felony indictment). In cases in which a habitual felon indictment was quashed for technical reasons (and therefore probably could have been amended), the courts have continued the proceedings without entering judgment and have allowed the State to obtain a superseding habitual felon indictment even after the defendant was convicted of the principal felony. *See* paragraph no. 4., below.

Second, the N.C. courts have held that the State may not obtain the initial habitual felon indictment, or obtain a superseding habitual felon indictment that makes substantive changes, once the defendant has entered a plea (guilty or not guilty) to the principal felony. The defendant has entered the plea in reliance on the charges then pending, on the likelihood of the State succeeding on those charges, and on the maximum punishment those charges permit. *See State v. Little*, 126 N.C. App. 262 (1997) (finding that initial habitual felon pleading was valid because it was returned before plea in principal felony case but that superseding habitual felon indictment, which was obtained after conviction of principal felony and alleged different prior convictions, was invalid); *see also* paragraph no. 4., below, regarding amendments. In *State v. Cogdell*, 165 N.C. App. 368 (2004), the N.C. Court of Appeals limited the impact of *Little* by holding that *Little* refers to the entry of plea before trial, not to the entry of plea at arraignment. "[T]he critical event that forecloses substantive changes in an habitual felon indictment is the plea entered before the actual trial." *Id.* at 373.

Third, the defendant may not be tried on a habitual felon indictment less than twenty days after the return of the indictment. The defendant may waive this requirement by failing to object at trial. *See* G.S. 14-7.3; *State v. Winstead*, 78 N.C. App. 180 (1985) (defendant did not object at trial and waived the 20-day period, but court considered defendant's appeal due to statutory ambiguity; the 20-day period runs from the time the grand jury returns an indictment on the habitual felon charge).

3. *State must properly plead habitual felon charge.* A habitual felon indictment must state: (i) the dates the prior felonies were committed; (ii) the name of the state or sovereign against whom the prior felonies were committed; (iii) the dates of the prior convictions; and (iv) the court where the convictions were obtained. *See* G.S. 14-7.3; *State v. McIlwaine*, 169 N.C. App. 397 (2005) (habitual felon indictment was sufficient even though it did not allege controlled substance involved in defendant's prior drug felony conviction); *State v. Briggs*, 137 N.C. App. 125 (2000) (habitual felon indictment contained adequate description of prior crimes without alleging elements of prior offenses). Some errors may be considered technical and either subject to amendment or not of consequence. *See* paragraph no. 4., below.

   The habitual felon indictment does not need to identify or contain a description of the principal felony to which the habitual felon indictment is ancillary. *See State v. Cheek*, 339 N.C. 725 (1995); *State v. Smith*, 160 N.C. App. 107 (2003). If the habitual felon indictment incorrectly refers to the principal felony, it may be treated as surplusage. *See State v. Bowens*, 140 N.C. App. 217 (2000) (habitual felon indictment referenced one of the three principal felonies charged, felonious possession of marijuana, which was dismissed; court treated the reference as surplusage); *cf. State v. Lee*, 150 N.C. App. 701 (2002) (habitual felon indictment alleged five prior convictions rather than required three convictions; none of convictions used to establish habitual felon status could be used to calculate prior record level under structured sentencing).

   Since the habitual felon charge is ancillary to the principal felony charge, it fails if either the habitual felon indictment *or* the indictment for the principal felony is insufficient and not subject to amendment to cure the defect. *See State v. Winstead*, 78 N.C. App. 180 (1985).

4. *State may not make substantive amendments to habitual felon indictment.* A habitual felon indictment may be amended if the amendment does not make a substantive change. Rather than amending the habitual felon indictment, some prosecutors will seek a superseding indictment to correct a defect. For example, in some cases in which the defendant has raised the defect after trial of the principal felony, the State has asked the court to continue the proceedings while it obtained a superseding indictment. As long as the change, whether by amendment or superseding indictment, does not make a substantive change, either procedure is probably permissible. *See, e.g., State v. Coltrane*, 188 N.C. App. 498 (2008) (permissible for State to amend date and county of prior conviction); *State v. Lewis*, 162 N.C. App. 277 (2004) (amendment to correct dates of prior convictions was permissible; change was not

substantial); *State v. Hargett*, 148 N.C. App. 688 (2002) (same); *State v. Mewborn*, 131 N.C. App. 495 (1998) (permitting superseding indictment after trial of principal felony that made technical changes only, to wit, identifying the state where the prior felonies were committed); *State v. Oakes*, 113 N.C. App. 332 (1994) (permitting superseding indictment after trial of principal felony that made technical changes only).

In contrast, the State may not amend a habitual felon indictment that makes a substantive change. Thus, the State may not amend a habitual felon indictment to allege different prior felonies. The State may obtain a superseding habitual felon indictment alleging different prior felonies; however, under *State v. Little*, 126 N.C. App. 262 (1997) and *State v. Cogdell*, 165 N.C. App. 368 (2004), the State may not obtain a superseding indictment alleging different prior felonies after the defendant has entered a plea (*see* paragraph no. 2., above).

8.5 Common Pleading Defects in Superior Court

The following are common pleading problems that may be evident on the face of the indictment or that may become evident during trial. *See also supra* § 8.2F, Common Pleading Defects in District Court. The timing of challenges to these problems is discussed *infra* § 8.5J, Timing of Motions to Challenge Indictment Defects. *See also infra* § 9.4, Challenges to Grand Jury Procedures.

A. Pleading Does Not State Crime within Superior Court's Jurisdiction

If your client is indicted in superior court, make sure that the pleading charges a felony or a misdemeanor that is within the original jurisdiction of the superior court. *See State v. Bell*, 121 N.C. App. 700 (1996) (indictment dismissed because superior court lacked jurisdiction over case; indictment charged misdemeanor and failed to allege facts that would have elevated offense to felony); *see also State v. Wagner*, 356 N.C. 599 (2002) ("felony" possession of drug paraphernalia does not exist, and trial court never had jurisdiction over offense). In addition to subject matter jurisdiction, check for territorial jurisdiction. North Carolina courts have jurisdiction over a crime only if at least one of the essential acts of the crime took place in North Carolina. *See infra* § 10.2, Territorial Jurisdiction.

B. Pleading Does Not State Any Crime

An indictment or information must state a violation of the current criminal code or a current common law crime. When an indictment alleges a violation of a rescinded or superseded law, or where it does not allege proscribed behavior, the pleading is defective and a motion to dismiss must be granted.

In the following cases, convictions have been vacated because the indictment failed to allege a crime.

State v. McGaha, 306 N.C. 699 (1982) (indictment alleging first-degree rape on theory that victim was under 12 years old was invalid where victim was 12 years, 8 months at time of offense)

State v. Hanson, 57 N.C. App. 595 (1982) (court of appeals finds, sua sponte, that indictment alleging attempt to provide controlled substance to inmate was fatally defective as statute does not proscribe such behavior; conviction vacated)

State v. Wallace, 49 N.C. App. 475 (1980) (citation alleged that "named defendant did unlawfully and willfully operate a (motor) vehicle on a (street or highway) . . . [b]y hunting deer with dogs in violation of Senate Bill #391 which prohibits same"; no crime stated, and trial court properly dismissed on motion made at trial)

State v. Holmon, 36 N.C. App. 569 (1978) (indictment alleged common-law kidnapping, which had been superseded by statutory kidnapping; conviction vacated for failure of indictment to state a crime)

C. Pleading Does Not State Required Elements of Crime

Generally. Except for those crimes where a short-form indictment is statutorily permitted, an indictment must allege every essential element of a crime. *See* G.S. 15A-924(a)(5); *State v. Westbrooks*, 345 N.C. 43 (1996); *State v. Hare*, 243 N.C. 262 (1955) (indictment that fails to allege every element of crime strips superior court of jurisdiction over case). This requirement serves two purposes: first, it ensures that the grand jury considered and found probable cause to believe that the defendant committed every element of the charged offense; second, it puts the defendant on notice of the offense and potential punishment.

Pleading defects often arise in cases involving controlled substances under G.S. 90-95(a); in those cases, the pleading must allege, among other things, the identity of the controlled substance and, in sale and delivery cases, the identity of the buyer or recipient. *See e.g.*, *State v. LePage*, 204 N.C. App. 37 (2010) (indictment identifying controlled substance as "benzodiazepines, which is included in Schedule IV of the North Carolina Controlled Substances Act" was fatally defective; benzodiazepines are not listed in Schedule IV); *State v. Turshizi*, 175 N.C. App. 783 (2006) (indictment fatally flawed where it did not include the full name of controlled substance; substance listed as "methylenedioxymethamphetamine" but did not include "3,4" as listed in statute); Smith, *Criminal Indictment*, at 43–48, *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0803.pdf.

Illustrative cases. In the following cases, our appellate courts vacated convictions where the indictment failed to contain an essential element of the crime.

State v. Galloway, ___ N.C. App. ___, 738 S.E.2d 412 (2013) (trial court erred by instructing jury on offense of discharging a firearm into a vehicle that is in operation under G.S. 14-34.1(b) where indictment failed to allege vehicle was in operation)

State v. Justice, ___ N.C. App. ___, 723 S.E.2d 798 (2012) (indictment charging defendant with larceny from a merchant by removal of anti-theft device fatally defective where term "merchandise" in charging language was too general to identify the property allegedly taken; court also notes that indictment alleges only an attempted rather than completed larceny by stating the defendant "did remove a component of an anti-theft or inventory control device . . . in an effort to steal merchandise")

State v. Barnett, ___ N.C. App. ___, 733 S.E.2d 95 (2012) (indictment charging failing to notify sheriff's office of change of address by a registered sex offender under G.S. 14-208.9 was defective where it failed to allege that defendant was a person required to register)

State v. Harris, ___ N.C. App. ___, 724 S.E.2d 633 (2012) (sex offender unlawfully on premises indictment stated that defendant "did unlawfully, willfully, and feloniously on the premises of Winget Park Elementary School, located at . . . Charlotte North Carolina. A place intended primarily for the use, care, or supervision of minors and defendant is a registered sex offender"; court found grammatical errors did not render indictment insufficient and "willfully" alleged requisite "knowing" conduct; indictment defective, however, because it did not allege a conviction of a required, specific offense with the term "registered sex offender"); *accord State v. Herman*, ___ N.C. App. ___, 726 S.E.2d 863 (2012)

State v. Burge, 212 N.C. App. 220 (2011) (warrant charging defendant with a violation of G.S. 67-4.2, failure to confine a dangerous dog, could not support a conviction for a violation of G.S. 67-4.3, attack by a dangerous dog; though the warrant cited G.S. 67-4.2, it would have supported a conviction under G.S. 67-4.3 had it included the element of medical treatment cost, but it failed to do so)

State v. Brunson, 51 N.C. App. 413 (1981) (motion to dismiss at close of evidence for failure to allege required element of financial transaction card fraud; conviction vacated, although State could refile charge)

State v. Epps, 95 N.C. App. 173 (1989) (conviction for conspiracy to traffic in cocaine vacated for failure to allege amount of cocaine, an essential element of crime)

State v. Coppedge, 244 N.C. 590 (1956) (indictment for refusing to pay child support invalid where indictment left out term "willfully," and willful refusal to support was element of crime)

Where the indictment alleges an element of the crime but the State's proof does not conform to the allegation, fatal variance may result. *See infra* § 8.5I, Variance Between Pleading and Proof.

D. Failure to Identify Defendant

Every indictment must correctly name the defendant or contain a description of the

defendant sufficient to identify him or her. *See* G.S. 15A-924(a)(1); *State v. Simpson*, 302 N.C. 613 (1981) (name of defendant, or sufficient description if his or her name is unknown, must be alleged in body of indictment); *State v. Powell*, 10 N.C. App. 443 (1971) (warrant fatally defective that gave defendant's last name as Smith when it actually was Powell). Misspelling of the defendant's name, or use of a nickname, does not necessarily invalidate an indictment. *See State v. Higgs*, 270 N.C. 111 (1967) (per curiam) (indictment valid where "Burford Murril Higgs" was spelled "Beauford Merrill Higgs"; court found that names were enough alike to come within doctrine of idem sonans, which means sounding the same); *State v. Spooner*, 28 N.C. App. 203 (1975) ("Mike" instead of "Michael" Spooner adequate).

A pleading may identify the defendant by an alias if it is done in good faith. *See State v. Young*, 54 N.C. App. 366 (1981) (nickname alleged was sufficiently similar to actual name; also, defendant waived objection to misnomer by failing to object before entering plea and going to trial), *aff'd*, 305 N.C. 391 (1982); *see also State v. Sisk*, 123 N.C. App. 361 (1996) (no error where defendant's name misstated in one part of indictment but correctly stated in another part), *aff'd in part*, 345 N.C. 749 (1997); *State v. Johnson*, 77 N.C. App. 583 (1985) (no error when defendant's name omitted from body of indictment but included in caption referenced in body of indictment).

E. Lack of Identification, or Misidentification, of Victim

An indictment or information must correctly name the victim against whom the defendant allegedly committed the crime. The omission of the victim's name, or incorrect identification of the victim, is fatal. If the State's proof of the identity of the victim varies from the allegation in the pleading, the variance constitutes grounds to dismiss the charge. A misspelling or incorrect order in the victim's name, if it does not mislead the defendant as to the identity of the victim, will not provide grounds for dismissal.

For a discussion of these principles and applicable cases, see *supra* "Misidentification of victim" in § 8.2F, Common Pleading Defects in District Court.

F. Two Crimes in One Count (Duplicity)

Each count in an indictment may charge only one offense. Where a count charges more than one offense, the defendant may require the State to elect which offense it will pursue at trial; a count may be dismissed if the State fails to make a selection. *See* G.S. 15A-924(b); *see also supra* "Duplicity" in § 8.2F, Common Pleading Defects in District Court.

G. Disjunctive Pleadings

Where a single statute creates more than one offense set forth in the disjunctive, or where a statute states alternative ways of committing an offense, questions may arise regarding both pleadings and jury instructions.

Single statute creates one offense. If a single statute states alternative means of

committing an offense, an indictment should link the alternatives conjunctively by the word "and." *See State v. Swaney*, 277 N.C. 602 (1971) (indictment for robbery with a dangerous weapon properly charged "endangered *and* threatened"; State could prove at trial that defendant either endangered or threatened victim), *overruled on other grounds, State v. Hurst*, 320 N.C. 589 (1987); *State v. Armstead*, 149 N.C. App. 652 (2002) (indictment properly charged that defendant did "obtain *and* attempt to obtain" property by false pretense; State was not required to prove defendant actually obtained the property in addition to attempting to do so); *see also State v. Pigott*, 331 N.C. 199 (1992) (kidnapping indictment proper that listed two different purposes for kidnapping as conjunctive alternatives). The rationale for conjunctive wording is that a disjunctive allegation may "leave it uncertain what is relied on as the accusation" against the defendant. *Swaney*, 277 N.C. at 612. However, use of the disjunctive does not render an indictment defective if the indictment charges only one offense and the allegations represent alternative means of committing that offense. *See State v. Creason*, 313 N.C. 122 (1985) (where defendant is charged with the single offense of possession of LSD with intent to sell or deliver, State must prove only the intent to transfer to another, regardless of the method used).

The State is not bound to prove all of the alternatives it alleges, even though the indictment alleges them in the conjunctive. *See State v. Birdsong*, 325 N.C. 418 (1989) (where indictment sets forth conjunctively two means by which crime charged may have been committed, no fatal variance between indictment and proof when State offers evidence supporting only one of the means charged).

Also, although the indictment alleges the alternatives in the conjunctive, the court may instruct the jury of the alleged alternatives in the disjunctive. The reason given by the courts is that the jury does not need to be unanimous on the method of committing a single crime. *See, e.g., State v. Garnett*, 209 N.C. App. 537 (2011) (not error for trial court to instruct jury that State must prove defendant maintained a dwelling house for "keeping *or* selling marijuana" where indictment charged defendant with maintaining a dwelling house for "keeping *and* selling a controlled substance"); *State v. Petty*, 132 N.C. App. 453 (1999) (in first-degree sex offense case, disjunctive instructions on whether sex act was cunnilingus or penetration not error because offense could be committed in either of two ways). Reversal on appeal may still be required, however, if the judge instructs the jury on alternative ways of committing the offense, there is insufficient evidence to support one of those theories, and the record does not indicate on which theory the jury relied. *See, e.g., State v. Pakulski*, 319 N.C. 562 (1987) (error to instruct jury on felony murder based on felonious breaking or entering and armed robbery where breaking was without a deadly weapon, so that felony would not be a predicate to a felony murder charge; new trial ordered because uncertain whether jury relied on improper theory to support murder verdict); *State v. Moore*, 315 N.C. 738 (1986) (insufficient evidence to support one of three purposes submitted to jury in support of first-degree kidnapping).

If the State alleges only one of the alternative ways of committing an offense, the State may be bound by the theory it has alleged and precluded from obtaining a conviction based on alternative theories. *See, e.g., State v. Yarborough***,** 198 N.C. App. 22 (2009)

(while State is not required to allege the felony that was the purpose of a kidnapping, if it does so, the State must prove the particular felony or fatal variance may result); *see also infra* § 8.5I, Variance between Pleading and Proof (discussing variance issues).

Single statute creates more than one crime. If a single statute creates more than one crime—that is, the statute creates separate offenses for which a defendant could be separately punished—only one of those crimes should be charged in each count. *See State v. Thompson*, 257 N.C. 452, 456 (1962) (stating that pleading "should contain a separate count, complete within itself, as to each criminal offense" but holding that defendant waived right to attack warrant by proceeding to trial without moving to quash); *State v. Albarty*, 238 N.C. 130 (1953) (jury verdict, which was based on misdemeanor pleading charging that defendant sold, bartered, or caused to be sold a lottery ticket, was invalid; each act of selling, bartering, or causing to be sold was separate offense, and verdict was not sufficiently definite to identify crime of which defendant was convicted). Older cases indicate that if the State alleges more than one offense (conjunctively or disjunctively) in a single count, the count is defective and subject to dismissal. However, under G.S. 15A-924(e), the defendant's remedy appears to be a motion to require the State to elect one of the offenses. *See supra* § 8.5F, Two Crimes in One Count (Duplicity).

If the court gives disjunctive jury instructions and the alternatives are separate offenses, not alternative ways of committing a single offense, the instructions violate the defendant's state constitutional right to a unanimous verdict. *See, e.g.*, *State v. Lyons*, 330 N.C. 298 (1991) (disjunctive instructions are fatally ambiguous if the alternatives constitute separate offenses for which the defendant could be separately punished; instruction that permitted jury to find that defendant assaulted Douglas Jones and/or Preston Jones violated jury unanimity requirement); *State v. Diaz*, 317 N.C. 545 (1986) (jury instructions that charged that defendant "knowingly possessed or transported" marijuana invalid because each act of possessing and transporting constituted separate crime for which defendant could be separately punished).

Which is it? Where a statute contains disjunctive clauses, it is not always easy to discern whether the legislature intended to make each disjunctive alternative a separate offense, or intended for the disjunctive clauses to create alternative means of committing one offense. The N.C. Supreme Court has stated that where the disjunctive alternatives go to the "gravamen" of the offense then separate offenses were intended, and otherwise not. *See State v. Creason*, 313 N.C. 122 (1985) (possession with intent to sell or deliver creates one offense with separate means of committing it; possession with intent to transfer is gravamen of offense); *State v. Hartness*, 326 N.C. 561 (1990) (indecent liberties with child by touching child or compelling child to touch defendant creates alternative means of committing same offense; gravamen of offense is taking indecent liberties); *see also Schad v. Arizona*, 501 U.S. 624 (1991) (Due Process requires jury unanimity regarding specific crime; court does not decide extent to which states may define acts as alternative means of committing single crime).

This rule can be hard to apply. In situations where the law is unclear, be careful what you ask for. An objection to a pleading on the ground that it is disjunctive may result in the

State re-indicting the defendant separately for each alternative, and punishing the defendant separately for each.

For more cases on this issue, see Robert L. Farb, *The "Or" Issue in Criminal Pleadings, Jury Instructions, and Verdicts; Unanimity in Jury Verdict*, (UNC School of Government, Feb. 2010), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/verdict.pdf .

H. One Crime in Multiple Counts (Multiplicity)

The Double Jeopardy Clause of the Fifth Amendment regulates multiple punishments for the same offense in the same proceeding. (Double Jeopardy imposes stricter requirements on prosecution of the same offense in successive proceedings. *See infra* § 8.6A, Double Jeopardy.) The State may indict and try a defendant for crimes that are the "same" for Double Jeopardy purposes, but the defendant may only be punished for one of the offenses unless the legislature has made it clear that it intended for there to be multiple punishments. *See Missouri v. Hunter*, 459 U.S. 359 (1983); *State v. Gardner*, 315 N.C. 444 (1986). For example, if two counts of an indictment separately charge your client with larceny and robbery of the same property, the State may proceed to trial on both charges. However, if the defendant is convicted of both, judgment on one of the two must be arrested to avoid multiple punishment. *See State v. Jaynes*, 342 N.C. 249 (1995) (where defendant was separately indicted for and convicted of robbery and larceny of vehicle from same victim in same taking, larceny was lesser included offense of robbery and judgment for larceny had to be arrested).

Even if offenses are not considered the "same" for double jeopardy purposes, multiple punishments may still be barred in light of legislative intent. *See State v. Ezell*, 159 N.C. App. 103 (2003) (legislature did not intend to allow multiple punishments for assault inflicting serious bodily injury and assault with deadly weapon with intent to kill inflicting serious injury in connection with same conduct); *see also State v. Davis*, 364 N.C. 297 (2010) (applying *Ezell*'s analysis to hold that defendant could not be sentenced for second-degree murder and felony death by vehicle; similarly, defendant could not be sentenced for assault with deadly weapon inflicting serious injury and felony serious injury by vehicle). In both *Ezell* and *Davis*, the court relied on the General Assembly's inclusion in the statute that it applied "unless the conduct is covered under some other provision of law providing greater punishment." In light of this language, the court concluded that the General Assembly did not intend to impose multiple punishments.

I. Variance Between Pleading and Proof

General rule. A defendant may be convicted only of the offense alleged in the indictment. *See State v. Faircloth*, 297 N.C. 100 (1979); *State v. Cooper*, 275 N.C. 283 (1969); *State v. Jackson*, 218 N.C. 373 (1940). Not only must the *proof* conform to the indictment, the *instructions* to the jury must also be tailored to the offense alleged in the pleadings. It has been held to be plain error to instruct the jury on an offense not charged in the indictment. *See, e.g., State v. Williams*, 318 N.C. 624 (1986) (where indictment alleged forcible rape and state's proof was of statutory rape because victim was under

twelve years old, indictment would not support conviction); *State v. Rahaman*, 202 N.C. App. 36 (2010) (proper to arrest judgment where jury was instructed on the crime of felony possession of a stolen motor vehicle, but defendant was never indicted on that crime; however, retrial of that charge not barred because dismissal was not based on insufficient evidence and therefore did not amount to acquittal); *State v. Langley*, 173 N.C. App. 194 (2005) (finding fatal variance in possession of firearm by felon case where State alleged in indictment that defendant possessed handgun but evidence at trial showed defendant possessed sawed-off shotgun; "handgun" was a material and essential element of offense); *cf. State v. Rogers*, ___ N.C. App. ___, 742 S.E.2d 622 (2013) (error, but not plain error where first-degree burglary indictment alleged that defendant entered dwelling with intent to commit larceny, but trial court instructed jury it could find defendant guilty if at the time of the breaking and entering he intended to commit robbery with a dangerous weapon; defendant was not prejudiced because instruction benefited defendant by requiring State to prove an additional element).

If the indictment alleges a particular theory of a crime, the State is bound to prove that theory. *See, e.g.*, *State v. Clark*, 208 N.C. App. 388 (2010) (in felonious breaking and entering a motor vehicle, where State alleged the intent to commit a specific felony, the State must prove that allegation); *State v. Loudner*, 77 N.C. App. 453 (1985) (State need not allege particular sex act in indictment for sex offense, but when it does it is bound by those allegations). An exception to this rule exists where the allegations in the pleading are considered "surplusage" or not essential to the crime. *See State v. Pickens*, 346 N.C. 628 (1997) (allegation in indictment for firing into occupied dwelling that shooting was done with shotgun was surplusage; no error where State proved that weapon used was handgun); *State v. Westbrooks*, 345 N.C. 43 (1996) (allegations in indictment for murder that defendant was actor in concert was surplusage; State free to prove that defendant was accessory before fact); *State v. Lark*, 198 N.C. App. 82 (2009) (language in indictment identifying a particular sex act to support felonious child abuse charge was surplusage; trial court instructed jury on the theory alleged in the indictment and on second theory supported by the proof). If you are not sure whether factually specific allegations in an indictment are binding, or will be considered mere surplusage, ask for a bill of particulars. Bills of particular are binding on the State. *See* G.S. 15A-925(e).

Motion to dismiss. A challenge to a variance between pleading and proof should be raised by a motion to dismiss for insufficient evidence *and* for fatal variance at the close of the State's evidence and at the close of all of the evidence. *See State v. Bell*, 270 N.C. 25 (1967) (variance properly raised by motion for nonsuit); *State v. Pulliam*, 78 N.C. App. 129 (1985) (variance properly raised by motion to dismiss for insufficient evidence). Recent cases have required that defendants specifically assert fatal variance to preserve the issue for appeal. *State v. Mason*, ___ N.C. App. ___, 730 S.E.2d 795 (2012) (by failing to assert fatal variance as a basis for his motion to dismiss, defendant did not preserve the argument for appellate review); *accord Hester*, 736 S.E.2d 571 (2012). Counsel may use the following "magic words" to ensure preservation.

> "Your Honor, the defense moves to dismiss each charge on the ground that the evidence is insufficient as a matter of law on every element of

> each charge to support submission of the charge to the jury and that submission to the jury would therefore violate the Fourteenth Amendment.
>
> Further, the defense moves to dismiss each charge on the ground that, as to each charge, there is a variance between the crime alleged in the indictment and any crime for which the State's evidence may have been sufficient to warrant submission to the jury and that submission to the jury would therefore violate the Fifth, Sixth, and Fourteenth Amendments.
>
> [Lay out specific insufficiency arguments and specific variance arguments, if any.]
>
> [If you made specific insufficiency or variance arguments, then repeat motion to dismiss: "Therefore, Your Honor, the defense moves to dismiss each charge on the ground that . . . .]"

Reindictment following dismissal for variance. When charges are dismissed because of variance between the pleading and proof, the defendant is acquitted of the charged offense. The State has failed to offer sufficient evidence to support the charged offense and suffers a nonsuit. Generally, the State is free to reindict on the theory that was proven at trial but not charged. *See State v. Wall*, 96 N.C. App. 45 (1989); *State v. Loudner*, 77 N.C. App. 453 (1985); *State v. Ingram*, 20 N.C. App. 464 (1974).

Reindictment may be barred in some instances, however. *See supra* § 8.2E, Timing and Effect of Motions to Dismiss in District Court (discussing effect of dismissal on subsequent charges) and *infra* § 8.6, Limits on Successive Prosecution.

Cases finding fatal variance. In the following cases, a motion to dismiss at the end of the evidence was granted on the grounds of variance between the pleading and proof.

State v. Christopher, 307 N.C. 645 (1983) (fatal variance where defendant prepared alibi defense based on indictment alleging offense occurred on a specific date, but State offered evidence showing crime might have occurred over a three-month period)

State v. Faircloth, 297 N.C. 100 (1979) (indictment charged kidnapping to facilitate flight following commission of felony of rape, while proof was that victim was kidnapped to facilitate commission of felony of rape)

State v. Best, 292 N.C. 294 (1977) (doctor who prescribed drugs wrongly charged with sale or delivery of drugs)

State v. Bell, 270 N.C. 25 (1967) (indictment charged robbery of Jean Rogers while evidence showed robbery of Susan Rogers)

State v. Sergakis, ___ N.C. App. ___, 735 S.E.2d 224 (2012) (trial court committed plain error by instructing jury it could find defendant guilty of conspiracy if defendant conspired to commit felony breaking and entering or felony larceny where indictment alleged only a conspiracy to commit felony breaking or entering); *see also State v. Pringle*, 204 N.C. App. 562, 566–67 (2010) ("where an indictment charging a defendant with conspiracy names specific individuals with whom the defendant is alleged to have conspired and the evidence at trial shows the defendant may have conspired with persons other than those named in the indictment, it is error for the trial court to instruct the jury that it may find the defendant guilty of conspiracy based upon an agreement with persons not named in the indictment"; no error in this case where indictment alleged that defendant conspired to commit robbery with a dangerous weapon with "Jimon Dollard and another unidentified male," evidence at trial did not vary from allegation in indictment, and trial court instructed jury that it could find defendant guilty if the jury found the defendant conspired with "at least one other person," which court found was in accord with material allegations in indictment and evidence at trial)

State v. Khouri, ___ N.C. App. ___, 716 S.E.2d 1 (2011) (fatal variance existed where indictment stated sexual offense occurred sometime between March 30, 2000 and December 31, 2000, but testimony showed the offense occurred in spring 2001)

State v. Langley, 173 N.C. App. 194 (2005) (finding fatal variance in possession of firearm by felon case where State alleged in indictment that defendant possessed handgun but evidence at trial showed defendant possessed sawed-off shotgun; "handgun" was a material and essential element of offense)

State v. Skinner, 162 N.C. App. 434 (2004) (fatal variance existed between the indictment and the evidence at trial where indictment alleged defendant assaulted victim with his hands, a deadly weapon; and evidence at trial indicated that the deadly weapon used was a hammer or pipe)

State v. Custis, 162 N.C. App. 715 (2004) (fatal variance existed between dates alleged in sex offense and indecent liberties indictment and evidence introduced at trial; the indictment alleged that the defendant committed the offenses on or about June 15, 2001; at trial there was no evidence of sexual acts or indecent liberties occurring on or about that date; evidence at trial suggested sexual encounters over a period of years some time before the date listed in the indictment; and defendant relied on the date alleged in the indictment to prepare alibi defense for the weekend of June 15)

State v. Bruce, 90 N.C. App. 547 (1988) (different sex act with child than that alleged in indictment)

State v. McClain, 86 N.C. App. 219 (1987) (indictment alleged kidnapping to facilitate rape and terrorize victim; court instructed jury it could convict if defendant kidnapped to inflict serious injury)

State v. Washington, 54 N.C. App. 683 (1981) (indictment charged prison escape under

G.S. 148-45(b) while evidence showed failure to return from work release program in violation of G.S. 148-45(g)(1))

State v. Trollinger, 11 N.C. App. 400 (1971) (defendant charged with armed robbery but evidence was that he obtained items from trash can)

Cases where fatal variance not shown. In the following cases, convictions were upheld.

State v. Thompson, 359 N.C. 77 (2004) (no fatal variance where indictment for armed robbery designated a property owner different from the property owner shown at trial; gravamen of offense is endangering or threatening human life by firearms or other dangerous weapons in perpetration of robbery)

State v. Pickens, 346 N.C. 628 (1997) (no fatal variance where indictment alleged firing into occupied dwelling with shotgun and evidence showed firing into occupied dwelling with handgun; "gist of offense" was firing into dwelling with firearm)

State v. Westbrooks, 345 N.C. 43 (1996) (no fatal variance where indictment alleged defendant acted in concert with another to commit murder, and proof showed that defendant was accessory before fact to murder; theory of murder was "surplusage," and State was not bound by it)

State v. Seelig, ___ N.C. App. ___, 738 S.E.2d 427 (2013) (no fatal variance between indictment alleging that defendant obtained value from victim and evidence showed that he obtained value from victim's husband; indictment for obtaining property by false pretenses need not allege ownership of the thing of value obtained; thus allegation was surplusage)

State v. Mason, ___ N.C. App. ___, 730 S.E.2d 795 (2012) (no fatal variance where name of victim was "You Xing Lin" in indictment but Lin You Xing testified at trial; court finds defendant not surprised or disadvantaged by different order of name)

State v. Roman, 203 N.C. App. 730 (2010) (no fatal variance where warrant alleged defendant assaulted officer while he was discharging official duty of arresting defendant for communicating threats, and testimony at trial showed assault occurred when officer arrested defendant for being intoxicated and disruptive in public; reason for arrest was immaterial)

State v. Johnson, 202 N.C. App. 765 (2010) (no fatal variance where indictment alleged "Detective Dunabro" as purchaser of cocaine and evidence at trial identified purchaser as "Agent Amy Gaulden," where they were the same person; she was commonly known by both her maiden and married name)

State v. Williams, 201 N.C. App. 161 (2009) (even if there was variance between the allegation concerning the method of strangulation and the evidence at trial, variance was immaterial; method of strangulation alleged in indictment was surplusage)

Other cases. For additional cases addressing fatal variance, see Smith, *Criminal Indictment*, *available at* www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0803.pdf.

J. Timing of Motions to Challenge Indictment Defects

There are two somewhat inconsistent rules governing the timing of challenges to indictments. G.S. 15A-952 states that challenges to indictments must be made before arraignment or they are waived. On the other hand, if the defect in the indictment is jurisdictional, then the error is unwaivable and may be raised at any time. *See State v. Wallace*, 351 N.C. 481, 503 (2000) ("where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time"); G.S. 15A-952(d) (motion concerning jurisdiction of court or failure of pleading to charge offense may be made at any time).

It is not always easy to determine whether a defect in a pleading is jurisdictional. The first three subsections of this § 8.5, Common Pleading Defects in Superior Court—covering failure to allege a crime within the jurisdiction of the superior court, failure to allege a crime at all, and failure to set forth all essential elements of the crime—describe jurisdictional errors. *See Wallace*, 351 N.C at 503–504 (allegation that indictment failed to include all elements of crime was jurisdictional in nature). Failing to identify the victim, or misidentifying the victim, likely is also fatal. However, if a mistake concerning the identity of the victim appears technical, and did not mislead the defendant, the error may be waivable.

Misnomers regarding the defendant's name usually must be objected to before entry of plea. *See State v. Young*, 54 N.C. App. 366 (1981), *aff'd*, 305 N.C. 391 (1982). Other errors, such as an incorrect date or place, that do not change the nature of the offense charged, are not jurisdictional defects. *See, e.g.*, *State v. Price*, 310 N.C. 596 (1984) (permissible to amend indictment to change date of offense from date victim died to date victim was shot). Duplicity and multiplicity in the pleadings are not jurisdictional defects (although jury instructions that are disjunctive may invalidate a conviction for lack of a unanimous jury verdict, and multiple punishments for overlapping offenses may be barred).

If you are dealing with an indictment that contains a jurisdictional defect, it may be advantageous to wait until during trial (after jeopardy has attached, that is, when the jury is empanelled and sworn) or even after conviction to object to the indictment. There are several potential advantages to such a strategy. First, in certain situations, going to trial may create a double jeopardy bar to a successor prosecution. Second, if there is a mistake in the indictment and the State's proof does not conform to the allegations in the indictment, you may have a good variance claim at the end of trial. Third, if you try the case without raising any objection and the defendant is acquitted, the State is likely barred from retrying the defendant. *See Ball v. United States*, 163 U.S. 662 (1896) (acquittal upon indictment that defendant did not object to as insufficient barred second indictment for same offense).

Sometimes the remedy for a faulty indictment is not dismissal. If the indictment states the essential elements of a crime (for instance, indecent liberties with a child), but fails to allege sufficient details to prepare a defense, you should request a bill of particulars. *See* G.S. 15A-925. If the pleading is duplicitous you should request that the State elect an offense prior to trial. If the State declines to elect, you then have grounds for dismissal. *See* G.S. 15A-924(b). The cure for pleadings where the "same" offense is charged twice or the General Assembly did not intend to impose multiple punishments (multiplicity) is to move to arrest judgment on one offense after conviction.

G.S. 15A-924(f) also provides that the defendant may move to strike allegations that are inflammatory or prejudicial surplusage.

8.6 Limits on Successive Prosecution

This section discusses challenges involving pleadings that may be made when the State seeks to re-prosecute a defendant for criminal conduct that already has been the subject of previous proceedings, either in district or superior court. In such cases, check both sets of pleadings to determine whether there is a double jeopardy, statutory joinder, or due process bar to the successive prosecution (discussed below).

A. Double Jeopardy

Protections. The Double Jeopardy Clause of the Fifth Amendment protects against:

- a second prosecution for the same offense after acquittal;
- a second prosecution for the same offense after conviction (by trial or plea); and
- multiple punishments in a single prosecution for the same offense (*see supra* § 8.5H, One Crime in Multiple Counts (Multiplicity)).

See North Carolina v. Pearce, 395 U.S. 711 (1969); *State v. Brunson*, 327 N.C. 244 (1990) (article 1, section 19 of the N.C. Constitution affords defendants same protections). This section discusses Double Jeopardy restrictions on successive prosecutions. For further discussion of double jeopardy, see *infra* § 13.4B, Motion to Dismiss on Double Jeopardy Grounds.

General test. The test used to determine whether offenses are the "same" for double jeopardy purposes is the same-elements test of *Blockburger v. United States*, 284 U.S. 299 (1932). Under that test, the question is whether each offense requires proof of an element not contained in the other; if not, they are the same offense and double jeopardy bars a successive prosecution.

Lesser offenses. Under the same-elements test of double jeopardy, a lesser offense is considered the "same" as the greater offense. *See Brown v. Ohio*, 432 U.S. 161 (1977). For example, conviction or acquittal of misdemeanor assault with a deadly weapon ordinarily would bar a later prosecution of felony assault with a deadly weapon with

intent to kill based on the same act. The double jeopardy bar does not apply simply because the offenses involve the same act; the offenses must meet the same-elements test (although other doctrines, discussed below, may bar successive prosecutions based on the same incident). Thus, conviction of misdemeanor assault with a deadly weapon would not bar, on double jeopardy grounds, a felony prosecution for shooting into occupied property based on the same act.

Proceedings covered. Double jeopardy protections apply to all prosecutions of a criminal nature. Thus, a finding of responsibility or nonresponsibility for an infraction, although considered a noncriminal violation of law, could bar a later criminal prosecution for the "same" offense. *See State v. Hamrick*, 110 N.C. App. 60 (1993) (stating this general rule, but finding no bar to prosecution of death by vehicle charge where charges for misdemeanor death by vehicle and for driving left of center infraction were filed simultaneously and defendant voluntarily appeared before magistrate and entered plea of responsible for infraction); *State v. Griffin*, 51 N.C. App. 564 (1981) (successive prosecution barred where defendant pled guilty to failing to yield right of way on April 10 and defendant was charged on April 17 with death by vehicle based on same conduct). For a further discussion of *Hamrick* and *Griffin*, see *infra* "Limitations" in this subsection A.

Likewise, acquittal or conviction of criminal contempt will sometimes bar a later criminal prosecution. *See United States v. Dixon*, 509 U.S. 688 (1993) (finding that double jeopardy protections barred later prosecution for assault after defendant had been convicted of criminal contempt for violating domestic violence protective order forbidding same conduct); *State v. Dye*, 139 N.C. App. 148 (2000) (distinguishing *Gilley*, below, court holds that double jeopardy barred later prosecution for domestic criminal trespass after defendant had been adjudicated in criminal contempt for violating domestic violence protective order forbidding similar conduct); *State v. Gilley*, 135 N.C. App. 519 (1999) (criminal contempt proceeding for violation of domestic violence protective order barred later prosecution for assault on female but not prosecution for domestic criminal trespass, misdemeanor breaking and entering, and kidnapping).

Attachment of jeopardy. In district court, jeopardy attaches once the court begins to hear evidence. *See State v. Brunson*, 327 N.C. 244 (1990). In superior court, jeopardy attaches when the jury is empaneled and sworn. *See State v. Bell*, 205 N.C. 225 (1933). For guilty pleas in either level of court, jeopardy generally attaches when the court accepts the plea. *See State v. Wallace*, 345 N.C. 462 (1997) (jeopardy did not attach where judge rejected guilty plea); *State v. Ross*, 173 N.C. App. 569 (2005) (jeopardy did not attach where record insufficient to show whether guilty plea tendered or accepted), *aff'd per curiam*, 360 N.C. 355 (2006); *see also* 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 25.1(d), at 589–99 (3d ed. 2007).

Waiver and guilty pleas. If the defendant pleads guilty in superior court, he or she ordinarily will be unable to raise a double jeopardy claim on appeal. *See State v. Hopkins*, 279 N.C. 473 (1971); *see also State v. McKenzie*, 292 N.C. 170 (1977) (defendant waived

double jeopardy claim by failing to raise claim at trial level). *But see United States v. Broce*, 488 U.S. 563 (1989) (plea of guilty does not waive claim that charge, judged on its face, is one that State may not constitutionally prosecute); *Thomas v. Kerby*, 44 F.3d 884 (10th Cir. 1995) (recognizing exception created by *Broce*).

A guilty plea in district court probably does not constitute a waiver of the defendant's right to argue double jeopardy on appeal for a trial de novo in superior court, but no cases have specifically addressed the issue. *See generally State v. Sparrow*, 276 N.C. 499 (1970) (defendant convicted in district court entitled to appeal to superior court for trial de novo as matter of right, even if defendant entered guilty plea in district court); G.S. 15A-953 (except for motion to dismiss for improper venue, "no motion in superior court is prejudiced by any ruling upon, or a failure to make timely motion on, the subject in district court").

Limitations. The bar on re-prosecution of offenses that are considered the "same" for double jeopardy purposes is not absolute. There are some limitations.

First, if subsequent events provide the basis for new charges (for example, the victim dies after prosecution for assault), the defendant may be charged with those offenses notwithstanding a prior trial or plea to a lesser offense. *See State v. Meadows*, 272 N.C. 327 (1968). *But see State v. Griffin*, 51 N.C. App. 564 (1981) (entry of guilty plea to traffic violation barred later prosecution for death by vehicle even though victim died after plea).

Second, the double jeopardy bar does not necessarily apply if the defendant acts to sever the charges and then pleads guilty to one of them.

- In *Ohio v. Johnson*, 467 U.S. 493 (1984), the defendant pled guilty to one count of a multi-count indictment. The plea did not bar continued prosecution of the other counts. *See also State v. Hamrick*, 110 N.C. App. 60 (1993) (applying *Ohio v. Johnson* and finding no bar to prosecution of death by vehicle charge where charges for misdemeanor death by vehicle and driving left of center infraction were filed simultaneously and defendant voluntarily appeared before magistrate and entered plea of responsible to infraction).
- If the defendant successfully moves to sever offenses or opposes joinder, and then pleads guilty to one of the offenses, double jeopardy would not bar prosecution of the remaining offenses. *See Jeffers v. United States*, 432 U.S. 137 (1977) (defendant was solely responsible for severing offenses and so could not raise double jeopardy as bar).

In contrast, if the State schedules two offenses for different court dates, and the defendant is not responsible for severing the offenses, a defendant's guilty plea to the first-scheduled offense should bar a later prosecution for the same offense. *See* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 17.4(b), at 91–92 (3d ed. 2007).

B. Collateral Estoppel

Double jeopardy includes a collateral estoppel component. A defendant who is *acquitted* in a first trial may be able to rely on the constitutional doctrine of collateral estoppel to bar a second trial on a factually related crime. Collateral estoppel bars the State from relitigating an issue of fact that has previously been determined against it. For example, in *Ashe v. Swenson*, 397 U.S. 436 (1970), the defendant was acquitted of the robbery of "A" in a case in which the only issue of fact was the defendant's presence at the scene. The Court held that the State was collaterally estopped from a subsequent prosecution of the defendant for the robbery of "B" because the issue of his presence had already been decided adversely against the State. *See also State v. McKenzie*, 292 N.C. 170 (1977) (acquittal of DWI precludes State from relitigating issue at defendant's subsequent involuntary manslaughter trial); *State v. Parsons*, 92 N.C. App. 175 (1988) (trial court dismisses indictment for manslaughter of fetus on basis that unborn child is not "person" within meaning of statute and thus indictment did not state crime; State barred by collateral estoppel from bringing second indictment changing term "fetus" to "unborn child" because issue had already been litigated); G.S. 15A-954(a)(7) (codifying constitutional requirement, statute provides that court must dismiss charge if "issue of fact or law essential to a successful prosecution has been previously adjudicated in favor of the defendant in a prior action between the parties").

The term "acquittal" includes a not guilty verdict or dismissal for insufficient evidence. For double jeopardy purposes, an acquittal also includes an implied acquittal of a greater offense. For example, if the defendant is charged with assault with a deadly weapon with intent to kill and is convicted of assault with a deadly weapon, the defendant is deemed to be acquitted of the greater offense. *See Green v. United States*, 355 U.S. 184 (1957); *State v. McKenzie*, 292 N.C. 170 (1977); *State v. Broome*, 269 N.C. 661 (1967).

The application of collateral estoppel is contingent on the previous resolution of the *same* issue. The test is whether a second conviction would *require* the jury to find against the defendant on an issue already decided in his or her favor. *See Dowling v. United States*, 493 U.S. 342 (1990) (acquittal of robbery of victim in her home no bar to showing that defendant was among the group in the house, as the acquittal need not have been based on issue of defendant's presence); *State v. Edwards*, 310 N.C. 142 (1984) (acquittal of larceny charge no bar to prosecution for breaking or entering with intent to commit larceny).

C. Failure to Join

G.S. 15A-926(c) provides that a defendant who has been tried for an offense may move to dismiss a successor charge of any joinable offense, and this motion to dismiss must be granted. *See also* G.S. 15A-926 Official Commentary (statute was intended to bar successive trials of offenses, absent some reason for separate trials); 2 ABA STANDARDS FOR CRIMINAL JUSTICE Standard 13-2.3 & commentary (2d ed. 1980). Our statutory right to dismissal is broader than double jeopardy protections because it bars subsequent prosecutions of related offenses, not merely the same or lesser offenses. For example, if a

defendant is tried for felony breaking and entering, the defendant has a statutory right to dismissal of a later larceny charge that the prosecution could have joined with the earlier offense.

There are a number of limits to this right, however. First, the statute applies only to charges brought after the first trial. It creates no right to dismissal with respect to joinable charges that were pending at the time of the first trial and that the defendant could have moved to join. *See* G.S. 15A-926(c)(2) (no right to dismissal if defendant fails to move to join charges, thus waiving right to joinder, or if defendant makes such a motion and motion is denied). Second, the right to dismissal of a successor charge does not apply if the defendant pled guilty or no contest to the previous charge. *See* G.S. 15A-926(c)(3). If defense counsel has concerns about this possibility, counsel may want to make an explicit part of any plea agreement that the State will not prosecute any other charges related to the transaction or occurrence. Third, the court may deny a motion to dismiss if the court finds that the prosecution did not have sufficient evidence to try the successor charge at the time of trial or the ends of justice would be defeated by granting the motion. *See* G.S. 15A-926(c)(2); *State v. Warren*, 313 N.C. 254 (1985) (no error in denial of motion to dismiss burglary and larceny charges brought after trial of related murder when insufficient evidence of those offenses existed at time of murder trial; delay in charging additional offenses was not for purpose of circumventing statutory joinder requirements).

Case law has further limited the right. In *State. v. Furr*, 292 N.C. 711 (1977), the N.C. Supreme Court held that the right to dismissal applies only where the defendant has been indicted for the joinable offenses at the time of the first trial. This holding effectively eviscerated the statutory right to dismissal because G.S. 15A-926(c)(2), discussed above, provides for no right to dismissal of a pending charge that the defendant failed to move to join or unsuccessfully moved to join. In a later case, *State v. Warren*, 313 N.C. 254 (1985), the N.C. Supreme Court rolled back *Furr*, recognizing that the joinder statute applies to successor charges that were not pending at the time of trial and that would have been joinable had the State filed them. The Court added, however, that a defendant who has been tried for an offense is entitled to dismissal of joinable offenses only if the sole reason that the State withheld indictment on the offenses was to circumvent the statutory joinder requirements. The Court ameliorated the potential strictness of this requirement by stating that the defendant may meet this burden by showing that the State had substantial evidence of the successor charge at the time of the first trial or that the State's evidence at a second trial would be the same as at the first trial. In *Warren*, the Court found that the defendant failed to make such a showing and that there were valid reasons for the State's failure to seek an indictment charging larceny and burglary before the defendant was tried on a related murder charge. *See also State v. Tew*, 149 N.C. App. 456 (2002) (relying on *Warren*, court found that State did not circumvent statutory joinder requirements and trial court did not err in denying defendant's motion to dismiss successor felony assault charge; defendant had originally been convicted of attempted second-degree murder, and N.C. Supreme Court vacated the conviction on the rationale, not established at the time of the charge, that the offense of attempted second-degree murder did not exist).

D. Due Process

If a defendant is convicted of a misdemeanor (for example, misdemeanor assault) in district court and appeals for a trial de novo in superior court, a subsequent indictment of the defendant for a felony assault arising out of the same incident is presumed to be vindictive and therefore in violation of Due Process. This rule bars prosecution of the more serious offense regardless of whether it meets the same-elements test for double jeopardy purposes. *See Blackledge v. Perry*, 417 U.S. 21 (1974) (Due Process bars indictment for more serious offense regardless of whether prosecutor acted in good or bad faith); *see also Thigpen v. Roberts*, 468 U.S. 27 (1984) (following *Blackledge*); *State v. Bissette*, 142 N.C. App. 669 (2001) (*Blackledge* barred filing of felony charge after appeal of misdemeanor conviction for trial de novo; State also was barred from refiling misdemeanor charge because State elected at commencement of trial on felony charge to dismiss misdemeanor charge); *State v. Mayes*, 31 N.C. App. 694 (1976) (recognizing that showing of actual vindictiveness not required).

Can the State rebut this presumption of vindictiveness? The only situation in which the U.S. Supreme Court has found that the presumption may be rebutted is when subsequent events form the basis for new charges (for example, the victim dies after appeal). *See Blackledge*, 417 U.S. at 29 n.7; *Thigpen*, 468 U.S. at 32 n.6. What other circumstances, if any, would be sufficient to rebut the presumption is unclear.

If the defendant appeals from a plea of guilty in district court, offenses that were dismissed as part of any plea agreement, including felonies, may be charged in superior court. *See State v. Fox*, 34 N.C. App. 576 (1977) (State may indict defendant on felony breaking and entering and felony larceny where defendant was initially charged with those offenses but pled guilty to misdemeanor breaking and entering pursuant to a plea agreement in district court and then appealed to superior court for trial de novo). If, however, the defendant is charged with a misdemeanor, pleads guilty in district court without any plea agreement, and then appeals, *Blackledge* bars the State from initiating felony charges based on the same conduct.

The State is not barred on appeal of a misdemeanor for a trial de novo from seeking a greater sentence for that misdemeanor than the district court imposed. *See Colten v. Kentucky*, 407 U.S. 104 (1972); *State v. Burbank*, 59 N.C. App. 543 (1982); *cf.* G.S. 15A-1335 (when conviction or sentence in superior court is set aside on direct review or collateral attack, court may not impose more severe sentence for same offense or for different offense based on same conduct); Jessica Smith, *Limitations on a Judge's Authority to Impose a More Severe Sentence After a Defendant's Successful Appeal or Collateral Attack*, ADMINISTRATION OF JUSTICE BULLETIN No. 2003/03 (UNC School of Government, July 2003), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200303.pdf. [*Legislative note:* Effective for resentencing hearings held on or after December 1, 2013, S.L. 2013-385 (H 182) amends G,S. 15A-1335 (resentencing after appellate review) to provide that the statute does not apply when a defendant on direct review or collateral attack succeeds in having a guilty plea vacated.]

E. Timing of Challenge

When the prosecution has failed to allege an offense properly as described in previous sections, the defendant may wish to wait until trial to move to dismiss the charges. *See supra* § 8.2, Misdemeanors Tried in District Court; § 8.4, Felonies and Misdemeanors Initiated in Superior Court; § 8.5, Common Pleading Defects in Superior Court.

In the situations described in this section § 8.6, there is less reason to wait to file a motion to dismiss. In all of the situations described here, the defendant has already been tried for one offense and the prosecution is seeking to try the defendant for another, related offense. If the defendant's motion to dismiss is successful, the prosecution should be barred from pursuing the charge.

If the case is in superior court, the following time limits apply: (1) the motions do not appear to be subject to G.S. 15A-952(b), which requires that certain motions be filed before arraignment; (2) if the motion to dismiss is for lack of joinder, G.S. 15A-926(c)(2) requires that it be filed before trial; (3) if the motion to dismiss is based on constitutional grounds, G.S. 15A-954(c) provides that it may be raised at any time; however, such motions may be waived by the failure to raise them at the trial level. *See State v. Frogge*, 351 N.C. 576 (2000) (defendant argued that prosecution was vindictive and moved to dismiss indictment; court finds that defendant waived motion by failing to make motion in trial court). For more on timing of motions, see *infra* Chapter 13, Motions Practice.

8.7 *Apprendi* and *Blakely* Issues

A. The Decisions

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that any fact (other than a prior conviction) that increases the punishment for a crime beyond the statutory maximum must be included in the charging instrument, submitted to the jury, and proven beyond a reasonable doubt. *Id.* at 476.[1] In *Blakely v. Washington*, 542 U.S. 296 (2004), the Court elaborated on the meaning of statutory maximum, holding "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* at 303 (emphasis in original). In *State v. Allen*, 359 N.C. 425 (2005), *opinion withdrawn on other grounds*, 360 N.C. 569 (2006), the N.C. Supreme Court recognized that North Carolina's structured sentencing scheme violated the Sixth Amendment requirement that any factor, other than a prior conviction, that increases the

1. In a footnote in *Apprendi*, the Court stated that it was not reaching the question of whether the states are bound by the Fifth Amendment requirement that crimes be charged in a grand jury indictment. 530 U.S. at 477 n.3. However, the defendant has a Sixth and Fourteenth Amendment right to notice of the charges against him or her, and pleadings ordinarily must allege all the elements of the offense. *See generally State v. Hunt*, 357 N.C. 257 (2003) (recognizing these principles, but finding that North Carolina statutes authorize short-form indictments for murder and such indictments are sufficient to put defendants on notice of statutory capital aggravating factors).

defendant's maximum sentence be alleged in the pleading, submitted to the jury, and proven beyond a reasonable doubt.

In response to these decisions, the General Assembly revised the procedures for determining aggravating factors in the "Blakely Bill" (2005 N.C. Sess. Laws Ch. 145 (H 822)), effective for offenses committed on or after June 30, 2005. The Blakely Bill applies to structured sentencing for felonies in both district and superior court and requires that the finder of fact determine aggravating factors beyond a reasonable doubt unless admitted by the defendant. Additionally, the Blakely Bill changed the procedures for pleading or providing notice of aggravating factors and certain prior record points, as discussed below.

For a further analysis of the impact of *Blakely* on determining and weighing aggravating factors and prior record points, see 2 NORTH CAROLINA DEFENDER MANUAL § 24.1E (Right to Jury Verdict on Every Element of Offense, Including "Sentencing" Factors) (UNC School of Government, 2d ed. 2012); JOHN RUBIN & SHEA RIGGSBEE DENNING, PUNISHMENTS FOR NORTH CAROLINA CRIMES AND MOTOR VEHICLE OFFENSES 1-3 (UNC School of Government, Supp. 2008), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/punchtsuppl08.pdf; Jessica Smith, *North Carolina Sentencing after* Blakely v. Washington *and the* Blakely *Bill* (UNC School of Government, Sept. 2005), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/Blakely%20Update.pdf.

B. Notice and Pleading Requirements after *Blakely*

Aggravating factors and prior record points for structured sentencing felonies. In addition to the other pleading requirements, the Blakely Bill requires that every indictment (or information if an indictment is waived) allege any "catch all" aggravating factors under G.S. 15A-1340.16(d)(20) that it intends to use. The State does not need to allege in the indictment the aggravating factors specifically enumerated in G.S. 15A-1340.16(d)(1) through (19) except the aggravating factor in G.S. 15A-1340.16(d)(9) (offense directly related to public office or employment held by defendant). *See* G.S. 15A-1340.16(f) (requiring that indictment allege this aggravating factor); *see also* 2012 N.C. Sess. Laws Ch. 193 (H 153) (amending several statutes to require forfeiture of retirement benefits on conviction with this aggravating factor).

The State still must give written notice of aggravating factors it intends to use at least 30 days before trial or plea of guilty or no contest unless the defendant waives notice. *See* G.S. 15A-1340.16(a4), (a6); *see also State v. Mackey*, 209 N.C. App. 116 (2011) (State did not provide proper notice of intent to pursue aggravating factors by giving defendant plea offer letter stating that defendant "qualified for aggravated sentencing" under two enumerated aggravating factors; letter did not indicate that State intended to proffer these factors in court proceedings).

Similarly, the State need not allege in the indictment, but must provide 30-days' notice in writing of its intent to prove, the prior record level point in G.S. 15A-1340.14(b)(7)

(defendant committed the offense while on probation, parole, or post-release supervision, while serving a sentence of imprisonment, or while on escape from a correctional facility during a sentence of imprisonment). The applicable statutes do not require the State to provide written notice (or allege in the indictment) either prior convictions or the prior record point in G.S. 15A-1340.14(b)(6) (all elements of present offense are included in a prior offense for which defendant convicted).

Firearm and Other Enhancements. North Carolina's firearms enhancement statute increases the defendant's sentence beyond the statutory maximum, and the facts supporting the enhancement must be alleged in the indictment or information. *See* G.S. 15A-1340.16A(d) (requiring that indictment include this allegation); *see also State v. Lucas*, 353 N.C. 568 (2001), *overruled on other grounds, State v. Allen*, 359 N.C. 425 (2005), *opinion withdrawn on other grounds*, 360 N.C. 569 (2006). This procedure also applies to the sex offender enhancement in G.S. 15A-1340.16B, the bullet-proof vest enhancement in G.S. 15A-1340.16C, and the enhancements for certain methamphetamine offenses in G.S. 15A-1340.16D (expanded by S.L. 2013-124 (H 29) to include additional circumstances, effective for offenses committed on or after Dec. 1, 2013). *See generally* JOHN RUBIN, BEN F. LOEB, JR., & JAMES C. DRENNAN, PUNISHMENTS FOR NORTH CAROLINA CRIMES AND MOTOR VEHICLE OFFENSES 8–9 & n.11 (UNC School of Government, 3d ed. 2005).

In 2008, the General Assembly added the offenses of rape and sexual offense by an adult involving a child under age 13. *See* G.S. 14-27.2A, 14-27.4A. These statutes establish a mandatory sentence of 300 months but allow a judge, on determining "egregious aggravation," to impose a sentence of up to life without parole. This procedure likely violates *Blakely*. *See* John Rubin, *2008 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/06, at 2–4 (UNC School of Government, Nov. 2008), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0806.pdf.

Legislative note: Effective for offenses committed on or after October 1, 2013, S.L. 2013-369 (H 937) amends G.S. 15A-1340.16A to apply a firearm sentence enhancement to all felonies instead of Class A through E felonies only. The length of the enhancement depends on the class of felony (72 months for Class A through E felonies instead of the current 60 months; 36 months for Class F and G felonies; and 18 months for Class H and I felonies). G.S. 15A-1340.16A(d) continues to require that the facts supporting the enhancement be alleged in the indictment or information.

Misdemeanors, including impaired driving offenses. The Blakely Bill applies to structured sentencing for felonies in both district and superior court. It does not apply to structured sentencing for misdemeanors, which was not affected by the *Apprendi* and *Blakely* decisions. The Blakely Bill also does not apply to offenses not subject to structured sentencing, such as impaired driving. However, in *State v. Speight*, 359 N.C. 602 (2005), *vacated on other grounds*, 548 U.S. 923 (2006), the court addressed the application of *Blakely* to misdemeanor impaired driving and held that for impaired driving offenses tried in superior court (either when the offense is the subject of a misdemeanor appeal or is joined with a felony for trial initially in superior court),

aggravating factors other than prior convictions must be found by a jury beyond a reasonable doubt or admitted by the defendant.

The General Assembly thereafter amended G.S. 20-179 to require that aggravating factors in impaired driving cases be proved beyond a reasonable doubt. As revised, the statute also requires in superior court that the State provide notice of its intent to prove aggravating factors at least 10 days before trial. *See* G.S 20-179(a1); *see also* Shea Denning, *What's* Blakely *got to do with it? Sentencing in Impaired Driving Cases after Melendez-Diaz*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 24, 2009) (discussing applicability of Confrontation Clause to evidence of aggravating factors in impaired driving cases), http://nccriminallaw.sog.unc.edu/?p=567. The provisions of G.S. 20-179 also apply to other implied consent offenses. *See* G.S. 20-179(a) (statute applicable to impaired driving in a commercial vehicle; second or subsequent violations for operating a commercial vehicle after consuming alcohol; or second or subsequent violations for operating a school bus, school activity bus, or child care vehicle after consuming alcohol).

DISTRICT COURT PLEADINGS "TO GO"

APDs A. Maris & J. Donovan 2011

What are they? **CAMCSI!**
Citation (15A-302(b), 15A-922(c)),
Arrest Warrant (15A-304(b)),
Magistrate's Order (15A-511(c)),
Criminal Summons (15A-301(b)),
Statement of Charges (15A-922(a))
& **I**nformation & indictment!

Misdemeanor Pleadings (N.C. Gen. Stat. §15A-921, 922)

What do I Say: (Defective Pleading = missing element of correct charge or allege wrong charge, Ex's: RDO (no duty) or Prost'n should be CAN)

"Objection, Your Honor…I move to dismiss. The pleading in the case is defective. It fails to properly allege the elements of a (*insert offense*)."

When to Object (& Why) → Do you have a **Fatal Defect or Fatal Variance?...** DURING TRIAL

FATAL DEFECT Pleading fails to charge offense properly → Object after witness sworn in

- Generally, any objection of defense that can be addressed pre-trial is addressed then, 15A-952(a)—but don't!
- Wait until **after arraignment, at least!** Why?...
  ---The State **cannot** fix the defect by filing a *misdemeanor statement of charges* where it would **change the nature of the offense** *after* arraignment (15A-922(e)).
  *****Also note—*amendments:* State may **amend** pleading, incl. a misd. statement, if doesn't change nature of offense prior to or after final judgment (15A-922(f)).---
- **Nature of offense** changed when—misd. statement (or amendment) changes to *another* charge or makes a "substantial alteration" of the charge as set out in case law (310 NC 596, *see also* "Specific Offense Reqts").
- Wait until **after witness sworn**? Not necessary but good practice…
  *This is when **jeopardy** attaches. ("In a nonjury trial, jeopardy attaches when the court begins to hear evidence," 420 US 377. However, a dismissal based on fatal variance or a fatal defect does not create a DJ bar to subsequent prosecution, 156 NCA 671.)
  IN PRACTICE: DA/PO may not pursue once J. attaches.
- Statute also says can make defective pleading motion "at any time," 15A-952(d).

TO REVIEW PLEADING:
| *See **back side**:* 15A-924(a)
| & Specific Offenses Reqts

NOTE: REVIEW YOUR PLEADING FOR DEFECTS BEFORE TRIAL→→ **BACK SIDE→**

FATAL VARIANCE The proof at trial (evidence presented) is different from what was alleged in pleading → Object at close of State's evidence & at close of ALL the evidence!!

- "It has long been the law of this state that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment."
- "The question of variance…is based on the assertion, not that there is no *proof* of a crime having been committed, but that there is none which tends to prove that the particular offense charged in the bill has been committed. *In other words, the proof does not fit the allegation, and therefore, leaves the latter without any evidence to sustain it*." State v Faircloth, 297 NC 100 (1979)

What if the state files a **Misdemeanor Statement of Charges** BEFORE TRIAL? 15A-922(a),(b)&(d)

The state can file a **Misdemeanor Statement of Charges** (supersedes all previous pleadings → becomes the pleading!) to add offenses or change the original offense before arraignment under **15A-922(d)** → You are entitled to **a motion to continue of at least "3 working days"** from the time it is filed or D is 1st notified (whichever is later) unless the "judge finds that the statement…makes no material change in the pleadings" **15A-922(b)(2) ***PRACTICAL NOTE: A 3-day MTC may = a 30 day MTC & be wise, esp. if case turns on a civ. witness not inclined to return or to meet with your client again.

Are there additional limitations on **Amendments**?

Yes! State 1) must amend in writing (10 NCA 443) & 2) cannot amend original charge to greater offense (add aggravating factors w/ felonies, e.g. charged with (M) Oper. MV to Elude Arrest & State amended to add aggravating factor to become (F) Oper. MV Elude Arrest – can't do! Elevating offense = changing its nature! 154 NCA 332)

"DUE PROCESS IS NOT A TECHNICALITY" THE MOTION GOES BEYOND STATUTES.
How do I respond to arguments that pleading defects are "just a technicality"/minor statutory violations?? **Constitution! Constitution! Constitution! DP, DJ.** → A pleading "must allege lucidly and accurately all the essential elements of the [crime]…charged." This ensures: 1) identification of offense charged, 2) D on notice of what is alleged so he can prepare for trial, 3) D not put in jeopardy twice for same charge & 4) proper sentencing, 357 N.C. 257, 166 N. C. App. 202

STATUTORY REQUIREMENTS --&-- CASE LAW FOR SPECIFIC OFFENSES…

15A-924(a) IS YOUR FIRST STOP. It will tell you what all pleadings must contain.15A-922 controls changes to pleadings by amendment or misdemeanor statement (referenced on *front* side).

STATUTORY REQ'TS (all pleadings)

The pleading is facially defective; it fails to charge offense properly. **15A-924(a)**

"(a) A criminal pleading must contain:
(1) Name or other identification of D
→ name totally unknown, fatally defective, 302 NC 613 → name in caption, not body ok, 77 NCA 583 → ok to amend & doctrine of *idem sonans*, 123 NCA 361
(2) Separate count for each offense charged
(3) County where offense took place
→ establishes venue, not fatal if not material
(4) Date or time period when offense took place → grounds to dismiss if time is "of the essence," e.g. SOL or alibi, 307 NC 645 *and* the error misled D to his prejudice, 162 NCA 715
→ amendments-if time not of essence, amendment does not change nature of offense!
(5) Plain & concise factual statement supporting *every* element of offense charged! (What are charge's elements?) – says must be "with sufficient precision clearly to apprise the D or Ds of the conduct" which is subject of accusation
(6) Reference to the statute or ordinance D allegedly violated
→ not grounds for dismissal, (not fatal-body of pleading properly alleges crime & amend ok, 362 NC 169) → *but see* ordinances: 160A-79, 153A-50, 283 NC 705, 33 NCA 195.

Warrant failing to charge any offense: The trial court must dismiss the charge against a D if the criminal pleading fails to charge offense, *State v. Madry*, 140 NCA 600 (2000) (warrant insufficient b/c "it did not adequately apprise D of the specific offense with which he was being charged").

General rule – pleading for statutory offense is sufficient if charges offense in words of statute. (161 NCA 686) Exceptn: the words of statute do not unambiguously set out all elements (238 NC 325, also 15A-924(a)(5)), e.g. PDP (162 NCA 268, What is the "PDP?" Officer must describe!), Prostitution charged under subsection (7) (see 244 NC 57).

SPECIFIC OFFENSE REQ'TS:

Larceny & Embezzlement—Grounds for dismissal if pleading fails to id person w/ property interest or legal entity capable of owning property, e.g. must say "Walmart, Inc." → ask: what is the legal name of the entity in my case? = element! → "takes personal property belonging to another" Remember—larceny can occur if taken from someone in lawful poss'n of item at time (e.g. bailee) or *in loco parentis* (137 NCA 553). Generally, can't amend! (162 NCA 350) (149 NCA 588) Fatal variance if—person named not owner in evidence (282 NC 249) **Exception: Shoplifting** b/c offense always commitd against a store (18 NCA 652)
FTRRP—2 statutes: **14-167 & 14-168.4** (contract w/ purchase option). Charge correct statute? Can't amend
RDO-must id PO by name, duty & how D R/D/O'd in factual allegations (262 NC 472, 263 NC 694). (Rem-onstrating w/ PO ok, 278 NC 243, 118 NCA 676)
Disorderly Conduct-do factual allegations support a DC? D's conduct "fighting words" or gesture "intended & plainly likely to provoke violent retaliation & thereby cause a breach of the peace?" (14-288.4, 282 NC 157) "MFs ought to be arrested."
PDP—Pleading must describe PDP item in allegation to "sufficiently apprise D," error to allow amend (267 NC 755, common household item could be PDP)
Prostitution or CAN?—14-203 defines prostitution as act of *sexual intercourse* & nothing else. Sexual intercourse is, "The actual contact of the sexual organs of a man and a woman, & an actual penetration into the body of the latter." If legislature wishes include w/in 14-204 other sexual acts (cunnilingus, fellatio, masturbation, sodomy) it should do so w/ specificity since 14-204 is a criminal statute. 307 N.C. 692.
Remember! Solicitation to commit I (F) is a Cl. 2 (M), 14-2.6 & Cl. 2 doesn't count toward (F) sentencing record level, but Cl. 1 does. 15A-1340.14(b)(5).
Assault or Assault by Show of Violence—assault by show of violence must allege more than assault: (1) a show of violence by D; (2) "accompanied by reasonable apprehension of immediate bodily harm or injury on the part of the person assailed"; (3) causing the vic "to engage in a course of conduct which she would not otherwise have followed." 146 NCA 745
B&E—must id bdlg. w/ particularity, 267 NC 755
Shopl/Poss Marij/Worth Check—must allege facts showing subseqt crime to subject D to higher penalty, 237 NC 427, 21 NCA 70

CRIMINAL PLEADINGS IN DISTRICT COURT

WHAT IS IT: The "charging instrument" or document the State uses to charge D with a crime.

EXAMPLES:

- **Citation**-Issued by officer who must have probable cause that D committed a misdemeanor or infraction. 15A-302(b). D can object to being tried on a citation, 15A-922(c), but State can then file statement of charges. If magistrate signs, it becomes a magistrate's order.
- **Magistrate's Order**-Issued by magistrate when a person has been arrested without a warrant and magistrate finds probable cause. 15A-511(c).
- **Criminal Summons**-Issued by a judicial official on finding of probable cause. Directs D to appear in court; D is not taken into custody. 15A-301(b).
- **Arrest Warrant**-Issued by judicial official on finding of probable cause. Directs officers to arrest D. 15A-304(b).
- **Statement of Charges**-Prepared by prosecutor to charge a misdemeanor. Supersedes all previous pleadings. 15A-922(a).
    - Before arraignment, prosecutor may file to amend charge or add new charges. 15A-922(d). D entitled to continuance unless no material change. 15A-922(b)(2).
    - After arraignment, prosecutor may file only if does not change nature of offense.15A-922(e). D entitled to continuance unless no material change. 15A-922(b)(2).

BASIC REQUIREMENTS FOR CONTENTS: 15A-924(a).

- Name or other identification of D;
- Separate count for each offense charged;
    - Move to require State to elect where there is duplicity. 15A-924(b).
- County where offense took place;
- Date or time period when offense took place.
    - Grounds to dismiss where time is of the essence, ie, D has alibi. 307 NC 645.
- Plain and concise factual statement supporting *every* element of offense charged;
- Reference to the statute or ordinance that D allegedly violated.
    - Error or omission is not grounds for dismissal. 15A-924(a)(6).
    - *But see* "Specific Offenses" below regarding ordinance violations.

  [Note: 15A-924(a)(7) applies to felonies only. State does not have to allege in pleading the aggravating factors it intends to use in DWI sentencing.]

*Court MUST dismiss for failure to meet requirements, unless amendment allowed. 15A-924(e).

PROBLEMS WITH PLEADING:

- **Facially Defective**-Fails to charge offense properly.
    - Fair Notice-Vague language violates due process right to be informed of accusation D must defend against.
    - Jurisdiction-Certain defects deprive court of jurisdiction to hear matter.
        - Failure to include element. 291 NC 586
        - Failure to name victim. 338 NC 315.
    - Jeopardy Protections-Would not enable D to raise double jeopardy bar to subsequent prosecution for same offense. 312 NC 432.
- **Fatal Variance**-State's proof at trial is different from what is alleged in pleading. 297 NC 100.
- *Remedy is dismissal. 15A-952.

WHEN TO MOVE TO DISMISS:

- For facial defect: typically, pre-trial. 15A-952(a).
    - Wait until arraignment. Then, State can NOT correct by filing a statement of charges where it would change the nature of the offense. 15A-922(e).
    - Motion concerning jurisdiction or failure of pleading to charge offense can be made at any time. 15A-952(d). But best practice is to make motion right after arraignment.
- For fatal variance: at close of State's evidence and at close of all evidence.

SPECIFIC OFFENSES:

- **Larceny**
    - Pleading must correctly name owner of stolen property. 289 NC 578; 671 SE 2d 357.
    - Fatal variance if person named in pleading is not owner. 282 NC 249.
        - But sufficient if person named was in lawful possession. 35 NCA 64; 673 SE 2d 718.
    - Grounds for dismissal if pleading fails to identify legal entity capable of owning property. 162 NCA 350 (pleading fatally defective where it named "Faith Temple Church of God" instead of "Faith Temple Church-High Point, Inc.")
- **Break and Enter**-Must identify building with reasonable particularity. 267 NC 755.
- **Possess Drug Paraphernalia**-Must describe item alleged to be paraphernalia. 162 NCA 268 (error to allow amendment from "can" to "brown paper container").
- **Resist, Delay, Obstruct**-Must identify officer by name, indicate duty being discharged and how D resisted/delayed/obstructed. 262 NC 472.
- **Assaults**-Must identify victim correctly; error to allow amendment to change.
    - Fatal variance where pleading alleged victim was "Gabriel Henandez Gervacio" and evidence revealed name was "Gabriel Gonzalez." 349 NC 382.
- **Shoplifting/Possess Marijuana/Worthless Check**-Pleading must allege facts showing the offense is a subsequent crime in order to subject the accused to the higher penalty. 237 NC 427; 21 NCA 70.
- **Ordinance Violations**-Per 15A-924(a)(6), failure to cite ordinance is not grounds for dismissal. But see 160A-79 (requirements for pleading city ordinance); 153A-50 (same for county ordinances); 283 NC 705 (dismissal where State failed to plead and prove ordinance where no section number or caption); 33 NCA 195 (dismissal where State failed to allege caption or contents).

AMENDMENT:

- State can NOT amend if it changes the nature of the offense. 15A-922(f).
    - But State can prepare statement of charges prior to arraignment. 15A-922(d).
    - State can NOT amend to convict of a greater offense than the one originally charged or to add aggravating factors. 154 NCA 332.
- State must amend in writing. 10 NCA 443.

PRACTICE TIPS:

- √ Examine pleadings closely for defects on face such as missing elements, failure to identify D or victim, or vague language that D can not defend against.
- √ Compare allegations in pleading to State's proof at trial to make sure they match up.
- √ If the State tries to amend, object (after arraignment) where the nature of the offense would be changed.

There are three components of a good client interview.

Be **Positive** –in your attitude/approach

Being positive does not mean being overly optimistic and misleading your client about the possible outcome. It does mean putting the best spin on the information provided and facts that you have.

Be **Productive**—in what you get from your client

Includes getting information from your client
Making sure you get the right information
Making sure your client understands your function
    Confidentiality
    Role of attorney

Be **Proactive** by getting down to business/ being practical

Acting in advance to deal with the situation; taking the steps to avoid a difficult situation.
Making sure that you speak to your client in a way they understand (saves you and them headaches in the future)
Taking good notes

Before you can put these abstract concepts into practical use, you have to start the with the client interview

A. Information Gathering

Information gathering is the most important aspect of the client interview, but it's the **type** of information you get and **how** you go about gathering it that counts. This includes more than work information and family support.

1. The information you get could be the difference between your client being found guilty and not guilty. If you don't get the right information, you may miss a crucial defense.

    a. Ask open-ended questions. Instead of asking: **do you have children?** Say: **tell me about your family.**

    b. Ask the same questions in different ways (and more than once)

    c. Give your client the opportunity to tell you his/her story in their own way.

2. Go into each interview knowing the basic information you have to get from your client

    a. have in interview sheet or checklist (see attachment A)

    b. don't be afraid to deviate from the "script."

3. Present the information in a way that is helpful to your client.

Positive/Productive/Proactive:

looking your client in eye and making sure they know you are listening to them and what they have to say <u>is important</u>. Keeping your head down and taking notes is not appropriate the whole time they are talking

Keep good notes in your file. This will save you from having to ask you client for information they've already given (which affects trust)

Go over the elements of the crime in a way to bring out possible defenses or legal issues. Unfortunately your clients aren't going to hand you the information on a silver platter. You may have to do a little digging.

Get witness or alibi information. The last thing you want to happen is for your client to say during trial: Well my boss was there and he saw the whole thing. Always ask.

This way you know what's happening with your clients <u>and</u> they know you know

B. Forming relationship with client

Whether it's for fifteen minutes or over several months, at soon as that case is assigned to you a relationship has begun. How successful that relationship is will largely be up to you.

1. Talk to your client not at him/her

2. Establishing trust

    a. know the law –that includes affirmative defenses. **Your client needs to trust you as an attorney. Be prepared with your elements of the crime and their defenses.**

    b. let the client know that you are comfortable in the courtroom and with the way things work.

    c. Keep them informed.

3. Treating client with respect

    a. your job while interviewing your client is to let them know that the opinion of the cops, DA, judge and general public is not your opinion

    b. how you speak to your client is there indication of how you will represent them

Positive/Proactive/Productive:

It's important that your client knows that while you are handling their case it is the most important one you have. Reinforce that idea.

Reassure them that you are on their side while remaining objective about the law and the facts.

Let them know that you're going to put up the best defense possible and that you're going to argue to the judge that they get the outcome of that they want (even if you don't agree with it. And then do just that.

Develop a rapport. We represent people we don't like all the time. However, you can't effectively represent someone that you can even tolerate speaking to and who refuses to speak with you. So utilize all the points to make sure that you have a working rapport with your client.

C. Making sure your client understands you

1. Don't speak over the client's head

    a. Legal jargon is not necessary to explain most charges or defenses

    b. Just because your client has a long record, doesn't mean s/he understands what's happening. Maybe no one else ever took the time to explain it. 2.

2. No two are alike

    a. Some clients will have had little or no experience with the system and quickly become intimidated, let them know that you can address them on their level

    b. Talk to them about what they are going to hear in court and assure them it will be explained afterwards if they don't understand.

Positive/Productive/Proactive:

Take the time to explain the legal language they will hear in court. Don't just leave the conditions of probation to the PO. Don't let the first time they hear the language of the transcript be from the judge. Don't let the first time they know jail is possible is when the deputy puts the handcuffs on them.

A client always wants to know the worse case scenario and it important that you tell them all the things that could happen **and** based on your experiences what probably will happen.

D. Making sure you understand your client

1. What are his/her issues?
    a. Mental Illness
    b. Retardation
    c. Youth
    d. Stubbornness
    e. Fear

Each of these will warrant that you approach your client in a different way. Sometimes there will be a combination and only through talking with (**not at**) your client, will you figure out how to best deal with him/her.

2. What is his/her motivation for the crime?
    a. Drug use
    b. Peer Pressure
    c. Retaliation
    d. Fear

Knowing underlying issues will go along way in negotiation and sentencing

Epilogue:

Be Positive: This doesn't stop after the interview. Put the best possible spin on the information your client give you. Know what to say and what to leave out. **Even you if you can sum up your client's life in thirty seconds, doesn't mean you should.**

Be Productive: Keep up with the law on the most common cases you handle. Revise your interview sheets when necessary.

Be proactive: Know your judges and DA's. Use this information to benefit your clients.

CLIENT INTERVIEWING
2017 New Misdemeanor Defender Training

ROADMAP

I. What type of lawyer are you?
II. Three Techniques to use during every client interview.
III. The Furious Five – type of clients.

1. WHAT TYPE OF LAWYER ARE YOU?

I. **Three Types of Public Defenders.**

a. The Die Hard.
   i. All about the client.
   ii. A feeling of doing for others . . . "Client-Driven"

b. The Runway Model.
   i. All about the lawyer.
   ii. A feeling of doing for self . . . "Self-Driven"

c. The Waiter
   i. All about waiting for the "real" job.
   ii. A feeling of just-do-it . . . "Opportunity-Driven"

II. **No Matter What Type of Lawyer You Are – We All Need the Same Thing.**

a. To zealously represent a client to the fullest – need client interviewing skills.

b. To be as effective in the courtroom as possible – need client interviewing skills.

c. To get the next job – need the marketable skill of client interviewing.

III. **If You Don't Maximize This Skill:**

a. Miserable . . . despise your clients.

b. Miss crucial information needed for your defense.

c. Client interaction – become ineffective and burdensome.

IV. **Generally, Client Interviewing is**

a. Time consuming in the short term.

b. But, if done properly, it can be very useful in the long term.

Trust is not built, trust is the result of what you've built.

2. THREE TECHINIQUES

I. **Set the Stage.**

a. Set the boundaries for the interview.
   i. Explain the process and expectations.
      1. Keep it brief . . . 60 seconds or less
   ii. Imagine: A chess board or an empty canvass (Four Corners).

b. Introduce the Four Corners.
   i. Yourself . . . "I am your attorney" then your name.
   ii. Trial and Guilty Plea options.
   iii. Charges.
      1. There is no discovery in District Court.
      2. But get what you can – copy of the Pink Sheet or Affidavit.
   iv. Sentencing options. (+ worst case scenario).
      1. Maximum sentence length.
      2. Probation length and conditions.
      3. Range of court costs and fees.
      4. Alternatives to convictions.

II. **Listen! (Silent)**

a. Purpose of the interview.
   i. The Case?
   ii. The Client?

b. To get started – ask open-ended questions.
   i. "What can you tell me about this case?"
   ii. A quick note about note-taking. . .
      1. Keeping notes will be important down the road – it will prevent you from having to ask your client to repeat important details all over again.
      2. But don't write verbatim . . . jot down a word or two.

c. Be Mindful of Distractors.
   i. Stanford game – rename that object
   ii. Race & the interview.
      1. Implicit Bias plays a role in how we interpret everything.
      2. Be mindful of your implicit bias towards the client.
      3. Be mindful of the client's implicit bias towards you the Public Defender.
      4. But don't let it create a barrier between you and the client.

Trust is not built, trust is the result of what you've built.

2. THREE TECHINIQUES (cont'd.)

III. **The Interview.**

a. You don't have to prove yourself.
   i. Not an interrogation.
   ii. Not an investigation.
   iii. Not an intramural competition.

b. Information gathering.
   i. Inter…inside.
   ii. View…to look.
   iii. Client inter-views allow you "to look inside" the facts of the case or the life experiences of your client.

c. Keep it Simple.
   i. No legal jargon.
   ii. Don't believe the tone or facts in the police report . . . Always BIASED.

d. Stay within the Four Corners.
   i. Gently guide the interview and keep on task.

3. THE FURIOUS FIVE

I. Every Client is Different.

a. Different clients require different approaches.

II. The 5 Common Types of Client (Courtesy of Kung Fu Panda).

a. The Emotionally Aggressive (Tigress).
   i. *Client Personality* – These type of clients normally:
      1. Lack control over their emotions.
      2. Are self-destructive.
      3. Believe the world is out to get them, a feeling of being abandoned.
   ii. *Lawyer Approach* - As the lawyer, you must:
      1. Acknowledge their emotions.
         a. "I can see that this really bothers you."
         b. "I hate that the cop did that to you."
         c. "I see that you are trying to do right."
      2. But do not get drawn into those emotions.
      3. Be disciplined.
         a. You cannot change their world, so stick to the case before you.

Trust is not built, trust is the result of what you've built.

THE FURIOUS FIVE (cont'd.)

b. The Intelligibly Challenged (Crane).
   i. *Client Personality* – These type of clients normally:
      1. Lack confidence.
      2. Act like it's not their fault
      3. Are immature or mentally disabled.
   ii. *Lawyer Approach* - As the lawyer you must:
      1. Be confident – show that you know what you are talking about.
      2. Do not ask or make insulting statements.
      3. Ask about mental health treatment, level of schooling, etc.

c. The Liars & Deceivers (Snake).
   i. *Client Personality* – These type of clients normally:
      1. Seem sneaky.
      2. Act timid but are not.
      3. Are elusive with the facts and the truth.
   ii. *Lawyer Approach* - As the lawyer you must:
      1. Be observant.
      2. Handle the facts with care.
      3. Don't argue with them – always say "it is up to the judge or jury."

d. The Cynic (Monkey).
   i. *Client Personality* – These type of clients normally:
      1. Make empty-threats.
      2. Act cynically.
      3. Are troublemakers.
   ii. *Lawyer Approach* - As the lawyer you must:
      1. Be compassionate.
      2. Be optimistic.
      3. Don't take it personal / laugh along when appropriate.

e. The Know-it-All (Mantis).
   i. *Client Personality* – These type of clients normally are:
      1. Jump to conclusions.
      2. Act impatiently.
      3. Are impulsive decision-makers.
   ii. *Lawyer Approach* - As the lawyer you must:
      1. Be patient.
      2. See the big picture and don't get caught up in the heat of the moment.
      3. Realize the more you say, the more you give them to argue about.

Know your lawyer-type; Use the three techniques (set the stage, listen, and inter-view); ID the client.

Misdemeanor Offenses Committed on or after **December 1, 2013**

OFFENSE CLASS	PRIOR CONVICTION LEVEL			
	I No Prior Convictions	**II** One to Four Prior Convictions		**III** Five or More Prior Convictions
A1	C/I/A 1–60 days	C/I/A 1–75 days		C/I/A 1–150 days
1	C 1–45 days	C/I/A 1–45 days		C/I/A 1–120 days
2	C 1–30 days	C/I 1–45 days		C/I/A 1–60 days
		One to Three Prior Convictions	**Four Prior Convictions**	
3	C Fine Only* 1–10 days	C Fine Only* 1–15 days	C/I 1–15 days	C/I/A 1–20 days

*Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.

A—Active Punishment **I**—Intermediate Punishment **C**—Community Punishment

Misdemeanor Offenses Committed before **December 1, 2013**

OFFENSE CLASS	PRIOR CONVICTION LEVEL		
	I No Prior Convictions	**II** One to Four Prior Convictions	**III** Five or More Prior Convictions
A1	C/I/A 1–60 days	C/I/A 1–75 days	C/I/A 1–150 days
1	C 1–45 days	C/I/A 1–45 days	C/I/A 1–120 days
2	C 1–30 days	C/I 1–45 days	C/I/A 1–60 days
3	C 1–10 days	C/I 1–15 days	C/I/A 1–20 days

A—Active Punishment **I**—Intermediate Punishment **C**—Community Punishment

Step 1: Determine the Applicable Law

Choose the appropriate sentencing grid based on the defendant's date of offense.

- Offenses committed on or after December 1, 2013.
- Offenses committed before December 1, 2013.

Step 2: Determine the Offense Class

North Carolina misdemeanors are assigned to one of four offense classes—Class A1, 1, 2, and 3, from most to least serious. Identify the offense class of the crime being sentenced. See APPENDIX B, Offense Class Table for Misdemeanors.

OFFENSE CLASS REDUCTIONS

Unless otherwise provided by law, the following step-down rules apply for attempts, conspiracies, and solicitations to commit a misdemeanor:

Attempt	1 class lower (G.S. 14-2.5)
Conspiracy	1 class lower (G.S. 14-2.4)
Solicitation	Always a Class 3 misdemeanor (G.S. 14-2.6)

OFFENSE CLASS ENHANCEMENTS

With appropriate factual findings, the offense class of certain misdemeanors may be increased under the enhancements set out below. Additional procedural requirements apply.

Criminal street gang activity (G.S. 14-50.22)	One offense class higher (Class A1 misdemeanor enhanced to Class I felony)
Committed because of the victim's race, color, religion, nationality, or country of origin (G.S. 14-3(c))	Class 2 and 3 misdemeanors enhanced to Class 1 misdemeanor Class 1 and A1 misdemeanors enhanced to Class H felony

Step 3: Determine the Prior Conviction Level

The defendant is assigned to one of three prior conviction levels (I through III) based on his or her criminal history.

Level	Prior Convictions
I	No prior convictions
II	1–4 prior convictions
III	5 or more prior convictions

QUALIFYING PRIOR CONVICTIONS

COUNT:

- Only one prior conviction from a single session of district court, or in a single week of superior court or court in another jurisdiction. G.S. 15A-1340.21(d).
- Convictions in superior court, regardless of a pending appeal to the appellate division. G.S. 15A-1340.11(7).
- Qualifying convictions, regardless of when they arose (there is no statute of limitations). State v. Rich, 130 N.C. App. 113 (1998).
- A prayer for judgment continued (PJC). State v. Canellas, 164 N.C. App. 775 (2004).
- A conviction resulting in G.S. 90-96 probation, if it has not yet been dismissed. State v. Hasty, 133 N.C. App. 563 (1999).

DO NOT COUNT:

- Infractions.
- Contempt. State v. Reaves, 142 N.C. App. 629 (2001).
- Juvenile adjudications.
- District court convictions on appeal, or for which the time for appeal to superior court has not yet expired. G.S. 15A-1340.11(7).

NOTES:

- *Proof.* The State must prove a defendant's record by a preponderance of the evidence. Prior convictions are proved by stipulation, court or administrative records, or any other method found by the court to be reliable. G.S. 15A-1340.21(c).
- *Date of determination.* Prior record level is determined on the date a criminal judgment is entered, G.S. 15A-1340.11(7), and may include convictions for offenses that occurred after the offense now being sentenced, State v. Threadgill, 227 N.C. App. 175 (2013).

- *Ethical considerations.* The State and defendant may not agree to intentionally underreport a defendant's record to the court. Council of the N.C. State Bar, 2003 Formal Ethics Op. 5. A defendant may not misrepresent his or her record but may remain silent on the issue, even during the presentation of an inaccurate record, provided he or she was not the source of the inaccuracy. 1998 Formal Ethics Op. 5.
- *Suppression.* The defendant may move to suppress a prior conviction obtained in violation of his or her right to counsel. G.S. 15A-980.

Step 4: Select a Sentence of Imprisonment

The court imposes a sentence of imprisonment as part of every sentence, including probationary sentences. The court then determines (in Step 5) whether the defendant will be incarcerated for that term (Active punishment) or whether the sentence will be suspended and served only upon revocation of probation (Intermediate or Community punishment).

TERM OF IMPRISONMENT

For misdemeanor sentencing, the court selects a single term of imprisonment from the range shown in the applicable grid cell; unlike felony sentencing, there is no minimum and maximum.

For sentences imposed on or after October 1, 2014, misdemeanor sentences of 90 days or less are served in the local jail, except as provided in G.S. 148-32.1. Misdemeanor sentences in excess of 90 days are served through the Statewide Misdemeanant Confinement Program, through which the N.C. Sheriffs' Association will find space for the inmate in a jail that has volunteered beds to the program. *See* APPENDIX G, Place of Confinement Chart, for additional rules.

FINE-ONLY SENTENCES

The only exception to the requirement for the court to select a sentence of imprisonment is a sentence to a fine only, which is permissible as a Community punishment. For Class 3 misdemeanors committed on or after December 1, 2013, unless otherwise provided for a specific offense, the judgment for a defendant with no more than three prior convictions shall consist of a fine only. G.S. 15A-1340.23(d).

Step 5: Choose a Sentence Disposition

The court must choose a disposition for each sentence. There are three possible sentence dispositions under Structured Sentencing: Active, Intermediate, and Community. The letters shown in each grid cell (A, I, and/or C) indicate which dispositions are permissible in that cell.

Active Punishment Exception
An Active sentence to time already served is permissible for any misdemeanant with pretrial jail credit, even if an Active punishment is not ordinarily allowed in his or her grid cell. G.S. 15A-1340.20(c1).

ACTIVE PUNISHMENT (G.S. 15A-1340.11(1))

An Active punishment requires that the defendant serve the imposed sentence of imprisonment in jail or prison.

INTERMEDIATE PUNISHMENT (G.S. 15A-1340.11(6))

Intermediate punishment requires that the court suspend the sentence of imprisonment and impose SUPERVISED probation.

COMMUNITY PUNISHMENT (G.S. 15A-1340.11(2))

Community punishment requires that the court suspend the sentence of imprisonment and impose SUPERVISED or UNSUPERVISED probation. A Community punishment also may consist of a fine only.

See PROBATIONARY SENTENCES, PAGE 16

Step 6: Review Additional Issues, as Appropriate

The "Additional Issues" section of this handbook includes information on the following matters that may arise at sentencing:

- Fines, costs, and other fees
- Restitution
- Sex Crimes
- Sentencing multiple convictions
- Jail credit
- Sentence reduction credits
- DNA sample
- Deferrals (deferred prosecution, PJC, and conditional discharge)
- Work release
- Purposes of sentencing
- Obtaining additional information for sentencing

See ADDITIONAL ISSUES, PAGE 11

Fines, Costs, and Other Fees

FINES

Any sentence may include a fine. Unless otherwise provided for a specific crime, the amount of the fine is in the discretion of the court. Unless otherwise provided by law, the maximum fine for a Class 3 misdemeanor is $200, and the maximum fine for a Class 2 misdemeanor is $1,000. G.S. 15A-1340.23(b). The fine for a local ordinance violation may not exceed $50 unless the ordinance expressly provides for a larger fine, which in no case may exceed $500. G.S. 14-4. For Class 3 misdemeanors committed on or after December 1, 2013, unless otherwise provided for a specific offense, the judgment for a defendant with no more than three prior convictions shall consist of a fine only. G.S. 15A-1340.23(b).

Unpaid fines may, upon a determination of default, be responded to as provided in G.S. 15A-1364 and docketed as a civil judgment as provided in G.S. 15A-1365.

COSTS

Court costs apply by default in every case in which the defendant is convicted, regardless of sentence disposition. Only upon entry of a written order, supported by findings of fact and conclusions of law, determining that there is just cause may the court waive costs. G.S. 7A-304(a). Unpaid costs may, upon a determination of default, be responded to as provided in G.S. 15A-1364 and docketed as a civil judgment as provided in G.S. 15A-1365.

ATTORNEY FEES

Attorney fees are ordered and docketed as provided in G.S. 7A-455, under rules adopted by the Office of Indigent Defense Services. An additional $60 attorney appointment fee applies under G.S. 7A-455.1.

PROBATION SUPERVISION FEES

Supervised probationers pay a supervision fee of $40 per month. The fee is waivable for good cause and upon motion of the probationer. G.S. 15A-1343(c1).

PROBATIONARY JAIL FEES

Probationers may, in the discretion of the court, be ordered to pay a $40 fee for each day of jail confinement imposed as a condition of probation. This fee is not to be confused with the $10 per day fee for *pretrial* confinement, which is a court cost and applicable by default unless waived for just cause. G.S. 7A-313.

ELECTRONIC HOUSE ARREST (EHA) FEE

Probationers sentenced to electronic house arrest (EHA) pay a one-time fee of $90, plus an additional fee reflecting the actual daily cost ($4.48 per day as of October 2016). This fee is waivable for good cause upon motion of the probationer. G.S. 15A-1343(c2).

COMMUNITY SERVICE FEE

Defendants ordered to complete community service pay a fee of $250 per sentencing transaction. G.S. 143B-708.

Restitution

The court must consider ordering restitution from a criminal defendant to a victim in every case. G.S. 15A-1340.34(a). The court shall order restitution to the victim of any offense covered under the Crime Victims' Rights Act (CVRA). G.S. 15A-1340.34(b).

See APPENDIX E, Crimes Covered under the Crime Victims' Rights Act.

RESTITUTION MAY BE ORDERED FOR THE FOLLOWING:

- Bodily injury. G.S. 15A-1340.35(a)(1).
- Damage, loss, or injury to property. G.S. 15A-1340.35(a)(2).
- To a person other than the victim, or to any organization, corporation, or association, including (as of December 1, 2016) an insurer, that provided assistance to the victim and is subrogated to the rights of the victim. G.S. 15A-1340.37(b).

RESTITUTION MAY NOT BE ORDERED FOR THE FOLLOWING:

- A victim's pain and suffering. State v. Wilson, 158 N.C. App. 235 (2003).
- As punitive damages. State v. Burkhead, 85 N.C. App. 535 (1987).

NOTES:

- *Proof of the restitution amount.* The restitution amount must be supported by evidence adduced at trial or at the sentencing hearing, or by stipulation. A prosecutor's statement or restitution worksheet, standing alone, is insufficient to support an award of restitution.

- *Ability to pay.* The court must consider the defendant's ability to pay restitution. The burden of demonstrating the defendant's inability to pay restitution is on the defendant. State v. Tate, 187 N.C. App. 593 (2007).
- *Active cases.* The court must consider recommending that restitution be paid out of any work-release earnings or as a condition of post-release supervision. G.S. 15A-1340.36(c).
- *Civil judgments.* In CVRA cases, restitution orders exceeding $250 may be enforced as a civil judgment as provided in G.S. 15A-1340.38(b). If initially ordered as a condition of probation, the judgment may be executed upon the defendant's property only when probation is terminated or revoked and the judge has made a finding that a sum certain remains owed. G.S. 15A-1340.38(c). There is no clear authority to order restitution as a civil judgment in non-CVRA cases.

Sex Crimes

See APPENDIX F, Crimes Requiring Sex Offender Registration.

SATELLITE-BASED MONITORING DETERMINATION HEARING

When sentencing a crime that requires sex offender registration, the court must conduct the hearing required by G.S. 14-208.40A, at which it will make findings related to registration and determine whether the defendant is required to enroll in satellite-based monitoring (SBM). (Use form AOC-CR-615.)

NOTICE OF DUTY TO REGISTER

When sentencing a sex offender to probation, the court must give the defendant notice of his or her duty to register. G.S. 14-208.8(b). (Use form AOC-CR-261.)

NO-CONTACT ORDER

At sentencing, the district attorney may ask the court to enter a permanent no-contact order prohibiting the defendant from having any contact with the victim of the offense. A violation of a no-contact order is a Class A1 misdemeanor. G.S. 15A-1340.50. (Use form AOC-CR-620.)

Sentencing Multiple Convictions

CONSOLIDATION

If a defendant is convicted of more than one offense at the same time, the court may consolidate the convictions and impose a single judgment with a sentence appropriate for the most serious offense. G.S. 15A-1340.15(b) (felonies); -1340.22(b) (misdemeanors).

DWI Two or more impaired driving charges may not be consolidated for judgment. Such sentences may, however, run concurrently. An impaired driving conviction sentenced under G.S. 20-179 may be consolidated with a charge carrying greater punishment.

CONCURRENT SENTENCES

Unless otherwise specified by the judge, all sentences of imprisonment run concurrently with one another. G.S. 15A-1340.15(a); -1354(a).

CONSECUTIVE SENTENCES

Generally, the judge may order one sentence of imprisonment to run at the expiration of another sentence. Note the following:

- *Single sentence rule*. When felony sentences are run consecutively, the Division of Adult Correction (DAC) treats them as a single sentence. The aggregate minimum sentence is the sum of all of the individual minimum sentences. The aggregate maximum sentence is the sum of all the individual maximum sentences, less 12 months for each second and subsequent Class B1–E felonies, less 60 months for each second or subsequent Class B1–E reportable sex crime, and less 9 months for each second and subsequent Class F–I felony. The defendant will serve a single term of supervised release upon his or her release from prison, the length of which is dictated by the longest post-release supervision term to which the defendant is subject. G.S. 15A-1354(b).
- *Mandatory consecutive sentences*. Some laws require a sentence to run consecutively to any other sentence being served by the defendant: habitual felon (G.S. 14-7.6); violent habitual felon (G.S. 14-7.12); armed habitual felon (G.S. 14-7.41); habitual breaking and entering (G.S. 14-7.31); habitual impaired driving (G.S. 20-138.5(b)); drug trafficking (G.S. 90-95(h)). These laws allow for concurrent or consolidated sentences for convictions sentenced at the same time. State v. Bozeman, 115 N.C. App. 658 (1994).
- *Limit on consecutive sentences for misdemeanors*. The cumulative term of imprisonment of consecutive misdemeanor sentences may not exceed twice the maximum sentence authorized for the class and prior conviction level of the most serious offense. If all convictions are for Class 3 misdemeanors, consecutive sentences shall not be imposed. G.S. 15A-1340.22(a).

PROBATIONARY SENTENCES

Suspended sentences may (consistent with the limitations described above) be set to run concurrently with or consecutively to one another in the event of revocation. Probation periods themselves, however, must run concurrently with one another. G.S. 15A-1346(a). The court may order a probation period to run consecutively to an Active sentence—an arrangement sometimes referred to as a contingent sentence. G.S. 15A-1346(b).

Jail Credit

A defendant must receive credit for the total amount of time he or she has spent in any State or local correctional, mental, or other institution as a result of the charge that culminated in the sentence or the incident from which the charge arose, including credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing. G.S. 15-196.1. The presiding judge must determine jail credit. G.S. 15-196.4.

COUNT FOR CREDIT:

- Pretrial confinement and time spent in confinement awaiting a probation violation hearing. G.S. 15-196.1.
- The active portion of a split sentence. State v. Farris, 336 N.C. 552 (1994).
- Time spent at DART Cherry as a condition of probation. State v. Lutz, 177 N.C. App. 140 (2006).
- Presentence commitment for study. State v. Powell, 11 N.C. App. 194 (1971).
- Hospitalization to determine competency to stand trial. State v. Lewis, 18 N.C. App. 681 (1973).
- Time spent in confinement in another state awaiting extradition when the defendant was held in the other state solely based on North Carolina charges. Childers v. Laws, 558 F. Supp. 1284 (W.D.N.C. 1983).
- Time spent imprisoned for contempt under G.S. 15A-1344(e1). State v. Belcher, 173 N.C. App. 620 (2005).
- Time imprisoned as confinement in response to violation (CRV). G.S. 15A-1344(d2).
- Time imprisoned as a "quick dip" under G.S. 15A-1343(a1)(3) or -1343.2.
- DWI Time spent as an inpatient at a state-operated or state-licensed treatment facility for the treatment of alcoholism or substance abuse, provided such treatment occurred after the commission of the offense for which the defendant is being sentenced. G.S. 20-179(k1).

DO NOT COUNT FOR CREDIT:

- Time in custody on a pending charge while serving a sentence imposed for another offense. G.S. 15-196.1.
- Time spent under electronic house arrest. State v. Jarman, 140 N.C. App. 198 (2000).
- Time spent at a privately run residential treatment program. State v. Stephenson, 213 N.C. App. 621 (2011).
- When two or more consecutive sentences are activated upon revocation of probation, credit for time served on concurrent CRV periods shall be credited to only one sentence. G.S. 15-196.2.
- DWI The first 24 hours spent in jail pending trial. G.S. 20-179(p).

NOTES:

- *Multiple charges.* When a defendant is detained on multiple charges and has shared jail credit applicable to all of them, the following rules apply. If the convictions are sentenced to run *concurrently*, each sentence is credited by as much of the time as was spent in custody on each charge. If the convictions are sentenced to run *consecutively*, shared credit is applied against only one sentence. G.S. 15-196.2.
- *Special probation.* When imposing special probation (a split sentence), the judge has discretion to order credit for any pretrial confinement to either the active portion of the split sentence or to the suspended sentence of imprisonment. G.S. 15A-1351(a).
- DWI *Jail credit.* If a defendant sentenced under G.S. 20-179 is ordered to serve 48 hours or more or has 48 hours or more remaining on a term of imprisonment, he or she must be required to serve 48 continuous hours of imprisonment to be given credit. Credit for jail time may only be awarded hour for hour for time actually served. G.S. 20-179(s).

Sentence Reduction Credits

A defendant serving an active term of imprisonment may reduce his or her maximum sentence by working or participating in educational programming in prison. By Division of Adult Correction (DAC) regulation, *earned time* credit is awarded at 3, 6, or 9 days per month, depending on the nature of the work or program. In no case may the defendant's sentence be reduced below the minimum term of imprisonment. A misdemeanant may reduce his or her sentence by up to 4 days per month through earned time and credit for work or educational programming. G.S. 15A-1340.20(d); 162-60. A term of special probation (a split sentence) may not be reduced by any sentence reduction credit. G.S. 148-13(f).

DWI By DAC regulation, DWI inmates are awarded good time at the rate of one day deducted from their prison or jail term for each day they spend in custody without a conviction through the Disciplinary Process of a violation of inmate conduct rules—which generally results in an inmate's sentence being cut in half. A defendant sentenced under G.S. 20-179 is eligible for good time credit regardless of the place of confinement. Good time may not be used to reduce an inmate's sentence below the mandatory minimum period of imprisonment for his or her level of DWI. G.S. 20-179(r). The prison system does not award good time to Aggravated Level One DWI sentences.

DWI Parole

Defendants sentenced to a term of imprisonment for a conviction sentenced under G.S. 20-179—other than defendants sentenced at Aggravated Level One—are eligible for parole. G.S. 15A-1371.

If the sentence includes a minimum term of imprisonment, the person is eligible for release on parole upon completion of the minimum term or one-fifth the maximum penalty allowed by law, whichever is less, subject to the limitations below. If no minimum sentence is imposed for a prisoner serving an active term of imprisonment for a conviction of impaired driving, the person is eligible for release on parole at any time, subject to the limitations below. Good time credit reduces the term that must expire before a defendant becomes eligible for release on parole. Because good time credit is awarded day for day, the time that must expire before a defendant is parole-eligible effectively is halved. G.S. 15A-1355(c). Limitations on DWI parole:

- A defendant may not be released on parole until he or she has served the mandatory minimum term of imprisonment. G.S. 20-179(p).
- To be released on parole, a defendant must have obtained a substance abuse assessment and have completed any recommended treatment or training program or must be paroled into a residential treatment program. G.S. 20-179(p).

In addition to the rules above, a defendant serving a sentence of imprisonment of not less than 30 days nor as great as 18 months under G.S. 20-179 may be released on parole after serving one-third of the maximum sentence as provided in G.S. 15A-1371(g).

DNA Sample

The court must, under G.S. 15A-266.4, order the defendant to provide a DNA sample as a condition of the sentence for defendants convicted of:

- Any felony.
- Assault on a handicapped person (G.S. 14-32.1).
- Stalking (G.S. 14-277.3A).
- Cyberstalking (G.S. 14-196.3).
- Any offense requiring registration as a sex offender (G.S. 14-208.6).

See APPENDIX F, Crimes Requiring Sex Offender Registration.

Deferrals

DEFERRED PROSECUTION

Prosecution may be deferred for a person charged with a misdemeanor or a Class H or Class I felony, and the defendant may be placed on probation as provided in G.S. 15A-1341(a). The maximum probation period for a deferred prosecution is 2 years. G.S. 15A-1342(a). A district attorney may also have local deferral procedures.

PRAYER FOR JUDGMENT CONTINUED (PJC)

A prayer for judgement continued (PJC) is permissible for any defendant who is found guilty or pleads guilty, except for:

- Impaired driving. State v. Greene, 297 N.C. 305 (1979).
- Solicitation of prostitution. G.S. 14-205.1.
- Speeding in excess of 25 m.p.h. over the posted limit. G.S. 20-141(p).
- Passing a stopped school bus. G.S. 20-217(e).

For Class B1–E felonies committed on or after December 1, 2012, the permissible length of a PJC is limited by G.S. 15A-1331.2.

A PJC is converted into a judgment when it includes conditions that amount to punishment. Conditions not amounting to punishment include payment of costs (G.S. 15A-101(4a)) and a requirement to obey the law. State v. Brown, 110 N.C. App. 658 (1993).

CONDITIONAL DISCHARGE UNDER G.S. 15A-1341(a4)

When a defendant pleads guilty to or is found guilty of any Class H or Class I felony or a misdemeanor other than impaired driving, the court may, on joint motion of the defendant and prosecutor, place the defendant on probation without entering a judgment of guilt, as provided in G.S. 15A-1341(a4). The maximum period of probation for this conditional discharge is 2 years. G.S. 15A-1342(a).

CONDITIONAL DISCHARGE UNDER G.S. 90-96

Certain defendants who plead guilty to or are found guilty of the following drug offenses are eligible for a conditional discharge under G.S. 90-96(a):

- Misdemeanor possession of a controlled substance in Schedules I–VI.
- Felony possession of a controlled substance under G.S. 90-95(a)(3).
- Misdemeanor possession of drug paraphernalia under G.S. 90-113.22.

Eligible defendants are those who:

- Have no prior felony convictions of any type.
- Have no prior convictions under Article 5 of G.S. Chapter 90.
- Have never received a prior discharge and dismissal under G.S. 90-96 or 90-113.14.

The maximum period of probation for this conditional discharge is 2 years. G.S. 15A-1342(a).

G.S. 90-96(a) is mandatory for consenting defendants for offenses committed before December 1, 2013. For offenses committed on or after December 1, 2013, conditional discharge is not required if the court, with the agreement of the district attorney, makes a written finding that the defendant is inappropriate for a conditional discharge for factors related to the offense.

G.S. 90-96(a1) describes a discretionary conditional discharge with slightly broader eligibility than G.S. 90-96(a) and a seven-year look-back limitation on disqualifying prior convictions and conditional discharges. The probation period imposed under G.S. 90-96(a1) shall be for at least 1 year.

Work Release

Work release is the temporary release of a sentenced inmate to work on a job in the free community, outside the jail or prison, for which the inmate is paid by the outside employer.

FELONIES

When a person is given an active sentence for a felony, the court may recommend work release. G.S. 15A-1351(f). The prison system makes the ultimate decision of whether and when to grant work release. G.S. 148-33.1. The court shall consider recommending to the Secretary of Public Safety that any restitution be made out of the defendant's work release earnings. G.S. 15A-1340.36.

MISDEMEANORS

When a person is given an active sentence for a misdemeanor, the judge may recommend work release. With the consent of the defendant, the judge may order work release. G.S. 15A-1351(f). When ordering work release, the judge must indicate the date the work is to begin, the place of confinement, a provision that work release terminates if the offender loses his or her job, and a determination about the disbursement of earnings, including how much should be paid to the assigned custodian for the costs of the prisoner's keep. G.S. 15A-1353(f); 148-33.1(f). The court may commit the defendant to a specific jail or prison facility to facilitate an ordered work release arrangement, as provided in G.S. 15A-1352(d).

PROBATIONARY CASES

The judge should not make any recommendation on work release when placing a defendant on probation; that recommendation should be made, if at all, upon revocation of probation. G.S. 148-33.1(i).

Purposes of Sentencing

Under G.S. 15A-1340.12, the primary purposes of sentencing in North Carolina are to:

PUNISH the defendant, commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the defendant's culpability.

PROTECT the public by restraining the defendant.

REHABILITATE the defendant.

RESTORE the defendant to the community as a lawful citizen.

DETER criminal behavior by others.

Obtaining Additional Information for Sentencing

PRESENTENCE INVESTIGATION

In any case, the court may order a probation officer to make a presentence investigation of the defendant. G.S. 15A-1332(b). To accommodate rotation, a judge who orders a presentence report may direct that the sentencing hearing in the case be held before him or her in another district during or after the session in which the defendant was convicted. G.S. 15A-1334(c).

DWI When a person has been convicted of an offense involving impaired driving, the court may, unless the person objects, request a presentence investigation to determine whether the person would benefit from treatment for habitual use of alcohol or drugs. G.S. 20-179.1.

PRESENTENCE COMMITMENT FOR STUDY

Defendants charged with or convicted of any felony or a Class A1 or Class 1 misdemeanor may, with the defendant's consent, be committed to prison for up to 90 days for diagnostic study. G.S. 15A-1332(c). Contact the Division of Adult Correction (DAC) Diagnostic Services Branch at 919-838-3729 to make arrangements.

PROBATIONARY SENTENCES

Probation is a suspended sentence of imprisonment that requires compliance with conditions set by the court. There are two types of probationary sentences, Intermediate punishment and Community punishment. When the court imposes a probationary sentence, it must indicate the type of probation, the length of the probation period, the conditions of probation, and whether or not delegated authority applies.

Types of Probation

INTERMEDIATE PUNISHMENT (G.S. 15A-1340.11(6))

Intermediate punishment requires that the court suspend the sentence of imprisonment and impose SUPERVISED probation.

FOR OFFENSES COMMITTED ON OR AFTER DECEMBER 1, 2011

An Intermediate punishment is supervised probation that MAY include drug treatment court, a split sentence, or other conditions in the discretion of the court, including any of the "community and intermediate probation conditions" set out in G.S. 15A-1343(a1). Intensive supervision, residential program, and day-reporting center are repealed as Intermediate conditions of probation.

FOR OFFENSES COMMITTED BEFORE DECEMBER 1, 2011

An Intermediate punishment is supervised probation that MUST include at least one of the following six conditions:

- Special probation (split sentence)
- Residential program
- Electronic house arrest
- Intensive supervision
- Day-reporting center
- Drug treatment court

Special Probation (Split Sentence) (G.S. 15A-1351(a))

Special probation, often referred to as a split sentence, is a term of probation that includes a period or periods of incarceration. The total of all periods of special probation confinement may not exceed one-fourth the maximum imposed sentence. Imprisonment may be in prison or a designated jail or treatment facility, as provided in APPENDIX G, Place of Confinement Chart. If confinement is in the jail, the court may order the defendant to pay a $40 per day jail fee. G.S. 7A-313. Imprisonment may be for noncontinuous periods, such as weekends; noncontinuous imprisonment may be served only in a jail or treatment facility, not in prison. No confinement other than an activated sentence may be required beyond two years of conviction.

COMMUNITY PUNISHMENT (G.S. 15A-1340.11(2))

Community punishment requires that the court suspend the sentence of imprisonment and impose SUPERVISED or UNSUPERVISED probation. A Community punishment also may consist of a fine only.

FOR OFFENSES COMMITTED ON OR AFTER DECEMBER 1, 2011

A Community punishment is a non-active punishment that does not include drug treatment court or special probation but that may include any of the "community and intermediate probation conditions" set out in G.S. 15A-1343(a1).

FOR OFFENSES COMMITTED BEFORE DECEMBER 1, 2011

A Community punishment is a non-active punishment that does not include any of the six conditions set out above that formerly made a sentence an Intermediate punishment.

DWI PROBATION

DWI The distinctions between Community and Intermediate punishment do not apply to probationary sentences under G.S. 20-179. However, the following DWI-specific rules apply.

Special Probation (Split Sentence) for DWI (G.S. 15A-1351(a))

The total of all periods of confinement imposed as special probation under G.S. 20-179 may not exceed one-fourth the maximum authorized sentence for the level at which the defendant was punished. G.S. 15A-1351(a). The judge may order that a term of imprisonment imposed as a condition of special probation be served as an inpatient in a facility operated or licensed by the State for the treatment of alcoholism or substance abuse where the defendant has been accepted for admission or commitment as an inpatient. The defendant must bear the expense of any treatment unless the judge orders that the costs be absorbed by the State.

Preference for Unsupervised Probation (G.S. 20-179(r))

Unless the judge makes specific findings in the record about the need for probation supervision, a person sentenced at Levels Three through Five must be placed on unsupervised probation if he or she

- has no impaired driving convictions in the seven years preceding the current offense date and
- has been assessed and completed any recommended treatment.

If a judge places a convicted impaired driver on supervised probation under this subsection based on a finding that supervised probation is necessary, the judge must authorize the probation officer to transfer the defendant to unsupervised probation after he or she completes any ordered community service and pays any fines.

Continuous Alcohol Monitoring (CAM)

In addition to the requirements set out in the DWI sentencing grids, the following rules apply to continuous alcohol monitoring (CAM) ordered as part of a DWI sentence for an offense committed on or after December 1, 2012.

- A judge may order as a condition of probation for any level of punishment under G.S. 20-179 that the defendant abstain from alcohol consumption, as verified by CAM. G.S. 20-179(k2).
- A judge may authorize a probation officer to require a defendant to submit to CAM for assessment purposes if the defendant is required, as a condition of probation, not to consume alcohol and the probation officer believes the defendant is consuming alcohol. If the probation officer orders the defendant to submit to CAM pursuant to this provision, the defendant must bear the costs of CAM. G.S. 20-179(k3).
- A court may not impose CAM pursuant to G.S. 20-179(k2) or (k3) if it finds good cause that the defendant should not be required to pay the costs of CAM, unless the local governmental entity responsible for the incarceration of the defendant in the local confinement facility agrees to pay the costs of the system.

Period of Probation

When a judge suspends a sentence of imprisonment and places a defendant on probation, the judge must decide how long the period of probation will be. The permissible length of the period of probation is governed by statute (it does not flow from the length of the suspended sentence of imprisonment).

Under G.S. 15A-1343.2(d), the original period of probation in a case sentenced under Structured Sentencing must fall within the following limits:

	Community Punishment	Intermediate Punishment
Misdemeanant	6 to 18 months	12 to 24 months
Felon	12 to 30 months	18 to 36 months

The court may depart from these ranges with a finding that a longer or shorter period is required. The maximum permissible period is 5 years.

DWI The permissible length of probation in a DWI case is 5 years, and no special findings are required to impose a probationary sentence of that length.

Conditions of Probation

The sentencing judge has broad discretion to shape the conditions of the defendant's probation. Conditions fall into different categories, some of which apply by default and some which may be added by the court, as indicated in the lists below.

Note: The numbering of the conditions in this handbook mirrors the numbering used in the referenced General Statute sections. Omitted numbers indicate repealed conditions.

REGULAR CONDITIONS (G.S. 15A-1343(b))

Regular conditions of probation apply to each defendant placed on supervised probation unless the presiding judge specifically exempts the defendant from one or more of the conditions in open court and in the judgment of the court. Regular conditions are as follows:

1. Commit no criminal offense in any jurisdiction.

***2.** Remain within the jurisdiction of the court unless granted written permission to leave by the court or the defendant's probation officer.

***3.** Report as directed by the court or the defendant's probation officer to the officer at reasonable times and places and in a reasonable manner; permit the officer to visit the probationer at reasonable times; answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment.

***3a.** Not abscond, by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer. [*Offenses committed on/after 12/1/2011.*]

4. Satisfy child support and other family obligations as required by the court. If the court requires the payment of child support, the amount of the payments shall be determined as provided in G.S. 50-13.4(c).

5. Possess no firearm, explosive device, or other deadly weapon listed in G.S. 14-269 without the written permission of the court.

***6.** Pay a supervision fee.

7. Remain gainfully and suitably employed or faithfully pursue a course of study or of vocational training that will equip the probationer for suitable employment. A defendant pursuing a course of study or of vocational training shall abide by all of the rules of the institution providing the education or training, and the probation officer shall forward a copy of the probation judgment to that institution and request to be notified of any violations of institutional rules by the defendant.

***8.** Notify the probation officer if the probationer fails to obtain or retain satisfactory employment.

9. Pay the costs of court and any fine ordered by the court and make restitution or reparation as provided in G.S. 15A-1343(d).

10. Pay the State of North Carolina for the costs of appointed counsel, public defender, or appellate defender to represent the defendant in the case(s) for which he or she was placed on probation.

12. Attend and complete an abuser treatment program if (i) the court finds that the defendant is responsible for acts of domestic violence and (ii) there is a program, approved by the Domestic Violence Commission, reasonably available to the defendant, unless the court finds that such would not be in the best interests of justice.

***13.** Submit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present, for purposes directly related to the probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful. [*Offenses committed on/after 12/1/2009.*]

***14.** Submit to warrantless searches by a law enforcement officer of the probationer's person and of the probationer's vehicle, upon a reasonable suspicion that the probationer is engaged in criminal activity or is in possession of a firearm, explosive device, or other deadly weapon listed in G.S. 14-269 without written permission of the court. [*Offenses committed on/after 12/1/2009.*]

***15.** Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for him or her by a licensed physician and is in the original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors, or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used. [*Offenses committed on/after 12/1/2009.*]

***16.** Supply a breath, urine, or blood specimen for analysis of the possible presence of prohibited drugs or alcohol when instructed by the defendant's probation officer for purposes directly related to the probation supervision. If the results of the analysis are positive, the probationer may be required to reimburse the Division of Adult Correction (DAC) of the Department of Public Safety for the actual costs of drug or alcohol screening and testing. [*Offenses committed on/after 12/1/2011.*]

***17.** Waive all rights relating to extradition proceedings if taken into custody outside of this state for failing to comply with the conditions imposed by the court upon a felony conviction. [*Offenses committed on/after 12/1/2016.*]

18. Submit to the taking of digitized photographs, including photographs of the probationer's face, scars, marks, and tattoos, to be included in the probationer's records. [*Offenses committed on/after 12/1/2016.*]

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* Does not apply to defendants on unsupervised probation.

If ordered to special probation, the defendant is required to obey the rules and regulations of DAC governing the conduct of inmates while imprisoned and report to a probation officer in the State of North Carolina within seventy-two hours of discharge from the active term of imprisonment.

SPECIAL CONDITIONS (G.S. 15A-1343(b1))

The court may require that the defendant comply with one or more of the following special conditions:

1. Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose. Notwithstanding the provisions of G.S. 15A-1344(e) or any other provision of law, the defendant may be required to participate in such treatment for its duration regardless of the length of the suspended sentence imposed.

2. Attend or reside in a facility providing rehabilitation, counseling, treatment, social skills, or employment training, instruction, recreation, or residence for persons on probation.

2b. Participate in and successfully complete a Drug Treatment Court Program pursuant to Article 62 of Chapter 7A of the General Statutes.

2c. Abstain from alcohol consumption and submit to continuous alcohol monitoring when alcohol dependency or chronic abuse has been identified by a substance abuse assessment.

3. Submit to imprisonment required for special probation under G.S. 15A-1351(a) or -1344(e).

3c. Remain at his or her residence. The court, in the sentencing order, may authorize the offender to leave the offender's residence for employment, counseling, a course of study, vocational training, or other specific purposes and may modify that authorization. The probation officer may authorize the offender to leave the offender's residence for specific purposes not authorized in the court order

upon approval of the probation officer's supervisor. The offender shall be required to wear a device which permits the supervising agency to monitor the offender's compliance with the condition electronically and to pay a fee for the device as specified in G.S. 15A-1343(c2).

4. Surrender his or her driver's license to the clerk of superior court and not operate a motor vehicle for a period specified by the court.

5. Compensate the Department of Environmental Quality or the North Carolina Wildlife Resources Commission, as the case may be, for the replacement costs of any marine and estuarine resources or any wildlife resources which were taken, injured, removed, harmfully altered, damaged, or destroyed as a result of a criminal offense of which the defendant was convicted. If any investigation is required by officers or agents of the Department of Environmental Quality or the Wildlife Resources Commission in determining the extent of the destruction of resources involved, the court may include compensation of the agency for investigative costs as a condition of probation. The court may also include, as a condition of probation, compensation of an agency for any reward paid for information leading to the arrest and conviction of the offender. This subdivision does not apply in any case governed by G.S. 143-215.3(a)(7).

6. Perform community or reparation service under the supervision of the Section of Community Corrections of DAC and pay the fee required by G.S. 143B-708.

8a. Purchase the least expensive annual statewide license or combination of licenses to hunt, trap, or fish listed in G.S. 113-270.2, -270.3, -270.5, -271, -272, and -272.2 that would be required to engage lawfully in the specific activity or activities in which the defendant was engaged and which constitute the basis of the offense or offenses of which he or she was convicted.

9. If the offense is one in which there is evidence of physical, mental, or sexual abuse of a minor, the court should encourage the minor and the minor's parents or custodians to participate in rehabilitative treatment and may order the defendant to pay the cost of such treatment.

9b. Any or all of the following conditions relating to street gangs as defined in G.S. 14-50.16(b): Not knowingly associate with any known street gang members and not knowingly be present at or frequent any place or location where street gangs gather or where street gang activity is known to occur; not wear clothes, jewelry, signs, symbols, or any paraphernalia readily identifiable as associated with or used by a street gang; not initiate or participate in any contact with any individual who was or may be a witness against or victim of the defendant or the defendant's street gang.

9c. Participate in any Project Safe Neighborhood activities as directed by the probation officer.

10. Satisfy any other conditions determined by the court to be reasonably related to his or her rehabilitation.

COMMUNITY AND INTERMEDIATE CONDITIONS (G.S. 15A-1343(a1))

For Structured Sentencing offenses committed on or after December 1, 2011, the court may include any one or more of the following conditions as part of a Community or Intermediate punishment:

1. House arrest with electronic monitoring.

2. Perform community service and pay the fee prescribed by law for this supervision.

3. Submit to a period or periods of confinement in a local confinement facility for a total of no more than 6 days per month during any three separate months during the period of probation. The 6 days per month confinement provided for in this subdivision may only be imposed as 2-day or 3-day consecutive periods. When a defendant is on probation for multiple judgments, confinement periods imposed under this subdivision shall run concurrently and may total no more than 6 days per month.

4. Substance abuse assessment, monitoring, or treatment.

4a. Abstain from alcohol consumption and submit to continuous alcohol monitoring when alcohol dependency or chronic abuse has been identified by a substance abuse assessment. [*Offenses committed on/after 12/1/2012.*]

5. Participation in an educational or vocational skills development program, including an evidence-based program.

6. Submission to satellite-based monitoring, pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes, if the defendant is described by G.S. 14-208.40(a)(2).

INTERMEDIATE CONDITIONS (G.S. 15A-1343(b4))

For offenses committed on or after December 1, 2009, the following conditions of probation apply to each defendant subject to Intermediate punishment, unless the court specifically exempts the defendant from one or more of the conditions in its judgment or order:

1. If required in the discretion of the defendant's probation officer, perform community service under the supervision of the Section of Community Corrections of the Division of Adult Correction (DAC), Department of Public Safety and pay the fee required by G.S. 143B-708.

2. Not use, possess, or control alcohol.

3. Remain within the county of residence unless granted written permission to leave by the court or the defendant's probation officer.

4. Participate in any evaluation, counseling, treatment, or educational program as directed by the probation officer, keeping all appointments and abiding by the rules, regulations, and direction of each program.

SEX OFFENDER CONDITIONS (G.S. 15A-1343(b2))

A defendant who has been convicted of a reportable sex crime or an offense that involves the physical, mental, or sexual abuse of a minor must be made subject to the following conditions. These defendants may not be placed on unsupervised probation.

1. Register as required by G.S. 14-208.7 if the offense is a reportable conviction as defined by G.S. 14-208.6(4).
2. Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the court.
3. Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.
4. Not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor.
5. Not reside in a household with any minor child if the offense is one in which there is evidence of physical or mental abuse of a minor, unless the court expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the minor child's best interest to allow the probationer to reside in the same household with a minor child.
6. Satisfy any other conditions determined by the court to be reasonably related to his or her rehabilitation.
7. Submit to satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes, if the defendant is described by G.S. 14-208.40(a)(1).
8. Submit to satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes, if the defendant described by G.S. 14-208.40(a)(2) and DAC, based on its risk assessment program, recommends that the defendant submit to the highest possible level of supervision and monitoring.
9. Submit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present, for purposes specified by the court and reasonably related to the probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful. For purposes of this subdivision, warrantless searches of the probationer's computer or other electronic mechanism which may contain electronic data shall be considered reasonably related to the probation supervision. Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse DAC for the actual cost of drug screening and drug testing, if the results are positive.

Delegated Authority (G.S. 15A-1343.2)

Delegated authority applies only to crimes sentenced under Structured Sentencing. Thus, it does not apply to DWI probationers sentenced under G.S. 20-179. Unless the presiding judge specifically finds in the judgment of the court that delegation is not appropriate, a probation officer may require an offender to do any of the following:

COMMUNITY PUNISHMENT CASES

1. Perform up to 20 hours of community service and pay the fee prescribed by law for this supervision.
2. Report to the offender's probation officer on a frequency to be determined by the officer.
3. Submit to substance abuse assessment, monitoring, or treatment.
4. Submit to house arrest with electronic monitoring. [*Offenses committed on/after 12/1/2011.*]
5. Submit to a period or periods of confinement in a local confinement facility for a total of no more than 6 days per month during any three separate months during the period of probation. The 6 days per month confinement provided for in this subdivision may only be imposed as 2-day or 3-day consecutive periods. [*Offenses committed on/after 12/1/2011.*]
6. Submit to a curfew which requires the offender to remain in a specified place for a specified period each day and wear a device that permits the offender's compliance with the condition to be monitored electronically. [*Offenses committed on/after 12/1/2011.*]
7. Participate in an educational or vocational skills development program, including an evidence-based program. [*Offenses committed on/after 12/1/2011.*]

INTERMEDIATE PUNISHMENT CASES

1. Perform up to 50 hours of community service and pay the fee prescribed by law for this supervision.
2. Submit to a curfew which requires the offender to remain in a specified place for a specified period each day and wear a device that permits the offender's compliance with the condition to be monitored electronically.
3. Submit to substance abuse assessment, monitoring, or treatment, including [*for offenses committed on/after 12/1/2012*] continuous alcohol monitoring when abstinence from alcohol consumption has been specified as a term of probation.
4. Participate in an educational or vocational skills development program, including an evidence-based program.
5. Submit to satellite-based monitoring if the defendant is described by G.S. 14-208.40(a)(2).
6. Submit to a period or periods of confinement in a local confinement facility for a total of no more than 6 days per month during any three separate months during the period of probation. The 6 days per month confinement provided for in this subdivision may only be imposed as 2-day or 3-day consecutive periods. [*Offenses committed on/after 12/1/2011.*]
7. Submit to house arrest with electronic monitoring. [*Offenses committed on/after 12/1/2011.*]
8. Report to the offender's probation officer on a frequency to be determined by the officer. [*Offenses committed on/after 12/1/2011.*]

The officer may impose the conditions listed above upon a determination that the offender has violated a court-imposed probation condition. For offenses on or after December 1, 2011, the officer may also impose any condition except jail confinement for defendants deemed to be high risk based on a risk assessment. Jail confinement may be ordered only in response to a violation, and only when the probationer waives his or her right to a hearing on the violation.

APPENDIX B: OFFENSE CLASS TABLE FOR MISDEMEANORS

Class A1

Assault by Pointing a Gun (G.S. 14-34)	
*Assault in Presence of Minor (G.S. 14-33(d))	
Assault Inflicting Serious Injury (G.S. 14-33(c)(1))	
Assault on Child under 12 Years of Age (G.S. 14-33(c)(3))	
Assault on Female (G.S. 14-33(c)(2))	
Assault on Government Officer or Employee (G.S. 14-33(c)(4))	
Assault on Handicapped Person (G.S. 14-32.1)	
Assault on School Employee or Volunteer (G.S. 14-33(c)(6))	
Assault with Deadly Weapon (G.S. 14-33(c)(1))	
Child Abuse (G.S. 14-318.2)	
First-Degree Trespass, Utility Premises or Agricultural Center (G.S. 14-159.12)	
Food Stamp Fraud, $100–$500 (G.S. 108A-53.1)	
Interfering with Emergency Communication (G.S. 14-286.2)	
Misdemeanor Death by Vehicle (G.S. 20-141.1)	Class 1 for offenses before 12/1/2009
Secretly Peeping, Second Offense or with Photo Device (G.S. 14-202)	
Sexual Battery (G.S. 14-27.33)	Codified as G.S. 14-27.5A for offenses before 12/1/2015
*Stalking, First Offense (G.S. 14-277.3A)	
Violation of a Valid Protective Order (G.S. 50B-4.1(a))	

Class 1

Aggressive Driving (G.S. 20-141.6)	
Breaking into Coin-Operated Machine, First Offense (G.S. 14-56.1)	
Breaking or Entering Buildings (G.S. 14-54(b))	
Communicating Threats (G.S. 14-277.1)	
Contributing to the Delinquency of a Juvenile (G.S. 14-316.1)	
Cruelty to Animals (G.S. 14-360)	
Cyber-Bullying, Defendant 18 or Older (G.S. 14-458.1)	
Disclosure of Private Images, Defendant under 18, First Offense (G.S. 14-190.5A)	New for offenses on/after 12/1/2015
Domestic Criminal Trespass (G.S. 14-134.3)	
Driving While License Revoked (DWI Revocation) (G.S. 20-28(a1))	
Escape from Local Confinement Facility (G.S. 14-256)	
Escape from Prison, by Misdemeanant (G.S. 148-45)	
Failure to Stop for School Bus (G.S. 20-217)	
Failure to Yield to Emergency Vehicle, Damage or Injury (G.S. 20-157(h))	
False Imprisonment (Common Law)	
Forgery (Common Law)	
Going Armed to the Terror of the People (Common Law)	
Hit-and-Run Property Damage (G.S. 20-166)	
Injury to Personal Property, > $200 (G.S. 14-160(b))	
Injury to Real Property (G.S. 14-127)	
Larceny of Property, Worth $1,000 or Less (G.S. 14-72)	
Misrepresentation to Obtain Employment Security Benefits (G.S. 96-18(a))	
Misuse of 911 System (G.S. 14-111.4)	Class 3 for offenses before 12/1/2013
Obstruction of Justice (Common Law)	
Possession of Certain Schedule II–IV Controlled Substances (G.S. 90-95(d)(2))	
Possession of Non-Marijuana Drug Paraphernalia (G.S. 90-113.22)	
Possession of Handgun by Minor (G.S. 14-269.7(a))	Class 2 for offenses before 12/1/2011
Possession of over One-Half Ounce of Marijuana (G.S. 90-95(d)(4))	
Possession of Stolen Goods (G.S. 14-72)	
Possession/Manufacture of Fraudulent ID (G.S. 14-100.1)	
Purchase/Possess/Consume Alcohol by Person under 19 (G.S. 18B-302)	
Secretly Peeping (G.S. 14-202)	
Shoplifting/Concealment of Merchandise, Third Offense in 5 Years (G.S. 14-72.1)	
Solicitation of Prostitution, First Offense (G.S. 14-205.1)	G.S. 14-204 for offenses before 10/1/2013
Speeding to Elude (G.S. 20-141.5)	
Tax Return Violations (G.S. 105-236)	
Unauthorized Use of a Motor Vehicle (G.S. 14-72.2)	
Use of Red or Blue Light (G.S. 20-130.1)	
Weapon (Non-Firearm or Explosive) on School Property (G.S. 14-269.2)	
Worthless Check, Closed Account (G.S. 14-107(d)(4))	
*Worthless Check, Fourth Conviction (G.S. 14-107(d)(1))	

*Special Sentencing rules apply. *See* APPENDIX H, Special Sentencing Rules.

Class 2

Carrying Concealed Weapons, First Offense (G.S. 14-269(a), (a1))	
Cyber-Bullying, Defendant under 18 (G.S. 14-458.1)	
Cyberstalking (G.S. 14-196.3)	
Defrauding Innkeeper (G.S. 14-110)	
Disorderly Conduct (G.S. 14-288.4)	
Driving after Consuming (G.S. 20-138.3)	
Failure to Appear on a Misdemeanor (G.S. 15A-543)	
Failure to Report Accident (G.S. 20-166.1)	
Failure to Work after Being Paid (G.S. 14-104)	
Failure to Yield to Emergency Vehicle (G.S. 20-157)	
False Report to Police (G.S. 14-225)	
Financial Card Fraud (G.S. 14-113.13)	
First-Degree Trespass (G.S. 14-159.12)	
Furnishing False Information to Officer (G.S. 20-29)	
Gambling (G.S. 14-292)	
Harassing Phone Calls (G.S. 14-196)	
Indecent Exposure (G.S. 14-190.9)	
Injury to Personal Property, $200 or Less (G.S. 14-160(a))	
Marine/Wildlife Violations, Second/Subsequent Offense (G.S. 113-135)	
Possession of Schedule V Controlled Substance (G.S. 90-95(d)(3))	
Racing/Speed Competition (G.S. 20-141.3)	
Reckless Driving to Endanger (G.S. 20-140)	
Resisting Officers (G.S. 14-223)	
Shoplifting/Concealment of Merchandise, Second Offense in 3 Years (G.S. 14-72.1)	
Simple Assault/Assault and Battery/Affray (G.S. 14-33(a))	
Standing/Sitting/Lying on Highway (G.S. 20-174.1)	

Class 3

Allowing Unlicensed Person to Drive (G.S. 20-34)	Class 2 for offenses before 12/1/2013
Conversion by Bailee, Lessee, etc. ($400 or less) (G.S. 14-168.1)	Class 1 for offenses before 12/1/2013
Driving a Commercial Vehicle after Consuming Alcohol (G.S. 20-138.2A)	
Driving While License Revoked (Non-DWI Revocation) (G.S. 20-28(a))	Class 1 for offenses before 12/1/2013
Expired, Altered, or Revoked Registration/Tag (G.S. 20-111(2))	Class 2 for offenses before 12/1/2013
Failure to Comply with License Restrictions (G.S. 20-7(e))	Class 2 for offenses before 12/1/2013
Failure to Return Hired Property (G.S. 14-167)	Class 2 for offenses before 12/1/2013
Failure to Return Rented Property (G.S. 14-168.4)	Class 2 for offenses before 12/1/2013
Fictitious/Altered Title/Registration (G.S. 20-111(2))	Class 2 for offenses before 12/1/2013
Intoxicated and Disruptive in Public (G.S. 14-444)	
*Littering, 15 Pounds or Less, Non-Commercial (G.S. 14-399(c))	
Local Ordinance Violation (G.S. 14-4)	
Marine/Wildlife Violations, First Offense (G.S. 113-135)	
No Operator's License (G.S. 20-7(a))	Class 2 for offenses before 12/1/2013
Obtaining Property for Worthless Check (G.S. 14-106)	Class 2 for offenses before 12/1/2013
Open Container, First Offense (G.S. 20-138.7)	
Operating Unregistered Vehicle or Not Displaying Plate (G.S. 20-111(1))	Class 2 for offenses before 12/1/2013
Operating Vehicle without Insurance (G.S. 20-313(a))	Class 1 for offenses before 12/1/2013
*Possession of Marijuana (One-Half Ounce or Less) (G.S. 90-95(a)(3))	
Possession of Marijuana Drug Paraphernalia (G.S. 90-113.22A)	New for offenses on/after 12/1/2014
Purchase/Possess/Consume Alcohol by 19 or 20 Year Old (G.S. 18B-302(i))	
Second-Degree Trespass (G.S. 14-159.13)	
*Shoplifting/Concealment of Merchandise, First Offense (G.S. 14-72.1)	
Speeding, More Than 15 m.p.h. over Limit or over 80 m.p.h. (G.S. 20-141(j1))	Class 2 for offenses before 12/1/2013
Unsealed Wine/Liquor in Passenger Area (G.S. 18B-401)	
Window Tinting Violation (G.S. 20-127)	Class 2 for offenses before 12/1/2013
*Worthless Check (Simple, $2,000 or Less) (G.S. 14-107(d)(1))	Class 2 for offenses before 12/1/2013

Selected Infractions

Failure to Carry/Sign Registration Card (G.S. 20-57(c))	Class 2 for offenses before 12/1/2013
Failure to Carry License (G.S. 20-7(a))	Class 2 for offenses before 12/1/2013
Failure to Notify DMV of Address Change for License (G.S. 20-7.1) or Registration (G.S. 20-67)	Class 2 for offenses before 12/1/2013
Fishing without a License (G.S. 113-174.1(a) and -270.1B(a))	Class 3 for offenses before 12/1/2013
Operating a Motor Vehicle with Expired License (G.S. 20-7(f))	Class 2 for offenses before 12/1/2013
Ramp Meter Violation (G.S. 20-158(c)(6))	New for offenses on/after 12/1/2014
Violations of Boating and Water Safety Provisions of Art. 1, G.S. Ch. 75A, Except as Otherwise Provided	Class 3 for offenses before 12/1/2013

Note: Offense classifications are subject to change, and different classifications may apply to older offenses.

*Special Sentencing rules apply. *See* APPENDIX H, Special Sentencing Rules.

APPENDIX G: PLACE OF CONFINEMENT CHART

	Active	**Split Sentence at Sentencing** G.S. 15A-1351(a)	**Split Sentence as a Modification of Probation** G.S. 15A-1344(e)	**Confinement in Response to Violation (CRV)** G.S. 15A-1344(d2)	**Quick Dip** G.S. 15A-1343(a1)(3) and -1343.2	**Nonpayment of Fine** G.S. 15A-1352	**Probation Revocation**
Felony G.S. 15A-1352(b)	Division of Adult Correction (DAC)	*Continuous:* Local jail or DAC *Noncontinuous:* Local jail or treatment facility	*Continuous:* Local jail or DAC *Noncontinuous:* Local jail or treatment facility	DAC	Local jail	DAC	Place of confinement indicated in the judgment suspending sentence
Misdemeanor G.S. 15A-1352(a)	*Sentences imposed on/after 10/1/2014:* ≤ 90 days: Local jail > 90 days: Statewide Misdemeanant Confinement Program (SMCP) *Sentences imposed before 10/1/2014:* ≤ 90 days: Local jail 91–180 days: SMCP > 180 days: DAC	Local jail or treatment facility	*Continuous:* Local jail or DAC *Noncontinuous:* Local jail or treatment facility	Place of confinement indicated in the judgment suspending sentence	Local jail	Local jail	Place of confinement indicated in the judgment suspending sentence
Driving While Impaired (DWI) G.S. 15A-1352(f)	*Sentences imposed on/after 1/1/2015:* SMCP, regardless of sentence length *Sentences imposed before 1/1/2015 (G.S. 20-176(c1)):* • Defendants with no prior DWI or jail imprisonment for a Ch. 20 offense: Local jail • Defendants with a prior DWI or prior jail imprisonment for a Ch. 20 offense: - ≤ 90 days: Local jail - 91–180 days: Local jail or DAC, in court's discretion - > 180 days: DAC	Local jail or treatment facility	*Continuous:* Local jail or DAC *Noncontinuous:* Local jail or treatment facility	Place of confinement indicated in the judgment suspending sentence	N/A	N/A	Place of confinement indicated in the judgment suspending sentence

NOTES:

Work release. Notwithstanding any other provision of law, the court may order that a consenting misdemeanant (including DWI) be granted work release. The court may commit the defendant to a particular prison or jail facility in the county or to a jail in another county to facilitate the work release arrangement. If the commitment is to a jail in another county, the sentencing court must first get the consent of the sheriff or board of commissioners there. G.S. 15A-1352(d).

Overcrowded confinement. When a jail is overcrowded or otherwise unable to accommodate additional prisoners, inmates may be transferred to another jail or, in certain circumstances, to DAC, as provided in G.S. 148-32.1(b). A judge also has authority to sentence an inmate to the jail of an adjacent county when the local jail is unfit or insecure, G.S. 162-38, or has been destroyed by fire or other accident, G.S. 162-40.

APPENDIX H: SPECIAL SENTENCING RULES

The listed crimes are a selection of commonly charged offenses that are sentenced under Structured Sentencing, but with the additional rules or exceptions indicated below. The list is not comprehensive.

Statutory Rape of a Child by an Adult (G.S. 14-27.23), and
Statutory Sexual Offense with a Child by an Adult (G.S. 14-27.28)

Mandatory minimum sentence of no less than 300 months and mandatory lifetime satellite-based monitoring upon release from prison. The statutes also provide for a sentence of up to life without parole with judicial findings of "egregious aggravation," but that provision has been ruled unconstitutional. State v. Singletary, 786 S.E.2d 712 (2016) (N.C. Ct. App. 2016).

Assault in the Presence of a Minor on a Person with Whom the Defendant Has a Personal Relationship (G.S. 14-33(d))

A defendant sentenced to Community punishment must be placed on supervised probation. A defendant sentenced for a second or subsequent offense must be sentenced to an active punishment of no less than 30 days.

Concealment of Merchandise (Shoplifting) (G.S. 14-72.1)

First offense. Any term of imprisonment may be suspended only on condition that the defendant complete at least 24 hours of community service.

Second offense within three years of conviction. Any term of imprisonment may be suspended only on condition that the defendant serve a split sentence of at least 72 hours, complete at least 72 hours of community service, or both.

Third or subsequent offense within five years of conviction of two other offenses. Any term of imprisonment may be suspended only on condition that the defendant serve a split sentence of at least 11 days.

If the sentencing judge finds that the defendant is unable to perform community service, the judge may pronounce a sentence that he or she deems appropriate. If the judge imposes an active sentence, he or she may not give jail credit for the first 24 hours of pretrial confinement.

Worthless Checks (G.S. 14-107)

If the court imposes any sentence other than an active sentence, it may require the payment of restitution to the victim for the amount of the check, any service charges imposed by the bank, and any processing fees imposed by the payee, and it must impose witness fees for each prosecuting witness.

Fourth and subsequent offenses. The court must, as a condition of probation, order the defendant not to maintain a checking account or make or utter a check for three years.

Secretly Peeping (G.S. 14-202)

Any probation for a first-time offender may include a requirement that the defendant obtain a psychological evaluation and comply with any recommended treatment. Probation for a second or subsequent offense must include that requirement.

Falsely Representing Self as Law Enforcement Officer (G.S. 14-277)

Intermediate punishment is always authorized for this crime.

Stalking (G.S. 14-277.3A)

A defendant sentenced to Community punishment must be placed on supervised probation.

Littering (15 Pounds or Less, Non-Commercial) (G.S. 14-399(c))

Punishable by a fine from $250 to $1,000. The court may also require 8 to 24 hours of community service, which shall entail picking up litter, if feasible.

Sell or Give Alcoholic Beverage to Person Under 21 (G.S. 18B-302; -302.1)

If the court imposes a non-active sentence, it must impose a fine of at least $250 and at least 25 hours of community service.

Subsequent offense within four years of conviction. If the court imposes a non-active sentence, it must impose a fine of at least $500 and at least 150 hours of community service.

Aiding or Abetting a Violation of G.S. 18B-302 by a Person Over the Lawful Age (G.S. 18B-302.1)

If the court imposes a non-active sentence, it must impose a fine of at least $500 and at least 25 hours of community service.

Subsequent offense within four years of conviction. If the court imposes a non-active sentence, it must impose a fine of at least $1,000 and at least 150 hours of community service.

Habitual Impaired Driving (G.S. 20-138.5)

Mandatory minimum sentence of no less than 12 months, which shall not be suspended. Sentences shall run consecutively with any sentence being served.

Felony Death by Vehicle (G.S. 20-141.4(a1))

Intermediate punishment is authorized for Prior Record Level I defendants.

Aggravated Felony Death by Vehicle (G.S. 20-141.4(a5))

The court must sentence the defendant from the aggravated range, without the need for any findings of aggravating factors.

Possession of Up to One-Half Ounce of Marijuana, 7 Grams of Synthetic Cannabinoid, or One-Twentieth of an Ounce of Hashish (G.S. 90-95(d)(4))

Any sentence of imprisonment must be suspended, and the judge may not impose a split sentence at sentencing.

PROBATION VIOLATIONS

September 2017

Jamie Markham
UNC School of Government

- **Notice**
  - A probationer is entitled to at least 24 hours' notice of any alleged violation of probation. G.S. 15A-1345(e). That notice usually comes via a probation violation report:
    - *Supervised probation*: DCC-10 filed by probation officer.
    - *Unsupervised*: AOC-CR-220, Notice of Hearing on Violation of Unsupervised Probation.
  - To be eligible for revocation, the defendant must receive notice of a revocation-eligible violation. State v. Lee, 232 N.C. App. 256 (2014) (holding that violation report listing charges pending against the defendant was sufficient to put him on notice of a "commit no criminal offense" violation).
- **Jurisdiction/Timing**
  - In general, a judge has power to act on a probation matter at any time before probation expires.
  - The court may act after expiration if a violation report was filed (and file stamped) before the case expired. G.S. 15A-1344(f).
  - If an earlier extension was improper and probation would have expired without it, the court lacks jurisdiction to act on the case now. *E.g.*, State v. Gorman, 221 N.C. App. 330 (2012).
- **Bail**
  - The prehearing release options for a probationer arrested for an alleged violation are generally the same as pretrial release for a criminal charge.
  - If a probationer arrested for an alleged violation also has a pending felony charge or has ever been convicted of a reportable sex crime, the judicial official shall determine whether the probationer poses a danger to the public before imposing conditions of release.
    - If the probationer is deemed dangerous, he or she shall be denied release.
    - If the probationer is not dangerous, conditions of release shall be imposed as usual.
    - If dangerousness cannot be determined, the probationer may be detained for up to seven days to obtain sufficient information.
    - After seven days, if no determination has been made, release conditions shall be imposed as usual. G.S. 15A-1345(b1); AOC-CR-272.
- **Preliminary Hearing**
  - A probationer detained for a probation violation is entitled to a preliminary hearing on the violation within seven working days of his or her arrest, unless the probationer waives it or the final violation hearing is held first.
  - If no preliminary hearing is held within seven working days, the probationer must be released pending a hearing. G.S. 15A-1345(c)–(d).

- **Final Hearing**
  - Venue: Probation violations may be heard in the district where:
    - probation was imposed,
    - the alleged violation took place, or
    - the probationer currently resides. G.S. 15A-1344(a).
    - A court on its own motion may return a probationer to the district where probation was imposed or where the probationer resides for reduction, termination, continuation, extension, modification, or revocation of probation. G.S. 15A-1344(c).
  - Confrontation: A probationer may confront and cross-examine witnesses, unless the court finds good cause for not allowing confrontation.
  - Counsel: A probationer has a right to counsel for a violation hearing. The court must comply with G.S. 15A-1242 when accepting a waiver of the right to counsel for a violation hearing.
  - Evidence:
    - The rules of evidence do not apply at a violation hearing.
    - Hearsay is admissible. State v. Murchison, 367 N.C. 461 (2014).
    - The exclusionary rule does not apply. State v. Lombardo, 74 N.C. App. 460 (1985).
  - Standard of proof: The State must present evidence proving to the judge's *reasonable satisfaction* that the probationer willfully violated a valid condition of probation.
  - Willfulness:
    - The probationer may offer evidence that a violation was not willful. If the probationer offers such evidence, the court must consider it and make written findings of fact clearly showing that it was considered.
    - If the alleged violation concerned the nonpayment of a monetary obligation, the defendant must be given an opportunity to show that the nonpayment was attributable to a good faith inability to pay.
  - Class H and I felonies pled in district court: By default, probation violation hearings for felony defendants who pled guilty in district court are in *superior court*. Hearings may be held in district court with the consent of the State and the defendant. G.S. 7A-271(e).
- **Appeals**
  - A probationer may appeal to superior court for a de novo violation hearing if a district court judge revokes probation or imposes special probation.
  - There is no right to appeal other modifications of probation, including imposition of a period of confinement in response to violation (CRV). State v. Romero, 228 N.C. App. 348 (2013).
  - There is no right to a de novo hearing in superior court if the defendant waived his or her right to a hearing in district court. G.S. 15A-1347.
  - Appeal of a violation hearing held in district court for a Class H or I felony pled in district court is to superior court for a de novo hearing. State v. Hooper, 358 N.C. 122 (2004).

Probation Response Options

	Felony	Non-DWI Misdemeanor Placed On Probation		DWI	Notes
		Before 12/1/15	On/After 12/1/15		
REVOCATION G.S. 15A-1345	Permissible in response to: • New criminal offense • Absconding • Any violation after two prior CRV	Permissible in response to: • New criminal offense • Absconding • Any violation after two prior CRV	Permissible in response to: • New criminal offense • Absconding • Any violation after two prior QUICK DIPS imposed in response to technical violations, either by judge or by probation officer	Permissible in response to: • New criminal offense • Absconding • Any violation after two prior CRV	• No revocation solely for conviction of a Class 3 misdemeanor. G.S. 15A-1344(d) • Deferred prosecution and conditional discharge probation may be revoked for any violation
CONFINEMENT IN RESPONSE TO VIOLATION (CRV) G.S. 15A-1344(d2)	For violations other than: • New criminal offense • Absconding ***90 days[1]***	For violations other than: • New criminal offense • Absconding ***Up to 90 days***	N/A	For violations other than: • New criminal offense • Absconding ***Up to 90 days***	• Must be served continuously (no "weekend CRV") • Will not be reduced by earned time/good time • CRV periods must run concurrently with one another • Max of two CRV in any case
QUICK DIP G.S. 15A-1343(a1)(3) G.S. 15A-1344(d2)	For any violation ***2 or 3 days***	For any violation ***2 or 3 days***	For any violation ***2 or 3 days***	N/A	• No more than 6 quick dip days per month • Used in no more than three separate calendar months
SPECIAL PROBATION (SPLIT) G.S. 15A-1344(e)	For any violation ***Up to ¼ the maximum imposed sentence***	For any violation ***Up to ¼ the maximum imposed sentence***	For any violation ***Up to ¼ the maximum imposed sentence***	For any violation ***Up to ¼ the maximum penalty allowed by law***	May be served in noncontinuous intervals in the Jail
CONTEMPT G.S. 15A-1344(e1)	Permissible in response to any violation ***Up to 30 days***				• Must be proved beyond a reasonable doubt • Counts for credit against suspended sentence
EXTENSION G.S. 15A-1344(d) G.S. 15A-1342(a) G.S. 15A-1343.2(d)	**Ordinary:** Up to 5-year maximum. Permissible at any time after notice and hearing and for good cause shown. **Special purpose:** By up to 3 years beyond the original period if: (1) Probationer consents; (2) During last 6 months of original period; and (3) To complete restitution or med/psych treatment				The ordinary maximum period of probation in deferred prosecution and conditional discharge cases is two years
MODIFICATION G.S. 15A-1344(d)	Permissible at any time after notice and hearing and for good cause shown				
TRANSFER TO UNSUPERVISED	At any time (except sex offenders)	At any time (except sex offenders)	At any time (except sex offenders)	At any time[2]	The court may authorize a probation officer to transfer a person to unsupervised probation after all money is paid to the clerk. G.S. 15A-1343(g).
TERMINATE G.S. 15A-1342(b)	At any time				No statute defines an "unsuccessful" termination
CONTINUE WITHOUT MODIFICATION	At any time				

1. For violations on/after 10/1/2014, CRV may not be reduced by prior jail credit.
2. The judge shall authorize a probation officer to transfer a defendant to unsupervised probation upon completion of community service or payment of any fines, costs, and fees. G.S. 20-179(r).

Introducing Evidence:

Get it In and Keep it Out

JOHN C. DONOVAN
CHARNS & DONOVAN, DURHAM NC

Categories of Evidence

- **Demonstrative Evidence**
  - Evidence that shows what something looks like (a neighborhood) or how something was done (an assault, a sobriety test). This can also be presented as an attorney or witness demo.
- **Documentary Evidence**
  - Paper documents, Phone records, Medical Records, Employment records.
- **Physical Evidence**
  - Physical objects of evidentiary value.

Demonstrations: Safety First!

Laying the Foundation

For physical or documentary evidence, proponent must establish:

- **1) Identity** - Can the witness identify it? (Rule 901)
  - Requirement of an "original" or acceptable "duplicate," (Rules 1001-1003)
- **2) Authentication** – Is the item what you say it is (Rule 901) or is it self-authenticating (Rule 902)?
- **3) Relevance** - Does it make a consequential fact more or less probable? (Rules 401, 402, 403)
- **4) Chain of Custody** – Has it changed or been altered since it was collected? (Custody requirements may be relaxed with some documentary evidence, e.g. medical records).

Relevance: Does it Move the Ball?

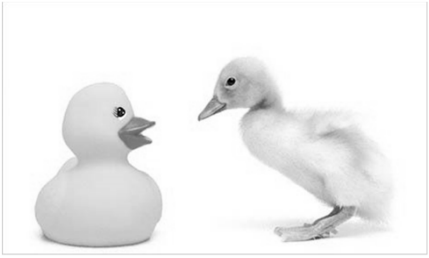
Identification and Authentication

- Often used interchangeably in Rule 901
- Identification – How can the witness identify it?
  - Markings on object, individual characteristics of the item, serial number
  - Witness is record custodian, or created the item herself
- Authentication – How does the evidence "connect to the relevant facts of the case"?
  - Linked to a relevant person, place, time, event?

RULE 901 – Requirement of Authentication or Identification

- Must present "evidence sufficient to support a [rational] finding that the matter in question is what its proponent claims."
  - Intentionally broad language – threshold standard
  - Rule 901 details many different ways to authenticate
  - Even if 'authenticated' and admitted, the jury need not believe the authenticating witness' testimony, or even believe that the admitted evidence is actually what it the witness says it is. Fact finder does not have to rely on evidence just because the judge admitted it.

Just because it's admissible doesn't mean it's persuasive.



Rule 901(b)(1), Testimony of Witness with Knowledge & Chain of Custody

- 901(b)(1) - "Testimony that a matter is what it is claimed to be"- a witness with first-hand knowledge can establish the foundation through testimony.
- Custody authentication : A series of witnesses account for the whereabouts and condition of an object from the time it is found in connection with the relevant facts of the case until the moment it is offered into evidence.

Beware of documentary evidence containing hearsay!

- If the DA attempts to introduce documentary evidence that does not fall under a hearsay exception, OBJECT on hearsay and 14th Amendment Due Process grounds, as well as 6th Amendment Confrontation Clause grounds if appropriate.
- (If you are proffering the evidence, perhaps you are actually "refreshing recollection" of the witness and stopping short of moving to introduce the item.)
- What is the item being offered for? Impeachment purposes? Illustrative purposes? Substantive purposes?
- Hearsay is not permitted if an item is being offered for substantive purposes without a hearsay exception.

Types of Evidence to Introduce

- Phone records, Text messages, Social Media posts
- Business records - Rule 803(6) hearsay exception - including Medical records.
- Photographs / Video
- Voice recordings
- Diagrams

Phone records...

- You represent a man charged with assault on a female in domestic violence court. He wants to testify regarding abusive and/or amorous phone calls made to him by the prosecuting witness. You are seeking to introduce his phone records into evidence or in the alternative, use them to refresh his present recollection. Try this:

Phone Records in District Court

- Mark exhibit for identification
- Show exhibit to opposing counsel
- Ask to approach witness
- Show exhibit to witness – what is it?
- Does defendant own a phone? What is the phone number ?
- Who is the phone carrier? What is the account number?
- What is the billing address?
- Whether he recognizes the phone records
- Whether the information contained on the records matches his personal information and recollection
- Whether the records are an accurate account of the calls the defendant made/received on the date in question
- Ask to admit into evidence

Hearsay Objection

- Without a records custodian in court, phone records are subject to a hearsay objection from the State.
- If you must introduce phone records over the State's objection, use the business record exception to the hearsay rule contained in Evidence Rule 803(6).

The Pause That Refreshes

Present Recollection Refreshed

- If the State's hearsay objection is sustained, ask the witness if reviewing the phone records would refresh his present recollection of the times and dates of the calls in question (Rule of Evidence 612).
- But remember the witness can't directly read from the records and they can't be introduced into evidence over a sustained hearsay objection.
- However the witness is allowed to refer to the document as an aid to memory
- State is entitled to see the document

Phone Records as Business Records (Make the State lay the foundation!)

- Subpoena phone company records custodian
- Custodian must testify from first-hand knowledge that the phone records are:
  - 1) a record of activity on your client's phone number;
  - 2) made at or near the time of the phone activity;
  - 3) recorded by someone with personal knowledge of the phone activity;
  - 4) kept in the ordinary course of business as a regular business practice;
  - 5) by someone with a business duty to record such data.

Computerized Business Records

- If the phone records are computer-generated, the custodian-witness must have personal knowledge of how the computers gather and store information about phone activity so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy. *State v. Springer*, 283 N.C. 627, 636 (1973).

Business Records How To

- 1) Mark documents for identification
- 2) Show documents to opposing counsel
- 3) Approach witness
- 4) Show documents to witness
- 5) Ask witness to identify the documents
- 6) Ask how the records are made, i.e. in the ordinary course of business by someone with a business duty to record such info
- 7) Storage of the documents, where the documents are retrieved from
- 8) Whether it is a regular part of business to keep and maintain this type of record
- 9) Whether documents of this type would be kept under the witness's custody or control – any changes since the records were made?
- 10) Move for admission of the documents

Jury or Judge Still Get to Decide if the Records are Reliable

- Authentication only establishes that the evidence supports a rational finding that they are phone records.
- The jury gets to decide if the records really are accurate.
- And if the record-keeping process really produces reliable records.
- And if the specific foundation witness should actually be believed.
  - *See State v. Crawley,* 217 N.C. App. 509 (Dec. 20, 2011).

The Special Case of Medical Records

- NC law provides a method for you to subpoena medical records and introduce them into evidence without in-person authentication.
- Pursuant to N.C.G.S. §§ 1A-1 Rule 45(c)(2) and 8-44.1, a medical records custodian need not appear in response to subpoena so long as the custodian delivers certified copies of the records requested to the judge's chambers.
- The records must be accompanied by a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business.
- Medical records can come in without further authentication if this procedure is followed.

Photographs

- Photographs are admissible under N.C.G.S. § 8-97 as either illustrative or substantive evidence.
- Under the NC Pattern Jury Instructions, the jury may consider a "substantive" photograph itself as "evidence of facts it illustrates or shows."
- An "illustrative" photograph may only be considered by the jury to the extent it "illustrates and explains" the testimony of a witness and not for any other purpose. The testimony is evidence, not the photograph.

Photographs as Substantive Evidence

- To introduce a photograph as substantive evidence, you must lay a foundation showing that the photograph establishes a relevant fact and that the photograph has not changed or been altered since it was taken.
- To lay such a foundation you need the witness to confirm:
  - First-hand knowledge of when and how the photo was taken, developed or displayed
  - The photograph accurately depicts its subject as it appeared at a relevant time
  - No methods were used during photography, processing or display to distort how the subject looks
  - The photograph has not been altered or changed since it was taken or processed

Introducing Photo - Illustrative

1) Mark exhibit and show to opposing counsel
2) Approach witness and show exhibit
3) Ask whether the witness recognizes and is familiar with the image (person, place, object, etc.) portrayed in this photograph
4) How the witness recognizes what is shown in this photograph
5) Whether the photograph fairly and accurately represents the subject as the witness remembers it on the date in question
6) Would the photo assist you in illustrating your testimony?
7) Move for admission of the exhibit
8) Expect State's request for limiting instruction (illustrative purposes only)
9) Consider publishing photo to jury or placing on display screen during testimony

Introducing Photo - Substantive

- Who took the picture?
- What kind of camera? Film? Digital?
- Does the picture accurately depict how the subject looked at the relevant time?
- How was the picture processed or stored?
- Any special methods used in processing or display to alter how the subject looks?
- Any alterations since the photo was first taken?

Voice Recording

- Authentication of recording upheld where:
  - (1) the call was made to the same phone number as later calls made using the defendant's jail positive identification number;
  - (2) the voice of the caller was similar to later calls placed from the jail using the defendant's jail positive identification number;
  - (3) a witness familiar with the defendant's voice identified the defendant as the caller;
  - (4) the caller identified himself as "Little Renny" and the defendant's name is Renny Mobley; and
  - (5) the caller discussed circumstances similar to those involved with the defendant's arrest.
    - *State v. Mobley,* 206 N.C. App. 285 (Aug. 3, 2010).

Video Authentication

- Authentication upheld where:
  - Witness established that the recording process was reliable by testifying:
    - He was familiar with how video surveillance system worked, equipment was "industry standard," "in working order" on [the date in question], and the videos produced by the surveillance system contain safeguards to prevent tampering.
  - Witness established that the video introduced at trial was the same video produced by the recording process, and was the same video that he saw on the digital video recorder display.
  - Because Defendant made no argument that the video had been altered, the State was not required to offer further evidence of chain of custody.
    - *State v. Snead,* 368 N.C. 811 (April 15, 2016)

Don't allow a mere foundation witness to tell the fact finder what they are seeing!

- Don't blithely allow the witness to narrate the video.
- Unless the video is being used to illustrate what the witness saw with his own eyes, he doesn't get to tell the jury or judge what they are seeing.
- If the video "fairly and accurately depicts" what the witness actually saw, it can be introduced for illustrative purposes and the witness can narrate the video to illustrate her testimony.
  - *State v. Fleming*, ___ N.C. App. ___, 786 S.E.2d 760 (June 7, 2016).

"Functioning Properly" Testimony

- If the witness can only testify that the video equipment was "functioning properly" at the time the video was made, she lacks first hand knowledge and should not be allowed to narrate or explain the video, since it is the video that is evidence, not her testimony.
  - *State v. Snead*, 368 N.C. 811 (April 15, 2016)
- If the witness is not an expert and does not have first hand knowledge of the events shown, she is no better than the jury or judge at deciding what the video shows.
- State might try to qualify the witness as an expert to explain the video. Be ready to challenge under Rule 702.

Video Authentication Elements

- Video equipment functioning properly
  - Date and time stamps accurate
  - Other diagnostics show system working as intended
- System is monitored and maintained to prevent tampering and ensure functioning
- Video has not been edited or altered since the video custodian (store employee) first watched it
  - *See, e.g.*, *State v. Ross*, ___ N.C. App. ___, 792 S.E.2d 155 (Oct. 4, 2016).

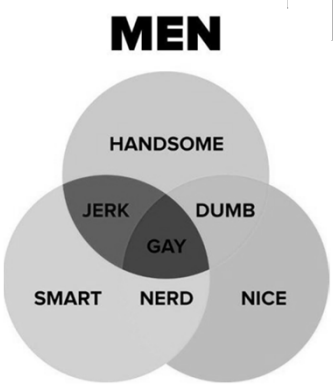
Cell phone video of surveillance video (Pt. 1)

- Officer took cell phone video of store surveillance video monitor.
- Officer testified the cell phone video accurately showed the contents of the video that he had seen at the store.
- The store clerk also reviewed the video but was not asked any questions about the creation of the original video or whether it accurately depicted the events that he had observed on the day in question.

Cell phone video of surveillance video (Pt. 2): Need foundation.

- Need foundation testimony about the type of recording equipment used to make the original surveillance video, its condition on the day in question, and its general reliability.
- Must ask witness if the video accurately depicts events he observed personally.
- Without this, proponent lacks proper foundation for introduction of the video as either illustrative or substantive evidence.
  - *State v. Moore,* ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017).

Diagrams



Diagrams

- A picture is worth a lot – especially if it illustrates your story of innocence.
- Can clarify and simplify complicated testimony
- Can help guide awkward or rambling witnesses
- Can serve as a symbol and reminder of your most important points

Diagrams - Illustrative

1) Mark exhibit and show exhibit to opposing counsel
2) Approach witness and show exhibit
3) Ask if witness is familiar with the area that this diagram depicts. If so, how?
4) Whether this diagram/map appears to be an accurate depiction of the area as the witness recalls it on the date in question
5) Is the diagram to scale?
6) Whether the diagram/map would help the witness describe the area included in the diagram or any events that occurred during the day in question
7) Move to admit the diagram into evidence for illustrative purposes

Internet Diagrams: Substantive

- If the diagram is created by a program such as Google Maps, consider asking the court to take judicial notice of the printout as substantive evidence.
- Potential substantive evidence includes layout of neighborhoods, distance between points, arrangement of highways, etc., under Rule of Evidence 201(b).
- Google Maps' diagrams have been recognized by federal appellate courts as a source containing information "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." See *U.S. v. Perea-Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012); *Ke Chiang Dai v. Holder*, 455 Fed. Appx. 25, 26 n.1 (2d Cir. 2012); *Pahls v. Thomas*, 718 F.3d 1210 n.1 (10th Cir. 2012).

Text Messages - Substantive

- Courts will usually require circumstantial evidence tending to show who sent a text message, above and beyond evidence of the number the text was sent from.
- Rule of Evidence 901(b)(4) allows for the use of "distinctive characteristics and the like" to identify or authenticate writings, including "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."

Text Messages – circumstantial evidence

- Robbery case with multiple accomplices
- A detective testified that he took pictures of text messages on an accomplice's cell phone while searching the defendant's phone incident to arrest.
- The detective identified the photographs in the exhibit as screen shots of the cell phone and testified that they were in substantially the same condition as when he obtained them.
- Another accomplice, with whom the first accomplice was communicating in the text messages, also testified to the authenticity of the exhibit.
- Court rejected defendant's argument that authentication required testimony by phone company employees.
  - *State v. Gray*, 234 N.C. App. 197 (June 3, 2014).

Circumstantial Foundation for Text Messages:

- Defendant's car was seen driving up and down the victim's street on the day of the crime in a manner such that an eyewitness found the car suspicious and called the police;
- Eyewitness provided a license plate number and a description of the car that matched the defendant's car, and testified that the driver appeared to be using a cell phone;
- Morning after the crime, the car was found parked at the defendant's home with some of the stolen property in the trunk;
- Phone was found on the defendant's person the following morning; around the time of the crime, multiple calls were made from and received by the defendant's phone;
- Text message itself referenced a stolen item;
- By analyzing cell towers used to transmit the calls, expert witnesses established the time of the calls placed, the process employed, and a route tracking the phone from the area of the defendant's home to the area of the victim's home and back.
  - *State v. Wilkerson*, 223 N.C. App. 195 (Oct. 16, 2012).

Text Message - Example

1) Mark phone (showing text) as exhibit
2) Show phone to opposing counsel
3) Approach witness and show phone with text
4) Whose phone is this
5) Is the witness familiar with the text – if so, how?
6) What number the text came from
7) Whether the defendant recognizes the number – if so, how?
8) What if any other communication to or from this number during the time in question
9) Later communication – by phone or in person – in response to or referring to this text
10) Other distinctive characteristics of the text message (use of nicknames, reference to prior texts whose origin in verified, reference to private details only the alleged sender would likely know, threats or promises in the text later carried out by alleged sender, later admission by alleged sender, etc.)
11) Who witness believes sent the text
12) Move to admit into evidence
13) Remember – just need enough evidence to allow a rational finding that the text message was sent by the person the witness says sent it!

Facebook & Electronic Media

- You want to introduce into evidence a print-out of threatening messages the prosecuting witness made on the wall of your client's Facebook page.

Facebook Example Part I

1) Whether the witness is familiar with Facebook
2) Whether the witness can explain what Facebook is
3) How the witness got a Facebook account
4) How the witness is identified as a Facebook user
5) How do users gain access to each other's pages
6) Once a user gains access to a page, how users can communicate between pages
7) What the term "wall" means and how it functions
8) The procedures for who can leave messages on witness's wall
9) Whether the witness can identify who writes on their wall
10) Mark exhibit

Facebook Example Part II

11) Show exhibit to opposing counsel
12) Approach witness and show exhibit
13) Whether defendant recognizes the exhibit – if so, how?
14) Who printed the exhibit out? (Witness should have done this)
15) Whether the information about the message writer included on the exhibit (account user name, other identification) matches identifying information of writer
16) Whether this print out is a fair and accurate depiction of the message left on the witness's Facebook page on that specific date and time
17) Who wrote on the witness's wall and the contents of the writing
18) Any distinctive characteristics of the message itself tending to show who wrote it (Rule 901(b)(4))
19) Move to admit print-out into evidence

Not all dogs are this nice.

Social Media Screenshots: Foundation

- Pit bull kills man – voluntary manslaughter charge against owner
- State attempts to introduce MySpace screenshots
- Court finds screenshots properly authenticated where:
  - State presents evidence Defendant goes by "Flex", and page in question has name "Flexugod/7."
  - Page contained photos of the defendant and of the dog allegedly involved in the incident.
  - Link to a YouTube video depicting the defendant's dog.

Screenshots: Circumstantial Foundation

- Circumstantial evidence was sufficient to support a prima facie showing that the MySpace page was the defendant's webpage.
- Court noted: "While tracking the webpage directly to defendant through an appropriate electronic footprint or link would provide some technological evidence, such evidence is not required in a case such as this, where strong circumstantial evidence exists that this webpage and its unique content belong to defendant".
  - *State v. Ford*, ___ N.C. App. ___, 782 S.E.2d 98 (Feb. 16, 2016).

Contact Information:

- Charns & Donovan, Durham NC
- JCDonovanLaw@gmail.com
- (919) 956-7564

Thanks - feel free to contact us with questions!

Medical Records:

If the custodian of records delivers them by subpoena, pursuant to N.C. Gen. Stat. § 1A-1, Rule 45(c)(2), for the sole purpose of delivering the medial records, the custodian need not appear so long as the custodian delivered certified copies of the records requested together with a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business. These materials can come in without authentication.

Assume that you have the records and have subpoenaed your client's doctor (who is not the custodian of records) to testify in court. You are seeking admission of the medical records into evidence on direct examination. You need to ask regarding the following issues:

1) Mark exhibit

2) Show exhibit to opposing counsel

3) Approach witness

4) Show exhibit to witness

5) Familiarity of witness with exhibit for identification

6) Whether witness can identify the documents

7) How the documents were prepared, i.e. in the ordinary scope of the business of the company

8) Storage of the documents, where the documents are retrieved from

9) Whether it is a regular part of business to keep and maintain this type of record

10) Whether documents of this type would be kept under the witness's custody or control

11) Move for admission of the documents

Intoximeter Results:

Your client has been charged for DWI and blew a .04 on the Intoximeter. The DA is proceeding to trial under appreciable impairment and refuses to stipulate to the admission of the test results, so you are cross examining the chemical analyst to admit the test. You need to ask regarding the following issues:

1) Whether arresting officer requested that Client take the Intoximeter

2) Whether officer took Client before a licensed chemical Analyst

3) Whether the Analyst advised Client of rights orally and in writing pursuant to N.C. Gen. Stat. § 20-16.2(a) (i.e. rights to a witness, rights to an alternative test, right of refusal, general revocations for implied consent offenses)

4) Whether client acknowledged or signed the rights form

5) Whether the Analyst's affidavit was signed, sworn to and executed by analyst, in the presence of notary public. N.C. Gen. Stat. § 20-139.1 (e1)

6) Whether the Client's name is on Analyst affidavit.

7) Whether what is commonly referred to as the Skinny Sheet (DHHS 3908/DHHS 4082, which details the results of the test) attached to Analyst affidavit.

8) Whether affidavit reflect that Intoximeter was performed by person with current and valid permit for that Intoximeter instrument by DEHNR & **Department of Health & Human Services.** N.C. Gen. Stat. § 20-139.1(b)(1)

9) Whether the Intoximeter EC/IR-II is an automated instrument that prints results of the analysis. N.C. Gen. Stat. § 20-139.1(b1)(2)

10) Whether the affidavit reflects that a 15 minute observation period was observed. N.C. Gen. Stat. § 20-139.1(b)

11) Whether affidavit and Skinny Sheet reflect that preventative maintenance was performed within 125 test or 4 months, whichever comes first. N.C. Gen. Stat. § 20-139.1(b)(2)

12) Whether the affidavit and Skinny Sheet reflect two consecutive tests within .02 of each other. N.C. Gen. Stat. § 20-139.1(b)(3)

13) Whether the Client was given copy of the results. N.C. Gen. Stat. § 20-139.1

14) What was lower of 2 readings recorded on the test.

MVR or Police Videos:

You represent a client charged with DWI, and you are seeking to have the video of the dashboard mounted camera admitted into evidence. You are cross examining the arresting officer. You need to ask regarding the following issues.

1) Mark exhibit
2) Show exhibit to opposing counsel
3) Approach witness
4) Show exhibit to witness
5) Familiarity of witness with MVR or vehicle recording devices
6) Definition of the recording device
7) How the device works and records
8) How the device is activated and deactivated
9) The procedure for when a recording is initiated and how it is stored
10) Whether there is audio and how that is controlled
11) Whether the equipment was functional during that day/time
12) Whether the taped material is a fair and accurate depiction of the events of the stop
13) Whether the label on the disc containing the video matches the details (complaint number, defendant's name) of the present case
14) Ask to play video
15) Once video is functional, determine if date and time on video match the incident
16) Determine if officer and defendant, as well as defendant's vehicle appear in the tape.
17) Determine if the video fairly and accurately depicts the stop in question
18) Move for admission of video disc

Phone Records:

You represent a client charged with assault on a female in domestic violence court. He wants to testify regarding harassing phone calls made to him by the victim. During direct examination, you are seeking to admit his phone records into evidence or in the alternative, refresh his recollection. You need to ask regarding the following issues:

1) Mark exhibit
2) Show exhibit to opposing counsel
3) Approach witness
4) Show exhibit to witness
5) Whether the defendant owns a phone
6) What the phone number is for the phone
7) Who the defendant's phone carrier is
8) What the defendant's account number is for his phone carrier
9) What is the defendant's billing address
10) Whether they recognize the phone records
11) Whether the information contained on the records matches their personal information
12) Whether the records is an accurate account of the calls the defendant made/received on the date in question
13) Whether the defendant recognizes the victim's number
14) How they recognize the victim's number
15) Whether they received or made any calls from or to the victim during the time in question
16) Move to admit into evidence

Business Records:

You are seeking to introduce financial records and receipts from a local business owner into evidence during direct examination. You need to ask regarding the following issues:

1) Mark exhibit

2) Show exhibit to opposing counsel

3) Approach witness

4) Show exhibit to witness

5) Familiarity of witness with exhibit for identification

6) Whether witness can identify the documents

7) How the documents were prepared, i.e. in the ordinary scope of the business of the company

8) Storage of the documents, where the documents are retrieved from

9) Whether it is a regular part of business to keep and maintain this type of record

10) Whether documents of this type would be kept under the witness's custody or control

11) Move for admission of the documents

Photographs:

You represent a defendant and wish to admit a photograph into evidence showing the condition of his vehicle after an accident during direct examination. You need to ask regarding the following issues:

1) Mark exhibit

2) Show exhibit to opposing counsel

3) Approach witness

4) Show exhibit to witness

5) Whether witness recognizes what is shown in this photograph

6) Whether the witness is familiar with the scene (person, product, etc.) portrayed in this photograph

7) How the witness recognizes what is shown in this photograph

8) Whether the scene portrayed in the photograph fairly and accurately represents the scene as the witness remembers it on the date in question

9) Move for admission of the exhibit

Diagrams:

You represent a defendant and are seeking to admit a diagram into evidence that contains a map of the area, including the defendant's home and the location of the arrest during direct examination. You need to ask regarding the following issues:

1) Mark exhibit

2) Show exhibit to opposing counsel

3) Approach witness

4) Show exhibit to witness

5) Whether witness is familiar with the area that this diagram depicts

6) How they are familiar with this area

7) Whether this diagram/map appears to be an accurate depiction of the areas

8) Whether this diagram/map fairly depicts the area as the witness recalls it on the date in question

9) Whether the diagram/map would be valuable in helping the defendant describe the area included in the diagram or the series of events that occurred during that day

10) Move to admit the diagram into evidence

Facebook or Electronic Media:

You represent a defendant and you are seeking to introduce into evidence a print out of threatening messages that an alleged victim made on the wall of his Facebook page during direct examination. You need to ask regarding the following issues:

1) Whether the witness is familiar with Facebook
2) Whether the witness can explain what Facebook is
3) How the witness got a Facebook account
4) How the witness is identified as a Facebook user
5) How do users gain access to each other's pages
6) Once a user gains access to a page, how users can communicate between pages
7) What the term "wall" means and how it functions
8) The procedures for who can leave messages on witness's wall
9) Whether the witness can identify who writes on their wall
10) Mark exhibit
11) Show exhibit to opposing counsel
12) Approach witness
13) Show exhibit to witness
14) Whether defendant recognizes the exhibit
15) How they recognize the exhibit
16) Whether the information included on the exhibit (account user name, victim's identification) matches information in case
17) Whether this print out is a fair and accurate depiction of the message left on the Facebook page on that specific date and time
18) Whether the victim wrote on the witness's wall and the contents of the writing
19) Move to admit item into evidence

North Carolina Defender Trial School
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PRESERVING THE RECORD AND MAKING OBJECTIONS AT TRIAL:

A Win-Win Proposition for Client and Lawyer

Ira Mickenberg
Public Defender Trainer and Consultant
6 Saratoga Circle
Saratoga Springs, NY 12866
(518) 583-6730
imickenberg@nycap.rr.com

I. The Prime Directive For Preserving the Record and Making Objections at Trial

WHEN IN DOUBT -- OBJECT

A. This cannot be overstated. If you do not object, you have lost -- regardless of whether you are right or wrong about the issue. If you do object, two things can happen, and both of them leave your client in a better position than if you were silent:

1. The objection will be sustained. Whatever you were objecting to has been excluded, and some prejudice has been kept out of the trial. You have also seized the moral high ground for future objections, if the prosecutor violates the judge's ruling.

2. The objection will be overruled. This is not great, but at least you have preserved the issue so that on appeal or habeas, your client will have a chance for reversal. Almost as important, you have begun to educate the judge on the issue, which maximizes your chances of limiting the prosecution's ability to expand the prejudice later in the trial.

B. Many lawyers are afraid to make objections because they think the court may get angry at them for daring to object. There are two answers to this:

1. It is more important to preserve your client's right to appellate and habeas review than it is to have the court happy with you.

2. If a judge is going to get upset with you for objecting, he or she is probably the kind of judge who is already upset with your very existence as a defense lawyer. It's part of our job, so we have to learn to live with it.

MYTH ALERT #1 Objecting too much will make the jurors angry:

When I took trial advocacy courses in law school, I was advised not to object too much, because it will make the jury angry. This is nonsense for two reasons:

1. Jurors don't get angry because you are objecting. They get angry if you are behaving like a jerk when you object. Whining, eye-rolling and other stereotypical lawyer histrionics might offend a jury. Making your objection in an intelligent, calm, sincere and respectful-sounding way lets the jury know you are doing your job and care about your case.

2. The law professors who keep advising you not to object have never gone to jail because they were procedurally barred from raising a winning issue on habeas. Your client will.

II. How to Prepare For Objections and Record Preservation

MYTH ALERT #2: You can't prepare for trial objections. You just have to be very smart and very fast on your feet.

This is also nonsense. It was probably made up by a trial attorney who was invited to teach at an advocacy seminar, and wanted to convince the audience that he was smarter and faster than they were. Like every aspect of a trial, knowing your theory of defense, thinking about your case critically and doing your homework in advance will allow you to make effective objections even if you are really slow on your feet.

A. Know your theory of defense inside out. Go through the exercise of writing out your theory of defense paragraph. Know what story you are going to tell the jury that will convince them to return the verdict you want.

B. Then ask yourself four questions:

1. What evidence, arguments and general prejudice might the prosecutor come up with that will hurt my theory of defense?

2. What legal objections can I make to those tactics?

3. What evidence and arguments will the prosecutor offer in support of his or her theory of the case?

4. What legal objections can I make to the prosecutor's evidence and arguments?

C. Once you have answered these four questions, take the following steps:

1. Go to the law library and research the law on those objections.

2. If you find supportive law, make copies of the relevant cases or statutes. Bring them to court with you, and cite them if you make a motion in limine.

D. If appropriate, make a motion in limine, in writing and on the record, to obtain the evidentiary ruling you want before trial.

E. If a motion in limine is not appropriate, bring the copies of the law you have found with you to trial. This will guarantee that when you make the objection, you will be the only one in the courtroom who is able to cite directly relevant law.

MYTH ALERT #3: You have to choose between preserving the record, and following a good trial strategy.

Baloney. If you know your theory of defense, you will know whether an objection advances the theory or conflicts with it. Object when it advances your theory. Don't object if it conflicts with your theory. Just make sure you know the difference.

III. How to Make Objections

A. Whenever you anticipate a problem, consider making a motion in limine to head off the difficulty and get an advance ruling.

B. When you are unsure whether to object, DO IT. You have far less to lose if you have an objection overruled than if you allow the damaging evidence in without a fight.

C. Be unequivocal when you object, don't waffle.

1. RIGHT: I object.
   WRONG: Excuse, me you honor, but I think that may possibly be objectionable.

2. Don't ever let the judge bully you into withdrawing an objection. If the judge goes ballistic because you have made an objection, just make sure you get it all on the record -- including his ruling.

D. If the objection is sustained, ask for a remedy.

1. Mistrial.

2. Strike testimony.

3. Curative instruction.

E. If you realize that you have neglected to make an objection which you should have made:

1. DON'T PANIC -- but don't just forget about it.

2. Make a late objection on the record.

3. Ask for a remedy which the court can grant now.

   a. Curative instruction/strike testimony.

   b. Mistrial.

IV. If You Happen To Have A Capital Case, Remember To Make Objections On Non-Capital Issues

NOTE: This particularly important because in many jurisdictions death penalty law is so bad that if a reviewing court feels that an injustice is being done, you have to give the court a non-death penalty issue on which to peg its reversal.

A. If you are objecting to the admission of evidence, raise every possible ground:

EX: If you are objecting to admission of a photo array, don't just cite your state's equivalent of Wade. You may also wish to raise:

1. Suggestive behavior by police
2. Photo array unreliable based on nature of the witness
3. Right to counsel.
4. Fruit of an illegal arrest or other police misconduct.
5. Fruit of an illegally obtained statement
    a. Coerced statement
    b. Miranda
    c. Right to counsel
6. The photo array is biased, based on the latest scientific research on photo arrays.

B. If you are relying on scientific or technical information as the basis for your objection, give the court a copy of the relevant articles in advance of the court proceeding. This not only helps your chances of winning the objection, but it educates the judge about the issue.

C. Prosecutorial Misconduct in Summation

1. In General

a. ***It is not impolite to interrupt opposing counsel's summation -- it is mandatory to preserve error and stop the prejudice.***

b. Be sure to ask for some remedy any time an objection is sustained to remarks in a prosecutor's closing argument.

1. Admonish the jury to ignore the statements.
2. Admonish the prosecutor not to do it again.
3. Mistrial.

2. Some common objections to prosecutorial summations.

a. Distorting or lessening the burden of proof.

b. Negative references to the defendant's exercise of a constitutional or statutory right.

1. Pre- and post- arrest silence.
2. Requests for counsel.
3. Not testifying at trial.

c. Religious or patriotic appeals -- particularly now that the government is asserting that everything it doesn't like (including your client) is tied to terrorism.

d. Appeals to sympathy, passion or sentiment.

e. Name-calling or other invective directed at either the defendant, defense counsel or the defense theory.

f. References to evidence that has been suppressed or not introduced.

g. Attacks on the defendant's character, when character has not been made an issue in the case.

D. Some Common Objections in the Evidentiary Portion of the Trial

1. Improper introduction of uncharged crimes or bad acts attributed to the defendant

2. The court improperly limited the defense right to cross-examine witnesses.

3. The court wrongfully permitted the prosecutor to cross-examine the defendant in a prejudicial manner or about improper subjects.

a. The defendant's pre- and post-arrest silence.

b. The defendant's request for a lawyer and consultation with counsel.

4. The prosecutor tried to have a police officer testify about the defendant's invocation of his right to silence or his request for a lawyer.

5. Improper use of expert testimony.

a. There was no need for an expert because a lay jury could understand the subject on its own.

b. The opinion evidence was given outside the area of the expert's expertise.

c. The expert is unqualified.

d. The expert's opinion is so far outside the mainstream of current thought as to be junk science. Make a Daubert challenge.

BASIC EVIDENCE PROCEDURES

Thomas K Maher
Rudolf Maher Widenhouse & Fialko
312 West Franklin Street
Chapel Hill, N.C.

A. He Who Hesitates Is Lost, or at Least Overruled.

Judges are required to make rulings on the admissibility of scores of items of evidence during the course of every trial. They are making these rulings without the factual knowledge of the case that the trial lawyers possess, and not every judge was elevated to the bench based upon their knowledge of the rules of evidence. As a result, some judges look to the lawyers for input on evidentiary rulings. Lawyers who can quickly, and confidently, state the basis for the admissibility of a piece of evidence are more likely to prevail on a contested point than a lawyer who seems hesitant or unsure about the admissibility of their evidence. A lawyer who has demonstrated that they are prepared on both the law and the facts will be more likely to prevail than a lawyer who is not, and this is true regardless of the actual merits of the contested evidence.

This boils down to two simple, but important, points. Be prepared and act as if you know what you are doing. The second is easier to accomplish if you have done the first. Doing the first requires knowing the facts of your case before trial starts, and giving some serious thought to the evidentiary issues that may arise. You need to anticipate the evidence that will be offered by the other side, and determine what legitimate evidentiary

objections you want to make. The harder part is analyzing your own evidence and determining what objections will be made by the prosecution, and being prepared to defend the introduction of your evidence. When you have the luxury of properly preparing your case, you should have a written outline of every witness you expect to testify, and in the margins you should cite the Rule of Evidence that supports your position, or case, for every issue in which there is likely to be a contest of admissibility. You should also make sure you have written down the foundation questions for areas - such as character evidence or contested hearsay - that you intend to introduce. Do not rely solely on your memory. Finally, if you have a case that actually supports your position, make copies and be prepared to hand them up to the judge. State trial judges do not have law clerks, and most truly appreciate getting the legal basis for your position.

Acting as if you know what you are doing is important. Many judges gauge the merits of your argument in part by how strongly you appear to believe what you are saying. An objection that begins :"For the record, I would like to object....." might as well be phrased "I know I am wrong, but to preserve every possible appellate issue I am moving my lips..." A firm objection, followed by a citation to a rule, is much more likely to be taken seriously. Finally, do not talk yourself into having strategic reasons for not arguing evidentiary points; if you do not object, you will never hear the lovely word "sustained," and if you do not offer your evidence, you will never experience the joy of getting in evidence over objection.

B. The Often Overlooked Rule 1101(b)(1)

One of the Rules of Evidence that is often overlooked is Rule 1101(b)(1), which provides that the Rules of Evidence do not apply to: "The determination of questions of fact preliminary to the admissibility of evidence when the issue is to be determined by the court under Rule 104(a)." Rule 104(a) repeats the admonition that the Rules of Evidence do not apply to the court's consideration of facts relied upon in determining the admissibility of evidence, with the exception of rules relating to privilege. So, in offering evidence, or contesting evidence, the preliminary facts that you are relying upon to make your point need not be proved by admissible evidence. Obviously, the more reliable your facts, the more persuasive they will be, but you are not constrained by the Rules of Evidence.

C. Getting to "Sustained"; objecting to the State's Evidence.

Let's face facts, we are not Perry Mason and we seldom win cases through our presentation of irrefutable evidence of our client's innocence. We win cases by raising a reasonable doubt about the State's case, and by ensuring that the State's case does not contain unreliable or unfairly inflammatory evidence. Evidence that may lead an officer to arrest, or your friends and neighbors to assume your client is guilty after reading a news account, is not necessarily admissible at trial. It is your job to keep the jury from hearing that evidence. The purpose of this paper is not to discuss the substantive law governing the admissibility of evidence, but rather the procedures by which you raise

evidentiary issues.[1]

The discussion is geared principally toward jury trials in superior court. District courts, at least nominally, follow the Rules of Evidence. However, there is seldom a good reason for using tools such as a motion in limine in a district court trial, and in cases in which you have a right to a jury trial in superior court in the unlikely event that you lose, there is no need to worry about preserving evidentiary issues for later review. Rules governing the making of objections during trial still apply, although with less formality.

I. Pre-Trial: The Motion in Limine

Serious evidentiary issues can be raised prior to trial by way of a pre-trial motion in limine. A motion in limine is typically aimed at excluding evidence, although nothing prevents a motion being filed seeking a ruling prior to trial that certain evidence is admissible. There is no magic form to a motion in limine, nor is there any requirement that a motion be filed to preserve your right to object to the evidence at trial.[2]

There are benefits and risks to filing in limine motions. The principal benefits are that you are likely to get a more educated ruling from the trial court. and that you can adjust your trial strategy to fit the ruling. The principal risk is that you are likely to get a more educated response from the prosecution, and they can adjust their trial strategy to fit

[1] A useful book that gives coverage of most issues relating to the admissibility of most evidence is Admissibility of Evidence in North Carolina, by Adrienne Fox.

[2] In this regard, I am limiting myself to motions based upon the Rules of Evidence, and not upon violations of your client's constitutional rights. Motions to suppress must be filed according to the rules governing those issues.

the ruling.

In determining whether to file a motion in limine you should consider whether the contested evidence is such that the parties truly need a pre-trial ruling in order to adjust their opening statements and trial preparation. Not every contested item of evidence merits a pre-trial hearing.

Having chosen to litigate the issue prior to trial, your job is to draft a motion and be prepared to argue the point in a manner than educates the court as to the significant facts and law that govern the admissibility of the evidence. A motion that simply states what the evidence is that you wish to exclude, and which cites a Rule, but which contains no analysis is not likely to get you very far. Be prepared, either in the motion or in the hearing, to lay out the relevant factual background and legal basis for your argument. One of the significant benefits of a pre-trial hearing is a more considered ruling, but this will only happen if you take the time to educate the court. In addition, should the issue go up on appeal, and detailed and educated motion that is overruled is likely to get a more considered review that a boilerplate motion.

A final caution about motions in limine. Do not rely upon a pre-trial ruling to preserve your issue for appeal. First, should there be additional grounds for objection that come to light at trial, you need to assert them to preserve them. For example, a Rule 403 objection that is denied pre-trial cannot preserve a hearsay objection to the same evidence that should have been made at trial. Second, unlike the federal rules, the Rules of Evidence in North Carolina do not count a pre-trial ruling as sufficient to preserve an

objection for appeal.[3] To preserve the issue for appeal, you must renew your objection at trial, and if the pre-trial ruling was one that excluded evidence, you must renew your offer of the evidence. If you are going to rely on the trial court granting you a continuing objection to a line of questions, make sure that you are abundantly clear the scope of your objection. Second, make sure that when the same issue arises in the testimony of another witness, or even another portion of that witness's testimony, that you renew your objection. The appellate courts are quick to point out when an objection to improperly admitted evidence is waived by failure to object to the same evidence form another source.

II. At Trial: Convincing the Court and Preserving The Appeal

The first rule is to object when the question is asked or evidence offered. The second rule is to move to strike when the answer is inadmissible, even when the question was proper. Silence will not convince a trial court on its own to exclude evidence, particularly the State's evidence, and will make winning the point on appeal near impossible.

The applicable Rules are 103 and 105. Rule 103(a)(1) states that an erroneous ruling may not be grounds for relief unless a "timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent

[3] Rule 103 of the Federal Rules specifically includes definitive rules prior to trial as sufficient to preserve the issue for appeal.

from the context." Rule 105 provides that: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

The best objection is one that contains the specific ground for the objection, such as "Objection, hearsay." If, in fact, the evidence is inadmissible hearsay, you have properly made the objection. The next best is a simple "objection," as one can always argue on appeal that the basis of the objection was apparent from the context. The worst is the objection that assigns the wrong reason for the objection, as the trial court will rule based upon that ground and the appellate court will generally review only whether the trial court improperly ruled on the reason that was given. If there is more than one ground for your objection, state all of them.

When the objection legitimately requires some explanation or argument, request to approach the bench so that you can fully explain the context of your objection. If this request is denied, make sure you nonetheless state the basis for your objection with sufficient clarity that it can be reviewed if there is a conviction.

Rule 105 requires that a jury be instructed on the limited use of evidence when an appropriate objection is made. So, if you believe that evidence is admissible, but only for a limited purpose, you should object and request a limiting instruction. If you fail to make the objection, in the belief that the jury will not understand the instruction or the belief that everyone will inherently understand the proper purpose of the evidence, you

will have transformed evidence with limited value into evidence that is admissible for all purposes.

When the trial court is faced with an objection to your evidence, you should make clear the basis for admissibility; for example, if evidence of an out-of-court statement is being offered for a non-hearsay purpose, identify that purpose. The biggest stumbling block in reviewing the erroneous exclusion of evidence is the failure to make an adequate offer of proof. Rule 103(a)(2) requires that "the substance of the evidence was made known to the court by offer or was apparent from the context within which the questions were asked." The most appropriate time for making an offer of proof is while the witness from whom the testimony is sought is on the stand, and can be questioned out of the hearing of the jury. Do not delay making an offer of proof until after the witness has left unless the court has given you permission to do so while the witness is available.

III. Laying Foundation

There are categories of evidence that require foundation to be laid before they become admissible. For example, physical evidence and photographs, diagrams and other visual means of conveying information to a jury must have some foundation laid before they are admissible. There is no magic incantation that needs to be recited; rather, you need to show that the item is what it purports to be and that it is relevant. In the case of substantive exhibits - meaning anything that is not merely illustrative - you need to establish that the item is what it purports to be and that it is relevant. This last point

usually means establishing that the item has not changed in any significant way. For example, a knife that is relevant due to the size and shape of the blade would be admissible even if cleaned since it was used, while a knife that is relevant because of the location of blood stains would only be admissible if the stains were still in the same condition as they were at the time of the events. Illustrative evidence need only be shown to be a fair and accurate illustration of the item in question, and to be relevant.

The principal Rule governing foundation issues for physical evidence is Rule 901, which simply states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The Rule then, helpfully, provides 10 non-exclusive examples, including "[t]estimony that a matter is what it is claimed to be."

There is no exhaustive list of the items that need to be authenticated, or the means of authentication that should work. However, several types of evidence come up with sufficient frequency that they merit some discussion.

Photographs: If the relevance depends upon the content of the photograph being a fair representation of s person or scene, then testimony from someone with knowledge sufficient to state that the photographs are a fair and accurate representation of the event or person. A "staged" photograph may still be admissible as illustrative, rather than substantive evidence. There is no need to call the photographer. Some photographs are relevant because they were found in a given location, such as a photograph of a

spouse in a compromising position that the State alleges was the motive for a murder. In such a case the issue is not the accuracy of what the photograph depicts, but rather whether the defendant in fact saw the photograph.

Handwriting: Obviously an expert can be used to identify handwriting as belonging to a given person, but so can anyone with familiarity with the person's handwriting. In addition, the jury can be allowed to make their own comparison if there is a known sample of the person's handwriting.

Identity of Person on Telephone: It is enough for one party to identify the other's voice; it is also enough if the caller identifies themselves or discusses fact that would only be known to a given person. Other circumstantial facts may also be used to identify a caller.

Tape recordings: It is enough that someone involved in conversation that is recorded testify that they have listened to the tape and that it accurately recorded the conversation. The witness must be able to testify that there have been no changes, additions or deletions. To authenticate a transcript the witness must also testify that they have compared the transcript to the tape and that it is accurate.

Diagrams etc: Diagrams, other pieces of evidence that have been created for the purpose of illustrating a place or event, need testimony that they fairly and accurately portray the place or event. This would include police sketches or composite drawings of a suspect. Generally, issues as to the degree to which an exhibit is a fair and accurate depiction of a subject goes to its weight and not its admissibility.

Rule 1001 requires that the "original" of a writing, recording or photograph be used. An original of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect. Printouts from a computer are considered originals. Any print made from a negative is an original of a photograph. Under Rule 1003 duplicates are also admissible unless genuine issue is raised as to the authenticity of the original or the circumstances render it unfair to admit the duplicate in lieu of the original.

There are situations in which a witness's live testimony must also be supported by some manner of foundation. Experts must be shown to be experts, character witnesses must be shown to have sufficient knowledge of the reputation or character of the person. In laying the foundation, as the proponent of the evidence, the foundation should be built into the direct testimony. You want the jury to understand the expert's education, experience etc, and you want the jury to give some weight to the character testimony.

In cases in which you are the opponent of the physical evidence, or live testimony, that you believe is not supported by adequate foundation, you should object before the evidence is admitted, and if need be ask to voir dire the witness. If your voir dire is one that you do not wish the jury to hear, you should ask to conduct the voir dire outside the presence of the jury. When given the chance to voir dire the witness who is being used to lay the foundation, use your time wisely. Questions directed to the adequacy of the foundation will not try the patience of the court, questions that appear to be a fishing expedition may result in your voir being cut short.

Negotiation

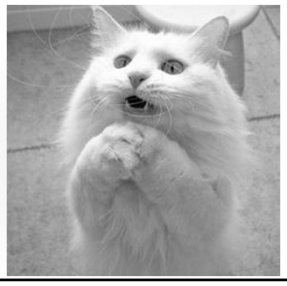
ELIZABETH HOPKINS THOMAS- MANNETTE AND THOMAS, PLLC
PREPARED BY FRAN CASTILLO- FORMER ASSISTANT CAPITAL DEFENDER

Pre-Game

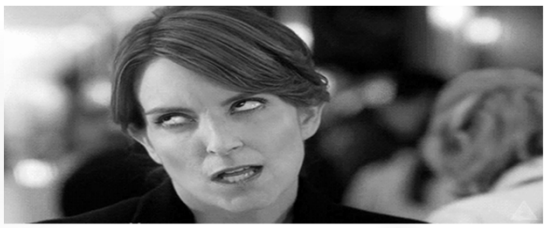
- Before you begin any negotiation these are things you must do to prepare.
- Know the Law and the cast of characters

The Cast of Characters

Starring the Assistant Public Defender



The Client



The ADA (How we see them)

The ADA (How they see themselves)

Know the Law

1) Is the citation correct or are there fatal errors? (charging issues)
2) Review the elements of the offense (proof issues)
3) Practice Note: NC Secretary of State website to verify ownership

Know your Client

1) Interview your client and get all relevant information about the charge.
2) Pay close attention to the relationship between your client and the witness/victim. Is this a relationship you can leverage in negotiation? Parent/child; romantic partners; friends. How heavily invested is the other party?
3) Review the client's record. Do not rely on them for this information.

Know your Victim

- If you are trying to negotiate on your client's behalf you have to acknowledge the victim.
- Who is the victim? Store – did they get the item back? Was it in usable condition? Negotiation: there was no actual harm
- Was the victim a family member or someone known to your client? If so, what is their position? Are they out for blood? Find out their position. Negotiation: witness doesn't want to prosecute

Know your ADA

- What is their personality type?
  - Is this the dedicated DV prosecutor who hates every Defendant?
  - Is this Pollyanna who has never done anything wrong?
  - Is this your lazy ADA who never wants to try a case so they'll make a deal?
- Negotiation is all about knowing your opponent.
- If it's one of the bat-shit crazy unreasonable ADA's you might want to continue the case in order to work with someone else.
- This is about strategy, who will give you what you want.

Know your Officer

Working with your Client

- Start the conversation with your client from a position of power, ie. I have reviewed your case and because of this, this and this, we should see if we can work out a plea to this
- If you start with what do you want to happen your client is going to come back with something unreasonable so limit the expectations from the beginning
- Get your client to commit to 2 options that way you have something to negotiate with rather than being a one-trick pony

Client

- Educate your client as to the most likely outcome in their case. Give the client a choice of two.
- Know you client's bottom line. There is no need in negotiating something with the ADA & then having your client balk.
- Acknowledge your client's limitations. Don't hang them out to dry with terms they can't meet.

Getting the Deal

What Can I do to get you in this car today?

The 2 Minute Pitch

1) Prepare a pitch

a) Here's the crime

b) Here's what we can do to resolve this today. Present your reasonable offer

c) Here's why we should do this – skip trial, victim and defendant have reconciled, there was no actual harm, here's all the great stuff my client is doing, etc.

ADA

2) Have all the questions the ADA will ask already answered.

- I need to talk to the victim (I have and here's their position)
- I need to talk to my officer (done)
- Ross got the dress back and it was undamaged

** Make it easy for the ADA to do what you want by doing the legwork

Once the Deal is Done

a) Review it one final time with your client to make sure he/she understands it and is on board

b) Iron out the details – specify in the plea community service but instead of downtown which entails your client taking 2 buses it can be done at a church around the corner from their house

**make sure to memorialize all details on the shuck or deferral agreement so there's no issue when/if your client has to return for a compliance date

North Carolina Commission on Indigent Defense Services

Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level

Adopted November 12, 2004

Guideline 5.3 Subsequent Filing and Renewal of Pretrial Motions

Counsel should be prepared to raise during the subsequent proceedings any issue that is appropriately raised pretrial, but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Further, counsel should be prepared to renew pretrial motions or file additional motions at any subsequent stage of the proceedings if new supporting information is later disclosed or made available. Counsel should also renew pretrial motions and object to the admission of challenged evidence at trial as necessary to preserve the motions and objections for appellate review.

SECTION 6:

Guideline 6.1 The Plea Negotiation Process and the Duties of Counsel

(a) After appropriate investigation and case review, counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to trial. In doing so, counsel should fully explain to the client the rights that would be waived by a decision to enter a plea and not proceed to trial.

(b) Counsel should keep the client fully informed of any plea discussions and negotiations, and convey to the client any offers made by the prosecution for a negotiated settlement. Counsel may not accept any plea agreement without the client's express authorization.

(c) Counsel should explain to the client those decisions that ultimately must be made by the client, as well as the advantages and disadvantages inherent in those choices. The decisions that must be made by the client after full consultation with counsel include whether to plead guilty or not guilty, whether to accept a plea agreement, and whether to testify at the plea hearing. Counsel should also explain to the client the impact of the decision to enter a guilty plea on the client's right to appeal. Although the decision to enter a plea of guilty ultimately rests with the client, if counsel believes the client's decisions are not in his or her best interest, counsel should attempt to persuade the client to change his or her position.

(d) Notwithstanding the existence of ongoing tentative plea negotiations with the prosecution, counsel should continue to prepare and investigate the case to the extent necessary to protect the client's rights and interests in the event that plea negotiations fail.

(e) Counsel should not allow a client to plead guilty based on oral conditions that are not disclosed to the court. Counsel should ensure that all conditions and promises comprising a plea arrangement between the prosecution and defense are included in writing in the transcript of plea.

Guideline 6.2 The Contents of the Negotiations

(a) In conducting plea negotiations, counsel should attempt to become familiar with any practices and policies of the particular district, judge, and prosecuting attorney that may affect the content and likely results of a negotiated plea bargain.

(b) To develop an overall negotiation plan, counsel should be fully aware of, and fully advise the client of:

(1) the maximum term of imprisonment that may be ordered under the applicable sentencing laws, including any habitual offender statutes, sentencing enhancements, mandatory minimum sentence requirements, and mandatory consecutive sentence requirements;

(2) the possibility of forfeiture of assets seized in connection with the case;

(3) any registration requirements, including sex offender registration;

(4) the likelihood that a conviction could be used for sentence enhancement in the event of future criminal cases, such as sentencing in the aggravated range, habitual offender status, or felon in possession of a firearm;

(5) the possibility of earned-time credits;

(6) the availability of appropriate diversion or rehabilitation programs;

(7) the likelihood of the court imposing financial obligations on the client, including the payment of attorney fees, court costs, fines, and restitution; and

(8) the effect on the client's appellate rights.

Counsel should also discuss with the client that there may be other potential collateral consequences of entering a plea, such as deportation or other effects on immigration status; motor vehicle or other licensing; parental rights; possession of firearms; voting rights; employment, military, and government service considerations; and the potential exposure to or impact on any federal charges.

(c) In developing a negotiation strategy, counsel should be completely familiar with:

(1) concessions that the client might offer the prosecution as part of a negotiated settlement, including but not limited to:

(A) declining to assert the right to proceed to trial on the merits of the charges;

(B) refraining from asserting or litigating any particular pretrial motion(s);

(C) agreeing to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs;

(D) providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity;

(E) waiving challenges to validity or proof of prior convictions; and

(F) waiving the right to indictment and consenting to a bill of information on a related but unindicted offense;

(2) benefits the client might obtain from a negotiated settlement, including but not limited to, an agreement:

(A) that the prosecution will not oppose the client's release on bail pending sentencing or appeal;

(B) that the client may enter a conditional plea to preserve the right to litigate and contest the denial of a suppression motion;

(C) to dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;

(D) that the client will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;

(E) that the client will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range;

(F) that at the time of sentencing and/or in communications with the preparer of a sentencing services plan or presentence report, the prosecution will take, or refrain from taking, a specified position with respect to the sanction to be imposed on the client by the court; and

(G) that at the time of sentencing and/or in communications with the preparer of a sentencing services plan or presentence report, the prosecution will not present certain information;

(3) information favorable to the client concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, educational background, and family and financial status;

(4) information that would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime; and

(5) information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities.

(d) In conducting plea negotiations, counsel should be familiar with:

(1) the various types of pleas that may be agreed to, including a plea of guilty, a plea of *nolo contendere*, a conditional plea of guilty in which the defendant retains the right to appeal the denial of a suppression motion, and a plea in which the defendant is not required to personally acknowledge his or her guilt (*Alford* plea);

(2) the advantages and disadvantages of each available plea according to the circumstances of the case; and

(3) whether the plea agreement is binding on the court and prison authorities.

Guideline 6.3 The Decision to Enter a Plea of Guilty

(a) Counsel shall inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, including its advantages, disadvantages, and potential consequences.

(b) When counsel reasonably believes that acceptance of a plea offer is in the client's best interests, counsel should attempt to persuade the client to accept the plea offer. However, the decision to enter a plea of guilty ultimately rests with the client.

Guideline 6.4 Entry of the Plea before the Court

(a) Prior to the entry of a plea, counsel should:

(1) fully explain to the client the rights he or she will waive by entering the plea;

(2) fully explain to the client the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences the client will be exposed to by entering a plea; and

(3) fully explain to the client the nature of the plea hearing and prepare the client for the role he or she may play in the hearing, including answering questions of the judge and providing a statement concerning the offense.

(b) When entering the plea, counsel should ensure that the full content and conditions of the plea agreement between the prosecution and defense are made part of the transcript of plea.

(c) Subsequent to the acceptance of a plea, counsel should review and explain the plea proceedings to the client, and respond to any client questions and concerns.

Getting Your Client Out of Jail

Mani Dexter
Assistant Public Defender
District 15B

Resources

- U.S. and NC Constitutions and Case Law
- Public Defender Manual (*available on SOG website*)
- N.C.G.S. 15A-531 *et. seq.*
- Local pretrial release policy (15B Pretrial Release Policy for Orange/Chatham)
- Other sources

Case Law – U.S.

- ***Stack v. Boyle***, 342 U.S. 1, 4, 5 (1951)

  "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *(Internal citation omitted.)*

  "Bail set at a figure higher than an amount reasonably calculated to [assure the defendant's presence at trial] is excessive under the Eighth Amendment."

- ***Gerstein v. Pugh***, 420 U.S. 103, 114 (1975)

  "The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."

- ***U.S. v. Salerno***, 481 U.S. 739, 755 (1987)

  "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."

Case Law - NC

- ***State v. Knoll***, 322 N.C. 535 (1988)
  - DWI – importance of timely opportunity to gather evidence
- ***State v. Thompson***, 349 N.C. 483, 499, 500 (1998)
  - DV 48-hour hold unconstitutional as applied
  - "[I]t is beyond question that . . . liberty, is a fundamental right."
  - "The right to freedom prior to trial is reflected in the principle that there is a presumption of innocence in favor of the accused which is the undoubted law, axiomatic and elementary, and lies at the foundation of the administration of our criminal law." *(Internal citations omitted.)*

From G.S. 15A-534(b)

- "The judicial official in granting pretrial release **must impose** condition (1) [written promise], (2) [unsecured bond], or (3) [custody release] . . . unless he determines that such release will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses." (e*mphasis added*)

From 15B Pretrial Release Policy

- "The policy of the State of North Carolina on bail is to impose the **least restrictive nonmonetary** form of pretrial release that will reasonably assure the defendant's appearance in court" (*emphasis added*)

ABA Criminal Justice Section Standards on Pretrial Release

The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many circumstances, deprives their families of support.

Standard 10-1.1

ABA Criminal Justice Section Standards on Pretrial Release

Financial conditions other than an unsecured bond should be imposed only when no less restrictive conditions of release will reasonably ensure the defendant's appearance in court. The judicial official should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay.

Standard 10-5.3(a)

U.S. Department of Justice

"Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release[.]"

"As the Department of Justice set forth in detail in a federal court brief last year, and as courts have long recognized, any bail practices that result in incarceration based on poverty violate the Fourteenth Amendment."

Letter from Vanita Gupta, Principal Deputy Assistant Attorney General, Civil Rights Div., Dep't of Justice, and Lisa Foster, Director, Office for Access to Justice, to Colleagues 2 (Mar. 14, 2016)

U.S. Department of Justice

"[T]he Fourteenth Amendment prohibits a jurisdiction from categorically imposing different criminal consequences – including and especially incarceration – on poor people without accounting for their indigence."

"[A] jurisdiction may not use a bail system that incarcerates indigent individuals without meaningful consideration of their indigence and alternative methods of assuring their appearance at trial."

USDOJ Amicus Brief, *Walker v. City of Calhoun*, No. 16-10521-HH (11th Cir., Brief filed 8/18/2016)

Importance of Release

- Psychological effects on client and family
- Assistance with defense
- Treatment
- Contribution to society/family
- Better chance at trial
- Better sentences
- Financial burden on client's family

See LJAF research, PJI documents, etc.

So the judge MUST release your client, right?

Factors Working Against You:

- Audience – open court
- Prosecutor
- Err on the side of caution
- Status quo versus change
- **"Danger to community"**
- **What kind of harm?**

The earlier you can be involved, the better.

Information You Need

- From your client:
  - Details of offense conduct (use with caution)
  - Personal characteristics of client
    - Record (but check accuracy)
    - Family
    - Work/school
    - Ties to community (church, volunteer, etc.)
    - Treatment (use with caution)
    - Financial situation

More Information You Need

- Client's future
  - Will live where? Work where?
  - Get client contact information
- Talk to investigating officer:
  - Get details of offense conduct (official state version)
  - Might say something about client (but think long-term)

Possibilities

If Pretrial doesn't take your client (or you don't have Pretrial in your county):

Talk with prosecutor

Possible results

Reduce or unsecure bond

Conditions to ensure appearance/safety

Release to treatment facility

Reduce or unsecure bond in exchange for no PC hearing

Other – be creative

Pitfalls (15A-533)

- No right to pretrial release if:
  - In custody or should be in custody
- Rebuttal presumption against release if:
  - Charged with trafficking while on pretrial release, AND A-E felony conviction within 5 years
  - Gang involvement in new charge while on pretrial release, AND prior gang conviction within 5 years
  - Charged with felony/A1 involving firearm AND
    - On pretrial release for same, OR
    - Conviction for same within 5 years

Pitfalls (15A-534)

- Prior FTA on same charges
  - At least same release conditions as most recent OFA
  - If no release conditions in OFA, double bond
  - If no bond listed, bond at least $1000
- Charged with felony, already on probation
  - Determine "danger to the public"
  - Can hold to get information (96 hours from arrest)
- On pretrial release for previous charge
  - Magistrate's discretion, but may double bond

Other Pitfalls

- DV cases (15A-534.1)
- Impaired Driving charges (15A-534.2)
- Communicable Diseases (15A-534.3)
- Sex Offenses (15A-534.4)
- Threat to Health/Safety of Others (15A-534.5)
- Manufacturing Meth charges (15A-534.6)
- Probation Violations??

Solutions to Pitfalls

- Talk with prosecutor
- Address at first appearances
- Automatic bonds might violate 8th and 14th Amendments
- Remember presumption of release
- Remember reasons for allowing secured bonds

Last Resort

File bond motion.

Have bond hearing.

Bond Motion

- Check local rules
- You choose date
- Bonds can go up
- Successive bond motions might be more difficult

Preparation for Hearing

- Characteristics of client
- Charged conduct
- Bond range from local guidelines
  - In 15B – personalized to client's prior record level
- Consider witnesses and/or letters

Bond Hearing

- Judge must consider (G.S. 15A-534(c)):
  - Nature/circumstances of charged offense
  - Weight of evidence
  - Characteristics of your client: family ties, employment, finances, character, mental condition
  - Length of residence in community
  - Prior ***convictions***
  - History of flight/FTAs

Remind Judge

- Least restrictive possible to ensure appearance
- Lack of family resources shouldn't keep someone in custody
- Judge must make findings unless written promise, unsecured bond, or custody release
  - 15B – findings must be in writing
- 15B – only one bond for multiple charges

Danger to Community *(Theoretically)*

Only if the [judicial] official determines that none of [the non-monetary] conditions will assure the appearance of the defendant or protect against other possible harm may he impose the requirement that the defendant post a secured bond . . . **[H]is dangerousness and potential for harm, other than the risk of non-appearance, are not factors to be considered in setting the conditions of release on the secured bail bond**.

Official Commentary
15A-534 (emphasis added)

Secured Bond only if other release conditions…

- Will not reasonably assure the appearance of the defendant as required;
- Will pose a danger of injury to any person; or
- Is likely to result in:
  - Destruction of evidence,
  - Subornation of perjury, or
  - Intimidation of potential witnesses

15A-534(b)

Danger to the Public 15A-534(d2)

- Shall be considered when on probation and charged with felony
- Determination must be written
- If danger exists, then secured bond or EHA
- If not enough information to determine, then hold up to 96 hours for additional information (document hold and reasons in writing)

Danger to Community *(Realistically)*

- Prior record – explain, if needed/possible
- If MH/SA issues, address treatment plan
  - Use with caution
- Supervision
  - Family
  - Pretrial Services
  - Probation
  - GPS/SCRAM

Why your client should be out

- Default is release
- Lots of costs to society for keeping someone locked up, especially pretrial
- Your client is a better citizen out of jail than in
- No flight risk – ties to community
- Can't be kept in custody solely because of $
- Other reasons unique to your case/client

Harm to Society

- Job loss leads to housing loss, harms kids
  - Society pays for housing/medical/food/etc.
- Outcomes at resolution of case are worse if held until resolution (LJAF studies)
  - 4 times more likely to get jail sentence
  - 3 times longer jail sentences
  - 3 times more likely to be sentenced to prison
  - 2 times longer prison sentences
- Society pays for increased custody and effects

Harm to Society (not as obvious)

- Longer pretrial detentions for low-risk people increases likelihood of FTA
- Detaining low/moderate-risk people pretrial even for a few days increases risk of new criminal activity during case and after
- Longer pretrial detentions (starting at two days) increases likelihood of new charges within one and two years

The Hidden Costs of Pretrial Detention

Laura and John Arnold Foundation (LJAF)

Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger

Our community pays and is harmed when we detain low/moderate risk people pretrial

Successive bond motions

- Proceed with caution
- Nothing in statutes prohibiting lots of bond motions, BUT, not much point unless something has changed (client's circumstances, state of the law, state's case, passage of time)
- Strength of case can be an issue and can change

When all else fails…

- Talk to ADA (again)
- Be heard in Superior Court (15A-538)

Advantages in Superior Court

- Court of record
- Opportunity to present case in writing
- Superior court judges not necessarily inclined to go along with district court judge determinations
- Maybe better chance to be heard
- Client can see you are working for him/her

The Hidden Costs of Pretrial Detention

Christopher T. Lowenkamp, Ph.D.

Marie VanNostrand, Ph.D.

Alexander Holsinger, Ph.D.

November, 2013

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EXECUTIVE SUMMARY

In the criminal justice system, the time between arrest and case disposition is known as the pretrial stage. Each time a person is arrested and accused of a crime, a decision must be made as to whether the accused person, known as the defendant, will be detained in jail awaiting trial or will be released back into the community. But pretrial detention is not simply an either-or proposition; many defendants are held for a number of days before being released at some point before their trial.

The release-and-detention decision takes into account a number of different concerns, including protecting the community, the need for defendants to appear in court, and upholding the legal and constitutional rights afforded to accused persons awaiting trial. It carries enormous consequences not only for the defendant but also for the safety of the community.

Little is known about the impact of pretrial detention on pretrial outcomes and post-disposition recidivism. Some researchers and legal professionals believe there is a relationship between the number of days spent in pretrial detention and the defendant's community stability (e.g., employment, finances, residence, family), especially for lower-risk defendants. Specifically, the defendant's place in the community becomes more destabilized as the number of days of pretrial detention increases. This destabilization is believed to lead to an increase in risk for both failure to appear and new criminal activity. While this purported relationship makes intuitive sense, there has been no empirical evidence in existence to support or refute this idea. Beyond the relationship between length of pretrial detention and pretrial outcomes, there is an additional underdeveloped area of research — the impact of pretrial detention on post-disposition recidivism.

Using data from the Commonwealth of Kentucky, this research investigates the impact of pretrial detention on 1) pretrial outcomes (failure to appear and arrest for new criminal activity); and 2) post-disposition recidivism.

REPORT HIGHLIGHTS:

- Detaining low- and moderate-risk defendants, even just for a few days, is strongly correlated with higher rates of new criminal activity both during the pretrial period and years after case disposition; as length of pretrial detention increases up to 30 days, recidivism rates for low- and moderate-risk defendants also increases significantly.
- When held 2-3 days, low-risk defendants are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours.
- When held 8-14 days, low-risk defendants are 51 percent more likely to commit another crime within two years after completion of their cases than equivalent defendants held no more than 24 hours.

Data on 153,407 defendants booked into a jail in Kentucky between July 1, 2009, and June 30, 2010, were used to answer two broad research objectives: 1) Investigate the relationship between the length of pretrial detention and pretrial outcome; and 2) Investigate the relationship between pretrial detention, as well as the length of pretrial detention, and new criminal activity post-disposition. Depending on the research objective and its associated research questions, subsamples of cases were drawn from this larger dataset of 153,407 defendants.

Multivariate models were generated that controlled for relevant factors including risk level, supervision status, offense type, offense level, time at risk in the community, demographics, and other factors. Three critical findings related to the impact of pretrial detention were revealed.

1. **Length of Pretrial Detention and Failure to Appear (FTA)** — Longer pretrial detentions, up to a certain point, are associated with the likelihood of FTA pending trial. This finding seems to be more consistent for defendants deemed to be low risk.

2. **Length of Pretrial Detention and New Criminal Activity (NCA)** — Longer pretrial detentions are associated with the likelihood of NCA pending trial. This is particularly true for defendants deemed to be low risk. The longer low-risk defendants are detained, the more likely they are to have new criminal activity pending trial. Defendants detained 2 to 3 days are 1.39 times more likely to have NCA than defendants released within a day; those detained 31 or more days are 1.74 times more likely.

3. **Pretrial Detention and Post-Disposition Recidivism** — Being detained pretrial for two days or more is related to the likelihood of post-disposition recidivism. Generally, as the length of time in pretrial detention increases, so does the likelihood of recidivism at both the 12-month and 24-month points.

INTRODUCTION

Study Description

The current study investigates the correlation of pretrial detention with 1) pretrial outcomes (failure to appear, hereafter FTA, and arrest for new criminal activity, hereafter NCA); and 2) post-disposition recidivism (new criminal activity post-disposition, hereafter NCA-PD).

Research Objectives and Questions

The study includes two (2) research objectives and 8 related research questions, as shown below.

1. **Investigate the relationship between the length of pretrial detention and pretrial outcome.**
    a. Is the length of pretrial detention related to the likelihood of pretrial FTA once other relevant statistical controls are considered?
    b. Do the observed effects (of days spent in detention when predicting FTA) differ for sub-populations of defendants?
    c. Is the length of pretrial detention related to the likelihood of pretrial NCA once other relevant statistical controls are considered?
    d. Do the observed effects (of days spent in detention when predicting NCA) differ for sub-populations of defendants?

2. **Investigate the relationship between pretrial detention, as well as the length of pretrial detention, and new criminal activity post-disposition (NCA-PD).**
    a. Is pretrial detention related to NCA-PD?
    b. Do the observed effects of pretrial detention differ for sub-populations of defendants (likelihood of 12-month NCA-PD and 24-month NCA-PD)?
    c. Is the length of pretrial detention related to NCA-PD?
    d. Do the observed effects of the length of pretrial detention differ for sub-populations of defendants (likelihood of 12-month NCA-PD and 24-month NCA-PD)?

Dataset

The sample used for the current study includes all defendants arrested and booked into a Kentucky jail between July 1, 2009, and June 30, 2010. This led to a working sample size of 153,407. The dataset does not represent unique individuals, but rather includes all bookings within the study period. (Some individuals were booked multiple times within the timeframe; calculating a unique count of individuals could not be performed reliably, as unique identifiers were missing in almost 10% of the cases.) All cases in the sample reached final case disposition. These data served as the sample of defendants used to respond to the research objectives. Depending on the research objective and its associated research questions, subsamples of cases were drawn from this larger dataset of 153,407 defendants. All bookings from July 1, 2010, to June 30, 2012, were added to the dataset to develop post-disposition measures of arrest for new criminal activity.

The measures in this study included the following:

- defendant demographics;
- defendant risk;
- offense characteristics including offense level (e.g., felony or misdemeanor) as well as felony offense class (A, B, C, D) for some analyses;
- details of pretrial status (released or detained, and length of detention);
- failure to appear and arrest for new criminal activity during pretrial release;
- time at risk in the community for both pretrial and post-disposition periods; and
- new criminal activity post-disposition (NCA-PD).

Methodology

Bivariate and multivariate models were used to complete the analysis. Most commonly used was logistic regression modeling, a procedure designed for what is generally referred to as a dichotomous or binary outcome variable. (Recidivism, for example, is typically considered either a "yes" or "no" outcome, regardless of measurement procedure.) Logistic regression, like many types of regression, allows for several variables to be entered into a model while statistically controlling for the effects of other variables. Generally, when a multivariate model is conducted, the variable of interest is highlighted (e.g., the effect of pretrial detention, or the length of pretrial detention) while controlling for the effects of other variables (such as age, race, gender, risk level, and the like).

Also incorporated in the analysis are Poisson regression models, which are typically used when the outcome variable is a discrete count (e.g., the number of months someone is sentenced to prison or jail, or the number of times someone is arrested). Counts tend to be distributed in such a way that the assumptions of linear regression are violated; therefore, an adjustment in modeling is required. Poisson regression, like logistic regression and other types of regression, allows for several variables to be entered into a model while statistically controlling for the effects of other variables. This allows for the examination of the effect of one or more variables of interest (e.g., pretrial detention and/or the length of pretrial detention).

The county of case origin, although not shown in any of the multivariate tables published here, was included in every multivariate model constructed and estimated. Robust standard error estimates were developed with clustering at the county level and were used in all multivariate analyses.

SAMPLE DESCRIPTION

The dataset described above, including 153,407 records representing all defendants arrested and booked into a Kentucky jail between July 1, 2009, and June 30, 2010, was used for the analysis.

There are 120 counties and 84 local jails in Kentucky. Table A-1 (see Appendix A) provides a jail-by-jail breakdown, identified by county location, and the number of cases originating from each jail. The number of cases is presented (N), as well as the percentage of the total that each jail comprises. Results are grouped by Pretrial, NCA-PD (12 months), and NCA-PD (24 months) samples. The vast majority of jails contributed 3% or less of the total sample, with the noted exception of Jefferson County (approximately 19%) and Fayette County (approximately 7%).

Demographics

Table 1 presents descriptive information for the entire state sample, grouped in three different categories, or models (Pretrial, NCA-PD 12 months, and NCA-PD 24 months). Taken as a whole, the sample is approximately 26% female, 74% male, 79% white, 17% black, and 4% hispanic. The average age is approximately 33, and approximately 20% reported being married.

The different samples used to answer the research questions in this report tend to be similar. In most instances, the number of defendants who are classified as hispanic or another ethnicity or race is insufficient to be included in the statistical models as control variables. Therefore, most of the analyses only include white and black as control variables.

Offense Information

Table 1 also presents the original offense types[1] for the entire sample and each sub-sample used for the different research questions. Generally, drug, traffic, theft, and driving under the influence appear to be the most frequent offense types across the three samples.

1 It is important to note that defendants could contribute more than one offense to the offense type categorizations.

Risk Level

Kentucky currently uses a research-based and validated assessment tool (Kentucky Pretrial Risk Assessment [KPRA]) to assess the risk of pretrial failure (FTA and NCA). The KPRA consists of 12 risk factors, including measures of offense class, criminal justice status, criminal history, failure to appear, and community stability, with each risk factor having a corresponding weight (or points). The weights are summed for a total risk score. The risk scores are categorized into three levels of risk — low, moderate, and high. For the sample, the largest risk category was low risk, with 53% to 67% falling into that level across the five models. The moderate risk level ranged between 29% and 40%, and the high risk level ranged between 3% and 7%.

Days in Pretrial Detention

Table 1 also presents information across the three models regarding days spent in pretrial detention. Cases in the Pretrial model had the lowest average (6.38 days). This fact makes intuitive sense as the pretrial sample included only those defendants who were, at some point, released pretrial. The other models included defendants who were released as well as those who were detained for the entire pretrial period.

Outcomes

Rates of FTA and NCA were presented for the Pretrial model only, with an 11% FTA rate and a 10% NCA rate. Other outcomes include the 12-month and 24-month recidivism rates for the NCA-PD 12 month and NCA-PD 24 month models. The recidivism rate is 24% at 12 months and 34% at 24 months.

Table 1. Descriptive Statistics for Three Models

	PRETRIAL MODEL		NCA-PD 12 MONTH MODEL		NCA-PD 24 MONTH MODEL	
	N	% or $\overline{X}$	N	% or $\overline{X}$	N	% or $\overline{X}$
Age	111688	33.18	142193	33.47	120962	33.44
Female	111623	27.96	142145	26.12	120942	25.94
White	110653	80.59	141092	79.62	120027	79.35
Black	110653	17.21	141092	18.01	120027	18.06
Hispanic	91153	5.00	117917	5.30	99711	5.82
Married	108371	21.15	138607	19.96	112868	19.74
Risk Level						
Low	79901	67.22	98707	62.36	82916	63.06
Moderate	79901	29.42	98707	32.89	82916	32.44
High	79901	3.36	98707	4.07	82916	4.50
Offense Type						
Drugs	112030	24.54	142571	23.24	121299	22.24
Violent	112030	4.15	142571	4.36	121299	4.12
Domestic Violence	112030	6.71	142571	7.09	121299	6.86
Sex Offense	112030	0.62	142571	0.45	121299	0.38
Firearm	112030	2.01	142571	1.90	121299	1.78

Theft	112030	18.44	142571	18.96	121299	18.59
Traffic	112030	30.10	142571	28.11	121299	28.72
Driving Under the Influence	112030	22.37	142571	20.68	121299	20.55
Felony	112030	27.15	142571	26.61	121299	24.16
Time at Risk	109841	103.89				
Days Spent In Detention						
1 Day	112030	42.34	141676	32.92	120505	33.19
2 to 3 Days	112030	35.61	141676	33.58	120505	34.27
4 to 7 Days	112030	8.42	141676	10.16	120505	10.46
8 to 14 Days	112030	5.99	141676	9.85	120505	10.16
15 to 30 Days	112030	3.34	141676	5.20	120505	5.25
31+ Days	112030	4.31	141676	8.29	120505	6.67
Mean Days	112030	6.38	141676	12.44	120505	9.20
Detained Pretrial Yes/No	112030	0.00	142571	25.32	121300	26.87
FTA	112030	11.12				
NCA	112030	10.33				
Sentence in Months						
12 Month Recidivism			142571	23.65		
24 Month Recidivism					121300	33.51

RESEARCH OBJECTIVE ONE:

Investigate the relationship between the length of pretrial detention and pretrial outcome

Research Questions

1a. Is the length of pretrial detention related to the likelihood of pretrial FTA once other relevant statistical controls are considered?

1b. Do the observed effects (of days spent in detention when predicting FTA) differ for sub-populations of defendants?

1c. Is the length of pretrial detention related to the likelihood of pretrial NCA once other relevant statistical controls are considered?

1d. Do the observed effects (of days spent in detention when predicting NCA) differ for sub-populations of defendants?

Primary Findings

Overall, when other relevant statistical controls are considered, defendants who are detained 2 to 3 days pretrial are slightly more likely to FTA than defendants who are detained 1 day (1.09 times more likely). Examining sub-populations of defendants revealed significant differences, however, in the impact of length of pretrial detention when considering defendant risk level. Specifically, low-risk defendants are more likely to FTA if they are detained 2 to 3 days (1.22 times more likely than low-risk defendants detained 1 day or less), 4 to 7 days (1.22 times more likely), and 15 to 30 days (1.41 times more likely).

The analysis of the relationship between length of pretrial detention and NCA revealed that longer pretrial detention periods were associated with an increase in NCA for each category. Similar to FTA, examining sub-populations of defendants revealed significant differences in the impact of length of pretrial detention when considering defendant risk level.

- All categorizations of days spent in detention are associated with significant increases in the likelihood of NCA for low-risk defendants when compared to low-risk defendants detained for 1 day or less.
- The longer low-risk defendants are detained, the more likely they are to have new criminal activity pretrial (1.39 times more likely when held 2 to 3 days, increasing to 1.74 when held 31 days or more).
- For moderate-risk defendants, the lowest three categories of days spent in detention (2 to 3 days, 4 to 7 days, and 8 to 14 days) are associated with significant increases in the likelihood of NCA.
- None of the days-in-detention categories are significant predictors of NCA for high-risk defendants.

Methods and Analysis Results

Bivariate models as well as multivariate logistic regression models predicting FTA and NCA were used to investigate these questions. Control items included length of pretrial detention, length of time in the community (time at risk), defendant risk, demographics, and offense characteristics. The analysis was repeated for sub-populations of defendants (i.e., gender, race, offense type, offense level and risk level).

RESEARCH QUESTION 1A

Is the length of pretrial detention related to the likelihood of pretrial FTA once other relevant statistical controls are considered?

To determine whether there was a relationship between the length of pretrial detention and the likelihood of pretrial FTA, a multivariate logistic regression was estimated (see Table 2). The model included 66,014 cases and controlled for age, gender, race, ethnicity, marital status, risk level, supervision status, offense type, offense level, and time at risk. Several variables in the model revealed a statistically significant relationship with outcome; however, the variable "days spent in detention" was of particular interest in light of the research question. Days spent in detention was categorized in an ascending fashion (e.g., 1 day, 2 to 3 days, 4 to 7 days, 8 to 14 days, and so on). Including days spent in detention into the model in this fashion allows for the examination of each particular length of time as a predictor.

According to the odds ratio, the category 2 to 3 days was statistically and significantly ($p < .05$) related to FTA. Further, having an odds ratio above 1.00 means detentions of 2 to 3 days (when compared to 1 day) were associated with an increase in the likelihood of FTA. The categories 4 to 7 days, 8 to 14 days, and 15 to 30 days were not statistically related to FTA. The category 31 or more days was statistically related to FTA but had an odds ratio of less than 1.00, which indicates that defendants detained for that amount of time had a significant reduction in the likelihood of FTA.[2]

2 The reason for this is unknown, yet it is likely that defendants detained more than 31 days have fewer court dates to attend while in the community, thereby reducing the number of opportunities defendants may have to fail to appear.

Table 2. Multivariate Logistic Regression Predicting Pretrial FTA

	ANY FTA	
	ODDS RATIO	P
Age	0.99	0.00
Female	1.08	0.01
White	1.03	0.81
Black	1.24	0.11
Hispanic	1.40	0.00
Married	0.88	0.00
Risk Level (Reference = Low)		
Moderate	1.83	0.00
High	2.63	0.00
On Probation or Parole	1.08	0.05
Offense Type		
Drugs	0.98	0.47
Violent	0.70	0.00
Domestic Violence	0.51	0.00
Sex Offense	0.26	0.00
Firearm	0.82	0.04
Theft	1.41	0.00
Traffic	1.59	0.00
Driving Under the Influence	0.50	0.00
Felony	0.54	0.00
Time at Risk	1.00	0.00
Days Spent in Detention (Reference = 1 Day)		
2 to 3 Days	1.09	0.01
4 to 7 Days	1.01	0.81
8 to 14 Days	1.00	0.95
15 to 30 Days	0.95	0.53
31 or more Days	0.80	0.01
Constant	0.05	0.00
N	66014	
Model X2	3819.16	

RESEARCH QUESTION 1B

Do the observed effects (of days spent in detention when predicting FTA) differ for sub-populations of defendants?

To determine whether the effects of days spent in detention differ for sub-populations of defendants, several additional logistic regression models were calculated (see Table 3). Separate models were calculated for the following sub-populations: whites, blacks, males, females, charged with a felony, charged with a misdemeanor, low risk, medium risk and high risk.

The analysis was conducted for all defendants released at some point pending trial. When interpreting the results, defendants released within one day were used as the reference or comparison group. For white defendants, even short periods in detention (2 to 3 days and 4 to 7 days), when compared to 1 day, were associated with increases in the odds of FTA, while longer periods were not related to FTA. The same held true for black defendants held 2 to 3 days, with longer periods of time not relating to the likelihood of FTA.

Male and female defendants were similar in that even short amounts of time in detention, when compared to 1 day, were statistically associated with increases in the likelihood of FTA (2 to 3 days for males, and both 2 to 3 days and 4 to 7 days for females).

The 2-to-3-day category was associated with a significant increase in the likelihood of FTA for both felony and misdemeanor defendants. The 4-to-7-day category was significantly related to FTA for misdemeanor defendants (but not felony defendants), while the 8-to-14-day category was significantly related to an increase in the likelihood of FTA for felony defendants only.

For low-risk defendants, every category of detention except 8 to 14 days was associated with a significant increase in the likelihood of FTA. For moderate-risk defendants, a short amount of time in detention (2 to 3 days) was associated with a significant increase in the likelihood of FTA, while longer amounts of time (15 to 30 days and 31 or more days) were associated with significant decreases in likelihood of FTA. For high-risk defendants, only one categorization (31 or more days) was statistically predictive of FTA, indicating a decrease in the likelihood.

Table 3. Parameter Estimates for Logistic Regression Analyses Predicting FTA

SUBGROUP	DAYS SPENT IN DETENTION (Reference = 1 day)	ODDS RATIO	P	LOWER 95% CI	UPPER 95% CI
White					
53,135	2 to 3 Days	1.17	0.00	1.09	1.25
	4 to 7 Days	1.17	0.01	1.04	1.31
	8 to 14 Days	1.03	0.66	0.90	1.18
	15 to 30 Days	1.05	0.62	0.87	1.25
	31 or more Days	0.87	0.20	0.71	1.07
Black					
11,676	2 to 3 Days	1.17	0.02	1.03	1.33
	4 to 7 Days	0.99	0.93	0.77	1.27
	8 to 14 Days	1.17	0.19	0.93	1.47
	15 to 30 Days	0.90	0.56	0.64	1.27
	31 or more Days	0.98	0.92	0.68	1.42
Male					
47,200	2 to 3 Days	1.14	0.00	1.06	1.22
	4 to 7 Days	1.11	0.10	0.98	1.25
	8 to 14 Days	1.04	0.56	0.91	1.20
	15 to 30 Days	0.91	0.30	0.75	1.09
	31 or more Days	0.89	0.29	0.73	1.10
Female					
18,581	2 to 3 Days	1.27	0.00	1.13	1.42
	4 to 7 Days	1.24	0.03	1.03	1.50
	8 to 14 Days	1.14	0.25	0.91	1.43
	15 to 30 Days	1.29	0.08	0.97	1.72
	31 or more Days	0.91	0.62	0.64	1.30
Felony					
11,249	2 to 3 Days	1.26	0.03	1.02	1.55
	4 to 7 Days	1.15	0.29	0.88	1.51
	8 to 14 Days	1.34	0.02	1.05	1.71
	15 to 30 Days	1.30	0.08	0.97	1.74
	31 or more Days	1.10	0.56	0.80	1.51
Misdemeanor					
46,454	2 to 3 Days	1.17	0.00	1.09	1.25
	4 to 7 Days	1.14	0.04	1.01	1.29
	8 to 14 Days	0.99	0.91	0.83	1.18
	15 to 30 Days	0.85	0.21	0.66	1.10
	31 or more Days	0.78	0.13	0.56	1.08

Low					
44,379	2 to 3 Days	1.22	0.00	1.13	1.33
	4 to 7 Days	1.22	0.01	1.05	1.43
	8 to 14 Days	1.06	0.55	0.87	1.29
	15 to 30 Days	1.41	0.01	1.10	1.79
	31 or more Days	1.31	0.05	1.00	1.72
Moderate					
19,300	2 to 3 Days	1.12	0.03	1.01	1.24
	4 to 7 Days	1.08	0.29	0.93	1.26
	8 to 14 Days	1.06	0.48	0.90	1.25
	15 to 30 Days	0.78	0.03	0.62	0.98
	31 or more Days	0.77	0.05	0.60	0.99
High					
2,161	2 to 3 Days	0.88	0.39	0.65	1.18
	4 to 7 Days	0.84	0.38	0.57	1.24
	8 to 14 Days	0.82	0.31	0.55	1.21
	15 to 30 Days	0.75	0.26	0.45	1.23
	31 or more Days	0.41	0.00	0.22	0.74

RESEARCH QUESTION 1C

Is the length of pretrial detention related to the likelihood of pretrial NCA once other relevant statistical controls are considered?

The analysis discussed in Research Question 1a was replicated using NCA as the dependent variable. As before, the variable of particular interest was length of days spent in detention. Every category of days spent in detention was significantly related to the likelihood of NCA. Every category in ascending order (2 to 3 days through 31 or more days) was associated with a significant increase in the likelihood of NCA; however, the impact of 31 or more days was not as large as the impact of other detention time periods.[3]

3 The argument can be made that at least some of the detained defendants would have recidivated regardless of the time in pretrial detention, and that the decision to detain those defendants was appropriate given their higher propensity to reoffend.

Table 4. Multivariate Logistic Regression Predicting Pretrial NCA

	ANY NCA	
	ODDS RATIO	P
Age	0.98	0.00
Female	0.77	0.00
White	0.98	0.91
Black	1.09	0.59
Hispanic	0.44	0.00
Married	0.89	0.00
Risk Level (Reference = Low Risk)		
Moderate	2.16	0.00
High	3.29	0.00
On Probation or Parole	1.24	0.00
Offense Type		
Drugs	1.26	0.00
Violent	1.04	0.59
Domestic Violence	1.01	0.89
Sex Offense	0.75	0.11
Firearm	1.14	0.11
Theft	1.39	0.00
Traffic	1.04	0.21
Driving Under the Influence	0.97	0.46
Felony	0.94	0.05
Time at Risk	1.00	0.00
Days Spent in Detention (Reference = 1 day)		
2 to 3 Days	1.26	0.00
4 to 7 Days	1.34	0.00
8 to 14 Days	1.41	0.00
15 to 30 Days	1.23	0.00
31 or more Days	1.15	0.03
Constant	0.05	0.00
N	66024	
Model X2	4145.67	

RESEARCH QUESTION 1D

Do the observed effects (of days spent in detention when predicting NCA) differ for sub-populations of defendants?

The analyses discussed in Research Question 1b were replicated using NCA as the dependent variable. As before, the variable of particular interest was length of days spent in detention. The relationship between length of days spent in detention and NCA was tested for each of several subgroups.

Table 5 contains the results for all subgroups. For white defendants, each successive categorization of days spent in detention was associated with a significant increase in the likelihood of NCA. A similar trend was also noted for black defendants.

For male defendants, only detention periods up to 14 days were associated with significant increases in the likelihood of NCA. For female defendants, detention periods up to 30 days were associated with a significant increase in the likelihood of NCA.

For felony defendants, two categories of days spent in detention (2 to 3 days and 8 to 14 days) were associated with significant increases in the likelihood of NCA. For misdemeanor defendants, all categories of days spent in detention were associated with a significant increase in the likelihood of NCA.

For low-risk defendants, all categories of days spent in detention were associated with significant increases in the likelihood of NCA. In fact, the longer low-risk defendants were detained, the more likely they were to have new criminal activity pretrial (1.39 times more likely for defendants detained 2 to 3 days, increasing to 1.74 times when detained 31 or more days). For moderate-risk defendants, the first three categories (2 to 3 days, 4 to 7 days, and 8 to 14 days) were associated with significant increases in the likelihood of NCA. None of the categories were significant predictors of NCA for high-risk defendants.

Table 5. Parameter Estimates for Logistic Regression Analyses Predicting NCA

SUBGROUP	DAYS IN SPENT DETENTION (Reference = 1 day)	ODDS RATIO	P	LOWER 95% CI	UPPER 95% CI
White					
52,916	2 to 3 Days	1.28	0.00	1.19	1.38
	4 to 7 Days	1.37	0.00	1.24	1.52
	8 to 14 Days	1.48	0.00	1.32	1.67
	15 to 30 Days	1.28	0.00	1.10	1.49
	31 or more Days	1.20	0.03	1.02	1.42
Black					
11,805	2 to 3 Days	1.19	0.02	1.03	1.38
	4 to 7 Days	1.27	0.05	1.00	1.61
	8 to 14 Days	1.23	0.08	0.98	1.54

	15 to 30 Days	1.18	0.28	0.87	1.60
	31 or more Days	0.91	0.60	0.65	1.29
Male					
47,209	2 to 3 Days	1.26	0.00	1.17	1.36
	4 to 7 Days	1.31	0.00	1.17	1.46
	8 to 14 Days	1.44	0.00	1.28	1.62
	15 to 30 Days	1.16	0.07	0.99	1.36
	31 or more Days	1.11	0.22	0.94	1.32
Female					
18,712	2 to 3 Days	1.32	0.00	1.16	1.50
	4 to 7 Days	1.47	0.00	1.21	1.77
	8 to 14 Days	1.36	0.01	1.09	1.70
	15 to 30 Days	1.62	0.00	1.23	2.11
	31 or more Days	1.23	0.19	0.91	1.67
Felony					
11,334	2 to 3 Days	1.20	0.05	1.00	1.44
	4 to 7 Days	1.22	0.08	0.98	1.51
	8 to 14 Days	1.50	0.00	1.23	1.84
	15 to 30 Days	1.09	0.50	0.85	1.39
	31 or more Days	1.01	0.94	0.78	1.31
Misdemeanor					
46,337	2 to 3 Days	1.26	0.00	1.17	1.35
	4 to 7 Days	1.38	0.00	1.22	1.56
	8 to 14 Days	1.50	0.00	1.28	1.77
	15 to 30 Days	1.52	0.00	1.22	1.89
	31 or more Days	1.35	0.03	1.03	1.79
Low					
44,468	2 to 3 Days	1.39	0.00	1.27	1.52
	4 to 7 Days	1.50	0.00	1.30	1.72
	8 to 14 Days	1.56	0.00	1.33	1.85
	15 to 30 Days	1.57	0.00	1.26	1.95
	31 or more Days	1.74	0.00	1.39	2.18
Moderate					
19,368	2 to 3 Days	1.12	0.03	1.01	1.24
	4 to 7 Days	1.20	0.01	1.05	1.38
	8 to 14 Days	1.28	0.00	1.10	1.48
	15 to 30 Days	1.03	0.76	0.85	1.25
	31 or more Days	0.86	0.18	0.70	1.07

RESEARCH OBJECTIVE TWO:

Investigate the relationship between pretrial detention, as well as the length of pretrial detention, and new criminal activity post-disposition (NCA-PD)

Research Questions

2a. Is pretrial detention related to NCA-PD?

2b. Do the observed effects of pretrial detention differ for sub-populations of defendants (likelihood of 12-month NCA-PD and 24-month NCA-PD)?

2c. Is the length of pretrial detention related to NCA-PD?

2d. Do the observed effects of the length of pretrial detention differ for sub-populations of defendants (likelihood of 12-month NCA-PD and 24-month NCA-PD)?

Primary Findings

Being detained for the entire pretrial period is related to the likelihood of post-disposition recidivism. When other relevant statistical controls are considered, pretrial detention had a statistically significant and positive (meaning increasing) effect on 12-month NCA-PD and 24-month NCA-PD. Defendants detained pretrial were 1.3 times more likely to recidivate compared to defendants who were released at some point pending trial. This association could indicate that there are unknown factors that cause both detention and recidivism, but it is an association worthy of further exploration.

Each category of days spent in pretrial detention had a significant increase in the likelihood of both 12- and 24-month NCA-PD, with the exception of 31 or more days (which was not statistically significant). The results suggest that the longer an individual stays in pretrial detention, the higher the likelihood of 12-month and 24-month NCA-PD.

When examining sub-populations, the relationship between pretrial detention and post-disposition recidivism is strongest for low-risk defendants.

- Each category of days spent in pretrial detention, except 31 or more, revealed a statistically significant and increasing effect on the likelihood of 12-month NCA-PD for low-risk defendants.
- Generally, as the length of time in pretrial detention increases, so does the likelihood that 12-month NCA-PD will occur for low-risk defendants (1.16 times more likely to recidivate if detained 2 to 3 days, increasing to 1.43 times if detained 15 to 30 days).

- Each category of days spent in pretrial detention was associated with a significant increase in the likelihood of 24-month NCA-PD for low-risk defendants (1.17 times more likely to recidivate if detained 2 to 3 days, increasing to 1.46 times if detained 15 to 30 days).

Methods and Analysis Results

Multivariate logistic regression models were constructed to investigate the relationship between pretrial detention and NCA post-disposition. Control items included risk level, supervision status, offense type, offense class, incarceration history, and demographics. The analysis was repeated for sub-populations of defendants (i.e., gender, race, offense type, offense level and risk level).

RESEARCH QUESTION 2A

Is pretrial detention related to NCA-PD?

NCA-PD was assessed at both 12-months and 24-months post-disposition. Table 6 presents the results of multivariate logistic regression models that test the effects of pretrial detention when predicting NCA-PD while controlling for age, gender, race, ethnicity, marital status, risk level, supervision status, offense type, offense class, and incarceration history. Two models were calculated, one predicting 12-month NCA-PD and one predicting 24-month NCA-PD.

Being detained pretrial significantly increased the likelihood of 12-month and 24-month NCA-PD (1.3 times more likely to recidivate within both time periods), while controlling for all other variables in the model.

Table 6. Multivariate Logistic Regression Predicting Post-Disposition Recidivism

	12 MONTH NCA-PD		24 MONTH NCA-PD	
	ODDS RATIO	P	ODDS RATIO	P
Age	0.99	0.00	0.99	0.00
Female	0.83	0.00	0.83	0.00
White	1.44	0.00	1.40	0.00
Black	1.52	0.00	1.50	0.00
Hispanic	0.56	0.00	0.49	0.00
Married	0.86	0.00	0.87	0.00
Risk Level (Reference = Low Risk)				
Moderate	1.56	0.00	1.58	0.00
High	1.75	0.00	1.78	0.00
On Probation or Parole	1.04	0.06	1.11	0.00
Offense Type				
Drugs	1.10	0.00	1.12	0.00
Violent	0.98	0.62	0.99	0.76
Domestic Violence	0.97	0.33	0.99	0.87
Sex Offense	0.75	0.02	0.79	0.07
Firearm	0.98	0.71	0.96	0.53

Theft	1.17	0.00	1.17	0.00
Traffic	0.96	0.06	0.94	0.00
Driving Under the Influence	0.77	0.00	0.81	0.00
Felony	0.83	0.00	0.89	0.00
Incarceration	1.09	0.00	1.14	0.00
Detained Pretrial	1.30	0.00	1.29	0.00
Constant	0.32	0.00	0.59	0.00
N	84,999		71,062	
Model X2	3010.15		3056.05	

RESEARCH QUESTION 2B

Do the observed effects of pretrial detention differ for sub-populations of defendants (likelihood of 12-month NCA-PD and 24-month NCA-PD)?

Table 7 presents the results of several logistic regression models that estimate the effects of pretrial detention on 12-month NCA-PD, while controlling for age, gender, race, ethnicity, marital status, risk level, supervision status, offense type, offense class, and incarceration history. The results are divided into subgroups as in previous analyses (white, black, male, female, felony, misdemeanor, low risk, moderate risk, and high risk). Pretrial detention was statistically significant and had a positive (increasing) effect on the likelihood of 12-month NCA-PD for all models with the exception of felony defendants.

Similar results were revealed for 24-month NCA-PD (see Table 8). Pretrial detention was a statistically significant and positive (increasing) predictor of 24-month NCA-PD while controlling for all other aforementioned variables. Similar results were observed for all subgroups, with the exception of felony defendants, where pretrial detention was not a significant predictor of 24-month NCA-PD.

Table 7. Parameter Estimates for Logistic Regression Analyses Predicting 12-Month Recidivism

SUBGROUP	N	ODDS RATIO	P	LOWER 95% CI	UPPER 95% CI
White	67885	1.32	0.00	1.26	1.38
Black	15817	1.21	0.00	1.10	1.32
Male	62109	1.31	0.00	1.25	1.37
Female	22884	1.25	0.00	1.15	1.36
Felony	14845	1.00	0.95	0.91	1.10
Misdemeanor	59333	1.45	0.00	1.38	1.52
Risk Level					
Low	52303	1.27	0.00	1.20	1.35
Moderate	28452	1.32	0.00	1.24	1.40
High	4238	1.33	0.00	1.15	1.54

Table 8. Parameter Estimates for Logistic Regression Analyses

Predicting 24 Month Recidivism

SUBGROUP	N	ODDS RATIO	P	LOWER 95% CI	UPPER 95% CI
White	56688	1.32	0.00	1.26	1.38
Black	13202	1.20	0.00	1.09	1.31
Male	51914	1.30	0.00	1.25	1.36
Female	19147	1.23	0.00	1.13	1.34
Felony	11402	0.97	0.56	0.88	1.07
Misdemeanor	51399	1.43	0.00	1.36	1.50
Risk Level					
Low	44241	1.28	0.00	1.21	1.35
Moderate	23462	1.30	0.00	1.23	1.38
High	3350	1.28	0.00	1.09	1.49

RESEARCH QUESTION 2C

Is the length of pretrial detention related to NCA-PD?

Similar logistic regression models predicting 12-month NCA-PD and 24-month NCA-PD are presented in Table 9, although the length of days spent in pretrial detention is broken out by category, as before (2 to 3 days, 4 to 7 days, 8 to 14 days, 15 to 30 days, and 31 or more days). Each category of days spent in pretrial detention had a significant increase in the likelihood of both 12- and 24-month NCA-PD, with the exception of 31 or more, which was not statistically significant. In addition, the results suggest that the longer an individual stays in pretrial detention, the higher the likelihood of NCA-PD at both the 12- and 24-month points. These results were observed while controlling for all other variables in the model (age, gender, race, ethnicity, marital status, risk level, supervision status, offense type, offense class, and incarceration history) and represent a general pattern, with some exceptions, for length of time spent in pretrial detention.

Table 9. Multivariate Logistic Regression Predicting Post-Disposition Recidivism

	12 MONTH NCA-PD ODDS RATIO	P	24 MONTH NCA-PD ODDS RATIO	P
Age	0.99	0.00	0.99	0.00
Female	0.82	0.00	0.82	0.00
White	1.44	0.00	1.41	0.00
Black	1.52	0.00	1.51	0.00
Hispanic	0.57	0.00	0.50	0.00
Married	0.86	0.00	0.87	0.00
Risk Level (Reference = Low Risk)				
Moderate	1.56	0.00	1.57	0.00
High	1.81	0.00	1.80	0.00
On Probation or Parole	1.06	0.02	1.11	0.00
Offense Type				
Drugs	1.09	0.00	1.11	0.00
Violent	0.97	0.48	0.98	0.56
Domestic Violence	0.94	0.06	0.96	0.28
Sex Offense	0.76	0.03	0.79	0.06
Firearm	0.97	0.64	0.95	0.37
Theft	1.16	0.00	1.16	0.00
Traffic	0.96	0.06	0.94	0.00
Driving Under the Influence	0.76	0.00	0.81	0.00
Felony	0.81	0.00	0.86	0.00
Incarceration	1.11	0.00	1.16	0.00
Days in Spent Detention (Reference = 1 day)				
2 to 3 Days	1.15	0.00	1.16	0.00
4 to 7 Days	1.31	0.00	1.31	0.00
8 to 14 Days	1.41	0.00	1.42	0.00
15 to 30 Days	1.36	0.00	1.37	0.00
31 or more Days	0.96	0.25	1.06	0.10
Constant	0.30	0.00	0.55	0.00
N	84,443		70,565	
Model X2	3056.05		3402.06	

RESEARCH QUESTION 2D.

Do the observed effects of the length of pretrial detention differ for sub-populations of defendants (likelihood of 12-month NCA-PD and 24-month NCA-PD)?

Table 10 presents the results for several logistic regression models predicting the likelihood of 12-month NCA-PD. The results are divided by defendant subgroup (race, gender, offense level and risk type). In addition, the effects of each amount of time are presented categorically (e.g., 2 to 3 days, 4 to 7 days, and so on).

In general, it appears that the longer a defendant spends in pretrial detention, the more likely 12-month NCA-PD is to occur. For white defendants, each category of days in pretrial detention was statistically significant when predicting 12-month NCA-PD, with the exception of 31 or more days. For black defendants, a similar pattern was observed, but the lowest length of pretrial detention (2 to 3 days) approached, but did not reach, statistical significance.

Male and female defendants were nearly identical in that each category of days spent in pretrial detention, except 31 or more days, was statistically significant and positive (increasing) in predicting the likelihood of 12-month NCA-PD.

For felony defendants, only the categories of 4 to 7 days and 8 to 14 days reached statistical significance when predicting 12-month NCA-PD. Both categories had an increasing effect on the likelihood of 12-month NCA-PD while all other categories were not significantly predictive.

For misdemeanor defendants, each category of days spent in pretrial detention, with the exception of 31 or more days, revealed statistically significant and positive (increasing) effects on the likelihood of 12-month NCA-PD.

When low-risk defendants were isolated, each category of days spent in pretrial detention, with the exception of 31or more days, revealed a statistically significant and positive (increasing) effect on the likelihood of 12-month NCA-PD.

When moderate-risk defendants were isolated, the lowest length of pretrial detention lost significance. Further, while the ensuing lengths of pretrial detention (4 to 7 days, 8 to 14 days, 15 to 30 days) revealed a statistically significant and increasing likelihood of 12-month NCA-PD, the final category (31 or more days) reversed the previously established trend. Those detained 31 or more days were significantly less likely to have 12-month NCA-PD.

For high-risk defendants, none of the categories of days spent in pretrial detention were predictive of 12-month NCA-PD, except for the category of 31 or more days. Defendants who were detained for 31 or more days had a significantly lower likelihood of 12-month NCA-PD.

Table 11 presents similar results to those that were presented in Table 10, although the outcome variable was NCA-PD at the 24-month point.

For white, black, female and male defendants, each category of days spent in detention, except 31 or more days, was associated with a significant increase in the likelihood that NCA-PD will occur at the 24-month point. In addition, it appears that generally the strength of the relationship may increase with each increase in the amount of time spent in pretrial detention.

For felony defendants, the middle three categories (4 to 7 days, 8 to 14 days, and 15 to 30 days) were statistically related to 24-month NCA-PD. Each of these three time categories was associated with a significant increase in the likelihood of-24 month NCA-PD.

The same pattern that was observed above for white, black, male and female defendants was also revealed for misdemeanor defendants, with each category of days spent in pretrial detention, except 31 or more days, being associated with a significant increase in the likelihood of 24-month NCA-PD. Likewise, the strength of the relationship may increase with each increase in the amount of time.

For low-risk defendants, each category of days spent in detention was associated with a significant increase in the likelihood of 24-month NCA-PD. The strength of the relationship appears to increase with each increase in the amount of pretrial detention time but drops at 31 days or more.

For moderate-risk defendants, all categories of days spent in detention pretrial, except 31 or more, was associated with a significant increase in the likelihood of 24-month NCA-PD. As was observed in several examples before, the strength of the relationship generally appears to increase as the amount of time spent in pretrial detention increases.

For high-risk defendants, only 31 or more days spent in detention pretrial was significantly associated with 24-month NCA-PD, and the relationship was negative. In other words, defendants who spent 31 or more days in pretrial detention had a statistically significant reduction in the likelihood of NCA-PD at the 24-month point.

Table 10. Parameter Estimates for Logistic Regression Analyses Predicting 12 Month Recidivism

SUBGROUP	DAYS IN SPENT DETENTION (REFERENCE = 1 DAY)	ODDS RATIO	P	LOWER 95% CI	UPPER 95% CI
White					
67,885	2 to 3 Days	1.16	0.00	1.11	1.22
	4 to 7 Days	1.33	0.00	1.25	1.43
	8 to 14 Days	1.42	0.00	1.32	1.52
	15 to 30 Days	1.38	0.00	1.27	1.50
	31 or more Days	0.97	0.50	0.90	1.05
Black					
15,817	2 to 3 Days	1.09	0.07	0.99	1.21
	4 to 7 Days	1.19	0.02	1.02	1.37
	8 to 14 Days	1.31	0.00	1.15	1.50
	15 to 30 Days	1.21	0.03	1.02	1.43
	31 or more Days	0.86	0.06	0.74	1.01
Male					
62,109	2 to 3 Days	1.15	0.00	1.09	1.21
	4 to 7 Days	1.31	0.00	1.22	1.40

	8 to 14 Days	1.45	0.00	1.35	1.56
	15 to 30 Days	1.39	0.00	1.27	1.51
	31 or more Days	0.97	0.44	0.90	1.05
Female					
22,884	2 to 3 Days	1.16	0.00	1.07	1.26
	4 to 7 Days	1.29	0.00	1.15	1.46
	8 to 14 Days	1.27	0.00	1.12	1.45
	15 to 30 Days	1.26	0.01	1.07	1.48
	31 or more Days	0.92	0.29	0.80	1.07
Felony					
14,845	2 to 3 Days	1.10	0.18	0.96	1.27
	4 to 7 Days	1.24	0.01	1.05	1.46
	8 to 14 Days	1.40	0.00	1.20	1.62
	15 to 30 Days	1.16	0.10	0.97	1.38
	31 or more Days	0.97	0.67	0.83	1.13
Misdemeanor					
59,333	2 to 3 Days	1.15	0.00	1.10	1.21
	4 to 7 Days	1.31	0.00	1.22	1.40
	8 to 14 Days	1.44	0.00	1.32	1.56
	15 to 30 Days	1.36	0.00	1.24	1.50
	31 or more Days	0.94	0.23	0.85	1.04
Low					
52,303	2 to 3 Days	1.16	0.00	1.10	1.23
	4 to 7 Days	1.32	0.00	1.21	1.43
	8 to 14 Days	1.45	0.00	1.33	1.59
	15 to 30 Days	1.43	0.00	1.28	1.61
	31 or more Days	1.09	0.11	0.98	1.21
Moderate					
28,452	2 to 3 Days	1.07	0.10	0.99	1.15
	4 to 7 Days	1.21	0.00	1.10	1.34
	8 to 14 Days	1.28	0.00	1.16	1.41
	15 to 30 Days	1.23	0.00	1.10	1.38
	31 or more Days	0.88	0.02	0.79	0.98
High					
4,238	2 to 3 Days	0.96	0.78	0.74	1.25
	4 to 7 Days	1.04	0.79	0.78	1.39
	8 to 14 Days	1.21	0.19	0.91	1.61
	15 to 30 Days	1.18	0.31	0.86	1.61
	31 or more Days	0.68	0.01	0.51	0.91

Table 11. Parameter Estimates for Logistic Regression Analyses Predicting 24 Month Recidivism

SUBGROUP	DAYS SPENT IN DETENTION (Reference = 1 day)	ODDS RATIO	P	LOWER 95% CI	UPPER 95% CI
White					
56,688	2 to 3 Days	1.17	0.00	1.12	1.23
	4 to 7 Days	1.35	0.00	1.26	1.44
	8 to 14 Days	1.45	0.00	1.35	1.55
	15 to 30 Days	1.40	0.00	1.29	1.53
	31 or more Days	1.06	0.17	0.98	1.15
Black					
13,202	2 to 3 Days	1.12	0.02	1.02	1.23
	4 to 7 Days	1.16	0.04	1.00	1.35
	8 to 14 Days	1.28	0.00	1.12	1.46
	15 to 30 Days	1.21	0.03	1.02	1.43
	31 or more Days	1.04	0.62	0.89	1.22
Male					
51,914	2 to 3 Days	1.15	0.00	1.10	1.21
	4 to 7 Days	1.30	0.00	1.22	1.39
	8 to 14 Days	1.42	0.00	1.32	1.52
	15 to 30 Days	1.39	0.00	1.28	1.52
	31 or more Days	1.07	0.10	0.99	1.16
Female					
19,147	2 to 3 Days	1.19	0.00	1.10	1.29
	4 to 7 Days	1.33	0.00	1.18	1.49
	8 to 14 Days	1.40	0.00	1.23	1.58
	15 to 30 Days	1.25	0.01	1.07	1.47
	31 or more Days	1.03	0.72	0.88	1.20
Felony					
11,402	2 to 3 Days	1.11	0.14	0.97	1.28
	4 to 7 Days	1.28	0.00	1.09	1.51
	8 to 14 Days	1.42	0.00	1.22	1.64
	15 to 30 Days	1.26	0.01	1.06	1.50
	31 or more Days	1.11	0.19	0.95	1.30
Misdemeanor					
51,399	2 to 3 Days	1.16	0.00	1.11	1.21
	4 to 7 Days	1.30	0.00	1.21	1.39
	8 to 14 Days	1.46	0.00	1.34	1.58
	15 to 30 Days	1.36	0.00	1.23	1.49
	31 or more Days	1.05	0.33	0.95	1.17

Low					
44,241	2 to 3 Days	1.17	0.00	1.11	1.24
	4 to 7 Days	1.35	0.00	1.25	1.46
	8 to 14 Days	1.51	0.00	1.39	1.65
	15 to 30 Days	1.46	0.00	1.31	1.63
	31 or more Days	1.16	0.01	1.04	1.29
Moderate					
23,462	2 to 3 Days	1.09	0.04	1.01	1.18
	4 to 7 Days	1.20	0.00	1.09	1.32
	8 to 14 Days	1.26	0.00	1.14	1.39
	15 to 30 Days	1.21	0.00	1.08	1.36
	31 or more Days	0.99	0.83	0.88	1.10
High					
3,350	2 to 3 Days	0.86	0.30	0.65	1.14
	4 to 7 Days	0.89	0.46	0.65	1.21
	8 to 14 Days	1.06	0.73	0.77	1.44
	15 to 30 Days	1.10	0.60	0.78	1.54
	31 or more Days	0.69	0.03	0.50	0.95

	PRETRIAL		NCA-PD 12		NCA-PD 24	
JAIL BY COUNTY	N	%	N	%	N	%
ADAIR	588	0.52	638	0.45	525	0.43
ALLEN	475	0.42	515	0.36	368	0.3
BALLARD	282	0.25	346	0.24	299	0.25
BARREN	1,595	1.42	1,787	1.25	1,383	1.14
BELL	1,253	1.12	1,376	0.97	1,117	0.92
BOONE	3,219	2.87	3,608	2.53	3,198	2.64
BOURBON	508	0.45	683	0.48	560	0.46
BOYD	1,388	1.24	2,132	1.5	1,929	1.59
BOYLE	1,080	0.96	1,474	1.03	1,269	1.05
BRECKINRIDGE	439	0.39	498	0.35	398	0.33
BULLITT	1,698	1.52	1,792	1.26	1,307	1.08
BUTLER	259	0.23	249	0.17	213	0.18
CALDWELL	410	0.37	479	0.34	393	0.32
CALLOWAY	608	0.54	749	0.53	666	0.55
CAMPBELL	1,993	1.78	2,756	1.93	2,535	2.09
CARROLL	1,371	1.22	1,625	1.14	1,358	1.12
CARTER	783	0.7	941	0.66	757	0.62
CASEY	398	0.36	456	0.32	394	0.32
CHRISTIAN	2,314	2.07	3,399	2.38	2,838	2.34
CLARK	746	0.67	1,195	0.84	1,051	0.87
CLAY	633	0.57	1,003	0.7	902	0.74
CLINTON	210	0.19	224	0.16	169	0.14
CRITTENDEN	183	0.16	251	0.18	201	0.17
DAVIESS	2,703	2.41	3,266	2.29	2,874	2.37
ESTILL	296	0.26	390	0.27	324	0.27
FAYETTE	6,971	6.22	10,868	7.62	9,901	8.16
FLOYD	1,079	0.96	1,541	1.08	1,270	1.05
FRANKLIN	1,661	1.48	2,077	1.46	1,753	1.45
FULTON	325	0.29	415	0.29	359	0.3
GRANT	739	0.66	928	0.65	799	0.66
GRAVES	1,201	1.07	1,434	1.01	1,172	0.97
GRAYSON	777	0.69	858	0.6	676	0.56

GREENUP	462	0.41	796	0.56	694	0.57
HARDIN	2,335	2.08	2,887	2.02	2,560	2.11
HARLAN	1,305	1.16	1,618	1.13	1,344	1.11
HART	390	0.35	520	0.36	417	0.34
HENDERSON	1,341	1.2	2,067	1.45	1,900	1.57
HICKMAN	113	0.1	145	0.1	125	0.1
HOPKINS	1,456	1.3	1,901	1.33	1,686	1.39
JACKSON	263	0.23	371	0.26	316	0.26
JEFFERSON	22,189	19.81	27,095	19	22,910	18.89
JESSAMINE	1,449	1.29	1,937	1.36	1,652	1.36
JOHNSON	2,896	2.59	3,287	2.31	2,722	2.24
KENTON	5,015	4.48	6,540	4.59	5,929	4.89
KNOX	1,019	0.91	1,319	0.93	1,184	0.98
LARUE	212	0.19	293	0.21	241	0.2
LAUREL	1,637	1.46	2,270	1.59	1,976	1.63
LEE	923	0.82	1,210	0.85	986	0.81
LESLIE	274	0.24	357	0.25	301	0.25
LETCHER	715	0.64	788	0.55	652	0.54
LEWIS	185	0.17	248	0.17	203	0.17
LINCOLN	638	0.57	852	0.6	721	0.59
LOGAN	604	0.54	818	0.57	720	0.59
MADISON	1,804	1.61	2,405	1.69	2,145	1.77
MARION	709	0.63	878	0.62	722	0.6
MARSHALL	619	0.55	671	0.47	585	0.48
MASON	1,033	0.92	1,198	0.84	972	0.8
MCCRACKEN	1,933	1.73	2,606	1.83	2,333	1.92
MCCREARY	501	0.45	612	0.43	497	0.41
MEADE	445	0.4	529	0.37	422	0.35
MONROE	220	0.2	258	0.18	214	0.18
MONTGOMERY	1,136	1.01	1,382	0.97	1,106	0.91
MUHLENBERG	605	0.54	816	0.57	678	0.56
NELSON	826	0.74	955	0.67	821	0.68
OHIO	635	0.57	703	0.49	606	0.5
OLDHAM	805	0.72	872	0.61	713	0.59
PERRY	1,147	1.02	1,420	1	1,062	0.88
PIKE	2,328	2.08	2,599	1.82	2,054	1.69
POWELL	400	0.36	640	0.45	558	0.46
PULASKI	1,605	1.43	2,056	1.44	1,693	1.4
ROCKCASTLE	584	0.52	806	0.57	664	0.55
ROWAN	1,111	0.99	1,310	0.92	1,055	0.87
RUSSELL	407	0.36	404	0.28	338	0.28
SCOTT	725	0.65	951	0.67	798	0.66
SHELBY	1,401	1.25	1,680	1.18	1,356	1.12
SIMPSON	540	0.48	619	0.43	450	0.37
TAYLOR	779	0.7	958	0.67	833	0.69

TODD	203	0.18	300	0.21	278	0.23
UNION	374	0.33	506	0.35	439	0.36
WARREN	3,293	2.94	4,334	3.04	3,417	2.82
WAYNE	373	0.33	424	0.3	320	0.26
WEBSTER	324	0.29	369	0.26	297	0.24
WHITLEY	1,223	1.09	1,570	1.1	1,242	1.02
WOODFORD	336	0.3	468	0.33	435	0.36

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Investigating the Impact of Pretrial Detention on Sentencing Outcomes

Christopher T. Lowenkamp, Ph.D.

Marie VanNostrand, Ph.D.

Alexander Holsinger, Ph.D.

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EXECUTIVE SUMMARY

In the criminal justice system, the time between arrest and case disposition is known as the pretrial stage. Each time a person is arrested and accused of a crime, a decision must be made as to whether the accused person, known as the defendant, will be detained in jail awaiting trial or will be released back into the community. But pretrial detention is not simply an either-or proposition; many defendants are held for a number of days before being released at some point before their trial.

The release-and-detention decision takes into account a number of different concerns, including protecting the community, the need for defendants to appear in court, and upholding the legal and constitutional rights afforded to accused persons awaiting trial. It carries enormous consequences not only for the defendant but also for the safety of the community.

Little is known about the impact of pretrial detention on sentencing outcomes. The limited research indicates that pretrial detention is related to the type and length of sentence received. While little is known about the impact of pretrial detention on felony sentence length, even less is known about the impact on the sentencing of misdemeanants.

Data on 153,407 defendants booked into a jail in Kentucky between July 1, 2009, and June 30, 2010, were used to answer one broad research objective: Investigate the relationship between pretrial detention and sentencing. Depending on the associated research question, subsamples of cases were drawn from this larger dataset of 153,407 defendants.

Multivariate models were generated that controlled for relevant factors including risk level, supervision status, offense type, offense level, time at risk in the community, demographics, and other factors. Two critical findings related to the impact of pretrial detention were revealed.

REPORT HIGHLIGHTS:

- Compared to defendants released at some point pending trial, defendants detained for the entire pretrial period are more likely to be sentenced to jail or prison – and for longer periods of time.
- Detained defendants are over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who are released at some point pending trial.
- Sentences for detained defendants are also significantly longer: Jail sentences are nearly three times as long, and prison sentences are more than twice as long.

1. **Pretrial Detention and Sentence to Jail and Prison** — Defendants who are detained for the entire pretrial period are much more likely to be sentenced to jail and prison. Low-risk defendants who are detained for the entire pretrial period are 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison when compared to low-risk defendants who are released at some point before trial or case disposition. Moderate and high-risk defendants who are detained for the entire pretrial period are approximately 3 times more likely to be incarcerated than similar defendants who are released at some point.

2. **Pretrial Detention and Length of Sentence to Jail and Prison** — Defendants who are detained for the entire pretrial period receive longer jail and prison sentences. While the effects for all risk levels are substantial and significant, the largest effects are seen for low-risk defendants.[1]

1 As a caveat, the empirical strategy here cannot definitively prove causation – after all, it is possible that defendants who are detained for the entire pretrial period are different in significant and unmeasured ways from other defendants. Still, the findings here are striking and show the need for more empirical research to determine exactly which defendants actually need to be detained.

INTRODUCTION

In the criminal justice system, the time between arrest and case disposition is known as the pretrial stage. Each time a person is arrested and accused of a crime, a decision must be made as to whether the accused, known as the defendant, will be detained in jail pending trial or released back into the community. But pretrial detention is not simply an either-or proposition; many defendants are held for a number of days before being released at some point before their trial.

The decision to detain or release is a crucial one in which courts must take into account public safety, the need for defendants to appear in court, and the legal and constitutional rights afforded to accused persons awaiting trial. Protecting these interests in a just manner has been the subject of research for most of the previous century (see, for example, Beeley, 1927; Foote, 1954 & 1958; and Ares, Rankin, & Sturz, 1963; Wice, 1974).

Deciding whether to release a defendant pending trial has obvious implications for public safety. It also impacts certain legal and constitutional rights of defendants, including their right to defend themselves (Leipold, 2005). One underdeveloped area of research is the impact of pretrial detention on sentencing. The limited research indicates that detention for the entire pretrial period is related to the type and length of sentence received (Freed and Wald, 1964; Schlesinger, 2005 & 2007; Wooldredge 2012). Ulmer (2012), in a recent and thorough review of research on sentencing, notes the long-time call for research to take into account the impact of earlier decisions on sentence severity. Ulmer also reviews only two studies that explicitly consider the impact of pretrial detention on sentence length. Both of these studies, and the previously cited studies, focus exclusively on defendants charged with felony offenses. While little is known about the impact of pretrial detention on felony sentence length, even less is known about the impact of pretrial detention on the sentencing of misdemeanants (Frase, 2009).

The current study is a necessary addition to the extant research, as it seeks to better understand the link between pretrial detention and the likelihood of sentence to incarceration, as well as sentence length for both felons and misdemeanants.

Study Description

The current study investigates the impact of pretrial detention on sentencing outcomes for both misdemeanors and felonies.

Research Objectives and Questions

The study includes one research objective: Investigate the relationship between pretrial detention and sentencing. There are eight related research questions as shown below.

1. Is pretrial detention related to the likelihood of being sentenced to incarceration in jail?
2. Do the observed effects of pretrial detention related to being sentenced to jail differ for sub-populations of defendants?
3. Is pretrial detention related to length of jail incarceration ordered at sentencing?
4. Do the observed effects of pretrial detention related to the length of sentence to jail differ for sub-populations of defendants?
5. Is pretrial detention related to the likelihood of being sentenced to incarceration in prison?
6. Do the observed effects of pretrial detention related to being sentenced to prison differ for sub-populations of defendants?
7. Is pretrial detention related to length of prison incarceration ordered at sentencing?
8. Do the observed effects of pretrial detention related to the length of sentence to prison differ for sub-populations of defendants?

Dataset

The sample used for the current study includes all defendants arrested and booked into a Kentucky jail between July 1, 2009, and June 30, 2010. This led to a working sample size of 153,407. The dataset does not represent unique individuals, but rather includes all bookings within the study period. (Some individuals were booked multiple times within the timeframe; calculating a unique count of individuals could not be performed reliably, as unique identifiers were missing in almost 10% of the cases.) All cases in the sample reached final case disposition. These data served as the sample of defendants used to respond to the research objective. Depending on the associated research question, subsamples of cases were drawn from this larger dataset of 153,407 defendants.

The measures in this study included the following:

- defendant demographics;
- defendant risk;
- offense characteristics including offense level (e.g., felony or misdemeanor) as well as felony offense class (A, B, C, D) for some analyses;
- details of pretrial status (released or detained, and length of detention);
- sentence imposed (if the defendant was found or pled guilty).

Methodology

Bivariate and multivariate models were used to complete the analysis. Most commonly used was logistic regression modeling, a procedure designed for what is generally referred to as a dichotomous or binary outcome variable. (Recidivism, for example, is typically considered either a "yes" or "no" outcome, regardless of measurement procedure.) Logistic regression, like many types of regression, allows for several variables to be entered into a model while statistically controlling for the effects of other variables. Generally, when a multivariate model is conducted, the variable of interest is highlighted (e.g., the effect of pretrial detention, or the length of pretrial detention) while controlling for the effects of other variables (such as age, race, gender, risk level, and the like).

Also incorporated in the analysis are Poisson regression models, which are typically used when the outcome variable is a discrete count (e.g., the number of months someone is sentenced to prison or jail, or the number of times someone is arrested). Counts tend to be distributed in such a way that the assumptions of linear regression are violated; therefore, an adjustment in modeling is required. Poisson regression, like logistic regression and other types of regression, allows for several variables to be entered into a model while statistically controlling for the effects of other variables. This allows for the examination of the effect of one or more variables of interest (e.g., pretrial detention and/or the length of pretrial detention).

The county of case origin, although not shown in any of the multivariate tables published here, was included in every multivariate model constructed and estimated. Robust standard error estimates were developed with clustering at the county level and were used in all multivariate analyses.

SAMPLE DESCRIPTION

The dataset described above, including 153,407 records representing all defendants arrested and booked into a Kentucky jail between July 1, 2009, and June 30, 2010, was used for the analysis.

There are 120 counties and 84 local jails in Kentucky. Table A-1 (see Appendix A) provides a jail-by-jail breakdown, identified by county location, and the number of cases originating from each jail. The number of cases is presented (N), as well as the percentage of the total that each jail comprises. The vast majority of jails contributed 3% or less of the total sample, with the noted exception of Jefferson County (approximately 19%) and Fayette County (approximately 7%).

Demographics

Table 1 presents descriptive information for the entire state sample, grouped in two categories, or models (Felony and Misdemeanor). Taken as a whole, the sample is approximately 26% female, 74% male, 79% white, 17% black, and 4% hispanic. The average age is approximately 33, and approximately 20% reported being married. With few exceptions, the different samples used to answer the different research questions tend to be very similar.

Offense Information

Table 1 also presents the original offense types[1] for the entire sample and each sub-sample used for the different research questions. Generally, drug, traffic, theft, and driving under the influence appear to be the most frequent offense types across the two samples. The Felony model had a higher percentage of violent offenses (9%) than the Misdemeanor model (3%).

Risk Level

Kentucky currently uses a research-based and validated assessment tool (Kentucky Pretrial Risk Assessment [KPRA]) to assess the risk of pretrial failure (FTA and NCA). The KPRA consists of 12 risk factors, including measures of offense class, criminal justice status, criminal history, failure to appear, and community stability, with each risk factor having a corresponding weight (or points). The weights are summed for a total risk score. The risk scores are categorized into three levels of risk — low, moderate, and high. For the sample, the largest risk category was low risk, with 53% to 67% falling into that level across the five models. The moderate risk level ranged between 29% and 40%, and the high risk level ranged between 3% and 7%. The sample of cases that make up the felony sentencing models are, relative to the other samples, higher risk.

1 It is important to note that defendants could contribute more than one offense to the offense type categorizations.

Days in Pretrial Detention

Table 1 also presents information across the two models regarding days spent in pretrial detention. Cases in the Felony model had an average of 35 days in pretrial detention, while cases in the Misdemeanor model had just 7 days. Both models included defendants who were released as well as those who were detained for the entire pretrial period.

Outcomes

The outcome is the sentence received (in months) for the Felony and Misdemeanor models (10.19 months and 0.49 months, respectively).

Table 1. Descriptive Statistics for Two Models

	FELONY MODEL		MISDEMEANOR MODEL	
	N	% OR $\bar{X}$	N	% OR $\bar{X}$
Age	47563	33.17	98165	33.59
Female	47514	24.77	98168	26.51
White	47360	78.07	97293	80.61
Black	47360	20.73	97293	16.57
Hispanic	40713	2.69	88557	6.31
Married	46931	19.33	95345	20.58
Risk Level				
Low	37249	53.48	65501	65.37
Moderate	37249	39.54	65501	30.57
High	37249	6.98	65501	4.05
Offense Type				
Drugs	47637	17.56	98460	17.56
Violent	47637	9.28	98460	2.72
Domestic Violence	47637	3.14	98460	9.03
Sex Offense	47637	1.82	98460	0.92
Firearm	47637	4.39	98460	1.05
Theft	47637	33.58	98460	13.97
Traffic	47637	11.77	98460	35.24
Driving Under the Influence	47637	6.77	98460	26.86
Felony	47637	100.00	98460	0.00
Days Spent In Detention				
1 Day	46943	13.74	97522	40.32
2 to 3 Days	46943	22.13	97522	37.34
4 to 7 Days	46943	11.58	97522	9.19
8 to 14 Days	46943	18.20	97522	5.92
15 to 30 Days	46943	8.96	97522	3.60
31+ Days	46943	25.38	97522	3/63
Mean Days	46943	35.07	97522	7.01
Detained Pretrial Yes/No	47637	33.75	98460	22.08
Sentence in Months	47637	10.19	98460	0.49

RESEARCH OBJECTIVE:

Investigate the relations between pretrial detention and sentencing

Research Questions

1. Is pretrial detention related to the likelihood of being sentenced to incarceration in jail?
2. Do the observed effects of pretrial detention related to being sentenced to jail differ for sub-populations of defendants?
3. Is pretrial detention related to length of jail incarceration ordered at sentencing?
4. Do the observed effects of pretrial detention related to the length of sentence to jail differ for sub-populations of defendants?
5. Is pretrial detention related to the likelihood of being sentenced to incarceration in prison?
6. Do the observed effects of pretrial detention related to being sentenced to prison differ for sub-populations of defendants?
7. Is pretrial detention related to length of prison incarceration ordered at sentencing?
8. Do the observed effects of pretrial detention related to the length of sentence to prison differ for sub-populations of defendants?

Primary Findings

Being detained for the entire pretrial period is related to the likelihood of being sentenced to jail and prison, as well as the length of the sentence. When other relevant statistical controls are considered, defendants detained until trial or case disposition are 4.44 times more likely to be sentenced to jail and 3.32 times more likely to be sentenced to prison than defendants who are released at some point pending trial. The jail sentence is 2.78 times longer for defendants who are detained for the entire pretrial period, and the prison sentence is 2.36 times longer. [2]

When examining sub-populations, the relationship between pretrial detention and sentence to jail and prison, and the length of the sentence, is significant for all risk levels of defendants but even more pronounced for low-risk defendants.

2 The IRR, in technical terms, captures the ratio of the rate of the dependent variable given a change in the independent variable

- Low-risk defendants detained for the entire pretrial period are 5.41 times more likely to be sentenced to jail when compared to low-risk defendants who are released at some point pending trial. Moderate- and high-risk defendants detained for the entire pretrial period are approximately 4 and 3 times (respectively) more likely to be sentenced to jail than their released counterparts.

- The effect of pretrial detention on jail sentence length is also significant. Jail sentences are 2 to 3.5 times longer for those who are detained until trial or disposition, depending on the risk level of the defendant.

- Low-risk defendants who are detained for the entire pretrial period are 3.76 times more likely to be sentenced to prison when compared to low-risk defendants who are released; moderate- and high-risk defendants are roughly 3 times as likely.

- The effect of pretrial detention on prison sentence length was most significant for low-risk defendants. Prison sentences were 2.84 times longer for low-risk defendants who were detained for the entire pretrial period. For detained moderate- and high-risk defendants, prison sentences were roughly 2 times longer.

Methods and Analysis Results

Descriptive statistics, bivariate models, and multivariate models (e.g., logistic regression and Poisson regression models) were constructed to investigate these questions. Control variables included pretrial release and detention, supervision status, defendant risk level, offense type, offense class, and demographics. The analysis was repeated for sub-populations of defendants (i.e., gender, race, and risk level).

RESEARCH QUESTION 1A

Is pretrial detention related to the likelihood of being sentenced to incarceration in jail?

Table 2 presents a logistic regression model that was calculated to predict whether misdemeanor defendants were sentenced to jail. Whether a defendant was detained for the entire pretrial period was the primary variable of interest while control variables included age, gender, race, ethnicity, marital status, supervision status, risk level, offense type, and offense class. According to the odds ratio for pretrial detention, being detained until trial or case disposition was a significant and strong predictor of the likelihood of being sentenced to jail while controlling for the effects of all other variables in the model. Specifically, when other relevant statistical controls are considered, defendants detained for the entire pretrial period were 4.44 times more likely to be sentenced to jail when compared to defendants who were released at some point pending trial.

Table 2. Logistic Regression Model Predicting Jail Sentence (Yes/No)

	ODDS RATIO	P	LOWER 95% CI	UPPER 95% CI
Age	1.00	0.00	1.00	1.00
Female	0.81	0.00	0.78	0.85
White	1.12	0.25	0.93	1.35
Black	1.14	0.19	0.94	1.39
Hispanic	0.90	0.12	0.79	1.03
Married	0.86	0.00	0.82	0.91
On Probation or Parole	1.27	0.00	1.20	1.35
Risk Level (Reference = Low Risk)				
Moderate	1.54	0.00	1.47	1.61
High	1.70	0.00	1.54	1.87
Offense Type				
Drugs	0.92	0.01	0.87	0.98
Violent	0.82	0.00	0.72	0.93
Domestic Violence	0.83	0.00	0.76	0.89
Sex Offense	1.93	0.03	1.07	3.48
Firearm	1.47	0.00	1.23	1.76
Theft	1.32	0.00	1.23	1.41
Traffic	0.70	0.00	0.66	0.73
Driving Under the Influence	2.48	0.00	2.35	2.62
Offense Class A	1.27	0.00	1.21	1.34
Detained Pretrial	4.44	0.00	4.23	4.67
Constant	0.08	0.00	0.06	0.12
N = 55,712; Pseudo-R^2 = 0.13				

RESEARCH QUESTION 1B

Do the observed effects of pretrial detention related to being sentenced to jail differ for sub-populations of defendants?

Table 3 presents the results of logistic regression models that predicted a sentence to jail for misdemeanants using pretrial detention until trial or case disposition as the main predictor of interest while controlling for all other aforementioned variables' effects. Several models were calculated based on sub-group (i.e., white, black, male, female, low risk, moderate risk, and high risk). For each model, being detained for the entire pretrial period was a statistically significant and strong predictor of being sentenced to jail. The effect was strongest for low-risk defendants but still significant and substantial for high-risk defendants. The effects for all other subgroups fell between the two. Low-risk defendants detained for the entire pretrial period were 5.41 times more likely to be sentenced to jail when compared to low-risk defendants who were released at some point pending trial.

Table 3. Odds Ratios for Pretrial Detention Predicting Jail for Subgroups

SUBGROUP	ODDS RATIO	P	LOWER 95% CI	UPPER 95% CI
White	4.44	0.00	4.21	4.69
Black	4.50	0.00	4.02	5.02
Male	4.38	0.00	4.14	4.63
Female	4.66	0.00	4.21	5.16
Risk Level				
Low	5.41	0.00	5.04	5.80
Moderate	3.77	0.00	3.50	4.06
High	3.11	0.00	2.57	3.76

RESEARCH QUESTION 1C

Is pretrial detention related to length of jail incarceration ordered at sentencing?

Table 4 presents the results of a Poisson regression model designed to determine the effects of being detained for the entire pretrial period on the length of the jail sentence received for misdemeanor defendants. The model controlled for age, gender, race, ethnicity, marital status, supervision status, risk level, offense type, and offense class. While controlling for the effects of all other predictors in the model, defendants detained for the entire pretrial period received jail sentences that were 2.78 times longer than sentences received by defendants who were released at some point.

Table 4. Poisson Model with Correction for Overdispersion Predicting Jail Sentence Length

	IRR	P	LOWER 95% CI	UPPER 95% CI
Age	1.00	0.54	1.00	1.00
Female	0.79	0.00	0.75	0.84
White	1.13	0.22	0.93	1.39
Black	1.18	0.06	0.99	1.40
Hispanic	0.91	0.26	0.78	1.07
Married	0.92	0.00	0.88	0.97
On Probation or Parole	1.28	0.00	1.20	1.37
Risk Level (Reference = Low Risk)				
Moderate	1.48	0.00	1.38	1.60
High	1.73	0.00	1.51	1.99
Offense Type				
Drugs	0.88	0.15	0.74	1.05
Violent	0.82	0.02	0.70	0.97
Domestic Violence	0.89	0.24	0.73	1.08
Sex Offense	2.91	0.00	1.81	4.68
Firearm	1.08	0.42	0.89	1.32
Theft	1.30	0.00	1.18	1.43
Traffic	0.77	0.00	0.72	0.81
Driving Under the Influence	1.68	0.00	1.38	2.06
Offense Class A	1.72	0.00	1.58	1.87
Detained Pretrial	2.78	0.00	2.46	3.13
Constant	0.11	0.00	0.09	0.15
N = 55,712; α=1.45				

RESEARCH QUESTION 1D

Do the observed effects of pretrial detention related to the length of sentence to jail differ for sub-populations of defendants?

Table 5 presents Poisson models[3] where the effects of pretrial detention on jail sentence length for pretrial defendants are isolated for several subgroups of defendants (white, black, male, female, low risk, moderate risk, and high risk). For all subgroups, being detained for the entire pretrial period resulted in a significantly longer sentence to jail when compared to defendants released at some point pretrial. While significant and substantial for all three categories of risk, the effect of pretrial detention on sentence length appeared to be strongest for low-risk defendants. (The jail sentence was 3.49 times longer for low-risk defendants who were detained for the entire pretrial period.)

Table 5. Incidence Rate Ratios for Pretrial Detention Predicting Jail Sentence Length by Subgroup

	IRR	P	LOWER 95% CI	UPPER 95% CI
White	2.84	0.00	2.56	3.14
Black	2.56	0.00	1.95	3.34
Male	2.77	0.00	2.42	3.16
Female	2.77	0.00	2.46	3.13
Risk Level				
Low	3.49	0.00	2.96	4.10
Moderate	2.26	0.00	2.01	2.55
High	2.22	0.00	1.88	2.63

3 Poisson models with corrections for over dispersion.

RESEARCH QUESTION 1E

Is pretrial detention related to the likelihood of being sentenced to incarceration in prison?

Table 6 presents a logistic regression model that was calculated to predict whether felony defendants were sentenced to prison. Whether a defendant was detained for the entire pretrial period was the primary variable of interest while control variables included age, gender, race, ethnicity, marital status, supervision status, risk level, offense type, and offense class. Being detained until trial or case disposition revealed a statistically significant and strong relationship with being sentenced to prison. Specifically, when other relevant statistical controls are considered, defendants detained for the entire pretrial period are 3.32 times more likely to be sentenced to prison than defendants who are released at some point.

Table 6. Logistic Regression Model Predicting Prison Sentence (Yes/No)

	ODDS RATIO	P	LOWER 95% CI	UPPER 95% CI
Age	1.00	0.17	0.99	1.00
Female	0.79	0.00	0.71	0.88
White	1.11	0.47	0.84	1.47
Black	1.10	0.52	0.83	1.46
Hispanic	0.76	0.05	0.58	1.00
Married	0.84	0.00	0.77	0.91
On Probation or Parole	1.30	0.00	1.20	1.40
Risk Level (Reference = Low Risk)				
Moderate	1.32	0.00	1.19	1.46
High	1.59	0.00	1.31	1.94
Offense Type				
Drugs	1.36	0.00	1.12	1.66
Violent	1.46	0.00	1.32	1.61
Domestic Violence	1.78	0.00	1.32	2.39
Sex Offense	1.64	0.00	1.34	2.00
Firearm	1.17	0.01	1.04	1.31
Theft	1.37	0.00	1.24	1.51
Traffic	1.02	0.67	0.94	1.11
Driving Under the Influence	1.78	0.00	1.49	2.12
Offense Class				
C	1.10	0.26	0.94	1.29
B	0.94	0.52	0.78	1.13
A	1.45	0.01	1.08	1.96
Detained Pretrial	3.32	0.00	3.04	3.63
Constant	0.20	0.00	0.15	0.27

N = 32,258; Pseudo-R^2 = 0.11

RESEARCH QUESTION 1F

Do the observed effects of pretrial detention related to being sentenced to prison differ for sub-populations of defendants?

The analysis discussed in Research Question 2 was replicated using sentence to prison for felony defendants as the dependent variable. The models used to address this question once again controlled for the effects of other predictors, but this time separate models were created for each of the subgroups of interest. As displayed in Table 7, those detained for the entire pretrial period were significantly more likely to be sentenced to prison. The effect of pretrial detention was strongest for low-risk defendants, but the impact was significant and large for defendants at all risk levels. Low-risk defendants who were detained until trial or case disposition were 3.76 times more likely to be sentenced to prison than low-risk defendants who were released at some point pending trial. Detained moderate- and high-risk defendants were about 3 times more likely to be sentenced to prison than similar defendants who were released at some point pretrial.

Table 7. Odds Ratios for Pretrial Detention Predicting Prison for Subgroups

SUBGROUP	ODDS RATIO	P	LOWER 95% CI	UPPER 95% CI
White	3.37	0.00	3.05	3.71
Black	3.11	0.00	2.83	3.42
Male	3.29	0.00	2.99	3.62
Female	3.50	0.00	3.09	3.95
Risk Level				
Low	3.76	0.00	3.32	4.27
Moderate	3.20	0.00	2.91	3.53
High	2.90	0.00	2.50	3.36

RESEARCH QUESTION 1G

Is pretrial detention related to length of prison incarceration ordered at sentencing?

The analysis discussed in Research Question 3 was replicated using prison sentence length for felony defendants as the dependent variable. As can be seen in Table 8, being detained for the entire pretrial period was a statistically significant predictor of increased prison sentences while controlling for all other predictors in the model.

Table 8. Poisson Model with Overdispersion Predicting Prison Sentence Length

	IRR	P	LOWER 95% CI	UPPER 95% CI
Age	1.00	0.54	1.00	1.01
Female	0.68	0.00	0.58	0.79
White	1.50	0.05	1.00	2.26
Black	1.74	0.01	1.13	2.68
Hispanic	0.59	0.02	0.38	0.92
Married	0.95	0.48	0.84	1.09
On Probation or Parole	1.57	0.00	1.45	1.71
Risk Level (Reference = Low Risk)				
Moderate	1.78	0.00	1.60	1.99
High	2.35	0.00	1.88	2.95
Offense Type				
Drugs	1.29	0.01	1.07	1.56
Violent	1.09	0.19	0.96	1.23
Domestic Violence	0.69	0.00	0.56	0.86
Sex Offense	2.31	0.00	1.80	2.96
Firearm	1.13	0.35	0.87	1.47
Theft	1.36	0.00	1.23	1.51
Traffic	0.82	0.13	0.63	1.06
Driving Under the Influence	0.97	0.83	0.74	1.28
Offense Class				
C	2.26	0.00	1.95	2.63
B	3.75	0.00	3.31	4.25
A	6.73	0.00	5.63	8.04
Detained Pretrial	2.36	0.00	2.10	2.65
Constant	2.20	0.00	1.39	3.49

N = 32,258

RESEARCH QUESTION 1H

Do the observed effects of pretrial detention related to the length of sentence to prison differ for sub-populations of defendants?

The analyses discussed in Research Question 4 were replicated for felony defendants with the effects of pretrial detention on prison sentence length isolated for each of several subgroups of defendants (white, black, male, female, low risk, moderate risk, and high risk). As can be seen in Table 9, detention for the entire pretrial period appears to result in statistically longer sentences to prison while controlling for all other variables in the model. The effects appear to be strongest for detained low-risk defendants, whose prison sentences in months were 2.84 times longer than their released counterparts. The effects appear to be weakest for black defendants, with the effects for all other subgroups falling between.

Table 9. Incidence Rate Ratios for Pretrial Detention Predicting Prison Sentence Length by Subgroup

	IRR	P	LOWER 95% CI	UPPER 95% CI
White	2.44	0.00	2.17	2.74
Black	1.99	0.00	1.66	2.40
Male	2.39	0.00	2.11	2.69
Female	2.45	0.00	2.02	2.98
Risk Level				
Low	2.84	0.00	2.41	3.33
Moderate	2.15	0.00	1.91	2.43
High	2.32	0.00	1.75	3.06

APPENDIX

Appendix A: Table A-1

JAIL BY COUNTY	N	%
ADAIR	721	0.47
ALLEN	586	0.38
BALLARD	392	0.26
BARREN	1,879	1.22
BELL	1,480	0.96
BOONE	3,823	2.49
BOURBON	736	0.48
BOYD	2,318	1.51
BOYLE	1,592	1.04
BRECKINRIDGE	561	0.37
BULLITT	1,964	1.28
BUTLER	296	0.19
CALDWELL	526	0.34
CALLOWAY	803	0.52
CAMPBELL	2,997	1.95
CARROLL	1,753	1.14
CARTER	1,094	0.71
CASEY	527	0.34
CHRISTIAN	3,672	2.39
CLARK	1,277	0.83
CLAY	1,080	0.7
CLINTON	250	0.16
CRITTENDEN	291	0.19
DAVIESS	3,541	2.31
ESTILL	431	0.28
FAYETTE	11,595	7.56
FLOYD	1,621	1.06
FRANKLIN	2,212	1.44
FULTON	472	0.31

JAIL BY COUNTY	N	%
GRANT	1,034	0.67
GRAVES	1,513	0.99
GRAYSON	985	0.64
GREENUP	847	0.55
HARDIN	3,072	2
HARLAN	1,757	1.15
HART	556	0.36
HENDERSON	2,187	1.43
HICKMAN	158	0.1
HOPKINS	2,045	1.33
JACKSON	405	0.26
JEFFERSON	28,578	18.63
JESSAMINE	2,087	1.36
JOHNSON	3,461	2.26
KENTON	6,942	4.53
KNOX	1,358	0.89
LARUE	328	0.21
LAUREL	2,455	1.6
LEE	1,342	0.87
LESLIE	388	0.25
LETCHER	869	0.57
LEWIS	295	0.19
LINCOLN	924	0.6
LOGAN	866	0.56
MADISON	2,521	1.64
MARION	925	0.6
MARSHALL	755	0.49
MASON	1,319	0.86
MCCRACKEN	2,979	1.94

JAIL BY COUNTY	N	%
MCCREARY	674	0.44
MEADE	570	0.37
MONROE	276	0.18
MONTGOMERY	1,519	0.99
MUHLENBERG	908	0.59
NELSON	1,044	0.68
OHIO	793	0.52
OLDHAM	920	0.6
PERRY	1,596	1.04
PIKE	2,814	1.83
POWELL	726	0.47
PULASKI	2,246	1.46
ROCKCASTLE	846	0.55
ROWAN	1,387	0.9
RUSSELL	449	0.29
SCOTT	1,013	0.66
SHELBY	1,762	1.15
SIMPSON	685	0.45
TAYLOR	1,013	0.66
TODD	320	0.21
UNION	531	0.35
WARREN	4,804	3.13
WAYNE	474	0.31
WEBSTER	422	0.28
WHITLEY	1,690	1.1
WOODFORD	484	0.32

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No. 16-10521-HH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MAURICE WALKER, on behalf of himself
and others similarly situated,

Plaintiff-Appellee

v.

CITY OF CALHOUN, GEORGIA,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE ON THE ISSUE ADDRESSED HEREIN

JOHN A. HORN
United States Attorney
Northern District of Georgia

LISA FOSTER
Director, Office for Access to Justice

VANITA GUPTA
Principal Deputy Assistant
Attorney General

TOVAH R. CALDERON
CHRISTINE H. KU
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 353-9044

Case No. 16-10521-HH

Maurice Walker v. *City of Calhoun, Georgia*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, *Amicus Curiae* United States certifies that, in addition to the persons and entities identified in the briefs of defendant-appellant, plaintiff-appellee, and all of the *amici curiae*, the following persons may have an interest in the outcome of this case:

1. Calderon, Tovah R., United States Department of Justice, Civil Rights Division, counsel for *amicus curiae* United States;

2. Foster, Lisa, United States Department of Justice, Office for Access to Justice, counsel for *amicus curiae* United States;

3. Gupta, Vanita, United States Department of Justice, Civil Rights Division, counsel for *amicus curiae* United States;

4. Horn, John A., United States Attorney, Northern District of Georgia, counsel for *amicus curiae* United States;

5. Ku, Christine H., United States Department of Justice, Civil Rights Division, counsel for *amicus curiae* United States.

s/ Christine H. Ku
CHRISTINE H. KU
Attorney

Date: August 18, 2016

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INTEREST OF THE UNITED STATES

The United States has a strong interest in ensuring that criminal justice systems, including bail practices within those systems, are fair and nondiscriminatory. In March 2010, the Department of Justice (Department or DOJ) established the Office for Access to Justice, whose mission is to help criminal and civil justice systems efficiently deliver fair and accessible outcomes, irrespective of wealth and status. The Department also has authority to investigate

unlawful criminal justice practices, including the problematic use of fines and fees and bond procedures. See, *e.g.*, Consent Decree at 1-2, 83, 86-87 (Doc. 41), *United States* v. *City of Ferguson*, No. 4:16-cv-180 (E.D. Mo. Apr. 19, 2016) (consent decree effectuated pursuant to the Department's authority under 42 U.S.C. 14141). By encouraging practices that avoid unnecessary and excessive incarceration, the Department strives to reduce the risk of unconstitutional conditions of confinement, which the Attorney General is authorized to address under the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997 *et seq.*

In the context of bail, the Department has promoted practices that do not discriminate against the poor. From the National Symposium on Pretrial Justice, which the Department's Office of Justice Programs helped convene in 2011, to the White House and DOJ Convening on the Cycle of Incarceration: Prison, Debt and Bail Practices in 2015, the Department has sought to call attention to the problem of discriminatory bail practices in state and local courts. At the White House convening, Attorney General Lynch discussed discriminatory bail practices, reiterating the Department's commitment "[t]o ensur[e] that in the United States

there is indeed no price tag on justice."[1] In addition, the Department's Bureau of Justice Assistance funds the National Task Force on Fines, Fees and Bail Practices, a joint project of the Conference of Chief Justices and the Conference of State Court Administrators, along with a $2.5 million grant program entitled *The Price of Justice: Rethinking the Consequences of Justice Fines and Fees*.[2] Both are intended to encourage state and local court reforms aimed at ending practices, including bail practices, that unfairly discriminate against the poor. These recent initiatives build upon DOJ's efforts since the 1960s to help reform bail practices. See pp. 5-6, *infra*.

In February 2015, the Department filed a statement of interest (SOI) arguing that bail practices that incarcerate indigent individuals before trial solely because of their inability to pay for their release violates the Fourteenth Amendment. See U.S. SOI, *Varden* v. *City of Clanton*, No. 2:15-cv-34, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015). And in March 2016, the Department issued a Dear Colleague

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[1] *Attorney General Loretta E. Lynch Delivers Remarks at White House Convening on Incarceration and Poverty* (Dec. 3, 2015), available at https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-white-house-convening-incarceration-and.

[2] See *Justice Department Announces Resources to Assist State and Local Reform of Fine and Fee Practices* (Mar. 14, 2016), available at https://www.justice.gov/opa/pr/justice-department-announces-resources-assist-state-and-local-reform-fine-and-fee-practices.

Letter advising state and local courts that due process and equal protection principles require that, among other things, they "must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release."[3]

STATEMENT OF THE ISSUE

The United States will address the following question only:

Whether a bail practice that results in the incarceration of indigent individuals without meaningful consideration of their ability to pay and alternative methods of assuring their appearance at trial violates the Fourteenth Amendment.[4]

STATEMENT OF THE CASE

1. Overview Of Bail In The United States

"In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States* v. *Salerno*, 481 U.S. 739, 755 (1987). Courts have recognized that it is within this limited exception that conditions can be imposed, or in rare circumstances, release can be denied, to

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[3] Letter from Vanita Gupta, Principal Deputy Assistant Attorney General, Civil Rights Div., Dep't of Justice, and Lisa Foster, Director, Office for Access to Justice, to Colleagues 2 (Mar. 14, 2016), available at https://www.justice.gov/crt/file/832461/download.

[4] The United States takes no position on the facts of this case or on any other issue raised in appellant's brief.

achieve legitimate goals like preventing the flight of defendants before trial or protecting the public from future danger. See *id.* at 754-755. Future appearance in court and public safety often can be assured through the imposition of nonmonetary conditions, such as supervised release or reasonable restrictions on activities and movements. See ABA Standards for Criminal Justice: Pretrial Release 10-1.4, 10-5.2 (3d ed. 2007).[5] Financial conditions (often referred to simply as "bail"), however, "should be used only when no other conditions will ensure appearance." *Id.* 10-1.4(c). This is because "[a] primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants." *Salerno*, 481 U.S. at 753; see also *Pugh* v. *Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc) (recognizing bail's limited function "of assuring the presence of [the] defendant").

Until the reform of the federal bail system in the 1960s, however, pretrial detention was effectively the norm rather than the exception for indigent federal defendants. Federal courts routinely set monetary bail conditions without regard for indigence, and "often the sole consideration in fixing bail [was] the nature of

[5] Available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html#10-1.1.

the crime."[6] In 1962, Attorney General Robert F. Kennedy called national attention to the "problem of bail," pointing out that pretrial detention "is directly influenced by how wealthy [a defendant] is."[7] In testifying to Congress about the problems associated with bail systems that fail to account for indigence, Attorney General Kennedy told the story of an individual who spent 54 days in jail because he could not afford the $300 bail amount for a traffic offense for which the maximum penalty was only five days in jail. See *Testimony by RFK* 3. Under Attorney General Kennedy's leadership, the Department pressed for expansive reforms that culminated in the Attorney General's National Conference on Bail and Criminal Justice in 1964 and the Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214.

The Bail Reform Act abolished the use of bail conditions that discriminate against indigent arrestees in the federal system. The Act's purpose was to revise federal bail practices "to assure that all persons, regardless of their financial status,

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[6] *Testimony by Attorney General Robert F. Kennedy on Bail Legislation Before the Subcomms. on Constitutional Rights and Improvements in Judicial Machinery of the S. Judiciary Comm.* 2 (Aug. 4, 1964) (*Testimony by RFK*), available at http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf.

[7] Department of Justice, *Address by Attorney General Robert F. Kennedy, American Bar Association House of Delegates* (Aug. 6, 1962), available at https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-06-1962%20Pro.pdf.

shall not needlessly be detained pending their appearance * * * when detention serves neither the ends of justice nor the public interest." Bail Reform Act of 1966 § 2; see also *Allen* v. *United States*, 386 F.2d 634, 637 (D.C. Cir. 1967) (Bazelon, J., dissenting) ("It plainly appears from the language and history of the Bail Reform Act that its central purpose was to prevent pretrial detention because of indigency."). In 1984, the Act was amended to make clear that a "judicial officer may not impose a financial condition that results in the pretrial detention of the person." 18 U.S.C. 3142(c)(2); see H.R. Rep. No. 98-1121, 98th Cong., 2d Sess. 12 (1984). This express mandate helps ensure that federal courts base pretrial detention decisions on an individualized assessment of dangerousness and risk of flight and that indigent defendants are not detained without meaningful consideration of an individual's ability to pay and alternative methods of achieving the government's interests. See also 18 U.S.C. 3142(g) (listing factors that judicial officers should consider to "reasonably assure" the appearance of an individual in court and the safety of others).

Many other jurisdictions, however, still maintain bail systems that incarcerate people without regard for indigency.[8] But as noted above, the

[8] Indeed, the use of monetary bail has increased substantially since 1990. See Ram Subramaniam, *et al.*, Vera Institute of Justice, *Incarceration's Front Door: The Misuse of Jails in America* 29 (updated July 29, 2015), available at

(continued…)

Department is working with state and local courts to reform their systems and promote constitutional bail practices. In *Varden*, after the Department filed its SOI, the parties reached a settlement agreeing to a bail policy that allows for release on an unsecured bond as the norm rather than the exception. See *Varden* v. *City of Clanton*, No. 2:15-cv-34, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015); see also Consent Decree, *City of Ferguson*, *supra*. Lawsuits challenging bail practices in other local jurisdictions have also been resolved by agreement or court order. See, *e.g.*, *Pierce* v. *City of Velda City*, No. 4:15-cv-570, 2015 WL 10013006 (E.D. Mo. June 3, 2015) (adopting a settlement agreeing to a new bail policy and declaring that, under the Equal Protection Clause, no defendant can be held in custody based solely on inability to post a monetary bond); *Snow* v. *Lambert*, No. 3:15-cv-567 (M.D. La. Sept. 3, 2015) (accepting a settlement prohibiting use of a secured monetary bond to hold misdemeanor arrestees in jail who cannot afford the bond).

2. Relevant Facts And Procedural History

a. Plaintiff Maurice Walker is a 54-year old man who was arrested by the Calhoun Police Department for being a pedestrian under the influence and was

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(…continued)
http://archive.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report_02.pdf.

kept in jail for six nights without making bail. Doc. 29-2, at 1.[9] He filed this class action alleging that the City of Calhoun, Georgia, employs an unconstitutional bail practice that imprisons indigent defendants because of their inability to pay fixed bail amounts for misdemeanors, traffic offenses, and ordinance violations. Doc. 1, at 5-7, 13.

According to the complaint, Walker has a serious mental health disability and limited income with no assets. He lives with his sister, who manages his only income of $530 per month of Social Security disability benefits. Doc. 1, at 3. When Walker was arrested on September 3, 2015, he was informed that he would not be released unless he paid the $160 fixed cash bond amount set by the City for the misdemeanor of being a pedestrian under the influence. Georgia law provides that "at no time * * * shall any person charged with a misdemeanor be refused bail." Ga. Code Ann. § 17-6-1(b)(1) (West 2014). But Walker alleged that, contrary to state law, the City's policy and practice was to immediately release individuals arrested for minor traffic or misdemeanor offenses if they can pay preset bond amounts (which vary by offense), but to hold those who cannot afford the bond in jail until their first court appearance. See Doc. 1, at 2; Doc. 29-5, at 9-10, 12, 15 (Calhoun's Bail Schedule). By contrast, Walker contended that many

[9] Citations to "Doc. __, at __" are to documents on the district court docket sheet and relevant page numbers.

other cities provide for release of misdemeanor arrestees on recognizance or unsecured bonds. These forms of security involve promises to appear with penalties for failing to appear in court, such as an added criminal charge or a monetary fine. Doc. 1, at 5-6.

Walker alleged that because he is indigent, and because he could not afford the fixed bail amount, he was kept in jail for several nights to await his court appearance. Doc. 1, at 4-5. When this lawsuit was filed, the City held court only on non-holiday Mondays, and because Walker was arrested on the Thursday before Labor Day, he remained in jail for six days until his counsel could secure his release on his own recognizance. Doc. 29, at 2. During his pretrial detention, Walker claimed that he was unable to take his daily medication, and that he was allowed out of his cell for only one hour each day. Doc. 1, at 5. Walker also alleged that "[e]ach Monday [when court is held], there are commonly about four to six indigent defendants who were not able to pay * * * to secure their release." Doc. 1, at 7.

On behalf of himself and those similarly situated, Walker sued the City under 42 U.S.C. 1983, alleging that its bail practice violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. He sought damages on behalf of himself and declaratory and injunctive relief on behalf of the class. Doc. 1, at 3, 13-14.

b. On January 28, 2016, the district court granted Walker's motion for a preliminary injunction. The court ordered the City to implement constitutional post-arrest procedures and, in the interim, to release any misdemeanor arrestees on their own recognizance or on an unsecured bond. Doc. 40, at 72. The court held, among other things, that there was a substantial likelihood that Walker would succeed on the merits of his claim, because "[a]ny bail or bond scheme that mandates payment of pre-fixed amounts for different offenses to obtain pretrial release, without any consideration of indigence or other factors, violates the Equal Protection Clause." Doc. 40, at 49. In reaching this conclusion, the district court reviewed Supreme Court and circuit precedent recognizing that equal protection and due process principles prohibit punishing people for their poverty. The court then determined that this rule was "especially true" for pretrial detainees who had yet to be found guilty of a crime. Doc. 40, at 49-52; see also Doc. 40, at 52-56 (observing that other courts have reached similar conclusions).[10]

[10] The district court also determined that the City's new Standing Bail Order, which was adopted after the lawsuit was filed, neither mooted Walker's claims nor remedied the constitutional deficiencies in the prior bail policy. Doc. 40, at 56, 59-62. Again, the United States takes no position on these or any other issues in this case that is not addressed herein.

SUMMARY OF THE ARGUMENT

If this Court reaches the issue, it should affirm the district court's holding that a bail scheme that mandates payment of fixed amounts to obtain pretrial release, without meaningful consideration of an individual's indigence and alternatives that would serve the City's interests, violates the Fourteenth Amendment.

In a long line of cases beginning with *Griffin* v. *Illinois*, 351 U.S. 12 (1956), the Supreme Court has held that denying equal access to justice—including and especially through incarceration—without consideration of ability to pay and possible alternatives to achieve a legitimate governmental interest, violates the Fourteenth Amendment. In these cases, the Court has recognized that the proper analysis reflects both equal protection and due process principles, and has rejected use of the traditional equal protection inquiry. The appropriate inquiry focuses instead on "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." *Bearden* v. *Georgia*, 461 U.S. 660, 666-667 (1983) (citation omitted; brackets in original).

As the district court recognized, the Supreme Court's holdings and analysis apply with special force in the bail context, where deprivations of liberty are at issue and defendants are presumed innocent. Under *Bearden* and other cases in

Griffin's progeny, a bail scheme that imposes financial conditions, without individualized consideration of ability to pay and whether such conditions are necessary to assure appearance at trial, violates the Fourteenth Amendment. Thus, as the former Fifth Circuit acknowledged, while the use of fixed bail schedules may provide a convenient way to administer pretrial release, incarcerating those who cannot afford to pay the bail amounts, without meaningful consideration of alternatives, infringes on equal protection and due process requirements. See *Pugh* v. *Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc).

In addition to violating the Fourteenth Amendment, such bail systems result in the unnecessary incarceration of people and impede the fair administration of justice for indigent arrestees. Thus, they are not only unconstitutional, but they also constitute bad public policy.

ARGUMENT

A BAIL PRACTICE VIOLATES THE FOURTEENTH AMENDMENT IF, WITHOUT CONSIDERATION OF ABILITY TO PAY AND ALTERNATIVE METHODS OF ASSURING APPEARANCE AT TRIAL, IT RESULTS IN THE PRETRIAL DETENTION OF INDIGENT DEFENDANTS

A. The Fourteenth Amendment Prohibits Incarcerating Individuals Without Meaningful Consideration Of Indigence And Alternative Methods Of Achieving A Legitimate Government Interest

The Supreme Court has long held that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin* v.

Illinois, 351 U.S. 12, 19 (1956) (plurality opinion); accord *Smith* v. *Bennett*, 365 U.S. 708, 710 (1961). As explained more fully below, in a long line of cases beginning with *Griffin*, the Court has repeatedly reaffirmed that denying access to equal justice, without meaningful consideration of indigence and alternative methods of achieving a legitimate government interest, violates the Fourteenth Amendment. Although a jurisdiction has discretion to determine which rights and penalties beyond what the Constitution minimally requires are appropriate to achieve its legitimate interests, the Fourteenth Amendment prohibits a jurisdiction from categorically imposing different criminal consequences—including and especially incarceration—on poor people without accounting for their indigence.

In *Griffin*, the Court first considered whether a State "may, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, * * * deny adequate appellate review [of a criminal conviction] to the poor while granting such review to all others." 351 U.S. at 13. The Court held that once a State decides to grant appellate rights, it may not "do so in a way that discriminates against some convicted defendants on account of their poverty." *Id*. at 18. The Court therefore found it unconstitutional to deny indigent criminal defendants appellate review by effectively requiring them to furnish appellate courts with a trial transcript, which cost money, before they could appeal their convictions. See *id*. at 18-19. In holding that "[d]estitute defendants must be afforded as adequate

appellate review as defendants who have money enough to buy transcripts," *id*. at 19, the Court declined to hold that the State "must purchase a stenographer's transcript in every case where a defendant cannot buy it," *id*. at 20. Instead, it held that the State "may find other means of affording adequate and effective appellate review to indigent defendants." *Ibid*.

In a line of cases building on *Griffin*, the Supreme Court has held that incarcerating individuals solely because of their inability to pay a fine or fee, without regard for indigence and a meaningful consideration of alternative methods of achieving the government's interests, effectively denies equal protection to one class of people within the criminal justice system while also offending due process principles. In *Williams* v. *Illinois*, 399 U.S. 235, 244 (1970), for example, the Court struck down a practice of incarcerating an indigent individual beyond the statutory maximum term because he could not pay the fine and court costs to which he had been sentenced. The Court held that "once 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." *Id.* at 241-242. The Court made clear, however, that "[t]he State is not powerless to enforce judgments against those financially unable to pay a fine." *Id*. at 244. On the contrary, nothing in the

Court's holding "limits the power of the sentencing judge to impose alternative sanctions" under state law." *Id*. at 245.

Similarly, in *Tate* v. *Short*, 401 U.S. 395, 398 (1971), the Court held that incarcerating an indigent individual convicted of fines-only offenses to "satisfy" his outstanding fines constituted unconstitutional discrimination because it "subjected [him] to imprisonment solely because of his indigency." *Id.* at 397-398. The Court explained that the scheme in *Tate* suffered from the same constitutional defect as that in *Williams*, and again emphasized that there "other alternatives to which the State may constitutionally resort to serve its concededly valid interest in enforcing payment of fines." *Id*. at 399.[11]

And in *Bearden* v. *Georgia*, 461 U.S. 660 (1983), the Court held that the Fourteenth Amendment prohibits a State from revoking an indigent defendant's probation for failure to pay a fine and restitution "without determining that [the defendant] had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist." *Id.* at 661-662. Such treatment of indigent defendants would amount to "little more than punishing a person for his poverty." *Id.* at 662.

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[11] See also *Barnett* v. *Hopper*, 548 F.2d 550, 554 (5th Cir. 1977) (relying on *Williams* and *Tate* to hold that "[t]o imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection of the laws"), vacated as moot, 439 U.S. 1041 (1978).

The *Bearden* Court further explained that, because "[d]ue process and equal protection principles converge in the Court's analysis in these cases," 461 U.S. at 665, the traditional equal protection framework that usually requires analysis under a particular level of scrutiny does not apply. Because "indigency in this context is a relative term rather than a classification, fitting the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished." *Id.* at 666 n.8 (internal quotation marks omitted). "Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis." *Id.* at 666. Instead, the relevant analysis "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." *Id*. at 666-667 (citation and internal quotation marks omitted; brackets in original).

Although *Bearden* and other cases in *Griffin*'s progeny have arisen in the sentencing and post-conviction contexts, their holdings apply with equal, if not greater, force in the bail context. Indeed, defendants who have not been found guilty have an especially "strong interest in liberty." *United States* v. *Salerno*, 481 U.S. 739, 750, 755 (1987). Because of that liberty interest, pretrial release should be the norm, and pretrial detention "the carefully limited exception." *Ibid*. To be

sure, in certain circumstances, such as when a court finds that a defendant poses a threat to others or presents a flight risk, this fundamentally important right may be circumscribed on a case-by-case basis. See, *e.g.*, *id.* at 750-751, 754-755. If 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*." *Id*. at 754 (emphasis added). Although the imposition of bail in such circumstances may result in a person's incarceration, the deprivation of liberty in such circumstances is not based *solely* on inability to pay.

But 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. Under such bail schemes, arrestees who can afford to pay the fixed bail amount are promptly released whenever they are able to access sufficient funds for payment, even if they are likely to miss their assigned court date or pose a danger to others. Conversely, the use of such schedules effectively denies pretrial release to those who cannot afford to pay the fixed bail amount, even if they pose no flight risk, and even if alternative methods of assuring appearance (such as an unsecured bond or supervised release) could be imposed. Such individuals are unnecessarily kept in jail until their court

appearance often for even minor offenses, such as a traffic or ordinance violation, including violations that are not punishable by incarceration.

As the former Fifth Circuit recognized in an en banc decision, while "[u]tilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting its requirements," the "incarceration of those who cannot, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." *Pugh* v. *Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc).[12] Although the court in *Pugh* found moot plaintiffs' claim challenging the use of monetary bail to incarcerate defendants pretrial without meaningful consideration of alternatives, it acknowledged "that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Id.* at 1056 (citing *Williams*, *supra*; *Tate*, *supra*); see also *Varden*, *supra*, at *2 (concluding that "[t]he Fourteenth Amendment prohibits punishing a person for his poverty, and this includes deprivations of liberty based on the inability to pay fixed-sum bail amounts"—a principle that "applies with special force" to pretrial defendants (internal citation and quotation marks omitted)). In fact, where fixed bail

[12] Decisions of the former Fifth Circuit rendered before October 1, 1981, serve as binding precedent of the Eleventh Circuit. See *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

schedules are used without meaningful consideration of alternatives that account for inability to pay, indigent arrestees seeking bail are faced with precisely the same type of "illusory choice" that the Supreme Court has recognized "works an invidious discrimination." *Williams*, 399 U.S. at 242.

Although fixed bail schedules appear to be neutral on their face, the Supreme Court has explained that policies that impose sanctions on only indigent individuals are not neutral in their operation. Thus, contrary to the City's argument (Appellant's Br. 45-46), its policies do not fall outside the Fourteenth Amendment's prohibition of disparate treatment. The City relies on *Washington* v. *Davis*, 426 U.S. 229, 244-245 (1976), which held that, absent evidence of a discriminatory purpose, a facially neutral law with a racially discriminatory effect does not violate equal protection. But the Supreme Court has rejected this argument with respect to policies that implicate due process concerns and discriminate against the indigent in the sanctions imposed, explaining that, because such policies "expose[] *only indigents*" to an additional sanction, they are "not merely *disproportionate* in impact. Rather, they are wholly contingent on one's ability to pay, and thus 'visi[t] different consequences on two categories of persons[]'; they apply to all indigents and do not reach anyone outside that class." *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 127 (1996) (internal citation omitted; second brackets in original); see also *Bearden*, 461 U.S. at 664 (applying "*Griffin*'s

principle of 'equal justice'" post-*Washington* v. *Davis* to prohibit revocations of probation without inquiring into ability to pay and consideration of alternatives); *Williams*, 399 U.S. at 242 ("Here the Illinois statutes as applied to Williams works an invidious discrimination solely because he is unable to pay the fine.").

In sum, under *Bearden* and other cases in *Griffin*'s progeny, a jurisdiction may not use a bail system that incarcerates indigent individuals without meaningful consideration of their indigence and alternative methods of assuring their appearance at trial.

B. Bail Systems That Keep Indigent Defendants In Jail Solely Because They Cannot Pay Bail Result In Unnecessary Pretrial Detention And Impede The Fair Administration Of Justice

Bail practices that do not account for indigence result in the unnecessary incarceration of numerous individuals who are presumed innocent. Of the more than 730,000 individuals incarcerated in local jails nationwide in 2011, for example, about 60% were pretrial detainees (a rate unchanged since 2005), and most of them were accused of nonviolent offenses.[13] Unnecessary pretrial detention significantly burdens the limited resources of taxpayers and state and

[13] See Richard Williams, *Bail or Jail*, State Legislatures (May 2012), available at http://www.ncsl.org/research/civil-and-criminal-justice/bail-or-jail.aspx; see also Todd D. Minton & Zhen Zeng, United States Department of Justice, Bureau of Justice Statistics, *Jail Inmates at Midyear 2014*, NCJ 248629, at 1, 3 (2015), available at http://www.bjs.gov/content/pub/pdf/jim14.pdf.

local governments. It also creates additional problems as jails become overcrowded.

The repercussions of unnecessary pretrial detention that disproportionately affect indigent individuals can reverberate in other parts of the criminal justice process and impede the fair administration of justice. The "traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction." *Pugh*, 572 F.2d at 1056-1057 (en banc) (citing *Hudson* v. *Parker*, 156 U.S. 277, 285 (1895)). But incarceration could hinder a defendant's "ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker* v. *Wingo*, 407 U.S. 514, 533 (1972). Excessive pretrial detention could also induce the innocent to plead guilty for a speedier release or result in a detention period that exceeds the expected sentence.[14] And because "[m]ost jails offer little or no recreational or rehabilitative programs," pretrial detention is not likely to reduce recidivism. *Ibid.*

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[14] See, *e.g.*, Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 Am. Crim. L. Rev. 1123, 1154 (2005); Mary T. Phillips, New York City Criminal Justice Agency, Inc., *Bail, Detention, and Felony Case Outcomes, Research Brief No. 18*, at 7 (2008), available at http://www.nycja.org/lwdcms/doc-view.php?module=reports&module_id=597&doc_name=doc; Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2492 (2004).

Pretrial incarceration also "often means loss of a job; it disrupts family life; and it enforces idleness." *Barker*, 407 U.S. at 532; see also ABA Standards for Criminal Justice: Pretrial Release 10-1.1 ("Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support.").[15] This impact may be exacerbated for indigent individuals who, as a consequence of their poverty, are already in vulnerable situations.[16]

In short, bail practices that fail to account for indigence are not only unconstitutional, but also conflict with sound public policy considerations.

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[15] Available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html#10-1.1.

[16] See Open Society Justice Initiative, *The Socioeconomic Impact of Pretrial Detention* 27-32 (2001) (examining the costs to pretrial detainees and their families as measured by income, employment, education, incarceration-related expenses, and long-term effects), available at http://www.pretrial.org/download/research/OSI%20Socioeconomic%20Impact%20Pretrial%20Detention%202011.pdf.

CONCLUSION

If this Court reaches the issue presented herein, the Court should affirm the district court's holding that a bail scheme violates the Fourteenth Amendment if, without a court's meaningful consideration of ability to pay and alternative methods of assuring appearance at trial, it results in the detention of indigent defendants pretrial.

Respectfully submitted,

JOHN A. HORN
United States Attorney
Northern District of Georgia

LISA FOSTER
Director, Office for Access to Justice

VANITA GUPTA
Principal Deputy Assistant
Attorney General

s/ Christine H. Ku
TOVAH R. CALDERON
CHRISTINE H. KU
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 353-9044

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s/ Christine H. Ku
CHRISTINE H. KU
Attorney

Date: August 18, 2016

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2016, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE ON THE ISSUE ADDRESSED HEREIN with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

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Bradley Williams Cornett
Ford Howard & Cornett, PC
140 S 9th ST
Gadsden, AL 35902

Lorelei Lein
Alabama League of Municipalities
535 Adams Ave
Montgomery, AL 36104-4333

s/ Christine H. Ku
CHRISTINE H. KU
Attorney

U.S. Department of Justice

Civil Rights Division

Office for Access to Justice

Washington, D.C. 20530

March 14, 2016

Dear Colleague:

The Department of Justice ("the Department") is committed to assisting state and local courts in their efforts to ensure equal justice and due process for all those who come before them. In December 2015, the Department convened a diverse group of stakeholders—judges, court administrators, lawmakers, prosecutors, defense attorneys, advocates, and impacted individuals—to discuss the assessment and enforcement of fines and fees in state and local courts. While the convening made plain that unlawful and harmful practices exist in certain jurisdictions throughout the country, it also highlighted a number of reform efforts underway by state leaders, judicial officers, and advocates, and underscored the commitment of all the participants to continue addressing these critical issues. At the meeting, participants and Department officials also discussed ways in which the Department could assist courts in their efforts to make needed changes. Among other recommendations, participants called on the Department to provide greater clarity to state and local courts regarding their legal obligations with respect to fines and fees and to share best practices. Accordingly, this letter is intended to address some of the most common practices that run afoul of the United States Constitution and/or other federal laws and to assist court leadership in ensuring that courts at every level of the justice system operate fairly and lawfully, as well as to suggest alternative practices that can address legitimate public safety needs while also protecting the rights of participants in the justice system.

Recent years have seen increased attention on the illegal enforcement of fines and fees in certain jurisdictions around the country—often with respect to individuals accused of misdemeanors, quasi-criminal ordinance violations, or civil infractions.[1] Typically, courts do not sentence defendants to incarceration in these cases; monetary fines are the norm. Yet the harm

[1] *See, e.g.*, Civil Rights Division, U.S. Department of Justice, *Investigation of the Ferguson Police Department* (Mar. 4, 2015), http://www.justice.gov/crt/about/spl/documents/ferguson_findings_3-4-15.pdf (finding that the Ferguson, Missouri, municipal court routinely deprived people of their constitutional rights to due process and equal protection and other federal protections); Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* (2010), *available at* http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf (reporting on fine and fee practices in fifteen states); American Civil Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons* (2010), *available at* https://www.aclu.org/files/assets/InForAPenny_web.pdf (discussing practices in Louisiana, Michigan, Ohio, Georgia, and Washington state).

caused by unlawful practices in these jurisdictions can be profound. Individuals may confront escalating debt; face repeated, unnecessary incarceration for nonpayment despite posing no danger to the community[2]; lose their jobs; and become trapped in cycles of poverty that can be nearly impossible to escape.[3] Furthermore, in addition to being unlawful, to the extent that these practices are geared not toward addressing public safety, but rather toward raising revenue, they can cast doubt on the impartiality of the tribunal and erode trust between local governments and their constituents.[4]

To help judicial actors protect individuals' rights and avoid unnecessary harm, we discuss below a set of basic constitutional principles relevant to the enforcement of fines and fees. These principles, grounded in the rights to due process and equal protection, require the following:

(1) Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful;

(2) Courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees;

(3) Courts must not condition access to a judicial hearing on the prepayment of fines or fees;

(4) Courts must provide meaningful notice and, in appropriate cases, counsel, when enforcing fines and fees;

(5) Courts must not use arrest warrants or license suspensions as a means of coercing the payment of court debt when individuals have not been afforded constitutionally adequate procedural protections;

(6) Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release; and

(7) Courts must safeguard against unconstitutional practices by court staff and private contractors.

In court systems receiving federal funds, these practices may also violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, when they unnecessarily impose disparate harm on the basis of race or national origin.

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[2] Nothing in this letter is intended to suggest that courts may not preventively detain a defendant pretrial in order to secure the safety of the public or appearance of the defendant.

[3] *See* Council of Economic Advisers, Issue Brief, *Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor*, at 1 (Dec. 2015), *available at* https://www.whitehouse.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf (describing the disproportionate impact on the poor of fixed monetary penalties, which "can lead to high levels of debt and even incarceration for failure to fulfil a payment" and create "barriers to successful re-entry after an offense").

[4] *See* Conference of State Court Administrators, 2011-2012 Policy Paper, *Courts Are Not Revenue Centers* (2012), *available at* https://csgjusticecenter.org/wp-content/uploads/2013/07/2011-12-COSCA-report.pdf.

As court leaders, your guidance on these issues is critical. We urge you to review court rules and procedures within your jurisdiction to ensure that they comply with due process, equal protection, and sound public policy. We also encourage you to forward a copy of this letter to every judge in your jurisdiction; to provide appropriate training for judges in the areas discussed below; and to develop resources, such as bench books, to assist judges in performing their duties lawfully and effectively. We also hope that you will work with the Justice Department, going forward, to continue to develop and share solutions for implementing and adhering to these principles.

1. Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful.

The due process and equal protection principles of the Fourteenth Amendment prohibit "punishing a person for his poverty." *Bearden v. Georgia*, 461 U.S. 660, 671 (1983). Accordingly, the Supreme Court has repeatedly held that the government may not incarcerate an individual solely because of inability to pay a fine or fee. In *Bearden*, the Court prohibited the incarceration of indigent probationers for failing to pay a fine because "[t]o do otherwise 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." *Id.* at 672-73; *see also Tate v. Short*, 401 U.S. 395, 398 (1971) (holding that state could not convert defendant's unpaid fine for a fine-only offense to incarceration because that would subject him "to imprisonment solely because of his indigency"); *Williams v. Illinois*, 399 U.S. 235, 241-42 (1970) (holding that an indigent defendant could not be imprisoned longer than the statutory maximum for failing to pay his fine). The Supreme Court recently reaffirmed this principle in *Turner v. Rogers*, 131 S. Ct. 2507 (2011), holding that a court violates due process when it finds a parent in civil contempt and jails the parent for failure to pay child support, without first inquiring into the parent's ability to pay. *Id.* at 2518-19.

To comply with this constitutional guarantee, state and local courts must inquire as to a person's ability to pay prior to imposing incarceration for nonpayment. Courts have an affirmative duty to conduct these inquiries and should do so sua sponte. *Bearden*, 461 U.S. at 671. Further, a court's obligation to conduct indigency inquiries endures throughout the life of a case. *See id.* at 662-63. A probationer may lose her job or suddenly require expensive medical care, leaving her in precarious financial circumstances. For that reason, a missed payment cannot itself be sufficient to trigger a person's arrest or detention unless the court first inquires anew into the reasons for the person's non-payment and determines that it was willful. In addition, to minimize these problems, courts should inquire into ability to pay at sentencing, when contemplating the assessment of fines and fees, rather than waiting until a person fails to pay.

Under *Bearden*, standards for indigency inquiries must ensure fair and accurate assessments of defendants' ability to pay. Due process requires that such standards include both notice to the defendant that ability to pay is a critical issue, and a meaningful opportunity for the defendant to be heard on the question of his or her financial circumstances. *See Turner*, 131 S. Ct. at 2519-20 (requiring courts to follow these specific procedures, and others, to prevent unrepresented parties from being jailed because of financial incapacity). Jurisdictions may benefit from creating statutory presumptions of indigency for certain classes of defendants—for example, those eligible for public benefits, living below a certain income level, or serving a term of confinement. *See, e.g.*, R.I. Gen. Laws § 12-20-10 (listing conditions considered "prima facie evidence of the defendant's indigency and limited ability to pay," including but not limited to "[q]ualification for and/or receipt of" public assistance, disability insurance, and food stamps).

2. Courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees.

When individuals of limited means cannot satisfy their financial obligations, *Bearden* requires consideration of "alternatives to imprisonment." 461 U.S. at 672. These alternatives may include extending the time for payment, reducing the debt, requiring the defendant to attend traffic or public safety classes, or imposing community service. *See id.* Recognizing this constitutional imperative, some jurisdictions have codified alternatives to incarceration in state law. *See, e.g.*, Ga. Code Ann. § 42-8-102(f)(4)(A) (2015) (providing that for "failure to report to probation or failure to pay fines, statutory surcharges, or probation supervision fees, the court shall consider the use of alternatives to confinement, including community service"); *see also Tate*, 401 U.S. at 400 n.5 (discussing effectiveness of fine payment plans and citing examples from several states). In some cases, it will be immediately apparent that a person is not and will not likely become able to pay a monetary fine. Therefore, courts should consider providing alternatives to indigent defendants not only after a failure to pay, but also in lieu of imposing financial obligations in the first place.

Neither community service programs nor payment plans, however, should become a means to impose greater penalties on the poor by, for example, imposing onerous user fees or interest. With respect to community service programs, court officials should consider delineating clear and consistent standards that allow individuals adequate time to complete the service and avoid creating unreasonable conflicts with individuals' work and family obligations. In imposing payment plans, courts should consider assessing the defendant's financial resources to determine a reasonable periodic payment, and should consider including a mechanism for defendants to seek a reduction in their monthly obligation if their financial circumstances change.

3. Courts must not condition access to a judicial hearing on prepayment of fines or fees.

State and local courts deprive indigent defendants of due process and equal protection if they condition access to the courts on payment of fines or fees. *See Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (holding that due process bars states from conditioning access to

compulsory judicial process on the payment of court fees by those unable to pay); *see also Tucker v. City of Montgomery Bd. of Comm'rs*, 410 F. Supp. 494, 502 (M.D. Ala. 1976) (holding that the conditioning of an appeal on payment of a bond violates indigent prisoners' equal protection rights and "'has no place in our heritage of Equal Justice Under Law'" (citing *Burns v. Ohio*, 360 U.S. 252, 258 (1959)).[5]

This unconstitutional practice is often framed as a routine administrative matter. For example, a motorist who is arrested for driving with a suspended license may be told that the penalty for the citation is $300 and that a court date will be scheduled only upon the completion of a $300 payment (sometimes referred to as a prehearing "bond" or "bail" payment). Courts most commonly impose these prepayment requirements on defendants who have failed to appear, depriving those defendants of the opportunity to establish good cause for missing court. Regardless of the charge, these requirements can have the effect of denying access to justice to the poor.

4. Courts must provide meaningful notice and, in appropriate cases, counsel, when enforcing fines and fees.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950); *see also Turner*, 131 S. Ct. at 2519 (discussing the importance of notice in proceedings to enforce a child support order). Thus, constitutionally adequate notice must be provided for even the most minor cases. Courts should ensure that citations and summonses adequately inform individuals of the precise charges against them, the amount owed or other possible penalties, the date of their court hearing, the availability of alternate means of payment, the rules and procedures of court, their rights as a litigant, or whether in-person appearance is required at all. Gaps in this vital information can make it difficult, if not impossible, for defendants to fairly and expeditiously resolve their cases. And inadequate notice can have a cascading effect, resulting in the defendant's failure to appear and leading to the imposition of significant penalties in violation of the defendant's due process rights.

Further, courts must ensure defendants' right to counsel in appropriate cases when enforcing fines and fees. Failing to appear or to pay outstanding fines or fees can result in incarceration, whether through the pursuit of criminal charges or criminal contempt, the imposition of a sentence that had been suspended, or the pursuit of civil contempt proceedings. The Sixth Amendment requires that a defendant be provided the right to counsel in any criminal proceeding resulting in incarceration, *see Scott v. Illinois*, 440 U.S. 367, 373 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), and indeed forbids imposition of a suspended jail sentence on a probationer who was not afforded a right to counsel when originally convicted and sentenced,

[5] The Supreme Court reaffirmed this principle in *Little v. Streater*, 452 U.S. 1, 16-17 (1981), when it prohibited conditioning indigent persons' access to blood tests in adversarial paternity actions on payment of a fee, and in *M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996), when it prohibited charging filing fees to indigent persons seeking to appeal from proceedings terminating their parental rights.

see Alabama v. Shelton, 535 U.S. 654, 662 (2002). Under the Fourteenth Amendment, defendants likewise may be entitled to counsel in civil contempt proceedings for failure to pay fines or fees. *See Turner*, 131 S. Ct. at 2518-19 (holding that, although there is no automatic right to counsel in civil contempt proceedings for nonpayment of child support, due process is violated when neither counsel nor adequate alternative procedural safeguards are provided to prevent incarceration for inability to pay).[6]

5. Courts must not use arrest warrants or license suspensions as a means of coercing the payment of court debt when individuals have not been afforded constitutionally adequate procedural protections.

The use of arrest warrants as a means of debt collection, rather than in response to public safety needs, creates unnecessary risk that individuals' constitutional rights will be violated. Warrants must not be issued for failure to pay without providing adequate notice to a defendant, a hearing where the defendant's ability to pay is assessed, and other basic procedural protections. *See Turner*, 131 S. Ct. at 2519; *Bearden*, 461 U.S. at 671-72; *Mullane*, 339 U.S. at 314-15. When people are arrested and detained on these warrants, the result is an unconstitutional deprivation of liberty. Rather than arrest and incarceration, courts should consider less harmful and less costly means of collecting justifiable debts, including civil debt collection.[7]

In many jurisdictions, courts are also authorized—and in some cases required—to initiate the suspension of a defendant's driver's license to compel the payment of outstanding court debts. If a defendant's driver's license is suspended because of failure to pay a fine, such a suspension may be unlawful if the defendant was deprived of his due process right to establish inability to pay. *See Bell v. Burson*, 402 U.S. 535, 539 (1971) (holding that driver's licenses "may become essential in the pursuit of a livelihood" and thus "are not to be taken away without that procedural due process required by the Fourteenth Amendment"); *cf. Dixon v. Love*, 431 U.S. 105, 113-14 (1977) (upholding revocation of driver's license after conviction based in part on the due process provided in the underlying criminal proceedings); *Mackey v. Montrym*, 443 U.S. 1, 13-17 (1979) (upholding suspension of driver's license after arrest for driving under the influence and refusal to take a breath-analysis test, because suspension "substantially served" the government's interest in public safety and was based on "objective facts either within the personal knowledge of an impartial government official or readily ascertainable by him," making the risk of erroneous deprivation low). Accordingly, automatic license suspensions premised on determinations that fail to comport with *Bearden* and its progeny may violate due process.

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[6] *Turner*'s ruling that the right to counsel is not automatic was limited to contempt proceedings arising from failure to pay child support to a custodial parent who is unrepresented by counsel. *See* 131 S. Ct. at 2512, 2519. The Court explained that recognizing such an automatic right in that context "could create an asymmetry of representation." *Id.* at 2519. The Court distinguished those circumstances from civil contempt proceedings to recover funds due to the government, which "more closely resemble debt-collection proceedings" in which "[t]he government is likely to have counsel or some other competent representative." *Id.* at 2520.

[7] Researchers have questioned whether the use of police and jail resources to coerce the payment of court debts is cost-effective. *See, e.g.*, Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 505, 527-28 (2011). This strategy may also undermine public safety by diverting police resources and stimulating public distrust of law enforcement.

Even where such suspensions are lawful, they nonetheless raise significant public policy concerns. Research has consistently found that having a valid driver's license can be crucial to individuals' ability to maintain a job, pursue educational opportunities, and care for families.[8] At the same time, suspending defendants' licenses decreases the likelihood that defendants will resolve pending cases and outstanding court debts, both by jeopardizing their employment and by making it more difficult to travel to court, and results in more unlicensed driving. For these reasons, where they have discretion to do so, state and local courts are encouraged to avoid suspending driver's licenses as a debt collection tool, reserving suspension for cases in which it would increase public safety.[9]

6. Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release.

When indigent defendants are arrested for failure to make payments they cannot afford, they can be subjected to another independent violation of their rights: prolonged detention due to unlawful bail or bond practices. Bail that is set without regard to defendants' financial capacity can result in the incarceration of individuals not because they pose a threat to public safety or a flight risk, but rather because they cannot afford the assigned bail amount.

As the Department of Justice set forth in detail in a federal court brief last year, and as courts have long recognized, any bail practices that result in incarceration based on poverty violate the Fourteenth Amendment. *See* Statement of Interest of the United States, *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC, at 8 (M.D. Ala., Feb. 13, 2015) (citing *Bearden*, 461 U.S. at 671; *Tate*, 401 U.S. at 398; *Williams*, 399 U.S. at 240-41).[10] Systems that rely primarily on secured monetary bonds without adequate consideration of defendants' financial means tend to result in the incarceration of poor defendants who pose no threat to public safety solely because they cannot afford to pay.[11] To better protect constitutional rights while ensuring defendants' appearance in court and the safety of the community, courts should consider transitioning from a system based on secured monetary bail alone to one grounded in objective risk assessments by pretrial experts. *See*, *e.g.*, D.C. Code § 23-1321 (2014); Colo. Rev. Stat. 16-

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[8] *See*, *e.g.*, Robert Cervero, et al., *Transportation as a Stimulus of Welfare-to-Work: Private versus Public Mobility*, 22 J. PLAN. EDUC. & RES. 50 (2002); Alan M. Voorhees, et al., *Motor Vehicles Affordability and Fairness Task Force: Final Report*, at xii (2006), *available at* http://www.state.nj.us/mvc/pdf/About/AFTF_final_02.pdf (a study of suspended drivers in New Jersey, which found that 42% of people lost their jobs as a result of the driver's license suspension, that 45% of those could not find another job, and that this had the greatest impact on seniors and low-income individuals).

[9] *See* Am. Ass'n of Motor Veh. Adm'rs, *Best Practices Guide to Reducing Suspended Drivers*, at 3 (2013), *available at* http://www.aamva.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=3723&libID=3709 (recommending that "legislatures repeal state laws requiring the suspension of driving privileges for non-highway safety related violations" and citing research supporting view that fewer driver suspensions for non-compliance with court requirements would increase public safety).

[10] The United States' Statement of Interest in *Varden* is available at http://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/02/13/varden statement_ of_interest.pdf.

[11] *See supra* Statement of the United States, *Varden*, at 11 (citing Timothy R. Schnacke, U.S. Department of Justice, National Institute of Corrections, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM, at 2 (2014), *available at* http://nicic.gov/library/028360).

4-104 (2014); Ky. Rev. Stat. Ann. § 431.066 (2015); N.J. S. 946/A1910 (enacted 2015); *see also* 18 U.S.C. § 3142 (permitting pretrial detention in the federal system when no conditions will reasonably assure the appearance of the defendant and safety of the community, but cautioning that "[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person").

7. Courts must safeguard against unconstitutional practices by court staff and private contractors.

In many courts, especially those adjudicating strictly minor or local offenses, the judge or magistrate may preside for only a few hours or days per week, while most of the business of the court is conducted by clerks or probation officers outside of court sessions. As a result, clerks and other court staff are sometimes tasked with conducting indigency inquiries, determining bond amounts, issuing arrest warrants, and other critical functions—often with only perfunctory review by a judicial officer, or no review at all. Without adequate judicial oversight, there is no reliable means of ensuring that these tasks are performed consistent with due process and equal protection. Regardless of the size of the docket or the limited hours of the court, judges must ensure that the law is followed and preserve "both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (internal quotation marks omitted); *see also* American Bar Association, MODEL CODE OF JUDICIAL CONDUCT, Canon 2, Rules 2.2, 2.5, 2.12.

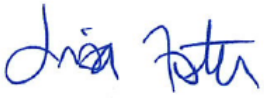
Additional due process concerns arise when these designees have a direct pecuniary interest in the management or outcome of a case—for example, when a jurisdiction employs private, for-profit companies to supervise probationers. In many such jurisdictions, probation companies are authorized not only to collect court fines, but also to impose an array of discretionary surcharges (such as supervision fees, late fees, drug testing fees, etc.) to be paid to the company itself rather than to the court. Thus, the probation company that decides what services or sanctions to impose stands to profit from those very decisions. The Supreme Court has "always been sensitive to the possibility that important actors in the criminal justice system may be influenced by factors that threaten to compromise the performance of their duty." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987). It has expressly prohibited arrangements in which the judge might have a pecuniary interest, direct or indirect, in the outcome of a case. *See Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (invalidating conviction on the basis of $12 fee paid to the mayor only upon conviction in mayor's court); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 61-62 (1972) (extending reasoning of *Tumey* to cases in which the judge has a clear but not direct interest). It has applied the same reasoning to prosecutors, holding that the appointment of a private prosecutor with a pecuniary interest in the outcome of a case constitutes fundamental error because it "undermines confidence in the integrity of the criminal proceeding." *Young*, 481 U.S. at 811-14. The appointment of a private probation company with a pecuniary interest in the outcome of its cases raises similarly fundamental concerns about fairness and due process.

* * * * *

The Department of Justice has a strong interest in ensuring that state and local courts provide every individual with the basic protections guaranteed by the Constitution and other federal laws, regardless of his or her financial means. We are eager to build on the December 2015 convening about these issues by supporting your efforts at the state and local levels, and we look forward to working collaboratively with all stakeholders to ensure that every part of our justice system provides equal justice and due process.

Sincerely,

Vanita Gupta
Principal Deputy Assistant Attorney General
Civil Rights Division



Lisa Foster
Director
Office for Access to Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CHRISTY DAWN VARDEN, et al.

Plaintiffs,

v.

Case No. 2:15-cv-34-MHT-WC

THE CITY OF CLANTON, **(Class Action)**

Defendant.

STATEMENT OF INTEREST OF THE UNITED STATES

Incarcerating 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. *See Tate v. Short*, 401 U.S. 395, 398 (1971); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970); *Smith v. Bennett*, 365 U.S. 708, 709 (1961). In this case, Plaintiffs allege that they are subjected to an unlawful bail scheme in Clanton, Alabama. Under this scheme, Plaintiffs are allegedly required to pay a cash "bond" in a fixed dollar amount for each misdemeanor charge faced or else remain incarcerated. Without taking a position on the factual accuracy of Plaintiff's claims, the United States files this Statement of Interest to assist the Court in evaluating the constitutionality of Clanton's bail practices. It is the position of the United States that, as courts have long recognized, any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pre-trial release, without any regard for indigence, not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy.

INTEREST OF THE UNITED STATES

The United States has authority to file this Statement of Interest pursuant to 28 U.S.C § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in a federal court. The United States can enforce the rights of the incarcerated pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997. The United States uses that statute to address unconstitutional conditions of confinement, many of which are caused by the overcrowding of prisons and jails.

The United States has a clear interest in ensuring that state and local criminal justice systems are fair, nondiscriminatory, and rest on a strong constitutional foundation.[1] Unfortunately, that is not always the case. As noted by Attorney General Eric Holder at the National Symposium on Pretrial Justice in 2011:

> As we speak, close to three quarters of a million people reside in America's jail system. . . . Across the country, nearly two thirds of all inmates who crowd our county jails—at an annual cost of roughly nine billion taxpayer dollars—are defendants awaiting trial. . . . Many of these individuals are nonviolent, non-felony offenders, charged with crimes ranging from petty theft to public drug use. And a disproportionate number of them are poor. They are forced to remain in custody—for an average of two weeks, and at a considerable expense to taxpayers—because they simply cannot afford to post the bail required . . . .[2]

For these reasons, the United States is taking an active role to provide guidance on the due process and equal protection issues facing indigent individuals charged with state and local crimes. For example, the United States filed Statements of Interest in *Wilbur v. City of Mount*

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[1] ABA Standards for Criminal Justice, *Prosecution and Defense Function*, Standard 3-1.2(d) (1993) ("It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action.").

[2] Eric Holder, Att'y Gen. of the United States, U.S. Dep't of Justice, Speech at the National Symposium on Pretrial Justice (June 1, 2011), *available at* http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-symposium-pretrial-justice.

Vernon in 2013[3] and *Hurrell-Harring v. State of New York* in 2014.[4] Both cases involved the fundamental right to counsel for indigent criminal defendants and the role counsel plays in ensuring the fairness of our justice system.[5]

Accordingly, the United States files this Statement of Interest, reaffirming this country's commitment to the principles of fundamental fairness and to ensuring that "the scales of our legal system measure justice, not wealth."[6]

BACKGROUND

It is long established that the American criminal justice system should not work differently for the indigent and the wealthy. Indeed, as early as 1956, the Supreme Court declared that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois*, 351 U.S. 12, 19 (1956). Twenty years later, the Fifth Circuit extended that precept to incarceration: "[t]o imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal

[3] Statement of Interest of the United States, *Wilbur v. City of Mount Vernon*, Civ. Action No. 11-1100 (W.D. Wash., Aug. 8, 2013), *available at* http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf.

[4] Statement of Interest of the United States, *Hurrell-Harring v. State of New York*, Case No. 8866-07 (N.Y. Sup. Ct., Sept. 25, 2014), *available at* http://www.justice.gov/crt/about/spl/documents/hurrell_soi_9-25-14.pdf.

[5] In both Statements of Interest, the United States did not take a position on the merits of the plaintiffs' claims. In *Wilbur*, the United States provided its expertise by recommending that if the court found for the plaintiffs, it should ensure that public defender counsel have realistic workloads, sufficient resources, and are carrying out the hallmarks of minimally effective representation. In *Hurrell-Harring*, the United States provided an informed analysis of existing case law to synthesize the legal standard for constructive denial of counsel.

[6] Robert F. Kennedy, Att'y Gen. of the United States, U.S. Dep't of Justice, Address to the Criminal Law Section of the American Bar Association (Aug. 10, 1964), *available at* http://www.justice.gov/ag/rfkspeeches/1964/08-10-1964.pdf; *see also* Eric Holder, Att'y Gen. of the United States, U.S. Dep't of Justice, Speech at the National Association of Criminal Defense Lawyers 57th Annual Meeting (Aug. 1, 2014), *available at* http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140801.html (quoting Attorney General Robert F. Kennedy).

protection of the laws." *Barnett v. Hopper*, 548 F.2d 550, 554 (5th Cir. 1977)[7], *vacated as moot*, 439 U.S. 1041 (1978). Under the clear precedent of this Circuit, "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (en banc).

The sweeping reforms to the federal bail system during the 1960s were based on these same constitutional principles—that access to justice should not be predicated on financial means. In 1962, Attorney General Robert F. Kennedy called for wide-scale bail reform, noting that "[i]f justice is priced in the market place, individual liberty will be curtailed and respect for law diminished."[8] In 1964, Attorney General Kennedy convened a National Conference on Bail and Criminal Justice with the express purpose of understanding and improving both the federal and state bail systems.[9] During his closing remarks at the conference, Attorney General Kennedy declared:

> [U]sually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money. How much money does the defendant have?[10]

At the time, federal courts routinely employed cash bail schemes similar to the one alleged in this case: bail amounts were based on the charges for which defendants were arrested, and

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[7] The Eleventh Circuit has adopted as precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

[8] Robert F. Kennedy, Att'y Gen. of the United States, U.S. Dep't of Justice, Address to the American Bar Association (Aug. 6, 1962), *available at* http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-06-1962%20Pro.pdf.

[9] Robert F. Kennedy, Att'y Gen. of the United States, U.S. Dep't of Justice, Welcome Address to the National Conference on Bail and Criminal Justice (May 27, 1964), *available at* http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/05-27-1964.pdf.

[10] National Criminal Justice Reference Service, *Proceedings and Interim Report from the National Conference on Bail and Criminal Justice* 297 (1965), *available at* https://www.ncjrs.gov/pdffiles1/Photocopy/355NCJRS.pdf.

judicial officers routinely set cash bail amounts that some defendants simply could not afford to pay.

Attorney General Kennedy's conference on bail reform sparked wide-scale changes to the federal pre-trial detention and bail system. Testifying before the Senate Judiciary Committee while bail reform legislation was under consideration, Attorney General Kennedy articulated the Department's growing concern that "the rich man and the poor man do not receive equal justice in our courts. And in no area is this more evident than in the matter of bail."[11] The main reason for this disparity, according to Attorney General Kennedy, was that the federal bail-setting process was "unrealistic and often arbitrary." Bail was set "without regard to a defendant's character, family ties, community roots or financial status." Instead, bail was frequently set based on the nature of the crime alone.[12]

Today, federal law expressly forbids that practice with a single sentence: "The judicial officer may not impose a financial condition that results in the pretrial detention of the person."[13] This concise but profound change was initiated as part of the Bail Reform Act of 1966, which marked a significant departure from past practices. The stated purpose of the Act was "to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest."[14]

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[11] *See Hearings on S. 2838, S. 2839, & S. 2840 Before the Subcomm. on Constitutional Rights and Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 88th Cong. (1964) (Testimony by Robert F. Kennedy, Att'y Gen. of the United States, U.S. Dep't of Justice), *available at* http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf.

[12] *Id.*

[13] 18 U.S.C. § 3142(c)(2).

[14] Bail Reform Act of 1966, Pub. L. No. 89-465, § 2, 80 Stat. 214 (1966). *See also Allen v. United States*, 386 F.2d 634, 637 (D.C. Cir. 1967) (Bazelon, J., dissenting) ("It plainly appears from the language and

The Bail Reform Act requires federal judges and magistrates to conduct an individualized analysis of each defendant prior to ordering pretrial detention.[15] The individualized analysis requires consideration of factors such as ties to the community, employment, and prior record and precludes fixing bail based solely on the charge.[16] In weighing these factors, judges are to consider 1) the extent to which pre-trial release will endanger the safety of those in the community, and 2) what is necessary to reasonably assure that the defendant will return to court when necessary—*i.e.*, that the defendant will not flee or otherwise attempt to avoid justice.[17]

Federal judges must also consider a wide range of "conditions" to be placed upon a defendant's pre-trial release that could alleviate these concerns. These conditions include regular community reporting, establishing curfews, abstaining from drug or alcohol use, and various types of community supervision.[18] Financial conditions, including money bonds, can be among these measures and, in appropriate cases where an accused might be a flight risk, financial conditions can provide strong incentives to return to court. But the imposition of financial conditions can only be made after an individualized assessment of the particular defendant. And, importantly, the Bail Reform Act expressly precludes any federal judge or magistrate from

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history of the Bail Reform Act that its central purpose was to prevent pretrial detention because of indigency.") (citations omitted).

[15] Federal judges must make these determinations during or following detention hearings in open court, in which defendants facing pre-trial detention are represented by counsel, either appointed or retained. 18 U.S.C. § 3142(f).

[16] The Comprehensive Crime Control Act of 1984, signed into law by President Ronald Reagan, modified several sections of the 1966 Act, but made even more explicit the requirement of an individualized determination and the prohibition against cash bail for those who could not pay.

[17] *See generally*, 18 U.S.C. § 3142(b)-(d) (outlining factors the courts must consider in determining whether or not to hold a defendant over until trial, or release him or her on his or her own recognizance or pursuant to conditions).

[18] 18 U.S.C. § 3142(c)(1)(B).

imposing money bail that an accused person cannot afford to pay and would therefore result in that person's pretrial detention.[19]

If the judge determines that no amount of conditions can reasonably secure the safety of the community and the return of the defendant, the judge may order pretrial detention. In doing so, the judge must provide a written statement of facts and the reasons for detention via a "detention order."[20] Reasons for or against pretrial detention include the nature and circumstances of the defendant's charges, the weight of the evidence against the defendant, the defendant's history and character (including family and community ties and employment), and the dangerousness or risk of flight that the defendant may pose if released.[21]

Essentially, the Bail Reform Act's provisions ensure that pretrial detention is based on an objective evaluation of dangerousness and risk of flight, rather than ability to pay. Previous critics of bail reform suggested that the Act would "create a nation of fugitives,"[22] but the Department has not found that to be the case. To the contrary, the Department has found that judicial officers are well suited to make fair, individualized determinations about the risks, if any, of releasing a particular defendant pending his or her next court date and that they are able to do so efficiently with the assistance of an able pretrial services staff and the input of both the prosecutor and defense counsel. Individualized determination and the basic elements of due

[19] 18 U.S.C. § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person.").

[20] 18 U.S.C. § 3142(i)(1).

[21] 18 U.S.C. § 3142(g).

[22] *Hearings on S. 2838, S. 2839, & S. 2840 Before the Subcomm. on Constitutional Rights and Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 88th Cong. (1964) (Testimony by George L. Will, Executive Director of the American Society of Professional Bail Bondsmen).

process help ensure that federal defendants are not detained unnecessarily or simply because they are poor.

DISCUSSION

Plaintiffs in this case seek declaratory, injunctive and compensatory relief, alleging that the mandatory imposition of a bail schedule that sets bail at a fixed amount per charge violates due process and equal protection. If Clanton's bail system indeed fixes bond amounts based solely on the arrest charge, and does not take individual circumstances into account, the Court should find this system to be unconstitutional. Not only are such schemes offensive to equal protection principles, they also constitute bad public policy.

I. Fixed-sum Bail Systems are Unconstitutional under the Equal Protection Clause of the Fourteenth Amendment

In general, the Equal Protection Clause of the Fourteenth Amendment prohibits "punishing a person for his poverty." *Bearden v. Georgia*, 461 U.S. 660, 671 (1983). This is especially true when it comes to depriving a person of his liberty. The Supreme Court has considered a variety of contexts in which the government attempted to incarcerate or continue incarceration of an individual because of his or her inability to pay a fine or fee, and in each context, the Court has held that indigency cannot be a barrier to freedom. *Tate*, 401 U.S. at 398; *Williams*, 399 U.S. at 240-41; *Smith*, 365 U.S. at 709.

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. Liberty is particularly salient for defendants awaiting trial, who have not been found guilty of any crime. *See United States v. Salerno*, 481 U.S. 739, 750 (1987) (recognizing the fundamental nature of the right to pretrial liberty). To be sure, pretrial detention may be

necessary in some circumstances including if a court finds a likelihood of future danger to society or that the defendant poses a flight risk. Fixed-sum bail systems, however, such as the one allegedly used in Clanton, Alabama, do not take these considerations into account. Such systems are based solely on the criminal charge. Because such systems do not account for individual circumstances of the accused, they essentially mandate pretrial detention for anyone who is too poor to pay the predetermined fee. This amounts to mandating pretrial detention only for the indigent.

The Fifth Circuit briefly discussed fixed-sum bail systems, otherwise referred to as "bail schedules," in *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc). There, the Court held that the new bail scheme passed by the Florida legislature was not constitutionally deficient simply because it failed to articulate a presumption against imposing cash bail. The *en banc* court noted that Florida's new system allowed for six different types of pretrial release—cash bail was but one option of many. Importantly, however, the Court pointed out that the utilization of bond schedules, and only bond schedules, creates an injustice for individuals who cannot meet the financial threshold:

> Utilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting its requirements. The incarceration of those who cannot, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements.

Pugh, 572 F.2d at1057.

As correctly noted in Plaintiff's Motion for Temporary Restraining Order or in the Alternative Motion for Preliminary Injunction (ECF No. 34), courts in this Circuit have had occasion to address scenarios analogous to those alleged here. For example, in *Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972), the Fifth Circuit invalidated a sentencing scheme that offered defendants the choice of immediately paying a $17 fine or serving a 13-day jail sentence as

applied to indigent defendants who could not pay the fine. As the Court noted, "[t]he alternative fine before us creates two disparately treated classes: those who can satisfy a fine immediately upon its levy, and those who can pay only over a period of time, if then. Those with means avoid imprisonment; the indigent cannot escape imprisonment." *Id.*

Similarly, in *Tucker v. City of Montgomery*, 410 F. Supp. 494 (M.D. Ala. 1976), this Court held that the City's practice of charging a bond to exercise appellate rights denied the equal protection of the law to indigent prisoners. In so holding, the court found that "[t]he imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law." *Id.* at 502 (quoting *Burns v. Ohio*, 360 U.S. 252, 258 (1959)).

Finally, this Court's recent decision in *United States v. Flowers*, 946 F. Supp. 2d 1295 (M.D. Ala. 2013), addressed practices analytically indistinguishable from those practices Plaintiffs allege are occurring in Clanton. In *Flowers*, the defendant could avoid prison only if she paid for her home confinement, an option her poverty prevented. This Court noted correctly that "it is inequitable for indigent defendants who cannot pay for home-confinement monitoring to be imprisoned while those who can pay to be subject to the more limited monitored home confinement avoid prison." *Id.* at 1302. If Plaintiffs' allegations in this case are true, indigent defendants in Clanton face a similar problem—pay a monetary bond they cannot afford or go to jail. This determination, like the sentence in *Flowers*, would be "constitutionally infirm and [unable to] stand." *Id.* at 1300.

II. Public Policy Weighs Strongly Against Fixed Bail Systems

In addition to being unconstitutional, fixed-bail systems that do not account for a defendant's indigency are an inadequate means of securing the safety of the public or ensuring

the return of the defendant to the court – the central rationales underlying pretrial detention. Indeed, such schemes are driven by financial considerations, rather than legitimate public safety concerns. This is bad public policy, and results in negative outcomes for both defendants and the community at large.

The problems with bail systems based on financial considerations are well-documented.[23] As summarized in a recent Department of Justice publication: "The two central issues concerning money bail are: (1) its tendency to cause unnecessary incarceration of defendants who cannot afford to pay secured financial conditions either immediately or even after some period of time; and (2) its tendency to allow for, and sometimes foster, the release of high-risk defendants, who should more appropriately be detained without bail."[24]

When bail amounts are too high for indigent individuals to afford, fewer defendants will be released pretrial,[25] thereby creating a burden on local jails.[26] Today, according to a Bureau of Justice Statistics analysis, more than 60 percent of all jail inmates nationwide are in custody awaiting an adjudication of their charges, and the majority of these pretrial detainees are charged

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[23] *See, e.g.*, Timothy R. Schnacke, United States Department of Justice, National Institute of Corrections, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (2014), *available at* http://www.pretrial.org/download/research/Fundamentals%20of%20Bail%20-%20NIC%202014.pdf.

[24] *Id.* at 15.

[25] Thomas H. Cohen & Brian A. Reaves, United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Pretrial Release of Felony Defendants in State Courts: State Court Processing Statistics, 1990-2004, Special Report*, NCJ 214994 (2007) (study of state courts in the 75 largest counties from 1990 to 2004, finding that about 7 of 10 defendants secured release when bail was set at less than $5,000, but only 1 in 10 secured release when bail was set at $10,000 or more), *available at* http://www.bjs.gov/content/pub/pdf/prfdsc.pdf.

[26] *See generally* Ram Subramaniam, et al., Vera Institute of Justice, *Incarceration's Front Door: The Misuse of Jails in America* 29-35 (Feb. 2015), *available at* http://vera.org/pubs/incarcerations-front-door-misuse-jails-america.

with nonviolent offenses.[27] Jail overcrowding, in turn, can result in significant security and life and safety risks for both inmates and staff.[28]

While there is a need for continued quantitative research on the effects of pretrial detention, it is clear that the decision to release or detain a defendant pretrial has many collateral consequences beyond the loss of liberty. As detailed by the Supreme Court:

> The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. . . Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.

Barker v. Wingo, 407 U.S. 514, 532-33 (1972). Incarceration carries weighty mental and social burdens for the accused and for those closest to them. Family obligations may go unmet while defendants are detained, and jobs may be lost, both of which can cause irreparable harm to the defendant, their families, and their communities.

In addition, for many reasons, the judicial decision to detain or release the accused pretrial may be a critical factor affecting the outcome of a case.[29] Pretrial detention can impede

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[27] Todd D. Minton, United States Department of Justice, Bureau of Justice Statistics, *Jail Inmates at Midyear 2012 – Statistical Tables*, NCJ 241264, at 1 (2013) *available at* www.bjs.gov/content/pub/pdf/jim12st.pdf (showing that the percentage of pretrial detainees in jail has remained unchanged since 2005)*; see also* Donna Lyons, *Predicting Pretrial Success,* State Legislatures, February 2014 at 18-19, *available at* http://www.ncsl.org/Portals/1/Documents/magazine/articles/2014/SLG_0214_Pretrial_1.pdf; Arthur W. Pepin, Conference of State Court Administrators, *Policy Paper: Evidence-Based Pretrial Release* (2014), *available at* http://www.colorado.gov/ccjjdir/Resources/Resources/Ref/EBPre-TrialRelease_2012.pdf.

[28] *See generally Brown v. Plata*, 131 S. Ct. 1910 (2011) (overcrowding in California prisons created unconstitutional conditions of confinement, including inadequate medical and mental health care); *see also Hutto v. Finney*, 437 U.S. 678, 688 (1978) (upholding 30-day limit on confinement in isolation, noting that overcrowding in the isolation unit contributed to violence and vandalism of cells).

[29] Mary T. Phillips, New York City Criminal Justice Agency, Inc., *Pretrial Detention and Case Outcomes, Part 1: Nonfelony Cases* (2007), *available at* http://www.nycja.org/lwdcms/doc-view.php?module=reports&module_id=669&doc_name=doc.

the preparation of a defense, such as gathering evidence and interviewing witnesses, and pretrial detention can make it more difficult to confer with an attorney.[30] Research indicates that these barriers have practical consequences: defendants who are detained pretrial have less favorable outcomes than those who are not detained, notwithstanding other relevant factors such as the charges they face or their criminal history. One contributing factor is that detained defendants are more likely to plead guilty, if only to secure release, possibly resulting in at least some wrongful convictions.[31] In some instances, the time someone is detained pretrial can even exceed the likely sentence if the defendant were later found guilty.[32]

For these reasons, many states have moved away from bail systems that are based entirely on the criminal charge and towards systems that allow for different pretrial release options based on individualized determinations of dangerousness or risk of flight.[33] The

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[30] Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 Am. Crim. L. Rev. 1123, 1165 (2005); *see also Barker*, 407 U.S. at 532-33 (noting that a defendant detained pretrial "is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.").

[31] *Id*. *See also* Mary T. Phillips, New York City Criminal Justice Agency, Inc., *Bail, Detention, and Felony Case Outcomes, Research Brief No. 18* (2008), *available at* http://www.nycja.org/lwdcms/doc-view.php?module=reports&module_id=597&doc_name=doc; *Barker*, 407 U.S. at 533, n.35.

[32] *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2492 (2004).

[33] States employ a variety of bail systems that satisfy constitutional concerns. The federal model, while constitutionally sufficient, is not the only adequate scheme. *See* Arizona (AR.S. Crim. Proc. Rule 7.2); Arkansas (Arkansas Rules of Criminal Procedure, Rule 9.2); Connecticut (C.G.S.A § 54-63b(b)); Illinois (725 ILCS 5/110-2); Maine (15 M.R.S.A §§ 1002, 1006); Massachusetts (MGL Ch. 276, § 58); Michigan (M.C.L.A 780.62-for misdemeanors only); Minnesota (49 M.S.A, Rules Crim. Proc. § 6.02(1)); Missouri (Missouri Supreme Court Rule 33.01); Montana (MCA 46-9-108 (2)); Nebraska (Neb. Rev. Stat. § 29-901); New Mexico (NMRA, Rule 5-401(D)(2)); North Carolina (N.C.G.S.A. § 15A-534(b)); North Dakota (N.D.R. Crim. P. 46); Oregon (ORS 135.245(3)); Rhode Island (RI ST § 12-13-1.3(e)); South Carolina (S.C. Code § 17-15-10—for non-capital cases only); South Dakota(SDCL § 23A-43-2—for non-capital cases only); Tennessee (T. C. A § 40-11-116(a)); Vermont (13 V.S.A § 7554—for misdemeanors only); Washington (WA ST SUPER CT CR CrR 3.2(b)—for non-capital cases only); Wisconsin (W.S.A 969.01(4)); Wyoming (WY RCRP Rule 46.1(c)(1)(B)—for non-capital cases only). *See generally* Cynthia E. Jones, "*Give Us Free:" Addressing Racial Disparities in Bail Determinants*, 16 N.Y.U. J. Leg. & Pub. Pol'y 919, 930 (2013).

American Bar Association's *Standards for Criminal Justice* have also evolved to reflect the importance of the presumption of pretrial release and the need for individualized determinations before imposing pretrial detention. The Standards advocate for the imposition of the least restrictive of release conditions necessary to ensure the defendant's appearance in court. The Standards also include guidelines to limit the use of financial conditions for pretrial release.[34]

The use of a more dynamic bail scheme, such as that set forth in the federal Bail Reform Act, not only ensures adherence to constitutional principles of due process and equal protection, but constitutes better public policy. Individualized determinations, rather than fixed-sum schemes that unfairly target the poor, are vital to preventing jail overcrowding, avoiding the costs attendant to incarceration,[35] and providing equal justice for all. Consequently, in light of the potential harmful consequences of prolonged confinement and the strain that unnecessary confinement puts on jail conditions, the United States urges that pretrial detention be used only when necessary, as determined by an appropriate individualized determination.

CONCLUSION

Fundamental and long-standing principles of equal protection squarely prohibit bail schemes based solely on the ability to pay. Fixed-sum bail schemes do not meet these mandates. By using a predetermined schedule for bail amounts based solely on the charges a defendant faces, these schemes do not properly account for other important factors, such as the defendant's potential dangerousness or risk of flight. For these reasons, if the bail system in Clanton is as Plaintiff describes, the system should not stand.

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[34] ABA Standards for Criminal Justice, *Pretrial Release*, Standard 10-1.4 (3d ed. 2007).

[35] As noted by the Supreme Court, pretrial detention not only adversely impacts defendants – it also creates significant costs for taxpayers. *See Tate*, 401 U.S. at 399 (prolonged pretrial detention "saddles the State with the cost of feeding and housing [the defendant] for the period of his imprisonment.").

Respectfully submitted,

VANITA GUPTA
Acting Assistant Attorney General
Civil Rights Division
United States Department of Justice

MARK KAPPELHOFF
Deputy Assistant Attorney General
Civil Rights Division

JONATHAN M. SMITH (DC 396578)
Chief
Civil Rights Division
Special Litigation Section

GEORGE L. BECK, JR.
United States Attorney
Middle District of Alabama

/s/ Winsome G. Gayle
WINSOME G. GAYLE (DC 479887)
Special Litigation Counsel
Civil Rights Division
Special Litigation Section
Winsome.Gayle@usdoj.gov

/s/ Paul Killebrew
PAUL KILLEBREW (LA 32176)
Paul.Killebrew@usdoj.gov

/s/ Sharon Brett
SHARON BRETT (NY 5090279)
Trial Attorneys
Civil Rights Division
Special Litigation Section
Sharon.Brett@usdoj.gov

Of Counsel:
Lisa Foster (CA 122178)
Director
Access to Justice Initiative
Telephone: (202) 514-7073
lisa.foster3@usdoj.gov

Jennifer Katzman (NY 4388898)
Senior Counsel
Access to Justice
Telephone: (202) 514-7086
jenni.katzman@usdoj.gov

Robert B. Bullock (CA 219942)
Senior Counsel
Access to Justice
Telephone: (202) 514-5324
bob.bullock@usdoj.gov

Andrew Stanner (DC 979839)
Senior Counsel
Access to Justice
Telephone: (202) 353-9024
andrew.stanner@usdoj.gov

/s/Robert G. Anderson
ROBERT G. ANDERSON (MSB 1589)
Assistant United States Attorney
131 Clayton Street
Montgomery, AL 36104
(334) 223-7280
Robert.Anderson@usdoj.gov

Attorneys for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2015, a copy of the foregoing Statement of Interest was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Robert G. Anderson
Assistant United States Attorney

Fundamentals of Bail

A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform

NIC
National Institute of Corrections

U.S. Department of Justice
National Institute of Corrections

Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform

Authors: Timothy R. Schnacke

August 2014

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Preface

Achieving pretrial justice is like sharing a book – it helps when everyone is on the same page. So this document, "Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Justice," is primarily designed to help move America forward in its quest for pretrial reform by getting those involved in that quest on the same page. Since I began studying, researching, and writing about bail I (along with others, including, thankfully, the National Institute of Corrections) have seen the need for a document that figuratively steps back and takes a broader view of the issues facing America when it comes to pretrial release and detention. The underlying premise of this document is that until we, as a field, come to a common understanding and agreement about certain broad fundamentals of bail and how they are connected, we will see only sporadic rather than widespread improvement. In my opinion, people who endeavor to learn about bail will be most effective at whatever they hope to do if their bail education covers each of the fundamentals – the history, the law, the research, the national standards, and its terms and phrases.

Timothy R. Schnacke

Executive Director

Center for Legal and Evidence-Based Practices

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I would also like to thank my dear friend and an extraordinary criminal justice professor, Eric Poole, who patiently listened and helped me to mold the more arcane concepts from the paper. Moreover, I am also indebted to my former boss, Tom Giacinti, whose foresight and depth of experience in criminal justice allowed him to forge a path in this generation of American bail reform.

Finally, I give my deepest thanks and appreciation to Claire Brooker (Jefferson County, Colorado) and Mike Jones (Pretrial Justice Institute), who not only inspired most of the paper, but also acted (as usual) as my informal yet indispensable editors. It is impossible to list all of their contributions to my work, but the biggest is probably that Claire and Mike have either conceived or molded – through their intellectual and yet practical lenses – virtually every thought I have ever had concerning bail. If America ever achieves true pretrial justice, it will be due to the hard work of people like Claire Brooker and Mike Jones.

Executive Summary

Pretrial justice in America requires a common understanding and agreement on all of the component parts of bail. Those parts include the need for pretrial justice, the history of bail, the fundamental legal principles underlying bail, the pretrial research, the national standards on pretrial release and detention, and how we define our basic terms and phrases.

Why Do We Need Pretrial Improvements?

If we can agree on why we need pretrial improvements in America, we are halfway toward implementing those improvements. As recently as 2007, one of the most frequently heard objections to bail reform was the ubiquitous utterance, "If it ain't broke, don't fix it." That has changed. While various documents over the last 90 years have consistently pointed toward the need to improve the administration of bail, literature from this current generation of pretrial reform gives us powerful new information from which we can articulate exactly why we need to make changes, which, in turn, frames our vision of pretrial justice designed to fix what is most certainly broken.

Knowing that our understanding of pretrial risk is flawed, we can begin to educate judges and others on how to embrace risk first and mitigate risk second so that our foundational American precept of equal justice remains strong. Knowing that the traditional money-based bail system leads both to unnecessary pretrial detention of lower risk persons and the unwise release of many higher risk persons, we can begin to craft processes that are designed to correct this illogical imbalance. Knowing and agreeing on each issue of pretrial justice, from infusing risk into police officer stops and first advisements to the need for risk-based bail statutes and constitutional right-to-bail language, allows us as a field to look at each state (or even at all states) with a discerning eye to begin crafting solutions to seemingly insoluble problems.

The History of Bail

Knowing the history of bail is critical to understanding why America has gone through two generations of bail reform in the 20th century and why it is currently in a third. History provides the contextual answers to virtually every question raised at bail. Who is against pretrial reform and why are they against it? What makes this generation of pretrial reform different from previous generations? Why did America move from using unsecured bonds administered through a personal surety system to using mostly secured bonds administered through a commercial surety system and when, exactly, did that happen? In what ways are our current constitutional and statutory bail provisions flawed? What are historical solutions to the dilemmas we currently see in the pretrial field? What is bail, and what is the purpose of bail? How do we achieve pretrial justice? All of these questions, and more, are answered through knowledge of the history of bail.

For example, the history tells us that bail should be viewed as "release," just as "no bail" should be viewed as detention. It tells us that whenever (1) bailable defendants (or those whom we feel should be bailable defendants) are detained, or (2) unbailable defendants (or those whom we feel should be unbailable defendants) are released, history demands a correction to ensure that, instead, bailable defendants are released and unbailable defendants are detained. Knowledge of this historical need for correction, by itself, points to why America is currently in a third generation of pretrial reform.

The history also tells us that it is the collision of two historical threads – the movement from an unsecured bond/personal surety system to a secured bond/commercial surety system colliding with the creation and nurturing of a "bail/no bail" dichotomy, in which bailable defendants are released and unbailable defendants are detained – that has led to the acute need for bail reform in the last 100 years. Thus, the history of bail instructs us not only on relevant older practices, but also on the important lessons from more recent events, including the first two generations of bail reform in America in the 20th century. It tells us how we can change state laws, policies, and practices so that bail can be administered in a lawful and effective manner, thereby greatly diminishing, if not avoiding altogether, the need for future reform.

The Legal Foundations of Pretrial Justice

The history of bail and the law underlying the administration of bail are intertwined (with the law in most cases confirming and solidifying the history), but the law remains as the framework and boundary for all that we do in the pretrial field. Unfortunately, however, the legal principles underlying bail are uncommon in our court opinions; rarely, if ever, taught in our law schools and colleges; and have only recently been resurrected as subjects for continuing legal education. Nevertheless, in a field such as bail, which strives to follow "legal and evidence-based practices," knowledge of the fundamental legal principles and why they matter to the administration of bail is crucial to pretrial justice in America. Knowing "what works" – the essence of following the evidence in any particular field – is not enough in bail. We must also know the law and how the fundamental legal principles apply to our policies and practices.

Each fundamental principle of national applicability, from probable cause and individualization to excessiveness, due process, and equal protection, is thus a rod by which we measure our daily pretrial practices so that they further the lawful goals underlying the bail process. In many cases, the legal principles point to the need for drastic changes to those practices. Moreover, in this generation of bail reform we are beginning to learn that our current state and local laws are also in need of revision when held up to the broader legal foundations. Accordingly, as changing concepts of risk are infused into our knowledge of bail, shedding light on practices and local laws that once seemed practical but now might be considered irrational, the fundamental legal principles rise up to instruct us on how to change our state constitutions and bail statutes so that they again make sense.

Pretrial Research

The history of bail and the law intertwined with that history tell us that the three goals underlying the bail process are to maximize release while simultaneously maximizing court appearance and public safety. Pretrial social research that studies what works to effectuate all three of these goals is superior to research that does not, and as a field we must agree on the goals as well as know the difference between superior and inferior research.

Each generation of bail reform in America has had a body of literature supporting pretrial improvements, and while more research is clearly needed (in

all genres, including, for example, social, historical, and legal research) this generation nonetheless has an ample supply from which pretrial practitioners can help ascertain what works to achieve our goals. Current research that is highly significant to today's pretrial justice movement includes research used to design empirical risk assessment instruments and to gauge the effectiveness of release types or specific conditions on pretrial outcomes.

The National Standards on Pretrial Release

The pretrial field benefits significantly from having sets of standards and recommendations covering virtually every aspect of the administration of bail. In particular, the American Bar Association Standards, first promulgated in 1968, are considered not only to contain rational and practical "legal and evidence-based" recommendations, but also to serve as an important source of authority and have been used by legislatures and cited by courts across the country.

As a field we must recognize the importance of the national standards and stress the benefits from jurisdictions holding up their practices against what most would consider to be "best" practices. On the other hand, we must recognize that the rapidly evolving pretrial research may ultimately lead to questioning and possibly even revising those standards.

Pretrial Terms and Phrases

A solid understanding of the history of bail, the legal foundations of bail, the pretrial research, and the national standards means, in many jurisdictions, that even such basic things as definitions of terms and phrases are in need of reform. For example, American jurisdictions often define the term "bail" in ways that are not supported by the history or the law, and these improper definitions cause undue confusion and distraction from significant issues. As a field seeking some measure of pretrial reform, we must all first agree on the proper and universally true definitions of our key terms and phrases so that we speak with a unified voice.

Guidelines for Pretrial Reform

Pretrial justice in America requires a complete cultural change from one in which we primarily associate bail with money to one in which we do not. But cultural change starts with individuals making individual decisions to act. It may seem daunting, but it is not; many persons across America have decided to follow the

research and the evidence to assess whether pretrial improvements are necessary, and many of those same persons have persuaded entire jurisdictions to make improvements to the administration of bail. What these persons have in common is their knowledge of the fundamentals of bail. When they learn the fundamentals, light bulbs light, the clouds of confusion part, and what once seemed impossible becomes not only possible, but necessary and seemingly long overdue.

This document is designed to help people come to the same epiphany that has led so many to focus on pretrial reform as one of the principle criminal justice issues facing our country today. It is a resource guide written at a time when the resources are expanding exponentially and pointing in a single direction toward reform. More importantly, however, it represents a mental framework – a slightly new and interconnected way of looking at things – so that together we can finally and fully achieve pretrial justice in America.

Introduction

It is a paradox of criminal justice that bail, created and molded over the centuries in England and America primarily to facilitate the release of criminal defendants from jail as they await their trials, today often operates to deny that release. More unfortunate, however, is the fact that many American jurisdictions do not even recognize the paradox; indeed, they have become gradually complacent with a pretrial process through which countless bailable defendants are treated as unbailable through the use of money. To be paradoxical, a statement must outwardly appear to be false or absurd, but, upon closer examination, shown to be true. In many jurisdictions, though, a statement such as, "The defendant is being held on $50,000 bail," a frequent tagline to any number of newspaper articles recounting a criminal arrest, seems to lack the requisite outward absurdity to qualify as paradoxical. After all, defendants are "held on bail" all the time. But the idea of being held or detained on bail is, in fact, absurd. An equivalent statement would be that the accused has been freed and is now at liberty to serve time in prison.

Recognizing the paradox is paramount to fully understanding the importance of bail, and the importance of bail cannot be overstated. Broadly defined, the study of bail includes examining all aspects of the non-sentence release and detention decision during a criminal defendant's case.[1] Internationally, bail is the subject of numerous treaties, conventions, rules, and standards. In America, bail has been the focus of two significant generations of reform in the 20th century, and appears now to be firmly in the middle of a third. Historically speaking, bail has existed since Roman times and has been the catalyst for such important criminal jurisprudential innovations as preliminary hearings, habeas corpus, the notion of "sufficient sureties," and, of course, prohibitions on pretrial detention without charge and on "excessive" bail as foundational to our core constitutional rights. Legally, decisions at bail trigger numerous foundational principles, including

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[1] A broad definition of the study of criminal bail would thus appropriately include, and has in the past included, discussion of issues occasionally believed to be outside of the bail process, such as the use of citations in order to avoid arrest altogether or pretrial diversion as a dispositional alternative to the typical pretrial release or detention/trial/adjudication procedure. A broad definition would certainly include discussions of post-conviction bail, but because of fundamental differences between pretrial defendants and those who have been convicted, that subject is beyond the scope of this paper. For purposes of this paper, "bail" will refer to the pretrial process.

due process, the presumption of innocence, equal protection, the right to counsel, and other key elements of federal and state law. In the realm of criminal justice social science research, bail is a continual source of a rich literature, which, in turn, helps criminal justice officials as well as the society at large to decide the most effective manner in which to administer the release and detention decision. And finally, the sheer volume and resulting outcomes of the decisions themselves – decisions affecting over 12 million arrestees per year – further attest to the importance of bail as a topic that can represent either justice or injustice on a grand scale.

Getting Started – What is Bail? What is Bond?

Later in this paper we will see how the history, the law, the social science research, and the national best practice standards combine to help us understand the proper definitions of terms and phrases used in the pretrial field. For now, however, the reader should note that the terms "bail" and "bond" are used differently across America, and often inaccurately when held up to history and the law. In the 1995 edition to his Dictionary of Modern Legal Usage, Bryan Garner described the word "bail" as a "chameleon-hued" legal term, with strikingly different meanings depending on its overall use as a noun or a verb. And indeed, depending on the source, one will see "bail" defined variously as money, as a person, as a particular type of bail bond, and as a process of release. Occasionally, certain definitions will conflict with other definitions or word usage even within the same source. Accordingly, to reflect an appropriate legal and historical definition, the term "bail" will be used in this paper to describe a process of releasing a defendant from jail or other governmental custody with conditions set to provide reasonable assurance of court appearance or public safety.

The term "bond" describes an obligation or a promise, and so the term "bail bond" is used to describe the agreement between a defendant and the court, or between the defendant, a surety (commercial or noncommercial), and the court that sets out the details of the agreement. There are many types of bail bonds – secured and unsecured, with or without sureties, and with or without other conditions – that fall under this particular definition. Later we will also see how defining types of bonds primarily based on their use of money in the process (such as a "cash" bond or a "personal recognizance bond") is misleading and inaccurate.

This paper occasionally mentions the terms "money bail," and the "traditional money bail system." "Money bail" is typically used as a shorthand way to describe the bail process or a bail bond using secured financial conditions (which

necessarily includes money that must be paid up-front prior to release). The two central issues concerning money bail are: (1) its tendency to cause unnecessary incarceration of defendants who cannot afford to pay secured financial conditions either immediately or even after some period of time; and (2) its tendency to allow for, and sometimes foster, the release of high-risk defendants, who should more appropriately be detained without bail.

The "traditional money bail system" typically describes the predominant American system (since about 1900) of primarily using secured financial conditions on bonds administered through commercial sureties. More broadly, however, it means any system of the administration of bail that is over-reliant on money, typically when compared to the American Bar Association's National Standards on Pretrial Release. Some of its hallmarks include monetary bail bond schedules, overuse of secured bonds, a reliance on commercial sureties (for-profit bail bondsmen), financial conditions set to protect the public from future criminal conduct, and financial conditions set without consideration of the defendant's ability to pay, or without consideration of non-financial conditions or other less-restrictive conditions that would likely reduce risk.

Sources and Resources: Black's Law Dictionary (9th ed. 2009); Bryan A. Garner, A Dictionary of Modern Legal Usage (Oxford Univ. Press, 2nd ed. 1995); Timothy R. Schnacke, Michael R. Jones, Claire M.B. Brooker, *Glossary of Terms and Phrases Relating to Bail and the Pretrial Release or Detention Decision* (PJI 2011).

The importance of bail foreshadows the significant problems that can arise when the topic is not fully understood. Those problems, in turn, amplify the paradox. A country founded upon liberty, America leads the world in pretrial detention at three times the world average. A country premised on equal justice, America tolerates its judges often conditioning pretrial freedom based on defendant wealth – or at least on the ability to raise money – versus important and constitutionally valid factors such as the risk to public and victim safety. A country bound by the notion that liberty not be denied without due process of law, America tolerates its judges often ordering de-facto pretrial detention through brief and perfunctory bail hearings culminating with the casual utterance of an arbitrary and often irrational amount of money. A country in which the presumption of innocence is "axiomatic and elementary" [2] to its administration of criminal justice and foundational to the right to bail,[3] America, instead, often projects a presumption of guilt. These issues are exacerbated by the fact that the type of pretrial justice a person gets in this country is also determined, in large part, on where he or she is, with some jurisdictions

[2] *Coffin v. United States*, 156 U.S. 432, 453 (1895).
[3] *See Stack v. Boyle*, 342 U.S. 1, 4 (1951).

endeavoring to follow legal and evidence-based pretrial practices but with others woefully behind. In short, the administration of bail in America is unfair and unsafe, and the primary cause for that condition appears simply to be: (1) a lack of bail education that helps to illuminate solutions to a number of well-known bail problems; and (2) a lack of the political will to change the status quo.

> *"It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones."*
>
> Nelson Mandela, 1995

Fortunately, better than any other time in history, we have now identified, and in many cases have actually illustrated through implementation, solutions to the most vexing problems at bail. But this knowledge is not uniform. Moreover, even where the knowledge exists, we find that jurisdictions are in varying stages of fully understanding the history of bail, legal foundations of bail, national best practice recommendations, terms and phrases used at bail, and legal and evidence-based practices that fully implement the fair and transparent administration of pretrial release and detention. Pretrial justice requires that those seeking it be consistent with both their vision and with the concept of pretrial best practices, and this document is designed to help further that goal. It can be used as a resource guide, giving readers a basic understanding of the key areas of bail and the criminal pretrial process and then listing key documents and resources necessary to adopt a uniform working knowledge of legal and evidence-based practices in the field.

Hopefully, however, this document will serve as more than just a paper providing mere background information, for it is designed, instead, to also provide the intellectual framework to finally achieve pretrial justice in America. As mentioned previously, in this country we have undertaken two generations of pretrial reform, and we are currently in a third. The lessons we have learned from the first two generations are monumental, but we have not fully implemented them, leading to the need for some "grand unifying theory" to explore how this third generation can be our last. In my opinion, that theory comes from a solid consensus understanding of the fundamentals of bail, why

they are important, and how they work together toward an idea of pretrial justice that all Americans can embrace.

The paper is made up of seven chapters designed to help jurisdictions across America to reach consensus on a path to pretrial justice. In the first chapter, we will briefly explore the need for pretrial improvements as well as the reasons behind the current generation of reform. In the second chapter, we will examine the evolution of bail through history, with particular emphasis on why the knowledge of certain historical themes is essential to reforming the pretrial process. In the third chapter, we will list and explain fundamental legal foundations underpinning the pretrial field. The fourth chapter will focus on the evolution of empirical pretrial research, looking primarily at research associated with each of the three generations of bail reform in America in the 20th and 21st centuries.

The fifth chapter will briefly discuss how the history, law, and research come together in the form of national pretrial standards and best practice recommendations. In the sixth chapter, we will further discuss how bail's history, law, research, and best practice standards compel us to agree on certain changes to the way we define key terms and phrases in the field. In the seventh and final chapter, we will focus on practical application – how to begin to apply the concepts contained in each of the previous sections to lawfully administer bail based on best practices. Throughout the document, through sidebars, the reader will also be introduced to other important but sometimes neglected topics relevant to a complete understanding of the basics of bail.

Direct quotes are footnoted, and other, unattributed statements are either the author's own or can be found in the "additional sources and resources" sections at the end of most chapters. In the interest of space, footnoted sources are not necessarily listed again in those end sections, but should be considered equally important resources for pretrial practitioners. Throughout the paper, the author occasionally references information that is found only in various websites. Those websites are as follows:

The American Bar Association: http://www.americanbar.org/aba.html;

The Bureau of Justice Assistance: https://www.bja.gov/;

The Bureau of Justice Statistics: http://www.bjs.gov/;

The Carey Group: http://www.thecareygroup.com/;

The Center for Effective Public Policy: http://cepp.com/;

The Crime and Justice Institute: http://www.crj.org/cji;

The Federal Bureau of Investigation Crime Reports: http://www.fbi.gov/about-us/cjis/ucr/ucr;

Human Rights Watch: http://www.hrw.org/;

Justia: http://www.justia.com/;

The Justice Management Institute: http://www.jmijustice.org/;

The Justice Policy Institute: http://www.justicepolicy.org/index.html;

NACo Pretrial Resources, http://www.naco.org/programs/csd/Pages/PretrialJustice.aspx;

The National Association of Pretrial Services Agencies: http://napsa.org/;

The National Criminal Justice Reference Service: https://www.ncjrs.gov/;

The National Institute of Corrections, http://nicic.gov;

The National Institute of Justice: http://www.nij.gov/Pages/welcome.aspx;

The Pretrial Justice Institute: http://www.pretrial.org/;

The Pretrial Services Agency for the District of Columbia, http://www.psa.gov/;

The United States Census Bureau, http://www.census.gov/;

The Vera Institute of Justice: http://www.vera.org/;

The Washington State Institute for Public Policy: http://www.wsipp.wa.gov/.

Chapter 1: Why Do We Need Pretrial Improvements?

The Importance of Understanding Risk

Of all the reasons for studying, identifying, and correcting shortcomings with the American system of administering bail, two overarching reasons stand out as foundational to our notions of freedom and democracy. The first is the concept of risk. From the first bail setting in Medieval England to any of a multitude of bail settings today, pretrial release and detention has always been concerned with risk, typically manifested by the prediction of pretrial misbehavior based on the risk that any particular defendant will not show up for court or commit some new crime if released. But often missing from our discussions of pretrial risk are the reasons for why we allow risk to begin with. After all, pretrial court appearance rates (no failures to appear) and public safety rates (no new crimes while on pretrial release) would most certainly hover near 100% if we could simply detain 100% of defendants.

The answer is that we not only allow for risk in criminal justice and bail, we demand it from a society that is based on liberty. In his Commentaries on the Laws of England (the eighteenth century treatise on the English common law used extensively by the American Colonies and our Founding Fathers) Sir William Blackstone wrote, "It is better that ten guilty persons escape than that one innocent suffer,"[4] a seminal statement of purposeful risk designed to protect those who are governed against unchecked despotism. More specifically related to bail, in 1951, Justice Robert H. Jackson succinctly wrote, "Admission to bail always involves a risk . . . a calculated risk which the law takes as the price of our system of justice."[5] That system of justice – one of limited government powers and of fundamental human rights protected by the Constitution, of defendants cloaked with the presumption of innocence, and of increasingly arduous evidentiary hurdles designed to ensure that only the guilty suffer punishment at the hands of the state – inevitably requires us to *embrace* risk at bail as fundamental to maintaining our democracy. Our notions of equality, freedom, and the rule of law demand that we embrace risk, and embracing risk requires us

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[4] William Blackstone, *Commentaries on the Laws of England*, Book 4, ch. 27 (Oxford 1765-1769).

[5] *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (Jackson, J., concurring).

to err on the side of release when considering the right to bail, and on "reasonable assurance," rather than complete assurance, when limiting pretrial freedom.

Despite the fact that risk is necessary, however, many criminal justice leaders lack the will to undertake it. To them, a 98% court appearance rate is 2% too low, one crime committed by a defendant while on pretrial release is one crime too many, and detaining some large percentage of defendants pretrial is an acceptable practice if it avoids those relatively small percentage failures. Indeed, the fears associated with even the smallest amount of pretrial failure cause those leaders to focus first and almost entirely on mitigating perceived risk, which in turn leads to unnecessary pretrial detention.

> *"All too often our current system permits the unfettered release of dangerous defendants while those who pose minimal, manageable risk are held in costly jail space."*
>
> Tim Murray, Pretrial Justice Institute, 2011

But these fears misapprehend the entire concept of bail, which requires us first to embrace the risk created by releasing defendants (for the law presumes and very nearly demands the release of bailable defendants) and then to seek to mitigate it only to reasonable levels. Indeed, while the notion may seem somewhat counterintuitive, in this one unique area of the law, everything that we stand for as Americans reminds us that when court appearance and public safety rates are high, we must at least consider taking the risk of releasing more defendants pretrial. Accordingly, one answer to the question of why pretrial improvements are necessary, and the first reason for correcting flaws in the current system, is that criminal justice leaders must continually take risks in order to uphold fundamental precepts of American justice; unfortunately, however, many criminal justice leaders, including those who administer bail today, often fail to fully understand that connection and have actually grown risk averse.

The Importance of Equal Justice

The second foundational reason for studying and correcting the administration of bail in America is epitomized by a quote from Judge Learned Hand uttered during a keynote address for the New York City Legal Aid Society in 1951. In his

speech, Judge Hand stated, "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."[6] Ten years later, the statement was repeated by Attorney General Robert Kennedy when discussing the need for bail reform, and it became a foundational quote in the so-called "Allen Committee" report, the document from the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice that provided a catalyst for the first National Conference on Bail and Criminal Justice in 1964. Judge Hand's quote became a rallying cry for the first generation of American bail reform, and it remains poignant today, for in no other area of criminal procedure do we so blatantly restrict allotments of our fundamental legal principles. Like our aversion to risk, our rationing of justice at bail is something to which we have grown accustomed. And yet, if Judge Hand is correct, such rationing means that our very form of government is in jeopardy. Accordingly, another answer for why pretrial improvements are necessary, and a second reason for correcting flaws in the current system, is that allowing justice for some, but not all Americans, chips away at the founding principles of our democracy, and yet those who administer bail today have grown content with a system in which justice capriciously eludes persons based on their lack of financial resources.

Arguably, it is America's aversion to risk that has led to its complacency toward rationing pretrial justice. That is because bail, and therefore the necessary risk created by release, requires an in-or-out, release/no release decision. As we will see later in this paper, since at least 1275, bail was meant to be an in-or-out proposition, and only since about the mid to late 1800s in America have we created a process that allows judges to delegate that decision by merely setting an amount of up-front money. Unfortunately, however, setting an amount of money is typically not a release/no release decision; indeed, it can often cause both unintended releases and detentions. Setting money, instead, creates only the illusion of a decision for when money is a precondition to release, the actual release (or, indeed, detention) decision is then made by the defendant, the defendant's family, or perhaps some third party bail bondsman who has analyzed the potential for profit. This illusion of a decision, in turn, has masked our aversion to risk, for it appears to all that some decision has been made. Moreover, it has caused judges across America to be content with the negative outcomes of such a non-decision, in which pretrial justice appears arbitrarily rationed out only to those with access to money.

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[6] *See* The Legal Aid Society website at http://www.legal-aid.org/en/las/thoushaltnotrationjustice.aspx.

Negative Outcomes Associated with the Traditional Money Bail System

Those negative outcomes have been well-documented. Despite overall drops in total and violent crime rates over the last twenty years, jail incarceration rates remain high – so high, in fact, that if we were to jail persons at the 1980 incarceration rate, a rate from a time in which crime rates were actually higher than today, our national jail population would drop from roughly 750,000 inmates to roughly 250,000 inmates. Moreover, most of America's jail inmates are classified as pretrial defendants, who today account for approximately 61% of jail populations nationally (up from approximately 50% in 1996). As noted previously, the United States leads the world in numbers of pretrial detainees, and detains them at a rate that is three times the world average.

Understanding Your Jail Population

Knowing who is in your jail as well as fundamental jail population dynamics is often the first step toward pretrial justice. Many jurisdictions are simply unaware of who is in the jail, how they get into the jail, how they leave the jail, and how long they stay, and yet knowing these basic data is crucial to focusing on particular jail populations such as pretrial inmates.

A jail's population is affected not only by admissions and lengths of stay, but also by the discretionary decisionmaking by criminal justice officials who, whether on purpose or unwittingly, often determine the first two variables. For example, a local police department's policy of arresting and booking (versus release on citation) more defendants than other departments or to ask for unusually high financial conditions on warrants will likely increase a jail's number of admissions and can easily add to its overall daily population. As another example, national data has shown that secured money at bail causes pretrial detention for some defendants and delayed release for others, both increasing the lengths of stay for that population and sometimes creating jail crowding. Accordingly, a decision by one judge to order mostly secured (i.e., cash or surety) bonds will increase the jail population more than a judge who has settled on using less-restrictive means of limiting pretrial freedom while mitigating pretrial risk.

Experts on jail population analysis thus advise jurisdictions to adopt a systems perspective, create the infrastructure to collect and analyze system data, and collect and track trend data not only on inmate admissions and lengths of stay, but also on criminal justice decisionmaking for policy purposes.

Sources and Resources: David M. Bennett & Donna Lattin, *Jail Capacity Planning Guide: A Systems Approach* (NIC, Nov. 2009); Cherise Fanno Burdeen, *Jail Population Management: Elected County Officials' Guide to Pretrial Services* (NACo/BJA/PJI, 2009); Mark A. Cunniff, *Jail Crowding: Understanding Jail Population Dynamics,* (NIC, Jan. 2002); Robert C. Cushman, *Preventing Jail Crowding: A Practical Guide* (NIC, 2nd ed., May 2002); Todd D. Minton, *Jail Inmates at Midyear- 2012 Statistical Tables*, (BJS, 2013 and series). **Policy Documents Using Jail Population Analysis:** Jean Chung, *Baltimore Behind Bars, How to Reduce the Jail Population, Save Money and Improve Public Safety* (Justice Policy Institute, Jun. 2010); Marie VanNostrand, *New Jersey Jail Population Analysis: Identifying Opportunities to Safely and Responsibly Reduce the Jail Population* (Luminosity/Drug Policy Alliance, Mar. 2013).

These trends are best explained by the justice system's increasing use of secured financial conditions on a population that appears less and less able to afford them. In 2013, the Census Bureau announced that the poverty rate in America was 15%, about one in every seven persons and higher than in 2007, which was

just before the most recent recession. Nevertheless, according to the Bureau of Justice Statistics, the percentage of cases for which courts have required felony defendants to post money in order to obtain release has increased approximately 65% from 1990 to 2009 (from 37% to 61% of cases overall, mostly from the large increase in use of surety bonds), and the amounts of those financial conditions have steadily risen over the same period.

Unnecessary Pretrial Detention

The problem highlighted by these data comes from the fact that secured financial conditions at bail cause unnecessary pretrial detention. In a recent and rigorous study of 2,000 Colorado cases comparing the effects between defendants ordered to be released on secured financial conditions (requiring either money or property to be paid in advance of release) and those ordered released on unsecured financial conditions (requiring the payment of either money or property only if the defendant failed to appear and not as a precondition to release), defendants with unsecured financial conditions were released in "statistically significantly higher" numbers no matter how high or low their individual risk.[7] Essentially, defendants ordered to be released but forced to pay secured financial conditions: (1) took longer to get out of jail (presumably for the time needed to gather the necessary money or to find willing sureties); and (2) in many cases did not get out at all. In short, using secured bonds leads to the detention of bailable defendants by delaying or preventing pretrial release. These findings are consistent with comparable national data; indeed, the federal government has estimated the percentage of felony defendants detained for the duration of their pretrial period nationally to be approximately 38%, and the percentage of those defendants detained simply due to the lack of money to be approximately 90% of that number.

There are numerous reasons to conclude that anytime a bailable defendant is detained for lack of money (rather than detained because of his or her high risk for pretrial misbehavior), that detention is unnecessary. First, secured money at bail is the most restrictive condition of release – it is typically the only precondition to release itself – and, in most instances, other less-restrictive alternatives are available to respond to pretrial risk without the additional financial condition. Indeed, starting in the 1960s, researchers have demonstrated that courts can use alternatives to release on money bonds that have acceptable

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[7] Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, 12 (PJI 2013).

outcomes concerning risk to public safety and court appearance. Second, the money itself cannot serve as motivation for anything until it is actually posted. Until then, the money merely detains, and does so unequally among defendants resulting in the unnecessary detention of releasable inmates. This problem is exacerbated by the fact that the financial condition of a bail bond is typically arbitrary; even when judges are capable of expressing reasons for a particular amount, there is often no rational explanation for why a second amount, either lower or higher, might not arguably serve the same purposes. Third, money set with a purpose to detain is likely unlawful under numerous theories of law, and is also unnecessary given the Supreme Court's approval of a lawful detention scheme that uses no money whatsoever. Financial conditions of release are indicators of decisions to release, not to detain; accordingly, any resulting detention due to money bonds used outside of a lawful detention process makes that money-based detention unnecessary or potentially unlawful. Fourth, no study has ever shown that money can protect the public. Indeed, in virtually every American jurisdiction, financial conditions of bail bonds cannot even be forfeited for new crimes or other breaches in public safety, making the setting of a money bond for public safety irrational. Given that irrationality, any pretrial detention resulting from that practice is per se unnecessary.

Fifth, ever since 1968, when the American Bar Association openly questioned the basic premise that money serves as a motivator for court appearance, no valid study has been conducted to refute that uncertainty. Instead, the best research to date suggests what criminal justice leaders have long suspected: secured money does not matter when it comes to either public safety or court appearance, but it is directly related to pretrial detention. This hypothesis was supported most recently by the Colorado study, mentioned above, which compared outcomes for defendants released on secured bonds with outcomes for defendants released on unsecured bonds. In 2,000 cases of defendants from all risk categories, this research showed that while having to pay the money up-front led to statistically significantly higher detention rates, whether judges used secured or unsecured money bonds did not lead to any differences in court appearance or public safety rates.

A sixth reason for concluding that bailable defendants held on secured financial conditions constitutes unnecessary pretrial detention is that we know of at least one jurisdiction, Washington D.C., that uses virtually no money at all in its bail setting process. Instead, using an "in or out," "bail/no bail" scheme of the kind contemplated by American law, the District of Columbia releases 85-88% of all defendants – detaining the rest through rational, fair, and transparent detention

procedures – and yet maintains high court appearance (no FTA) and public safety (no new crime) rates. Moreover, that jurisdiction does so day after day, with all types of defendants charged with all types of crimes, using almost no money whatsoever.

Unnecessary pretrial detention is also suggested whenever we look at the adjudicatory outcomes of defendants' cases to see if they are the sorts of individuals who must be absolutely separated from society. When we look at those outcomes, however, we see that even though we foster a culture of pretrial detention, very few persons arrested or admitted to jail are ultimately sentenced to significant incarceration post-trial. Indeed, only a small fraction of jail inmates nationally (from 3-5%, depending on the source) are sent to prison. In one statewide study, only 14% of those defendants detained for the *entire duration* of their case were sentenced to prison. Thirteen percent had their cases dismissed (or the cases were never filed), and 37% were sentenced to noncustodial sanctions, including probation, community corrections, or home detention. Accordingly, over 50% of those pretrial detainees were released into the community once their cases were done. In another study, more than 25% of felony pretrial detainees were acquitted or had their cases dismissed, and approximately 20% were ultimately sentenced to a noncustodial sentence. Clearly, another disturbing paradox at bail involves the dynamic of releasing presumptively innocent defendants back into the community only after they have either pleaded or been found guilty of a particular crime.

In addition, and as noted by the Pretrial Justice Institute (PJI), these statistics vary greatly across the United States, and that variation itself hints at the need for reform. According to PJI:

> Looking at the counties individually shows the great disparity in pretrial release practices and outcomes. In 2006, pretrial release rates ranged from a low of 31% in one county to a high of 83% in another. Non-financial release rates ranged from lows of zero in one county, 3% in another, and 5% in a third to a high of 68%.[8]

[8] *Important Data on Pretrial Justice* (PJI 2011).

Different Laws/Different Practices

Bail laws are different among the states, often due to the extent to which those states have fully embraced the principles and practices evolving out of the two previous generations of bail reform in the 1960s and 1980s. Even in states with similar laws, however, pretrial practices can nonetheless vary widely. Indeed, local practices can vary among jurisdictions under the same state laws, and, given the great discretion often afforded at bail, even among judges within individual jurisdictions. Disparity beyond that needed to individualize bail settings can rightfully cause concerns over equal justice, through which Americans can be reasonably assured that the laws will not have widely varying application depending on their particular geographical location, court, or judge.

Normally, state and federal constitutional law would provide adequate benchmarks to maintain equal justice, but with bail we have an unfortunate scarcity of language and opinions from which to gauge particular practices or even the laws from which those practices derive. Fortunately, however, we have best practice standards on pretrial release and detention that take fundamental legal principles and marry them with research to make recommendations concerning virtually every issue surrounding pretrial justice. In this current generation of pretrial reform, we are realizing that both bail practices and the laws themselves – from court rules to constitutions – must be held up to best practices and the legal principles underlying them to create bail schemes that are fair and applied somewhat equally among the states.

The American Bar Association's (ABA's) Criminal Justice Standards on Pretrial Release can provide the benchmarks that we do not readily find in bail law. When followed, those Standards provide the framework from which pretrial practices or even laws can be measured, implemented, or improved. For example, the use of monetary bail schedules (a document assigning dollar amounts to particular charges regardless of the characteristics of any individual defendant) are illegal in some states but actually required by law in others. There is very little law on the subject, but the ABA standards (using fundamental legal principles, such as the need for individuality in bail setting as articulated by the United States Supreme Court), research (indicating that release or detention based on individual risk is a superior practice to any mechanism based solely on charge and wealth), and logic (the standards call schedules "arbitrary and inflexible") reject the use of monetary bail schedules, thus suggesting that any state that either mandates or permits their use should consider statutory amendment.

Sources and Resources: *American Bar Association Standards for Criminal Justice – Pretrial Release* (3rd ed. 2007).

Pretrial detention, whether for a few days or for the duration of the case, imposes certain costs, and unnecessary pretrial detention does so wastefully. In a purely monetary sense, these costs can be estimated, such as the comparative cost of incarceration (from $50 to as much as $150 per day) versus community supervision (from as low as $3 to $5 per day). Given the volume of defendants and their varying lengths of stays, individual jails can incur costs of millions of dollars per year simply to house lower risk defendants who are also presumed innocent by the law. Indeed, the United States Department of Justice estimates that keeping the pretrial population behind bars costs American taxpayers roughly 9 billion dollars per year. Jails that are crowded can create an even more costly scenario for taxpayers, as new jail construction can easily reach $75,000 to $100,000 per inmate bed. Added to these costs are dollars associated with lost wages, economic mobility (including intergenerational effects), possible welfare costs for defendant families, and a variety of social costs, including denying the defendant the ability to assist with his or her own defense, the possibility of imposing punishment prior to conviction, and eroding justice system credibility due to its complacency with a wealth-based system of pretrial freedom.

Perhaps more disturbing, though, is research suggesting that pretrial detention alone, all other things being equal, leads to harsher treatment and outcomes than pretrial release. Relatively recent research from both the Bureau of Justice Statistics and the New York City Criminal Justice Agency continues to confirm studies conducted over the last 60 years demonstrating that, controlling for all other factors, defendants detained pretrial are convicted and plead guilty more often, and are sentenced to prison and receive harsher sentences than those who are released. Moreover, as recently as November 2013, the Laura and John Arnold Foundation released a study of over 150,000 defendants finding that – all other things being equal – defendants detained pretrial were over four times more likely to be sentenced to jail (and with longer sentences) and three times more likely to be sentenced to prison (again with longer sentences) than defendants who were not detained.[9]

While detention for a defendant's entire pretrial period has decades of documented negative effects, the Arnold Foundation research is also beginning to demonstrate that even small amounts of pretrial detention – perhaps even the few days necessary to secure funds to pay a cash bond or fee for a surety bond – have negative effects on defendants and actually makes them more at risk for

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[9] *See* Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, at 10-11 (Laura & John Arnold Found. 2013).

pretrial misbehavior.[10] Looking at the same 150,000 case data set, the Arnold researchers found that low- and moderate-risk defendants held only 2 to 3 days were more likely to commit crimes and fail to appear for court before trial than similar defendants held 24 hours or less. As the time in jail increased, the researchers found, the likelihood of defendant misbehavior also increased. The study also found similar correlations between pretrial detention and long-term recidivism, especially for lower risk defendants. In a field of paradoxes, the idea that a judge setting a condition of bail intending to protect public safety might be unwittingly *increasing* the danger to the public – both short and long-term – is cause for radically rethinking the way we administer bail.

Other Areas in Need of Pretrial Reform

Unnecessary pretrial detention is a deplorable byproduct of the traditional money bail system, but it is not the only part of that system in need of significant reform. In many states, the overreliance on money at bail takes the place of a transparent and due-process-laden detention scheme based on risk, which would allow for the detention of high-risk defendants with no bail. Indeed, the traditional money bail system fosters processes that allow certain high-risk defendants to effectively purchase their freedom, often without being assessed for their pretrial risk and often without supervision. These processes include using bail schedules (through which defendants are released by paying an arbitrary money amount based on charge alone), a practice of dubious legal validity and counter to any notions of public safety. They include using bail bondsmen, who operate under a business model designed to maximize profit based on getting defendants back to court but with no regard for public safety. And they include setting financial conditions to help protect the public, a practice that is both legally and empirically flawed. In short, the use of money at bail at the expense of risk-based best practices tends to create the two main reasons cited for the need for pretrial reform: (1) it needlessly and unfairly keeps lower risk defendants in jail, disproportionately affecting poor and minority defendants and at a high cost to taxpayers; and (2) it too often allows higher risk defendants out of jail at the expense of public safety and integrity of the justice system. Both of these reasons were illustrated by the Colorado study, cited above, which documented that when making bail decisions without the benefit of an empirical risk instrument, judges often set financial conditions that not only

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[10] *See* Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (Laura & John Arnold Found. 2013).

kept lower risk persons in jail, but also frequently allowed the highest risk defendants out.

While the effect of money at bail is often cited as a reason for pretrial reform, research over the last 25 years has also illuminated other issues ripe for pretrial justice improvements. They include the need for (1) bail education among all criminal justice system actors; (2) data-driven policies and infrastructure to administer bail; (3) improvements to procedures for release through citations and summonses; (4) better prosecutorial and defense attorney involvement at the front-end of the system; (5) empirically created pretrial risk assessment instruments; (6) traditional (and untraditional) pretrial services functions in jurisdictions without those functions; (7) improvements to the timing and nature of first appearances; (8) judicial release and detention decision-making to follow best practices; (9) systems to allocate resources to better effectuate best practices; and (10) changes in county ordinances, state statutes, and even state constitutions to embrace and facilitate pretrial justice and best practices at bail.

> *"What has been made clear . . . is that our present attitudes toward bail are not only cruel, but really completely illogical. . . . '[O]nly one factor determines whether a defendant stays in jail before he comes to trial [and] that factor is, simply, money."*
>
> Attorney General Robert Kennedy, 1962
>
> *Many pretrial inmates "are forced to remain in custody . . . because they simply cannot afford to post the bail required – very often, just a few hundred dollars."*
>
> Attorney General Eric Holder, 2011

The Third Generation of Bail/Pretrial Reform

The traditional money bail system that has existed in America since the turn of the 20th century is deficient legally, economically, and socially, and virtually every neutral and objective bail study conducted over the last 90 years has called for its reform. Indeed, over the last century, America has undergone two generations of bail reform, but those generations have not sufficed to fully achieve what we know today constitutes pretrial justice. Nevertheless, we are

entering a new generation of pretrial reform with the same three hallmarks seen in previous generations.

First, like previous generations, we now have an extensive body of research literature – indeed, we have more than previous generations – pointing uniformly in a single direction toward best practices at bail and toward improvements over the status quo. Second, we have the necessary meeting of minds of an impressive number of national organizations – from police chiefs and sheriffs, to county administrators and judges – embracing the research and calling for data-driven pretrial improvements. Third, and finally, we are now seeing jurisdictions actually changing their laws, policies, and practices to reflect best practice recommendations for improvements. Fortunately, through this third generation of pretrial reform, we already know the answers to most of the pressing issues at bail. We know what changes must be made to state laws, and we know how to follow the law and the research to create bail schemes in which pretrial practices are rational, fair, and transparent.

A deeper understanding of the foundations of bail makes the need for pretrial improvements even more apparent. The next three parts of this paper are designed to summarize the evolution and importance of three of the most important foundational aspects of bail – the history, the law, and the research.

Additional Sources and Resources: American Bar Association Standards for Criminal Justice – Pretrial Release (3rd ed. 2007); Spike Bradford, *For Better or for Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice* (JPI 2012); E. Ann Carson & William J. Sabol, *Prisoners in 2011* (BJS 2012); *Case Studies: the D.C. Pretrial Services Agency: Lessons From Five Decades of Innovation and Growth* (PJI), found at http://www.pretrial.org/download/pji-reports/Case%20Study-%20DC%20Pretrial%20Services%20-%20PJI%202009.pdf; Thomas H. Cohen & Tracey Kyckelhahn, *Felony Defendants in Large Urban Counties*, 2006 (BJS 2010); Jean Chung, *Bailing on Baltimore: Voices from the Front Lines of the Justice System* (JPI 2012); Thomas H. Cohen & Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts* (BJS 2007); Jamie Fellner, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City* (Human Rights Watch 2010); *Frequently Asked Questions About Pretrial Release Decision Making* (ABA 2012); Robert F. Kennedy, *Address by Attorney General Robert F. Kennedy to the American Bar Association House of Delegates, San Francisco, Cal.*, (Aug. 6, 1962) available at http://www.justice.gov/ag/rfkspeeches/1962/08-06-1962%20Pro.pdf; Christopher T. Lowenkamp & Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes* (Laura & John Arnold Found. 2013); Barry

Mahoney, Bruce D. Beaudin, John A. Carver, III, Daniel B. Ryan, & Richard B. Hoffman, *Pretrial Services Programs: Responsibilities and Potential* (NIJ 2001); Todd D. Minton, *Jail Inmates at Midyear 2012 – Statistical Tables* (BJS 2013); *National Symposium on Pretrial Justice: Summary Report of Proceedings* (PJI/BJA 2011); Melissa Neal, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail* (JPI 2012); Mary T. Phillips, *Bail, Detention, and Non-Felony Case Outcomes, Research Brief Series No. 14* (NYCCJA 2007); Mary T. Phillips, *Pretrial Detention and Case Outcomes, Part 2, Felony Cases, Final Report* (NYCCJA 2008); *Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process* (PJI/MacArthur Found. 2012); Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables* (BJS 2013); *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice* (Univ. of Mich. 2011) (1963); *Responses to Claims About Money Bail for Criminal Justice Decision Makers* (PJI 2010); Timothy R. Schnacke, Michael R. Jones, Claire M.B. Brooker, *The Third Generation of Bail Reform* (Univ. Den. L. Rev. online, 2011); Standards on Pretrial Release (NAPSA, 3rd ed. 2004); Bruce Western & Becky Pettit, *Collateral Costs: Incarceration's Effect on Economic Mobility* (The PEW Charitable Trusts 2010).

Chapter 2: The History of Bail

According to the American Historical Association, studying history is crucial to helping us understand ourselves and others in the world around us. There are countless quotes on the importance of studying history from which to draw, but perhaps most relevant to bail is one from philosopher Soren Kierkegaard, who reportedly said, "Life must be lived forward, but it can only be understood backward." Indeed, much of bail today is complex and confusing, and the only way to truly understand it is to view it through a historical lens.

The Importance of Knowing Bail's History

Understanding the history of bail is not simply an academic exercise. When the United States Supreme Court equated the right to bail to a "right to release before trial," and likened the modern practice of bail with the "ancient practice of securing the oaths of responsible persons to stand as sureties for the accused,"[11] the Court was explaining the law by drawing upon notions discernible only through knowledge of history. When the commercial bail insurance companies argue that pretrial services programs have "strayed" beyond their original purpose, their argument is not fully understood without knowledge of 20th century bail, and especially the improvements gained from the first generation of bail reform in the 1960s. Some state appellate courts have relied on sometimes detailed accounts of the history of bail in order to decide cases related to release under "sufficient sureties," a term fully known only through the lens of history.

> *"This difference [between the U.S. and the Minnesota Constitution] is critical to our analysis and to fully understand this critical difference, some knowledge of the history of bail is necessary. Therefore, it is important to examine the origin of bail and its development in Anglo-American jurisprudence."*
>
> *State v. Brooks*, 604 N.W.2d 345 (Minn. 2000)

In short, knowledge of the history of bail is necessary to pretrial reform, and therefore it is crucial that this history be shared. Indeed, the history of bail is the

[11] *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951).

starting point for understanding all of pretrial justice, for that history has shaped our laws, guided our research, helped to mold our best practice standards, and forced changes to our core definitions of terms and phrases. Fundamentally, though, the history of bail answers two pressing questions surrounding pretrial justice: (1) given all that we know about the deleterious effects of money at bail, how did America, as opposed to the rest of the world, come to rely upon money so completely?; and (2) does history suggest solutions to this dilemma, which might lead to American pretrial justice?

Civil Rights, Poverty, and Bail

Anyone who has read the speeches of Robert F. Kennedy while he was Attorney General knows that civil rights, poverty, and bail were three key issues he wished to address. Addressing them together, as he often did, was no accident, as the three topics were, and continue to be, intimately related.

In 1961, philanthropist Louis Schweitzer and magazine editor Herbert Sturz took their concerns over the administration of bail in New York City (a system "that granted liberty based on income") to Robert Kennedy and Daniel Freed, Department of Justice liaison to the newly created Committee on Poverty and the Administration of Federal Criminal Justice, known as the "Allen Committee." Schweitzer's and Sturz's efforts ultimately led to the creation of the Vera Foundation (now the Vera Institute of Justice), whose pioneering work on the Manhattan Bail Project heavily influenced the first generation of bail reform by finding effective alternatives to the commercial bail system. Freed, in turn, took the Vera work and incorporated it into an entire chapter of the Allen Committee's report, leading to the first National Conference on Bail and Criminal Justice in 1964.

At the same time that these bail and poverty reformers were working to change American notions of equal justice, civil rights activists were taking on a traditionally difficult hurdle for Southern blacks – the lack of money to bail themselves and others out of jail – and using it to their advantage. Through the "jail, no bail" policy, activists refused to pay bail or fines after being arrested for sit-ins, opting instead to have the government incarcerate them, and sometimes to force them to work hard labor, to bring more attention to their cause.

The link between civil rights, poverty, and bail was probably inevitable, and Kennedy set out to rectify overlapping injustices seen in all three areas. But despite promising improvements encompassed in the war on poverty, the civil rights movement, and the first generation of bail reform in the 1960s, we remain unfortunately tolerant of a bail process inherently biased against the poor and disproportionately affecting persons of color. Studies continue to demonstrate that bail amounts are empirically related to increased (and typically needless)

pretrial detention, and other studies are equally consistent in demonstrating racial disparity in the application of bail and detention.

Fortunately, however, just like those persons pursuing civil rights and equal justice in the 20th century, the current generation of pretrial reform is fueled by committed individuals urging cultural changes to a system manifested by disparate state laws, unfair practices, and irrational policies that negatively affect the basic human rights of the most vulnerable among us. The commitment of those individuals, stemming from the success of past reformers, remains the catalyst for pretrial justice across the nation.

Sources and Resources: Thomas H. Cohen and Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts, 1990-2004* (BJS Nov. 2007); Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. Legis. & Pub. Pol'y 919 (2013); Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (PJI Oct. 2013); Besiki Kutateladze, Vanessa Lynn, & Edward Liang, *Do Race and Ethnicity Matter in Prosecution? Review of Empirical Studies* (1st Ed.) (Vera Institute of Justice 2012) at 11-12; *National Symposium on Pretrial Justice: Summary Report of Proceedings* at 35-35 and citations therein (PJI/BJA 2011) (statement of Professor Cynthia Jones).

Origins of Bail

While bail can be traced to ancient Rome, our traditional American understanding of bail derives primarily from English roots. When the Germanic tribes the Angles, the Saxons, and the Jutes migrated to Britain after the fall of Rome in the fifth century, they brought with them the blood feud as the primary means of settling disputes. Whenever one person wronged another, the families of the accused and the victim would often pursue a private war until all persons in one or both of the families were killed. This form of "justice," however, was brutal and costly, and so these tribes quickly settled on a different legal system based on compensation (first with goods and later with money) to settle wrongs. This compensation, in turn, was based on the concept of the "wergeld," meaning "man price" or "man payment" and sometimes more generally called a "bot," which was a value placed on every person (and apparently on every person's property) according to social rank. Historians note the existence of detailed tariffs assigning full wergeld amounts to be paid for killing persons of various ranks as well as partial amounts payable for injuries, such as loss of limbs or other wrongs. As a replacement to the blood feud between families, the wergeld system was also initially based on concepts of kinship and private justice, which

meant that wrongs were still settled between families, unlike today, where crimes are considered to be wrongs against all people or the state.

With the wergeld system as a backdrop, historians agree on what was likely a prototypical bail setting that we now recognize as the ancestor to America's current system of release. Author Hermine Meyer described that original bail process as follows:

> Since the [wergeld] sums involved were considerable and could rarely be paid at once, the offender, through his family, offered sureties, or *wereborh*, for the payment of the *wergeld*. If accepted, the injured party met with the offender and his surety. The offender gave a *wadia,* a *wed,* such as a stick, as a symbol or pledging or an indication of the assumption of responsibility. The creditor then gave it to the surety, indicating that he recognized the surety as the trustee for the debt. He thereby relinquished his right to use force against the debtor. The debtor's pledge constituted a pledging of person and property. Instead of finding himself in the hands of the creditor, the debtor found himself, up to the date when payment fell due, in the hands of the surety.[12]

This is, essentially, the "ancient practice of securing the oaths" referred to by the Supreme Court in *Stack v. Boyle,* and it has certain fundamental properties that are important to note. First, the surety (also known as the "pledge" or the "bail") was a person, and thus the system of release became known as the "personal surety system." Second, the surety was responsible for making sure the accused paid the wergeld to avoid a feud, and he did so by agreeing in early years to stand in completely for the accused upon default of his obligations ("body for body," it was reported, meaning that the surety might also suffer some physical punishment upon default), and in later years to at least pay the wergeld himself in the event of default. Thus, the personal surety system was based on the use of recognizances, which were described by Blackstone as obligations or debts that would be voided upon performance of specified acts. Though not completely the same historically, they are essentially what we might now call unsecured bonds using co-signors, with nobody required to pay any money up-front, and with the

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[12] Hermine Herta Meyer, *Constitutionality of Pretrial Detention,* 60 Geo. L. J. 1139, 1146 (1971-1972) (citing and summarizing Elsa de Haas, *Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275,* 3-15 (NY, AMS Press, 1966).

security on any particular bond coming from the sureties, or persons, who were willing to take on the role and acknowledge the amount potentially owed upon default.

Third, the surety was not allowed to be repaid or otherwise profit from this arrangement. As noted above, the wadia, or the symbol of the suretyship arrangement, was typically a stick or what historians have described as some item of trifling value. In fact, as discussed later, even reimbursing or merely promising to reimburse a surety upon default – a legal concept known as indemnification – was declared unlawful in both England and America and remained so until the 1800s.

Fourth, the surety's responsibility over the accused was great and was based on a theory of continued custody, with the sureties often being called "private jailers" or "jailers of [the accused's] own choosing."[13] Indeed, it was this great responsibility, likely coupled with the prohibition on reimbursement upon default and on profiting from the system, which led authorities to bestow great powers to sureties as jailers to produce the accused – powers that today we often associate with those possessed by bounty hunters under the common law. Fifth, the purpose of bail in this earliest of examples was to avoid a blood feud between families. As we will see, that purpose would change only once in later history. Sixth and finally, the rationale behind this original bail setting made sense because the amount of the payment upon default was identical to the amount of the punishment. Accordingly, because the amount of the promised payment was identical to the wergeld, for centuries there was never any questioning whether the use of that promised amount for bail was arbitrary, excessive, or otherwise unfair.

The administration of bail has changed enormously from this original bail setting, and these changes in America can be attributed largely to the intersection during the 20th century of two historical phenomena. The first was the slow evolution from the personal surety system using unsecured financial conditions to a commercial surety system (with profit and indemnification) primarily using secured financial conditions. The second was the often misunderstood creation and nurturing of a "bail/no bail" or "release/no release" dichotomy, which continues to this day.

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[13] *Reese v. United States*, 76 U.S. (9 Wall.) 13, 21 (1869).

The Evolution to Secured Bonds/Commercial Sureties

The gradual evolution from a personal surety system using unsecured bonds to the now familiar commercial surety system using secured bonds in America began with the Norman Invasion. When the Normans arrived in 1066, they soon made changes to the entire criminal justice system, which included moving from a private justice system to a more public one through three royal initiatives. First, the crown initiated the now-familiar idea of crimes against the state by making certain felonies "crimes of royal concern." Second, whereas previously the commencement of a dispute between families might start with a private summons based upon sworn certainty, the crown initiated the mechanism of the presentment jury, a group of individuals who could initiate an arrest upon mere suspicion from third parties. Third, the crown established itinerant justices, who would travel from shire to shire to exert royal control over defendants committing crimes of royal concern. These three changes ran parallel to the creation of jails to hold various arrestees, although the early jails were crude, often barbaric, and led to many escapes.

These changes to the criminal justice process also had a measurable effect on the number of cases requiring bail. In particular, the presentment jury process led to more arrests than before, and the itinerant justice system led to long delays between arrest and trial. Because the jails at the time were not meant to hold so many persons and the sheriffs were reluctant to face the severe penalties for allowing escapes, those sheriffs began to rely more frequently upon personal sureties, typically responsible (and preferably landowning) persons known to the sheriff, who were willing to take control of the accused prior to trial. The need for more personal sureties, in turn, was met through the growth of the parallel institutions of local government units known as tithings and hundreds – a part of the overall development of the frankpledge system, a system in which persons were placed in groups to engage in mutual supervision and control.

While there is disagreement on whether bail was an inherent function of frankpledge, historians have frequently documented sheriffs using sureties from within the tithings and hundreds (and sometimes using the entire group), indicating that that these larger non-family entities served as a safety valve so that sheriffs or judicial officials rarely lacked for "sufficient" sureties in any particular case. The fundamental point is that in this period of English history, sureties were individuals who were willing to take responsibility over defendants – for no money and with no expectation of indemnification upon default – and the sufficiency of the sureties behind any particular release on bail

came from finding one or more of these individuals, a process that was made exceedingly simpler through the use of the collective, non-family groups.

All of this meant that the fundamental purpose of bail had changed: whereas the purpose of the original bail setting process of providing oaths and pledges was to avoid a blood feud between families while the accused met his obligations, the use of more lengthy public processes and jails meant that the purpose of bail would henceforth be to provide a mechanism for release. As before, the purpose of conditioning that release by requiring sureties was to motivate the accused to face justice – first to pay the debt but now to appear for court – and, indeed, court appearance remained the sole purpose for limiting pretrial freedom until the 20th century.

Additional alterations to the criminal process occurred after the Norman Invasion, but the two most relevant to this discussion involve changes in the criminal penalties that a defendant might face as well as changes in the persons, or sureties, and their associated promises at bail. At the risk of being overly simplistic, punishments in Anglo-Saxon England could be summed up by saying that if a person was not summarily executed or mutilated for his crime (for that was the plight of persons with no legal standing, who had been caught in the act, or persons of "ill repute" or long criminal histories, etc.), then that person would be expected to make some payment. With the Normans, however, everything changed. Slowly doing away with the wergeld payments, the Normans introduced first afflictive punishment, in the form of ordeals and duels, and later capital and other forms of corporal punishment and prison for virtually all other offenses.

The changes in penalties had a tremendous impact on what we know today as bail. Before the Norman Invasion, the surety's pledge matched the potential monetary penalty perfectly. If the wergeld was thirty silver pieces, the surety was expected to pay exactly thirty silver pieces upon default of the primary debtor. After the Invasion, however, with increasing use of capital punishment, corporal punishment, and prison sentences, it became frequently more difficult to assign the amount that ought to be pledged, primarily because assigning a monetary equivalent to either corporal punishment or imprisonment is largely an arbitrary act. Moreover, the threat of these seemingly more severe punishments led to increasing numbers of defendants who refused to stay put, which created additional complexity to the bail decision. These complexities, however, were not enough to cause society to radically change course from its use of the personal surety system. Instead, that change came when both England and America began running out of the sureties themselves.

As noted previously, the personal surety system generally had three elements: (1) a reputable person (the surety, sometimes called the "pledge" or the "bail"); (2) this person's willingness to take responsibility for the accused under a private jailer theory and with a promise to pay the required financial condition on the back-end – that is, only if the defendant forfeited his obligation; and (3) this person's willingness to take the responsibility without any initial remuneration or even the promise of any future payment if the accused were to forfeit the financial condition of bail or release. This last requirement addressed the concept of indemnification of sureties, which was declared unlawful by both England and America as being against the fundamental public policy for having sureties take responsibility in the first place. In both England and America, courts repeatedly articulated (albeit in various forms) the following rationale when declaring surety indemnification unlawful: once a surety was paid or given a promise to be paid the amount that could potentially be forfeited, that surety lost all interest and motivation to make sure that the condition of release was performed. Thus, a prohibition on indemnifying sureties was a foundational part of the personal surety system.

And indeed, the personal surety system flourished in England and America for centuries, virtually ensuring that those deemed bailable were released with "sufficient sureties," which were designed to provide assurance of court appearance. Unfortunately, however, in the 1800s both England and America began running out of sureties. There are many reasons for this, including the demise of the frankpledge system in England, and the expansive frontier and urban areas in America that diluted the personal relationships necessary for a personal surety system. Nevertheless, for these and other reasons, the demand for personal sureties gradually outgrew supply, ultimately leading to many bailable defendants being unnecessarily detained.

It is at this point in history that England and the United States parted ways in how to resolve the dilemma of bailable defendants being detained for lack of sureties. In England (and, indeed, in the rest of the world), the laws were amended to allow judges to dispense with sureties altogether when justice so required. In America, however, courts and legislatures began chipping away at the laws against surety indemnification. This transformation differed among the states. In the end, however, across America states gradually allowed sureties to demand re-payment upon a defendant's default and ultimately to profit from the bail enterprise itself. By 1898, the first commercial surety was reportedly opened for business in America. And by 1912, the United States Supreme Court wrote, "The distinction between bail [i.e., common law bail, which forbade

indemnification] and suretyship is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary."[14]

Looking at court opinions from the 1800s, we see that the evolution from a personal to a commercial surety system (in addition to the states gradually increasing defendants ability to self-pay their own financial conditions, a practice that had existed before, but that was used only rarely) was done in large part to help release bailable defendants who were incarcerated due only to their inability to find willing sureties. However, that evolution ultimately virtually assured unnecessary pretrial incarceration because bondsmen began charging money up-front (and later requiring collateral) to gain release in addition to requiring a promise of indemnification. While America may have purposefully moved toward a commercial surety system from a personal surety system to help release bailable defendants, perhaps unwittingly, and certainly more importantly, it moved to a secured money bail system (requiring money to be paid before release is granted) from an unsecured system (promising to pay money only upon default of obligations). The result has been an increase in the detention of bailable defendants over the last 100 years.

The "Bail/No Bail" Dichotomy

The second major historical phenomenon involved the creation and nurturing of a "bail/no bail" dichotomy in both England and America. Between the Norman Invasion and 1275, custom gradually established which offenses were bailable and which were not. In 1166, King Henry II bolstered the concept of detention based on English custom through the Assize of Clarendon, which established a list of felonies of royal concern and allowed detention based on charges customarily considered unbailable. Around 1275, however, Parliament and the Crown discovered a number of abuses, including sheriffs detaining bailable defendants who refused or could not pay those sheriffs a fee, and sheriffs releasing unbailable defendants who were able to pay some fee. In response, Parliament enacted the Statute of Westminster in 1275, which hoped to curb abuses by establishing criteria governing bailability (largely based on a prediction of the outcome of the trial by examining the nature of the charge, the weight of the evidence, and the character of the accused) and, while doing so, officially categorized presumptively bailable and unbailable offenses.

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[14] *Leary v. United States,* 224 U.S. 567, 575 (1912).

Importantly, this statutory enactment began the legal tradition of expressly articulating a bail/no bail scheme, in which a right to bail would be given to some, but not necessarily to all defendants. Perhaps more important, however, are other elements of the Statute that ensured that bailable defendants would be released and unbailable defendants would be detained. In 1275, the sheriffs were expressly warned through the Statute that to deny the release of bailable defendants or to release unbailable defendants was against the law; all defendants were to be either released or detained (depending on their category), and without any additional payment to the sheriff. Doing otherwise was deemed a criminal act.

> *"And if the Sheriff, or any other, let any go at large by Surety, that is not replevisable . . . he shall lose his Fee and Office for ever. . . . And if any withhold Prisoners replevisable, after that they have offered sufficient Surety, he shall pay a grievous Amerciament to the King; and if he take any Reward for the Deliverance of such, he shall pay double to the Prisoner, and also shall [be in the great mercy of] the King."*
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> Statute of Westminster 3 Edward I. c. 15, *quoted in* Elsa de Haas, Antiquities of Bail, Origin and Historical Development in Criminal Cases to the Year 1275 (NY AMS Press 1966).

Accordingly, in 1275 the right to bail was meant to equal a right to release and the denial of a right to bail was meant to equal detention, and, generally speaking, these important concepts continued through the history of bail in England. Indeed, throughout that history any interference with bailable defendants being released or with unbailable (or those defendants whom society deemed unbailable) defendants being lawfully detained, typically led to society recognizing and then correcting that abuse. Thus, for example, when Parliament learned that justices were effectively detaining bailable defendants through procedural delays, it passed the Habeas Corpus Act of 1679, which provided procedures designed to prevent delays prior to bail hearings. Likewise, when corrupt justices were allowing the release of unbailable defendants, thus causing what many believed to be an increase in crime, it was rearticulated in 1554 that unbailable defendants could not be released, and that bail decisions be held in open session or by two or more justices sitting together. As another example, when justices began setting financial conditions for bailable defendants in prohibitively high amounts, the abuse led William and Mary to consent to the

English Bill of Rights in 1689, which declared, among other things, that "excessive bail ought not to be required."[15]

"Bail" and "No Bail" in America

Both the concept of a "bail/no bail" dichotomy as well as the parallel notions that "bail" should equal release and "no bail" should equal detention followed into the American Colonies. Generally, those Colonies applied English law verbatim, but differences in beliefs about criminal justice, customs, and even crime rates led to more liberal criminal penalties and bail laws. For example, in 1641 the Massachusetts Body of Liberties created an unequivocal right to bail to all except for persons charged with capital offenses, and it also removed a number of crimes from its list of capital offenses. In 1682, Pennsylvania adopted an even more liberal law, granting bail to all persons except when charged with a capital offense "where proof is evident or the presumption great," adding an element of evidentiary fact finding so as to also allow bail even for certain capital defendants. This provision became the model for nearly every American jurisdiction afterward, virtually assuring that "bail/no bail" schemes would ultimately find firm establishment in America.

Even in the federal system – despite its lack of a right to bail clause in the United States Constitution – the Judiciary Act of 1789 established a "bail/no bail," "release/detain" scheme that survived radical expansion in 1984 and that still exists today. Essentially, any language articulating that "all persons shall be bailable . . . unless or except" is an articulation of a bail/no bail dichotomy. Whether that language is found in a constitution or a statute, it is more appropriately expressed as "release (or freedom) or detention" because the notion that bailability should lead to release was foundational in early American law.

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[15] English Bill of Rights, 1 W. & M., 2nd Sess., Ch. 2 (1689).

"Bail" and "No Bail" in the Federal and District of Columbia Systems

Both the federal and the District of Columbia bail statutes are based on "bail/no bail" or "release/no release" schemes, which, in turn, are based on legal and evidence-based pretrial practices such as those found in the American Bar Association's Criminal Justice Standards on Pretrial Release. Indeed, each statute contains general legislative titles describing the process as either "release" or "detention" during the pretrial phase, and each starts the bail process by providing judges with four options: (1) release on personal recognizance or with an unsecured appearance bond; (2) release on a condition or combination of conditions; (3) temporary detention; or (4) full detention. Each statute then has provisions describing how each release or detention option should function.

Because they successfully separate bailable from unbailable defendants, thus allowing the system to lawfully and transparently detain unbailable defendants with essentially none of the conditions associated with release (including secured financial conditions), both statutes are also able to include sections forbidding financial conditions that result in the preventive detention of the defendant – an abuse seen frequently in states that have not fully incorporated notions of a release/no release system.

The "bail" or "release" sections of both statutes use certain best practice pretrial processes, such as presumptions for release on recognizance, using "least restrictive conditions" to provide reasonable assurance of public safety and court appearance, allowing supervision through pretrial services entities for both public safety and court appearance concerns, and prompt review and appeals for release and detention orders.

The "no bail" or "detention" sections of both statutes are much the same as when the United States Supreme Court upheld the federal provisions against facial due process and 8th Amendment claims in *United States v. Salerno* in 1987. The *Salerno* opinion emphasized key elements of the existing federal statute that helped it to overcome constitutional challenges by "narrowly focusing" on the issue of pretrial crime. Moreover, the Supreme Court wrote, the statute appropriately provided "extensive safeguards" to further the accuracy of the judicial determination as well as to ensure that detention remained a carefully limited exception to liberty. Those safeguards included: (1) detention was limited to only "the most serious of crimes;" (2) the arrestee was entitled to a prompt hearing and the maximum length of pretrial detention was limited by stringent speedy trial time limitations; (3) detainees were to be housed separately from those serving sentences or awaiting appeals; (4) after a finding of probable cause, a "fullblown adversary hearing" was held in which the government was required to convince a neutral decision maker by clear and convincing evidence that no condition or combination of conditions of release would reasonably assure court appearance or the safety of the community or any person; (5) detainees had a

right to counsel, and could testify or present information by proffer and cross-examine witnesses who appeared at the hearing; (6) judges were guided by statutorily enumerated factors such as the nature of the charge and the characteristics of the defendant; (7) judges were to include written findings of fact and a written statement of reasons for a decision to detain; and (8) detention decisions were subject to immediate appellate review.

While advances in pretrial research are beginning to suggest the need for certain alterations to the federal and D.C. statutes, both laws are currently considered "model" bail laws, and the Summary Report to the National Symposium on Pretrial Justice specifically recommends using the federal statute as a structural template to craft meaningful and transparent preventive detention provisions.

Sources and Resources: District of Columbia Code, §§ 23-1301-09, 1321-33; Federal Statute, 18 U.S.C. §§ 3141-56; *United States v. Salerno,* 481 U.S. 739 (1987); *National Symposium on Pretrial Justice: Summary Report of Proceedings*, at 42 (PJI/BJA 2011).

Indeed, given our country's foundational principles of liberty and freedom, it is not surprising that this parallel notion of bailable defendants actually obtaining release followed from England to America. William Blackstone, whose Commentaries on the Laws of England influenced our Founding Fathers as well as the entire judicial system and legal community, reported that denying the release of a bailable defendant during the American colonial period was considered itself an offense. In examining the administration of bail in Colonial Pennsylvania, author Paul Lermack reported that few defendants had trouble finding sureties, and thus, release.

This notion is also seen in early expressions of the law derived from court opinions. Thus, in the 1891 case of *United States v. Barber*, the United States Supreme Court articulated that in criminal bail, "it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial if the government can be assured of his presence at that time."[16] Four years later, in *Hudson v. Parker,* the Supreme Court wrote that the laws of the United States "have been framed upon the theory that [the accused] shall not, until he has been finally adjudged guilty . . . be absolutely compelled to undergo imprisonment or punishment."[17] Indeed, it was *Hudson* upon which the Supreme

[16] *United States v. Barber*, 140 U.S. 164, 167 (1891).
[17] *United States v. Hudson*, 156 U.S. 277, 285 (1895).

Court relied in *Stack v. Boyle* in 1951, when the Court wrote its memorable quote equating the right to bail with the right to release and freedom:

> From the passage of the Judiciary Act of 1789, to the present Federal Rules of Criminal Procedure, Rule 46 (a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.[18]

In his concurring opinion, Justice Jackson elaborated on the Court's reasoning:

> The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense. To open a way of escape from this handicap and possible injustice, Congress commands allowance of bail for one under charge of any offense not punishable by death . . . providing: 'A person arrested for an offense not punishable by death shall be admitted to bail' . . . before conviction.[19]

And finally, in perhaps its best known expression of the right to bail, the Supreme Court did not explain that merely having one's bail set, whether that setting resulted in release or detention, was at the core of the right. Instead, the Court wrote that "liberty" – a state necessarily obtained from actual release – is the American "norm."[20]

Nevertheless, in the field of pretrial justice we must also recognize the equally legitimate consideration of "no bail," or detention. It is now fairly clear that the

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[18] 342 U.S. 1, 4 (1951) (internal citations omitted).

[19] *Id.* at 7-8.

[20] *United States v. Salerno,* 481 U.S. 739, 755 (1987) ("In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception").

federal constitution does not guarantee an absolute right to bail, and so it is more appropriate to discuss the right as one that exists when it is authorized by a particular constitutional or legislative provision. The Court's opinion in *United States v. Salerno* is especially relevant because it instructs us that when examining a law with no constitutionally-based right-to-bail parameters (such as, arguably, the federal law), the legislature may enact statutory limits on pretrial freedom (including detention) so long as: (1) those limitations are not excessive in relation to the government's legitimate purposes; (2) they do not offend due process (either substantive or procedural); and (3) they do not result in a situation where pretrial liberty is not the norm or where detention has not been carefully limited as an exception to release.

It is not necessarily accurate to say that the Court's opinion in *Salerno* eroded its opinion in *Stack,* including *Stack's* language equating bail with release. *Salerno* purposefully explained *Stack* and another case, *Carlson v. Landon*, together to provide cohesion. And therefore, while it is true that the federal constitution does not contain an explicit right to bail, when that right is granted by the applicable statute (or in the various states' constitutions or statutes), it should be regarded as a right to pretrial freedom. The *Salerno* opinion is especially instructive in telling us how to create a fair and transparent "no bail" side of the dichotomy, and further reminds us of a fundamental principle of pretrial justice: both bail and no bail are lawful if we do them correctly.

Liberalizing American bail laws during our country's colonial period meant that these laws did not always include the English "factors" for initially determining bailability, such as the seriousness of the offense, the weight of the evidence, and the character of the accused. Indeed, by including an examination of the evidence into its constitutional bail provision, Pennsylvania did so primarily to allow bailability despite the defendant being charged with a capital crime. Nevertheless, the historical factors first articulated in the Statute of Westminster survived in America through the judge's use of these factors to determine *conditions* of bail.

Thus, technically speaking, bailability in England after 1275 was determined through an examination of the charge, the evidence, and the character or criminal history of the defendant, and if a defendant was deemed bailable, he or she was required to be released. In America, bailability was more freely designated, but judges would still typically look at the charge, the evidence, and the character of the defendant to set the only limitation on pretrial freedom available at that time – the amount of the financial condition. Accordingly, while bailability in America was still meant to mean release, by using those factors traditionally used to

determine bailability to now set the primary condition of bail or release, judges found that those factors sometimes had a determining effect on the actual release of bailable defendants. Indeed, when America began running out of personal sureties, judges, using factors historically used to determine bailability, were finding that these same factors led to unattainable financial conditions creating, ironically, a state of unbailability for technically bailable defendants.

> *"Bail is a matter of confidence and personal relation. It should not be made a matter of contract or commercialism. . . . Why provide for a bail piece, intended to promote justice, and then destroy its effect and utility? Why open the door to barter freedom from the law for money?"*
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> *Carr v Davis* 64 W. Va. 522, 535 (1908) (Robinson, J. dissenting).

Intersection of the Two Historical Phenomena

The history of bail in America in the 20th century represents an intersection of these two historical phenomena. Indeed, because it involved requiring defendants to pay money up-front as a prerequisite to release, the blossoming of a secured bond scheme as administered through a commercial surety system was bound to lead to perceived abuses in the bail/no bail dichotomy to such an extent that history would demand some correction. Accordingly, within only 20 years of the advent of commercial sureties, scholars began to study and critique that for-profit system.

In the first wave of research, scholars focused on the inability of bailable defendants to obtain release due to secured financial conditions and the abuses in the commercial surety industry. The first generation of bail reform, as it is now known, used research from the 1920s to the 1960s to find alternatives to the commercial surety system, including release on recognizance and nonfinancial conditional release. Its focus was on the "bail" side of the dichotomy and how to make sure bailable defendants would actually obtain release.

The second generation of bail reform (from the 1960s to the 1980s) focused on the "no bail" side, with a wave of research indicating that there were some defendants whom society believed should be detained without bail (rather than by using money) due to their perceived dangerousness through documented instances of defendants committing crime while released through the bail process. That generation culminated with the United States Supreme Court's

approval of a federal detention statute, and with states across America changing their constitutions and statutes to reflect not only a new constitutional purpose for restricting pretrial liberty – public safety – but also detention provisions that followed the Supreme Court's desired formula.

Three Generations of Bail Reform: Hallmarks and Highlights

Since the evolution from a personal surety system using unsecured bonds to primarily a commercial surety system using secured bonds, America has seen two generations of bail or pretrial reform and is currently in a third. Each generation has certain elements in common, such as significant research, a meeting of minds, and changes in laws, policies, and practices.

The First Generation – 1920s to 1960s: Finding Alternatives to the Traditional Money Bail System; Reducing Unnecessary Pretrial Detention of Bailable Defendants

Significant Research – This generation's research began with Roscoe Pound and Felix Frankfurter's *Criminal Justice in Cleveland* (1922) and Arthur Beeley's *The Bail System in Chicago* (1927), continued with Caleb Foote's study of the Philadelphia process found in *Compelling Appearance in Court: Administration of Bail in Philadelphia* (1954), and reached a peak through the research done by the Vera Foundation and New York University Law School's Manhattan Bail Project (1961) as well as similar bail projects such as the one created in Washington D.C. in 1963.

Meeting of Minds – The meeting of minds for this generation culminated with the 1964 Attorney General's National Conference on Bail and Criminal Justice and the Bail Reform Act of 1966.

Changes in Laws, Policies and Practices – The Supreme Court's ruling in *Stack v. Boyle* (1951) had already guided states to better individualize bail determinations through their various bail laws. The Bail Reform Act of 1966 (and state statutes modeled after the Act) focused on alternatives to the traditional money bail system by encouraging release on least restrictive, nonfinancial conditions as well as presumptions favoring release on recognizance, which were based on information gathered concerning a defendant's community ties to help assure court appearance. The American Bar Association's Criminal Justice Standards on Pretrial Release in 1968 made legal and evidence-based recommendations for all aspects of release and detention decisions. Across America, though, states have not fully incorporated the full panoply of laws, policies, and practices designed to reduce unnecessary pretrial detention of bailable defendants

The Second Generation – late 1960s to 1980s: Allowing Consideration of Public Safety as a Constitutionally Valid Purpose to Limit Pretrial Freedom; Defining the Nature and Scope of Preventive Detention

Significant Research – Based on discussions in the 1960s, the American Bar Association Standards on Pretrial Release first addressed preventive detention (detaining a defendant with no bail based on danger and later expressly encompassing risk for failure to appear) in 1968, a position later adopted by other organizations' best practice standards. Much of the "research" behind this wave of reform focused on: (1) philosophical debates surrounding the 1966 Act's inability to address public safety as a valid purpose for limiting pretrial freedom; and (2) judges' tendencies to use money to detain defendants due to the lack of alternative procedures for defendants who pose high risk to public safety or for failure to appear for court. The research used to support Congress's finding of "an alarming problem of crimes committed by persons on release" (noted by the U.S. Supreme Court in *United States v. Salerno)* is contained in the text and references from Senate Report 98-225 to the Bail Reform Act of 1984. Other authors, such as John Goldkamp (*see Danger and Detention: A Second Generation of Bail Reform,* 76 J. Crim. L. & Criminology 1 (1985)) and Senator Ted Kennedy (*see A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform,* 48 Fordham L. Rev. 423 (1980)), also contributed to the debate and relied on a variety of empirical research in their papers.

Meeting of Minds – Senate Report 98-225 to the Bail Reform Act of 1984 cited broad support for the idea of limiting pretrial freedom up to and including preventive detention based on public safety in addition to court appearance. This included the fact that consideration of public safety already existed in the laws of several states and the District of Columbia, the fact that the topic was addressed by the various national standards, and the fact that it also had the support from the Attorney General's Task Force on Violent Crime, the Chief Justice of the United States Supreme Court, and even the President.

Changes in Laws, Policies and Practices – Prior to 1970, court appearance was the only constitutionally valid purpose for limiting a defendant's pretrial freedom. Congress first allowed public safety to be considered equally to court appearance in the District of Columbia Court Reform and Criminal Procedure Act of 1970, and many states followed suit. In 1984, Congress passed the Bail Reform Act of 1984 (part of the Comprehensive Crime Control Act), which included public safety as a valid purpose for limiting pretrial freedom and procedures designed to allow preventive detention without bail for high-risk defendants. In 1987, the United States Supreme Court upheld the Bail Reform Act of 1984 against facial due process and excessive bail challenges in *United States v, Salerno*. However, as in the first generation of bail reform, states across America have not fully implemented the laws, policies, and practices needed to adequately and lawfully detain defendants when necessary.

The Third Generation – 1990 to present: Fixing the Holes Left by States Not Fully Implementing Improvements from the First Two Generations of Bail Reform; Using Legal and Evidence-Based Practices to Create a More Risk-Based System of Release and Detention

Significant Research – Much of the research in this generation revisits deficiencies caused by the states not fully implementing adequate "bail" and "no bail" laws, policies, and practices developed in the previous two generations. Significant legal, historical, and empirical research sponsored by the Department of Justice, the Pretrial Justice Institute, the New York City Criminal Justice Agency, the District of Columbia Pretrial Services Agency, the Administrative Office of the U.S. Courts, various universities, and numerous other public, private, and philanthropic entities across America have continued to hone the arguments for improvements as well as the solutions to discreet bail issues. Additional groundbreaking research involves the creation of empirical risk assessment instruments for local, statewide, and now national use, along with research focusing on strategies for responding to predicted risk while maximizing release.

Meeting of Minds – The meeting of minds for this generation has been highlighted so far by the Attorney General's National Symposium on Pretrial Justice in 2011, along with the numerous policy statements issued by national organizations favoring the administration of bail based on risk.

Changes in Laws, Policies and Practices – Jurisdictions are only now beginning to make changes reflecting the knowledge generated and shared by this generation of pretrial reform. Nevertheless, changes are occurring at the county level (such as in Milwaukee County, Wisconsin, which has implemented a number of legal and evidence-based pretrial practices), the state level (such as in Colorado, which passed a new bail statute based on pretrial best practices in 2013), and even the national level (such as in the federal pretrial system, which continues to examine its release and detention policies and practices).

The Current Generation of Bail/Pretrial Reform

The first two generations of bail reform used research to attain a broad meeting of the minds, which, in turn, led to changes to laws, policies, and practices. It is now clear, however, that these two generations did not go far enough. The traditional money bail system, which includes heavy reliance upon secured bonds administered primarily through commercial sureties, continues to flourish in America, thus causing the unnecessary detention of bailable defendants. Moreover, for a number of reasons, the states have not fully embraced ways to fairly and transparently detain persons without bail, choosing instead to maintain a primarily charge-and-money-based bail system to respond to threats to public safety. In short, the two previous generations of bail reform have instructed us on how to properly implement both "bail" (release) and "no bail" (detention), but many states have instead clung to an outmoded system that leads to the detention of bailable defendants (or those whom we believe should be bailable defendants) and the release of unbailable defendants (or those whom we believe should be unbailable defendants) – abuses to the "bail/no bail" dichotomy that historically demand correction.

Fortunately, the current generation of pretrial reform has a vast amount of relevant research literature from which to fashion solutions to these problems. Moreover, like previous generations, this generation also shaped a distinct meeting of minds of numerous individuals, organizations, and government agencies, all of which now believe that pretrial improvements are necessary.

At its core, the third generation of pretrial reform thus has three primary goals. First, it aims to fully implement lawful bail/no bail dichotomies so that the right persons (and in lawful proportions) are deemed bailable and unbailable. Second, using the best available research and best pretrial practices, it seeks to lawfully effectuate the release and subsequent mitigation of pretrial risk of defendants deemed bailable and the fair and transparent detention of those deemed unbailable. Third, it aims to do this primarily by replacing charge-and-money-based bail systems with systems based on empirical risk.

Generations of Reform and the Commercial Surety Industry

The first generation of bail reform in America in the 20th century focused almost exclusively on finding alternatives to the predominant release system in place at the time, which was one based primarily on secured financial conditions administered through a commercial surety system. In hindsight, however, the second generation of bail reform arguably has had more of an impact on the for-profit bail bond industry in America. That generation focused primarily on public safety, and it led to changes in federal and state laws providing ways to assess pretrial risk for public safety, to release defendants with supervision designed to mitigate the risk to public safety, and even to detain persons deemed too risky.

Despite this national focus on public safety, however, the commercial surety industry did not alter its business model of providing security for defendants solely to help provide reasonable assurance of court appearance. Today, judges concerned with public safety cannot rely on commercial bail bondsmen because in virtually every state allowing money as condition of bail, the laws have been crafted so that financial conditions cannot be forfeited for breaches in public safety such as new crimes. In those states, a defendant who commits a new crime may have his or her bond revoked, but the money is not lost. When the bond is revoked, bondsmen, when they are allowed into the justice system (for most countries, four American states, and a variety of other large and small jurisdictions have ceased allowing profit at bail), can simply walk away, even though the justice system is not yet finished with that particular defendant. Bondsmen are free to walk away and are even free re-enter the system – free to negotiate a new surety contract with the same defendant, again with the money forfeitable only upon his or her failing to appear for court. Advances in our knowledge about the ineffectiveness and deleterious effects of money at bail only exacerbate the fundamental disconnect between the commercial surety industry, which survives on the use of money for court appearance, and what our society is trying to achieve through the administration of bail.

There are currently two constitutionally valid purposes for limiting pretrial freedom – court appearance and public safety. Commercial bail agents and the insurance companies that support them are concerned with only one – court appearance – because legally money is simply not relevant to public safety. Historically speaking, America's gradual movement toward using pretrial services agencies, which, when necessary, supervise defendants both for court appearance and public safety concerns, is due, at least in part, to the commercial surety industry's purposeful decision not to take responsibility for public safety at bail.

What Does the History of Bail Tell Us?

The history of bail tells us that the pretrial release and detention system that worked effectively over the centuries was a "bail/no bail" system, in which bailable defendants (or those whom society deemed should be bailable defendants) were expected to be released and unbailable defendants (or those whom society deemed should be unbailable defendants) were expected to be detained. Moreover, the bail side of the dichotomy functioned most effectively through an uncompensated and un-indemnified personal surety system based on unsecured financial conditions. What we in America today know as the traditional money bail system – a system relying primarily on secured financial conditions administered through commercial sureties – is, historically speaking, a relatively new system that was encouraged to solve America's dilemma of the unnecessary detention of bailable defendants in the 1800s. Unfortunately, however, the traditional money bail system has only exacerbated the two primary abuses that have typically led to historical correction: (1) the unnecessary detention of bailable defendants, whom we now often categorize as lower risk; and (2) the release of those persons whom we feel should be unbailable defendants, and whom we now often categorize as higher risk.

The history of bail also instructs us on the proper purpose of bail. Specifically, while avoiding blood feuds may have been the primary purpose for the original bail setting, once more public processes and jails were fully introduced into the administration of criminal justice, the purpose of bail changed to one of providing a mechanism of conditional release. Concomitantly, the purpose of "no bail" was and is detention. Historically speaking, the only purpose for limiting or conditioning pretrial release was to assure that the accused come to court or otherwise face justice. That changed in the 1970s and 1980s, as jurisdictions began to recognize public safety as a second constitutionally valid purpose for limiting pretrial freedom.[21]

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[21] Occasionally, a third purpose for limiting pretrial freedom has been articulated as maintaining or protecting the integrity of the courts or judicial process. Indeed, the third edition of the ABA Standards changed "to prevent intimidation of witnesses and interference with the orderly administration of justice" to "safeguard the integrity of the judicial process" as a "third purpose of release conditions." ABA Standards *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007), Std. 10-5.2 (a) (history of the standard) at 107. The phrase "integrity of the judicial process," however, is one that has been historically misunderstood (its meaning requires a review of

The American history of bail further instructs us on the lessons of the first two generations of bail and pretrial reform in the 20th century. If the first generation provided us with practical methods to better effectuate the release side of the "bail/no bail" dichotomy, the second generation provided us with equally effective methods for lawful detention. Accordingly, despite our inability to fully implement what we now know are pretrial best practices, the methods gleaned from the first two generations of bail reform as well as the research currently contributing to the third generation have given us ample knowledge to correct perceived abuses and to make improvements to pretrial justice. In the next section, we will see how the evolution of the law and legal foundations of pretrial justice provide the parameters for those improvements.

Additional Sources and Resources: William Blackstone, *Commentaries on the Laws of England* (Oxford 1765-1769); June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail,* 34 Syracuse L. Rev. 517 (1983); Stevens H. Clarke, *Pretrial Release: Concepts, Issues, and Strategies for Improvement,* 1 Res. in Corr. 3:1 (1988); Comment, *Bail: An Ancient Practice Reexamined,* 70 Yale L. J. 966 (1960-61); Elsa de Haas, *Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275* (AMS Press, Inc., New York 1966); F.E. Devine, *Commercial Bail Bonding: A Comparison of Common Law Alternatives* (Praeger Pub. 1991); Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System,* 33 Hous. L. Rev. 731 (1996-97); William F. Duker, *The Right to Bail: A Historical Inquiry,* 42 Alb. L. Rev. 33 (1977-78); Caleb Foote, *The Coming Constitutional Crisis in Bail: I and II,* 113 Univ. Pa. L. Rev. 959 and 1125 (1965); Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964* (DOJ/Vera Found. 1964); Ronald Goldfarb, *Ransom: A Critique of the American Bail System* (Harper & Rowe 1965); James V. Hayes, *Contracts to Indemnify Bail in Criminal Cases,* 6 Fordham L. Rev. 387 (1937); William Searle Holdsworth, *A History of English Law* (Methuen & Co., London, 1938); Paul Lermack, *The Law of Recognizances in Colonial Pennsylvania,* 50 Temp. L. Q. 475 (1977); Evie Lotze, John Clark, D. Alan Henry, & Jolanta Juszkiewicz, *The Pretrial Services Reference Book: History, Challenges, Programming* (Pretrial Servs. Res. Ctr. 1999); Hermine Herta

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appellate briefs for decisions leading up to the Supreme Court's opinion in *Salerno*), and that typically begs further definition. Nevertheless, in most, if not all cases, that further definition is made unnecessary as being adequately covered by court appearance and public safety. Indeed, the ABA Standards themselves state that one of the purposes of the pretrial decision is "maintaining the integrity of the judicial process by securing defendants for trial." *Id.* Std. 10-1.1, at 36.

Meyer, *Constitutionality of Pretrial Detention,* 60 Geo. L. J. 1139 (1971-72); Gerald P. Monks, *History of Bail* (1982); Luke Owen Pike, *The History of Crime in England* (Smith, Elder, & Co. 1873); Frederick Pollock & Frederic Maitland, *The History of English Law Before the Time of Edward I* (1898); Timothy R. Schnacke, Michael R. Jones, Claire M. B. Brooker, *The History of Bail and Pretrial Release* (PJI 2010); Wayne H. Thomas, Jr. *Bail Reform in America* (Univ. CA Press 1976); Peggy M. Tobolowsky & James F. Quinn, *Pretrial Release in the 1990s: Texas Takes Another Look at Nonfinancial Release Conditions,* 19 New Eng. J. on Crim. & Civ. Confinement 267 (1993); Marie VanNostrand, *Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC 2007); Betsy Kushlan Wanger, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act,* 97 Yale L. J. 320 (1987-88). **Cases:** *United States v. Edwards,* 430 A. 2d 1321 (D.C. 1981) (en banc); *State v. Brooks,* 604 N.W. 2d 345 (Minn. 2000); *State v. Briggs,* 666 N.W. 2d 573 (Iowa 2003).

Chapter 3: Legal Foundations of Pretrial Justice

History and Law

History and the law clearly influence each other at bail. For example, in 1627, Sir Thomas Darnell and four other knights refused to pay loans forced upon them by King Charles I. When the King arrested the five knights and held them on no charge (thus circumventing the Statute of Westminster, which required a charge, and the Magna Carta, on which the Statute was based), Parliament responded by passing the Petition of Right, which prohibited detention by any court without a formal charge. Not long after, however, officials sidestepped the Petition of Right by charging individuals and then running them through numerous procedural delays to avoid release. This particular practice led to the Habeas Corpus Act of 1679. However, by expressly acknowledging discretion in setting amounts of bail, the Habeas Corpus Act also unwittingly allowed determined officials to begin setting financial conditions of bail in prohibitively high amounts. That, in turn, led to passage of the English Bill of Rights, which prohibited "excessive" bail. In America, too, we see historical events causing changes in the laws and those laws, in turn, influencing events thereafter. One need only look to events before and after the two American generations of bail reform in the 20th century to see how history and the law are intertwined.

And so it is that America, which had adopted and applied virtually every English bail reform verbatim in its early colonial period, soon began a process of liberalizing both criminal laws generally, and bail in particular, due to the country's unique position in culture and history. Essentially, America borrowed the best of English law (such as an overall right to bail, habeas corpus, and prohibition against excessiveness) and rejected the rest (such as varying levels of discretion potentially interfering with the right to bail as well as harsh criminal penalties for certain crimes). The Colonies wrote bail provisions into their charters and re-wrote them into their constitutions after independence. Among those constitutions, we see broader right-to-bail provisions, such as in the model Pennsylvania law, which granted bail to all except those facing capital offenses (limited to willful murder) and only "where proof is evident or the presumption

great."[22] Nevertheless, some things remained the same. For example, continuing the long historical tradition of bail in England, the sole purpose of limiting pretrial freedom in America remained court appearance, and the only means for doing so remained setting financial conditions or amounts of money to be forfeited if a defendant missed court.

> *"The end of law is not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings capable of law, where there is no law, there is no freedom."*
>
> John Locke, 1689

In America, the ultimate expression of our shared values is contained in our founding documents, the Declaration of Independence and the Constitution. But if the Declaration can be viewed as amply supplying us with certain fundamental principles that can be interwoven into discussions of bail, such as freedom and equality, then the Constitution has unfortunately given us some measure of confusion on the topic. The confusion stems, in part, from the fact that the Constitution itself explicitly covers only the right of habeas corpus in Article 1, Section 9 and the prohibition on excessive bail in the 8th Amendment, which has been traced to the Virginia Declaration of Rights. There is no express right to bail in the U.S. Constitution, and that document provides no illumination on which persons should be bailable and which should not. Instead, the right to bail in the federal system originated from the Judiciary Act of 1789, which provided an absolute right to bail in non-capital federal criminal cases. Whether the constitutional omission was intentional is subject to debate, but the fact remains that when assessing the right to bail, it is typical for a particular state to provide superior rights to the United States Constitution. It also means that certain federal cases, such *United States v. Salerno*, must be read realizing that the Court was addressing a bail/no bail scheme derived solely from legislation. And it means that any particular bail case or dispute has the potential to involve a fairly complex mix of state and federal claims based upon any particular state's bail scheme.

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[22] June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517, 531 (1983) (quoting 5 American Charters 3061, F. Thorpe ed. 1909).

The Legal "Mix"

There are numerous sources of laws surrounding bail and pretrial practices, and each state – and often a jurisdiction within a state – has a different "mix" of sources from that of all other jurisdictions. In any particular state or locality, bail practices may be dictated or guided by the United States Constitution and United States Supreme Court opinions, federal appellate court opinions, the applicable state constitution and state supreme court and other state appellate court decisions, federal and state bail statutes, municipal ordinances, court rules, and even administrative regulations. Knowing your particular mix and how the various sources of law interact is crucial to understanding and ultimately assessing your jurisdiction's pretrial practices.

The fact that we have separate and sometimes overlapping federal and state pretrial legal foundations is one aspect of the evolution of bail law that adds complexity to particular cases. The other is the fact that America has relatively little authoritative legal guidance on the subject of bail. In the federal realm, this may be due to issues of incorporation and jurisdiction, but in the state realm it may also be due to the relatively recent (historically speaking) change from unsecured to secured bonds. Until the nineteenth century, historians suggest that bail based on unsecured bonds administered through a personal surety system led to the release of virtually all bailable criminal defendants. Such a high rate of release leaves few cases posing the kind of constitutional issues that require an appellate court's attention. But even in the 20th century, we really have only two (or arguably three) significant United States Supreme Court cases discussing the important topic of the release decision at bail. It is apparently a topic that lawyers, and thus federal and state trial and appellate courts, have largely avoided. This avoidance, in turn, potentially stands in the way of jurisdictions looking for the bright line of the law to guide them through the process of improving the administration of bail.

On the other hand, what we lack in volume of decisions is made up to some extent by the importance of the few opinions that we do have. Thus, we look at *Salerno* not as merely one case among many from which we may derive guidance; instead, *Salerno* must be scrutinized and continually referenced as a foundational standard as we attempt to discern the legality of proposed improvements. The evolution of law in America, whether broadly encompassing all issues of criminal procedure, or more narrowly discussing issues related directly to bail and pretrial justice, has demonstrated conclusively the law's

importance as a safeguard to implementing particular practices in the criminal process. Indeed, in other fields we speak of using evidence-based practices to achieve the particular goals of the discipline. In bail, however, we speak of "legal and evidence-based practices,"[23] because it is the law that articulates those disciplinary goals to begin with. The phrase legal and evidence-based practices acknowledges the fact that in bail and pretrial justice, the empirical evidence, no matter how strong, is always subservient to fundamental legal foundations based on fairness and equal justice.

Fundamental Legal Principles

While all legal principles affecting the pretrial process are important, there are some that demand our particular attention as crucial to a shared knowledge base. The following list is derived from materials taught by D.C. Superior Court Judge Truman Morrison, III, in the National Institute of Corrections' Orientation for New Pretrial Executives, and occasionally supplemented by information contained in Black's Law Dictionary (9th ed.) as well as the sources footnoted or cited at the end of the chapter.

The Presumption of Innocence

Perhaps no legal principle is as simultaneously important and misunderstood as the presumption of innocence. Technically speaking, it is the principle that a person may not be convicted of a crime unless and until the government proves guilt beyond a reasonable doubt, without any burden placed on the defendant to prove his or her innocence. Its importance is emphasized in the Supreme Court's opinion in *Coffin v. United States*, in which the Court wrote: "a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[24] In *Coffin,* the Court traced the presumption's origins to various extracts of Roman law, which included language similar to the "better that ten guilty persons go free" ratio articulated by Blackstone. The importance of the presumption of innocence has not waned, and the Court has expressly quoted the "axiomatic and elementary" language in just the last few years.

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[23] Marie VanNostrand, *Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC 2007).
[24] *Coffin v. United States,* 156 U.S. 432, 453 (1895).

Its misunderstanding comes principally from the fact that in *Bell v. Wolfish*, the Supreme Court wrote that the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun,"[25] a line that has caused many to argue, incorrectly, that the presumption of innocence has no application to bail. In fact, *Wolfish* was a "conditions of confinement" case, with inmates complaining about various conditions (such as double bunking), rules (such as prohibitions on receiving certain books), and practices (such as procedures involving inmate searches) while being held in a detention facility. In its opinion, the Court was clear about its focus in the case: "We are not concerned with the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily entails. . . . Instead, what is at issue when an aspect of pretrial detention that is not alleged to violate any express guarantee of the Constitution is challenged, is the detainee's right to be free from punishment, and his understandable desire to be as comfortable as possible during his confinement, both of which may conceivably coalesce at some point."[26] Specifically, and as noted by the Court, the parties were not disputing whether the government could detain the prisoners, the government's purpose for detaining the prisoners, or even whether complete confinement was a legitimate means for limiting pretrial freedom, all issues that would necessarily implicate the right to bail, statements contained in *Stack v. Boyle*, and the presumption of innocence. Instead, the issue before the Court was whether, after incarceration, the prisoners' complaints could be considered punishment in violation of the Due Process Clause.

Accordingly, the presumption of innocence has everything to do with bail, at least so far as determining which classes of defendants are bailable and the constitutional and statutory rights flowing from that decision. And therefore, the language of *Wolfish* should in no way diminish the strong statements concerning the right to bail found in *Stack v. Boyle* (and other state and federal cases that have quoted *Stack*), in which the Court wrote, "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[27] The idea that the right to bail (that is, the right to release when the accused is bailable) necessarily triggers serious consideration of the presumption of innocence is also clearly seen

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[25] *Bell v. Wolfish*, 441 U.S. 520, 533 (1979).

[26] *Id.* at 533-34 (internal citations omitted).

[27] 342 U.S. 1, 4 (1951) (internal citation omitted).

through Justice Marshall's dissent in *United States v. Salerno,* in which he wrote, albeit unconvincingly, that "the very pith and purpose of [the Bail Reform Act of 1984] is an abhorrent limitation of the presumption of innocence."[28]

As explained by the Court in *Taylor v. Kentucky*, the phrase is somewhat inaccurate in that there is no true presumption – that is, no mandatory inference to be drawn from evidence. Instead, "it is better characterized as an 'assumption' that is indulged in the absence of contrary evidence."[29] Moreover, the words "presumption of innocence" themselves are found nowhere in the United States Constitution, although the phrase is linked to the 5th, 14th, and 6th Amendments to the Constitution. *Taylor* suggests an appropriate way of looking at the presumption as "a special and additional caution" to consider beyond the notion that the government must ultimately prove guilt. It is the idea that "no surmises based on the present situation of the accused"[30] should interfere with the jury's determination. Applying this concept to bail, then, the presumption of innocence is like an aura surrounding the defendant, which prompts us to set aside our potentially negative surmises based on the current arrest and confinement as we determine the important question of release or detention.

> *"Here we deal with a right, the right to release of presumably innocent citizens. I cannot conceive that such release should not be made as widely available as it reasonably and rationally can be."*
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> *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (Gee, J. specially concurring)

[28] *United States v. Salerno*, 481 U.S. 739, 762-63 (1987).
[29] *Taylor v Kentucky*, 436 U.S. 478, 483 n. 12 (1978).
[30] *Id.* at 485 (quoting 9 J. Wigmore, Evidence § 2511 (3d ed. 1940) at 407).

The Right to Bail

When granted by federal or state law, the right to bail should be read as a right to release through the bail process. It is often technically articulated as the "right to non-excessive" bail, which goes to the reasonableness of any particular conditions or limitations on pretrial release.

The preface, "when granted by federal or state law" is crucial to understand because we now know that the "bail/no bail" dichotomy is one that legislatures or the citizenry are free to make though their statutes and constitutions. Ever since the Middle Ages, there have been certain classes of defendants (typically expressed by types of crimes, but changing now toward categories of risk) who have been refused bail – that is, denied a process of release altogether. The bail/no bail dichotomy is exemplified by the early bail provisions of Massachusetts and Pennsylvania, which granted bail to some large class of persons "except," and with the exception being the totality of the "no bail" side. These early provisions, as well as those copied by other states, were technically the genesis of what we now call "preventive detention" schemes, which allow for the detention of risky defendants – the risk at the time primarily being derived from the seriousness of the charge, such as murder or treason.

The big differences between detention schemes then and now include: (1) the old schemes were based solely on risk for failure to appear for court; we may now detain defendants based on a second constitutionally valid purpose for limiting pretrial freedom – public safety; (2) the old schemes were mostly limited to findings of "proof evident and presumption great" for the charge; today preventive detention schemes often have more stringent burdens for the various findings leading to detention; (3) overall, the states have largely widened the classes of defendants who may lawfully be detained – they have, essentially, changed the ratio of bailable to unbailable defendants to include potentially more unbailable defendants than were deemed unbailable, say, during the first part of the 20th century; and (4) in many cases, the states have added detailed provisions to the detention schemes (in addition to their release schemes). Presumably, this was to follow guidance by the United States Supreme Court from its opinion in *United States v. Salerno,* which approved the federal detention scheme based primarily on that law's inclusion of certain procedural due process elements designed to make the detention process fair and transparent.

How a particular state has defined its "bail/no bail" dichotomy is largely due to its constitution, and arguably on the state's ability to easily amend that

constitution. According to legal scholars Wayne LaFave, et al., in 2009 twenty-three states had constitutions modeled after Pennsylvania's 1682 language that guaranteed a right to bail to all except those charged with capital offenses, where proof is evident or the presumption is great. It is unclear whether these states today choose to remain broad "right-to-bail" states, or whether their constitutions are simply too difficult to amend. Nevertheless, these states' laws likely contain either no, or extremely limited, statutory pretrial preventive detention language.[31]

Nine states had constitutions mirroring the federal constitution – that is, they contain an excessive bail clause, but no clause explicitly granting a right to bail. The United States Supreme Court has determined that the federal constitution does not limit Congress' ability to craft a lawful preventive detention statute, and these nine states likewise have the same ability to craft preventive detention statutes (or court rules) with varying language.

The remaining 18 states had enacted in their constitutions relatively recent amendments describing more detailed preventive detention provisions. As LaFave, et al., correctly note, these states may be grouped in three ways: (1) states authorizing preventive detention for certain charges, combined with the requirement of a finding of danger to the community; (2) states authorizing preventive detention for certain charges, combined with some condition precedent, such as the defendant also being on probation or parole; and (3) states combining elements of the first two categories.

There are currently two fundamental issues concerning the right to bail in America today. The first is whether states have created the right ratio of bailable to unbailable defendants. The second is whether they are faithfully following best practices using the ratio that they currently have. The two issues are connected.

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[31] *See* Wayne R. LaFave, Jerold H. Israel, Nancy J. King and Orin S. Kerr, *Criminal Procedure* (3rd ed. 2007 & 5th ed. 2009). Readers should be vigilant for activity changing these numbers. For example, the 2010 constitutional amendment in Washington State likely adds it to the category of states having preventive detention provisions in their constitutions. Moreover, depending on how one reads the South Carolina constitution, the counts may, in fact, reveal 9 states akin to the federal scheme, 21 states with traditional right to bail provisions, and 20 states with preventive detention amendments.

American law contemplates a presumption of release, and thus there are limits on the ratio of bailable to unbailable defendants. The American Bar Association Standards on Pretrial Release describes its statement, "the law favors the release of defendants pending adjudication of charges" as being "consistent with Supreme Court opinions emphasizing the limited permissible scope of pretrial detention."[32] It notes language from *Stack v. Boyle*, in which the Court equates the right to bail to "[the] traditional right to freedom before conviction,"[33] and from *United States v. Salerno*, in which the Court wrote, "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[34] Beyond these statements, however, we have little to tell us definitively and with precision how many persons should remain bailable in a lawful bail/no bail scheme.

We do know, however, that the federal "bail/no bail" scheme was examined by the Supreme Court and survived at least facial constitutional attacks based on the Due Process Clause and the 8th Amendment. Presumably, a state scheme fully incorporating the detention-limiting elements of the federal law would likely survive similar attacks. Accordingly, using the rest of the *Salerno* opinion as a guide, one can look at any particular jurisdiction's bail scheme to assess whether that scheme appears, at least on its face, to presume liberty and to restrict detention by incorporating the numerous elements from the federal statute that were approved by the Supreme Court. For example, if a particular state included a provision in either its constitution or statute opening up the possibility of detention for all defendants no matter what their charges, the scheme should be assessed for its potential to over-detain based on *Salerno's* articulated approval of provisions that limited detention to defendants "arrested for a specific category of extremely serious offenses."[35] Likewise, any jurisdiction that does not "carefully" limit detention – that is, it detains carelessly or without thought possibly through the casual use of money – is likely to be seen as running afoul of the foundational principles underlying the Court's approval of the federal law.

The second fundamental issue concerning the right to bail – whether states are faithfully following the ratio that they currently have – is connected to the first. If states have not adequately defined their bail/no bail ratio, they will often see money still being used to detain defendants whom judges feel are extreme risks,

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[32] *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007), Std. 10-1.1 (commentary) at 38.
[33] 342 U.S. 1, 4 (1951).
[34] 481 U.S. 739, 755 (1987).
[35] *Id.* at 750.

which is essentially the same practice that led to the second generation of American bail reform in the 20th century. Simply put, a proper bail/no bail dichotomy should lead naturally to an in-or-out decision by judges, with bailable defendants released pursuant to a bond with reasonable conditions and unbailable defendants held with no bond. Without belaboring the point, judges are not faithfully following any existing bail/no bail dichotomy whenever they (1) treat a bailable defendant as unbailable by setting unattainable conditions, or (2) treat an unbailable defendant as bailable in order to avoid the lawfully enacted detention provisions. When these digressions occur, then they suggest either that judges should be compelled to comply with the existing dichotomy, or that the balance of the dichotomy must be changed.

This latter point is important to repeat. Among other things, the second generation of American bail reform was, at least partially, in response to judges setting financial conditions of bail at unattainable levels to protect the public despite the fact that the constitution had not been read to allow public safety as a proper purpose for limiting pretrial freedom. Judges who did so were said to be setting bail "sub rosa," in that they were working secretively toward a possibly improper purpose of bail. The Bail Reform Act of 1984, as approved by the United States Supreme Court, was designed to create a more transparent and fair process to allow the detention of high-risk defendants for the now constitutionally valid purpose of public safety. From that generation of reform, states learned that they could craft constitutional and statutory provisions that would effectively define the "bail" and "no bail" categories so as to satisfy both the Supreme Court's admonition that liberty be the "norm" and the public's concern that the proper persons be released and detained.

Unfortunately, many states have not created an appropriate balance. Those that have attempted to, but have done so inadequately, are finding that the inadequacy often lies in retaining a charge-based rather than a risk-based scheme to determine detention eligibility. Accordingly, in those states judges continue to set unattainable financial conditions at bail to detain bailable persons whom they consider too risky for release. If a proper bail/no bail balance is not crafted through a particular state's preventive detention provisions, and if money is left as an option for conditional release, history has shown that judges will use that money option to expeditiously detain otherwise bailable defendants. On the other hand, if the proper balance is created so that high-risk defendants can be detained through a fair and transparent process, money can be virtually eliminated from the bail process without negatively affecting public safety or court appearance rates.

Despite certain unfortunate divergences, the law, like the history, generally considers the right to bail to be a right to release. Thus, when a decision has been made to "bail" a particular defendant, every consideration should be given, and every best practice known should be employed, to effectuate and ensure that release. Bailable defendants detained on unattainable conditions should be considered clues that the bail process is not functioning properly. Judicial opinions justifying the detention of bailable defendants (when the bailable defendant desires release) should be considered aberrations to the historic and legal notion that the right to bail should equal the right to release.

What Can International Law and Practices Tell Us About Bail?

Unnecessary and arbitrary pretrial detention is a worldwide issue, and American pretrial practitioners can gain valuable perspective by reviewing international treaties, conventions, guidelines, and rules as well as reports documenting international practices that more closely follow international norms.

According to the American Bar Association's Rule of Law Initiative,

> "International standards strongly encourage the imposition of noncustodial measures during investigation and trial and at sentencing, and hold that deprivation of liberty should be imposed only when non-custodial measures would not suffice. The overuse of detention is often a symptom of a dysfunctional criminal justice system that may lack protection for the rights of criminal defendants and the institutional capacity to impose, implement, and monitor non-custodial measures and sanctions. It is also often a cause of human rights violations and societal problems associated with an overtaxed detention system, such as overcrowding; mistreatment of detainees; inhumane detention conditions; failure to rehabilitate offenders leading to increased recidivism; and the imposition of the social stigma associated with having been imprisoned on an ever-increasing part of the population. Overuse of pretrial detention and incarceration at sentencing are equally problematic and both must be addressed in order to create effective and lasting criminal justice system reform."

International pretrial practices, too, can serve as templates for domestic improvement. For example, bail practitioners frequently cite to author F.E. Devine's study of international practices demonstrating various effective alternatives to America's traditional reliance on secured bonds administered by commercial bail bondsmen and large insurance companies.

Sources and Resources: David Berry & Paul English, *The Socioeconomic Impact of Pretrial Detention* (Open Society Foundation 2011); F.E. Devine, *Commercial Bail Bonding: A Comparison of Common Law Alternatives* (Greenwood Publishing Group 1991); Anita H. Kocsis, *Handbook of International Standards on Pretrial Detention Procedure* (ABA, 2010); Amanda Petteruti & Jason Fenster, *Finding Direction:*

Expanding Criminal Justice Options by Considering Policies of Other Nations (Justice Policy Institute, 2011). There are also several additional documents and other resources available from the Open Society Foundation's Global Campaign for Pretrial Justice online website, found at http://www.opensocietyfoundations.org/projects/global-campaign-pretrial-justice.

Release Must Be the Norm

This concept is part of the overall consideration of the right to bail, discussed above, but it bears repeating and emphasis as its own fundamental legal principle. The Supreme Court has said, "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[36] As noted previously, in addition to suggesting the ratio of bailable to unbailable defendants, the second part of this quote cautions against a release process that results in detention as well as a detention process administered haphazardly. Given that the setting of a financial bail condition often leaves judges and others wondering whether the defendant will be able to make it – i.e., the release or detention of that particular defendant is now essentially random based on any number of factors – it is difficult to see how such a detention caused by money can ever be considered a "carefully limited" process.

Due Process

Due Process refers generally to upholding people's legal rights and protecting individuals from arbitrary or unfair federal or state action pursuant to the rights afforded by the Fifth and Fourteenth Amendments of the United States Constitution (and similar or equivalent state provisions). The Fifth Amendment provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law."[37] The Fourteenth Amendment places the same restrictions on the states. The concept is believed to derive from the Magna Carta, which required King John of England to accept certain limitations to his power, including the limitation that no man be imprisoned or otherwise deprived of his rights except by lawful judgment of his peers or the law of the land. Many of the original provisions of the Magna Carta were incorporated into the Statute of Westminster of 1275, which included important provisions concerning bail.

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[36] *Id.* at 755.

[37] U.S. Const. amend. V.

As noted by the Supreme Court in *United States v. Salerno*, due process may be further broken down into two subcategories:

> So called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.' When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as 'procedural' due process.[38]

In *Salerno,* the Court addressed both substantive and procedural fairness arguments surrounding the federal preventive detention scheme. The substantive due process argument dealt with whether detention represented punishment prior to conviction and an ends-means balancing analysis. The procedural issue dealt with how the statute operated – whether there were procedural safeguards in place so that detention could be ordered constitutionally. People who are detained pretrial without having the benefit of the particular safeguards enumerated in the *Salerno* opinion could, theoretically, raise procedural due process issues in an appeal of their bail-setting.

A shorthand way to think about due process is found in the words "fairness" or "fundamental fairness." Other words, such as "irrational," "unreasonable," and "arbitrary" tend also to lead to due process scrutiny, making the Due Process Clause a workhorse in the judicial review of bail decisions. Indeed, as more research is being conducted into the nature of secured financial conditions at bail – their arbitrariness, the irrationality of using them to provide reasonable assurance of either court appearance or public safety, and the documented negative effects of unnecessary pretrial detention – one can expect to see many more cases based on due process clause claims.

Equal Protection

If the Due Process Clause protects against unfair, arbitrary, or irrational laws, the Equal Protection Clause of the Fourteenth Amendment (and similar or equivalent state provisions) protects against the government treating similarly situated persons differently under the law. Interestingly, "equal protection" was not mentioned in the original Constitution, despite the phrase practically embodying what we now consider to be the whole of the American justice

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[38] 481 U.S 739, 746 (internal citations omitted).

system. Nevertheless, the Fourteenth Amendment to the United States Constitution now provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[39] While there is no counterpart to this clause that is applicable to the federal government, federal discrimination may be prohibited as violating the Due Process Clause of the Fifth Amendment.

> *"The only stable state is the one in which all men are equal before the law."*
>
> Aristotle, 350 B.C.

Over the years, scholars have argued that equal protection considerations should serve as an equally compelling basis as does due process for mandating fair treatment in the administration of bail, especially when considering the disparate effect of secured money bail bonds on defendants due only to their level of wealth. This argument has been bolstered by language from Supreme Court opinions in cases like *Griffin v. Illinois*, which dealt with a defendant's ability to purchase a transcript required for appellate review. In that case, Justice Black wrote, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[40] Moreover, sitting as circuit justice to decide a prisoner's release in two cases, Justice Douglas uttered the following dicta frequently cited as support for equal protection analysis: (1) "Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?";[41] and (2) "[N]o man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on 'personal recognizance' where other relevant factors make it reasonable to believe that he will comply with the orders of the Court."[42] Overall, despite scholarly arguments to invoke equal protection analysis to the issue of bail (including any further impact caused by the link between income and race), the courts have been largely reluctant to do so.

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[39] U.S. Const. amend. XIV, § 1.

[40] 351 U.S. 12, 19 (1956).

[41] *Bandy v. United States*, 81 S. Ct. 197, 198 (1960).

[42] *Bandy v. United States*, 82 S. Ct. 11, 13 (1961).

Excessive Bail and the Concept of Least Restrictive Conditions

Excessive bail is a legal term of art used to describe bail that is unconstitutional pursuant to the 8th Amendment to the United States Constitution (and similar or equivalent state provisions). The 8th Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[43] The Excessive Bail Clause derives from reforms made by the English Parliament in the 1600s to curb the abuse of judges setting impossibly high money bail to thwart the purpose of bail to afford a process of pretrial release. Indeed, historians note that justices began setting high amounts on purpose after King James failed to repeal the Habeas Corpus Act, and the practice represents, historically, the first time that a condition of bail rather than the actual existence of bail became a concern. The English Bill of Rights of 1689 first used the phrase, "Excessive bail ought not to be required," which was incorporated into the 1776 Virginia Declaration of rights, and ultimately found its way into the United States and most state constitutions. Excessiveness must be determined by looking both at federal and state law, but a rule of thumb is that the term relates overall to reasonableness.

"Excessive bail" is now, in fact, a misnomer, because bail more appropriately defined as a process of release does not lend itself to analysis for excessiveness. Instead, since it was first uttered, the phrase excessive bail has always applied to conditions of bail or limitations on pretrial release. The same historical factors causing jurisdictions to define bail as money are at play when one says that bail can or cannot be excessive; hundreds of years of having only one condition of release – money – have caused the inevitable but unfortunate blurring of bail and one of its conditions. Accordingly, when we speak of excessiveness, we now more appropriately speak in terms of limitations on pretrial release or freedom.

Looking at excessiveness in England in the 1600s requires us to consider its application within a personal surety system using unsecured amounts. Bail set at a prohibitively high amount meant that no surety (i.e., a person), or even group of sureties, would willingly take responsibility for the accused. Even before the prohibition, however, amounts were often beyond the means of any particular defendant, requiring sometimes several sureties to provide "sufficiency" for the bail determination. Accordingly, as is the case today, it is likely that some indicator of excessiveness at a time of relatively plentiful sureties for any particular defendant was continued detention of an otherwise bailable

[43] U.S. Const. amend. VIII.

defendant. Nevertheless, before the abuses leading to the English Bill of Rights and Habeas Corpus Act, there was no real indication that high amounts required of sureties led to detention in England. And in America, "[a]lthough courts had broad authority to deny bail for defendants charged with capital offenses, they would generally release in a form of pretrial custody defendants who were able to find willing custodians."[44] In a review of the administration of bail in Colonial Pennsylvania, author Paul Lermack concluded that "bail . . . continued to be granted routinely . . . for a wide variety of offenses . . . [and] [a]lthough the amount of bail required was very large in cash terms and a default could ruin a guarantor, few defendants had trouble finding sureties."[45]

The current test for excessiveness from the United States Supreme Court is instructive on many points. In *United States v. Salerno*, the Court wrote as follows:

> The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil. Of course, to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. *Stack v. Boyle*, *supra*. We believe that, when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the 8th Amendment does not require release on bail.[46]

Thus, as explained in *Galen v. County of Los Angeles,* to determine excessiveness, one must

> look to the valid state interests bail is intended to serve for a particular individual and judge whether bail conditions are excessive for the purpose of achieving those interests. The state may not set bail to achieve invalid interests . . . nor in an amount

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[44] Betsy Kushlan Wanger, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 Yale L. J. 323, 323-24 (1987-88) (internal citations omitted).

[45] Paul Lermack, *The Law of Recognizances in Colonial Pennsylvania,* 50 Temp. L. Q. 475 at 497, 505 (1977).

[46] 481 U.S. 739, 754-55 (1987).

> that is excessive in relation to the valid interests it seeks to achieve.[47]

Salerno thus tells us at least three important things. First, the law of *Stack v. Boyle* is still strong: when the state's interest is assuring the presence of the accused, "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the 8th Amendment."[48] The idea of "reasonable" calculation necessarily compels us to assess how judges are typically setting bail, which might be arbitrarily (such as through a bail schedule) or irrationally (such as through setting financial conditions to protect the public when those conditions cannot be forfeited for breaches in public safety, or when they are otherwise not effective at achieving the lawful purposes for setting them, which recent research suggests).

Second, financial conditions (i.e., amounts of money) are not the only conditions vulnerable to an excessive bail claim. Any unreasonable condition of release, including a nonfinancial condition, that has no relationship to mitigating an identified risk, or that exceeds what is needed to reasonably assure the constitutionally valid state interest, might be deemed constitutionally excessive.

Third, the government must have a proper purpose for limiting pretrial freedom. This is especially important because scholars and courts (as well as Justice Douglas, again sitting as circuit justice) have indicated that setting bail with a purpose to detain an otherwise bailable defendant would be unconstitutional. In states where the bail/no bail dichotomy has been inadequately crafted, however, judges are doing precisely that.

While the Court in *Salerno* upheld purposeful pretrial detention pursuant to the Bail Reform Act of 1984, it did so only because the statute contained "numerous procedural safeguards" that are rarely, if ever, satisfied merely through the act of setting a high money bond. Therefore, when a state has established a lawful method for preventively detaining defendants, setting financial conditions designed to detain otherwise bailable defendants outside of that method could still be considered an unlawful purpose. Purposeful pretrial detention through a process of the type endorsed by the United States Supreme Court is entirely different from purposeful pretrial detention done through setting unattainable financial conditions of release.

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[47] 477 F.3d 652, 660 (9th Cir. 2007) (internal citations omitted).
[48] 342 U.S. 1, 5 (1951).

When the United States Supreme Court says that conditions of bail must be set at a level designed to assure a constitutionally valid purpose for limiting pretrial freedom "and no more," as it did in *Salerno,* then we must also consider the related legal principle of "least restrictive conditions" at bail. The phrase "least restrictive conditions" is a term of art expressly contained in the federal and District of Columbia statutes, the American Bar Association best practice standards on pretrial release, and other state statutes based on those Standards (or a reading of *Salerno*). Moreover, the phrase is implicit through similar language from various state high court cases articulating, for example, that bail may be met only by means that are "the least onerous" or that impose the "least possible hardship" on the accused.

Commentary to the ABA Standard recommending release under the least restrictive conditions states as follows:

> This Standard's presumption that defendants should be released under the least restrictive conditions necessary to provide reasonable assurance they will not flee or present a danger is tied closely to the presumption favoring release generally. It has been codified in the Federal Bail Reform Act and the District of Columbia release and pretrial detention statute, as well as in the laws and court rules of a number of states. The presumption constitutes a policy judgment that restrictions on a defendant's freedom before trial should be limited to situations where restrictions are clearly needed, and should be tailored to the circumstances of the individual case. Additionally, the presumption reflects a practical recognition that unnecessary detention imposes financial burdens on the community as well as on the defendant.[49]

The least restrictive principle is foundational, and is expressly reiterated throughout the ABA Standards when, for example, those Standards recommend citation release or summonses versus arrest. Moreover, the Standards' overall scheme creating a presumption of release on recognizance, followed by release on nonfinancial conditions, and finally release on financial conditions is directly tied to this foundational premise. Indeed, the principle of least restrictive conditions transcends the Standards and flows from even more basic

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[49] *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007), Std. 10-1.2 (commentary) at 39-40 (internal citations omitted).

understandings of criminal justice, which begins with presumptions of innocence and freedom, and which correctly imposes increasing burdens on the government to incrementally restrict one's liberty.

More specifically, however, the ABA Standards' commentary on financial conditions makes it clear that the Standards consider secured financial conditions to be more restrictive than both unsecured financial conditions and nonfinancial conditions: "When financial conditions are warranted, the least restrictive conditions principle requires that unsecured bond be considered first."[50] Moreover, the Standards state, "Under Standard 10-5.3(a), financial conditions may be employed, but only when no less restrictive non-financial release condition will suffice to ensure the defendant's appearance in court. An exception is an unsecured bond because such a bond requires no 'up front' costs to the defendant and no costs if the defendant meets appearance requirements."[51] These principles are well founded in logic: setting aside, for now, the argument that money at bail might not be of any use at all, it at least seems reasonably clear that secured financial conditions (requiring up-front payment) are always more restrictive than unsecured ones, even to the wealthiest defendant. Moreover, in the aggregate, we know that secured financial conditions, as typically the only condition precedent to release, are highly restrictive compared to all nonfinancial conditions and unsecured financial conditions in that they tend to cause pretrial detention. Like detention itself, any condition causing detention should be considered highly restrictive. In sum, money is a highly restrictive condition, and more so (and possibly excessive) when combined with other conditions that serve the same purpose.

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[50] *Id.* Std. 10-1.4 (c) (commentary) at 43-44.

[51] *Id.* Std. 10-5.3 (a) (commentary) at 112.

What Can the Juvenile Justice System Tell Us About Adult Bail?

In addition to the fact that the United States Supreme Court relied heavily on *Schall v. Martin,* a juvenile preventive detention case, in writing its opinion in *United States v. Salerno,* an adult preventive detention case, the juvenile justice system has an impressive body of knowledge and research that can be used to inform the administration of bail for adults.

Perhaps most relevant is the work being done through the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative (JDAI), an initiative to promote changes to juvenile justice policies and practices to "reduce reliance on secure confinement, improve public safety, reduce racial disparities and bias, save taxpayers' dollars, and stimulate overall juvenile justice reforms."

In remarks at the National Symposium on Pretrial Justice in 2011, Bart Lubow, Director of the Juvenile Justice Strategy Center of the Foundation, stated that JDAI used cornerstone innovations of adult bail to inform its work with juveniles, but through collaborative planning and comprehensive implementation of treatments designed to address a wider array of systemic issues, the juvenile efforts have eclipsed many adult efforts by reducing juvenile pretrial detention an average of 42% with no reductions in public safety measures.

Sources and Resources: *National Symposium on Pretrial Justice: Summary Report of Proceedings* at 23-24 (Statement of Bart Lubow) (PJI/BJA 2011); *Schall v. Martin*, 467 U.S 253 (1984); *United States v. Salerno,* 481 U.S. 739 (1987); Additional information may be found at the Annie E. Casey Foundation Website, found at http://www.aecf.org/.

Bail May Not Be Set For Punishment (Or For Any Other Invalid Purpose)

This principle is related to excessiveness, above, because analysis for excessiveness begins with looking at the government's purpose for limiting pretrial freedom. It is more directly tied to the Due Process Clause, however, and was mentioned briefly in *Salerno* when the Court was beginning its due process analysis. In *Bell v. Wolfish*, the Supreme Court had previously written, "The Court of Appeals properly relied on the Due Process Clause, rather than the 8th Amendment, in considering the claims of pretrial detainees. Due process

requires that a pretrial detainee not be punished."[52] Again, there are currently only two constitutionally valid purposes for limiting pretrial freedom – court appearance and public safety. Other reasons, such as punishment or, as in some states, to enrich the treasury, are clearly unconstitutional. And still others, such as setting a financial condition to detain, are at least potentially so.

The Bail Process Must Be Individualized

In *Stack v. Boyle*, the Supreme Court wrote as follows:

> Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards, as expressed in the Federal Rules of Criminal Procedure [at the time, the nature and circumstances of the offense, the weight of the evidence against the defendant, and the defendant's financial situation and character] are to be applied in each case to each defendant.[53]

In his concurrence, Justice Jackson observed that if the bail in *Stack* had been set in a uniform blanket amount without taking into account differences between defendants, it would be a clear violation of the federal rules. As noted by Justice Jackson, "Each defendant stands before the bar of justice as an individual."[54]

At the time, the function of bail was limited to setting conditions of pretrial freedom designed to provide reasonable assurance of court appearance. Bail is still limited today, although the purposes for conditioning pretrial freedom have been expanded to include public safety in addition to court appearance. Nevertheless, pursuant to *Stack*, there must be standards in place relevant to these purposes. After *Stack,* states across America amended their statutes to include language designed to individualize bail setting for purposes of court appearance. In the second generation of bail reform, states included individualizing factors relevant to public safety. And today, virtually every state has a list of factors that can be said to be "individualizing criteria" relevant to the proper purposes for limiting pretrial freedom. To the extent that states do not use these factors, such as when over-relying on monetary bail bond schedules that

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[52] 441 U.S. 520, 535 and n. 16 (1979).

[53] 342 U.S. 1, 5 (1951) (internal citations omitted).

[54] *Id.* at 9.

merely assign amounts of money to charges for all or average defendants, the non-individualized bail settings are vulnerable to constitutional challenge.

The concept of requiring standards to ensure that there exists a principled means for making non-arbitrary decisions in criminal justice is not without a solid basis under the U.S. Constitution. Indeed, such standards have been a fundamental precept of the Supreme Court's death penalty jurisprudence under the cruel and unusual punishment clause of the 8th Amendment.

> *"The term [legal and evidence-based practices] is intended to reinforce the uniqueness of the field of pretrial services and ensure that criminal justice professionals remain mindful that program practices are often driven by law and when driven by research, they must be consistent with the pretrial legal foundation and the underlying legal principles."*
>
> Marie VanNostrand, Ph.D., 2007

The Right to Counsel

This principle refers to the Sixth Amendment right of the accused to assistance of counsel for his or her defense. There is also a 5th Amendment right, which deals with the right to counsel during all custodial interrogations, but the 6th Amendment right more directly affects the administration of bail as it applies to all "critical stages" of a criminal prosecution. According to the Supreme Court, the 6th Amendment right does not attach until a prosecution is commenced. Commencement, in turn, is "the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[55] In *Rothgery v. Gillespie County*, the United States Supreme Court "reaffirm[ed]" what it has held and what "an overwhelming majority of American jurisdictions" have understood in practice: "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."[56]

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[55] *See United States* v. *Gouveia*, 467 U. S. 180, 188 (1984) (quoting *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (plurality opinion)).

[56] 554 U.S. 191, 198, 213 (2008).

Both the American Bar Association's and the National Association of Pretrial Services Agencies' best practice standards on pretrial release recommend having defense counsel at first appearances in every court, and important empirical data support the recommendations contained in those Standards. Noting that previous attempts to provide legal counsel in the bail process had been neglected, in 1998 researchers from the Baltimore, Maryland, Lawyers at Bail Project sought to demonstrate empirically whether or not lawyers mattered during bail hearings. Using a controlled experiment (with some defendants receiving representation at the bail bond review hearing and others not receiving representation) those researchers found that defendants with lawyers: (1) were over two and one-half times more likely to be released on their own recognizance; (2) were over four times more likely to have their initially-set financial conditions reduced at the hearing; (3) had their financial conditions reduced by a greater amount; (4) were more likely to have the financial conditions reduced to a more affordable level ($500 or under); (5) spent less time in jail (an average of two days versus nine days for unrepresented defendants); and (6) had longer bail bond review hearings than defendants without lawyers at first appearance.

The Privilege Against Compulsory Self-Incrimination

This foundational principle refers to the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment (in addition to similar or equivalent state provisions), which says that no person "shall be compelled, in any criminal case, to be a witness against himself . . ." At bail there can be issues surrounding pretrial interviews as well as with incriminating statements the defendant makes while the court is setting conditions of release. In that sense, the principle against compulsory self-incrimination is undoubtedly linked to the right to counsel in that counsel can help a particular defendant fully understand his or her other rights.

Probable Cause

Black's Law Dictionary defines probable cause as reasonable cause, or a reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime. Probable cause sometimes refers to having more evidence for than against. It is a term of art in criminal procedure referring to the requirement that arrests be based on probable cause. Probable cause to arrest is present when "at that moment [of the

arrest] the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [person] had committed or was committing an offense."[57] In *County of Riverside v. McLaughlin*, [58] the Supreme Court ruled that suspects who are arrested without a warrant must be given a probable cause hearing within 48 hours.

As the arrest or release decision is technically one under the umbrella of a broadly defined bail or pretrial process, practices surrounding probable cause or the lack of it are crucial for study. Interestingly, because a probable cause hearing is a prerequisite only to "any significant pretrial restraint of liberty,"[59] jurisdictions that employ bail practices that are speedy and result in a large number of releases using least restrictive conditions (such as the District of Columbia) may find that they need not hold probable cause hearings for every arrestee prior to setting bail.

Other Legal Principles

Of course, there are other legal principles that are critically important to defendants during the pretrial phase of a criminal case, such as certain rights attending trial, evidentiary rules and burdens of proof, the right to speedy trial, and rules affecting pleas. Moreover, there are principles that arise only in certain jurisdictions; for example, depending on which state a person is in, using money to protect public safety may be expressly unlawful and thus its prohibition may rise to the level of other, more universal legal principles beyond its inferential unlawfulness due to its irrationality. Nevertheless, the legal foundations listed above are the ones most likely to arise in the administration of bail. It is thus crucial to learn them and to recognize the issues that arise within them.

What Do the Legal Foundations of Pretrial Justice Tell Us?

Pretrial legal foundations provide the framework and the boundaries within which we must work in the administration of bail. They operate uniquely in the pretrial phase of a criminal case, and together should serve as a cornerstone for all pretrial practices; they animate and inform our daily work and serve as a visible daily backdrop for our pretrial thoughts and actions.

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[57] *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

[58] 500 U.S. 44 (1991).

[59] *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975).

For the most part, the legal foundations confirm and solidify the history of bail. The history of bail tells us that the purpose of bail is release, and the law has evolved to strongly favor, if not practically demand the release of bailable defendants as well as to provide us with the means for effectuating the release decision. The history tells us that "no bail" is a lawful option, and the law has evolved to instruct us on how to fairly and transparently detain unbailable defendants. History tells us that court appearance and public safety are the chief concerns of the bail determination, and the law recognizes each as constitutionally valid purposes for limiting pretrial freedom.

The importance of the law in "legal and evidence-based practices" is unquestioned. Pretrial practices, judicial decision making (for judges are sworn to uphold the law and their authority derives from it), and even state bail laws themselves must be continually held up to the fundamental principles of broad national applicability for legal legitimacy. Moreover, the law acts as a check on the evidence; a pretrial practice, no matter how effective, must always bow to the higher principles of equal justice, rationality, and fairness. Finally, the law provides us with the fundamental goals of the pretrial release and detention decision. Indeed, if evidence-based decision making is summarized as attempting to achieve the goals of a particular discipline by using best practices, research, and evidence, then the law is critically important because it tells us that the goals of bail are to maximize release while simultaneously maximizing court appearance and public safety. Accordingly, all of the research and pretrial practices must be continually questioned as to whether they inform or further these three inter-related goals. In the next section, we will examine how the evolution of research at bail has, in fact, informed lawful and effective bail decision making.

Additional Sources and Resources: Black's Law Dictionary (9th ed. 2009); Douglas L. Colbert, Ray Paternoster, & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail,* 32 Cardozo L. Rev. 1719 (2002); *Early Appointment of Counsel: The Law, Implementation, and Benefits* (Sixth Amend. Ctr./PJI 2014); Wayne R. LaFave, Jerold H. Israel, Nancy J. King and Orin S. Kerr, *Criminal Procedure* (3rd ed. 2007 & 5th ed. 2009); Jack K. Levin & Lucan Martin, 8A American Jurisprudence 2d, *Bail and Recognizance* (West 2009); Timothy R. Schnacke, Michael R. Jones, & Claire M. B. Brooker, *Glossary of Terms and Phrases Relating to Bail and the Pretrial Release or Detention Decision* (PJI 2011); Marie VanNostrand, *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services*

(CJI/NIC 2007); 3B Charles Allen Wright & Peter J. Henning, Federal Practice and Procedure §§ 761-87 (Thomson Reuters 2013).

Chapter 4: Pretrial Research

The Importance of Pretrial Research

Research allows the field of bail and pretrial justice to advance. Although our concepts of proper research have certainly changed over the centuries, arguably no significant advancement in bail or pretrial justice has ever occurred without at least some minimal research, whether that research was legal, historical, empirical, opinion, or any other way of better knowing things. This was certainly true in England in the 1200s, when Edward I commissioned jurors to study bail and used their documented findings of abuse to enact the Statute of Westminster in 1275. It is especially true in America in the 20th century, when research was the catalyst for the first two generations of bail reform and has arguably sparked a third.

While other research disciplines are important, the current workhorse of the various methods in bail is social research. According to noted sociologists Earl Babbie and Lucia Benaquisto, social research is important because we often already know the answers to life's most pressing problems, but we are still unable to solve them. Social science research provides us with the solutions to these problems by telling us how to organize and run our social affairs by analyzing the forms, values, and customs that make up our lives. This is readily apparent in bail, where many of the solutions to current problems are already known; social science research provides help primarily by illuminating how we can direct our social affairs so as to fully implement those solutions. By continually testing theories and hypotheses, social science research finds incremental explanations that simplify a complex life, and thus allows us to solve confounding issues such as how to reduce or eliminate unnecessary pretrial detention.

> *"We can't solve our social problems until we understand how they come about, persist. Social science research offers a way to examine and understand the operation of human social affairs. It provides points of view and technical procedures that uncover things that would otherwise escape our awareness."*
>
> Earl Babbie & Lucia Benaquisto, 2009

Like history and the law, social science research and the law are growing more and more entwined. In the 1908 case of *Muller v. Oregon,*[60] Louis Brandeis submitted a voluminous brief dedicated almost exclusively to social science research indicating the negative effects of long work hours on women. This landmark instance of the use of social research in the law, ultimately dubbed a "Brandeis brief," became the model for many legal arguments thereafter. One need only read the now famous footnote 11 of the Supreme Court's opinion in *Brown v. Board of Education*,[61] which ended racial segregation in America's schools and showed the detrimental effects of segregation on children, to understand how social science research can significantly shape our laws.

Social science research and the law are especially entwined in criminal justice and bail. Perhaps no single topic ignites as deep an emotional response as crime – how to understand it, what to do about it, and how to prevent it. And bail, for better or worse, ignites the same emotional response. Moreover, bail is deceptively complex because it superimposes notions of a defendant's freedom and the presumption of innocence on top of our societal desires to bring defendants to justice and to avoid pretrial misbehavior. Good social science research can aid us in simplifying the topic by answering questions surrounding the three legal and historical goals of bail and conditions of bail. Specifically, social science pretrial research tells us what works to simultaneously: (1) maximize release; (2) maximize public safety; and (3) maximize court appearance.

Because of the complex balance of bail, research that addresses all three of these goals is superior to research that does not. For example, studies showing only the effectiveness of release pursuant to a commercial surety bond at ultimately reducing failures to appear (whether true or not) is less helpful than also knowing how those bonds do or do not affect public safety and tend to detain otherwise bailable defendants. It is helpful to know that pretrial detention causes negative long-term effects on defendants; it is more helpful to learn how to reduce those effects while simultaneously keeping the community safe. It is helpful to know a defendant's risk empirically; it is more helpful to know how to best embrace risk so as to facilitate release and then to mitigate known risk to further the constitutionally valid purposes for limiting pretrial freedom.

Nevertheless, some research is always better than no research, even if that research is found on the lowest levels of an evidence-based decision making

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[60] *Muller v. Oregon,* 208 U.S. 412 (1908).

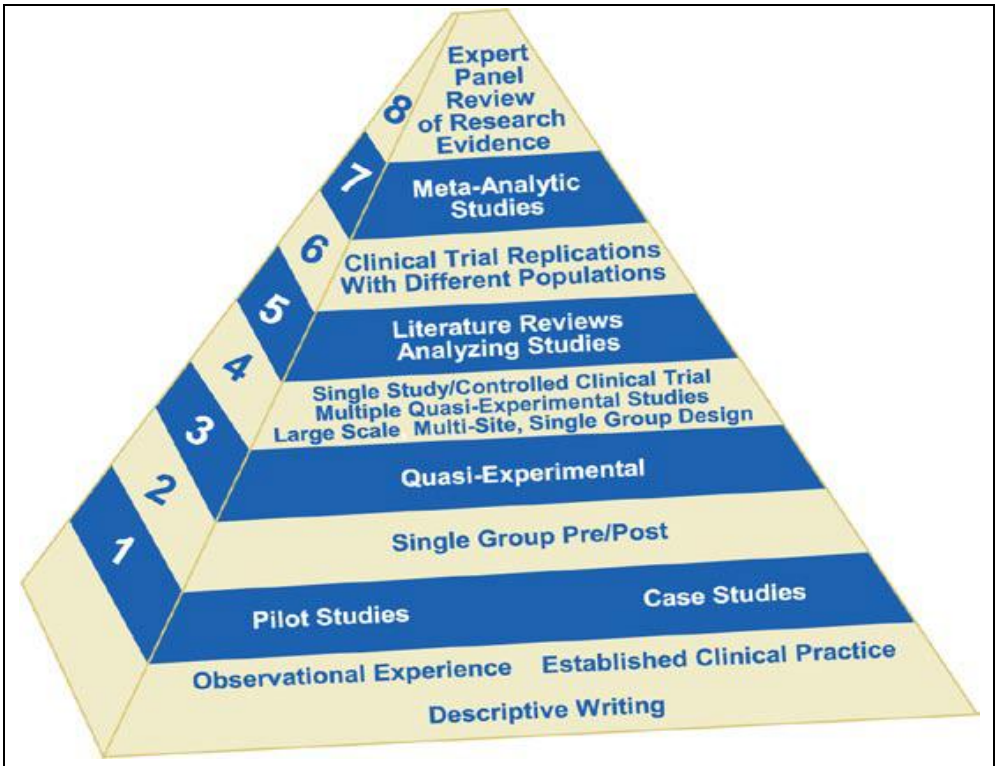
[61] *Brown v. Board of Education,* 347 U.S. 483 (1954).

hierarchy of evidence pyramid. And that is simply because we are already making decisions every day at bail, often with no research at all, and typically based on customs and habits formed over countless decades of uninformed practice. To advance our policies, practices, and laws, we must at least become informed consumers of pretrial research. We must recognize the strengths and limitations of the research, understand where it is coming from, and even who is behind creating it. Ultimately, however, we must use it to help solve what we perceive to be our most pressing problems at bail.

Research in the Context of Legal and Evidence-Based Practices

The term "evidence-based practices" is common to numerous professional fields. As noted earlier, however, due to the unique nature of the pretrial period of a criminal case as well as the importance of legal foundations to pretrial decision making, Dr. Marie VanNostrand has more appropriately coined the term "legal and evidence-based practices" for the pretrial field. Legal and evidence-based practices are defined as "interventions and practices that are consistent with the pretrial legal foundation, applicable laws, and methods research has proven to be effective in decreasing failures to appear in court and danger to the community during the pretrial stage."

In addition to holding up practices and the evidence behind them to legal foundations, to fully follow an evidence-based decision making model jurisdictions must also determine how much research is needed to make a practice "evidence-based." According to the U.S. Department of Health and Human Services (HHS), this is done primarily by assessing the strength of the evidence indicating that the practice leads to the desired outcome. To help with making this assessment, many fields employ the use of graphics indicating the varying "strength of evidence" for the kinds of data or research they are likely to use. For example, the Colorado Commission on Criminal and Juvenile Justice, a statewide commission that focuses on evidence-based recidivism reduction and cost-effective criminal justice expenditures, refers to the strength of evidence pyramid, below, which was developed by HHS's Substance Abuse and Mental Health Services Administration's Co-Occurring Center for Excellence (COCE).



As one can see, the levels vary in strength from lower to higher, with higher levels more likely to illuminate research that works better to achieve the goals of a particular field. As noted by the COCE, "Higher levels of research evidence derive from literature reviews that analyze studies selected for their scientific merit in a particular treatment area, clinical trial replications with different populations, and meta-analytic studies of a body of research literature. At the highest level of the pyramid are expert panel reviews of the research literature."

Sources and Resources: Marie VanNostrand, *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC 2007); Information gathered from the Colorado Commission on Criminal and Juvenile Justice website, found at http://www.colorado.gov/cs/Satellite/CDPS-CCJJ/CBON/1251622402893; *Understanding Evidence-Based Practices for Co-Occurring Disorders* (SAMHSA's CORE) contained in SAMHSA's website, found online at http://www.samhsa.gov/co-occurring/topics/training/OP5-Practices-8-13-07.pdf.

Research in the Last 100 Years: The First Generation

If we focus on just the last 100 years, we see that major periods of bail research in America have led naturally to more intense periods of reform resulting in new policies, practices, and laws. Although French historian Alexis de Tocqueville informally questioned America's continued use of money bail in 1835, detailed studies of bail practices in America had their genesis in the 1920s, first from Roscoe Pound and Felix Frankfurter's study of criminal justice in Cleveland, Ohio, and then from Arthur Beeley's now famous study of bail in Chicago, Illinois. Observing secured-money systems primarily administered through the use of commercial bail bondsmen (that had really only existed since 1898), both of those 1920s studies found considerable flaws in the current way of administering bail. Beeley's seminal statement of the problem in 1927, made at the end of a painstakingly detailed report, is still relevant today:

> [L]arge numbers of accused, but obviously dependable persons are needlessly committed to Jail; while many others, just as obviously undependable, are granted a conditional release and never return for trial. That is to say, the present system, in too many instances, neither guarantees security to society nor safeguards the rights of the accused. The system is lax with those with whom it should be stringent and stringent with those with whom it could safely be less severe.[62]

Pound, Frankfurter, and Beeley began a period of bail research, advanced significantly by Caleb Foote in the 1950s, that culminated in the first generation of bail reform in the 1960s. That research consisted of several types – for example, one of the most important historical accounts of bail was published in 1940 by Elsa de Haas. But the most significant literature consisted of social science studies observing and documenting the deficiencies of the current system. As noted by author Wayne H. Thomas, Jr.,

> [These] studies had shown the dominating role played by bondsmen in the administration of bail, the lack of any meaningful consideration to the issue of bail by the courts, and the detention of large numbers of defendants who could and should have been released but were not because bail, even in modest amounts, was

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[62] Arthur L. Beeley, *The Bail System in Chicago*, at 160 (Univ. of Chicago Press, 1927).

> beyond their means. The studies also revealed that bail was often used to 'punish' defendants prior to a determination of guilt or to 'protect' society from anticipated future conduct, neither of which is a permissible purpose of bail; that defendants detained prior to trial often spent months in jail only to be acquitted or to receive a suspended sentence after conviction; and that jails were severely overcrowded with pretrial detainees housed in conditions far worse than those of convicted criminals.[63]

Clearly, the most impactful of this period's research was so-called "action research," in which bail practices were altered and outcomes measured in pioneering "bail projects" to study alternatives to the secured bond/commercial surety system of release. Perhaps the most well-known of these endeavors was the Manhattan Bail Project, conducted by the Vera Foundation (now the Vera Institute of Justice) and the New York University Law School beginning in 1960. The Manhattan Bail Project used an experimental design to demonstrate that given the right information, judges could release more defendants without the requirement of a financial bond condition and with no measurable impact on court appearance rates. At that time in American history, bail had only two goals – to release defendants while simultaneously maximizing court appearance – because public safety had not yet been declared a constitutionally valid purpose for limiting pretrial freedom. The Manhattan Bail Project was significant because it worked to achieve both of the existing goals. Based on the information provided by Vera, release rates increased while court appearance rates remained high.

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[63] Wayne H. Thomas, Jr., *Bail Reform in America* at 15 (Univ. Cal. Press 1976).

Caleb Foote's Unfulfilled Prediction Concerning Bail Research

At the National Conference on Bail and Criminal Justice in 1964, Professor of Law Caleb Foote explained to attendees that courts would likely move from their "wholly passive role" during the first generation of bail reform to a more active one, saying, "Certainly courts are not going to be immune to the sense of basic unfairness which alike has motivated scholarly research, foundation support for bail action projects, the Attorney General's Committee on Poverty, and your attendance at this Conference." Noting the lack of any definitive empirical evidence showing that pretrial detention alone adversely affected the quality of treatment given to criminal defendants, Foote nonetheless cited current studies attempting to show that very thing, and predicted:

"If it comes to be generally accepted that in the outcome of his case the jailed defendant is prejudiced compared with the defendant who has pretrial liberty, such a finding will certainly have a profound impact upon any judicial consideration of constitutional bail questions. It was such impermissible prejudicial effects, stemming from poverty, which formed the basis of the due process requirement of counsel in *Gideon v. Wainwright*."

Since then, numerous studies have highlighted the prejudicial effects of pretrial detention, with the research consistently demonstrating that when compared to defendants who are released, defendants detained pretrial – all other things being equal – plead guilty more often, are convicted more often, get sentenced to prison more often, and receive longer sentences. And yet, despite this overwhelming research, Foote's prediction of increased judicial interest and activity in the constitutional issues of bail has not come true.

Sources and Resources: *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* at 29 n. 1 (2007) (citing studies); John Clark, *Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process*, at 2 (PJI/MacArthur Found. 2012) (same); *The National Conference on Bail and Criminal Justice, Proceedings and Interim Report,* at 224-25 (Washington, D.C. April 1965);

The Manhattan Bail Project was the center of discussion of bail reform at the 1964 National Conference on Bail and Criminal Justice, which in turn led to changes in both federal and state laws designed to facilitate the release of bailable defendants who were previously unnecessarily detained. Those changes included presumptions for release on recognizance, release on unsecured bonds (like those used for centuries in England and America prior to the 1800s), release on "least restrictive" nonfinancial conditions, and additional constraints on the

use of secured money bonds. The improvements were, essentially, America's attempt to solve the early 20th century's dilemma of bailable defendants not being released – a dilemma that, historically speaking, has always demanded correction.

The Second Generation

Research flowing toward the second generation of pretrial reform in America followed the same general pattern of identifying abuses or areas in need of improvement and then gradually creating a meeting of minds on practical solutions to those abuses. In that generation, though, the identified "abuse" dealt primarily with the "no bail" side of the "bail/no bail" dichotomy – the side that determines who should not be released at all. As summarized by Senator Edward Kennedy in 1980,

> Historically, bail has been viewed as a procedure designed to ensure the defendant's appearance at trial by requiring him to post a bond or, in effect, make a promise to appear. Current findings, suggest, however, that this traditional approach, though noble in design, has one important shortcoming. It fails to deal effectively with those defendants who commit crimes while they are free on bail.[64]

Indeed, for nearly 1,500 years, the only acceptable purpose for limiting pretrial freedom was to assure that the defendant performed his or her duty to face justice, which ultimately came to mean appearing for court. Even when crafting their constitutional and statutory exceptions to any recognized right to bail, the states and the federal government had always done so with an eye toward court appearance. To some, limiting freedom based on future dangerousness was un-American, more akin to tyrannical practices of police states, and contrary to all notions of fundamental human rights. Indeed, there was considerable debate over whether it could *ever* be constitutional to do so.

Nevertheless, many judges felt compelled to respond to legitimate fears for public safety even if the law did not technically allow for it. Accordingly, those judges often followed two courses of action when faced with obviously dangerous defendants who perhaps posed virtually no risk of flight: (1) if those

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[64] Edward M. Kennedy, *A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform*, 48 Fordham L. Rev. 423, 423 (1980) (internal footnotes omitted).

defendants happened to fall in the categories listed as "no bail," judges could deny their release altogether; (2) if they did not fall into a "no bail" category, judges could and would set high monetary conditions of bail to effectively detain the defendant. The practice of detaining persons for public safety, or preventive detention, was known at the time as furthering a "sub rosa" or secret purpose for limiting freedom, and it was done with little interference from the appellate courts.

The research leading to reform in this area was multifaceted. Law reviews published articles on the right to bail, the Excessive Bail Clause, and on due process concerns. Historians examined the right to bail in England and America to determine if and how it could be restricted or even denied altogether for purposes of public safety. Politicians and others looked to the experiences of states that had already changed their laws to account for public safety and danger. And social scientists documented what Congress ultimately called "the alarming problem of crimes committed by persons on release"[65] by conducting empirical studies of pretrial release and re-arrest rates in a number of American jurisdictions.

Ultimately, this research led to dramatic changes in the administration of bail. Congress passed the Bail Reform Act of 1984, which expanded the law to allow for direct, fair, and transparent detention of certain dangerous defendants after a due process hearing. In *United States v. Salerno*, the Supreme Court upheld the Act, giving constitutional validity to public safety as a limitation on pretrial freedom. If they had not already done so, many states across the country changed their statutes and constitutions to allow consideration of dangerousness in the release and detention decision and by re-defining the "no bail" side of their schemes to better reflect which defendants should be denied the right to bail altogether.

[65] S. Rep. No. 98-225, P. L. 98-473 p. 3 (1983).

The Third Generation

The previous generations of bail research have followed the pattern of identifying abuses or issues of concern and then finding consensus on solutions, and the current generation is no different. Some of the research in this generation of bail reform is merely a continuation of studies begun in previous generations. For example, a body of literature examining the effects of pretrial detention on ultimate outcomes of cases (guilty pleas, sentences, etc.) began in the 1950s and has continued to this day. As another example, after Congress passed the Bail Reform Act of 1966, pretrial services programs gradually expanded from the "bail projects" of the early 1960s to more comprehensive agencies designed to carry out the mandates of new laws requiring risk assessment and often supervision of pretrial defendants. As these programs evolved, a body of research began to develop around their practices. In 1973, the National Association of Pretrial Services Agencies (NAPSA) was founded to, among other things, promote research and development in the field. In 1976, NAPSA and the Department of Justice created the Pretrial Services Resource Center (PSRC, now the Pretrial Justice Institute), an entity also designed to, among other things, collect and disseminate research and information relevant to the pretrial field. The data collected by these entities over the years, in addition to the numerous important reports they have issued analyzing that data, have been instrumental sources of fundamental pretrial research.

A Meeting of Minds – Who is Currently In Favor of Pretrial Improvements?

The following national organizations have produced express policy statements generally supporting the use of evidence-based and best pretrial practices, which include risk assessment and fair and transparent preventive detention, at the front end of the criminal justice system:

The Conference of Chief Justices

The Conference of State Court Administrators

The National Association of Counties

The International Association of Chiefs of Police

The Association of Prosecuting Attorneys

The American Council of Chief Defenders

The National Association of Criminal Defense Lawyers

The American Jail Association

The American Bar Association

The National Judicial College

The National Sheriff's Association

The American Probation and Parole Association

The National Association of Pretrial Services Agencies

In addition, numerous other organizations and individuals are lending their support or otherwise partnering to facilitate pretrial justice in America. For a list of just those organizations participating in the Pretrial Justice Working Group, created in the wake of the National Symposium on Pretrial Justice, go to http://www.pretrial.org/infostop/pjwg/

As another example, in 1983, the PSRC – with funding from the Bureau of Justice Statistics (BJS) – initiated the National Pretrial Reporting Program, which was designed to create a national pretrial database by collecting local bail data and aggregating it at the state and national levels. In 1994, that program became BJS's State Court Processing Statistics (SCPS) program, which collected data on felony defendants in jurisdictions from the 75 most populous American counties. Research documents analyzing that data, including the *Felony Defendants from Large Urban Counties* series, and *Pretrial Release of Felony Defendants in State Courts*,

have become crucial, albeit sometimes misinterpreted sources of basic pretrial data, such as defendant charges and demographics, case outcomes, types of release and release rates, financial condition amounts, and basic information on pretrial misconduct. Most recently, BJS asked the Urban Institute to re-design and re-develop the National Pretrial Reporting Program as a replacement to SCPS.

An Unusual, But Necessary, Research Warning

Since 1988, the Bureau of Justice Statistic's (BJS) State Court Processing Statistics (SCPS) program (formerly the National Pretrial Reporting Program) has been an important source of data on criminal processing of persons charged with felonies in the 75 most populous American counties. Issues surrounding pretrial release, in particular, have been tempting topics for study due to the SCPS's inclusion of data indicating whether defendants were released pretrial, the type of release (e.g., personal recognizance, surety bond), and whether the defendant misbehaved while on pretrial release. In some cases, researchers would use the SCPS data to make "evaluative" statements, that is, statements declaring that a particular type of release was superior to another based on the data showing pretrial misbehavior associated with each type. Moreover, when these studies favored the commercial bail bonding and insurance industry, that industry would repeat the researcher's evaluative statements (as well as make their own statements based on their own reading of the SCPS data), and claim that the data demonstrated that the use of a commercial surety bond was a superior form of release.

According to Bechtel, et.al, (2012) "The bonding industry's claims based on the SCPS data became so widespread that BJS was compelled to take the unusual and unprecedented step of issuing a 'Data Advisory.'" That advisory, issued in March of 2010, listed the limitations of the SCPS data, and specifically warned that, "Any evaluative statement about the effectiveness of a particular program in preventing pretrial misconduct based on SCPS is misleading."

Bureau of Justice Statistics

DATA ADVISORY

State Court Processing Statistics Data Limitations

Despite the warning, there are those who persist in citing SCPS data to convince policy makers or others about the effectiveness of one type of release over another. Both Bechtel, et al., and VanNostrand, et al., have listed flaws in the various studies using the data and have given compelling reasons for adopting a more discriminating attitude whenever persons or entities begin comparing one type of release with another.

As mentioned in the body of this paper, the best research at bail, which will undoubtedly include future efforts at comparing release types, must not only comply with the rigorous standards necessary so as not to violate the BJS Data Advisory, but should also address all three legal and evidence-based goals underlying the bail decision, which include maximizing release while maximizing public safety and court appearance.

Sources and Resources: Kristin Bechtel, John Clark, Michael R. Jones, & David J. Levin, *Dispelling the Myths, What Policy Makers Need to Know About Pretrial Research* (PJI, 2012); Thomas Cohen & Tracey Kyckelhahn, *Data Advisory: State Court Processing Statistics Data Limitations* (BJS 2010); Marie VanNostrand, Kenneth J. Rose, & Kimberly Weibrecht, *State of the Science of Pretrial Release Recommendations and Supervision* (PJI/BJA 2011).

Finally, a related body of ongoing research derives simply from pretrial services agencies and programs measuring themselves, which can be a powerful way to present and use data to affect pretrial practices. In 2011, the NIC published *Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field*, which proposed standardized definitions and uniform suggested measures consistent with established pretrial standards to "enable pretrial services agencies to gauge more accurately their programs' effectiveness in meeting agency and justice system goals."[66] Broadly speaking, standardized guidelines and definitions for documenting performance measures and outcomes enables better communication and leads to better and more coordinated research efforts overall.

Other research flowing toward this current generation of pretrial reform, akin to Arthur Beeley's report on Chicago bail practices, has been primarily observational. That research, such as some of the multifaceted analyses performed in Jefferson County, Colorado, in 2007-2010, merely examines system practices to assess whether those practices or even the current laws can be improved. Other entities, such as Human Rights Watch and the Justice Policy Institute, have created similar research documents that include varying ratios of observational and original research. On the other hand, another body of this generation's research goes far beyond observation and uses large data sets and complex statistical tests to create empirical pretrial risk instruments that provide scientific structure and meaning to current lists dictating the factors judges must consider in the release and detention decision.

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[66] *Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field* (NIC 2011) at v.

In between is a body of research most easily identified by topic, but sometimes associated best with the person or entity producing it. For example, throughout the years researchers have been interested in analyzing judicial discretion and guided discretion in the decision to release, and so one finds numerous papers and studies examining that issue. In particular, though, Dr. John Goldkamp spent much of his distinguished academic career focusing on judicial discretion in the pretrial release decision, and published numerous important studies on his findings. Likewise, other local jurisdictions have delved deep into their own systems to look at a variety of issues associated with pretrial release and detention, but perhaps none have done so as consistently and thoroughly as the New York City Criminal Justice Agency, and its research continues to inspire and inform the nation.

Other topics of interest in this generation of reform include racial disparity, cost benefit analyses affecting pretrial practices, training police officers for first contacts and effects of that training on pretrial outcomes, citation release, the legality and effectiveness of monetary bail schedules, pretrial processes and outcomes measurements, re-entry from jail to the community, bail bondsmen and bounty hunters, special populations such as those with mental illness or defendants charged with domestic violence, and gender issues. Prominent organizations consistently working on publishing pretrial research literature include various agencies within the Department of Justice, including the National Institute of Corrections, the Bureau of Justice Assistance, the Bureau of Justice Statistics, and the National Institute of Justice. Other active entities include the Pretrial Justice Institute, the National Association of Counties, the United States Probation and Pretrial Services, the Pretrial Services Agency for the District of Columbia, the Vera Institute, the Urban Institute, and the Justice Policy Institute. Other organizations, such as the International Association of Chiefs of Police, the National Association of Drug Court Professionals, National Council on Crime and Delinquency, the Council of State Governments, the Pew Research Center, the American Probation and Parole Association, and various colleges and universities have also become actively involved in pretrial issues.

Along with these entities are a number of individuals who have consistently led the pretrial field by devoting much or all of their professional careers on pretrial research, such as Dr. John Goldkamp, D. Alan Henry, Dr. Marie VanNostrand, Dr. Christopher Lowenkamp, Dr. Alex Holsinger, Dr. James Austin, Dr. Mary Phillips, Dr. Brian Reaves, Dr. Thomas Cohen, Dr. Edward J. Latessa, Timothy Cadigan, Spurgeon Kennedy, John Clark, Kenneth J. Rose, Barry Mahoney, and Dr. Michael Jones. Often these individuals are sponsored by generous

philanthropic foundations interested in pretrial justice, such as the Public Welfare Foundation and the Laura and John Arnold Foundation.

Public Opinion Research

An important subset of criminal justice research is survey research, which can include collecting data to learn how people feel about crime or justice policy. For example, in 2012 the PEW Center on the States published polling research by Public Opinion Strategies and the Mellman Group showing that while people desire public safety and criminal accountability, they also support sentencing and corrections reforms that reduce imprisonment, especially for non-violent offenders. In 2009, the National Institute of Corrections reported a Zogby International poll similarly showing that 87% of those contacted would support research-based alternatives to jail to reduce recidivism for non-violent persons.

Very little of this type of research had been done in the field of pretrial release and detention, but in 2013 Lake Research Partners released the results of a nationwide poll focusing on elements of the current pretrial reform movement. That research found "overwhelming support" for replacing a cash-based bonding system with risk-based screening tools. Moreover, that support was high among all demographics, including gender, age, political party identification, and region. Interestingly too, most persons polled were unaware of the current American situation, with only 36% of persons understanding that empirical risk assessment was not currently happening in most places.

Sources and Resources: *A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems* (NIC, 2010); *Support for Risk Assessment Programs Nationwide* (Lake Research Partners 2013) found at http://www.pretrial.org/download/advocacy/Support%20for%20Risk%20Assessment%20Nationwide%20-%20Lake%20Research%20Partners.pdf. Public Opinion on Sentencing and Corrections Policy in America (Public Opinion Strategies/Mellman Group 2012) found at http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/PEW_NationalSurveyResearchPaper_FINAL.pdf;

All of this activity brings hope to a field that has recently been described as significantly limited in its research agenda and output. In 2011, the Summary Report to the National Symposium on Pretrial Justice listed four recommendations related to a national research agenda: (1) collect a comprehensive set of pretrial data needed to support analysis, research, and reform through the Bureau of Justice Statistics; (2) embark on comprehensive research that results in the identification of proven best pretrial practices through the National Institute of Justice; (3) develop and seek funding for research proposals relating to pretrial justice; and (4) prepare future practitioners and leaders to effectively address pretrial justice issues in a fair, safe, and effective manner.

In the wake of the Symposium, the Department of Justice's Office of Justice Programs (OJP) convened a Pretrial Justice Working Group, a standing, multidisciplinary group created to collaboratively address national challenges to moving toward pretrial reform. The Working Group, in turn, established a "Research Subcommittee," which was created to stimulate detailed pretrial data collection, increase quantitative and qualitative pretrial research, support existing OJP initiatives dealing with evidence-based practices in local justice systems, and develop pretrial justice courses of studies in academia. Due in part to that Subcommittee's purposeful focus, its members have begun a coordinated effort to identify pretrial research needs and to develop research projects designed specifically to meet those needs. Accordingly, across America, we are seeing great progress in both the interest and the output of pretrial research.

> *"Research is formalized curiosity. It is poking and prying with a purpose."*
>
> Zora Neale Hurston, 1942

However, there are many areas of the pretrial phase of a defendant's case that are in need of additional helpful research. For example, while Professor Doug Colbert has created groundbreaking and important research on the importance of defense attorneys at bail, and while the Kentucky Department of Public Advocacy has put that research into practice through a concentrated effort toward advancing pretrial advocacy, there is relatively little else on this very important topic. Similarly, other areas under the umbrella of pretrial reform, such as a police officer's decision to arrest or cite through a summons, the prosecutor's decision to charge, early decisions dealing with specialty courts, and diversion, suffer from a relative lack of empirical research. This is true in the legal field as well, as only a handful of scholars have recently begun to focus

again on fundamental legal principles or on how state laws can help or hinder our intent to follow evidence-based pretrial practices. In sum, there are still many questions that, if answered through research, would help guide us toward creating bail systems that are the most effective in maximizing release, public safety, and court appearance. Moreover, there exists today even a need to better compile, categorize, and disseminate the research that we do have. To that end, both the National Institute of Justice and the Pretrial Justice Institute have recently created comprehensive bibliographies on their websites.

Current Research – Special Mention

One strand of current pretrial research warranting special mention, however, is research primarily focusing on one or both of the two following categories: (1) empirical risk assessment; and (2) the effect of release type on pretrial outcomes, including the more nuanced question of the effect of specific conditions of release on pretrial outcomes. The two topics are related, as often the data sets compiled to create empirical risk instruments contain the sort of data required to answer the questions concerning release type and conditions as well as the effects of conditional release or detention on risk itself. The more nuanced subset of how conditions of release affect pretrial outcomes can become quite complicated when we think about differential supervision strategies including questions of dosage, e.g., how much drug testing must we order (if any) to achieve the optimal pretrial court appearance and public safety rates?

Empirical Risk Assessment Instruments

Researchers creating empirical pretrial risk assessment instruments take large amounts of defendant data and identify which specific factors are statistically related and how strongly they are related to defendant pretrial misconduct. Ever since the mid-20th century, primarily in response to the United States Supreme Court's opinion in *Stack v. Boyle,* states have enacted into their laws factors judges are supposed to consider in making a release or detention decision. For the most part, these factors were created using logic and later some research from the 1960s showing the value of community ties to the pretrial period. Unfortunately, however, little to no research existed to demonstrate which of the many enacted factors were actually predictive of pretrial misconduct and at what strength. Often, judges relied on one particular factor – the current charge or sometimes the charge and police affidavit – to make their decisions. Over the years, single jurisdictions, such as counties, occasionally created risk instruments

using generally accepted social science research methods, but their limited geographic influence and sometimes their lack of data from which to test multiple variables meant that research in this area spread slowly.

In 2003, however, Dr. Marie VanNostrand created the Virginia Pretrial Risk Assessment Instrument, most recently referred to by Dr. VanNostrand and others as simply the "Virginia Model," which was ultimately tested and validated in multiple Virginia jurisdictions and then deployed throughout the state. Soon after, other researchers developed other multi-jurisdictional risk instruments, including Kentucky, Ohio, Colorado, Florida, and the federal system, and now other American jurisdictions, including single counties, are working on similar instruments. Still others are "borrowing" existing instruments for use on local defendants while performing the process of validating them for their local population. Most recently, in November 2013, researchers sponsored by the Laura and John Arnold Foundation announced the creation of a "national" risk instrument, capable of accurately predicting pretrial risk (including risk of violent criminal activity) in virtually any American jurisdiction due to the extremely large database used to create it.

In its 2012 issue brief titled, *Pretrial Risk Assessment 101: Science Provides Guidance on Managing Defendants*, PJI and BJA summarize the typical risk instrument as follows:

> A pretrial risk assessment instrument is typically a one-page summary of the characteristics of an individual that presents a score corresponding to his or her likelihood to fail to appear in court or be rearrested prior to the completion of their current case. Instruments typically consist of 7-10 questions about the nature of the current offense, criminal history, and other stabilizing factors such as employment, residency, drug use, and mental health.
>
> Responses to the questions are weighted, based on data that shows how strongly each item is related to the risk of flight or rearrest during pretrial release. Then the answers are tallied to produce an overall risk score or level, which can inform the judge or other decisionmaker about the best course of action.[67]

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[67] *Pretrial Risk Assessment 101: Science Provides Guidance on Managing Defendants* (PJI/BJA 2012) (internal footnote omitted).

Using a pretrial risk assessment instrument is an evidence-based practice, and to the extent that it helps judges with maximizing the release of bailable defendants and identifying those who can lawfully be detained, it is a legal and evidence-based practice. Nevertheless, it is a relatively new practice – it is too new for detailed discussion in the current ABA Criminal Justice Standards on Pretrial Release – and so the fast-paced research surrounding these instruments must be scrutinized and our shared knowledge constantly updated to provide for the best application of these powerful tools. In 2011, Dr. Cynthia Mamalian authored *The State of the Science of Pretrial Risk Assessment*, and noted many of the issues (including "methodological challenges") that surround the creation and implementation of these instruments.[68]

Bail and the Aberrational Case

Social scientists primarily deal with aggregate patterns of behavior rather than with individual cases, but the latter is often what criminal justice professionals are used to. Cases that fall outside of a particular observable pattern might be called "outliers" or "aberrations" by social scientists and thus disregarded by the research that is most relevant to bail. Unfortunately, however, it is often these aberrational cases – typically those showing pretrial misbehavior – that drive public policy.

Thus, when making policy decisions about bail it is important for decision makers to embrace perspective by also studying aggregates. By looking at a problem from a distance, one can often see that the single episode that brought a particular case to the pretrial justice discussion table may not present the actual issue needing improvement. If the single case represents an aggregate pattern, however, or if that case illustrates some fundamental flaw in the system that demands correction, then that case may be worthy of further study.

In the aggregate, very few defendants misbehave while released pretrial (for example, the D.C. Pretrial Services Agency reports that in 2012, 89% of released defendants were arrest-free during their pretrial phase, and that only 1% of those arrested were for violent crimes; likewise, Kentucky reports a 92% public safety rate), and yet occasionally defendants will commit heinous crimes under all forms of supervision, including secured detention. In the aggregate, most people show up for court (again, D.C. Pretrial reports that 89% of defendants did not miss a single court date; likewise, Kentucky reports a 90% court appearance rate), and yet occasionally some high profile defendant will not appear, just as fifty may not show up for traffic court on the same day. In the aggregate, virtually all defendants will ultimately be released back into our communities and thus can be safety supervised within our communities while awaiting the disposition of

[68] *See* Cynthia A. Mamalian, *State of the Science of Pretrial Risk Assessment*, at 26 (PJI/BJA 2011).

their cases, and yet occasionally there are defendants who are so risky that they must be detained.

Sources and Resources: Tara Boh Klute & Mark Heyerly, *Report on Impact of House Bill 463: Outcomes, Challenges, and Recommendations* (KY Pretrial Servs. 2012); Michael G. Maxfield & Earl Babbie, Research Methods for Criminal Justice and Criminology (Wadsworth, 6th ed. 2008); D.C. Pretrial statistics found at http://www.psa.gov/.

Beyond those issues, however, is the somewhat under-discussed topic of what these "risk-based" instruments mean for states that currently have entire bail schemes created without pure notions of risk in mind. For example, many states have preventive detention provisions in their constitutions denying the right to bail for certain defendants, but often these provisions are tied primarily to the current charge or the charge and some criminal precondition. The ability to better recognize high-risk defendants, who perhaps should be detained but who, because of their charge, are not detainable through the available "no bail" process, has caused these states to begin re-thinking their bail schemes to better incorporate risk. The general move from primarily a charge-and-resource-based bail system to one based primarily on pretrial risk automatically raises questions as to the adequacy of existing statutory and constitutional provisions.

Effects of Release Types and Conditions on Pretrial Outcomes

The second category of current research – the effect of release type as well as the effect of individual conditions on pretrial outcomes – continues to dominate discussions about what is next in the field. Once we know a particular defendant's risk profile, it is natural to ask "what works" to then mitigate that risk. The research surrounding this topic is evolving rapidly. Indeed, during the writing of this paper, the Pretrial Justice Institute released a rigorous study indicating that release on a secured (money paid up front) bond does nothing for public safety or court appearance compared to release on an unsecured (money promised to be paid only if the defendant fails to appear) bond, but that secured bonds have a significant impact on jail bed use through their tendency to detain defendants pretrial. Likewise, in November 2013, the Laura and John Arnold Foundation released its first of several research studies focusing on the impact of pretrial supervision. Though admittedly lacking detail in important areas, that study suggested that moderate and higher risk defendants who were supervised were significantly more likely to show up for court than non-supervised defendants.

In 2011, VanNostrand, Rose, and Weibrecht summarized the then-existing research behind a variety of release types, conditions, and differential supervision strategies, including court date notification, electronic monitoring, pretrial supervision and supervision with alternatives to detention, release types based on categories of bail bonds, and release guidelines, and that summary document, titled *State of the Science of Pretrial Release Recommendations and Supervision,* remains an important foundational resource for anyone focusing on the topic. Nevertheless, as the Pretrial Justice Institute explained in its conclusion to that report, we have far to go before we can confidently identify legal and evidence-based conditions and supervision methods:

> Great strides have been made in recent years to better inform [the pretrial release decision], both in terms of what is appropriate under the law and of what works according to the research, and to identify which supervision methods work best for which defendants.
>
> As this document demonstrates, however, there is still much that we do not know about what kinds of conditions are most effective. Moreover, as technologies advance to allow for the expansion of potential pretrial release conditions and the supervision of those conditions, we can anticipate that legislatures and courts will be called upon to define the limits of what is legally appropriate.[69]

Application and Implications

Applying the research has been a major component of jurisdictions currently participating in the National Institute of Correction's (NIC's) Evidence-Based Decision Making Initiative, a collaborative project among the Center for Effective Public Policy, the Pretrial Justice Institute, the Justice Management Institute, and the Carey Group. The seven jurisdictions piloting the NIC's collaborative "Framework," which has been described as providing a "purpose and a process" for applying evidence-based decision making to all decision points in the justice system, are actively involved in applying research and evidence to real world issues with the aim toward reducing harm and victimization while maintaining certain core justice system values. Those Framework jurisdictions focusing on the

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[69] Marie VanNostrand, Kenneth J. Rose, & Kimberly Weibrecht, *State of the Science of Pretrial Release Recommendations and Supervision*, at 42 (conclusion by PJI) (PJI/BJA 2011).

pretrial release and detention decision are learning first hand which areas have sufficient research to fully inform pretrial improvements and which areas have gaps in knowledge, thus signifying the need for more research. Their work will undoubtedly inform the advancement of pretrial research in the future.

Finally, the weaving of the law with the research into pretrial application has the potential to itself raise significantly complex issues. For example, if GPS monitoring is deemed by the research to be ineffective, is it not then excessive under the 8th Amendment? If a secured money condition does nothing for public safety or court appearance, is it not then irrational, and thus also a violation of a defendant's right to due process, for a judge to set it? If certain release conditions actually increase a lower risk defendant's chance of pretrial misbehavior, can imposing them ever be considered lawful? These questions, and others, will be the sorts of questions ultimately answered by future court opinions.

What Does the Pretrial Research Tell Us?

Pretrial research is crucial for telling us what works to achieve the purposes of bail, which the law and history explain are to maximize release while simultaneously maximizing public safety and court appearance. All pretrial research informs, but the best research helps us to implement laws, policies, and practices that strive to achieve all three goals. Each generation of bail or pretrial reform has a body of research literature identifying areas in need of improvement and creating a meeting of minds surrounding potential solutions to pressing pretrial issues. This current generation is no different, as we see a growing body of literature illuminating poor laws, policies, and practices while also demonstrating evidence-based solutions that are gradually being implemented across the country.

Nevertheless, in the field of pretrial research there are still many areas requiring attention, including areas addressed in this chapter such as risk assessment, risk management, the effects of money bonds, cost/benefit analyses, impacts and effects of pretrial detention, and racial disparity as well as areas not necessarily addressed herein, such as money bail forfeitures, fugitive recovery, and basic data on misdemeanor cases.

Most of us are not research producers. We are, however, research consumers. Accordingly, to further the goal of pretrial justice we must understand how rapidly the research is evolving, continually update our knowledge base of relevant research, and yet weed out the research that is biased, flawed, or

otherwise unacceptable given our fundamental legal foundations. We must strive to understand the general direction of the pretrial research and recognize that a change in direction may require changes in laws, policies, and practices to keep up. Most importantly, we must continue to support pretrial research in all its forms, for it is pretrial research that advances the field.

Additional Sources and Resources: Steve Aos, Marna Miller, & Elizabeth Drake, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* (WSIPP 2006); Earl Babbie & Lucia Benaquisto, *Fundamentals of Social Research: Second Canadian Edition* (Cengage Learning 2009); Bernard Botein, *The Manhattan Bail Project: Its Impact on Criminology and the Criminal Law Processes,* 43 Tex. L. Rev. 319 (1964-65); Kristin Bechtel, John Clark, Michael R. Jones, & David J. Levin, *Dispelling the Myths, What Policy Makers Need to Know About Pretrial Research* (PJI, 2012); John Clark, *A Framework for Implementing Evidence-Based Practices in Pretrial Services,* Topics in Cmty. Corr. (2008); Thomas H. Cohen & Tracey Kyckelhahn, *Felony Defendants in Large Urban Counties, 2006* (BJS 2010); Thomas Cohen & Tracey Kyckelhahn, *Data Advisory: State Court Processing Statistics Data Limitations* (BJS 2010); Elsa de Haas, *Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275* (AMS Press, Inc., New York 1966); *Evidence-Based Practices in the Criminal Justice System (Annotated Bibliography)* (NIC updated 2013); Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia,* 102 Univ. of Pa. L. Rev. 1031 (1954); Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964* (DOJ/Vera Found. 1964); Michael R. Jones, *Pretrial Performance Measurement: A Colorado Example of Going from the Ideal to Everyday Practice* (PJI 2013); Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (PJI Oct. 2013); *Laura and John Arnold Foundation Develops National Model for Pretrial Risk Assessments* (Nov. 2013) found at http://www.arnoldfoundation.org/laura-and-john-arnold-foundation-develops-national-model-pretrial-risk-assessments; Christopher T. Lowenkamp & Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes* (Laura & John Arnold Found. 2013); Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (Laura & John Arnold Found. 2013); Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (Laura & John Arnold Found. 2013); Michael G. Maxfield & Earl Babbie, *Research Methods for Criminal Justice and Criminology* (Wadsworth, 6th ed. 2008); *National Conference on Bail and Criminal Justice, Proceedings and Interim Report* (Washington, D.C. 1965); *National Symposium on Pretrial Justice: Summary Report of Proceedings* (PJI/BJS 2011); Mary T. Phillips, *A Decade of Bail Research in*

New York City (N.Y. NYCCJA 2012); Roscoe Pound & Felix Frankfurter (Eds.), *Criminal Justice in Cleveland* (Cleveland Found. 1922); Marie VanNostrand, *Assessing Risk Among Pretrial Defendants In Virginia: The Virginia Pretrial Risk Assessment Instrument* (VA Dept. Crim. Just. Servs. 2003); Marie VanNostrand, *Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC 2007).

Chapter 5: National Standards on Pretrial Release

Pretrial social science research tells us what works to further the goals of bail. History and the law tell us that the goals of bail are to maximize release while simultaneously maximizing public safety and court appearance, and the law provides a roadmap of how to constitutionally deny bail altogether through a transparent and fair detention process. If this knowledge was all that any particular jurisdiction had to use today, then its journey toward pretrial justice might be significantly more arduous than it really is. But it is not so arduous, primarily because we have national best practice standards on pretrial release and detention, which combine the research and the law (which is intertwined with history) to develop concrete recommendations on how to administer bail.

In the wake of the 1964 National Conference on Bail and Criminal Justice and the 1966 Federal Bail Reform Act, various organizations began issuing standards designed to address relevant pretrial release and detention issues at a national level. The American Bar Association (ABA) was first in 1968, followed by the National Advisory Committee on Criminal Justice, the National District Attorneys Association, and finally the National Association of Pretrial Services Agencies (NAPSA). The NAPSA Standards, in particular, provide important detailed provisions dealing with the purposes, roles, and functions of pretrial services agencies.

The ABA Standards

Among these sets of standards, however, the ABA Standards stand out. Their preeminence is based, in part, on the fact that they "reflect[] a consensus of the views of representatives of all segments of the criminal justice system,"[70] which includes prosecutors, defense attorneys, academics, and judges, as well as various groups such as the National District Attorneys Association, the National Association of Criminal Defense Lawyers, the National Association of Attorneys General, the U.S. Department of Justice, the Justice Management Institute, and other notable pretrial scholars and pretrial agency professionals.

More significant, however, is the justice system's use of the ABA Criminal Justice Standards as important sources of authority. The ABA's Standards have been

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[70] Martin Marcus, *The Making of the ABA Criminal Justice Standards, Forty Years of Excellence,* 23 Crim. Just. (Winter 2009).

either quoted or cited in more than 120 U.S. Supreme Court opinions, approximately 700 federal circuit court opinions, over 2,400 state supreme court opinions, and in more than 2,100 law journal articles. By 1979, most states had revised their statutes to implement some part of the Standards, and many courts had used the Standards to implement new court rules. According to Judge Martin Marcus, Chair of the ABA Criminal Justice Standards Committee, "[t]he Standards have also been implemented in a variety of criminal justice projects and experiments. Indeed, one of the reasons for creating a second edition of the Standards was an urge to assess the first edition in terms of the feedback from such experiments as pretrial release projects."[71]

> *"The Court similarly dismisses the fact that the police deception which it sanctions quite clearly violates the American Bar Association's Standards for Criminal Justice – Standards which the Chief Justice has described as 'the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history,' and which this Court frequently finds helpful."*
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> *Moran v. Burbine*, 475 U.S. 412 (1986) (Stevens, J. dissenting)

The ABA's process for creating and updating the Standards is "lengthy and painstaking," but the Standards finally approved by the ABA House of Delegates (to become official policy of the 400,000 member association) "are the result of the considered judgment of prosecutors, defense lawyers, judges, and academics who have been deeply involved in the process, either individually or as representatives of their respective associations, and only after the Standards have been drafted and repeatedly revised on more than a dozen occasions, over three or more years."[72]

Best practices in the field of pretrial release are based on empirically sound social science research as well as on fundamental legal principles, and the ABA Standards use both to provide rationales for its recommendations. For example, in recommending that commercial sureties be abolished, the ABA relies on numerous critiques of the money bail system going back nearly 100 years, social science experiments, law review articles, and various state statutes providing for its abolition. In recommending a presumption of release on recognizance and

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[71] *Id.* (internal quotation omitted).

[72] *Id.*

that money not be used to protect public safety, the ABA relies on United States Supreme Court opinions, findings from the Vera Foundation's Manhattan Bail Project, discussions from the 1964 Conference on Bail and Criminal Justice, Bureau of Justice Statistics data, as well as the *absence* of evidence, i.e., "the absence of any relationship between the ability of a defendant to post a financial bond and the risk that a defendant may pose to public safety."[73]

The ABA Standards provide recommendations spanning the entirety of the pretrial phase of the criminal case, from the decision to release on citation or summons, to accountability through punishment for pretrial failure. They are based, correctly, on a "bail/no bail" or "release/detain" model, designed to fully effectuate the release of bailable defendants while providing those denied bail with fair and transparent due process hearing prior to detention.

Drafters of the 2011 Summary Report to the National Symposium on Pretrial Justice recognized that certain fundamental features of an ideal pretrial justice system are the same features that have been a part of the ABA Standards since they were first published in 1968. And while that Report acknowledged that simply pointing to the Standards is not enough to change the customs and habits built over 100 years of a bail system dominated by secured money, charge versus risk, and profit, the Standards remain a singularly important resource for all pretrial practitioners. Indeed, given the comprehensive nature of the ABA Standards, jurisdictions can at least use them to initially identify potential areas for improvement by merely holding up existing policies, practices, and even laws to the various recommendations contained therein.

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[73] *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007), Std. 10-5.3 (a) (commentary) at 111.

Chapter 6: Pretrial Terms and Phrases

The Importance of a Common Vocabulary

It is only after we know the history, the law, the research, and the national standards that we can fully understand the need for a common national vocabulary associated with bail. The Greek philosopher Socrates correctly stated that, "The beginning of wisdom is a definition of terms." After all, how can you begin to discuss society's great issues when the words that you apply to those issues elude substance and meaning? But beyond whatever individual virtue you may find in defining your own terms, the undeniable merit of this ancient quote fully surfaces when applied to dialogue with others. It is one thing to have formed your own working definition of the terms "danger" or "public safety," for example, but your idea of danger and public safety can certainly muddle a conversation if another person has defined the terms differently. This potential for confusion is readily apparent in the field of bail and pretrial justice, and it is the wise pretrial practitioner who seeks to minimize it.

Minimizing confusion is necessary because, as noted previously, bail is already complex, and the historically complicated nature of various terms and phrases relating to bail and pretrial release or detention only adds to that complexity, which can sometimes lead to misuse of those terms and phrases. Misuse, in turn, leads to unnecessary quibbling and distraction from fundamental issues in the administration of bail and pretrial justice. This distraction is multiplied when the definitions originate in legislatures (for example, by defining bail statutorily as an amount of money) or court opinions (for example, by articulating an improper or incomplete purpose of bail). Given the existing potential for confusion, avoiding further complication is also a primary reason for finding consensus on bail's basic terms and phrases.

As also noted previously, bail is a field that is changing rapidly. For nearly 1,500 years, the administration of bail went essentially unchanged, with accused persons obtaining pretrial freedom by pledging property or money, which, in turn, would be forfeited if those persons did not show up to court. By the late 1800s, however, bail in America had changed from the historical personal surety system to a commercial surety system, with the unfortunate consequence of solidifying money at bail while radically transforming money's use from a condition subsequent (i.e., using unsecured bonds) to a condition precedent (i.e.,

using secured bonds) to release. Within a mere 20 years after the introduction of the commercial surety system in America, researchers began documenting abuses and shortcomings associated with that system based on secured financial conditions. By the 1980s, America had undergone two generations of pretrial reform by creating alternatives to the for-profit bail bonding system, recognizing a second constitutionally valid purpose for the government to impose restrictions on pretrial freedom, and allowing for the lawful denial of bail altogether based on extreme risk. These are monumental changes in the field of pretrial justice, and they provide further justification for agreeing on basic definitions to keep up with these major developments.

Finally, bail is a topic of increasing interest to criminal justice researchers, and criminal justice research begins with conceptualizing and operationalizing terms in an effort to collect and analyze data with relevance to the field. For example, until we all agree on what "court appearance rates" mean, we will surely struggle to agree on adequate ways to measure them and, ultimately, to increase them. In the same way, as a field we must agree on the meaning and purpose of so basic a term as "bail."

More important than achieving simple consensus, however, is that we agree on meanings that reflect reality or truth. Indeed, if wisdom begins with a definition of terms, wisdom is significantly furthered when those definitions hold up to what is real. For too long, legislatures, courts, and various criminal justice practitioners have defined bail as an amount of money, but that is an error when held up to the totality of the law and practice through history. And for too long legislatures, courts, and criminal justice practitioners have said that the purpose of bail is to provide reasonable assurance of public safety and/or court appearance, but that, too, is an error when held up against the lenses of history and the law. Throughout history, the definition of "bail" has changed to reflect what we know about bail, and the time to agree on its correct meaning for this generation of pretrial reform is now upon us.

The Meaning and Purpose of "Bail"

For the legal and historical reasons articulated above, bail should never be defined as money. Instead, bail is best defined in terms of release, and most appropriately as a process of conditional release. Moreover, the purpose of bail is not to provide reasonable assurance of court appearance and public safety – that is the province and purpose of conditions of bail or limitations on pretrial freedom. The purpose of bail, rather, is to effectuate and maximize release. There

is "bail" – i.e., a process of release – and there is "no bail," – a process of detention. Constitutionally speaking, "bail" should always outweigh "no bail" because, as the U.S. Supreme Court has explained, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[74]

Historically, the term bail derives from the French "baillier," which means to hand over, give, entrust, or deliver. It was a delivery, or bailment, of the accused to the surety – the jailer of the accused's own choosing – to avoid confinement in jail. Indeed, even until the 20th century, the surety himself or herself was often known as the "bail" – the person to whom the accused was delivered. Unfortunately, however, for centuries money was also a major part of the bail agreement. Because paying money was the primary promise underlying the release agreement, the coupling of "bail" and money meant that money slowly came to be equated with the release process itself. This is unfortunate, as money at bail has never been more than a condition of bail – a limitation on pretrial freedom that must be paid upon forfeiture of the bond agreement. But the coupling became especially misleading in America after the 1960s, when the country attempted to move away from its relatively recent adoption of a secured money bond and toward other methods for releasing defendants, such as release on recognizance and release on nonfinancial conditions.

Legally, bail as a process of release is the only definition that (1) effectuates American notions of liberty from even colonial times; (2) acknowledges the rationales for state deviations from more stringent English laws in crafting their constitutions (and the federal government in crafting the Northwest Territory Ordinance of 1787); and (3) naturally follows from various statements equating bail with release from the United States Supreme Court from *United States v. Barber*[75] and *Hudson v. Parker,*[76] to *Stack v. Boyle*[77]

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[74] *United States v. Salerno,* 481 U.S. 739, 755 (1987).

[75] 140 U.S. 164, 167 (1891) ("[I]n criminal cases it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial if the government can be assured of his presence at that time . . . .").

[76] 156 U.S 277, 285 (1895) ("The statutes of the United States have been framed upon the theory that a person accused of a crime shall not, until he has been finally adjudged guilty . . . be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail . . . .").

[77] 342 U.S. 1, 4 (1951) ("[F]ederal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction . . . .").

and *United States v. Salerno*.[78]

Bail as a process of release accords not only with history and the law, but also with scholars' definitions (in 1927, Beeley defined bail as the release of a person from custody), the federal government's usage (calling bail a process in at least one document), and use by organizations such as the American Bar Association, which has quoted Black's Law Dictionary definition of bail as a "process by which a person is released from custody."[79] States with older (and likely outdated) bail statutes often still equate bail with money, but many states with newer provisions, such as Virginia (which defines bail as "the pretrial release of a person from custody upon those terms and conditions specified by order of an appropriate judicial officer"),[80] Colorado (which defines bail as security like a pledge or a promise, which can include release without money),[81] and Florida (which defines bail to include "any and all forms of pretrial release"[82]) have enacted statutory definitions to recognize bail as something more than simply money. Moreover, some states, such as Alaska,[83] Florida,[84] Connecticut,[85] and Wisconsin,[86] have constitutions explicitly incorporating the word "release" into their right-to-bail provisions.

> *"In general, the term 'bail' means the release of a person from custody upon the undertaking, with or without one or more persons for him, that he will abide the judgment and orders of the court in appearing and answering the charge against him. It is essentially a delivery or bailment of a person to his sureties—the jailers of his own choosing—so that he is placed in their friendly custody instead of remaining in jail."*
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> Arthur Beeley, 1927

A broad definition of bail, such as "release from governmental custody" versus simply release from jail, is also appropriate to account for the recognition that

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[78] 481 U.S. 739, 755 (1987) ("In our society, liberty is the norm . . . .").
[79] *Frequently Asked Questions About Pretrial Release Decision Making* (ABA 2012).
[80] Va. Code. § 19.2-119 (2013).
[81] Colo. Rev. Stat. § 16-1-104 (2013).
[82] Fla. Stat. § 903.011 (2013).
[83] Alaska Const. art. I, § 11.
[84] Fla. Const. art. I, § 14.
[85] Conn. Const. art. 1, § 8.
[86] Wis. Const. art. 1, § 8.

bail, as a process of conditional release prior to trial, includes many mechanisms – such as citation or "station house release" – that effectuate release apart from jails and that are rightfully considered in endeavors seeking to improve the bail process.

The Media's Use of Bail Terms and Phrases

Much of what the public knows about bail comes from the media's use, and often misuse, of bail terms and phrases. A sentence from a newspaper story stating that "the defendant was released without bail," meaning perhaps that the defendant was released without a secured financial condition or on his or her own recognizance, is an improper use of the term "bail" (which itself means release) and can create unnecessary confusion surrounding efforts at pretrial reform. Likewise, stating that someone is being "held on $50,000 bail" not only misses the point of bail equaling release, but also equates money with the bail process itself, reinforcing the misunderstanding of money merely as a condition of bail – a limitation of pretrial freedom which, like all such limitations, must be assessed for legality and effectiveness in any particular case. For several reasons, the media continues to equate bail with money and tends to focus singularly on the amount of the financial condition (as opposed to any number of non-financial conditions) as a sort-of barometer of the justice system's sense of severity of the crime. Some of those reasons are directly related to faulty use of terms and phrases by the various states, which define terms differently from one another, and which occasionally define the same bail term differently at various places within a single statute.

In the wake of the 2011 National Symposium on Pretrial Justice, the Pretrial Justice Working Group created a Communications Subcommittee to, among other things, create a media campaign for public education purposes. To effectively educate the public, however, the Subcommittee recognized that some measure of media education also needed to take place. Accordingly, in 2012 the John Jay College Center on Media, Crime, and Justice, with support from the Public Welfare Foundation, held a symposium designed to educate members of the media and to help them identify and accurately report on bail and pretrial justice issues. Articles written by symposium fellows are listed as they are produced, and continue to demonstrate how bail education leads to more thorough and accurate coverage of pretrial issues.

Sources and Resources: John Jay College and Public Welfare Foundation Symposium resources, found at http://www.thecrimereport.org/conferences/past/2012-05-jailed-without-conviction-john-jaypublic-welfare-sym. Pretrial Justice Working Group website and materials, found at http://www.pretrial.org/infostop/pjwg/.

To say that bail is a process of release and that the purpose of bail is to maximize release is not completely new (researchers have long described an "effective" bail decision as maximizing or fostering release) and may seem to be only a subtle shift from current articulations of meaning and purpose. Nevertheless, these ideas have not taken a firm hold in the field. Moreover, certain consequences flow from whether or not the notions are articulated correctly. In Colorado, for example, where, until recently, the legislature incorrectly defined bail as an amount of money, bail insurance companies routinely said that the sole function of bail was court appearance (which only makes sense when bail and money are equated, for legally the only purpose of money was court appearance), and that the right to bail was the right merely to have an amount of money set – both equally untenable statements of the law. Generally speaking, when states define bail as money their bail statutes typically reflect the definition by overemphasizing money over all other conditions throughout the bail process. This, in turn, drives individual misperceptions about what the bail process is intended to do.

Likewise, when persons inaccurately mix statements of purpose for bail with statements of purpose for conditions of bail, the consequences can be equally misleading. For example, when judges inaccurately state that the purpose of bail is to protect public safety (again, public safety is a constitutionally valid purpose for any particular condition of bail or limitation of pretrial freedom, not for bail itself), those judges will likely find easy justification for imposing unattainable conditions leading to pretrial detention – for many, the safest pretrial option available. When the purpose of bail is thought to be public safety, then the emphasis will be on public safety, which may skew decisionmakers toward conditions that lead to unnecessary pretrial detention. However, when the purpose focuses on release, the emphasis will be on pretrial freedom with conditions set to provide a reasonable assurance, and not absolute assurance, of court appearance and public safety.

Thus, bail defined as a process of release places an emphasis on pretrial release and bail conditions that are attainable at least in equal measure to their effect on court appearance and public safety. In a country, such as ours, where bail may be constitutionally denied, a focus on bail as release when the right to bail is granted is crucial to following *Salerno's* admonition that pretrial liberty be our nation's norm. Likewise, by correctly stating that the purpose of any particular bail condition or limitation on pretrial freedom is tied to the constitutionally valid rationales of public safety and court appearance, the focus is on the particular

condition – such as GPS monitoring or drug testing – and its legality and efficacy in providing reasonable assurance of the desired outcome.

Other Terms and Phrases

There are other terms and phrases with equal need for accurate national uniformity. For example, many states define the word "bond" differently, sometimes describing it in terms of one particular type of bail release or condition, such as through a commercial surety. A bond, however, occurs whenever the defendant forges an agreement with the court, and can include an additional surety, or not, depending on that agreement. Prior definitions – and thus categories of bail bonds – have focused primarily on whether or how those categories employ money as a limitation on pretrial freedom, thus making those definitions outdated. Future use of the term bond should recognize that money is only one of many possible conditions, and, in light of legal and evidence-based practices, should take a decidedly less important role in the agreement forged between a defendant and the court. Accordingly, instead of describing a release by using terms such as "surety bond," "ten percent bond," or "personal recognizance bond," pretrial practitioners should focus first on release or detention, and secondarily address conditions (for release is always conditional) of the release agreement.

Other misused terms include: "pretrial" and "pretrial services," which are often inaccurately used as a shorthand method to describe pretrial services agencies and/or programs instead of their more appropriate use as (1) a period of time, and (2) the actual services provided by the pretrial agency or program; "court appearance rates" (and, concomitantly, "failure to appear rates") which is defined in various ways by various jurisdictions; "the right to bail," "public safety," "sureties" or "sufficient sureties," and "integrity of the judicial process." There have been attempts at creating pretrial glossaries designed to bring national uniformity to these terms and phrases, but acceptance of the changes in usage has been fairly limited. Until that uniformity is reached, however, jurisdictions should at least recognize the extreme variations in definitions of terms and phrases, question whether their current definitions follow from a study of bail history, law, and research, and be open to at least discussing the possibility of changing those terms and phrases that are misleading or otherwise in need of reform.

Additional Sources and Resources: Black's Law Dictionary (9th ed. 2009); *Criminal Bail: How Bail Reform is Working in Selected District Courts*, U.S. GAO Report to the Subcomm. on Courts, Civ. Liberties, and the Admin. of Justice (1987); Bryan A. Garner, A Dictionary of Modern Legal Usage (Oxford Univ. Press, 3rd ed. 1995); Timothy R. Schnacke, Michael R. Jones, & Claire M. B. Brooker, *Glossary of Terms and Phrases Relating to Bail and the Pretrial Release or Detention Decision* (PJI 2011) (currently available electronically on the PJI website).

Chapter 7: Application – Guidelines for Pretrial Reform

In a recent op-ed piece for *The Crime Report*, Timothy Murray, then Executive Director of the Pretrial Justice Institute, stated that "the cash-based model [relying primarily on secured bonds] represents a tiered system of justice based on personal wealth, rather than risk, and is in desperate need of reform."[87] In fact, from what we know about the history of bail, because a system of pretrial release and detention based on secured bonds administered primarily through commercial sureties causes abuses to both the "bail" and "no bail" sides of our current dichotomy, reform is not only necessary – it is ultimately inevitable. But how should we marshal our resources to best accomplish reform? How can we facilitate reform across the entire country? What can we do to fully understand pretrial risk, and to fortify our political will to embrace it? And how can we enact and implement laws, policies, and practices aiming at reform so that the resulting cultural change will actually become firmly fixed?

Individual Action Leading to Comprehensive Cultural Change

The answers to these questions are complex because every person working in or around the pretrial field has varying job responsibilities, legal boundaries, and, presumably, influence over others. Nevertheless, pretrial reform in America requires all persons – from entry-level line officers and pretrial services case workers to chief justices and governors – to embrace and promote improvements within their spheres of influence while continually motivating others outside of those spheres to reach the common goal of achieving a meaningful top to bottom (or bottom to top) cultural change. The common goal is collaborative, comprehensive improvement toward maximizing release, public safety, and court appearance through the use of legal and evidence-based practices, but we will only reach that goal through individual action.

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[87] Timothy Murray, *Why the Bail Bond System Needs Reform*, The Crime Report (Nov. 19, 2013) found at http://www.thecrimereport.org/viewpoints/2013-11-why-the-bail-bond-system-needs-reform

Individual Decisions

Individual action, in turn, starts with individual decisions. First, every person working in the field must decide whether pretrial improvements are even necessary. It is this author's impression, along with numerous national and local organizations and entities, that improvements are indeed necessary, and that the typical reasons given to keep the customary yet damaging practices based on a primarily money-based bail system are insufficient to reject the national movement toward meaningful pretrial reform. The second decision is to resolve to educate oneself thoroughly in bail and to make the necessary improvements by following the research, wherever that research goes and so long as it does not interfere with fundamental legal foundations. Essentially, the second decision is to follow a legal and evidence-based decision making model for pretrial improvement. By following that model, persons (or whole jurisdictions working collaboratively) will quickly learn (1) which particular pretrial justice issues are most pressing and in need of immediate improvement, (2) which can be addressed in the longer term, and (3) which require no action at all.

Third, each person must decide how to implement improvements designed to address the issues. This decision is naturally limited by the person's particular job and sphere of influence, but those limitations should not stop individual action altogether. Instead, the limitations should serve merely as motivation to recruit others outside of each person's sphere to join in a larger collaborative process. Fourth and finally, each person must make a decision to ensure those improvements "stick" by using proven implementation techniques designed to promote the comprehensive and lasting use of a research-based improvement.

Learning about improvements to the pretrial process also involves learning the nuances that make one's particular jurisdiction unique in terms of how much pretrial reform is needed. If, for example, in one single (and wildly hypothetical) act, the federal government enacted a provision requiring the states to assure that no amount of money could result in the pretrial detention of any particular defendant – a line that is a currently a crucial part of both the federal and District of Columbia bail statutes – some states would be thrust immediately into perceived chaos as their constitutions and statutes practically force bail practices that include setting high amounts of money to detain high-risk yet bailable defendants pretrial. Other states, however, might be only mildly inconvenienced, as their constitutions and statutes allow for a fairly robust preventive detention process that is simply unused. Still others might recognize that their preventive detention provisions are somewhat archaic because they rely primarily on

charge-based versus risk-based distinctions. Knowing where one's jurisdiction fits comparatively on the continuum of pretrial reform needs can be especially helpful when crafting solutions to pretrial problems. Some states underutilize citations and summonses, but others have enacted statutory changes to encourage using them more. Some jurisdictions rely heavily on money bond schedules, but some have eliminated them entirely. There is value in knowing all of this.

Individual Roles

The process of individual decision making and action will look different depending on the person and his or her role in the pretrial process. For a pretrial services assessment officer, for example, it will mean learning everything available about the history, fundamental legal foundations, research, national standards, and terms and phrases, and then holding up his or her current practices against that knowledge to perhaps make changes to risk assessment and supervision methods. Despite having little control over the legal parameters, it is nonetheless important for each officer to understand the fundamentals so that he or she can say, for example, "Yes, I know that bail should mean release and so I understand that our statute, which defines bail as money, has provisions that can be a hindrance to certain evidence-based pretrial practices. Nevertheless, I will continue to pursue those practices within the confines of current law while explaining to others operating in other jobs and with other spheres of influence how amending the statute can help us move forward." This type of reform effort – a bottom to top effort – is happening in numerous local jurisdictions across America.

> *"Once you make a decision, the universe conspires to make it happen."*
>
> Ralph Waldo Emerson

For governors or legislators, it will mean learning everything available about the history, legal foundations, research, national standards, and terms and phrases, and then also holding up the state's constitution and statutes against that knowledge to perhaps make changes to the laws to better promote evidence-based practices. It is particularly important for these leaders to know the fundamentals and variances across America so that each can say, for example, "I now understand that our constitutional provisions and bail statutes are somewhat outdated, and thus a hindrance to legal and evidence-based practices

designed to fully effectuate the bail/no bail dichotomy that is already technically a part of our state bail system. I will therefore begin working with state leaders to pursue the knowledge necessary to make statewide improvements to bail and pretrial justice so that our laws will align with broad legal and evidence-based pretrial principles and therefore facilitate straightforward application to individual cases." This type of reform effort – a top to bottom effort – is also happening in America, in states such as New York, New Jersey, Delaware, and Kentucky.

Everyone has a role to play in pretrial justice, and every role is important to the overall effort. Police officers should question whether their jurisdiction uses objective pretrial risk assessment and whether it has and uses fair and transparent preventive detention (as the International Chiefs of Police/PJI/Public Welfare Foundation's Pretrial Justice Reform Initiative asks them to do), but they should also question their own citation policies as well as the utility of asking for arbitrary money amounts on warrants. Prosecutors should continue to advocate support for pretrial services agencies or others using validated risk assessments (as the Association of Prosecuting Attorneys policy statement urges them to do), but they should also question their initial case screening policies as well as whether justice is served through asking for secured financial conditions for any particular bond at first appearance. Defense attorneys, jail administrators, sheriffs and sheriff's deputies, city and county officials, state legislators, researchers and academics, persons in philanthropies, and others should strive individually to actively implement the various policy statements and recommendations that are already a part of the pretrial justice literature, and to question those parts of the pretrial system seemingly neglected by others.

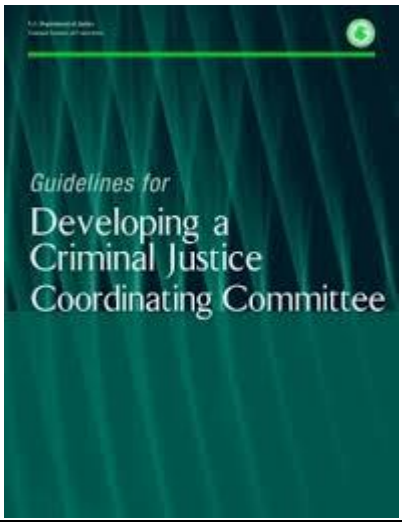
Everyone has a part to play in pretrial justice, and it means individually deciding to improve, learning what improvements are necessary, and then implementing legal and evidence-based practices to further the goals of bail. Nevertheless, while informed individual action is crucial, it is also only a means to the end of a comprehensive collaborative culture change. In this generation of pretrial reform, the most successful improvement efforts have come about when governors and legislators have sat at the same table as pretrial services officers (and everyone else) to learn about bail improvements and then to find comprehensive solutions to problems that are likely insoluble through individual effort alone.

Collaboration and Pretrial Justice

In a complicated justice system made up of multiple agencies at different levels of government, purposeful collaboration can create a powerful mechanism for discussing and implementing criminal justice system improvements. Indeed, in the National Institute of Corrections document titled *A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems,* the authors call collaboration a "key ingredient" of an evidence-based system, which uses research to achieve system goals.

Like other areas in criminal justice, bail and pretrial improvements affect many persons and entities, making collaboration between system actors and decision makers a crucial part of an effective reform strategy. Across the country, local criminal justice coordinating committees (CJCCs) are demonstrating the value of coming together with a formalized policy planning process to reach system goals, and some of the most effective pretrial justice strategies have come from jurisdictions working through these CJCCs. Collaboration allows individuals with naturally limited spheres of influence to interact and achieve group solutions to problems that are likely insoluble through individual efforts. Moreover, through staff and other resources, CJCCs often provide the best mechanisms for ensuring the uptake of research so that full implementation of legal and evidence-based practices will succeed.

The National Institute of Corrections currently publishes two documents designed to help communities create and sustain CJCCs. The first, Robert Cushman's *Guidelines for Developing a Criminal Justice Coordinating Committee* (2002), highlights the need for system coordination, explains a model for a planning and coordination framework, and describes mechanisms designed to move jurisdictions to an "ideal" CJCC. The second, Dr. Michael Jones's *Guidelines for Staffing a Criminal Justice Coordinating Committee* (2012), explains the need and advantages of CJCC staff and how that staff can help collect, digest, and synthesize research for use by criminal justice decision makers.



Judicial Leadership

Finally, while everyone has a role and a responsibility, judges must be singled out as being absolutely critical for achieving pretrial justice in America. Bail is a judicial function, and the history of bail in America has consistently demonstrated that judicial participation will likely mean the difference between pretrial improvement and pretrial stagnation. Indeed, the history of bail is replete with examples of individuals who attempted and yet failed to make pretrial improvements because those changes affected only one or two of the three goals associated with evidence-based decision making at bail, and they lacked sufficient judicial input on the three together. Judges alone are the individuals who must ensure that the balance of bail – maximizing release (through an understanding of a defendant's constitutional rights) while simultaneously maximizing public safety and court appearance (through an understanding of the constitutionally valid purposes of limiting pretrial freedom, albeit tempered by certain fundamental legal foundations such as due process, equal protection, and excessiveness, combined with evidence-based pretrial practices) – is properly maintained. Moreover, because the judicial decision to release or detain any particular defendant is the crux of the administration of bail, whatever improvements we make to other parts of the pretrial process are likely to stall if judges do not fully participate in the process of pretrial reform. Finally, judges are in the best position to understand risk, to communicate that understanding to others, and to demonstrate daily the political will to embrace the risk that is inherent in bail as a fundamental precept of our American system of justice.

Indeed, this generation of bail reform needs more than mere participation by judges; this generation needs judicial leadership. Judges should be organizing and directing pretrial conferences, not simply attending them. Judges should be educating the justice system and the public, including the media, about the right to bail, the presumption of innocence, due process, and equal protection, not the other way around.

Fortunately, American judges are currently poised to take a more active leadership role in making the necessary changes to our current system of bail. In February of 2013, the Conference of Chief Justices, made up of the highest judicial officials of the fifty states, the District of Columbia, and the various American territories, approved a resolution endorsing certain fundamental

recommendations surrounding legal and evidence-based improvements to the administration of bail. Additionally, the National Judicial College has conducted focus groups with judges designed to identify opportunities for improvement. Moreover, along with the Pretrial Justice Institute and the Bureau of Justice Assistance, the College has created a teaching curriculum to train judges on legal and evidence-based pretrial decision making. Judges thus need only to avail themselves of these resources, learn the fundamentals surrounding legal and evidence-based pretrial practice, and then ask how to effectuate the Chief Justice Resolution in their particular state.

The Chief Justice Resolution should also serve as a reminder that all types of pretrial reform include both an evidentiary and a policy/legal component – hence the term legal and evidence-based practices. Indeed, attempts to increase the use of evidence or research-based practices without engaging the criminal justice system and the general public in the legal and policy justifications and parameters for those practices may lead to failure. For example, research-based risk assessment, by itself, can be beneficial to any jurisdiction, but only if implementing it involves a parallel discussion of the legal parameters for embracing and then mitigating risk, the need to avoid other practices that undermine the benefits of assessment, and the pitfalls of attempting to fully incorporate risk into a state legal scheme that is unable to adequately accommodate it. On the other hand, increasing the use of unsecured financial conditions, coupled with a discussion of how research has shown that those conditions can increase release without significant decreases in court appearance and public safety – the three major legal purposes underlying the bail decision – can move a jurisdiction closer to model bail practices that, among other things, ensure bailable defendants who are ordered release are actually released.

Additional Sources and Resources: Association of Prosecuting Attorneys, *Policy Statement on Pretrial Justice* (2012) found at http://www.apainc.org/html/APA+Pretrial+Policy+Statement.pdf. Conference of Chief Justices Resolution 3: *Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial* Release (2013), found at http://www.pretrial.org/wp-content/uploads/2013/05/CCJ-Resolution-on-Pretrial.pdf; William F. Dressell & Barry Mahoney, *Pretrial Justice in Criminal Cases: Judges' Perspectives on Key Issues and Opportunities for Improvement* (Nat'l. Jud. College 2013); *Effective Pretrial Decision Making: A Model Curriculum for Judges* (BJA/PJI/Nat'l Jud. Coll. (2013) http://www.pretrial.org/download/infostop/Judicial%20Training.pdf; Dean L. Fixsen, Sandra F. Naoom, Karen A. Blase, Robert M. Friedman, and Frances Wallace, *Implementation Research: A Synthesis of the Literature* (Univ. S. Fla. 2005); International Chiefs of Police Pretrial Justice Reform Initiative, found at http://www.theiacp.org/Pretrial-Justice-Reform-Initiative.

Conclusion

Legal and evidence-based pretrial practices, derived from knowing the history of bail, legal foundations, and social science pretrial research, and expressed as recommendations in the national best practice standards, point overwhelmingly toward the need for pretrial improvements. Fortunately, in this third generation of American bail reform, we have amassed the knowledge necessary to implement pretrial improvements across the country, no matter how daunting or complex any particular state believes that implementation process to be. Whether the improvements are minor, such as adding an evidence-based supervision technique to an existing array of techniques, or major, such as drafting new constitutional language to allow for the fair and transparent detention of high-risk defendants without the need for money bail, the only real prerequisites to reform are education and action. This paper is designed to further the process of bail education with the hope that it will lead to informed action.

As a prerequisite to national reform, however, that bail education must be uniform. Accordingly, achieving pretrial justice in America requires everyone both inside and outside of the field to agree on certain fundamentals, such as the history of bail, the legal foundations, the importance of the research and national standards, and substantive terms and phrases. This includes agreeing on the meaning and purpose of the word "bail" itself, which has gradually evolved into a word that often is used to mean anything but its historical and legal connotation of release. Fully understanding these fundamentals of bail is paramount to overcoming our national amnesia of a system of bail that worked for centuries in England and America – an unsecured personal surety system in which bailable defendants were released, in which non-bailable defendants were detained, and in which no profit was allowed.

> *"A sound pretrial infrastructure is not just a desirable goal – it is vital to the legitimate system of government and to safer communities."*
>
> Deputy Attorney General James M. Cole (2011).

Moreover, while we have learned much from the action generated by purely local pretrial improvement projects, we must not forget the enormous need for pretrial justice across the entire country. We must thus remain mindful that meaningful American bail reform will come about only when entire American

states focus on these important issues. Anything less than an entire state's complete commitment to examine all pretrial practices across jurisdictions and levels of government – by following the research from all relevant disciplines – means that any particular pretrial practitioner's foremost duty is to continue communicating the need for reform until that complete commitment is achieved. American pretrial justice ultimately depends on reaching a tipping point among the states, which can occur only when enough states have shown that major pretrial improvements are necessary and feasible.

In 1964, Robert Kennedy stated the following:

> [O]ur present bail system inflicts hardship on defendants and it inflicts considerable financial cost on society. Such cruelty and cost should not be tolerated in any event. But when they are *needless*, then we must ask ourselves why we have not developed a remedy long ago. For it is clear that the cruelty and cost of the bail system *are* needless.[88]

Fifty years later, this stark assessment remains largely true, and yet we now have significant reason for hope that this third generation of bail reform will be America's last. For in the last 50 years, we have accumulated the knowledge necessary to replace, once and for all, this "cruel and costly" system with one that represents safe, fair, and effective administration of pretrial release and detention. We have amassed a body of research literature, of best practice standards, and of experiences from model jurisdictions that together have created both public and criminal justice system discomfort with the status quo. It is a body of knowledge that points in a single direction toward effective, evidence-based pretrial practices, and away from arbitrary, irrational, and customary practices, such as the casual use of money. We now have the information necessary to recognize and fully understand the paradox of bail. We know what to do, and how to do it. We need only to act.

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[88] Attorney General Robert F. Kennedy, Testimony on Bail Legislation Before the Subcommittee on Constitutional Rights and Improvements in the Judicial Machinery of the Senate Judiciary Committee 4 (Aug. 4, 1964) (emphasis in original) *available at* http://www.justice.gov/ag/rfkspeeches/1964/08-04-1964.pdf.

UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION

PRETRIAL JUSTICE INSTITUTE

Michael R. Jones
Washington, D.C.
October 2013

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The Pretrial Justice Institute is a non-profit organization dedicated to advancing safe, fair, and effective pretrial justice practices and policies. For more information, visit www.pretrial.org.

STUDY SUMMARY

This study was done to provide judicial officers, prosecutors, defense attorneys, sheriffs, jail administrators, county commissioners, pretrial services program directors, and other decision-makers in Colorado as well as in other states empirical evidence that can directly inform their pretrial release and detention policies and practices. Specifically, the simultaneous influence of unsecured bonds (personal recognizance bonds with a monetary amount set) and of secured bonds (surety and cash bonds) on the three most important pretrial outcomes: (1) public safety; (2) court appearance; and (3) jail bed use, were compared. The study, using data from over 1,900 defendants from 10 Colorado counties, found the following:

For defendants who were lower, moderate, or higher risk:

- Unsecured bonds are as effective at achieving public safety as are secured bonds.
- Unsecured bonds are as effective at achieving court appearance as are secured bonds.
- Unsecured bonds free up more jail beds than do secured bonds because: (a) more defendants with unsecured bonds post their bonds; and (b) defendants with unsecured bonds have faster release-from-jail times.
- Higher monetary amounts of secured bonds are associated with more pretrial jail bed use but not increased court appearance rates.
- Unsecured bonds are as effective at "fugitive-return" for defendants who have failed to appear as are secured bonds.
- Many defendants are incarcerated for the pretrial duration of their case and then released to the community upon case disposition.
- Jurisdictions can make data-guided changes to local pretrial case processing that would achieve their desired public safety and court appearance results while reserving more jail beds for unmanageably high risk defendants and sentenced offenders.
- Judicial officers now have data and law to support changing their bail setting practices to maintain their effectiveness while increasing their efficiency.

This study provides empirical evidence about the effectiveness of secured and unsecured bonds. Findings support judicial officers changing their practices to use more unsecured releases, to include unsecured bonds if currently permitted by law, to achieve the same public safety and court appearance rates while using far fewer jail beds. These unsecured bonds could be used in conjunction with an individualized bond setting hearing.

INTRODUCTION

Multiple criminal justice and government decision-makers have a role in the decision to release or detain defendants on pretrial status, either at the policy level or on a case-by case basis. Jail administrators are commonly granted authority by the court to release many defendants on their own recognizance or through the use of a money bond schedule, and those administrators are responsible for housing defendants who are not released. Pretrial services staff members perform risk assessment and information gathering, and provide the results and any release-condition recommendations to the court. Prosecutors and defense attorneys at pretrial hearings often request certain release conditions, including substance testing, electronic monitoring, or changes to a previously set monetary bond amount, based on their perception of the defendant's pretrial risk to court appearance or public safety. Judges make the final decisions about the types of bond and conditions of bond, including financial and non-financial release conditions. County commissioners or state legislators fund the staff and court and jail facilities that comprise the pretrial system and/or pass laws, but often do so with little or no evaluative feedback about the system's effectiveness or efficiency.

Whether in the role of making daily, case-by-case pretrial release or detention decisions or policy-level funding decisions, many of these criminal justice decision-makers have had to do so without scientific evidence to help guide their decisions. As a result, they may assume that the current pretrial justice process meets their standards for effectiveness and efficiency, and that the money bail system motivates defendants to return to court or to refrain from criminal activity upon release from jail pending the disposition of their case.

Researchers have recently attempted to determine to what extent, if any, secured monetary forms of pretrial release (e.g., surety or cash bonds) improve court appearance and public safety over non-monetary or unsecured forms of pretrial release (e.g., recognizance bonds). Unfortunately, for the reasons that Cohen and Kyckelhahn (2010) and Bechtel, Clark, Jones, and Levin (2012) have recently explained, researchers have not had access to data that has allowed them to determine simultaneously the effect of different bond types on the three most important pretrial outcomes: (1) public safety; (2) court appearance; and (3) pretrial release and jail bed use. To summarize, previous research has either: (a) had data or methodological limitations that limit the generalizability of the findings to other jurisdictions (see, for example, Morris, 2013; Krahl & New Direction Strategies, 2011); (b) has not sufficiently accounted for possible alternate explanations of the findings (see, for example, Block, 2005); and/or (c) was limited to measuring the effect of various forms of pretrial release on a singular outcome - court appearance, but not on both of the other two important pretrial outcomes - public safety and jail bed use (see, for example, Helland & Tabarrok, 2004; Morris, 2013). Indeed, as Bechtel et al. (2012) explain, the optimal outcome for any pretrial justice system from both an effectiveness (justice system goals) and efficiency (resource management) perspective is to:

(1) Maximize public safety
and
(2) Maximize court appearance
while
(3) Maximizing release from custody.

Achieving only one or two of these pretrial outcomes without or at the expense of realizing the remain-

der would be less optimal than achieving all three simultaneously. Indeed, Osborne and Hutchinson (2004) make a compelling case for governments to maximize results while expending the minimal public resources to achieve those results.

The purpose of this study is to overcome some of the limitations of previous research and provide information to pretrial release decision-makers and criminal justice funding decision-makers that will enable them to accomplish a win-win situation: to achieve their desired public safety and court appearance outcomes while most efficiently using their costly jail resources. Because the study uses data from multiple Colorado counties, the results are generalizable throughout Colorado. Factors that may affect the extent to which the results are generalizable outside of Colorado are addressed later in the paper.

Furthermore, due to Colorado statute's requirement of financial conditions of release, this study is an evaluation of the effect of different types of monetary bonds on public safety, court appearance, and jail bed use. As described in more detail later, some of these monetary bonds in Colorado require the defendant to post the entire monetary amount in cash or some portion thereof through a commercial bail bondsman prior to leaving jail custody, whereas other monetary bonds do not require any money to be posted prior to release.[1]

After each statistical analysis, a brief explanation of the meaning of the findings is provided. Practical implications of this study for pretrial release decision-making and policy-making are discussed in the final section.

1 This study does not evaluate the effectiveness of commercial bail bonding in achieving court appearance results, nor does it evaluate the effectiveness of pretrial services program supervision in achieving certain court appearance or public safety results. Rather, the focus is on outcomes associated with various forms of monetary bonds set by the court.

METHOD

Data for this study came from the dataset used to develop Colorado's 12-item empirically-derived pretrial risk assessment instrument, the Colorado Pretrial Assessment Tool (CPAT; Pretrial Justice Institute & JFA Institute, 2012). The dataset has hundreds of case processing and outcome variables collected on 1,970 defendants booked into 10 Colorado county jails over a 16-month period.[2] Each local jurisdiction collected data on a pre-determined, "systematic random sampling" selection schedule to minimize bias in selecting defendants and to enhance the generalizability of the findings. For example, each jurisdiction collected data at an interval of every 2nd, 4th, or 7th defendant who was booked into the jail on new charges. Over 80% of the state's population resides in the 10 counties that participated: Adams, Arapahoe, Boulder, Denver, Douglas, El Paso, Jefferson, Larimer, Mesa, and Weld.

DEFENDANTS WERE ASSESSED FOR THEIR PRETRIAL RISK, AND NEARLY 70% SCORED IN THE LOWER TWO OF FOUR RISK CATEGORIES.

Based on the CPAT's scoring procedures, 1,970 defendants in the dataset were assigned a CPAT risk score, ranging from 0 (lower risk) to 82 (higher risk), and to a corresponding risk category, ranging from 1 (lower risk) to 4 (higher risk). Some relevant data were missing for 51 defendants, so they were removed from all analyses. Thus, the final sample used in the analyses was 1,919 defendants, with 1,309 (68%) of them having been released on pretrial status prior to case disposition. Table 1 shows the percentage of released defendants and the public safety and court appearance success rates associated with each risk category.

Table 1. Average Risk Score, Percent and Number of Defendants, and Public Safety and Court Appearance Rates by Released Defendants' Risk Category

CPAT PRETRIAL RISK CATEGORY	CPAT RISK SCORE RANGE	AVERAGE CPAT RISK SCORE	PERCENT (AND NUMBER) OF DEFENDANTS	PUBLIC SAFETY RATE[a]	COURT APPEARANCE RATE[b]
1 (lower)	0 to 17	8	20% (265)	92% (243/265)	95% (252/265)
2	18 to 37	28	49% (642)	81% (517/642)	86% (549/642)
3	38 to 50	44	23% (295)	70% (205/295)	78% (231/295)
4 (higher)	51 to 82	57	8% (107)	59% (63/107)	51% (55/107)
Average/Total	0 to 82	30	100% (1,309)	79% (1,028/1,309)	83% (1,087/1,309)

a. On the CPAT and for this study, the public safety rate is defined as the percentage of defendants who did not have a prosecutorial filing in court for any new felony, misdemeanor, traffic, municipal, or petty offense that allegedly occurred during the pretrial release time period. Thus, public safety is defined very broadly as any new filing and is not limited to physical harm against a person or to felony or misdemeanor charges.
b. The court appearance rate is defined as the percentage of defendants who attended all of their court hearings during their pretrial release (i.e., they did not have any notations of failure to appear indicated in the Colorado Judicial Branch's statewide database).

2 Risk assessment data were collected over the 16-month period from February 2008 to May 2009, and pretrial outcome data were collected after cases closed up until December 2010, thus allowing at least 19 months for all cases to close after defendants were booked into jail because of new charges. Ninety-nine percent (99%) of the cases closed within the minimum 19-month time period.

Summary of Findings

The CPAT effectively sorts defendants into one of four risk categories, with each category having different rates for the desired outcomes of public safety and court appearance. Nearly 70% of defendants scored in the lower two risk categories. These risk categories can be used when examining the impact of different forms of money bonds on public safety, court appearance, and jail bed use.

DEFENDANTS RECEIVED EITHER UNSECURED OR SECURED BONDS, AND WERE SEPARATED INTO FOUR GROUPS TO ENABLE ANALYSIS OF BOND-TYPE COMPARISONS.

Table 2 shows the percentage of released defendants who received unsecured or secured (surety or cash) money bonds within each of the four risk categories. Statutorily, all bonds in Colorado must have a financial condition.[3]

Table 2: Percent and Number of Released Defendants by Bond Type and Risk Category

PRETRIAL RISK CATEGORY	BOND TYPE	
	UNSECURED[a]	SECURED[b]
1 (lower)	52% (137/265)	48% (128/265)
2	32% (208/642)	68% (434/642)
3	15% (45/295)	85% (250/295)
4 (higher)	13% (14/107)	87% (93/107)
Average	31% (404/1,309)	69% (905/1,309)

a. Unsecured bonds do not require defendants to post money prior to their pretrial release from jail. While Colorado law uses the term "personal recognizance," the term "unsecured" is used in this paper to distinguish these bonds from "pure" personal recognizance bonds (or "own recognizance" bonds), as they are called in many other states. Financial conditions are rarely allowed or used with "pure" or "own" recognizance bonds.
b. Secured bonds require defendants to post some amount of money prior to their pretrial release from jail.[4]

3 Unsecured bonds in Colorado are known in statute as personal recognizance bonds and although they are required to have a financial condition in some monetary amount, they do not require the defendant to post any money with the court prior to pretrial release from jail. If the defendant fails to appear, the court can hold the defendant liable for the full amount of the bond. The court can also require the signature of a co-signor on unsecured bonds prior to the defendant's release from jail. The co-signor is typically a family member who promises the court that he or she will assist the defendant in appearing in court and who may be held liable for the full monetary amount if the defendant fails to appear. In this study, as noted above, these personal recognizance bonds are called "unsecured" bonds because they have a financial condition for which the defendant or co-signor could be fully liable. The unsecured bond group is for the most part a "defendant-only (with no co-signor) unsecured" group because 344 (85%) of the 404 unsecured bonds did not require a co-signor.

4 Secured bonds in Colorado require money to be posted with the court on the defendant's behalf prior to pretrial release, and can be in the form of cash, surety, or property. If the defendant fails to appear, the court can hold the defendant or a commercial bail bondsman (for a surety bond) liable for the full amount of the bond. The secured bond group is for the most part a "surety bond" group because 849 (94%) of the 905 secured bond defendants posted a surety bond rather than a cash bond. Surety bonds were the most prevalent form of bond set by the court during the time this study's data were collected. Property bonds are very rarely used in Colorado, and were not used for any of the defendants in this study.

Summary of Findings

Data show that judicial officers set both unsecured and secured bonds for defendants in each of the four risk groups. All of these bonds carry the possibility that the court could hold the defendant or other party (i.e., co-signor or bail bondsman) legally liable for the bond's full monetary amount if the defendant fails to appear in court. For surety bonds, defendants are still liable for the full monetary amount, albeit indirectly. If a defendant released on surety bond fails to appear, the court, within the confines of statute, may hold the bail bondsman liable for the full monetary amount. If so, then the bail bondsman may offset this expense by collecting the full monetary amount of the bond pursuant to the contract with the defendant or the defendant's family member or friend, and turn over the full bond amount to the court.

Placing defendants into one of four risk categories stratifies defendants based on their overall level of risk, thus helping increase the chances that defendants' bond type, rather than their degree of pretrial risk, accounts for the observed results. Specifically, the stratification was done because in the total sample there was a relatively higher proportion of lower risk defendants in the unsecured bond group and a relatively higher proportion of higher risk defendants in the secured bond group. This pattern of data is found across most criminal justice systems nationwide. In addition, the total sample size of defendants in this study and in the four separate risk groups is large enough to detect statistical differences between the two bond-type groups if differences indeed do exist (see Cohen, 1988).[5]

Moreover, the Colorado jurisdictions that have already implemented the CPAT or that will be implementing it in the near future use the CPAT's four-category risk scheme to guide daily pretrial release and detention decision-making, so using the CPAT's risk scheme in this study enables the study to provide decision-makers with findings that directly inform their daily practice.

5 The social science conventional standard of 0.05 for statistical significance testing was used throughout this study. Statistical significance at the 0.05 level means that we can be at least 95% confident that the observed results are not due to chance. To statistically determine that defendants with unsecured bonds were similar in pretrial risk to defendants with secured bonds, stratification, or the separation of the defendants into incremental groups, was done. Separate t-tests (tests used to determine if two groups have different averages on a measure) were performed on the four pretrial risk groups. These analyses showed that the average risk score for defendants with unsecured bonds was not statistically significantly different than the average risk score for defendants with secured bonds in risk categories 1, 3, and 4 (all $p > 0.19$). For risk category 2, the average score for defendants with unsecured bonds (27) was two points less than the average score for defendants with secured bonds (29) ($p < .001$). However, given that there was no significant difference for the other three risk categories, including the categories both below (i.e., category 1) and above (i.e., categories 3 and 4) category 2, and because the two-point score difference was no larger than the non-significant score difference in the other three risk categories, the statistically significant difference observed in category 2 is determined not to be practically significant. That is, the difference is likely not meaningful enough to be useful for purposes of informing practice. Additionally, there were no significant differences in the percentages of defendants who were ordered to pretrial supervision among the four risk groups (ranging from 48% to 50% for each of the four groups), indicating that pretrial supervision likely did not interfere with the effects of bond type on the outcome measures.

GOALS OF THE STUDY

This study evaluates the extent to which, if at all, one type of money bond (unsecured) is associated with better pretrial outcomes than is the other type of money bond (secured, in the form of cash or surety) while also accounting for jail bed use. Because all bonds in Colorado have a monetary condition, this study was not able to test whether bonds with no financial condition could have achieved the same public safety or court appearance outcomes as did bonds with a financial condition.

For the following analyses, defendants were sorted into two groups depending on the type of money bond they received – unsecured or secured. Defendants' performance on the three pretrial outcomes most important to pretrial decision-makers - public safety, court appearance, and jail bed use - was examined. Defendants in the two bond-type groups were compared separately within each of the four pretrial risk categories to mitigate the influence of defendants' risk levels on the observed outcomes.

RESULTS

UNSECURED BONDS ARE AS EFFECTIVE AS SECURED BONDS AT ACHIEVING PUBLIC SAFETY.

Table 3 shows the percentage of defendants who were not charged with a new crime during pretrial release (i.e., the public safety rate) for the unsecured and secured bond groups in each of the four risk categories.

Table 3: Public Safety Outcomes by Bond Type and Risk Category

PRETRIAL RISK CATEGORY	PUBLIC SAFETY RATE	
	UNSECURED BOND	SECURED BOND
1 (lower)+	93% (128/137)	90% (115/128)
2+	84% (174/208)	79% (343/434)
3+	69% (31/45)	70% (174/250)
4 (higher)+	64% (9/14)*	58% (54/93)
Average**	85% (342/404)	76% (686/905)

+ All statistical comparisons showed no statistically significant differences. All $p > 0.16$.
* The 64% observed in this cell is based on a small sample size (n=14) and thus should be interpreted with caution. For example, if one more defendant in the unsecured bond group had no new charges, the percentage would increase to 71%. If one more of these defendants had a new charge, the percentage would decrease to 57%.
** The public safety rate for all unsecured bond defendants was not compared to the rate for all secured bond defendants because that analysis would fail to control for defendants' degree of pretrial risk.

Chi-square tests[6] revealed that there were no statistically significant differences in defendants' public safety outcomes for the two different types of bond in each of the four risk categories. This finding also holds when only person crimes are analyzed. That is, defendants from both bond-type groups did not significantly differ from one another in their rate of receiving new charges for alleged crimes against a person while on pretrial release ($p > 0.65$).

Summary of Findings

Whether released defendants are higher or lower risk or in-between, unsecured bonds offer the same public safety benefit as do secured bonds. This finding is expected because although defendants can have their bond revoked if they receive a new charge while on pretrial release, they legally cannot be ordered to forfeit any amount of money or property under any bond type. Thus, the financial condition of an unsecured or secured bond cannot legally have an impact on defendants' criminal behavior. This study's failure to find a public safety benefit for one bond type over another is consistent with previous research (Helland & Tabarrok, 2004; Morris, 2013).

6 The Chi-square statistic tests the degree of agreement between observed data and the data expected under a certain hypothesis. It can be used to compare the differences in frequencies on a measure between two groups.

UNSECURED BONDS ARE AS EFFECTIVE AS SECURED BONDS AT ACHIEVING COURT APPEARANCE.

Table 4 shows the percentage of defendants who made all of their court appearances during pretrial release (i.e., the court appearance rate) for the unsecured and secured bond groups in each of the four risk categories.

Table 4: Court Appearance Outcomes by Bond Type and Risk Category

PRETRIAL RISK CATEGORY	COURT APPEARANCE RATE	
	UNSECURED BOND	SECURED BOND
1 (lower)[+]	97% (133/137)	93% (119/128)
2[+]	87% (181/208)	85% (368/434)
3[+]	80% (36/45)	78% (195/250)
4 (higher)[+]	43% (6/14)*	53% (49/93)
Average**	88% (356/404)	81% (731/905)

[+] All statistical comparisons showed no statistically significant differences. All $p > 0.12$.

* The 43% observed in this cell is based on a small sample size (n=14) and thus should be interpreted with caution. For example, if one more defendant in the unsecured bond group made all court appearances, the percentage would increase to 50%. If one more of these defendants had a failure to appear, the percentage would decrease to 36%.

** The court appearance rate for all unsecured bond defendants was not compared to the rate for all secured bond defendants because that analysis would fail to control for defendants' risk.

Chi-square tests revealed that there were no statistically significant differences in defendants' court appearance outcomes for the two different types of bond in each of the four risk categories.

Summary of Findings

Whether released defendants are higher or lower risk or in-between, unsecured bonds offer decision-makers the same likelihood of court appearance as do secured bonds. The lack of benefit from using one financial bond type versus another is not surprising given that both bond types carry the potential for the defendant to lose money for failing to appear.

UNSECURED BONDS FREE UP MORE JAIL BEDS THAN DO SECURED BONDS BECAUSE MORE DEFENDANTS WITH UNSECURED BONDS POST THEIR BONDS.

Table 5 shows the percentage of defendants who were released from jail on pretrial status for the unsecured and secured bond groups in each of the four risk categories.[7]

Table 5: Pretrial Release Rates by Bond Type and Risk Category

PRETRIAL RISK CATEGORY	RELEASE RATE+	
	UNSECURED BOND	SECURED BOND
1 (lower)+	93% (137/147)	83% (128/155)
2+	95% (208/220)	65% (434/669)
3+	96% (45/47)	54% (250/464)
4 (higher)+	88% (14/16)*	46% (93/201)
Average**	94% (404/430)	61% (905/1,489)

+ All statistical comparisons were statistically significant. All $p < 0.006$.

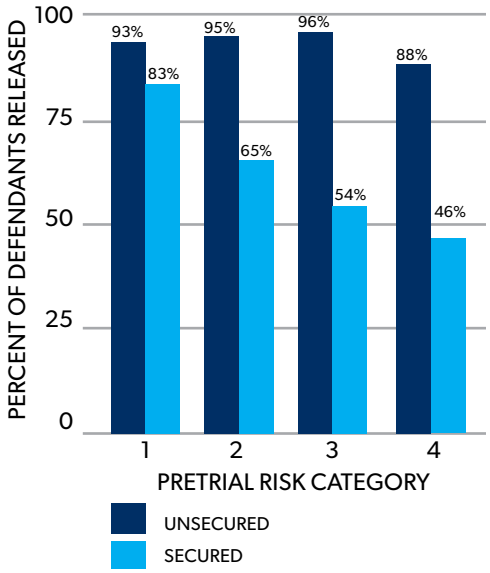
* The 88% observed in this cell is based on a small sample size (n=16) and thus should be interpreted with caution. For example, if one more defendant in the unsecured bond group were released, the percentage would increase to 94%. If one more of these defendants were not released, the percentage would decrease to 81%.

** The release rate for all unsecured bond defendants was not compared to the rate for all secured bond defendants because that analysis would fail to control for defendants' risk.

Chi-square tests revealed that the release rates for unsecured bond defendants were statistically significantly higher than the release rates for secured bond defendants for all four of the pretrial risk categories.

The findings shown in Table 5 are illustrated in Figure 1.

Figure 1: Pretrial Release Rates by Bond Type and Risk Category



7 The number of defendants who post their bonds and the time to post those bonds, as opposed to the number of defendants released on pretrial status and their time to release, are better measures for more accurately determining pretrial jail bed use because once a bond is posted, the defendant is no longer utilizing a jail bed for pretrial reasons. The defendant may or may not remain in jail after bond-posting because of other cases or holds. However, for this study, like in most pretrial research, data on dates that bonds were posted were not available, so the next best measures for determining pretrial jail bed use - release on pretrial status and time to pretrial release - were used.

Both Table 5 and Figure 1 show that judicial officers used both unsecured and secured bonds with defendants of all risk levels - higher risk, lower risk, and those in between. For defendants at all risk levels, defendants with an unsecured bond were statistically significantly more likely to be released than defendants with a secured bond.[8]

Summary of Findings

Whether released defendants are higher or lower risk or in-between, unsecured bonds enable more defendants to be released from jail than do secured bonds. Findings show that many defendants of all risk levels never post their secured bond. This finding is expected because defendants who receive unsecured bonds, or their family or friends, do not have to pay some monetary amount to the court or a commercial bail bondsman prior to the defendants' release from jail custody. Secured bonds, however, do require pre-release payment. Consequently, secured bonds used more jail beds. This finding is consistent with previous research using data from across the United States that shows that secured bond defendants are much more likely to be detained for their entire pretrial period than are unsecured bond defendants (Cohen & Reaves, 2007).

THE MONETARY AMOUNT OF SECURED BONDS AFFECTED PRETRIAL RELEASE RATES BUT NOT COURT APPEARANCE RATES.

Table 6 shows the percentage of defendants who were released from jail on secured bonds of select monetary amounts.

Table 6: Pretrial Release Rates by Secured Bond Amount

SECURED MONETARY BOND AMOUNT	PERCENT (AND NUMBER) OF RELEASED DEFENDANTS
$500 (12th Percentile)	64% (52/81)
$5,000 (65th Percentile)	58% (100/191)
$50,000 (97th Percentile)	49% (37/76)

Frequency analyses revealed that when the secured bond amount was set relatively very low at $500 (12th percentile of secured bond amounts set by Colorado judicial officers in this study), 64% of defendants were released. When the secured bond amount was set at $5,000 (65th percentile of secured bond amounts), 58% of defendants were released. When the secured bond amount was set at $50,000 (97th percentile of secured bond amounts), 49% of defendants were released. However, correlational analyses revealed that the monetary amount of posted secured bonds was not statistically significantly related to court appearance for any of the four risk groups ($p > 0.09$).

8 It is possible that the lower release rate for secured bond defendants could have been in part associated with judicial officers having accounted for an unmeasured risk factor in these defendants, and thus the public safety and court appearance rates would have been lower for these defendants had they been released. The mechanism for achieving this increase in pretrial detention would have been judicial officers setting secured bonds in a monetary amount the defendant could not post. Several judicial officers have told this author that this practice is not uncommon in Colorado, but have acknowledged its questionable lawfulness given Colorado's constitutional and statutory law. Nonetheless, as indicated by this study's analyses, if more secured bond defendants had been released, the secured bonds would likely not have associated with increased public safety or court appearance.

Summary of Findings

As the monetary amount of secured bonds increases, fewer defendants post their bonds. However, regardless of whether defendants are higher or lower risk or in-between, higher bond amounts are not associated with better court appearance outcomes for released defendants. Thus, higher secured bond amounts are associated with more pretrial incarceration but not more court appearances. The finding of increased incarceration associated with secured bonds is consistent with previous research using data from across the United States: As the monetary amount of secured bonds increases, the probability of release decreases (Cohen & Reaves, 2007).

UNSECURED BONDS ALSO FREE UP MORE JAIL BEDS THAN DO SECURED BONDS BECAUSE DEFENDANTS WITH UNSECURED BONDS HAVE FASTER RELEASE TIMES.

Table 7 shows the cumulative percent of defendants who were released on pretrial status for the unsecured and secured bond groups by the amount of time in jail that elapsed prior to pretrial release.

Table 7: Time to Pretrial Release by Bond Type

DAYS TO PRETRIAL RELEASE*	CUMULATIVE PERCENT OF DEFENDANTS RELEASED ON UNSECURED BONDS	CUMULATIVE PERCENT OF DEFENDANTS RELEASED ON SECURED BONDS
<1 to 1.9⁺	80% (325/404)	58% (525/905)
2 to 2.9⁺	83% (336/404)	68% (611/905)
3 to 3.9⁺	85% (344/404)	73% (663/905)
4 to 4.9⁺	86% (348/404)	77% (699/905)
5 to 5.9⁺	87% (351/404)	80% (721/905)
6 to 6.9⁺	88% (356/404)	81% (731/905)
7 to 7.9⁺	88% (356/404)	82% (741/905)
8 to 8.9⁺	89% (358/404)	84% (758/905)
9 to 9.9⁺	89% (360/404)	85% (768/905)
10 to 10.9**	89% (360/404)	86% (774/905)
11 to 11.9**	89% (361/404)	86% (781/905)
12 to 12.9**	90% (362/404)	87% (784/905)

⁺ All statistical comparisons were statistically significant. All $p < 0.05$.

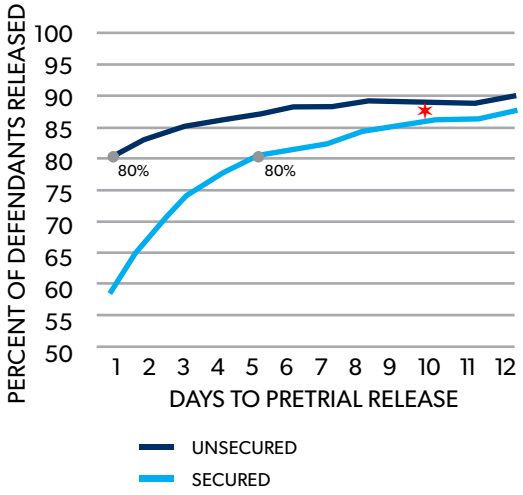
* Defendants across all risk categories were grouped together for this analysis because a defendant's pretrial risk level can have no legal bearing on the amount of time a defendant remains in pretrial incarceration after a judicial officer sets the bond. In contrast, the monetary amount of a secured bond, holds from other jurisdictions, or requirements from a defendant's other cases can affect whether and when the defendant can be released from jail even if the defendant has posted his bond, regardless of bond type and regardless of his pretrial risk level.

** Beginning on the tenth day of pretrial incarceration, the percent of defendants in the two bond type groups who had not been released on pretrial status was no longer statistically significantly different ($p > 0.07$). Because there was no significant difference after day 9, it was assumed for the purposes of this analysis that after day 9 other factors, such as the defendants' other cases or possible holds, contributed to defendants' continued pretrial incarceration to the degree that the bond type was no longer the primary factor contributing to continued pretrial incarceration. In addition, a t-test revealed that the average time to pretrial release for the unsecured bond group (0.7 days) was statistically significantly lower than that for the secured bond group (1.5 days) when the analysis of pretrial incarceration was capped at 9 days for the reasons described above ($p < 0.0001$). The 9-day cap also makes it likely that the 1.5-day average for the secured bond defendants is an underestimate because 10 or more days may actually elapse before a defendant or his family can meet the court's cash bond or bondsman's surety bond requirements; however, this cap was derived from the best data available for this study. Moreover, the use of this average for the secured bond defendants is still sufficient for statistically demonstrating the increased jail use that results from secured bonds, and is sufficient for demonstrating practical significance for policy-making.

Chi-square tests revealed that statistically significantly more defendants with unsecured bonds were released on pretrial status than were defendants with secured bonds for each of the first nine days after defendants' bonds were set. A t-test revealed that the average number of days spent in jail on pretrial status was statistically significantly less for defendants with unsecured bonds than the average for defendants with secured bonds up to the first nine days after defendants' bonds were set.

The findings shown in Table 7 are illustrated in Figure 2.

Figure 2: Time to Pretrial Release by Bond Type



Note. The ✶ symbol denotes that after day 9, the difference in the percent of released defendants between the two groups was no longer statistically significant. The time at which the 80% threshold was achieved is indicated for both groups.

Figure 2 depicts that released defendants with unsecured bonds spent fewer days incarcerated on pretrial status than did defendants with secured bonds. Moreover, Figure 2 depicts:

- Five days of jail incarceration were required for defendants with cash or surety bonds to achieve the same release threshold of 80% that defendants with unsecured bonds experienced by day one.
- Ten days of jail incarceration were required for defendants with cash or surety bonds to achieve the same overall release threshold as defendants with unsecured bonds because there were statistically significant differences for the first nine days.

Summary of Findings

After judicial officers set defendants' bonds, unsecured bonds enable defendants to be released from jail more quickly than do secured bonds. This finding is expected because nearly all defendants who receive unsecured bonds can be released from custody immediately upon signing their bond, whereas defendants with secured bonds must wait in custody until they or a family member or friend negotiates a payment contract with a commercial bail bondsman or their family member or friend posts the full monetary amount of a cash bond at the jail. This finding indicates that the process of posting a secured bond takes much longer than the process of posting a unsecured bond for released defendants. Furthermore, this finding is consistent with previous research using data from across the United States that shows released defendants with secured bonds remained in jail longer than did released defendants with bonds that did not require a pre-release payment (Cohen & Reaves, 2007).

UNSECURED BONDS ARE AS EFFECTIVE AS SECURED BONDS AT "FUGITIVE-RETURN" FOR DEFENDANTS WHO HAVE FAILED TO APPEAR.

Table 8 shows the percent of defendants whose case was still open up to 19 months after they were released from jail and who were at-large because of a failure to appear warrant, among all released defendants who had failed to appear (i.e., the at-large rate), for the unsecured and secured bond groups.

Table 8: At-Large Rate by Bond Type

AT-LARGE RATE+*	
UNSECURED BOND	SECURED BOND
10% (5/48)	9% (15/174)

+ The comparison was not statistically significantly different ($p > 0.69$). Non-significance was also found when data from just the surety bond defendants were compared to the unsecured bond defendants - that is, when the cash-only bond defendants were removed from the secured bond group ($p > 0.48$).

* There were too few at-large cases in each of the four risk categories to permit analyses within each of the risk categories.

Chi-square tests revealed that there were no statistically significant differences in defendants' at-large rates for the two different types of bond, as well as for surety-bond-only defendants.

Summary of Findings

When released defendants fail to appear, unsecured bonds offer the same probability of fugitive-return as do secured (including surety-only) bonds. Because the commercial bail bond industry often claims that it locates and captures defendants who have failed to appear or who are fugitives on the run (see Professional Bail Agents of the United States, 2013; Tabarrok, 2011), this topic is discussed in detail.

Nationally, the fugitive-return function has received minimal attention in the empirical research literature, and no empirical research prior to the current study has been done in Colorado. This study failed to find support for the commercial bail bond industry's fugitive-return claim for defendants released on surety bonds because there was no difference in the percent of defendants who were released on surety bonds, who failed to appear, and who still had an open case, when compared to the percent of defendants who were released on unsecured bonds, who failed to appear, and who still had an open case. All defendants who had an open case at the time this study's data collection was completed were at-large on a failure to appear warrant and not in jail custody. If commercial bail bondsmen or hired bounty hunters return defendants at a greater rate than the rate for which defendants on unsecured bonds return to custody or court, then the percent of at-large surety bond defendants would be statistically significantly less than it is for unsecured bond defendants. That difference was not found in this study.

This study's failure to find a fugitive-return benefit for one bond type over another is consistent with previous research designed to measure directly the fugitive-return function allegedly associated with surety bonds. Jones, Brooker, and Schnacke (2009) found no empirical support for Colorado commercial bail bondsmen's claim that they locate or apprehend surety bond defendants who had failed to appear, as indicated by local jail booking data, the court's bondsman-contact tracking logs, and by law enforcement officials' report (p. 83).

Furthermore, in 2012 a committee that consisted of several justice system stakeholders and Colorado bail agents' representatives studied Colorado pretrial case processing and decision-making for a year. A portion of that review included discussion about fugitive-return evidence in Colorado.

Committee members acknowledged that there are no data to support the bondsmen's fugitive-return claim, and that the extent to which bondsmen return defendants to jail, court, or to law enforcement officers in Colorado remains empirically undemonstrated.[9]

MANY DEFENDANTS ARE INCARCERATED FOR THE PRETRIAL DURATION OF THEIR CASE AND THEN RELEASED TO THE COMMUNITY UPON CASE DISPOSITION.

Because some judicial officers, sheriffs, and defense attorneys have expressed concern or puzzlement to this author about their observation that apparently many defendants spend the pretrial duration of their case in custody, sometimes for several weeks or months, and then are released to the community upon conviction or sentencing, data on case dispositions were analyzed to determine the extent to which this phenomenon occurs in Colorado.

Table 9 shows the collective percentage of never-released, secured-bond defendants by type of case disposition from all 10 Colorado jurisdictions.

Table 9: Never-Released Defendants by Case Disposition

CASE DISPOSITION	PERCENT (AND NUMBER) OF DEFENDANTS OR OFFENDERS*
Department of Corrections	14% (79)
Jail, Work Release, or Time Served in the Local Jail	34% (194)
Community-Based Option (Diversion, Probation, Community Corrections, Home Detention)	37% (210)
Dismissed or Not Filed	13% (76)
Still Open or Had Some Other Sentence	2% (9)
Total	100% (568)

* Each percentage changes 1% or less when unreleased defendants with recognizance bonds were included in the analysis.

9 See the Colorado Commission on Criminal and Juvenile Justice's Bail Subcommittee's March 2012 Meeting Minutes at http://www.colorado.gov/cs/Satellite/CDPS-CCJJ/CBON/1251617151523.

Summary of Findings

These findings have implications for pretrial jail bed use because 50% (37% + 13%) of defendants return to the community upon conviction or case closure.[10] This percentage increases to 84% (50% + 34%) when defendants who return to the community after completing a jail sentence (including those who received sentences for time served while in pretrial custody) are included. This pattern of findings suggests that when judges and other decision-makers consider the likelihood of a defendant's conviction and the most likely type of sentence, they can further reduce pretrial jail bed use by using more unsecured bonds in lieu of secured bonds for defendants who will likely return to the community upon case disposition (i.e., for those defendants who are not likely to be transported to the Department of Corrections to start a sentence).

10 With the exception of some defendants for whom another case results in continued detention.

DISCUSSION AND IMPLICATIONS FOR POLICY MAKING

The findings from this study provide strong evidence that the type of monetary bond posted does not affect public safety or defendants' court appearance, but does have a substantial effect on jail bed use. Specifically, when posted, unsecured bonds (personal recognizance bonds with a financial condition) achieve the same public safety and court appearance results as do secured (cash and surety) bonds. This finding holds for defendants who are lower, moderate, or higher risk for pretrial misconduct. However, unsecured bonds achieve these public safety and court appearance outcomes while using substantially (and statistically significantly) fewer jail resources. That is, more unsecured bond defendants are released than are secured bond defendants, and unsecured bond defendants have faster release times than do secured bond defendants. The amount of the secured monetary bond was associated with increased pretrial jail use but not increased court appearance. Finally, the type of monetary bond did not affect the fugitive-return rate as measured by the percent of cases with a failure to appear warrant remaining open up to one-and-a-half years later.

THE TYPE OF BOND SET BY THE COURT HAS A DIRECT IMPACT ON THE AMOUNT OF JAIL BEDS CONSUMED, BUT IT DOES NOT IMPACT PUBLIC SAFETY AND COURT APPEARANCE RESULTS.

A three-jurisdiction example demonstrates this study's implications for jail bed use. If there were three jurisdictions that use different rates of unsecured and secured bonds, they each would use their local jail resource very differently to achieve the same public safety and court appearance outcomes.[11] Table 10 demonstrates this scenario.

Table 10: Differential Jail Bed Use Resulting from Different Bond Setting Practices in Three Jurisdictions

JURISDICTION	PERCENT OF UNSECURED BONDS	PERCENT OF SECURED BONDS	PRETRIAL BEDS NEEDED FOR UNSECURED BONDS*	PRETRIAL BEDS NEEDED FOR SECURED BONDS*	TOTAL PRETRIAL BEDS NEEDED*	PUBLIC SAFETY RATE**	COURT APPEARANCE RATE**
Status Quo[a]	31%	69%	34	430	**464**	79%	83%
Moderate Unsecured[b]	61%	39%	67	243	**310**	79%	83%
High Unsecured[c]	91%	9%	100	56	**156**	79%	83%

c. The "Status Quo" jurisdiction's use of unsecured bonds was selected to be the same as the average unsecured bond use in the 10 jurisdictions that contributed data to this study (see Table 2).
d. The "Moderate Unsecured" jurisdiction's percent of unsecured bonds was selected to be 30 percentage points higher than that of the Status Quo jurisdiction and centered between the other two jurisdictions. Its bond type percentages are nearly the inverse of the Status Quo jurisdiction.
e. The "High Unsecured" jurisdiction's percent of unsecured bonds was selected to be 30 percentage points higher than that of the Moderate Unsecured jurisdiction. It also uses nearly the same percent of unsecured bonds as there are defendants in the three lowest Colorado Pretrial Assessment Tool (CPAT) risk categories (i.e., categories 1, 2, and 3). This would approximately be the case, for example, if a jurisdiction were to use unsecured bonds for defendants whose pretrial risk score is in CPAT risk categories 1 through 3 and use secured bonds for defendants whose pretrial risk score is in CPAT risk category 4.
* Per 10,000 defendants booked into jail on new charges.
** The public safety rate of 79% and the court appearance rate of 83% were averages for all 1,309 released defendants, regardless of their bond type or risk level.

As seen in Table 10, secured bonds require more jail beds than do unsecured bonds when a relatively high number (69% or 39%) of secured bonds are used. In particular, the Status Quo jurisdiction would need 464 jail beds allocated for pretrial detention for every 10,000 defendants booked into jail on new charges, whereas the Moderate Unsecured jurisdiction would need 310 jail beds allocated for pretrial detention for this same pool of defendants.

11 The average length of time that defendants spent in detention for pretrial reasons (calculated for this study as 0.7 days for unsecured bond defendants and 1.5 days for secured bond defendants) and the average length of time of 58 days for all in-custody cases to close were used to calculate the number of beds that defendants would use. See Cunniff (2002) for the formulas used (p. 30).

The Status Quo jurisdiction's higher amount of jail bed use is caused by fewer secured bond defendants being released and when they are released, taking more time to do so when compared to unsecured bond defendants (refer back to Tables 5 and 7).

In contrast, the High Unsecured (i.e., high use of personal recognizance bonds) jurisdiction would need only 156 jail beds allocated for pretrial detention for every 10,000 defendants booked into jail on new charges. In this jurisdiction, more jail beds are actually required for unsecured bond defendants than for secured bond defendants because of the very high volume of unsecured bond defendants. However, this jurisdiction uses substantially fewer pretrial jail beds overall than do the other two jurisdictions because fewer defendants remain incarcerated, and when defendants are released, they are released much more quickly.

In summary, the High Unsecured jurisdiction achieves the same court appearance and public safety outcomes as does the Status Quo jurisdiction, but does so while reserving 197% more jail beds for other purposes (e.g., incarcerating sentenced inmates, reducing jail expenses by closing one or more housing sections). Similarly, the Moderate Unsecured jurisdiction achieves the same court appearance and public safety outcomes as does the High Unsecured jurisdiction, but consumes twice as many jail beds while doing so.

JURISDICTIONS CAN MAKE DATA-GUIDED CHANGES TO LOCAL PRETRIAL CASE PROCESSING THAT WOULD ACHIEVE THEIR DESIRED PUBLIC SAFETY AND COURT APPEARANCE RESULTS WHILE RESERVING MORE JAIL BEDS FOR UNMANAGEABLY HIGH RISK DEFENDANTS AND SENTENCED OFFENDERS.

Criminal justice policy-makers, such as judges, sheriffs and jail administrators, district attorneys, defense attorneys, and county commissioners or city council members, in each local jurisdiction (e.g., county or city-county) could benefit from convening to discuss and analyze their current practices and to identify opportunities for improving their pretrial practices. Colorado jurisdictions use secured money bonds for over two-thirds (69%) of their cases. However, this study provides compelling evidence that the same level of public safety and court appearance that these jurisdictions experience today can be achieved at considerably lower costs to taxpayers who fund local jails, and this finding occurs for defendants of all risk levels.[12] Moreover, this study's findings provide empirical support for a Colorado jurisdiction changing its pretrial practices to be consistent with Colorado's new bail statute enacted in May of 2013.[13]

It will be important for local decision-makers to collaborate to hold each other accountable to maximize their desired public safety, court appearance, and jail bed use outcomes. Judges, sheriffs, district attorneys, and other justice system decision-makers desire to achieve the highest levels of public safety and court appearance as possible, and they rely on county commissioners and legislators to provide them with the resources (e.g., jail and court facilities, staff, programs) to make those outcomes possible. Similarly, county commissioners or legislators fund the jail and program resources, and they rely on judges and other system decision-makers to engage in effective practices that most efficiently

12 The higher financial cost to each local jail created by the use of secured bonds can be demonstrated whether short-run marginal costs and/or step-fixed costs are used in cost calculations (see Henrichson & Galgano, 2013).

13 See House Bill 13-1236 at http://www.leg.state.co.us/.

use those resources. This study indicates that Colorado jurisdictions have the opportunity to be much more effective and efficient with the pretrial use of local jails by using an empirically-based risk assessment instrument such as the Colorado Pretrial Assessment Tool and by maximally using personal recognizance bonds with a financial condition. In this decision-making scenario, defendants' risk for pretrial misconduct would be known prior to defendants' release from custody, and all released defendants would have a personal recognizance bond with a financial condition that the court could enforce if the defendant were to fail to appear.

COLORADO JUDICIAL OFFICERS NOW HAVE DATA AND LAW TO SUPPORT CHANGING THEIR BAIL SETTING PRACTICES TO BE AS EFFECTIVE BUT MUCH MORE EFFICIENT.

This study does not address the question of whether or when judicial officers should use monetary bonds or not use them (i.e., bonds with a financial condition or bonds with no financial condition). That is a research question beyond the scope of this study and is not currently relevant in Colorado, given that statute requires all bonds to have a financial condition. Rather, this study's results, combined with the new bail statute enacted in May of 2013, provide Colorado judicial officers with both empirical and legal justification for changing their bail setting practices to achieve their desired levels of public safety and court appearance while incarcerating only higher risk individuals and no longer incarcerating lower risk defendants who cannot pay their cash or surety bonds. The pretrial release mechanism created in Colorado's new bail statute for achieving all of these outcomes simultaneously are personal recognizance bonds with an unsecured financial condition found in Colorado Revised Statutes Sections 16-4-104(1) (a) and (b). These bonds are the only ones in Colorado that simultaneously (1) allow judicial officers to set an amount of money that they believe may give defendants sufficient incentive to return to court, *and* (2) do not prevent those defendants' release because the amount is too high for them or their family or friends to post.[14]

The new statute and this study's findings also converge to imply two features of a money bond schedule if a jurisdiction's decision-makers choose to have one: (1) The schedule should have the defendant's risk integrated into the formula that is to guide or determine a specific monetary amount of bond for each individual defendant; and (2) the scheduled monetary amounts should only be used for financial conditions associated with recognizance bonds and not for cash or surety bonds. If these two features are not incorporated and integrated into money bail bond schedules and pretrial decision-making, then the jurisdiction is likely to achieve its desired public safety and court appearance outcomes while failing to minimize pretrial detention because of the number of lower risk defendants who will be incarcerated for their lack of pre-release financial resources.

This study shows that defendants who are released from jail on personal recognizance bonds with a financial condition return to court and avoid new charges at the same rate as do defendants who bond out on cash or surety bonds, and they are as unlikely to remain at-large on fugitive status. Nonetheless, as one pretrial legal scholar has proposed (T. Schnacke, personal communication, August 1,

14 The Colorado Commission on Criminal and Juvenile Justice's Bail Subcommittee discussed the possibility that defendants are more likely to appear in court when they have "skin in the game" because of a financial condition of their bond (see http://www.colorado.gov/cs/Satellite/CDPS-CCJJ/CBON/1251617151523). Several justice system decision-makers in other states have suggested the same to this author. This study could not test this hypothesis; however, this study does provide empirical support that if defendants are more likely to appear in court because of a financial condition, this "motivation" is achieved just as effectively with a personal recognizance bond with a financial condition than it is with a cash or surety bond, but without the accompanying unnecessary pretrial jail bed use.

2013), even if the fugitive-return rate were some degree higher for surety bond defendants than for unsecured bond defendants, criminal justice decision-makers in each jurisdiction would need to decide if this gain offsets other costs. Specifically, if commercial bail bondsmen were to return defendants to custody sooner than law enforcement does, these cases could be closed more quickly. However, this benefit needs to be weighed against the high financial cost the local justice system incurs from the pretrial jail bed use that results from the large percent of surety bond defendants who are never released from jail or who take much longer to be released when they are released.

Finally, the pretrial decision-making supported by this study and the new statute has a precedent in Colorado. In early 2010 during Jefferson County's Bail Impact Study, which was a pilot project in which judges set more recognizance bonds with the support from the local criminal justice coordinating committee, a First Judicial District Court Judge set personal recognizance bonds with a financial condition for 75% of defendants who appeared before him at initial advisement. This Bail Impact Study, among initiatives in other jurisdictions and an earlier version of the research done for this paper, ultimately led to the introduction and passage of House Bill 13-1236, which rewrote Colorado's bail statute to encourage more recognizance releases and to reduce unnecessary pretrial detention while still emphasizing public safety and court appearance.[15]

THIS STUDY'S FINDINGS ARE LIKELY MORE GENERALIZABLE TO JURISDICTIONS THAT USE BOND SETTING PRACTICES SIMILAR TO THOSE USED IN COLORADO.

Colorado jurisdictions' pretrial case processes are very similar to one another and are typical of the processes used nationwide. When defendants are booked into jail, typically within a day or two most of them have the opportunity to leave custody after posting their bond via a money bail bond schedule or after first appearing before a judicial officer. Colorado judicial officers use unsecured, cash, and surety bonds in varying proportions, but not in a "sequential' manner as is done in some jurisdictions. For example, Dallas County's (Texas) use of non-financial release occurs almost exclusively in instances when defendants cannot first post their secured bond (L. Gamble, personal communication, March 4, 2013). In Colorado, judicial officers order unsecured bonds regardless of defendants' initial ability to post a secured bond. This non-sequential use, combined with this study's statistical controls for defendants' pretrial risk level, allow for methodologically sound bond-type comparisons on public safety, court appearance, and jail bed use.

Finally, research methods similar to those used in this study should be replicated in jurisdictions outside of Colorado to determine to what extent similar findings emerge. Criminal justice officials in many jurisdictions outside of Colorado also heavily rely on secured money bonds without any data showing the effect, pro or con, of these secured bonds on all three pretrial outcomes simultaneously. These decision-makers could likely improve the efficiency of their systems without detriment to their public safety and court appearance outcomes by using more recognizance bonds with a financial condition in lieu of cash or surety bonds.[16]

15 See C.R.S. 16-4-103(4) (c) (2013), "The Court shall . . . consider all methods of bond and conditions of release to avoid unnecessary pretrial incarceration."

16 As previously noted, the effect on court appearance of recognizance bonds that have no financial condition compared to unsecured or secured bonds could not be examined in this study. If studies show that recognizance bonds with no financial condition outperform unsecured or secured bonds, then they would provide an effective release option for jurisdictions that seek, voluntarily or through statute or court rule, to impose the least restrictive conditions that assure public safety and/or court appearance.

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ABOUT THE AUTHOR

Dr. Michael R. Jones has been a senior project associate at the non-profit Pretrial Justice Institute (PJI) since 2010. At PJI, he has assisted dozens of states and local jurisdictions in understanding and implementing more legal and empirically-based pretrial policies and practices. In Colorado, he led the project to develop Colorado's first empirically-based pretrial risk assessment tool, coordinated pretrial services programs' statutorily mandated performance measurement, and assisted justice system decision-makers in their efforts to defeat regressive legislation and pass progressive legislation. He currently provides strategic planning, training, technical assistance, and consulting to a variety of justice system stakeholders in Colorado and nationwide. Prior to PJI, he worked for nine years as a criminal justice planner and manager in Jefferson County, Colorado, where he was lead staff for the local criminal justice coordinating committee. He has also worked as a technical resource provider for the National Institute of Corrections since 2004, providing justice system assessments and assisting local jurisdictions in developing or improving their capacity for systemic collaboration and data-guided policy-making. Mike has a Ph.D. in Clinical Psychology from the University of Missouri-Columbia.

ljaf RESEARCH SUMMARY

Pretrial criminal justice research commissioned by the Laura and John Arnold Foundation (LJAF) has thrown new light on how critical the earliest decisions made in the criminal justice system may be for public safety, fairness, and cost effectiveness.

PRETRIAL CRIMINAL JUSTICE RESEARCH

Together, federal, state, and local corrections costs in the United States today exceed $80 billion per year. Pretrial detainees account for more than 60 percent of the inmate population in our jails. The cost to incarcerate defendants pretrial has been estimated at over $9 billion per year. Many pretrial detainees are low-risk defendants, who, if released before trial, are highly unlikely to commit other crimes and very likely to return to court. Others present moderate risks that can often be managed in the community through supervision, monitoring, or other interventions. There is, of course, a small but important group of defendants who should most often be detained because they pose significant risks of committing acts of violence, committing additional crimes, or skipping court.

The key, then, is to make sure that we accurately distinguish among the low-, moderate-, and high-risk defendants – and identify those who are at an elevated risk for violence. Moreover, it is important that, when we determine how to deal with defendants during the pretrial period, we appropriately assess what risk individual defendants pose. By making decisions in this manner, we can reduce crime, make wise use of public resources, and make our system more just.

Although police, prosecutors, and judges share the same objectives – to detain those who pose a risk to public safety and to release those who do not – this is not how our criminal justice system currently operates. Criminal justice decisionmakers do their best to achieve these goals, but they typically do not have sufficient information about defendants, the risks they pose, or the best methods to reduce these risks. Instead, key decisions are often made in a subjective manner, based on experience and instinct, rather than on an objective, data-driven assessment of a defendant's risk level and the most effective approach to protecting public safety in each case.

For two years, LJAF has been working to improve how decisions are made during the earliest part of the criminal justice process, from the time a defendant is arrested until the case is resolved. Our strategy has been to use data, analytics, and technology to promote a transition from subjective to more objective decision-making. To that end, we are developing easy-to-use, data-driven risk assessments

for judges and prosecutors and are exploring tools to assist police in determining when to arrest an individual and when to issue a citation instead. In addition, we are pursuing research into key criminal justice issues, including the impacts of pretrial release and detention; and we are investigating the long-unanswered question of what approaches are successful at reducing future crime – and for whom they are most effective. The LJAF research released today – which was conducted in partnership with two of the nation's leading pretrial justice researchers, Dr. Marie VanNostrand and Dr. Christopher Lowenkamp – is a key part of this effort. The central findings of these three studies are summarized below:

The Effect of Pretrial Detention on Sentencing:

A study, using data from state courts, found that defendants who were detained for the entire pretrial period were over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who were released at some point pending trial. And their sentences were significantly longer – almost three times as long for defendants sentenced to jail, and more than twice as long for those sentenced to prison. A separate study found similar results in the federal system.

The Hidden Costs of Pretrial Detention:

Using statewide data from Kentucky, this study uncovered strong correlations between the length of time low- and moderate-risk defendants were detained before trial, and the likelihood that they would reoffend in both the short- and long-term. Even for relatively short periods behind bars, low- and moderate-risk defendants who were detained for more days were more likely to commit additional crimes in the pretrial period – and were also more likely to do so during the two years after their cases ended.

The Impact of Pretrial Supervision:

This study drew on data from two states, one eastern and one western, and found that moderate- and high-risk defendants who received pretrial supervision were significantly more likely to appear for their day in court than those who were unsupervised. In addition, long periods of supervision (more than 180 days) were related to a decrease in new criminal activity; however, no such effect was evident for supervision of 180 days or less.

These studies raise significant questions about the way our pretrial system currently works. They also demonstrate the tremendous need for additional research in this area. As part of our commitment to using data, analytics, and technology to transform the front end of the criminal justice system – what we call *Moneyballing* criminal justice – LJAF stands committed to pursuing a robust research agenda to answer these pressing questions and to make sure the system is as safe, fair, and cost-effective as possible.

Key decisions are often made in a subjective manner, based on experience and instinct, rather than on an objective, data-driven assessment of a defendant's risk level and the most effective approach to protecting public safety in each case.

I. THE EFFECT OF PRETRIAL DETENTION ON SENTENCING

Two recent studies funded by LJAF shed new light on the impact that a defendant's release or detention before trial can have on the eventual sentence in the case. These studies – one using data from federal courts and the other using data from state courts – demonstrate that pretrial detention is associated with an increase in the likelihood a defendant will be sentenced to jail or prison, as well as the length of incarceration.[1] The findings serve to underscore just how important judges' decisions regarding pretrial release and detention truly are.

The state study analyzed records of over 60,000 defendants arrested in Kentucky in 2009 and 2010. It found that defendants detained for the entire pretrial period were over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who were released at some point pending trial. Sentences were also significantly longer – nearly three times as long for defendants sentenced to jail and more than twice as long for those sentenced to prison.

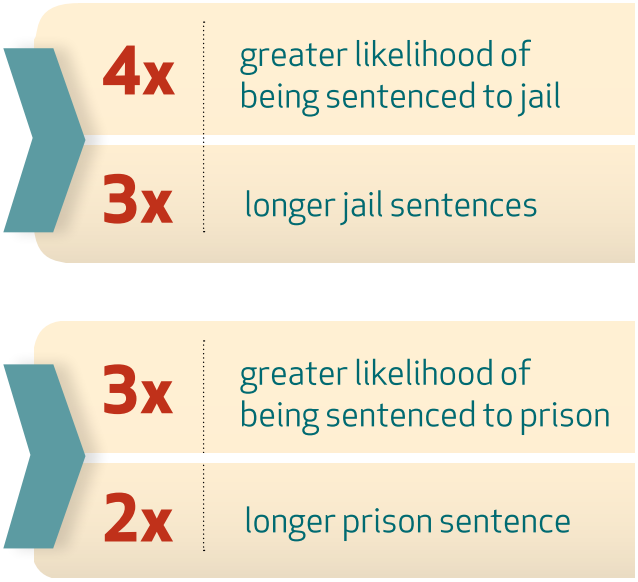
The analysis focused on the relationship between detention and sentencing. The study controlled for the other variables in the data set, meaning that defendants who were compared to one another were similar in terms of age, gender, race, marital status, risk level, offense type, incarceration history and other factors. In other words, defendants who were similar in every known way – except for their pretrial release status – had different outcomes at sentencing.

Studies demonstrate that pretrial detention is associated with an increase in the likelihood a defendant will be sentenced to jail or prison, as well as the length of incarceration.

1 Jails are usually locally operated and are used to detain individuals prior to trial or can be used to incarcerated individuals who have been sentenced, typically for one year or less. Prisons are state or federally run and are used to incarcerate sentenced individuals typically for one year or more, and often for much longer.

Impact of Pretrial Detention on State Sentencing

Compared to defendants released at some point prior to trial, defendants held for the entire pretrial detention period had:



The second study examined similar questions in the context of federal courts. The study, which is currently under review by a peer-reviewed journal, was conducted by Dr. Lowenkamp, Dr. VanNostrand, Dr. James Oleson of the University of Auckland, Timothy Cadigan of the Administrative Office of the United States Courts (retired), and Dr. John Wooldredge of the University of Cincinnati. Drawing on 1,798 cases from two United States District Courts, the research found that pretrial release reduces sentence length for all defendants, even if release is ultimately revoked due to a defendant's failure to adhere to conditions of release. Indeed, detained defendants' sentences are, on average, nearly two times longer than those of released defendants. And while defendants who were released and later revoked received longer sentences than defendants who completed pretrial release without incident, their sentences were still shorter than defendants who were never released at all. These findings were obtained while controlling for known factors.

The importance of these findings is clear when considering the state of our federal prison system. More than 110,000 defendants went through the federal court system in 2011, 86 percent of whom were sentenced to federal prison for an average sentence of almost 5½ years. Since 1980, the Bureau of Prison population has grown tenfold. The fiscal costs of this increase are staggering: Each prisoner in the system costs taxpayers between $21,006 (minimum security) and $33,930 (high security) annually.

II. THE HIDDEN COSTS OF PRETRIAL DETENTION

The primary goal of the American criminal justice system is to protect the public. But what if, rather than protecting society, the pretrial phase of the system is actually helping to create new repeat offenders?

That is the question raised by an LJAF-funded study that analyzed data on over 153,000 defendants booked into jail in Kentucky in 2009 and 2010. The analysis showed that low-risk defendants who were detained pretrial for more than 24 hours were more likely to commit new crimes not only while their cases were pending, but also years later. In addition, they were more likely to miss their day in court. Conversely, for high-risk defendants, there was no relationship between pretrial incarceration and increased crime. This suggests that high-risk defendants can be detained before trial without compromising, and in fact enhancing, public safety and the fair administration of justice.

Judges, of course, do their best to sort violent, high-risk defendants from nonviolent, low-risk ones, but they have almost no reliable, data-driven risk assessment tools at their disposal to help them make these decisions. Fewer than 10 percent of U.S. jurisdictions use any sort of risk-assessment tools at the pretrial stage, and many of the tools that are in use are neither data-driven nor validated. Kentucky provided a unique research opportunity because it used a validated tool that provided us with an understanding of the level of risk that individual defendants posed. While risk assessments could not be completed on approximately 30 percent of defendants, we were able to study whether, for the remaining 70 percent, the impact of pretrial detention varied depending on their risk levels.

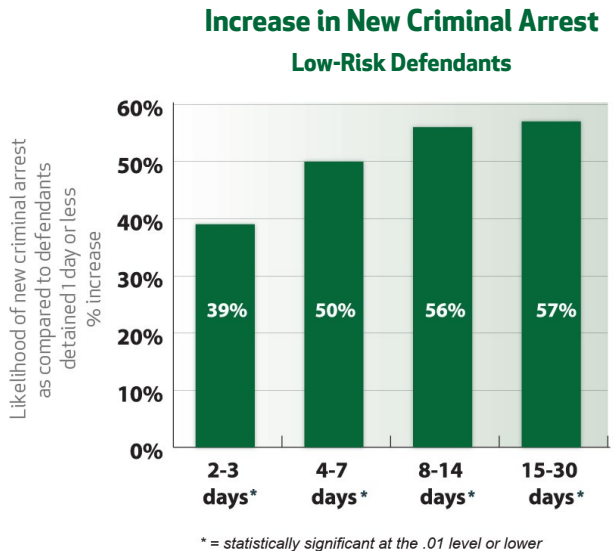
This study indicates that effectively distinguishing between low-, moderate-, and high-risk defendants at the pretrial stage could potentially enhance community safety.

The research findings are summarized below.

A. PRETRIAL DETENTION AND PRETRIAL OUTCOMES

This study explored whether there is a link between time spent in pretrial detention and the commission of new criminal activity or failure to appear in court. The study looked at 66,014 cases in which the defendants were released at some point before trial, and found that even very small increases in detention time are correlated with worse pretrial outcomes. The research controlled for other known variables. The study found that, when held 2-3 days, low-risk defendants were almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours. The study indicates that the correlation generally escalates as the time behind bars increases: low-risk defendants who were detained for 31 days or more offended 74 percent more frequently than those who were released within 24 hours. A similar pattern held for moderate-risk defendants, though the percentage increase in rates of new criminal activity is smaller.

Interestingly, for high-risk defendants, the study found no relationship between pretrial detention and increased new criminal activity. In other words, there is no indication that detaining high-risk defendants for longer periods before trial will lead to a greater likelihood of pretrial criminal activity.

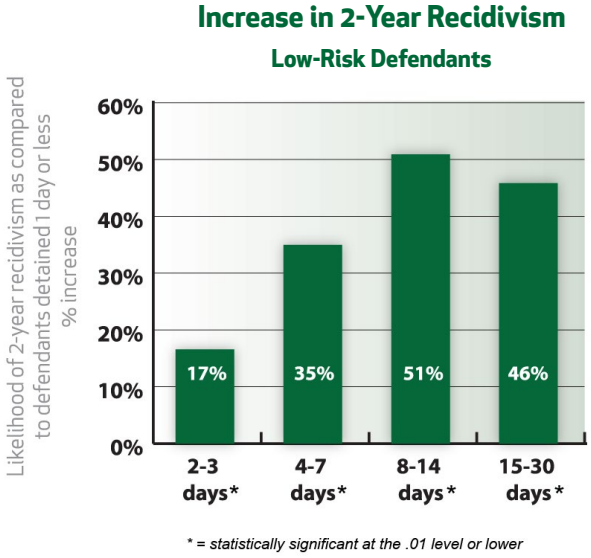


This same pattern emerged for failure to appear. Low-risk defendants held for 2-3 days were 22 percent more likely to fail to appear than similar defendants (in terms of criminal history, charge, background, and demographics) held for less than 24 hours. The number jumped to 41 percent for defendants held 15-30 days. For low-risk defendants held for more than 30 days, the study found a 31 percent increase in failure to appear. Again, however, detention was found to have no impact on high-risk defendants' rates of missing court, and for moderate-risk defendants, the effect was minimal.

B. PRETRIAL DETENTION AND LONG-TERM RECIDIVISM

Even for relatively short periods of detention, according to the study, the longer a low-risk defendant was detained before trial, the more likely he was to commit a new crime within two years of case disposition. Specifically, controlling for other known variables, the study found that pretrial detention is associated with long-term recidivism, particularly for low-risk defendants.

For detention periods of up to 14 days, according to the study, the longer a low-risk defendant was detained before trial, the more likely he was to commit a new crime within two years of case disposition. Compared to individuals released within 24 hours of arrest, low-risk defendants held 2-3 days were 17 percent more likely to commit another crime within two years. Detention periods of 4-7 days yielded a 35 percent increase in re-offense rates. And defendants held for 8-14 days were 51 percent more likely to recidivate than defendants who were detained less than 24 hours. Although the effects began to diminish slightly beyond 14 days, low-risk defendants remained significantly more likely to reoffend in the long run as compared to defendants released within 24 hours. Again, these effects were observed among defendants who were matched on all the other measurable variables. For high-risk defendants, however, more days spent in pretrial detention were not associated with an increase in recidivism.



C. POLICY IMPLICATIONS

In our criminal justice system today, judges frequently do not have an objective, scientific, and data-driven risk assessment to assist them in understanding the amount of risk that an individual defendant poses. Moreover, length of detention is frequently determined by factors totally unrelated to a defendant's risk level – for instance, the administrative speed with which a

given court system can process defendants. In some jurisdictions, defendants may be held up to three days before their first opportunity to go before a judge who will determine whether they are detained or released. What we see from this research is that the costs of these delays may potentially result in increased crime. The study finding regarding high-risk defendants is equally important: There appears to be no tradeoff between protecting the public during the pretrial period and improving public safety years later.

Although these studies do not demonstrate causation, they show correlations between length of detention and negative outcomes for low- and moderate-risk defendants. Additional studies are needed to further research these and other questions.

III. THE IMPACT OF PRETRIAL SUPERVISION

Although one of the most important decisions made before a criminal trial is whether to release or detain a defendant, the need for more data-driven tools does not end there. Judges frequently assign conditions to defendants they release, which may include pretrial supervision. There are many different models of pretrial supervision, some of which include periodic calls or meetings with a pretrial services officer, drug testing or treatment, or electronic monitoring. Currently, however, judges have very little data to help them determine who to assign to supervision, and what type of supervision works best for whom. With this in mind, LJAF is pursuing a number of studies of conditions of release including pretrial supervision.

In its initial study of pretrial supervision, LJAF researchers looked at 3,925 defendants from two states, one eastern and one western, and compared 2,437 defendants who were released without supervision with 1,488 who were released with supervision. In order to determine whether the effects of supervision varied based on defendants' risk levels, researchers used an existing validated risk assessment to assign defendants to risk categories.

The study found that moderate- and high-risk defendants who received pretrial supervision were significantly more likely to appear for their day in court. When controlling for state, gender, race, and risk, moderate-risk defendants who were supervised missed court dates 38 percent less frequently than unsupervised defendants. For high-risk defendants, the reduction was 33 percent. Analysis of various samples of the low-risk population generated inconsistent findings about the impacts of supervision on failure-to-appear rates – suggesting that the relationship between supervision for low-risk defendants and failure to appear is minimal or nonexistent.

In addition, pretrial supervision of more than 180 days was statistically related to a decrease in the likelihood of new criminal activity before case disposition. Defendants supervised pretrial for six months or more were 22 percent less likely to be arrested for new crimes before case disposition. While this finding is intriguing, the data set was not specific enough with regard to type of supervision to draw definite conclusions about the impact of supervision on new criminal activity pending case disposition.

This study is significant because it tells us that pretrial supervision may be effective in reducing failure to appear rates and, after a time, new criminal activity. However, while it appears that supervision generally helps prevent negative pretrial outcomes, details are scarce. For instance, in this study, no information was provided as to what type of supervision (minimal, moderate, or intensive) defendants received. And what types of supervision work for which defendants is something the field does not yet know. LJAF is committed to pursuing additional research in these important areas.

IV. CONCLUSION

This research demonstrates how critical it is to focus on the pretrial phase of the criminal justice system. Pretrial decisions made by judges, police, and prosecutors determine, as Caleb Foote stated in 1956, "mostly everything." These studies demonstrate that pretrial decisions may impact whether or not a defendant gets sentenced to jail or prison, and for how long; that an increased length of pretrial detention for low- and moderate-risk defendants is associated with an increased likelihood that they will reoffend both during the pretrial period and two years after the conclusion of their case; and that supervision may reduce failure to appear rates and, when done for 180 days or more, new criminal activity.

As important as these findings are, however, there remains an acute need for more research in this area. Moreover, for ethical and practical reasons, it would be difficult in many instances to conduct randomized controlled trials where judges would be asked to make detention, release, and supervision decisions based on research objectives. As a result, studies such as these do not prove causation. Although the findings noted above are observational, and not causal, the correlations are so striking that they merit further research.

LJAF is committed to researching questions that have arisen in these studies, and many others. This reflects our commitment to leveraging research, data, and technology to help jurisdictions improve public safety, reduce crime, make the best use of limited resources, and ensure that the justice system is working as fairly and efficiently as possible.

The full research reports for the studies can be accessed at:
www.arnoldfoundation.org/research/criminaljustice.

About Laura and John Arnold Foundation

Laura and John Arnold Foundation is a private foundation that currently focuses its strategic investments on criminal justice, education, public accountability, and research integrity.

LJAF has offices in Houston and New York City.

THE DOWNSTREAM CONSEQUENCES OF MISDEMEANOR PRETRIAL DETENTION

Paul Heaton[*]
Sandra Mayson[†]
Megan Stevenson[‡]

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Abstract: In misdemeanor cases, pretrial detention poses a particular problem because it may induce otherwise innocent defendants to plead guilty in order to exit jail, potentially creating widespread error in case adjudication. While practitioners have long recognized this possibility, empirical evidence on the downstream impacts of pretrial detention on misdemeanor defendants and their cases remains limited. This Article uses detailed data on hundreds of thousands of misdemeanor cases resolved in Harris County, Texas—the third largest county in the U.S.—to measure the effects of pretrial detention on case outcomes and future crime. We find that detained defendants are 25% more likely than similarly situated releasees to plead guilty, 43% more likely to be sentenced to jail, and receive jail sentences that are more than twice as long on average. Furthermore, those detained pretrial are more likely to commit future crime, suggesting that detention may have a criminogenic effect. These differences persist even after fully controlling for the initial bail amount as well as detailed offense, demographic, and criminal history characteristics. Use of more limited sets of controls, as in prior research, overstates the adverse impacts of detention. A quasi-experimental analysis based upon case timing confirms that these differences likely reflect the causal effect of detention. These results raise important constitutional questions, and suggest that Harris County could save millions of dollars a year, increase public safety, and reduce wrongful convictions with better pretrial release policy.

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[*] Senior Fellow, University of Pennsylvania Law School and Academic Director, Quattrone Center for the Fair Administration of Justice. We are deeply grateful for thoughtful input from Alex Bunin, John Hollway, Seth Kreimer, David Rudovsky, and participants in the April 2016 Quattrone Center Advisory Board meeting. The contents of this paper are solely the responsibility of the authors.

[†] Quattrone Fellow, University of Pennsylvania Law School.

[‡] Quattrone Fellow, University of Pennsylvania Law School.

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INTRODUCTION

The United States likely detains millions of people each year for inability to post modest bail. There are approximately eleven million admissions into local jails annually.[1] Many of those admitted remain jailed pending trial. At midyear 2014 there were an estimated 467,500 people awaiting trial in local jails, up from 349,800 in 2000 and 298,100 in 1996.[2] Available evidence suggests that the vast majority of pretrial detainees are detained because they cannot afford their bail, and that even bail of a few thousand dollars or less results in systemic detention.[3]

This expansive system of pretrial detention has profound consequences, within and beyond the criminal justice system. A person detained for even a few days may lose her job, her housing, or custody of her children. There is also substantial reason to believe that detention affects case outcomes. A detained defendant "is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense."[4] This is thought to increase the likelihood of conviction, either by trial or by plea, and may also increase the severity of any sanctions imposed. More directly, a detained person may plead guilty—even if innocent—simply to get out of jail. Not least important, a money bail system that selectively detains the poor violates basic constitutional protections.[5]

These problems are particularly extreme in the misdemeanor context. "Misdemeanor" may sound synonymous with "trivial," but that connotation is misleading. Misdemeanors matter. Misdemeanor convictions can result in jail time, heavy fines, invasive probation requirements, and collateral consequences that include deportation, loss of child custody, ineligibility for public

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[1] TODD D. MINTON AND ZHEN ZENG, JAIL INMATES AT MIDYEAR 2014, 1 (Bureau of Justice Statistics, 2015).

[2] *Id.* at 3; DARRELL K. GILLIARD AND ALLEN J. BECK, PRISON AND JAIL INMATES AT MIDYEAR 1996, 7 (Bureau of Justice Statistics, 1997). Pretrial detention rates rose steadily between 1980 and 2007, accompanying a shift away from release on recognizance and toward reliance on cash bail. Whereas between the years 1990 and 1994, 41% of pretrial releases were on recognizance and 24% were by cash bail, between 2002 and 2004 the relation was reversed: 23% of releases were on recognizance and 42% were by cash bail. BUREAU OF JUSTICE STATISTICS, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1990-2004, 2 (2007); JUSTICE POLICY INSTITUTE, FOR BETTER OR FOR PROFIT, at 5 (2012); BRENNAN CENTER FOR JUSTICE, REDUCING RACIAL AND ETHNIC DISPARITIES IN JAILS 9 (June 2015); RAM SUBRAMANIAN, ET AL., VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 8-10 (2015). As of 2015, financial conditions of release were imposed in 61% of all criminal cases and 70% of felony cases nationwide. BRENNAN CENTER, *supra*, at 9.

[3] *See* BRIAN A. REAVES, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009-STATISTICAL TABLES (Bureau of Justice Statistics, 2013) (reporting that nine in ten felony defendants detained until disposition had bail set); THOMAS H. COHEN & BRIAN A. REAVES, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1 (Bureau of Justice Statistics, 2007) (reporting that five in six felony defendants detained until disposition had bail set, and that approximately 30% of felony defendants with bail set at $5000 or less were detained); NEW YORK CITY CRIMINAL JUSTICE AGENCY, ANNUAL REPORT 2013, 22 (2014) (documenting bail less than $500 in 33% of non-felony cases and 3% of felony cases in New York City, and reporting that 30% of felony defendants and 46% of non-felony defendants whose bail was $500 or less were detained until the disposition of their case). What is unclear is how many of the defendants detained despite bail are there for inability to pay, and how many may have elected not to post bail for reasons other than financial inability (for instance, because they have a probation detainer, or plan to plead guilty and expect a custodial sentence). *See also infra*, Tbl.1 and accompanying text (discussing rates of misdemeanor pretrial detention in Harris County).

[4] Barker v. Wingo, 407 U.S. 514, 533 (1972).

[5] *See infra* note 123 and accompanying text. Note that wealth-based detention also exacerbates racial inequality. *See* BESIKI LUKA KUTATELADZE & NANCY R. ANDILORO, PROSECUTION AND RACIAL JUSTICE IN NEW YORK COUNTY – TECHNICAL REPORT FOR THE NATIONAL INSTITUTE OF JUSTICE ii–iii (2014), www.ncjrs.gov/pdffiles1/ nij/grants/247227.pdf (finding that, controlling for other relevant variables, racial minorities are disproportionately detained).

services and barriers to finding employment and housing.[6] Beyond the consequences of misdemeanor convictions for individuals, the misdemeanor system has a profound impact as a whole, because it is enormous; it represents the majority of criminal prosecutions in the United States. While national data on misdemeanors are lacking, one analysis finds that misdemeanors represent more than three quarters of the criminal caseload in state courts.[7]

Existing data suggest that a substantial percentage of misdemeanor defendants are detained pretrial for inability to post bail.[8] For this group, the worst punishment may come before conviction.[9] Conviction generally means getting out of jail; people detained on misdemeanor charges are routinely offered sentences for "time served" or probation in exchange for tendering a guilty plea. The incentives to take the deal are overwhelming. For defendants with a job or apartment on the line, the chance to get out of jail may be impossible to pass up. Misdemeanor pretrial detention therefore seems especially likely to induce guilty pleas, including wrongful ones.[10] This is also, perversely, the realm where the utility of cash bail or pretrial detention is most attenuated, because these defendants' incentives to abscond should be relatively weak, and the public-safety benefit of detention is dubious.[11]

Despite these structural problems, money-bail practices that result in systemic misdemeanor pretrial detention have persisted nationwide. In Harris County, the site of our

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[6] Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1090-91 (2013) (noting that misdemeanor convictions "can affect future employment, housing, and many other basic facets of daily life"); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1316-17 (2012) (reporting that a misdemeanor conviction can limit a person's access to "employment, as well as educational and social opportunities;" can limit eligibility for "professional licenses, child custody, food stamps, student loans, health care" or public housing; can "lead to deportation;" and "heightens the chances of subsequent arrest, and can ensure a longer felony sentence later on").

[7] *See* Roberts, *supra* (reporting that a "2010 analysis of seventeen state courts revealed that misdemeanors comprised 77.5% of the total criminal caseload in those courts"); Natapoff, *supra*, at 1315 ("Most U.S. convictions are misdemeanors, and they are generated in ways that baldly contradict the standard due process model of criminal adjudication.").

[8] *See, e.g.*, Charlie Gerstein, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1534 (2013) ("In New York . . . 25 percent of nonfelony defendants are held on bail. In Baltimore, that number is closer to 50 percent."); Natapoff, *Misdemeanors*, *supra* note 6, at 1321-22 ("In New York, the vast majority of such defendants cannot pay their bail."); ROBERT C. BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (Nat'l Ass'n of Criminal Def. Lawyers, 2009), www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf (estimating based on a sample of twelve states) ("If the whole country behaves about as well as New York State does, approximately 2.5 million people nationwide are held on bail they cannot pay for misdemeanor charges each year.").

[9] *Cf.* MALCOLM FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979); Stack v. Boyle, 342 U.S. 1, 4 (1951) (noting that the "traditional right to freedom before conviction . . . serves to prevent the infliction of punishment prior to conviction").

[10] *See, e.g.*, Natapoff, *supra* note 6 at 1315 ("[E]very year the criminal system punishes thousands of petty offenders who are not guilty."); *id.* at 1347-50 (cataloging pressures that lead innocent misdemeanor defendants to plead guilty); Samuel Gross, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 930-31 (2008) (noting that it is "entirely possible" that most wrongful convictions are "based on negotiated guilty pleas to comparatively light charges" to avoid "prolonged pretrial detention"); Alexandra Natapoff, *Negotiating Accuracy: DNA in the Age of Plea Bargaining*, http://papers.ssrn.com/sol3 /papers.cfm?abstract_id=2693218 (asserting that, "[b]ecause most of those arrested [for public-order offenses pursuant to aggressive broken-windows policing in New York City] pled out to avoid pretrial detention, that police policy resulted in numerous wrongful convictions").

[11] That is both because people accused of misdemeanors are likely to pose much less of a threat than people charged with more serious offenses, and because detention for the life of a misdemeanor case constitutes only very short-term incapacitation—which may be outweighed by criminogenic effects. *See infra* Part III(C).

study, more than 50% of misdemeanor defendants are detained.[12] Other jurisdictions also detain people accused of misdemeanors at surprising rates.[13] There are several possible reasons. A money-bail system may be easier to operate than a system of broad release with effective pretrial services. The bail bondsman lobby is a potent political force. In some jurisdictions, the local sheriff or jail administrator is paid on the basis of jail beds occupied, and so has a financial incentive to support policies that keep jails full. The individual judges or magistrates who make pretrial custody decisions, finally, suffer political blowback if they release a person (either directly or via affordable bail) who subsequently commits a violent crime, but few consequences, if any, for setting unaffordable bail that keeps misdemeanor defendants detained. In short, institutional actors in the misdemeanor system have had strong incentives to rely on money-bail practices that result in systemic pretrial detention.[14]

Given the inertia, misdemeanor bail policy is unlikely to shift in the absence of compelling empirical evidence that the status quo does more harm than good. Policymakers may be particularly attuned to whether misdemeanor pretrial detention produces wrongful convictions, and how it affects future crime. The evidence, however, has so far been thin. There is ample documentation that those detained pretrial are convicted more frequently, receive longer sentences, and commit more future crimes than those who are not (on average). But this is precisely what one would expect if the system detained those who pose the greatest flight or public safety risk. The key question for pretrial law and policy is whether detention actually *causes* the adverse outcomes with which is linked, independently of other factors. On this question, prior empirical work is not conclusive. The literature has produced suggestive evidence of the causal effects of detention. Nearly all prior studies, however, have been limited by the data available and by the number of variables for which they have been able to control. Only one study, a report published by the New York Criminal Justice Agency, has focused on misdemeanor cases specifically.[15]

This Article presents original evidence that misdemeanor pretrial detention causally affects case outcomes and the commission of future crimes. We offer new evidence from an empirical analysis of a large dataset from Harris County, Texas, the third-most-populous county in the United States. The data include uniquely detailed information about hundreds of thousands of misdemeanor cases. Our regression analysis controls for a wide range of confounding factors: defendant demographics, extensive criminal history variables, wealth measures (ZIP code and claims of indigence), judge effects, and 121 different categories of charged offense. In addition, we undertake a quasi-experimental analysis that leverages random variation in the access that

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[12] *Infra* Tbl.1.

[13] In Philadelphia and New York City around 25% of misdemeanor defendants are detained pretrial. See Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* (May 2, 2016), https://www.law.upenn.edu/cf/faculty/mstevens/workingpapers/Distortion-of-Justice-April-2016.pdf and MARY T. PHILLIPS, PRETRIAL DETENTION AND CASE OUTCOMES, PART I: NONFELONY CASES (NYC Criminal Justice Agency, 2007)

[14] Although that may be changing in some places, thanks to recent reform efforts. *See, e.g.*, *Ending the American Money Bail System*, http://equaljusticeunderlaw.org/wp/current-cases/ending-the-american-money-bail-system (last visited July 7, 2016) (describing litigation campaign).

[15] PHILLIPS, *supra* note 13.

defendants have to bail money based on the timing of arrest. These quasi-experimental results are very similar to those produced through regression analysis with detailed controls.

We find that detained defendants are much more likely than similarly situated releasees to plead guilty and serve jail time. Compared to similarly situated releases, detained defendants are 14 percentage points (25%) more likely to be convicted and 17 percentage points (43%) more likely to be sentenced to jail. On average, their incarceration sentences are 9 days longer, more than double that of similar releasees. Furthermore, we find that pretrial detainees are more likely than similarly situated releases to commit future crime. Although detention exerts an incapacitative effect in the short term, by 18 months post-hearing, detention is associated with a 30% increase in felonies and a 20% increase in misdemeanors, a finding consistent with other research suggesting that even short-term detention has criminogenic effects. These results raise important constitutional questions, and suggest that, with modest changes to misdemeanor pretrial policy, Harris County could save millions of dollars a year, increase public safety, and reduce wrongful convictions.

The Article proceeds in four parts. Part I provides background on pretrial detention and surveys the existing empirical literature assessing its effects. Part II outlines the pretrial process in Harris County, which has much in common with the process in other large jurisdictions, and describes our dataset. Part II also reports the result of an empirical analysis on the relationship between wealth and detention rates. Part III presents the results from a series of empirical analyses designed to measure the effect of pretrial detention on case and crime outcomes. Part IV, finally, explores the implications of the results for ongoing constitutional and policy debates.

I. THE PRETRIAL PROCESS AND PRIOR EMPIRICAL LITERATURE

A. On Bail and Pretrial Detention

The pretrial process begins with arrest and ends with the disposition of the criminal case. Since its founding, the United States has relied heavily on a money bail system adapted from the English model to ensure the appearance of the accused at trial.[16] Bail is deposited with the court and serves as security. If the accused appears in court when ordered to do so, his bail is returned at the conclusion of the case; if not, it is forfeited. But whereas in eighteenth-century England many offenses were "unbailable," the American colonies guaranteed a broad right to bail, with a narrow exception for capital cases.[17] In 1951, the Supreme Court held that the Excessive Bail Clause prohibits bail "set at a figure higher than an amount reasonably calculated" to ensure the

[16] *See, e.g.*, Hermine Herta Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L. J. 1139, 1146 (1971-1972) (chronicling history of U.S. bail system); TIMOTHY R. SCHNACKE, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 21-45 (2014).

[17] *See* Meyer, *supra*; SCHNACKE, *supra*; Judiciary Act of 1789, ch. 20, 1 Stat. 91 (repealed by 18 U.S.C. §§ 3141 to 3151 (1982) (guaranteeing a right to bail in noncapital cases); JOHN S. GOLDKAMP, TWO CLASSES OF THE ACCUSED: A STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE 55-60 (1979) (explaining "classic" state constitutional bail clause).

appearance of the accused.[18] The Court ruminated that "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[19]

The second half of the twentieth century brought major changes to America's pretrial system. In the 1960s, the realization that many people were detained pretrial for inability to post bail led to a national reform movement that limited the use of money bail in favor of simple release on recognizance ("ROR") for many defendants, as well as non-financial conditions of release.[20] In the 1970s and 80s, concerns about rising rates of pretrial crime led to a second wave of reform, this time directed at identifying and managing defendants who posed a threat to public safety.[21] The federal government and many states enacted pretrial preventive detention statutes, and almost every jurisdiction in the country amended its pretrial laws to direct courts to consider "public safety" when setting bail or conditions of release.[22]

As of this writing, most U.S. jurisdictions have reverted to a heavy reliance on money bail as the central mechanism of the pretrial system.[23] Despite the Supreme Court's admonition that "the function of bail is limited" to ensuring appearance, so that "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant," taking into account his or her financial status, many jurisdictions do not adhere to that mandate.[24] Bail hearings are typically just a few minutes long, often conducted over videoconference and without defense representation. Some jurisdictions employ bail "schedules" with predetermined bail amounts for each offense, which do not consider individual circumstances relevant to flight risk or ability to pay.[25] In many jurisdictions, judges set higher bail for defendants they perceive as dangerous, either as directed by statute or on their own initiative, despite the Supreme Court's statement that money bail is not an appropriate tool for controlling crime risk.[26]

Those who can post bail are released. Often a bail bondsman serves as a middleman; the bondsman posts the refundable bail deposit in exchange for a non-refundable fee (usually about ten percent of the total). Those who cannot post bail are detained pending trial. The length of pretrial detention various tremendously by jurisdiction and by the particulars of a given case. In most places, the state must institute formal charges and arraign the defendant within a few days

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[18] Stack v. Boyle, 342 U.S. 1, 5 (1951).

[19] *Id.* at 4.

[20] *See* GOLDKAMP, *supra* note 17, at 23-25, 84; Bail Reform Act, Pub. L. No. 98-473, 98 Stat. 1985 (1966) (codified at 18 U.S.C. §§ 3141-51) (repealed 1984), at Sec. 2 ("The purpose of this Act is to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance . . . .").

[21] *See generally* John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1 (1985).

[22] *Id.* at 15-30.

[23] *See supra* note 2.

[24] Stack v. Boyle, 342 U.S. 1, 5 (1951).

[25] *Cf.* Standard 10-5.3(f), ABA STANDARDS ON PRETRIAL RELEASE (3rd ed. 2002) ("Financial conditions . . . should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge.").

[26] *Cf. id.*, Standard 10-5.3(b) ("Financial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person.").

of arrest, and misdemeanor cases may be resolved within a few weeks. In other places the timeline is longer, so that a misdemeanor defendant may be detained for weeks or months before she is even arraigned.[27]

It has long been conventional wisdom that pretrial detention has an adverse effect on case outcomes (from the perspective of the accused). If this is true, there are at least six possible mechanisms. Most obviously, detention alters the incentives for fighting a charge. A detained defendant generally has less to lose by pleading guilty; detention may have already caused major disruption to her life. And whereas for a released defendant the prospect of a criminal sentence—custodial or otherwise—represents a serious loss of liberty, for a detainee it is, at worst, an extension of the status quo. For misdemeanor detainees, as noted above, pleading guilty usually means an *increase* in liberty, while fighting the charge means staying in jail. A second possible mechanism is that detention may limit the ability of the accused to develop a defense by working with his attorney or collecting relevant evidence. Relatedly, detention might limit the financial resources a person has to dedicate to her defense (if, for instance, it results in loss of wages). Fourth, detention prevents an accused person from engaging in commendable behavior that might mitigate her sentence or increase the likelihood of acquittal, dismissal or diversion, like paying restitution, seeking drug or mental health treatment, or demonstrating commitment to educational or professional advancement. Fifth, detention might prevent accused persons from engaging in reprehensible behaviors that have similar effects, like intimidating witnesses, destroying evidence, or engaging in bad-faith delay tactics. Finally, even if released defendants do not actively seek to delay adjudication, it may be the case that they have better outcomes simply because their cases move more slowly, which entails some inevitable degradation of evidence.

B. Challenges for Empirical Study

For policymakers and the public to properly consider changes to bail policy, such as reduction of cash bail or liberalization of ROR, they would ideally have estimates of the causal effects of pretrial detention on various outcomes of interest. The causal effect of pretrial detention represents the difference in outcomes between a representative defendant who is released pretrial as compared to an otherwise identical individual who is detained. There is, in fact, a tradition of empirical scholarship seeking to measure this effect.

As a practical matter, however, testing whether detention has a causal impact on case outcomes is complicated by the fact that those detained are systematically different from those released. Because those who are detained pretrial are likely to have committed more serious crimes, have a longer criminal history, or have less wealth, one might expect to observe differences in case outcomes between detainees and releasees even absent any causal effect of

[27] In Louisiana, people may be detained on misdemeanor arrest charges for up to 75 days without being arraigned. *See* La. C. Cr. P. § 701(B)(1)(a) (requiring that formal charges be instituted within 45 days of arrest); § 701(C) (requiring arraignment within 30 days of filing of formal charges).

pretrial custody status. To take a simple example, if crime is correlated over time, such that more frequent offenders in one period are more likely to offend in future periods, and a bail process detains defendants with more past convictions, then one would expect the future recidivism of those detained (who are high-frequency offenders) to be greater than that of those who are released even when pretrial release does not affect behavior at all. Thus, estimates of the causal effect of bail must properly account for any sorting effect of bail that occurs in the real world.

The sorting is further complicated by the fact that defendants themselves may have information about their guilt or innocence that is unobserved by the court or by researchers, but that also may alter the relative desirability of release versus detention. A defendant who is factually guilty and who plans to plead guilty may wish to forego bail simply to get the punishment over with, anticipating that she will receive credit for time served. On the other hand, a defendant who believes she has a strong case for innocence may have greater incentive to try to post bail in order to avoid being detained when innocent.

Because case-level factors such as the quality of evidence and underlying culpability of the defendant can generally not be observed in empirical studies of bail settings, all existing studies are subject to the potential for bias in measuring causal effects. The degree of bias depends on not only how significantly the unobserved factors affect the outcome of interest, but how closely correlated they are with pretrial detention. A final difficulty for measuring the effect of pretrial detention is that data on those factors known to be relevant for determining outcomes tends to be limited.

C. Prior Empirical Literature

Notwithstanding these challenges, there is a body of prior empirical work dedicated to assessing the effects of pretrial detention on criminal justice outcomes. To varying degrees, prior studies have attempted to control for underlying differences between detainees and releasees in order to estimate the true causal effect of detention. Earlier studies, which preceded the advent of computers and digitized data systems, could only control for a few variables at a time. More recent studies have been able to control for a wider variety of variables, coming closer to a causal estimate.

The first major empirical study addressed to the causal effect of detention was an innovative study conducted by the Vera Foundation in 1961, which was known as the Manhattan Bail Project.[28] The researchers conducted pretrial interviews and verifications designed to assess flight risk on the basis of community ties. They recommended release on recognizance (ROR) for all cases that met certain criteria for low flight risk. They only communicated this recommendation to the responsible judge, however, for a randomly selected subset of the cases. To a modern researcher, this experimental approach is an ideal way of determining the causal impact of pretrial detention: those for whom the ROR recommendation was communicated

[28] Charles E. Ares et al., *The Manhattan Bail Project*, 38 N.Y.U. L. REV 67 (1963).

should be statistically identical to those for whom it was not, the only difference being a higher pretrial release rate among the former. If the two groups also had differing case outcomes, one could infer that the difference was due to pretrial detention. Disappointingly, the researchers did not report overall outcomes for these two groups. They only compared case outcomes among those in the reporting group who were released versus those in the non-reporting group who were detained. They found that those detained were dramatically more likely to be found guilty and sentenced to prison. This study made a profound contribution, but was limited by its design. Because the two groups actually compared were subject to the additional filter of a release decision, they cannot be considered statistically identical. Comparing their outcomes might therefore provide a biased view of the causal impact of pretrial detention.[29]

Another important early paper came to different conclusions. John Goldkamp examined whether pretrial detention affected case outcomes at three separate stages in the criminal proceedings: whether the case was dismissed at the outset, whether the defendant entered a diversion program, and whether the defendant was ultimately adjudicated guilty.[30] Focusing on about 8000 Philadelphia court cases, Goldkamp found that after controlling for five factors – charge seriousness, detainers/warrants, number of prior arrests, open cases and number of charges – pretrial detention had no discernible impact on any of these phases. The only outcome where Goldkamp found some support for a causal channel of influence was on the likelihood of being sentenced to incarceration.

Empirical scholarship evaluating pretrial detention waned in the 1980s and 90s, but the new millennium brought new research. Since 2000, nearly a dozen correlational studies have been published on the subject. Although most of these studies have evaluated relatively small samples, they have taken advantage of improvements in data to control for a wider variety of underlying differences in characteristics. Most of these studies have found that pretrial detention was correlated with unfavorable case outcomes.[31]

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[29] A follow-up study using data on 700 of the Manhattan Bail Project cases used some basic cross-tabulations which suggest that the correlation between detention and unfavorable case outcomes is not explained away by prior record, bail amount, type of counsel, family integration or employment stability. Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641 (1964).

[30] John S. Goldkamp, "The Effects of Detention on Judicial Decisions: A Closer Look," 5 JUST. SYSTEM J. 234 (1980).

[31] Oleson et al., *The Effect of Pretrial Detention on Sentencing in Two Federal Districts*, JUST. Q. 16 (May 2014) (showing that pretrial detention was associated with an increased prison sentence in federal courts); Marvin D. Free Jr., *Bail and Pretrial Release Decisions*, 2 J. ETHNICITY IN CRIM. JUST. 23 (2004) (providing a review of studies looking at race and pretrial release); Christine Tartaro; Christopher M. Sedelmaier, *A Tale of Two Counties: The Impact of Pretrial Release, Race, and Ethnicity upon Sentencing Decisions*, 22 CRIM. JUST. STUD. 203 (2009) (examining heterogeneity in the effects of pretrial detention on sentences of incarceration for minority defendants in different Florida counties); Michael J. Leiber & Kristan C. Fox, *Race and the Impact of Detention on Juvenile Justice Decision Making*, 51 CRIME & DELINQ. 470 (2005) (assessing how the interaction between race and detention status affects juvenile delinquency case outcomes); Marian R. Williams, *The Effect of Pretrial Detention on Imprisonment Decisions*, 28 CRIM. JUST. REV. 299 (2003) (showing that pretrial detention is correlated with increased incarceration sentences using a small sample of Florida felony cases); Gail Kellough & Scot Wortley, *Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions*, 42 BRIT. J. CRIMINOLOGY 186 (2002) (finding that a negative personality assessment by police increases the likelihood of detention in Canada, and that those detained are more likely to plead guilty).

The new millennium also brought the publication of several important research studies funded by nonprofit organizations. Although not published in peer-reviewed or academic journals, these papers represented an advance because of their large sample sizes. In 2007 and 2008, the New York Criminal Justice Agency published two reports that assessed the impact of pretrial detention on case outcomes for non-felony and felony cases respectively.[32] Several years later, the Laura and John Arnold Foundation funded a pair of studies that assessed the impact of pretrial detention on case outcomes and on future crime. [33] With sample sizes in the tens to hundreds of thousands, the CJA and Arnold Foundation studies controlled for offense type within eight main classifications along with gender, race, age, and criminal history. These studies still found substantial correlations between pretrial detention and conviction rates, sentences of incarceration and post-disposition crime. One Arnold Foundation study in particular found large effects: low-risk defendants detained throughout the pretrial period were 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison than similarly situated defendants who were released at some point in their detention status.[34] These large effects, however, are unlikely to represent the true causal effect of pretrial detention. The researchers did not control for the particular offense charged, only broad offense categories such as "violent offenses". Those released on a violent offense are more likely to be facing minor charges like simple assault, and those detained on a violent offense are more likely to be facing serious charges like murder or rape. Given that likely variation, the study does not necessarily compare outcomes across similarly situated individuals, and differences in outcomes would be expected even in the absence of a causal effect.

In general, then, despite major improvements in data and analysis, this prior research has controlled for only a limited set of confounding variables, making it difficult to distinguish the effect of detention from the effects of underlying differences between detainees and releasees. Prior studies have typically controlled for limited measures of prior criminal involvement, and grouped cases into a limited number of offense categories. They have also tended to lack controls for defendants' wealth, which clearly affects pretrial release in cash bail systems, and which is likely to also affect defendant access to high-quality defense counsel and services such as counseling or drug treatment that might encourage the courts to impose a more lenient sentence. It is difficult, in other words, to exclude the possibility of "omitted-variable bias."

The newest empirical work on pretrial detention effects seeks to avoid the problem of omitted-variable bias by deploying quasi-experimental design. A working paper by Megan Stevenson, one of this paper's authors, uses a natural experiment in Philadelphia to estimate the causal effect of pretrial detention on case outcomes.[35] She exploits the fact that defendants have their bail set by different bail magistrates with broad discretion. Some magistrates tend to set bail

[32] MARY PHILIPS, PRETRIAL DETENTION AND CASE OUTCOMES, PART 1: NONFELONY CASES (2007); MARY PHILIPS, BAIL, DETENTION AND FELONY CASE OUTCOMES (2008).

[33] CHRISTOPHER T. LOWENKAMP ET AL., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES (2013); CHRISTOPHER T. LOWENKAMP ET AL., THE HIDDEN COSTS OF PRETRIAL DETENTION (2013).

[34] LOWENKAMP ET AL., THE HIDDEN COSTS OF PRETRIAL DETENTION, *supra.*

[35] Stevenson, *supra* note 13.

at unaffordable levels, while others set bail more leniently. The group of defendants randomly assigned to a high-bail magistrate are detained pretrial at higher rates than the group assigned to the more lenient magistrate. In all other respects, however, the two groups should be similar. Stevenson finds that defendants who receive the strict magistrate are also more likely to plead guilty and receive harsher sentences. Since this quasi-experimental method eliminates the bias that results from comparing individuals with different underlying characteristics, it produces a causal estimate of the effect of pretrial detention. Stevenson also performs a standard regression analysis (controlling for a detailed set of variables) that yields very similar results, suggesting that with enough controls, researchers can produce reasonable estimates of the causal effects of pretrial detention even in the absence of a natural experiment.

This Article offers several contributions to the field. First, like Stevenson, we offer both a quasi-experimental analysis and a regression analysis with a large set of highly detailed controls. Secondly, we focus on misdemeanor defendants, and assess the effect of pretrial detention both on case outcomes and on future crime. Third, we offer the first large-scale empirical study of misdemeanor pretrial detention in Harris County—which, because its pretrial process is representative of many jurisdictions, and because of the sheer number of people it affects, presents a particularly illuminating location of study.

II. MISDEMEANOR PRETRIAL DETENTION IN HARRIS COUNTY

A. The Misdemeanor Pretrial Process

The present analysis focuses on Harris County, Texas, the third largest county in the United States, which includes Houston, the nation's fourth largest city. Harris County contains a diverse population of 4.5 million residents, 20% of whom are African-American, 42% Hispanic/Latino, 25% foreign born, and 17% living below the federal poverty line.[36] In Houston, which comprises about half of the county by population, the 2014 FBI index crime rate was 1 per 100 residents for violent crime and 5.7 per 100 residents overall, placing Houston 30th among the 111 U.S. cities with population above 200,000.[37] Countywide, around 70,000 misdemeanors are processed each year, and these cases are adjudicated by the Harris County Criminal Courts at Law.[38] Historically, indigent defense in the county was provided though an appointed private counsel system, but a public defender office was established in 2010 and has gradually expanded, although it handles only a small subset misdemeanor cases.[39]

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[36] U.S. Census Bureau, *Quick Facts, Harris County, Texas*, https://www.census.gov/quickfacts/table/PST045214/48201.

[37] Authors' calculations from FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES (2014).

[38] We report this total misdemeanor count on the basis of the data (on file with authors).

[39] The Public Defender's office represents only those misdemeanor defendants who are severely mentally ill, as identified by a computer algorithm on the basis of three criteria: (1) they have taken prescribed psychoactive drugs in the last 90 days, (2) they have a diagnosis of Schizophrenia, Bipolar Disorder or Major Depression, or (3) they are assigned to the jail's specialty mental health housing. In total, this totals approximately 2500 persons annually. *Personal correspondence with* Alex Bunin, Harris County Public Defender (June 16, 2016).

After arrest and booking, misdemeanants are held at the county jail complex located in downtown Houston until a bail hearing occurs.[40] Bail hearings are held continuously every day during the year, and nearly always occur within 24 hours of the initial booking. To manage the large volume of new defendants that arrive each day, the county has developed a videoconferencing process for bail hearings, whereby defendants are taken to a conferencing facility within the jail, and participate in the hearing by speaking toward a split video screen that shows a prosecutor and the magistrate handling the hearing. Bail hearings are typically handled in an assembly-line fashion, with some hearings lasting under a minute. Unless they have somehow managed to retain counsel, which is very rare, defendants are not represented at the bail hearings, and although the hearings begin with a basic advisory of rights, defendants may self-incriminate or otherwise take actions that might affect their future case.

Magistrates making bail determinations have access to information from a pretrial services report that includes prior criminal record, and can also direct questions towards the defendant during the bail hearing. Texas statutory law defines bail as "the security given by the accused that he will appear and answer before the proper court the accusation brought against him."[41] Notwithstanding this unitary focus on ensuring appearance, the law also directs the officer who sets bail to consider public safety in determining the bail amount.[42] In Harris County, bail is typically set according to a bail schedule promulgated by the county courts. The schedule proposes bail of $500 for a first-time low-level misdemeanor with no prior criminal record and escalates bail in $500 increments according to the seriousness of the charged offense and the number of prior felony and misdemeanor convictions, up to a maximum of $5,000.[43] Although release without bail—referred to as a "personal bond" in Harris County—is allowed, it is not included on the schedule and occurs infrequently.[44] Prosecutors have an opportunity during the bail hearing to argue for departures form the schedule.

Nearly all misdemeanor offenders in Harris County are theoretically eligible for appointed counsel in the event of indigence, and indigent defense in misdemeanor cases is provided almost exclusively through appointed private counsel.[45] To apply for appointed counsel, defendants complete a form that asks about income and other assets and judges may also direct questions regarding defendants' financial circumstances from the bench either during

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[40] Some of the processes detailed here are described in Harris County Criminal Courts at Law, *Rules of Court* (Sept. 6, 2012), available at http://www.ccl.hctx.net/criminal/Rules%20of%20Court.pdf. The others are reported as described in personal communications with Alex Bunin, Harris County Public Defender (June 16 and July 27, 2016).

[41] Tex. Crim. Proc. Code Ann. § 17.01.

[42] Tex. Crim. Proc. Code Ann. § 17.15(5).

[43] Harris County Criminal Courts at Law, *Rule 9, Setting and Modifying Bail Schedule* (July 5, 2016), available at http://www.ccl.hctx.net/attorneys/BailSchedule.pdf. A non-profit advocacy organization, Equal Justice Under Law, recently filed a civil rights lawsuit against Harris County on behalf of misdemeanor pretrial detainees, alleging that reliance on the bail schedule violates due process and equal protection. *See, e.g.*, Lise Olsen, *Harris County's Pretrial Detention Practices Challenged as Unlawful in Federal Court*, HOUSTON CHRONICLE (May 19, 2016).

[44] *See* Tex. Crim. Proc. Code Ann. § 17.03 (defining "personal bond" and judicial authority to order it).

[45] *See supra* note 39. In the analysis that follows we control for public defender representation on the theory that these cases may be systematically different for other cases.

the bail hearing or in later proceedings.[46] In some cases, when it would facilitate a more orderly transition of court business, particularly when defendants appear *pro se* (without a lawyer), the judge may appoint indigent counsel without a formal request.[47] Although Texas law and the County's written policy prohibits judges from considering whether a defendant made bail in deciding whether she qualifies for appointed counsel (except to the extent that it reflects her financial circumstances),[48] there is considerable anecdotal evidence suggesting that this rule is violated in practice.[49] Thus, under the current system one potential impact of posting bail may be to alter one's chances of receiving an appointed attorney.

B. Data Description

Study data are derived from the court docket sheets maintained by the Harris County District Clerk.[50] These docket sheets include the universe of unsealed criminal cases adjudicated in the county, and include considerable detail regarding each case. We focus attention on 380,689 misdemeanor cases filed between 2008 and 2013. For each case, we observe the defendant name, address, and demographic information; prior criminal history; and top charge. We also observe the time of the bail hearing, bail amount, whether and when bail was posted, judge and courtroom assignment, motions and other metrics of procedural progress, and final case outcome, including whether the case was resolved through a plea. In the discussion below, we focus on the bail amount set at the initial hearing, which is likely to have a disproportionate impact on detention both because it is the operative bail during the early period when most defendants who post bail do so, and because it serves as a reference point for any further negotiations over bail. However, in Harris County, as in other jurisdictions, judges can exercise discretion to adjust bail as additional facts about a particular defendant or case come to light. To obtain information about the neighborhood environment for each defendant, we linked the court data by defendant ZIP code of residence—which was available for 85% of defendants—to ZIP code level demographic data from the 2008-2012 American Community Survey.

The court data have a few important limitations. Only a single most serious charge is recorded in each misdemeanor case, so it is not possible to clearly differentiate defendants with large numbers of charges. Although court personnel have access to criminal history information

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[46] Harris County District Courts, *Standards and Procedures: Appointment of Counsel for Indigent Defendants* (Sept. 2, 2009), available at https://www.justex.net/JustexDocuments/0/FDAMS/standards.pdf.

[47] This is apparent on the basis of the data, which sometimes shows counsel appointed without a motion (often on the day of final adjudication), and was confirmed in personal correspondence with Alex Bunin, Harris County Public Defender (July 27, 2016).

[48] Tex. Crim. Proc. Code Ann. § 26.04; Harris County District Courts, *Standards and Procedures* 15 (Sept. 2, 2009), available at https://www.justex.net/JustexDocuments/0/FDAMS/standards.pdf.

[49] See, for example, Emily DePrang, *Poor Judgment*, TEXASOBSERVER.ORG (Oct. 12, 2015), https://www.texasobserver.org/poor-judgment and Paul B. Kennedy, *Who is indigent in Harris County?*, THE DEFENSE RESTS BLOG (Jan. 25, 2010), http://kennedy-law.blogspot.com/2010/01/who-is-indigent-in-harris-county.html.

[50] These are available at CHRIS DANIEL, HARRIS COUNTY DISCRICT CLERK WEBSITE, http://www.hcdistrictclerk.com/edocs/public/search.aspx.

from across the state, these data only include criminal history data covering offenses within Harris County, not other jurisdictions. A further limitation is that the data do not in all cases provide clear indications of failure to appear, an obvious outcome of interest in a comprehensive evaluation of bail. The attorney information is also less than complete—although the data do indicate the identity of court-appointed counsel, as well as the fact that they are court-appointed, the identity of counsel is not observed when privately retained, nor can we distinguish between those who proceed *pro se* and those who hire a private attorney. Race and citizenship data are not carefully verified, so they may not be fully reliable.[51] Finally, although these data represent the near universe of criminal cases in the county, a small fraction of criminal court records are sealed or otherwise unavailable on the online court docket database. Additionally, arrestees who successfully complete diversion programs through which they avoid having charges filed are not included in the data.[52]

Table 1: Characteristics of Defendants by Pretrial Release Status

	Overall	Detained	Released
Convicted	68.3%	79.4%	55.7%
Guilty plea	65.6%	76.8%	52.8%
Any jail sentence	58.7%	75.0%	40.2%
Jail sentence days	17.0	25.4	7.4
Any probation sentence	14.0%	6.2%	22.9%
Probation sentence days	49.4	22.5	79.9
Requested appointed counsel	53.2%	71.3%	32.6%
Amount of bail	$2,225	$2,786	$1,624
Level A misdemeanor	30.7%	33.5%	27.4%
Male	76.8%	79.8%	73.5%
Age (years)	30.8	31.6	30.0
Black	38.9%	45.6%	31.3%
Citizen	74.1%	71.5%	77.0%
Prior misdemeanors	1.51	2.08	0.85
Prior felonies	0.74	1.11	0.31
Sample size	380,689	202,386	178,303

Table 1 presents summary statistics describing the sample of misdemeanor defendants examined in the study. We categorize as detained any individual who did not post bond with the first 7 days following the bail hearing. The data reveal stark differences in plea rates, conviction

[51] Anecdotal reports from Harris County criminal justice system actors suggest that this is the case.

[52] An example of one such program operating in Harris County is the First Chance Intervention Program, which diverts first-time, low-level marijuana offenders and is described at https://app.dao.hctx.net/OurOffice/FirstChanceIntervention.aspx.

rates, and jail sentences for detainees as compared to those who are able to make bail. However, detainees are also different from releasees across a number of pre-existing characteristics that seem likely to be related to case outcomes. For example, detainees are much more likely to request appointed counsel due to indigence (71% vs. 33%), disproportionately commit more serious Class A misdemeanors (34% vs. 24%), and have more extensive prior criminal records. Thus, it remains unclear to what extent the differences in case outcomes reflect the effect of detention versus other pre-existing differences across the two groups.

C. Pretrial Detention and Wealth

Not listed in Table 1, because it is unobserved in our data—but probably the most obvious characteristic that would likely differ between the detained and released—is wealth. A clear concern with a predominantly cash-based bail system as exists in Harris County is that individuals with money or other liquid assets will be most able to make bail, skewing the system in favor of the wealthy. Although the individual wealth of each defendant is unobserved, we can proxy for defendant wealth based upon median income in each defendant's ZIP code of residence. To illustrate the prominent role of wealth in the system, Figure 1 calculates the pretrial detention rate for defendants residing in each of the 217 ZIP codes observed in the data that contain at least 50 defendants, and plots this against the median household income in the ZIP.

The pattern is striking. Those who come from poorer neighborhoods are substantially more likely to be detained than those coming from wealthier neighborhoods. Only about 30% of defendants coming from the wealthiest ZIP codes are detained pretrial, versus around 60-70% in the poorest ZIP codes.

Although Figure 1 suggests that wealth may be an important determinant of pretrial release, it is possible that the patterns in Figure 1 reflect differential offending by defendants from lower-income ZIP codes. If, for example, lower-income misdemeanor defendants commit more serious offenses or tend to have more extensive criminal histories, one might expect them to be assigned higher bail amounts and be more likely to be detained for legally appropriate reasons. However, Figure 2, which shows the average seriousness of the offense, demonstrates that there is no relationship between wealth and offense seriousness.[53] Figure 3, moreover, demonstrates that the strongly negative wealth/detention relationship persists when focusing attention on the pool of defendants who have no prior charges in Harris County. Thus, the wealth gradient does not seem to be explainable simply as a matter of more extensive or more serious offending by low-income defendants.

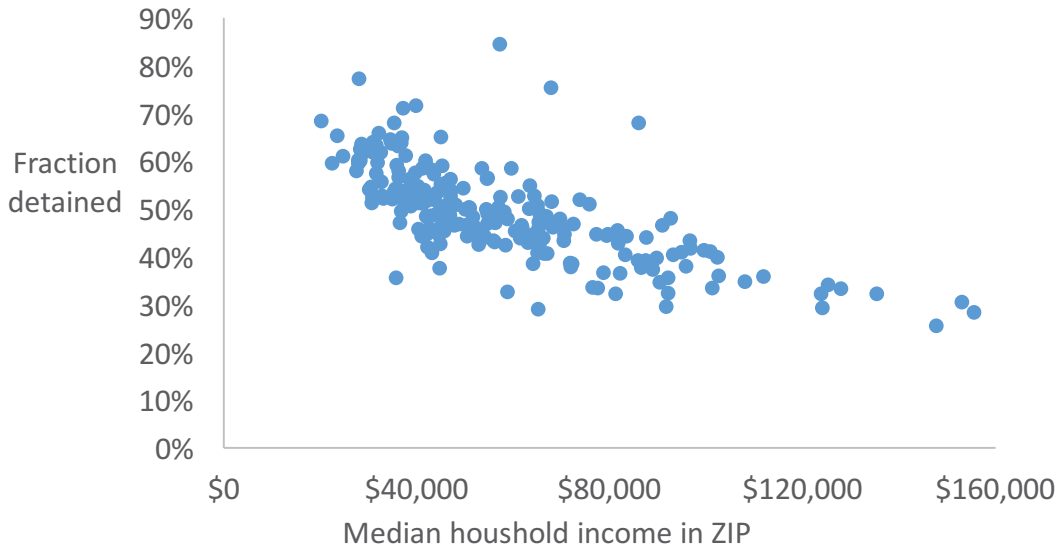
Would wealthier defendants still be detained less frequently if we could perfectly account for evidence and other factors relevant to flight or public-safety risk? To assess this question, for each defendant, we constructed an expected probability of detention by looking at the actual

[53] In a ZIP-code level regression of average seriousness on median household income, the estimated coefficient on income is practically small and not statistically significant.

detention rates of all other defendants in the sample who were assigned identical bail amounts at the initial hearing. This measure captures the average custody outcome for all defendants who were considered by the court as representing the same degree of risk, at least as expressed through the bail amount. For defendants falling within each decile of the ZIP code income distribution, we then compared this expected detention measure to the true rates of detention. The results of this analysis are reported in Figure 4.

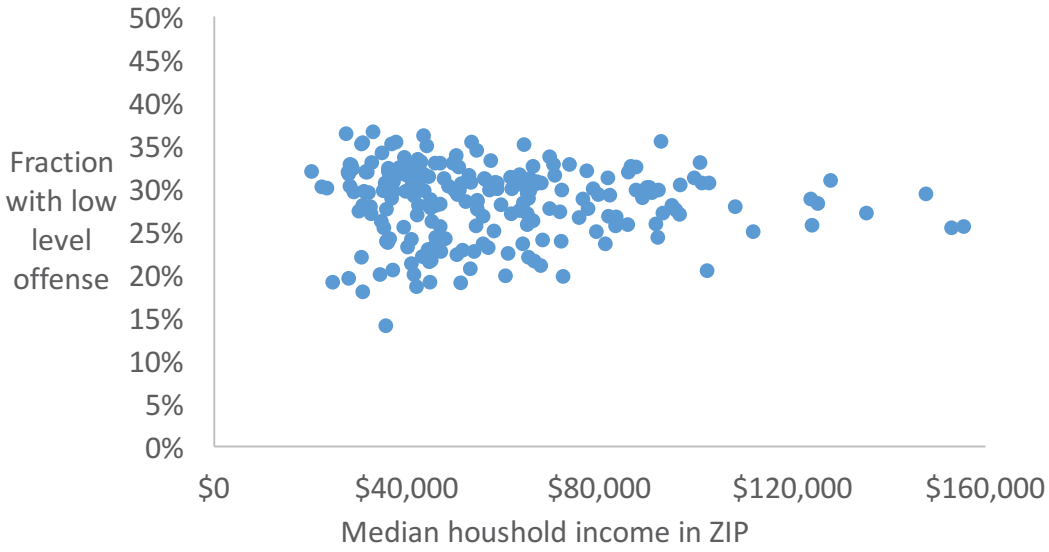
We see a striking pattern in which, for the poorest defendants, the actual detention rates are substantially above those that would be predicted based upon their assigned bail, whereas the reverse is true for the wealthiest defendants. Defendants in the lowest-income decile are about 15% (8 percentage points) more likely to be detained than would be expected based on their court assigned bail, and those in the top decile are 19% (9 percentage points) less likely to be detained. Because these comparisons already account for the bail amount, the differences cannot be plausibly attributed to anything in the court record that might implicate worthiness for bail. Thus, it appears that wealthier defendants are advantaged in their ability to obtain pretrial release beyond what would be expected simply based on the merits of their case.

Figure 1: Relationship Between Wealth and Detention Rates Among Misdemeanor Defendants in Harris County, TX



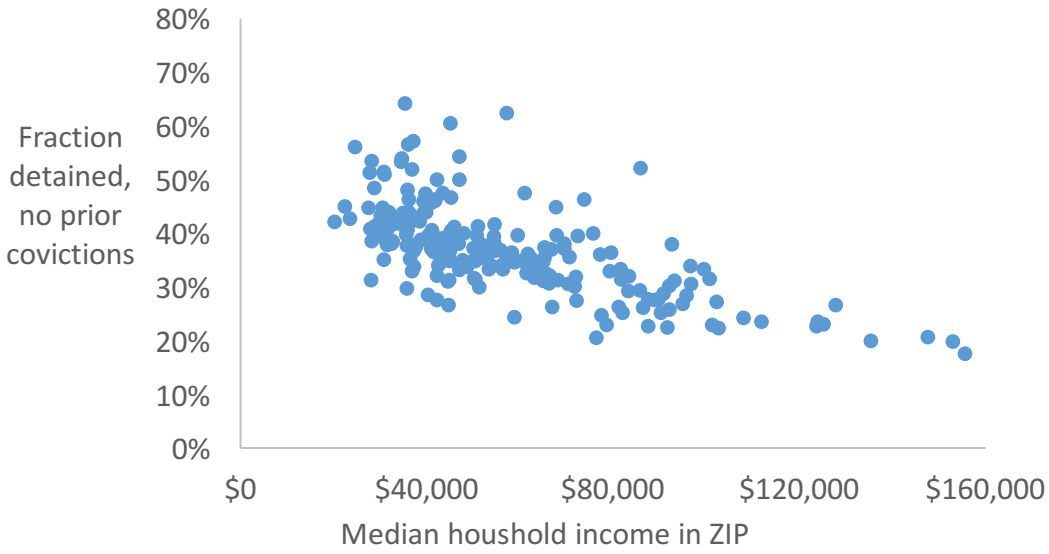
Note: This figure reports detention rates versus median income by ZIP code. Each dot in the chart represents defendants residing within a particular ZIP code.

Figure 2: Relationship Between Wealth and Offense Seriousness Among Misdemeanor Defendants in Harris County, TX



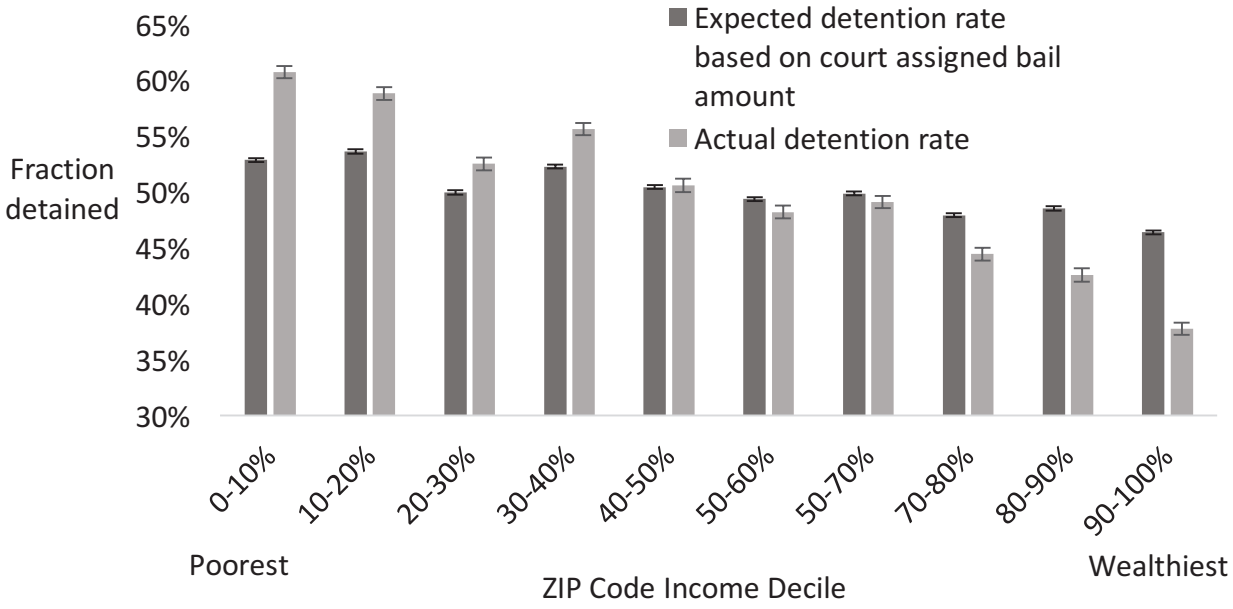
Note: This figure reports the fraction of defendants charged with a Class A misdemeanor versus median income by ZIP code. Each dot in the chart represents defendants residing within a particular ZIP code.

Figure 3: Relationship Between Wealth and Detention Rates Among Misdemeanor Defendants with No Prior Criminal Record in Harris County, TX



Note: This figure reports detention rates versus median income by ZIP code. Each dot in the chart represents defendants residing within a particular ZIP code.

Figure 4: Expected Detention Rates Versus Actual Detention Rates by Income Decline



Note: Expected detention rates are calculated by comparing defendants to all other defendants with equal bail amounts. Whiskers represent 95% confidence intervals.

III. ANALYSIS OF THE EFFECTS OF PRETRIAL DETENTION

A. Regression Analysis

Does this apparent unequal access to release have implications for the outcomes of cases? To begin to assess the impacts of bail, we estimate a series of regression models where the unit of observation is a case, the outcome is whether the case resulted in conviction, and the primary explanatory variable is a 0/1 indicator for whether a particular defendant was detained pretrial. We progressively introduce richer and richer sets of control variables to assess the extent to which the measured "effects" of detention might simply be attributable to uncontrolled factors other than detention.[54] As we progressively add additional controls we may get closer to the true causal estimate, but these estimates are all subject to the limitation that there may be uncontrolled, unobserved factors such as defendant wealth or quality of evidence that bias these as estimates of the causal effect of detention.

[54] We do not seek, by this methodology, to measure the effect of any of the variables we progressively introduce. For that purpose, this methodology would be flawed. *See* Jonah Gelbach, *When Do Covariates Matter? And Which Ones, and How Much?* 34 J. LABOR ECON. 509 (2016). We simply seek to assess the impact of detention under various specifications of increasing complexity.

Table 2 reports the regression estimates. The first specification reports a coefficient from a bivariate regression with no controls. The baseline conviction rate for those not detained is 56%, so detainees are 23.6 percentage points, or 42% more likely to be convicted. In Specification 2, we add controls for the charged offense along with the age, race, gender, and citizenship status of the defendant. In contrast to prior research, which tends to group crimes into a small number of general categories (e.g. "sex offense" or "minor public order offense"), in our regression we control for 121 different offense categories representing a wide range of different types and severities of offending. These additional controls do not dramatically alter the measured relationship between detention and conviction.

In Specification 3, we add controls for defendant build, skin color, and nativity and also include a full set of fixed effects for the ZIP code of residence. One clear drawback of attempting to measure the effects of pretrial detention through regression modeling is that wealth and SES are strong predictors of case outcomes, and seem likely to also be correlated with pretrial detention, but are rarely observed in court data. By including ZIP code controls, we are in essence comparing two individuals who come from the same neighborhood but who differ in pretrial detention status. While wealth and SES can vary within a ZIP code, the high degree of segregation by socioeconomic status that exists in Harris County (as in many urban areas in the United States) suggests that the ZIP codes can be a reasonable proxy for SES and education. Once again, the additional controls do not dramatically alter the results.

In Specification 4, we include indicators for the number of prior misdemeanor and felony charges and convictions as additional controls. Controlling for prior criminal history is important because prior offenses enter directly into the bail schedule, thus having a direct influence on detention. Prior criminal history may also factor into the outcome of the current case, particularly with reference to sentencing. As noted previously, our criminal history data only captures criminal justice contacts within Harris County. After conditioning on factors such as citizenship status, nativity, and residence location, however, it seems less likely that patterns of out-of-county offending would differ systematically between those who are detained and those who are released, suggesting the available controls may be adequate for capturing prior criminal activity. Somewhat surprisingly, controlling for prior criminal activity only modestly reduces the estimated relationship between detention and conviction.

Although we don't directly observe individual wealth, we can further proxy for wealth by whether a particular defendant requested appointed counsel, claiming indigence. Specification 5 adds an indigence indicator to the set of control variables. Controlling for this proxy for wealth appreciably reduces the coefficient estimate on detention, but it remains statistically significant and practically large.

In Specification 6 we add a full set of indicators for the actual bail amount set. In this specification, we are comparing individuals who have the same bail set at their hearing—and who are also equivalent across all variables enumerated in prior specifications—but who differ in their detention status. Since the amount of cash bail is, at least in theory, supposed to adjust to reflect the risk of flight and threat to public safety, conditioning precisely to the bail amount is

akin to comparing individuals only to others whom the court has deemed to be equally risky to one another. On a conceptual level, comparing individuals with similar court-determined risk seems attractive because it means that any subsequent difference in outcomes cannot result from the sorting function of the bail process, because the controls completely account for the instrumentality of sorting, which is the bail amount. In this, our preferred specification, pretrial detention is associated with a14 percentage point, or 25%, increase in the likelihood of conviction.

Table 2: Regression Estimates of the Effect of Pretrial Detention on Conviction

Specification	
1. No controls	0.236**
	(0.001)
2. Add controls for offense and basic demographics	0.266**
	(0.002)
3. Add controls for ZIP code of residence other characteristics	0.255**
	(0.002)
4. Add controls for prior criminal history	0.220**
	(0.002)
5. Add control for a claim of indigence	0.151**
	(0.002)
6. Add control for bail amount	0.140**
	(0.002)

Note: This table reports coefficient estimates from linear probability regressions estimating the relationship between pretrial detention and whether or not a misdemeanor defendant is convicted. The unit of observation is a case, and the sample size is 380,689. The dependent variable is an indicator for whether or not a particular defendant in a case was convicted, and the primary explanatory variable of interest is an indicator for whether the defendant in the case was released pretrial. Each table entry reports a coefficient from a separate regression, coefficients on other control variables are unreported. The mean conviction probability among those not detained was .557. Specification 1 is a simple bivariate regression. Specification 2 adds controls for defendant age (85 categories), gender, race (6 categories), citizenship status (3 categories), charged offense (121 categories), and week of case filing (289 categories). Specification 3 adds controls for the defendant's skin tone (14 categories), build (5 categories), whether they were born in Texas, and ZIP code of residence (223 categories). Specification 4 adds controls for the number of prior misdemeanor and felony charges (10 misdemeanor and 10 felony categories) and convictions (10 misdemeanor and 10 felony categories). Specification 5 adds an indicator for whether a defendant requested appointed counsel due to indigence. Specification 6 adds a full set of initial bail amount fixed effects (315 categories) as additional controls. Because the public defender handles a non-random subset of misdemeanors, all regressions with controls include an indicator for cases handled by the public defender. Robust standard errors are reported in parentheses. * denotes an estimate that is statistically significant at the .05 level in a two-sided test, and ** at the .01 level.

One variable not included in our specifications, and which might be important, is the type of defense representation actually provided (hired private counsel, public defender, appointed private counsel or no counsel (*pro se*)). We have not included it for two reasons. First, we cannot fully control for representation type, because our data do not allow us to distinguish between those who hire a private attorney and those who choose to represent themselves.[55] While we can control for whether or not the defendant receives a court-appointed attorney, this specification is difficult to interpret, as it essentially places those with a hired attorney and those representing themselves in the same category. Second, it might not be optimal to control for counsel type even if the data were available. The type of counsel may itself be an outcome of whether or not the defendant is detained pretrial; to control for it is thus to ignore one important effect of detention.[56] Changes to detention policy would likely also alter the type of representation received by defendants.

Finally, controlling for counsel type might actually introduce a new source of bias. In general, statistical practice cautions against controlling for variables that are not predetermined (*i.e.* variables that are influenced by the main variable of interest). The evidence suggests that judges are more likely to approve a request for counsel if the defendant is detained.[57] This suggests at releasees who receive court-appointed attorneys may be poorer and have more challenging cases than detainees with appointed counsel. Thus controlling for attorney status would tend to bias the results towards zero, since instead of comparing similarly situated individuals we would be comparing relatively wealthy detainees with relatively poor releasees.

Nonetheless, for the sake of completeness we did estimate a specification that controls for whether or not the defendant received a court-appointed attorney. The estimated coefficient was .042 with a p-value <.01—a smaller bail/conviction relationship, but one that remains statistically significant and relevant for policy purposes. This is not our preferred specification, however, due both to the data limitations and to the difficulties of interpreting the results of a regression that controls for one of the outcomes of pretrial detention.

The basic message from the analysis of conviction is that accounting for pre-existing differences in detainees and releasees is important, but even after controlling for a fairly wide range of relevant characteristics, pretrial detention remains a sizeable predictor of outcomes.

In Table 3, we extend the analysis to consider a range of additional case outcomes. The first row of the table replicates the previously reported results for conviction. The columns of the table report results from regressions with no controls, with a limited set of controls (basic offense

[55] In Harris County, judges will as a rule not proceed in misdemeanor cases without eventually assigning counsel, but in rare cases defendants will insist on representing themselves. *Personal correspondence with* Alex Bunin, Harris County Public Defender (June 16, 2016).

[56] There is some evidence that judges see the posting of bail as an indication that a defendant is not indigent enough to merit public defense. *See supra* note 47. In Harris County, 90% of detainee requests for counsel are granted, versus 44% of releasee requests. Detention may also affect attorney type through other channels. Those who have lost their job as a result of detention may be less able to afford a private attorney, for instance.

[57] In Harris County, 90% of detainee requests for counsel are granted, versus 44% of release requests. This could be because the act of paying bail is interpreted as evidence that the defendant has funds, or because detainees are unable to work while detained.

and demographics, similar to much of the past research measuring the effects of detention), and from our preferred specification that controls for a rich set of defendant and case characteristics and the bail amount (equivalent to Specification 6 in Table 2). Although there is a sizable impact of detention on all outcomes, estimated effects become smaller as one controls for a richer set of defendant and case characteristics. Prior research, which controlled for a limited set of variables, may indeed have overestimated the causal effect of detention.

The table demonstrates that nearly all of the difference in convictions can be explained by higher plea rates among those who are detained, with detainees pleading at a 25% higher rate than similarly situated releasees. We also find that those detained are more likely to receive jail sentences instead of probation. In our preferred specification, those detained are 43% (17 percentage points) more likely to receive a jail sentence, and will receive jail sentences that are nine days longer, more than double that of non-detainees. This estimate of the impact of pretrial detention includes in the sample those without a jail sentence, so it incorporates both the extensive effect on jail time (those detainees who, but for detention, would not have received a jail sentence at all) and the intensive effect on jail time (those who would have received a jail sentence regardless, but whose sentence may be longer as a result of detention). Those detained are less likely to receive sentences of probation, and receive fewer days of probation (including, once again, both the extensive and intensive margin).

Do these results shed light on which of the various potential mechanisms linking detention to case outcomes operate in Harris County? Although we cannot answer definitively, the overall patterns in Table 3 are consistent with an environment in which released defendants are able to engage in prophylactic measures—such as maintaining a clean record, engaging in substance abuse or anger management treatment, or providing restitution—that lead to charges being dismissed or encourage more lenient treatment. Detained defendants, in contrast, have essentially accumulated credits towards a final sentence of jail as a result of their detention, and therefore are more likely to accede to and receive sentences of imprisonment.

Are some defendants affected more dramatically by detention than others? For example, if one mechanism through which detention induces guilty pleas is by causing some defendants to "pre-serve" their expected sentences, so that contesting guilt has little ultimate effect on the amount of punishment, we might expect to see larger effects of detention for offenses where the expected punishment is low. To address this question, we constructed estimates of the effects of detention analogous to those presented in Tables 2 and 3, but limiting the sample to various subsets of the defendant population. Comparing the estimated impact of detention across different subgroups offers a means of assessing whether certain types of defendants are more or less disadvantaged by detention.

Table 3: Regression Estimates of the Effect of Pretrial Detention on Other Case Outcomes

		Estimated effect of pre-trail detention		
Outcome	Average for those released	No controls	Limited controls	Preferred specification
Conviction	.557	.236**	.266**	.140**
		(.001)	(.002)	(.002)
Guilty plea	.528	.240**	.264**	.133**
		(.002)	(.002)	(.002)
Received jail sentence	.402	.348**	.317**	.172**
		(.002)	(.002)	(.002)
Jail sentence days	7.38	18.0**	15.85**	8.67**
		(.10)	(.10)	(.12)
Received probation	.229	-.167**	-.125**	-.076**
		(.001)	(.001)	(.001)
Probation days	79.9	-57.5**	-41.2**	-25.3**
		(0.45)	(0.46)	(0.55)

Note: This table reports coefficient estimates from linear regressions estimating the relationship between case outcomes and whether a defendant was detained pretrial. Each entry represents results from a unique regression. The "Limited Controls" column reports regressions with controls as in Specification 2 of Table 2, and the "Preferred Specification" column reports regressions with controls as in Specification 6 of Table 2. See notes for Table 2. The jail and probation days outcomes include defendants assigned no jail or probation.

Table 4 reports the subgroup analysis. We first consider differences by prior criminal history, comparing defendants with no prior charges in Harris County to those with prior charges. We categorize by charges rather than convictions to account for the possibility that some individuals who are charged but later acquitted may have nonetheless accumulated experience with pretrial detention. Several mechanisms suggest that there may be different effects of detention for someone who has never been previously detained. First, those with prior experience in detention may experience less psychological or emotional discomfort because they have a clearer idea of what detention entails, a sort of acclimation effect. Second, these defendants may experience fewer collateral consequences of detention, either because they have already been labeled as offenders due to their prior acts, or because they have accumulated experience in dealing with collateral consequences. A third possibility is that those with a prior record face different types of potential punishments that change their calculus regarding the benefits and drawbacks of a plea. Finally, those with no prior record may be more likely to receive plea offers that involve low sanctions, increasing the incentives to accept the plea even if innocent.

Table 4 reveals that defendants without prior records are disproportionately affected by detention. Detention has more than twice the effect on conviction for first-time offenders, and appreciably increases their likelihood of being given a custodial sentence. Although other explanations are possible, this pattern is consistent with a scenario in which defendants detained for the first time are particularly eager to cut a deal to escape custody as quickly as possible; more experienced defendants, who perhaps have become acclimated to the jail environment or who face more serious consequences of conviction, are less influenced by their detention status. It appears that one consequence of pretrial detention, at least as practiced in Harris County, is that it causes large numbers of first-time alleged misdemeanants to be convicted and sentenced to jail time, rather than receiving intermediate sanctions or avoiding a criminal conviction altogether.

Table 4 demonstrates few differences in outcomes between "Whites" and "non-Whites," or between U.S. citizens and non-citizens.[58] Incentives to post bail may be different for non-citizens with immigration detainers, who would be held in custody for immigration purposes even after posting bail. However, the fact that we obtain similar results for citizens and non-citizens suggests that detainers may not be an important omitted variable here.

We do observe some important heterogeneity in the effects of custody by the primary offense of record. For DWI, for example, detention has little effect on adjudication of guilt—presumably because there is sufficient evidence from alcohol tests in most cases to convict—but there is evidence that those who are not detained are much more readily able to substitute probation for a custodial sentence. The largest effects on conviction accrue for assault and trespassing, two crimes for which physical evidence may be lacking, and the ability to obtain statements from witnesses in court may play an important role.[59]

Consistent with the evidence for defendants of varying criminal history, when we examine subsets of the defendant population based upon assigned bail, the most substantial effects are observed for those with low bail, at least for conviction and type of sentence. Effects on sentence length are largest in absolute terms for those with higher bail amounts, but this is perhaps unsurprising, since these defendants will also face more serious sentences overall. Detention has a greater *relative* effect on sentence length for people with low bail, given the shorter average sentence lengths of that group. One implication of these patterns is that Harris County could potentially achieve much of the benefit of liberalizing access to pretrial release by focusing on those with the lowest bail amounts, which may make a course of reform more politically feasible. This may be true in other jurisdictions with features similar to Harris County as well.

Finally, we analyzed the effects of bail by ZIP code quartile, examining whether those detained from wealthier neighborhoods fare as badly in their case outcomes as those from poorer neighborhoods. Although Table 4 shows that those from the poorest areas of the county are much

[58] As noted above, the race and citizenship designations in our data may not be wholly reliable.

[59] Stevenson observes similar patterns in her Philadelphia data. *See* Stevenson, *supra* note 13, at 19.

more likely to be detained, the effects of detention itself are fairly uniform across the wealth distribution. Thus, those who cannot post bond suffer higher conviction rates and a lowered likelihood of probation versus jail even when they come from more affluent parts of the county.

Table 4: Estimated Effects of Pretrial Detention for Population Subgroups

		Estimated effect of pre-trail detention on:				
Group	Group detention rate	Conviction	Sentenced to jail?	Jail sentence (days)	Sentenced to probation?	Probation sentence (days)
Criminal History						
No prior charges	.384	.195**	.213**	7.07**	-.084**	-23.6**
		(.003)	(.003)	(.126)	(.003)	(.909)
Prior charges	.634	.092**	.128**	9.44**	-.057**	-23.0**
		(.002)	(.002)	(.177)	(.001)	(.677)
Citizenship						
U.S. citizen	.514	.145**	.163**	8.24**	-.064**	-19.9**
		(.002)	(.002)	(.137)	(.002)	(.630)
Non-citizen	.586	.114**	.178**	9.50**	-.099**	-36.4**
		(.004)	(.004)	(.219)	(.003)	(1.12)
Race						
White	.481	.143**	.184**	9.63**	-.085**	-29.6**
		(.002)	(.002)	(.156)	(.002)	(.784)
Non-white	.603	.132**	.148**	7.12**	-.058**	-16.5**
		(.003)	(.003)	(.173)	(.002)	(.728)
Offense						
Drug	.464	.150**	.143**	5.31**	-.033**	-7.34**
		(.004)	(.004)	(.142)	(.003)	(.868)
DWI	.309	.034**	.224**	13.22**	-.190**	-82.8**
		(.004)	(.005)	(.331)	(.005)	(2.35)
Assault	.597	.215**	.210**	15.51**	-.046**	-12.3**
		(.007)	(.007)	(.528)	(.005)	(2.11)
Theft	.592	.151**	.132**	5.26**	-.094**	-23.1**
		(.005)	(.005)	(.245)	(.004)	(1.48)
Trespassing	.809	.196**	.229**	8.04**	-.047**	-12.5**
		(.008)	(.008)	(.409)	(.004)	(1.30)
Bond Amount						
$0-$500	.353	.179**	.198**	5.75**	-.082**	-2.88**
		(.003)	(.003)	(.109)	(.003)	(1.02)
$501-$2,500	.464	.146**	.173**	8.42**	-.075**	-24.2**
		(.003)	(.003)	(.180)	(.002)	(.975)
$2,501+	.704	.085**	.128**	10.92**	-.053**	-25.3**
		(.003)	(.003)	(.265)	(.002)	(.855)

ZIP Code Income Quartile						
1st Quartile (Lowest)	.597	.131**	.175**	9.13**	-.087**	-29.6**
		(.004)	(.004)	(.267)	(.003)	(1.07)
2nd Quartile	.550	.127**	.166**	8.61**	-.084**	-27.8**
		(.004)	(.004)	(.261)	(.003)	(1.14)
3rd Quartile	.495	.148**	.170**	8.25**	-.069**	-21.9**
		(.004)	(.004)	(.230)	(.003)	(1.17)
4th Quartile (Highest)	.423	.158**	.168**	8.32**	-.053**	-16.9**
		(.004)	(.004)	(.238)	(.003)	(1.37)

Note: This table reports coefficient estimates from linear regressions estimating the relationship between case outcomes and whether a defendant was detained pretrial for subgroups of the defendant population. Each entry represents results from a unique regression. Controls are as in Specification 6 of Table 2. See notes for Tables 2 and 3.

B. Natural Experiment

The preceding analysis indicates that even after controlling for a wide range of defendant and case characteristics, including bail amount (which should capture the information observed by the court when making bail decisions), there remains a large gap in case outcomes between those who are detained and observationally similar defendants who make bail. Nevertheless, it remains possible that some of the differences in outcomes revealed thus far reflect unobserved factors other than pretrial detention that were not controlled for in the regression analysis.

From a purely research perspective, the ideal approach to estimating the causal effect of pretrial detention would be to randomly select a subset of defendants and detain them, and then compare their downstream outcomes with those who were not detained. Random assignment to detention status would help to ensure that the two groups were otherwise comparable on other factors that might influence outcomes, including culpability. As a practical matter, however, implementing such an experiment would be ethically dubious.

Absent the ability to run a true experiment, one might seek to identify a naturally occurring "experiment", or some situation that causes pretrial detention to vary across different defendants for reasons unrelated to their underlying characteristics or culpability. Comparing outcomes among those more likely to be detained for such idiosyncratic reasons to those less likely to be detained could offer another way to measure the effects of detention.

Here we propose comparing defendants with bail hearings earlier in the week to those with hearings later in the week as a sort of natural experiment, under the theory that those with bail set later in the week are more likely to actually make bail. We limit attention to bail hearings that occur Tuesday through Thursday so as to focus on a set of days with fairly uniform crime patterns, and avoid comparisons between crime occurring on the weekends—which tends to involve different types of actors and activities—and crime occurring on weekdays.

Table 5 helps to illustrate the logic behind this natural experiment, reporting the amount of time elapsed between the bail hearing and posting of bond for those who successfully make

bail. The first 48 hours following the bail hearing appear to be a fairly critical period for making bail, as 77% of all those who eventually make bail do so during this period. Put differently, at the time of the bail hearing, a representative defendant has a 44% chance of being detained until judgement, but after two days have elapsed without yet making bail, the chances of never making bail have risen to 75%.

Typically, defendants rely on friends or family members to either post cash bail at a predetermined facility[60] or to visit a bail bonding company, which then posts a surety bond. The premise behind the natural experiment is that it is easier get ahold of someone who is willing to show up to post bail on the weekend than during the week. As an example, consider a defendant with a Tuesday bail hearing, who then must get in contact with someone to post bail. Family members or friends may be reluctant to disrupt school or work schedules to come to the bail facility and post bond, and they may be more difficult to contact if they are at work or otherwise away from home. A similarly-situated defendant with a bail hearing on a Thursday, in contrast, may have an easier time getting ahold of someone who is willing to appear to post bail, since the acquaintance could more easily do so on a Saturday.

Table 5: Time Elapsed Between Bail Bond Hearing and Release for Misdemeanor Defendants Posting Bond in Harris County, TX

	Number of defendants	Fraction of defendants
Same day	107,327	50.30%
1 day later	50,191	23.52%
2 days later	7,598	3.56%
3 days later	3,794	1.78%
4 days later	2,867	1.34%
5 days later	2,493	1.17%
6 days later	2,103	0.99%
7 days later	1,930	0.90%
>7 days later	35,088	16.44%

An additional factor that may contribute to the ability to make bail is liquidity. Because bail must be paid in cash or cash equivalents (cashiers' check or money order) in Harris County, to the extent that access to cash varies over the course of the week, this is likely to affect access to pretrial release. Many workers are paid on Friday, and so workers may have more ready access to cash on weekends immediately after being paid than at other times during the week.[61]

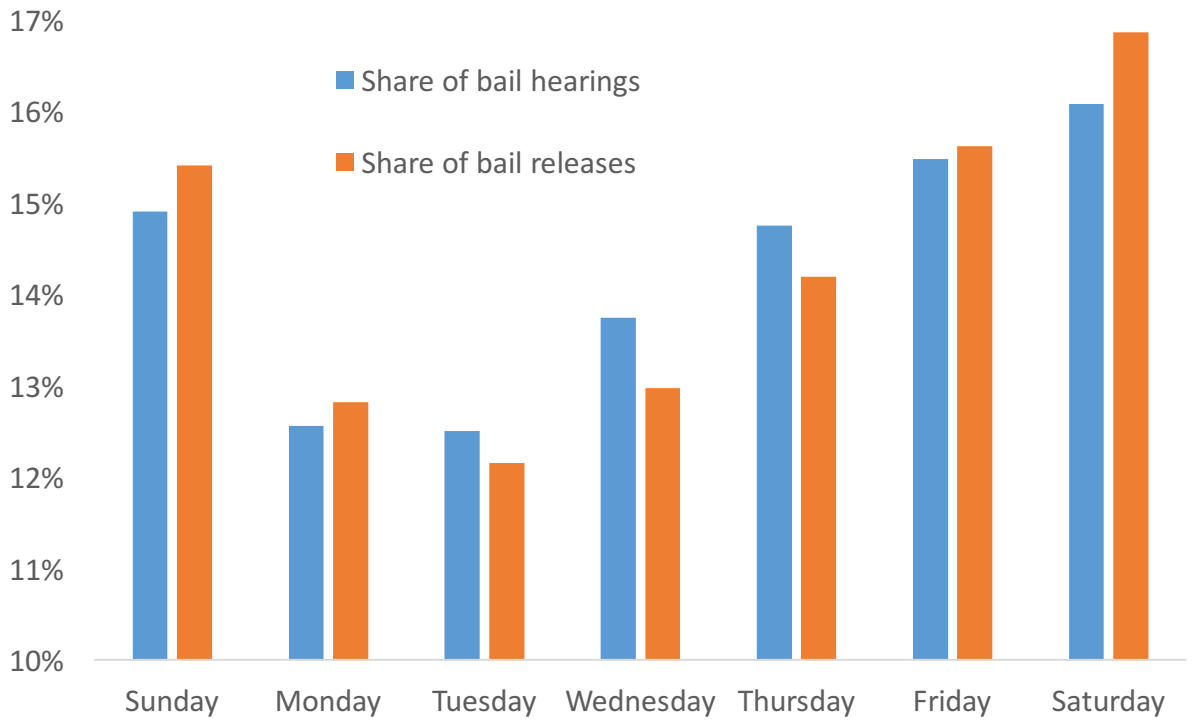
[60] In Harris County, this is the correctional complex located at 49 San Jacinto in Houston.

[61] Appendix Figure A.1 provides direct evidence on this point by plotting Google search volume for the terms "payday", "check cashing", and "payday loans" by day of week. Search volume for "payday" peaks on Friday, and demand for check cashing services is highest on Friday, Saturday, and Sunday. Searches for "payday loans", which are typically provided by

Thus, this liquidity channel might also explain why those with bail hearings closer to the weekend could be more likely to make bail.

Figure 5 provides evidence that weekend availability may indeed be a constraint affecting pretrial release by comparing the distribution of bail hearing dates over the course of the week with the dates on which defendants actually post bond. If it were equally easy to get a friend to post bond on any day of the week, we might expect the distribution of release days to closely mirror the distribution of bail hearings. In actuality, however, the figure reveals that releases are disproportionately more likely on Saturdays and Sundays, and less likely in the middle of the week. While other factors certainly influence the patterns shown in Figure 1, this simple comparison suggests that it may be easier to obtain release if the critical 48-hour period where pretrial releases most often occur overlaps with a weekend.

Figure 5: Comparison of Timing of Bail Hearings Versus Timing of Release by Day of Week



The basic premise underlying the natural experiment is that defendants with bail hearings on Thursdays should be largely similar to those with bail hearings on Tuesday or Wednesday, including in underlying culpability, but Thursday defendants may be more likely make bail

similar outlets to those offering check cashing services, and thus should be affected in similar ways by store hours, etc., but which represent negative rather than positive liquidity, show a reverse pattern, with the lowest search traffic observed on Saturdays and Sundays.

simply because there is an upcoming weekend when someone can more easily appear on their behalf with the necessary cash to post bail. Table 6 explores this possibility by comparing the average characteristics for defendants with bail hearings held on Tuesday, Wednesday, and Thursday, and reports results from tests designed to assess whether there is a statistically significant difference across the three groups of defendants in the listed characteristics. Because there is abundant evidence that the composition of offenses varies by day of the week[62], and differences in the charged offense could legitimately affect pretrial detention, the comparisons in Table 6 control for the underlying offense, which is conceptually equivalent to comparing defendants charged with the same offense who appear at bail hearings on different days.

Table 6: Average Characteristics of Defendants by Day of Bail Hearing

	Tues.	Wed.	Thurs.	P-Value
Amount of bail	$2,297	$2,300	$2,297	0.945
Pretrial release	40.6%	41.8%	44.2%	0.000
Level A misdemeanor	31.1%	31.1%	31.1%	0.916
Male	75.3%	74.9%	75.2%	0.159
Age (years)	30.7	30.7	30.7	0.809
Black	43.1%	44.0%	44.3%	0.000
Citizen	76.2%	76.0%	76.1%	0.822
Height (in.)	67.8	67.8	67.8	0.576
Weight (lbs.)	164.8	164.7	164.9	0.573
Born in TX	46.0%	46.0%	46.3%	0.495
Dark complexion	20.7%	20.8%	21.2%	0.212
Prior misdemeanor charges	1.90	1.91	1.90	0.476
Prior misdemeanor convictions	1.63	1.65	1.63	0.407
Prior felony charges	1.05	1.06	1.04	0.272
Prior felony convictions	0.83	0.84	0.82	0.109
Requested appointed counsel	55.2%	54.6%	53.6%	0.000

Note: Reported p-values are p-values from statistical tests of the null hypothesis that the characteristics listed in each row do not vary on average across all three days of the week.

[62] See for example Gerhard J. Falk, *The Influence of the Seasons on the Crime Rate*, 43 J. CRIM. L. & CRIMINOLOGY 199 (1952); THE CHIEF JUSTICE EARL WARREN INSTITUTE ON LAW AND SOCIAL POLICY, WHEN AND WHERE DOES CRIME OCCUR IN OAKLAND?: A TEMPORAL AND SPATIAL ANALYSIS, JANUARY 2008 – JULY 2013 (March 2014), available at https://www.law.berkeley.edu/files/When_and_Where_Does_Crime_Occur_in_Oakland.pdf; Marcus Felson & Erika Poulsen, *Simple Indicators of Crime by Time of Day*, 19 INT'L J. FORECASTING 595 (2003).

Table 6 suggests a remarkable degree of similarity between defendants with bail hearings on Tuesdays, Wednesday, and Thursdays across a broad range of case and offender characteristics. While for a few characteristics (race, appointed counsel request) there are statistically significant differences due to the large sample, the size of these differences are quite small. Importantly, as demonstrated in the first row of the table, the actual bail amounts set for these different groups are statistically and practically the same on average, and, as shown in Appendix Figure A.2, the entire distribution of bail amounts is in fact virtually unvarying across day of bail hearing. These patterns provide strong evidence that the courts view these three sets of defendants as identical in terms of their worthiness for pretrial release. However, the second row of the table demonstrates that, despite being assessed the same bail amounts, defendants with hearings on Thursday are about 3.6 percentage points (9%) more likely to make bail than those with hearings on Tuesday. This difference seems likely attributable to ease in producing the cash for bail, which may be greater on weekends for the reasons described above. Because the convenience/accessibility of paying bail is likely unrelated to the underlying culpability of a defendant, the weekend effect shown in Table 5 offers a plausible source of variation in pretrial detention that might be used to measure its causal effect.[63]

The main results from the analysis based upon the natural experiment are presented in Table 7. For reference in gauging the magnitude of the impacts, the first column reports the average outcome among defendants released pretrial. The second column reports coefficient estimates from ordinary regressions similar to those presented previously, where the offense, defendant demographics, ZIP code, prior criminal history, indigence status, and bail amount have been controlled. These estimates differ from those presented in Column 3 of Table 3 only because the sample for this analysis is restricted to the subset of defendants with bail hearings on Tuesday, Wednesday, or Thursday. The final column reports effects as measured by the natural experiment, which are estimated using two-stage least squares in an instrumental variables (IV) framework.[64]

Several patterns in the table are notable. The natural experiment/IV estimates are large, almost all statistically significant, and, consonant with the regression results, indicate that pretrial detention greatly influences case outcomes. As a general matter, the IV point estimates indicate larger effects of pretrial detention than the regression estimates, suggesting that the estimates

[63] One might wonder why defendants arrested on Tuesday do not simply wait until the weekend to post bail and get out, and thus have delayed but ultimately equivalent rates of release. There are several possible explanations. It may be that for those who lose jobs or suffer other major life disruptions as the result of pretrial detention, the damage is done within the first few days, such that after a few days, spending money on bail offers diminishing returns (especially if the money will go to a bail bondsmen). Moreover, for a crime with an expected punishment of a few days' imprisonment, after a few days a quick guilty plea may become relatively more attractive than posting bail.

[64] Two-stage least squares is a regression-based approach for measuring the effect of an explanatory variable (here, detention) on an outcome, controlling for other factors, that relies on an "instrument" (here, day of week of bail hearing) that shifts the explanatory variable but is thought to be otherwise unrelated to the outcome. By only exploiting variation in the explanatory variable that arises due to the instrument—which may be less prone to incorporate influences of unobserved, confounding factors—this approach is designed to deliver better causal estimates. See Joshua Angrist & Jörn-Steffen Pischke, *Mostly Harmless Econometrics: An Empiricist's Companion* 113-215 (2009).

presented earlier, to the extent that they imperfectly capture the causal effect of pretrial detention due to inability to control for all relevant factors, may in fact understate its effects. Such understatement could occur if, for example, defendants who have spent their funds on paying bail are less able to afford a high-quality private attorney than a similarly situated (i.e. from the same ZIP code, charged with the same crime, etc.) individual who did not pay bail. For all of the outcomes except jail days, however, the difference between the natural experiment and regression estimates is not statistically significant, suggesting that the regression approach yields reasonable causal estimates when sufficient controls are available.

Table 7: Effects of Pretrial Detention Based Upon the Natural Experiment

		Estimated effect of pre-trail detention	
	Average for	Regression	Natural
Outcome	those released	w/controls	experiment
Conviction	.542	.122**	.204**
		(.003)	(.077)
Guilty plea	.510	.116**	.234**
		(.003)	(.078)
Received jail sentence	.410	.142**	.227**
		(.003)	(.078)
Jail sentence days	7.5	7.33**	19.3**
		(0.18)	(5.39)
Received probation	.214	-.067**	-.124*
		(.002)	(.058)
Probation days	71.2	-2.2**	-42.3
		(0.81)	(22.1)

Note: This table reports coefficients from ordinary least squares (column II) and instrumental variables (IV) (column III) regressions measuring the effect of pretrial detention on the listed outcome. In the IV regressions, the instrument is whether the bail hearing occurred on Tuesday, Wednesday, or Thursday; the unreported first-stage effect is in the expected direction and highly significant. Controls are as in Specification 6 of Table 2; see notes for Table 2. Each reported estimated effect is from a unique regression. Sample size is 146,078 and the sample is limited to defendants with bail hearings on Tuesday, Wednesday, and Thursday.

The natural experiment is not without drawbacks. The underlying assumption of the natural experiment—that those with Thursday bail hearings would have had similar case outcomes to those with Tuesday or Wednesday bail hearings were it not for their enhanced access to pretrial release—is not directly testable. Moreover, because the absolute difference in detention rates across the Thursday, Wednesday, and Tuesday groups is relatively modest—about four percentage points—to the extent that there are remaining uncontrolled, unobserved differences across the groups, even small ones, such differences could be the true causal source

of what appear to be detention effects. Additionally, although the natural experiment still does deliver statistically significant estimates, the confidence intervals on these estimates are much larger, meaning that this approach allows us to make less definitive claims about the magnitude of the relationship between detention and outcomes. Thus, the results of this analysis are probably best interpreted as providing evidence that, after including a fairly rich set of controls, regression estimates approximate causal estimates of the effects of detention, and any remaining biases that may exist seem unlikely to fundamentally alter the conclusion that pretrial detention has significant adverse downstream consequences.

C. Future Crime

In addition to the impacts in the immediate case, pretrial detention carries the theoretical potential to affect later criminal activity. Given that a primary policy purpose of pretrial detention is to enhance public safety, such downstream effects, to the extent that they exist, should be an important component of the assessment of any particular bail system.[65] Unfortunately, rigorous estimates of the downstream crime effects of pretrial detention are relatively uncommon in the existing empirical work on bail. This section presents new estimates of the impact of misdemeanor detention in Harris County on future crime.

Downstream crime effects might occur through several mechanisms. Some would reduce future offending. Most directly, pretrial detention generates an incapacitation effect over the period of pretrial custody. Thus, at least in the immediate period following arrest, we expect detainees to commit fewer crimes than similarly situated releasees simply due to fact that they are in custody. Second, the experience of being detained might change offender perceptions of the disutility of confinement. To the extent that offenders discover that confinement is worse than expected, this could enhance the deterrent effect of the criminal law. This mechanism seems more likely to operate for first-time offenders or those with relatively little prior experience with confinement. Lastly, if pretrial detention increases the conviction rate (as our prior analysis suggests), and a prior conviction increases the possible sanctions for additional crime, pretrial detention may augment the expected sanction following a new crime, which would also enhance deterrence.

Other mechanisms would increase future offending (or arrest). If detention teaches offenders that confinement is less unpleasant than anticipated, it could reduce deterrence. Detention may also lead to job loss, disrupted interpersonal relationships, or other collateral consequences that change the relative attractiveness of crime in the future. To take a simple example: If a detained defendant loses her job, acquisitive criminal activities such as larceny or robbery might become a comparatively more attractive as a means of making up for lost income. Pretrial detainees may also make new social ties or learn new skills through their interactions

[65] For a discussion of the constitutional dimensions of this point, see *infra* Part IV.

with other jail inmates that change their propensity for crime.[66] Detention could also paradoxically lower expected sanctions for future crime if detention leads defendants to substitute custodial sentences for probation, because those on probation would face a supervision period where additional crime would trigger punishment for not only the new but also the prior offense. Finally, pretrial detention might alter the probability that future behavior is labeled by the criminal justice system as worthy of sanction. For instance, imagine that Defendant A is detained pretrial and then pleads guilty, while similar Defendant B is released, enrolls in a treatment program, and ultimately has the charge dismissed. Both are arrested in the future on allegations that the prosecutor views as presenting a marginal case. The prosecutor pursues charges against Defendant A because he has a prior conviction, but not against Defendant B, who does not.

Given that these various potential mechanisms cut in opposite directions, it is not apparent on a theoretical level whether pretrial detention should increase or decrease future crime. This is thus an empirical question of considerable import. To measure recidivism, we examined new charges for each defendant that were filed during the 18 months following his or her initial misdemeanor bail hearing. We measured future crime relative to the date that the bail hearing occurred, rather than the date the case ended, because the cases of released defendants take considerably longer to clear than those of detained defendants.[67] The recidivism analysis was conducted using conventional regression modeling and continues to adjust for offense, defendant demographics, prior criminal record, ZIP code of residence, indigence, and time and court of adjudication.[68] We separately consider misdemeanor and felony charges, and measure charges cumulatively.

An important feature of this analysis is that, as before in the preferred specification, it fully controls for the bail amount assessed at the bail hearing, which means that it compares detained defendants to similarly situated released defendants who were assigned the same bail. As a general matter, one might expect higher recidivism among those who are detained relative to those who are released simply as a result of the correct operation of the bail process. In particular, if the government is correctly assessing defendant risk, higher-risk defendants (who will ultimately commit more crime) should be detained more often. Our analysis, however, compares two defendants that the bail process has determined to be of equal risk, because their

[66] *See, e.g.*, Patrick Bayer et al., *Building Criminal Capital Behind Bars: Peer Effects in Juvenile Corrections*, 124 Q.J. ECON. 105 (2009) and Megan Stevenson, *Breaking Bad: Mechanisms of Social Influence and the Path to Criminality in Juvenile Jails* (October 12, 2015), http://ssrn.com/abstract=2627394 (presenting evidence of peer effects in juvenile incarceration).

[67] Unsurprisingly, defendants in detention tend to resolve cases much sooner. For detained defendants, the median time to first judgment is 3 days, and 80% of defendants have their cases resolved within 18 days. For those who make bond, the median time to first judgment is 125 days. Waiting until a case is resolved to start the clock would compare released defendants months or in some cases even years after their initial arrest to detained defendants in the days and weeks after their arrest.

[68] We explored applying the natural experiment to the recidivism outcomes, but the results, while not inconsistent with the results reported in the paper, were sufficiently imprecise so as to not provide useful guidance. For example, the instrumental variables estimates implied that detention increases felonies committed as of 18 months after the bail hearing by 15%, but the 95% confidence interval for this estimate was -59% to 219%.

bail was set identically. Thus, the impacts documented here already net out any effects that might reflect the differential sorting of defendants through the bail system.

Figure 6 plots results from a series of regressions where the outcome is the number of new misdemeanors recorded between the bail hearing and some number of days post-hearing. The actual average number of offenses for the non-detained population is depicted in the figure along with the adjusted rate for the detained population; this adjusted rate is calculated by estimating regressions similar to those in Specification 6 of Table 2, but with new offenses as the outcome, and then adding the resultant estimate for the effect of pretrial detention to the actual offending rate for non-detainees. This, in essence, depicts what the expected misdemeanor offending rate would be for the detainees if they were similar in demographics, case characteristics, prior criminal history, etc. to the released population. Figure 6 includes bars denoting the 95% confidence intervals for the adjusted rates, and shows impacts through the first 30 days post-hearing.

The figure demonstrates a steady rise in the number of new charges for both groups over time; this increase over time is a direct consequence of the choice to define the outcome as the cumulative number of new charges. For the first 19 days post bail hearing, the incidence of misdemeanors for detainees is below that of releasees, which likely reflects the incapacitative effect of being in jail. These differences are statistically significant through day 13. By day 30, however, there is a statistically significantly higher incidence of misdemeanors among the detained population. Thus, despite the initial incapacitation, by one month after the hearing those who were detained have exceeded their similarly situated counterparts who were released. To the extent that the rich set of controls allow us to construe these differences as causal, they suggest that pretrial detention has a greater criminogenic than deterrent effect.

Figure 7 plots similar differences between releasees and detainees in misdemeanor crime, but expands the time window to a full 18 months post-bail hearing. Throughout this later period the disparity between detainees and releasees remains statistically significant and practically large. Appendix Table A1, which reports the numeric estimates underlying the figure, shows that the gap between detainees and those released stabilizes at about one year post-hearing, and represents a roughly 22% increase in misdemeanor crime associated with detention.
Figure 8 depicts similar estimates but this time focusing on felonies and considering the time window from 0 to 100 days post-hearing. For felony offending, the incapacitative effect of detention appears somewhat longer lasting, with detainees overtaking releasees only after several months. By three months post-hearing, however, there is a statistically significant positive effect of detention on felony offending.

Figure 6: New Misdemeanor Charges by Pretrial Release Status During the First 30 Days After the Bail Hearing

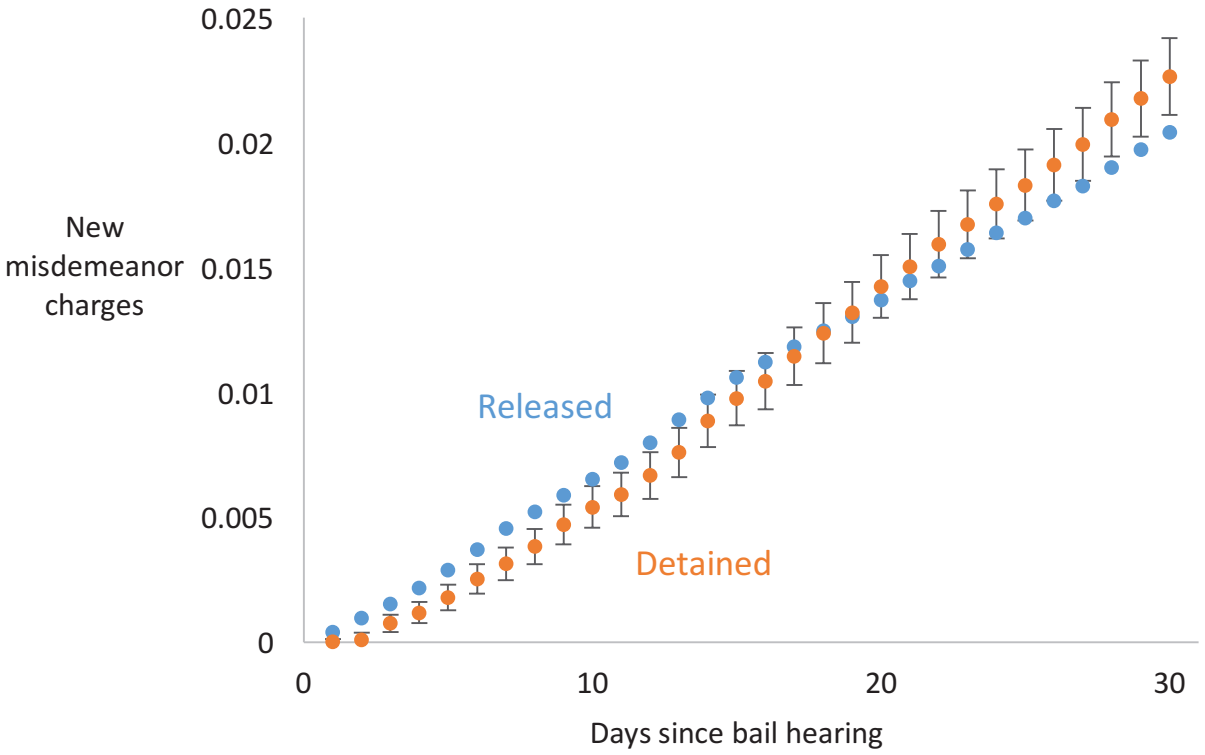


Figure 7: New Misdemeanor Charges by Pretrial Release Status During the First 18 Months After the Bail Hearing

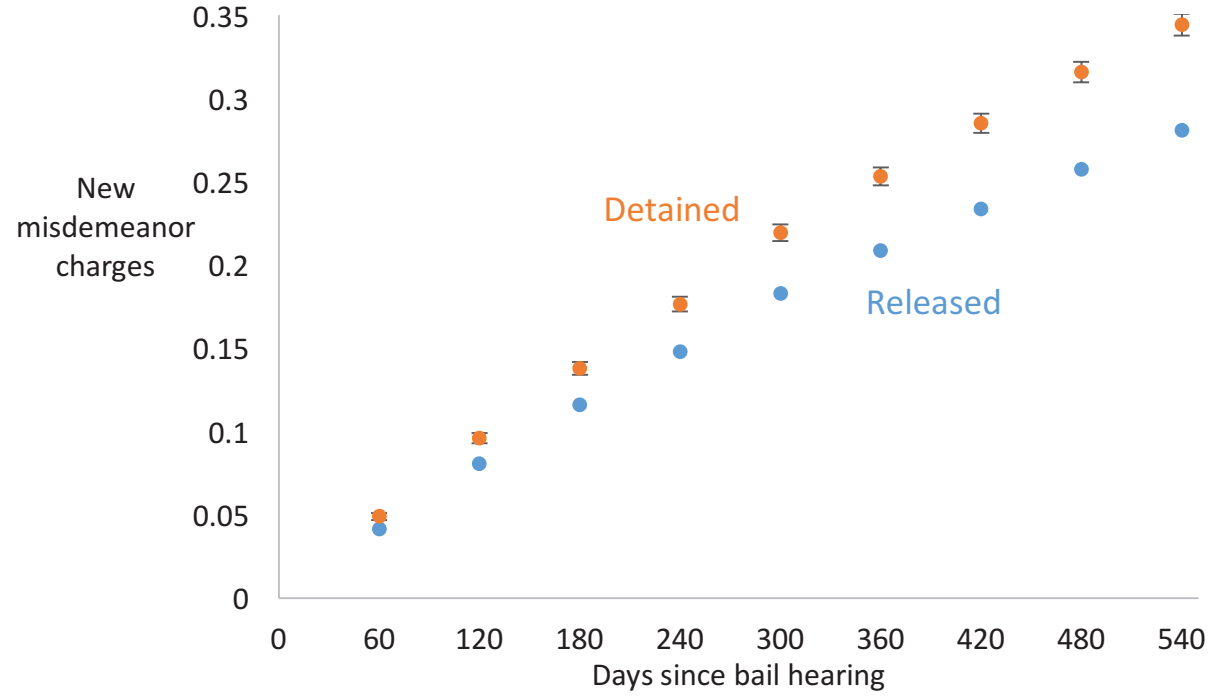


Figure 9, which extends the analysis to a full 18 months after the hearing, demonstrates continued heightened felony offending for those who are detained compared to similarly situated releasees. Appendix Table A2, which reports the estimates used to construct Figures 8 and 9, demonstrates that the offending gap appears to stabilize towards the end of our sample period, with detainees committing nearly a third more felonies. By 18 months after the conviction, a group of 100 detained defendants would be expected to have committed about 4 additional felonies as compared to an observationally similar group of 100 released defendants.

The notion that pretrial detention might actually increase future crime is consistent with recent research that suggests that incarceration might itself be criminogenic. A working paper by Michael Mueller-Smith, also set in Harris County, uses a research design that leverages random assignment to judges to estimate the causal effect of incarceration on future crime.[69] He finds that incarceration for misdemeanor defendants – who are in jail for a median of 10 days following the filing of charges – leads to a 6 percentage point increase in the likelihood of being charged with a new misdemeanor and a 6.7 percentage point increase in the likelihood of being charged with a new felony.[70] These estimates are not dissimilar to ours, although the timing of the effects is somewhat different. Mueller-Smith finds most of the effect within the first three months after charges are filed, while ours find a larger effect somewhat further out.[71]

These differences in recidivism are important from a policy perspective. To the extent that our estimates can be construed as causal, they suggest that a representative group of 10,000 misdemeanor offenders who are released pretrial would accumulate an additional 2,800 misdemeanor charges in Harris County over the next 18 months, and roughly 1,300 new felony charges. If this same group were instead detained they would accumulate 3,400 new misdemeanors and 1,700 felonies, an increase of 600 misdemeanors and 400 felonies. While pretrial detention clearly exerts a protective effect in the short run, for misdemeanor defendants it may ultimately serve to compromise public safety.

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[69] Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration* (Aug. 18, 2015), http://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf

[70] Those incarcerated will be 4.6 percentage points more likely to be charged with a new misdemeanor and 6.4 percentage points more likely to be charged with a felony during the first quarter after charges are filed, even though a portion of that quarter will be spent in jail. After the first quarter, those incarcerated will be 1.4 percentage points more likely to be charged with a misdemeanor and 0.3 percentage points more like to be charged with a new felony, although the latter effect is not statistically significant.

[71] Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned Judges* 130 Q. J. ECON 759 (2015) and Rafael Di Tella & Ernesto Schargrodsky, Criminal Recidivism after Prison and Electronic Monitoring (Nat'l Bureau of Econ. Research, Working Paper No. 15602, 2009), http://www.nber.org/papers/w15602.pdf also find that incarceration has a criminogenic effect. Earlier papers, however, have concluded that incarceration is not in fact criminogenic. *See* Jeffrey R. Kling, *Incarceration Length, Employment, and Earnings*, 96 AM. ECON. REV. 863 (2006) and Charles E. Loeffler, Does Imprisonment Alter the Life Course? Evidence on Crime and Employment from a Natural Experiment, 51 CRIMINOLOGY 137 (2013).

Figure 8: New Felony Charges by Pretrial Release Status During the First 100 Days After the Bail Hearing

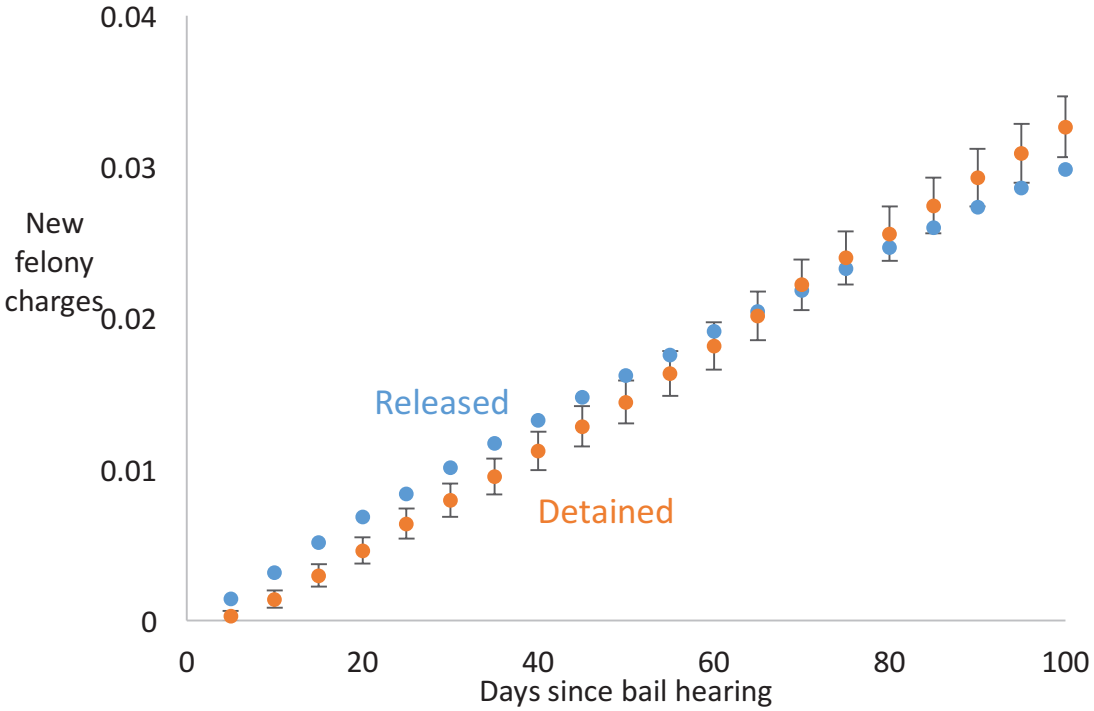
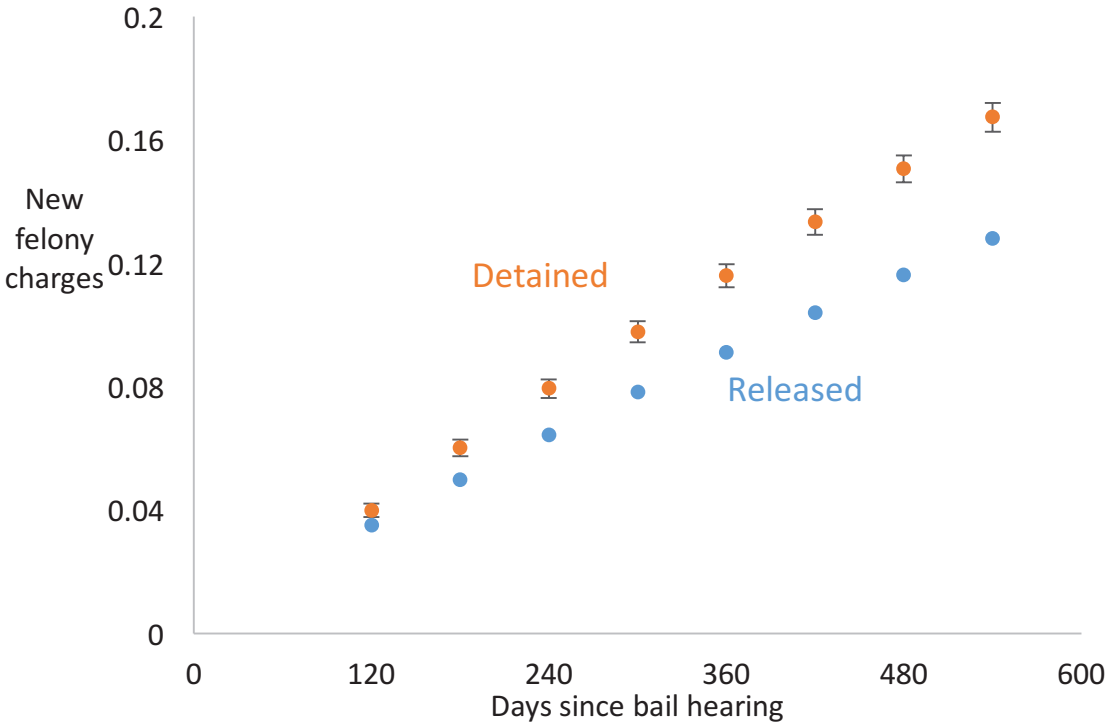


Figure 9: New Felony Charges by Pretrial Release Status During the First 18 Months After the Bail Hearing



IV. CONSTITUTIONAL IMPLICATIONS

The results reported here are relevant to an array of constitutional questions. As the Supreme Court has affirmed, "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[72] Whether or not that remains true as a descriptive matter, it remains the aspiration of the law. The constitutional provisions that serve to safeguard pretrial liberty include the Sixth Amendment, the Eighth Amendment, the Due Process Clause and the Equal Protection Clause. The effects of pretrial detention should inform constitutional analysis in each of these arenas.

Our study is limited, of course, to a particular dataset. It does not support generalization about the downstream effects of pretrial detention in all times and places and for all people. But it adds further evidence to the body of literature finding that pretrial detention causally affects conviction and future crime rates. This Part synthesizes the constitutional implications of such effects, in Harris County and wherever else they might exist.

A. Sixth Amendment Right to Counsel: Is Bail-Setting a "Critical Stage"?

The results suggest, first, that bail-setting should be deemed a "critical stage" of criminal proceedings at which accused persons have the right to the effective assistance of counsel.

Despite arguments by scholars and advocates that accused persons should benefit from the assistance of counsel at bail hearings, that has not been the practical or legal reality.[73] Some jurisdictions provide counsel at bail hearings (or "first appearances"), but many do not. Federal statutory law does not include the right to counsel at a bail hearing (although an accused person does have the right to representation in a pretrial detention hearing).[74] A 2008 survey of state practice found that only ten states guaranteed the presence of counsel at an accused's first

[72] United States v. Salerno, 481 U.S. 739, 755 (1987).

[73] *See, e.g.*, THE CONSTITUTION PROJECT'S NATIONAL RIGHT TO COUNSEL COMMITTEE, DON'T I NEED A LAWYER? PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING (2015), http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf; SIXTH AMENDMENT CENTER AND PRETRIAL JUSTICE INSTITUTE, EARLY IMPLEMENTATION OF COUNSEL: THE LAW, IMPLEMENTATION AND BENEFITS (2014), sixthamendment.org/6ac/6ACPJI_earlyappointmentofcounsel_032014.pdf; Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, 31 CRIM. JUST. 23 (ABA 2016); Douglas L. Colbert, *Prosecution without Representation*, 59 BUFF. L. REV. 333, 400 (2011); Douglas L. Colbert, *Coming Soon to A Court Near You—Convicting the Unrepresented at the Bail Stage: An Autopsy of A State High Court's Sua Sponte Rejection of Indigent Defendants' Right to Counsel*, 36 SETON HALL L. REV. 653 (2006); Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719 (2002); Douglas L. Colbert, *Thirty-Five Years after Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1 (1998); Charlie Gerstein, Note, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513 (2013) (arguing that, given the Supreme Court's recent holding that "the Constitution requires effective assistance of counsel to protect plea bargains," it also "requires the presence of counsel at proceedings that have the capacity to prejudice those bargains").

[74] *See* 18 U.S.C. § 3142(f).

appearance.[75] Ten states uniformly denied the right to counsel.[76] The remaining thirty assigned appointed counsel "in select counties only."[77]

It has remained an open question of constitutional law, meanwhile, whether the Sixth Amendment right to counsel extends to bail hearings. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[78] The Supreme Court has held the right to include the "effective" assistance of counsel with respect to any charge that may carry a sentence of incarceration, and the right to an appointed attorney if the accused cannot afford to hire one.[79] As a temporal matter, the right "attaches" at "the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty" (which is the nature of most bail hearings).[80] After that, "counsel must be appointed within a reasonable time . . . to allow for adequate representation at any critical stage before trial, as well as at trial itself."[81]

The question is whether the first appearance is itself a "critical stage."[82] Unfortunately, the term has no precise definition.[83] The Court most recently described critical stages as those "proceedings between an individual and agents of the State . . . that amount to trial-like confrontations, at which counsel would help the accused in coping with legal problems or . . . meeting his adversary."[84] It has also suggested that "those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel" constitute critical stages—among other formulations.[85] The Court has classified arraignments, preliminary hearings, pretrial lineups, deliberate attempts to elicit incriminating information from an accused, efforts to elicit consent to a psychiatric interview, and plea-bargaining as critical stages.[86]

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[75] Colbert, *Prosecution without Representation*, *supra* note 69 at 396.

[76] *Id.*

[77] *Id.* at 345, 400. *But see* Rothgery v. Gillespie Cty., 554 U.S. 191, 203-04 (2008) ("We are advised without contradiction that not only the Federal Government, including the District of Columbia, but 43 States take the first step toward appointing counsel "before, at, or just after initial appearance.").

[78] U.S. Const. Sixth Amendment; *see also* Gideon v. Wainwright, 372 U.S. 335 (1963) (overruling Betts v. Brady, 316 U.S. 455 (1942); holding that right to counsel is "so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the states by the Fourteenth Amendment").

[79] McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."); Strickland v. Washington, 466 U.S. 668 (1984) (articulating test for ineffective assistance claim); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial"); *Gideon*, 372 U.S. 335 (incorporating right to counsel, including appointed counsel for indigent persons, against the states).

[80] Rothgery v. Gillespie Cnty., 554 U.S. 191, 194 (2008).

[81] *Id.* at 212.

[82] The *Rothgery* majority stopped short of deciding it. *Id.* (emphasizing that it was not deciding this question).

[83] See Van v. Jones, 475 F.3d 292, 312 (6th Cir. 2007) (noting that "[o]ne would welcome a comprehensive and final one-line definition of 'critical stage,'" and providing survey of varying Supreme Court formulations).

[84] *Rothgery*, 554 U.S. at 233 n.16 (internal quotation marks and citations omitted).

[85] Gerstein v. Pugh, 420 U.S. 103, 122 (1975).

[86] *See* Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment); White v. Maryland, 373 U.S. 59 (1963) (arraignment); Coleman v. Alabama, 399 U.S. 1, 7 (1970) (preliminary hearing); United States v. Wade, 388 U.S. 218 (1967) (pretrial lineup); Massiah v. United States, 377 U.S. 201 (1964) (attempt to elicit information from accused); Estelle v. Smith, 451 U.S. 454 (1981) (consent to psychiatric interview); Lafler v. Cooper, 132 S. Ct. 1376, 1385 (2012) (plea-bargaining).

This case law offers arguments both for and against adding bail hearings to the list. In *Coleman v. Alabama*, the Court concluded that an Alabama preliminary hearing was a critical stage for reasons that apply with almost equal force to bail hearings.[87] On the other hand, in *Gerstein v. Pugh* the Court rejected the claim that a Fourth Amendment probable cause determination is a critical stage.[88] The Court distinguished *Coleman* on the basis that a probable cause determination "is addressed only to pretrial custody."[89] The Court acknowledged that "pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense," but concluded that "this does not present the high probability of substantial harm identified as controlling in *Wade* and *Coleman*."[90]

Our study demonstrates that pretrial custody *does* present a "high probability of substantial harm," at least for Harris County misdemeanor defendants.[91] It increases the likelihood of conviction by approximately fourteen percentage points, or 25%, for no reason relevant to guilt. While there are several possible explanations for this detention effect, it is likely that for many defendants, detention essentially eliminates the possibility of pursuing a trial altogether, by obligating them the serve out a likely sentence prior to adjudication. If pleading guilty for "time served" or a non-custodial sentence is an option, many a detained person will find that it is the only one; the costs of staying in jail to fight a charge are simply overwhelming. In this sense, the bail hearing is *the* critical stage of criminal proceedings. More broadly, our results suggest that the outcome of a bail hearing can profoundly impair the accused's ability to contest the charges against him.[92] And there is reason to think that representation makes a

[87] The Court reasoned that an effective defense counsel at a preliminary hearing could (1) "expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over;" (2) examine witnesses so as to "fashion a vital impeachment tool" for trial "or preserve testimony favorable to the accused"; (3) "discover the case the State has against his client and make possible the preparation of a proper defense;" and (4) make "effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail." 399 U.S. at 9. Three of these four reasons—all except the opportunity to question witnesses—apply to bail hearings.

[88] 420 U.S. 103.

[89] *Id.* at 122-23. The Court also noted that a probable cause determination does not involve witness testimony, but given that the Court has recognized plea-bargaining as a critical stage this cannot be determinative.

[90] *Id.*

[91] *See* Colbert, *Thirty-Five Years After Gideon*, *supra* note 73 at 37 (noting that "a showing that counsel's absence at the bail hearing prejudiced the accused's fair trial rights" would provide grounds for finding that bail-setting is a critical stage); *cf.* State v. Williams, 210 S.E.2d 298, 300 (S.C. 1974) ("There is no showing in this record, nor does appellant contend, that anything occurred at the bail hearing which in any way affected or prejudiced his subsequent trial or that was likely to do so."). Also note that the Supreme Court's recent recognition of the centrality of plea-bargaining to the contemporary criminal process might support this argument. *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.").

[92] This is true of any of the potential mechanisms discussed above *except* if the detention effect results from the inability of detainees to obstruct justice. It seems unlikely, however, that misdemeanor defendants released pretrial routinely engage in obstructionist tactics.

significant difference in bail and detention outcomes.[93] It is difficult to maintain, in these circumstances, that the bail hearing is not a critical stage.[94]

B. Eighth Amendment: When is Bail or Detention "Excessive"?

Our results also suggest that Harris County bail officers may be regularly setting bail that is unconstitutionally excessive. The Eighth Amendment provides that "[e]xcessive bail shall not be required."[95] This means that if money bail is set in order to ensure the appearance of the accused at trial, it must not be more than "reasonably calculated to fulfill this purpose."[96] The premise of money bail is that the prospect of some financial loss is a sufficient deterrent to prevent pretrial flight; full detention is not necessary. If money bail results in detention because a defendant cannot pay, it is thus arguably excessive *per se*.[97] Federal statutory law explicitly prohibits the setting of money bail in an amount that results in detention, as do the ABA Standards on Pretrial Release.[98] Yet in Harris County, half of misdemeanor defendants with bail set are nonetheless detained pending trial. The average bail amount for these detainees is only $2,225.

Our study also has broader implications for the question of when pretrial detention is "excessive" for purposes of the Eighth Amendment. This will become a particularly topical question as jurisdictions seeking to curtail the use of money bail adopt more explicit preventive detention regimes.[99] In *United States v. Salerno*, the Supreme Court held that the Excessive Bail Clause does not entail an absolute right to bail—that is, it does not prohibit detention without bail in some circumstances.[100] The Court also endorsed public safety as a potential basis for

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[93] *See, e.g.*, SIXTH AMENDMENT CENTER AND PRETRIAL JUSTICE INSTITUTE, EARLY IMPLEMENTATION OF COUNSEL, *supra* note 69; Colbert *et al.*, *Do Attorneys Really Matter?, supra* note 69 (reporting "convincing empirical data that the benefits of representation are measurable and that representation is crucial to the outcome of a pretrial release hearing").

[94] *Accord, e.g.*, Hurrell-Harring v. State, 930 N.E.2d 217, 223 (N.Y. Ct. App. 2010) ("There is no question that 'a bail hearing is a critical stage of the State's criminal process'") (quoting and citing Higazy v. Templeton, 505 F.3d 161, 172 (2d Cir. 2007)); *cf.* Gonzalez v. Comm'r of Correction, 68 A.3d 624, 637 (Ct. 2013), *cert. denied*, 134 S. Ct. 639 (2013) (concluding "the petitioner had a sixth amendment right to effective assistance of counsel at the arraignment stage in which proceedings pertaining to the setting of bond and credit for presentence confinement occurred").

[95] U.S. Const. Eighth amend.

[96] Stack v. Boyle, 342 U.S. 1, 4-5 (1951); *see also* United States v. Salerno, 481 U.S. 739, 754 (1987) ("[W]hen the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more.").

[97] The counterargument is that in some cases, an unaffordable bail amount is the only amount sufficient to create an adequate disincentive to flee. But if that is so, it is more accurate to say that *no* bail can reasonably assure appearance, and more honest to explicitly order detention on that basis—if no other non-financial conditions will suffice. The federal Bail Reform Act and many state statutes authorize such determinations. *See* 18 U.S.C. § 3142(e) ("If . . . the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required . . . , such judicial officer shall order the detention of the person before trial.").

[98] *See* 18 U.S.C. § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person."); Standard 10-1.4(e), Standards for Pretrial Release (American Bar Association, 3d ed. 2002) ("The 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.").

[99] *See* Sandra G. Mayson, *Dangerous Defendants: Bail Reform and Pretrial Prediction* (manuscript on file with authors).

[100] 481 U.S. 739, 754 (1987).

ordering the pretrial detention of some particularly dangerous defendants.[101] But the Court did suggest that the Bail Clause requires that "the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil" they are designed to address, and that, to determine whether the intrusion on pretrial liberty is excessive, courts must "compare" it "against the interest the Government seeks to protect by means of that response."[102] The analysis of Eighth Amendment "excessiveness" thus requires a kind of cost-benefit analysis. In the case of detention without bail, the analysis should turn on whether the costs of detention are excessive in relation to its benefit.[103]

The downstream effects of detention must factor into this analysis. In our sample set, it appears that detention distorts criminal adjudication. That is a significant cost, both to the people who would not have been convicted but for their detention and for the legitimacy of the system as a whole. Secondly, our study provides additional evidence that detention increases future criminal offending. To the extent that jurisdictions impose pretrial detention in order to prevent pretrial crime, its benefit—the pretrial crime averted—must be discounted by the increase in future crime it produces. If it is not clear that the pretrial crime averted is worth the increase in future crime, detention might be an excessive response to the public-safety threat. This is especially likely if less restrictive alternatives like GPS monitoring are capable of achieving the same results.[104]

C. Substantive Due Process: Is Pretrial Detention Punishment? Does it Impermissibly Infringe Liberty?

Our results might also support an argument that pretrial detention in some circumstances violates substantive due process by inflicting punishment before trial. "Under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."[105] Pretrial detainees, that is, have the right to be "free from punishment."[106] The difficult question is when a restraint on liberty amounts to punishment.

Pursuant to current doctrine, the answer turns on whether the restraint is rationally related to a non-punitive purpose, and not "excessive" for that purpose.[107] Thus far, the Court has declined to classify any pretrial restraint as punishment. In *Bell v. Wolfish*, a challenge to certain

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[101] *Id.*

[102] *Id.*

[103] For a recent effort to engage in this kind of cost-benefit analysis of pretrial detention, *see* Shima Baradaran Baughman, *Costs of Pretrial Detention*, B.U. L. REV (Forthcoming, 2017), http://papers.ssrn.com/sol3/papers.cfm? abstract_id=2757251.

[104] *See* Samuel Wiseman, *The Right to Be Monitored*, 123 YALE L.J. 1344 (2014).

[105] Bell v. Wolfish, 441 U.S. 520, 535 (1979). Note that this right against punishment is distinct from the presumption of innocence. *See id.* at 533 (holding that the presumption of innocence "is a doctrine that allocates the burden of proof in criminal trials," and "has no application to a determination of the rights of a pretrial detainee"). *But see* County of Riverside v. McLaughlin, 500 U.S. 44, 58 (1991) (alluding to the importance of minimizing "the time a presumptively innocent individual spends in jail").

[106] *Id.* at 534.

[107] *Id.* at 538; United States v. Salerno, 481 U.S. 739, 747 (1987).

conditions of pretrial confinement, the Court concluded that the conditions did not amount to punishment because they were rationally related to legitimate needs of prison administration and not excessive for those ends.[108] In *Salerno*, the Court rejected the argument that pretrial detention pursuant to the federal Bail Reform Act constituted punishment *per se*, on the basis that the detention regime was carefully tailored to the "legitimate" goal of preventing pretrial crime, and the "incidents" of detention were not "excessive in relation to the regulatory goal Congress sought to achieve."[109] In both cases, however, the Court left open the possibility that in other circumstances it might reach a different conclusion. This "punishment" analysis should also be responsive to the costs of pretrial detention, since it, like the Bail Clause analysis, is a genre of cost-benefit (or means-end) test. That is, detention that increases the likelihood of conviction and future crime might be an excessive means of preventing pretrial flight and crime, and therefore constitute impermissible pretrial "punishment."

Even if it not, pretrial detention might, in some cases, violate substantive due process as an impermissible regulatory infringement on individual liberty. "Freedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects."[110] The state must therefore meet a high burden of justification when it seeks to detain individuals for regulatory (that is, non-punitive) purposes. When challenges to regulatory detention have made their way to the Supreme Court, the Court has generally applied some type of heightened scrutiny.[111] Most relevant here, in *Salerno* the Supreme Court rejected the straight substantive-due-process challenge to the federal preventive detention regime on the ground that the regime was "narrowly focuse[d]" on the "legitimate and compelling" state interest of preventing pretrial crime by an especially dangerous subset of defendants.[112] Pursuant to the same analysis, pretrial detention might violate substantive due process if it is not carefully tailored to its goal, or if its costs vastly outweigh its benefits. Once again, the costs documented here should inform the calculation.[113]

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[108] *Bell*, 441 U.S. at 541-42.

[109] *Salerno*, 481 U.S. at 747-48.

[110] Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

[111] *See, e.g.*, *id.* at 690 (explaining that regulatory detention violates substantive due process except "in certain special and narrow nonpunitive circumstances, where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint") (internal quotation marks and citations omitted).

[112] 481 U.S. at 750-52 (1987); *id.* at 752 ("Given the legitimate and compelling regulatory purpose of the Act and the procedural protections it offers, we conclude that the Act is not facially invalid under the Due Process Clause of the Fifth Amendment.").

[113] The tests that the Court has articulated for impermissible pretrial "punishment" and impermissible regulatory detention are quite close, and also overlap with the Eighth Amendment prohibition on "excessive" pretrial restraints on liberty. It is unclear how the doctrine will evolve in these related areas. It is also possible to frame a constitutional challenge to pretrial restraints on liberty in Fourth Amendment terms, by alleging that the restraint constitutes an unreasonable search or seizure. *See* Gerstein v. Pugh, 420 U.S. 103, 125 (1975) ("The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases, including the detention of suspects pending trial.").

D. Procedural Due Process: Does Pretrial Detention Produce "Involuntary" Plea Bargains?

To the extent that the causal effect of detention on conviction rates reflects a reality that detained people plead guilty simply to get out of jail, it raises the question of whether such pleas are fully "voluntary," or whether they present procedural due process concerns.

The Due Process Clauses of the Fifth and Fourteenth Amendments require that guilty pleas be "voluntary" and "intelligent", which implies that a defendant must have, and make, a meaningful choice.[114] Plea-bargaining poses a dilemma because it is always coercive. This makes it extremely difficult to draw the due-process line. How much coercion is too much? The Supreme Court has confronted this question in two cases since 1970: *Brady v. United States* and *Bordenkircher v. Hayes.*[115] In *Brady*, the Court held that a plea was not rendered involuntary by the fact that it was motivated by the defendant's fear of receiving the death penalty if convicted at trial.[116] In *Bordenkircher*, the Court held that it did not violate due process for a prosecutor to threaten to re-indict the defendant on more serious charges unless he pled guilty (and then to carry out the threat).[117] The Court reasoned that "the imposition of these difficult choices is an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas."[118]

This precedent is clearly hostile to any argument that pretrial detention might render a guilty plea involuntary, but the Supreme Court did leave the door just slightly ajar. In *Brady*, the Court qualified its expansive endorsement of bargains driven by fear: "Of course, the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant."[119] And in *Bordenkircher*, the Court suggested that its decision was predicated on the assumption that the inducement at issue would not lead an innocent person to plead guilty. The Court reasoned that "[d]efendants advised by competent counsel and protected by other procedural safeguards are . . . unlikely to be driven to false self-condemnation."[120] It also noted that the case did not "involve the constitutional implications" of a prosecutor threatening harm or offering benefit to a third party, "which might pose a greater

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[114] Brady v. United States, 397 U.S. 742, 747-48 (1970) (holding that plea must be a "knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences"); *see also* Boykin v. Alabama, 395 U.S. 238, 241 (1969) (holding, on procedural-due-process grounds, that guilty plea must be knowing and voluntary).

[115] 397 U.S. 742, 750 (1970); 434 U.S. 357, 363 (1978).

[116] 397 U.S. at 750-52. The Court noted that "[t]he State to some degree encourages pleas of guilty at every important step in the criminal process," and rejected the idea "that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities" after trial. *Id.*; *see also id.* (""The issue we deal with is inherent in the criminal law and its administration. . . . ").

[117] 434 U.S. at 365.

[118] *Id.* at 364 (internal quotation marks and citation omitted).

[119] 397 U.S. at 750.

[120] *Id.* at 363.

danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider."[121]

These offhand caveats are hardly a firm foundation for a new jurisprudence of due-process limits to coercion in plea-bargaining, but they are suggestive. Evidence that pretrial detention leads to wrongful convictions by guilty plea might lead the Court to reconsider its due process conclusions. It is worth noting that the benefit of such a doctrinal shift is dubious. What remedy could the Court order – the chance for the accused to vacate his plea and sit in jail until trial? That problem aside, the question of the constitutional limits to coercive plea-bargaining practices is a pressing one, and our evidence that detention alone produces guilty pleas renders it all the more acute.

E. Equal Protection: Does Pretrial Detention Produce Class-Based Case Outcomes?

Finally, our data and results illustrate the extent to which the Harris County pretrial system produces disparate outcomes for the poor and for the wealthy. The principle of equal protection (as applied to the states by the Fourteenth Amendment, and to the federal government by the Fifth) prohibits invidious or irrational state discrimination.[122] Supreme Court precedent clearly establishes that incarcerating a person solely on the basis of her poverty violates equal protection.[123] Nonetheless, half of the misdemeanor defendants in our dataset were detained pending trial, nearly all of them ostensibly due to inability to post bail. Their detention, alone, significantly increased the chance of conviction. That is to say that not only were these people deprived of their liberty on the basis of wealth; they were also deprived of equal access to justice. In Harris County misdemeanor court, all do not stand equal before the law.[124]

There are reform efforts underway that may mitigate this problem, but they will not eliminate equality concerns. The new bail reform movement seeks to shift pretrial policy from a "resource-based" to a "risk-based" model driven by actuarial assessment of a defendant's risk of

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[121] *Id.* at 371 n.8 (internal citation omitted); *see also id.* at 363 ("[I]n the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is *free* to accept or reject the prosecution's offer") (emphasis added).

[122] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike.") (citing Plyler v. Doe*,* 457 U. S. 202, 216 (1982)); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (noting that the Fifth Amendment includes the same prohibition vis-à-vis the federal government).

[123] *See, e.g.*, U.S. Dep't of Justice, Statement of Interest filed in Varden v. City of Clanton, No. 2:15-cv-34-MHT-WC (M.D. Al., Feb. 13, 2015) ("Incarcerating individuals solely because of their inability to pay for their release . . . violates the Equal Protection Clause of the Fourteenth Amendment.") (citing Tate v. Short, 401 U.S. 395, 398 (1971); Williams v. Illinois, 399 U.S. 235, 240–41 (1970); Smith v. Bennett, 365 U.S. 708, 709 (1961)); see also Bearden v. Georgia, 461 U.S. 660, 671 (1983).

[124] To the extent that Harris County relies on "bail schedules" that are unresponsive to a defendant's ability to pay, that practice violates the Equal Protection Clause. *See* U.S. Dep't of Justice, Statement of Interest, *supra* note 119 ("[A]s courts have long recognized, any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pretrial release, without any regard for indigence, not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy.").

flight and rearrest.[125] The effort to eliminate wealth disparities in the system is laudable, but actuarial risk assessment is likely to import the effects of race and class bias earlier in the system.[126] Without violating the Equal Protection Clause, risk assessment might still discriminate, subtly, along race and class lines, and result in the disproportionate pretrial detention of poor and minority communities.[127] To the extent that detention also changes case outcomes, this means that a risk-based system of pretrial detention could continue to dispense deeply unequal justice. In view of the cost of detention—both its immediate fiscal and human costs and its downstream effects—policymakers should work to avoid this result.

CONCLUSION

Pretrial detention has a significant impact on downstream criminal justice outcomes—both in the immediate case, and through the future criminal activity of detained defendants. Detention increases the rate of guilty pleas, and leads detained individuals to commit more crime in the future. These findings carry import for not only Harris County, but raise a host of broader empirical and constitutional questions that merit attention.

To appreciate the magnitude of the effects we document here, we offer the following thought experiment: Imagine if, during the period of our sample, Harris County had released those defendants assigned the lowest amount of bail, $500, on personal bond (recognizance) rather than assessing bail. Using these estimates, and drawing from other data carefully documenting the costs of detention and probation supervision in Harris County[128], we predict that the county would have released 40,000 additional defendants pretrial, and these individuals would have avoided approximately 5,900 criminal convictions, many of which would have come through possibly erroneous guilty pleas. Incarceration days in the county jail—severely overcrowded as of April 2016—would have been reduced by at least 400,000[129]. Over the next 18 months post-release, these defendants would have committed 1,600 fewer felonies and 2,400 fewer misdemeanors. On net, after accounting for both reductions in jail time and increases in probation time, the county would have saved an estimated $20 million in supervision costs alone

[125] *See, e.g.*, Pretrial Justice Institute, Presentation, Resource-based to Risk-based Pretrial Justice (Aug. 7, 2015), *available at* https://prezi.com/h6eboff0oyhx/resource-based-to-risk-based-pretrial-justice.

[126] The most universal risk factors for future criminal behavior in current pretrial risk assessment tools are prior contacts with the criminal justice system. *See* Mayson, *supra* note 95; Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT. R. 237 (Vera Inst. Just. 2015).

[127] Equal protection only prohibits facial (explicit) and intentional discrimination. Washington v. Davis, 426 U.S. 229, 240-42 (1976). There is an argument that actuarial risk assessment is facially discriminatory if the variables used to predict risk include things like race and income. *See* Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 811-12, 821-36 (2014).

[128] VERA INSTITUTE OF JUSTICE, THE PRICE OF JAILS: MEASURING THE TAXPAYER COST OF LOCAL INCARCERATION (May 2015), http://www.vera.org/sites/default/files/resources/downloads/price-of-jails.pdf; TEXAS CRIMINAL JUSTICE COALITION, HARRIS COUNTY, TEXAS ADULT CRIMINAL JUSTICE DATA SHEET, http://countyresources.texascjc.org/sites/default/files/adult_county_data_sheets/TCJC's%20Adult%20Harris%20County%20Data%20Sheet.pdf

[129] This is actually a conservative estimate because it is based on the estimate of the change in the jail sentence associated with detention, and thus ignores time spent in pretrial detention that does not end up counting against the final sentence of the accused.

for this population. Thus, with better pretrial detention policy, Harris County could save millions of dollars per year, increase public safety, and likely reduce wrongful convictions.

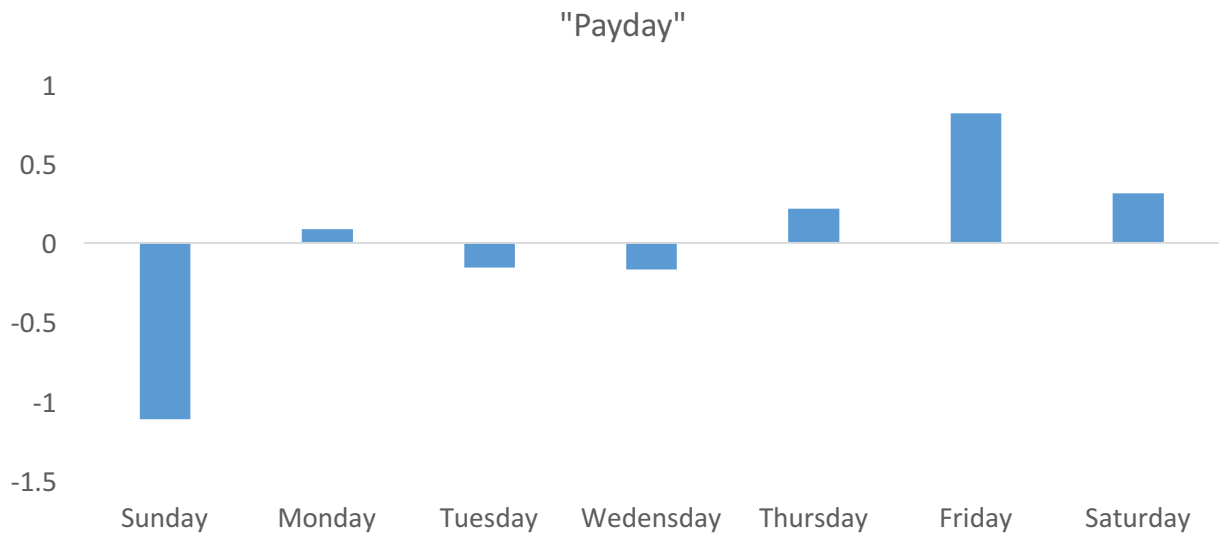
Our findings also carry import beyond the borders of Harris County. Many of the key features of Harris County's system—a heavy reliance on cash bail, assembly-line handling of bail hearings, and nonexistent representation for defendants at these hearings—are characteristic of misdemeanor bail systems across the country. The strong empirical evidence that under such circumstances the bail hearing influences later case outcomes demands further clarification from the courts as to whether the Sixth Amendment guarantees the assistance of counsel at such hearings, and whether such a process sufficiently protects the due process and Eighth Amendment rights of defendants.

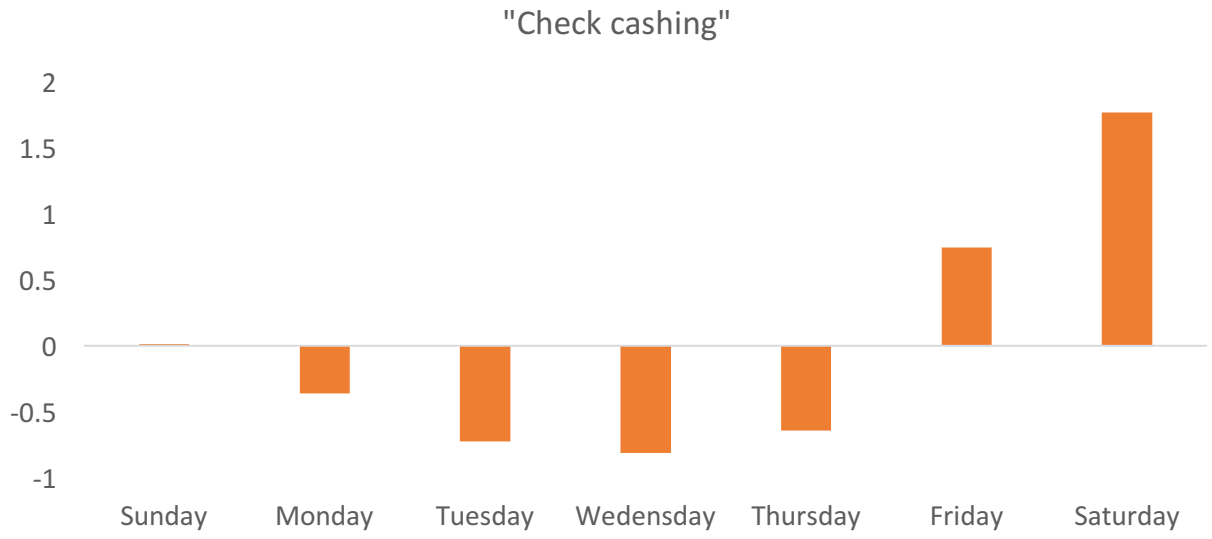
Our results also have important implications for the conduct of future empirical studies assessing the effects of pretrial detention. Our analysis suggests that prior work measuring the association between pretrial detention and case outcomes, which controls for only a limited set of defendant and case characteristics, risks the possibility of overestimating the causal effect of detention. After controlling for a broader set of characteristics, however—including the exact offense and the precise amount of bail set at the initial hearing—we are able to obtain correlational estimates that approach the causal estimates we observe using a natural experiment. In this respect, our results mirror those of Stevenson.[130] Researchers therefore may be able learn much about bail effects across many other jurisdictions operating under different systems without resorting to costly, and in some cases practically infeasible, randomized controlled trials, so long as we are sufficiently careful to account for pre-existing differences between the pools of detained and released defendants. Such future work could help to catalyze a shift towards bail systems that reduce wealth disparities, increase public safety, and minimize the lengthy periods of detention that have such high budgetary and human costs.

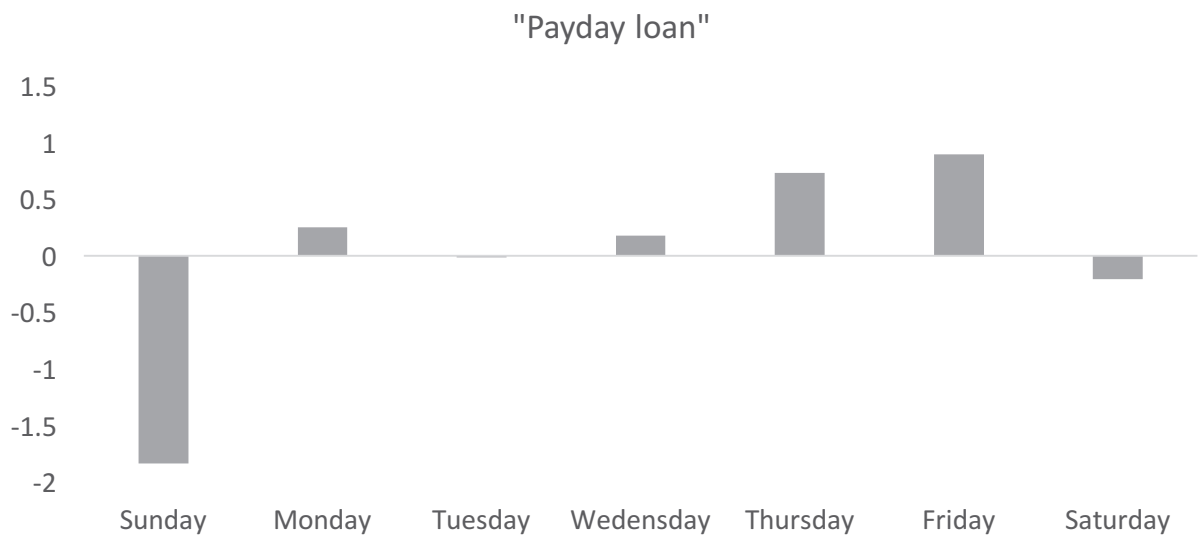
[130] *See supra* note 35 and accompanying text.

APPENDIX

Figure A.1: Google Daily Keyword Search Volume by Day of Week, Standardized Score







Note: This figure plots average daily Google search volume by day of week for several search terms that serve as proxies for liquidity. For each term, daily search volume was standardized and then averaged by day of week to construct the bars in the chart. Data were downloaded from Google Trends (https://www.google.com/trends/) and cover the period from 1/31/2016 to 4/23/2016.

Figure A.2: Distribution of Bail Assessments By Day of Week of Hearing

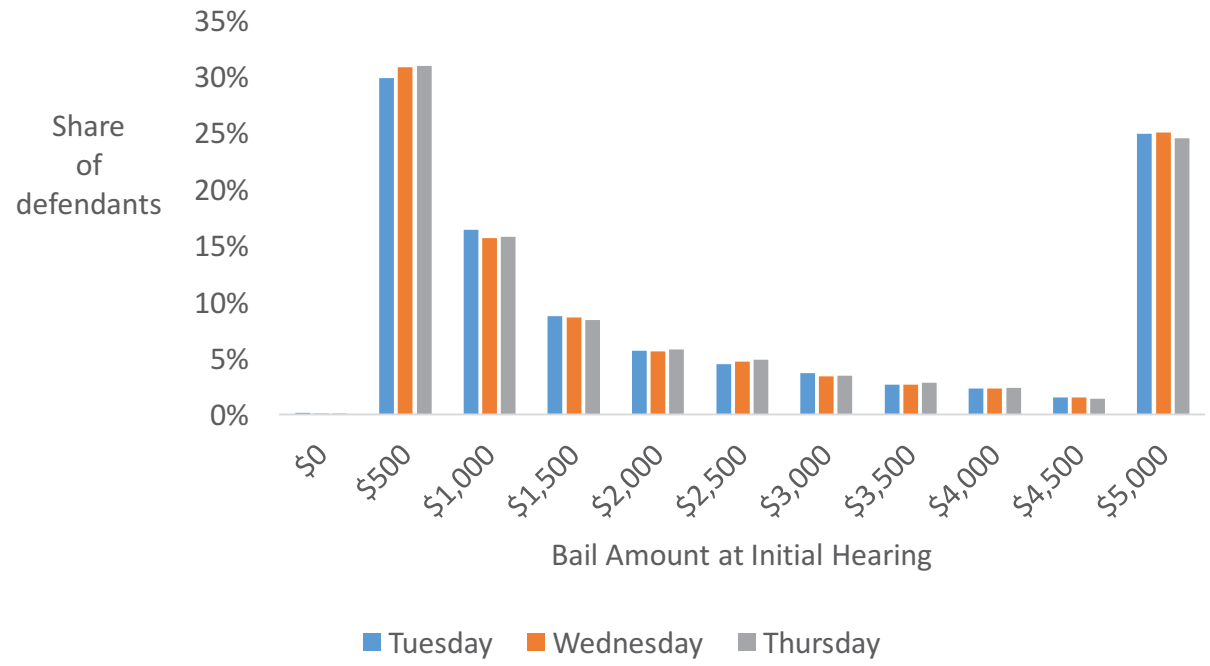


Table A.1: Numeric Results for Misdemeanor Recidivism Analysis

Days since bail hearing	Cumulative new misdemeanors per released defendant	Estimated effect of detention	Standard Error	P-Value	% change in misdemeanors due to detention
1	0.0004	-0.0004	0.00006	4.56E-10	-97.0%
2	0.0010	-0.0009	0.00013	4.55E-11	-89.1%
3	0.0015	-0.0008	0.00018	1.12E-05	-50.6%
4	0.0022	-0.0010	0.00022	5.52E-06	-45.6%
5	0.0029	-0.0011	0.00026	1.74E-05	-38.1%
6	0.0037	-0.0012	0.00030	7.28E-05	-31.8%
7	0.0046	-0.0014	0.00033	2.14E-05	-31.2%
8	0.0052	-0.0014	0.00036	0.000	-26.8%
9	0.0059	-0.0012	0.00040	0.003	-20.0%
10	0.0065	-0.0011	0.00043	0.009	-17.0%
11	0.0072	-0.0013	0.00045	0.005	-17.6%
12	0.0080	-0.0013	0.00048	0.005	-16.6%
13	0.0089	-0.0013	0.00050	0.009	-14.8%
14	0.0098	-0.0009	0.00053	0.079	-9.5%
15	0.0106	-0.0008	0.00056	0.127	-8.0%
16	0.0112	-0.0008	0.00057	0.178	-6.9%
17	0.0118	-0.0004	0.00059	0.520	-3.2%
18	0.0125	-0.0001	0.00061	0.870	-0.8%
19	0.0130	0.0002	0.00062	0.800	1.2%
20	0.0137	0.0005	0.00064	0.406	3.9%
21	0.0145	0.0006	0.00066	0.399	3.9%
22	0.0151	0.0009	0.00068	0.197	5.8%
23	0.0157	0.0010	0.00069	0.149	6.3%
24	0.0164	0.0012	0.00071	0.097	7.1%
25	0.0170	0.0013	0.00072	0.069	7.7%
26	0.0177	0.0014	0.00074	0.054	8.0%
27	0.0183	0.0017	0.00075	0.025	9.2%
28	0.0190	0.0019	0.00076	0.012	10.1%
29	0.0197	0.0020	0.00078	0.009	10.3%
30	0.0204	0.0022	0.00079	0.005	10.9%
60	0.0413	0.0075	0.00113	2.32E-11	18.2%
120	0.0805	0.0154	0.00158	1.58E-22	19.2%
180	0.1160	0.0219	0.00193	4.98E-30	18.9%
240	0.1480	0.0284	0.00223	3.26E-37	19.2%
300	0.1830	0.0364	0.00249	3.58E-48	19.9%
360	0.2086	0.0447	0.00272	1.19E-60	21.4%
420	0.2335	0.0515	0.00294	1.36E-68	22.0%
480	0.2575	0.0584	0.00314	3.07E-77	22.7%
540	0.2808	0.0638	0.00332	5.13E-82	22.7%

Table A.2: Numeric Results for Felony Recidivism Analysis

Days since bail hearing	Cumulative new felonies per released defendant	Estimated effect of detention	Standard Error	P-Value	% change in felonies due to detention
5	0.0015	-0.0012	0.00018	1.48E-10	-79.5%
10	0.0032	-0.0018	0.00028	6.28E-10	-55.1%
15	0.0052	-0.0022	0.00038	1.05E-08	-42.2%
20	0.0069	-0.0022	0.00045	6.67E-07	-32.5%
25	0.0084	-0.0020	0.00051	0.0001	-23.7%
30	0.0101	-0.0022	0.00056	0.0001	-21.3%
35	0.0117	-0.0022	0.00061	0.000	-18.6%
40	0.0133	-0.0020	0.00065	0.002	-15.4%
45	0.0148	-0.0019	0.00068	0.005	-13.0%
50	0.0162	-0.0018	0.00072	0.015	-10.8%
55	0.0176	-0.0012	0.00076	0.111	-6.9%
60	0.0192	-0.0010	0.00079	0.212	-5.2%
65	0.0205	-0.0003	0.00082	0.697	-1.6%
70	0.0218	0.0004	0.00085	0.650	1.8%
75	0.0233	0.0007	0.00089	0.429	3.0%
80	0.0247	0.0009	0.00092	0.328	3.6%
85	0.0260	0.0014	0.00095	0.126	5.6%
90	0.0274	0.0019	0.00097	0.046	7.1%
95	0.0286	0.0023	0.00100	0.021	8.0%
100	0.0298	0.0028	0.00102	0.006	9.4%
120	0.0351	0.0047	0.00111	0.000	13.5%
180	0.0498	0.0104	0.00136	0.000	20.9%
240	0.0644	0.0150	0.00157	0.000	23.3%
300	0.0782	0.0196	0.00177	0.000	25.1%
360	0.0911	0.0250	0.00194	0.000	27.4%
420	0.1039	0.0296	0.00210	0.000	28.5%
480	0.1163	0.0343	0.00224	0.000	29.5%
540	0.1280	0.0395	0.00237	0.000	30.9%

Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes

Megan Stevenson*†

May 2, 2016

Abstract

Instrumenting for detention status with the bail-setting propensities of rotating magistrates I find that pretrial detention leads to a 13% increase in the likelihood of being convicted, an effect explained by an increase in guilty pleas among defendants who otherwise would have been acquitted or had their charges dropped. On average, those detained will be liable for $128 more in court fees and will receive incarceration sentences that are almost five months longer. Effects can be seen in both misdemeanor and felony cases, across age and race, and appear particularly large for first or second time arrestees. Case types where evidence tends to be weaker also show pronounced effects: a 30% increase in pleading guilty and an additional 18 months in the incarceration sentence. While previous research has shown correlations between pretrial detention and unfavorable case outcomes, this paper is the first to use a quasi-experimental research design to show that the relationship is causal.

*Fellow, University of Pennsylvania Law School, mstevens@law.upenn.edu

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I have had the 'you can wait it out or take the deal and get out' conversation with way too many clients. -a public defender, Philadelphia

1 Introduction

The use of money bail has long been contentious, as it implies that freedom is reserved for those who can afford to pay for it. According to Bureau of Justice Statistics, five out of six people detained before trial are there because they could not afford their bail (Cohen and Reaves, 2007). For some, bail was intentionally set at an unaffordable level to keep them behind bars. But many have bail set at amounts that would be affordable for the middle or upper-middle class but are simply beyond the reach of the poor. In Philadelphia, the site of this study, only 51% of those who were assigned a bail amount less than or equal to $500 were able to pay the $50 deposit required for release within the first three days, and 25% remained in jail at the time of disposition. While the loss of freedom during the pretrial period is a serious concern, there are indirect consequences of pretrial detention which are potentially just as serious. If detention increases the likelihood that the defendant will plead guilty although innocent, accept an excessively-punitive plea deal, or lose at trial because detention impaired her ability to mount a successful defense, then the socio-economic disparities induced by a money bail system extend beyond the pretrial period.

Right now there is a wave of momentum in bail reform that dwarfs any seen in decades. Media attention to the recent deaths of Kalief Browder and Sandra Bland and budget pressures imposed by the 11.4 million yearly admissions to local jails have spurred jurisdictions all over the country to reconsider long-standing practices.[1][2] Yet despite all this activity, research on the pretrial period is limited. The work that does exist is almost entirely qualitative or correlational; the few experimental or quasi-experimental studies that have been conducted either did not examine case outcomes or did not report the results in a way that allowed for causal inference (Ares et al., 1963; Goldkamp, 1980; Abrams and Rohlfs, 2011).

In this paper I present the first quasi-experimental evidence that pretrial detention increases the likelihood of being convicted, pleading guilty, being sentenced to incarceration, and being required to pay hundreds or thousands of dollars in court fees. In Philadelphia, the bail decision is made by one of six Arraignment Court Magistrates

[1] In the last several years, pretrial reform has been committed to or implemented in New Jersey, Kentucky, Colorado, Maryland, New Mexico, Connecticut, Chicago, New York City. 26 cities are implementing new pretrial risk assessment regimes in partnership with the Laura and John Arnold Foundation and 20 cities are developing pretrial reform proposals with a $75 million fund from the MacArthur Foundation.

[2] Many of the 11.4 million admissions will spend only short periods in jail. The point-in-time count of jail inmates is 750,000, two thirds of whom are awaiting trial. BJS estimates that 95% of jail growth since the year 2000 has come from pretrial detainees (Minton and Zeng, 2015).

who have broad discretion in setting bail. These magistrates work on a rotating schedule which ensures that over time, the sample of defendants seen by each magistrate will be statistically near identical. By determining the bail amount, the magistrate has influence over whether a defendant is detained pretrial, but is unlikely to affect case outcomes through any other channel. All of the other activities that take place in the bail hearing are pro-forma and the schedules of the magistrates do not correlate with the schedules of the judges or attorneys that are influential later in the criminal proceedings. Thus the bail preferences of the magistrate who presides over the bail hearing provide an exogenous shock to the likelihood of being detained pretrial: a suitable instrument with which to identify the causal impact of pretrial detention on case outcomes.

The data used in this analysis covers all criminal cases originated in Philadelphia between September 2006 and February 2013. The sample size is 331,615 criminal cases with eight total bail magistrates. I use a jackknife instrumental variables technique which, in my preferred specification, allows the preferences of the magistrates to vary over time and according to offense, criminal history, race, and gender of the defendant (Mueller-Smith, 2015). This allows me to exploit considerable within-magistrate variance in detention rates. For example, a defendant with a shoplifting charge is 30 percentage points more likely to be detained if she is seen by the magistrate who is most strict on shoplifting charges instead of the one who's most lenient. However the magistrate that is most lenient on shoplifting charges is most strict on robbery charges, the magistrate that is most lenient on robbery is strict on drug possession, and so forth.

Using variation in the propensity to detain both within and across the magistrates, I estimate that pretrial detention leads to a 6.6 percentage point increase in the likelihood of being convicted on at least one charge, over a mean 50% conviction rate. The effect on conviction (being found guilty either through plea or at trial) is almost entirely explained by a 5.3 percentage point increase in the likelihood of pleading guilty among those who would otherwise have been acquitted, diverted, or had their charges dropped. Those detained will be liable for $128 more in non-bail court fees and will be sentenced to an additional 140 days of incarceration.[3]

Effects appear to be present in both misdemeanors and felonies, although the effects are much more precisely estimated in the former. Those detained on a misdemeanor charge will be 8 percentage points more likely to be convicted and 8 percentage points more likely to receive a sentence of incarceration. Effects are similar in magnitude for white and black defendants, don't vary substantially according to defendant's age, but appear largest for first or second time arrestees. For those with very limited experience

[3]Average court fees for the convicted are $775 and those who receive a prison sentence will serve almost two years on average before being eligible for parole.

in the criminal justice system, pretrial detention leads to a 17 percentage point increase in the likelihood of being convicted.

I divide the sample according to the strength of the evidence that tends to be available in different crime types. My hypothesis is that extra-legal factors such as detention will be more influential among cases where the facts are in dispute than among cases where the evidence is difficult to contest. I find that effects among 'strong-evidence' crimes (DUI, drugs, illegal firearms) are generally small and not statistically significant in the IV regressions, but effects among 'weak-evidence' crimes (assault, vandalism, burglary) are more pronounced. Those detained on a weak-evidence charge are 7 percentage points more likely to plead guilty and will receive an additional 18 months of incarceration. Since weak-evidence crimes tend to have higher rates of wrongful convictions, these findings are consistent with the claim that pretrial detention increases the likelihood that innocent people will plead guilty.[4]

Previous studies using multivariate regression techniques usually show that pretrial detention is correlated with unfavorable case outcomes even after controlling for a number of defendant and case characteristics (Ares et al., 1963; Rankin, 1964; Goldkamp, 1980; Williams, 2003; Free, 2004; Phillips, 2007, 2008; Tartaro and Sedelmaier, 2009; Sacks and Ackerman, 2012; Oleson et al., 2014; Heaton et al., 2016). Many have found very large correlations. An often-cited study by the Arnold Foundation concludes that low risk defendants who are detained throughout the pretrial period are 5.41 times more likely to be convicted and sentenced to jail than those who are released (Lowenkamp et al., 2013). They control for offense within eight broad categories as well as basic demographics and criminal history measures, but variations in charge severity, strength of the evidence, quality of the representation, wealth of the defendant, and a variety of other unobservable differences may have biased the results.

The IV estimates I present here are considerably lower than most previous estimates. This may be due to omitted variable bias in previous research, differences in effect sizes across jurisdictions, or the fact that the IV estimates capture the effect of pretrial detention only for those on the margins of being detained. I also conduct OLS regressions of case outcomes on pretrial detention, controlling for narrowly defined offense categories as well as many other defendant and case characteristics. The OLS results do not differ substantially from the IV results, suggesting that researchers who are able to control for narrowly defined offense categories as well as a variety of criminal history and demographic variables may be able to produce reasonable estimates of the effect of pretrial detention on case outcomes even in the absence of a natural

[4] A forthcoming study by Charles Loeffler and Jordan Hyatt examines wrongful convictions through the use of anonymous surveys of prison inmates. Their preliminary findings suggest that the rate of wrongful convictions is higher among assaultive crimes and lower among DUIs and some drug crimes.

experiment.[5]

The impact that pretrial detention has on case outcomes could come through a variety of channels. A common claim is that people plead guilty just to get out of jail (Bibas, 2004). While this is a reasonable mechanism for misdemeanor cases, effects are also seen in much more serious charges, where it is unlikely that a defendant would be able to avoid a prison sentence. It may be that since some of the disruptions of incarceration have already occurred – loss of job/housing, the initial adjustment to life behind bars – the incentives to fight the charges are lower. Jail may affect optimism about the likelihood of winning the case, or may affect risk preferences in such a way that the certainty of a plea deal seems preferable to the gamble of a trial.[6] Detention also impairs the ability to gather exculpatory evidence, makes confidential communication with attorneys more difficult, and limits opportunities to impress the judge with gestures of remorse or improvement (taking an anger management course, entering rehab, etc.) (Goldkamp, 1980). Detained defendants are likely to attend pretrial court appearances in handcuffs and/or prison garb, creating superficial impressions of criminality. Furthermore, if a defendant must await trial behind bars he may be reluctant to employ legal strategies that involve delay. Whereas a released defendant may file continuances in the hopes that the prosecution's witnesses will fail to appear, memories will blur, or charges eventually get dropped, a detained defendant pays a much steeper price for such a strategy. More nefariously, those detained have less opportunity to coerce witnesses, destroy evidence or otherwise impede the investigation (Allen and Laudan, 2008). While pretrial detention may increase wrongful conviction, pretrial release may decrease the likelihood of successfully prosecuting the truly guilty.

While this paper does not argue for or against the use of pretrial detention, it shows that detention has significant downstream consequences. Being found guilty in the court of law comes with hefty court fees, periods of incarceration or probation, potential disenfranchisement, a criminal record, and challenges securing future employment, school loans, or housing (Uggen et al., 2012; SHRM, 2012; Thacher, 2008; ONDC, n.d.). If wealth or race influence the likelihood of being detained pretrial – and both previous research as well as evidence presented in this paper suggest that they do – then pretrial detention exacerbates socio-economic inequalities in the criminal justice system (Schlesinger, 2005; Wooldredge, 2012).

In Section 2 I give a brief overview of the pretrial process, in Section 3 I describe

[5]In forthcoming work with Paul Heaton and Sandra Mayson (Heaton et al., 2016) we use OLS methods with extensive controls to estimate the impact pretrial detention has on case outcomes in Harris County, Texas. In general, results are similar to those found in Philadelphia; effect sizes are slightly larger but this may be explained by institutional differences across the different jurisdictions.

[6]Detention may change the reference point so that freedom is seen as a gain instead of incarceration being seen as a loss. Prospect theory would thus predict a shift towards more risk averse decisions (Daniel Kahneman, 1979).

the natural experiment, and in Section 4 I discuss the data and provide descriptive statistics and graphs. Section 5 tests the identifying assumption and Section 6 discusses the empirical strategy and shows a visual representation of the first and second stage. Section 7 presents the results for the full sample and Section 8 shows results for various subgroups. Section 9 provides robustness tests and shows how results vary with the number of days detained. Section 10 concludes.

2 Bail, pretrial detention, and an overview of criminal proceedings

Pretrial detention is the act of keeping a defendant confined during the period between arrest and disposition for the purposes of ensuring their appearance in court and/or preventing them from committing another crime. The vast majority of jurisdictions use a money bail system to govern whether or not a defendant is detained. In such a system a judge or a magistrate determines the amount of the bail required for release and the defendant is only released if she pays that amount and agrees to certain behavioral conditions. In some cases the defendant will be released without having to pay anything, in others (usually only the most serious cases) she will be denied bail and must remain detained. While the defendant is liable for the full amount of the bail bond if she fails to appear at court or commits another crime during the pretrial period, she usually does not need to pay the full amount in order to secure release. In many jurisdictions she will borrow this sum from a bail bondsman, who charges a fee and holds cash or valuables as collateral. In some jurisdictions, Philadelphia included, the courts act as a bail bondsman and will release the defendant after the payment of a deposit.

Bail hearings are generally quite brief – in Philadelphia most last only a minute or two – and often do not have any lawyers present. After the bail hearing there are a series of pretrial court appearances that defendants must attend. Although the exact procedure varies across jurisdictions these usually include at least an arraignment (where formal charges are filed) and some sort of preliminary hearing or pretrial conference (where the case is discussed and plea deals can be negotiated). Plea bargaining usually begins around the time of arraignment and can continue throughout the criminal proceedings. In some jurisdictions, like New York City, the arraignment happens simultaneous to the bail hearing and it is not uncommon to strike a plea deal at this first appearance. In other jurisdictions, such as New Orleans, arraignments often do not happen until six months after the bail hearing and a defendant who is unable to make bail must wait until then to file a plea. In Philadelphia, arraignments usually happen within a month of the bail hearing.

Plea negotiation is a process in which the defendant receives reduced charges or shorter sentences in return for pleading guilty and waiving her right to a trial. Since defendants often face severe sentences if found guilty at trial, the incentives to plead are strong. It's estimated that 90-95% of felony convictions are reached through a plea deal (Devers, 2011). Philadelphia differs from many other jurisdictions in its wide use of bench trials on felony cases. Since sentencing tends to be more lenient in bench trials than jury trials, this reduces the incentive to plead guilty.[7] As such, only about 75% of felony convictions are reached through plea in Philadelphia. Trial by jury is not constitutionally required if the maximum incarceration sentence is less than six months, and the use of bench trials for misdemeanors, as is the custom in Philadelphia, is more common across jurisdictions.

This paper shows that pretrial detention increases the likelihood that a defendant will plead guilty and will plead to less favorable terms. While there is little reason to believe this result is unique to Philadelphia, the magnitude of the effect is likely to differ across jurisdictions due to variations in the criminal justice proceedings.

3 The natural experiment

Immediately after arrest, arrestees are brought to one of seven police stations around the city. There, the arrestee will be interviewed via videoconference by Pretrial Services. Pretrial Services collects information about various risk factors as well as financial information to determine eligibility for public defense. Using risk factors and the current charge, Pretrial Services will determine the arrestee's place in a 4 by 10 grid of bail recommendations. These bail guidelines suggest a range of appropriate bail, but are only followed about 50% of the time (Shubik-Richards and Stemen, 2010). Once Pretrial Services has entered the bail recommendation and the financial information into the arrest report the arrestee is ready for her bail hearing.

Once every four hours the magistrate will hold bail hearings for all arrestees on the 'list' (those who are ready to be seen). The bail hearing will be conducted over videoconference by the magistrate, with a representative from the district attorney's office, a representative from the Philadelphia Defender Association (the local public defender), and a clerk also present. In general, none are attorneys. The magistrate makes the bail determination on the basis of information in the arrest report, the pretrial interview, criminal history, bail guidelines, and advocacy from the district attorney and public defender representatives.

[7] In Philadelphia, a bench trial is the default for all but the most serious felonies. The right to a jury trial can be asserted upon request, but this is uncommon. While there is no formal mechanism that ensures that a bench trial will lead to better outcomes for the defendant than a jury trial, all defense attorneys interviewed assured me that this was the case.

There are four things that happen during the bail hearing: the magistrate will read the charges to the arrestee, inform her of her next court appearance, determine whether the arrestee will be granted a court-appointed defense attorney, and set the bail amount. The first two activities are formalities that ensure the defendant is aware of what she is being charged with and where her next court date is. Eligibility for public defense is determined by income. If the defendant is deemed eligible, she will be assigned either to the Defender Association, or to a private attorney who has been approved to accept court appointments by the City of Philadelphia. The default is to appoint the Defender Association; if procedural rules require the court to appoint an attorney outside of the Defender Association the magistrate's clerk will appoint the attorney at the top of a rotating list of eligible attorneys known as a 'wheel'.[8]

A typical bail hearing lasts only a minute or two and the magistrate has broad authority to set bail as she sees fit.[9] Bail decisions fall into three categories: release with no payment required, cash bail or no bail.[10] Those with cash bail will be required to pay a 10% deposit on the total bail amount in order to be released. After disposition, and assuming that the behavioral conditions of the pretrial period were met, 70% of this deposit will be returned. The City of Philadelphia retains 30% of the deposit, even if charges get dropped or the defendant is acquitted on all charges. Those who do not have the 10% deposit in cash can borrow this amount from a commercial bail bondsman, who will accept cars, houses, jewelry and other forms of collateral for their loan. If the defendant's arrest occurred while she is already on parole, her parole officer may choose to file a detainer. If a detainer is filed she may not bail out until a judge removes the detainer.[11]

The research design uses variation in the propensity of the magistrates to assign affordable bail as an instrument for detention status. The validity of the instrument rests on several factors, including that the magistrate received is essentially random and that the instrument not affect outcomes through a channel other than pretrial detention. The following details help ease concerns along these lines.

[8]If there are multiple codefendants, such that representing all of them would pose a conflict of interest, one defendant will be randomly selected to be served by the Defender Association and the others will receive a court-appointed attorney. For opaque historical reasons, four out of five defendants charged with murder will be represented by court-appointed attorneys and the fifth will be represented by the homicide division of the Defender Association (Anderson and Heaton, 2012). This decision is made by the order in which defendants are entered into the data system and the court-appointed attorney is chosen by a Municipal Court judge, not a magistrate.

[9]If either the defense or the prosecution is unhappy with the decision they can make an appeal to a judge immediately after the bail hearing. However the bar is high for overturning the original bail decision so this is not very common.

[10]Holding a defendant without bail is uncommon, although bail is sometimes set at prohibitively high rates.

[11]The detainer hearing usually happens within a week of arrest. Detainer cases are evenly distributed across magistrates and should not bias the results.

Philadelphia employs six Arraignment Court Magistrates at a time, and one of the six will be on duty 24 hours a day, 7 days a week, including holidays. Each day is composed of three work shifts: graveyard (11:30 pm-7:30 am), morning (7:30 am-3:30 pm) and evening (3:30 pm-11:30 pm). Each magistrate will work for five days on a particular shift, take five days off, then do five days on the next shift, five days off, and so forth. For example, a magistrate may work the graveyard shift from January 1st to January 5th, have January 6th-10th off, then work the morning shift from January 11th-15th, have the 16th-20th off, do the evening shift from January 21st-25th, take the next five days off, and then start the cycle all over again.

This rotation relieves concerns that certain magistrates set higher bail because they work during shifts which see higher-risk defendants. Over time, each magistrate will be scheduled to work a balanced number of weekends, graveyard shifts, and so forth. However the magistrates do not always work their appointed shifts; in fact, about 20% of the time there is a substitute (usually one of the other magistrates). To avoid potential confounds I instrument with the magistrate who was scheduled to work instead of the magistrate that actually worked. Furthermore, arrestees do not have latitude to strategically postpone their bail hearing to receive a more lenient magistrate. The process from arrest to bail hearing has been described as a conveyor belt: on average the time from arrest to the bail hearing is 17 hours and defendants are seen as soon as Pretrial Services notifies the Arraignment Court that they are ready (Clark et al., 2011). Thus the cases seen by each scheduled magistrate should be statistically very close to identical. I confirm this empirically in Section 6.

Since the duties of the bail magistrate are so limited, there are few channels outside of the setting of bail through which the magistrate could affect outcomes. One concern would be a correlation between the schedules of the magistrates and the likelihood of receiving a particular judge, prosecutor or defense attorney later on in the criminal proceedings. However the peculiar schedule of the magistrates does not align with the schedule of any other actors in the criminal justice system. For one, this is because the other courts are not open on weekends. This is also because Philadelphia predominantly operates on a horizontal system, meaning that a different prosecutor handles each different stage of the criminal proceedings. Likewise, if the defendant is represented by the Defender Association ($\sim$60% of the sample), she will have a different defense attorney at each stage.[12] While attorneys often rotate duties, their rotations are based on a Monday-Friday work week and not the 'five days on, five days off' schedule of the magistrates.

While eligibility for public defense is another potential channel through which the

[12]The most serious cases are not handled horizontally, however the choice of attorney to handle these cases has nothing to do with the magistrate.

magistrate could affect outcomes, this is supposed to be a pro-forma action based on the income of the defendant. I am not able to see whether the defendant is deemed eligible, I only know the attorney type at the time of disposition. This is likely to be affected by detention status, as the decision to hire a private attorney is based both on having the money to pay one and expectations over case outcomes. While I cannot test directly whether magistrates vary in the rates at which they grant eligibility, I conduct robustness checks in which I control for the attorney type at the time of disposition. This has only a trivial impact on the results.

4 Data and descriptive statistics

The data for this analysis comes from the court records of the Pennsylvania Unified Judicial System; PDF files of case dockets and criminal histories are publicly available online. The data covers all criminal cases which had a bail hearing between September 13, 2006 and February 18, 2013.[13] Before September 13, 2006, Philadelphia used a different data management system with much lower data quality. I do not look at cases which began after February 18, 2013 both because I wanted to leave ample time for all cases to resolve and because one of the magistrates was replaced by a new one on that date.

Figure 1a shows a histogram of the number of days defendants are detained before disposition, conditional on being detained more than three days and less than 600 days.[14] The left tail of the distribution is omitted since the primary definition of 'detainees' used in this paper is being unable to make bail within three days; the long right hand tail of the distribution is omitted for visual simplicity. The median number of days detained for those who are unable to make bail within three days is 78, the mean is 146.

Summary statistics for the released group, the detained group, and the whole sample are shown in Table 1. Defendants are predominantly male, and, although race is missing for 11% of the sample, largely African-American. Those detained tend to have longer criminal histories and are facing more serious charges than those released. It should be noted, however, that 25% of the detained sample are only facing misdemeanor charges.[15]

Almost half the sample have their charges dropped, dismissed, or are placed in

[13] Case outcome or bail data was missing for 0.44% of the sample. These observations were dropped.

[14] Although the sixth amendment guarantees the right to a speedy trial this can be waived if the defendant finds it beneficial to extend.

[15] The offense information used in this paper is taken from the charge at the time of the bail hearing. Many of those who were originally charged with felonies subsequently had the felony charge downgraded to a misdemeanor.

some sort of diversion program.[16] Almost everyone else was convicted, through plea or at trial, on at least one charge. 90% of cases resolved at trial result in convictions, suggesting that prosecutors will not bring a case to trial if they don't believe they have a strong chance of winning. If a detained defendant pleads quickly to avoid more time waiting in jail, she may be pleading guilty on a case that otherwise would not have proceeded to court.

One third of the sample is released without being required to pay bail and an additional 26% are able to pay their way out within three days of the bail hearing. Figure 1b shows the number of people detained and released at a variety of bail ranges. The median amount of bail for the detained group is $10,000. Almost 40% of those who were given bail amounts less than or equal to $2000 are detained for longer than three days. Among this low-bail sample – 77% of whom are charged only with misdemeanors – the average number of days detained pretrial is 28. This group would need to pay a deposit $200 or less to secure their freedom.

Table 2 shows the most common lead charges. The table is organized in descending order, where the top of the list represents crime types where evidence tends to be strongest. The horizontal line separates those classified as 'strong-evidence' crimes from those classified as 'weak-evidence' crimes. The ranking of charges by strength of evidence was done in two ways. First, I surveyed a variety of Philadelphia lawyers and professors who specialize in criminal law. I asked them to rank each crime on a scale of one to five, where a one meant that the evidence in that crime type tended to be ambiguous and subject to multiple interpretations and a five meant that the evidence in that crime type tended to be clear and difficult to dispute. Second, I calculated the average conviction rate per crime type under the assumption that the conviction rates would be higher among crime types where the evidence was stronger. I ranked each crime according to both measures of evidence strength; the order in which they are presented here is the average of the two rankings. While there were differences across the two methods in the exact ordering, the general placement was quite similar.[17]

Figures 1c shows the likelihood of pleading guilty at various levels of 'sentence exposure'. Sentence exposure is a measure of how serious the case is: the average incarceration sentence that similarly situated defendants receive if they are found guilty at trial. This is estimated by taking the fitted values from a regression of sentence length on offense, criminal history, demographics, and time controls, using the sample of cases in which the defendant was found guilty at trial. A log transformation is

[16] Diversion programs are designed for those with low level misdemeanor charges; if the defendant agrees to requirements such as paying restitution to victims, entering rehab, or performing community service, they are generally able to avoid a formal adjudication of guilt and a criminal record.

[17] The ranking based on the survey would have placed car theft in the 'strong-evidence' category and other types of theft in the 'weak-evidence' category.

applied to the fitted values to compress the long right tail. Figure 1c shows that while the likelihood of pleading guilty is relatively flat at low levels of sentence exposure, it rises rapidly and then falls off at higher levels of sentence exposure. While no definitive conclusions should be inferred from this descriptive graph, it is consistent with a story in which defendants plead guilty out of fear of a sentence exposure at trial. While the plea rate drops off at the highest levels of sentence exposure, this may be because the guilty pleas themselves come with increasingly long prison sentences. A present-biased defendant may underweight the difference between the 10 year sentence she is offered via plea or the 25 year sentence she is at risk of receiving at trial.

Figure 1d shows conviction rates at various levels of sentence exposure. It shows that throughout most of the support of the distribution, the likelihood of being convicted decreases with sentence exposure. Figure 1e shows the likelihood of detention at various levels of sentence exposure. We see a monotonically increasing relationship between sentence exposure and the likelihood of being detained. This is not surprising, as those who face longer sentences will face increased incentive to flee, or may pose greater public safety risks to the community.[18]

In Table 3 I test to see if there are socio-economic disparities in the likelihood of being detained pretrial. I regress the log bail amount and a dummy for pretrial detention on race and the log of average income in the defendant's zip code, controlling for offense, criminal history, age and gender.[19] I limit the sample to those for whom both zip code and race is available.[20] I find that those coming from wealthier neighborhoods have bail set lower and are less likely to be detained pretrial even after controlling for a wide range of characteristics. A 10% increase in zip code wealth is correlated with a .4% decrease in bail and a .2 percentage point decrease in the likelihood of being detained pretrial. Race does not correlate with the bail amount in a statistically significant manner, however African-Americans are three percentage points more likely to be detained pretrial than Caucasian defendants with similar offense profile, age, gender, and criminal history.

[18]These three graphs, taken together, suggest that OLS regressions of case outcomes on detention status may in fact be biased downwards. Since the seriousness of the case is not fully visible in the data (offense can be controlled for, but severity can vary within charge categories) this omitted variable will increase the likelihood of detention but may actually decrease the likelihood of conviction. Other likely omitted variables, such as wealth, lawyer quality, and community ties are more consistent with an upward bias of OLS estimates.

[19]I add one to all bail amounts to avoid taking the log of zero.

[20]Average gross income per zip code in 2010 was downloaded from IRS.gov.

5 Identification test

Given the rotation of the work schedules, there may be slightly more imbalance across the magistrates than there would be if the magistrate was randomly and independently drawn for each bail hearing. Since most parametric tests of randomness assume an independent random draw, I conduct a permutation test to verify that the sample of defendants seen by each magistrate are no more different from one another than would be expected by chance, given a rotating work schedule such as the one in use.

I generate a variety of "false" work schedules, keeping the basic parameters of the work rotation fixed: five days on, five days off, rotating shifts, three eight hour shifts per day, etc. However I vary both the day at which the five day rotation begins, the hour at which the shifts begin, and the direction of rotation. (The actual magistrates move from graveyard to morning to evening shift, a reverse rotation would move from graveyard to evening to morning.) Since the schedule is five days long there are four potential "false" start dates to choose from. Since the shift is eight hours long there are three potential "false" start times, spaced two hours apart. I generate three false rotations: one in which both groups work a reverse rotation, and two in which one of the groups work a forward rotation while the other group works a reverse rotation. Given five start dates (four false and one real), four start times (three false and one real) and the three false rotations (I do not use the real rotation to minimize correlations with the actual work schedule) I build 60 false work schedules.

$$Cov_i = \alpha + \beta * Magistrate_i + \psi * Time_i + e_i \tag{1}$$

With each of these work schedules I run the regression specified in Equation 1, where Cov_i is one of 66 different offense, criminal history and demographic covariates, $Magistrate_i$ is the dummy for the magistrate who was scheduled during the bail hearing for case i under the false schedule, and $Time_i$ are the full set of controls for the time and date of the bail hearing as described in Section 4.[21] For each covariate and each false

[21] Unless otherwise specified, all regressions shown in this paper control for the variables listed as follows. Demographic variables include age, age squared, age cubed, gender, and dummies for being black or white. Criminal history variables include the number of prior cases, prior felony cases, prior cases involving a serious violent crime (robbery, assault, burglary, murder, rape), prior cases where the defendant was found guilty of at least one charge, and dummies for having at least one prior case, having at least three prior cases, awaiting trial on another charge, having a detainer placed on them, and having a prior arrest within five years of the bail hearing. Offense variables include dummies for having a charge in the following category: murder, rape, robbery, aggravated assault, burglary, theft, shoplifting, simple assault, drug possession, drug selling, drug buying, possession of marijuana, F2 firearm, F3 firearm, possession of stolen property, vandalism, a non-firearm weapon charge, prostitution, first offense DUI, second offense DUI, resisting arrest, stalking, motor vehicle theft, indecent assault, arson, solicitation of prostitutes, disorderly conduct, pedophilia, intimidation of witnesses, accident due to negligence, false reports to a police officer, fleeing an officer, and reckless

work schedule I collect the F statistic for the joint magistrate dummies. This creates an empirical distribution of the F statistic under false schedules. I then compare the F statistic from the Equation 1 regression in which the magistrate dummies are those who were *actually* scheduled to the distribution of F statistics under false schedules. For each covariate I build an 'empirical p value' which is the fraction of false-schedule F statistics that are larger than the true-schedule F statistic.

I also perform this technique on three summary variables which are the fitted values from a regression of a dummy for pretrial detention, a dummy for pleading guilty to at least one charge, and a dummy for being convicted on at least one charge on all 66 of the offense, criminal history, demographic and time controls. These predicted values are a weighted average of the characteristics that correlate most strongly with the main dependent variables and the endogenous independent variable. I show the F statistic and the empirical p value for these three summary statistics in Table 4. The F statistics are 1.84, 2.59 and 1.91 respectively; as expected the covariates are somewhat less balanced across the magistrates than they would be if the bail magistrate was independently and randomly assigned to each bail hearing. However, at 0.96, 0.56 and 0.58 respectively, the empirical p values show that any imbalance in the predicted likelihood of detention, guilt, or guilty pleas across the magistrates is no more than would be expected by chance.

Figure 1f shows a histogram of the 69 empirical p values from the 66 covariates and three summary statistics. As can be seen, the empirical p values are evenly spread between zero and one. The mean p value is 0.56, the median is 0.58, and three p values are less than or equal to 0.05. The mean F statistic is 2.21 and the median F statistic is 1.84.

The 'false' F statistics comprising the empirical distribution will be correlated, since there is overlap in the false schedules. This reduces the power on any single test (any

endangerment. Additional offense controls include dummies for being charged with a first, second or third degree felony, an unclassified felony, a first, second or third degree misdemeanor, an unclassified misdemeanor, or a summary offense. I also control for the total number of charges, the total number of felony charges, the total number of misdemeanor charges, and the total 'offense gravity score' of the charges (the offense gravity score is used by Philadelphia to measure the seriousness of a charge on a scale of 1-8). Time controls include dummies for the day of the week that the bail hearing occurs, a dummy for graveyard, morning, and evening shift, a cubic in day of the year (1-365), the bail date, and year dummies. Since magistrates tend to leave and be replaced in the third week of February, I define the year dummies to align with the start and end of a magistrate's work period. The following dates serve as dividers: February 21, 2008, February 23, 2009, February 23, 2010, February 23, 2011, February 23, 2012, and February 18, 2013. I interact some of the covariates with three time periods, as divided by February 23, 2009 and February 23, 2011. The covariates that I allow to have differing impacts over these three time periods are the same as the ones that I interact with the magistrate fixed effects in various specifications: murder, robbery, aggravated assault, burglary, theft, shoplifting, simple assault, drug possession, drug sale, drug purchase, marijuana possession, F2 firearm, F3 firearm, vandalism, prostitution, first offense DUI, motor vehicle theft, gender, a dummy for being African-American, the number of prior cases, the number of prior violent crimes, a dummy for having at least one prior and a dummy for having a detainer.

single covariate) since the 60 different false F statistics are not independent from one another. However among the 69 different tests there is no evidence to suggest strategic behavior that would undermine the credibility of the research design.

6 Empirical strategy and visual representations of the research design

Instrumenting for sentencing outcomes using varying propensities of randomly assigned or rotating judges is a popular method of identifying the impact that the criminal justice system has on defendants (Kling, 2006; Aizer and Doyle, 2009; Loeffler, 2013; Tella and Schargrodsky, 2013; Mueller-Smith, 2015). Two concerns with this methodology are that the judges may affect outcomes through channels other than the primary sentencing characteristics the researcher is interested in, and that the monotonicity assumption may be violated. Concern about alternate channels of influence are minimized in this setting due to the limited nature of the bail magistrates' responsibilities and the fact that their work schedule does not align with the other actors in the criminal justice system. However the assumption that the bail-setting propensities for each magistrate do not vary according to defendant characteristics would be harder to defend.

I follow Mueller-Smith (2015) in allowing the magistrates' bail habits to vary across time and according to defendant and case characteristics. Allowing the preferences of the magistrates to update every two years relaxes the assumption that all magistrates respond in the same way to changes in the criminal justice system: a new district attorney, an update to the bail guidelines, a change in capacity constraints at the local jail. Allowing the preferences of the magistrates to vary across case and defendant characteristics relaxes the assumption that a strict magistrate must be equally strict on all crimes and all defendants. In addition to minimizing non-monotonicity bias, exploiting within-magistrate variation in bail-setting propensities increases power.

Empirically, allowing the magistrates' bail preferences to vary is accomplished by interacting the magistrate fixed effects with time period fixed effects and a subset of the covariates in the first stage regression, as shown in Equation 2. $Detention_i$ is a dummy which is equal to one if the defendant is detained for more than three days in case i, $Magistrate_i$ is a dummy for the magistrate who was scheduled to work during the bail hearing for case i, and Cov_i^1 are the subset of the covariates across which I allow the magistrate's preferences to vary: the 16 most common crime types, gender, race, and criminal history. Cov_i^2 are the remainder of the offense, demographic and criminal history controls, as listed in Footnote 21. T_i^3 is a dummy for the time period of the bail hearing for case i (there are three time periods as divided by February 23,

2009 and February 23, 2011) and $Time_i$ are the full set of controls for the time and date of the bail hearing (which include T_i^3 as a subset). I use a jackknife instrumental variables technique to avoid the bias induced by many instruments (Angrist et al., 1999).

$$\begin{aligned} Detention_i = \alpha_2 + Magistrate_i * T_i^3 * \omega_2 + Magistrate_i * Cov_i^1 \\ * \phi_2 + Cov_i^1 * T_i^3 * \delta_2 + Cov_i^2 * \gamma_2 + Time_i * \psi_2 + e_i \end{aligned} \tag{2}$$

The second stage is shown in Equation 3 where $Case\_Outcome_i$ represents a variety of case outcomes, $\widehat{Detention}_i$ is the fitted value from the jackknifed first stage, and Cov_i^1, Cov_i^2, T_i^3 and $Time_i$ are as described above. I present results from a linear regression in both stages; logit regressions yield similar results.

$$Case\_Outcome_i = \alpha_3 + \widehat{Detention}_i * \beta_3 + Cov_i^1 * T_i^3 * \delta_3 + Cov_i^2 * \gamma_3 + Time_i * \psi_3 + \epsilon_i \tag{3}$$

Figures 2 and 3 show visual representations of the first and second stage of the IV regression. Figure 2 shows how pretrial detention rates vary by magistrate for different crime types. The y axes show residuals from a regression of pretrial detention on controls for the time and date of the bail hearing. The eight bars represent the average detention residuals for the eight magistrates, ordered so that Magistrate 1 has the lowest overall rate of pretrial detention, Magistrate 2 has the second lowest, and so forth. The order of the magistrates remains the same in all subplots. Figure 2a shows the magistrate means across the entire sample, Figures 2b-f show the means for different crime types. In each offense category, n refers to the number of cases charged with that offense and F refers to the joint significance of the magistrates in a regression of detention status on magistrate dummies and time controls on that subsample. The figures demonstrate that while magistrates vary in their overall detention rates, there is quite a bit of variance across the different crime types. For example, although the overall detention rate of Magistrates 2 is quite low, this magistrate has the highest detention rates for prostitution and drug possession. This within-magistrate variation in detention rates suggest that the monotonicity assumption will be violated if detention status is instrumented for with the overall detention rate of the magistrates.

Figure 3 shows that defendants whose bail hearing is presided over by high-bail-setting magistrates are more likely to be convicted or to plead guilty. In Figure 3a the y and x axes show residuals from a regression of conviction and detention dummies respectively on the set of time controls described by $Time$. Figure 3b is similar except the dummies are residualized over $Cov^1 * T^3, Cov^2$ and $Time$. Each circle represents the average detention and conviction residuals of the eight magistrates; the size of the circle is proportional to the total number of cases seen by each magistrate. As

can be seen there is a clear positive correlation between the conviction and detention residuals which changes very little once the effect of covariates have been removed. This provides visual evidence that the slight differences in the groups of defendants seen by each magistrate are not the cause of the positive relationship between detention and conviction.

Figures 3c and d show the relationship between pretrial detention and pleading guilty for those who are charged with weak-evidence crimes and those charged with strong-evidence crimes respectively. In this graphic, the magistrate dummies have been interacted with T^3, dummies for the three time periods. The x and y axes in both figures show residuals from a regression of pretrial detention and guilty pleas respectively on covariates, time controls, and time-covariate interactions. The circles show the average residuals per-magistrate-per-time period. A clear positive relationship can be seen between the likelihood of being detained and the likelihood of pleading guilty in weak-evidence cases. There is no visually discernible relationship among strong-evidence cases.

7 Full sample results

In Table 5 I show results from a variety of jackknife instrumental variables specifications where the outcome variable is a dummy which equals one if the defendant is convicted on at least one charge in Panel A, and a dummy variable which equals one if the defendant pled guilty to at least one charge in Panel B. In Column 1 the only instruments are the eight magistrate dummies and in Column 2 the magistrate dummies are interacted with T^3, the three time period dummies. The only controls in the first two columns are $Time$. The standard errors decrease between the first and second column by about 10%, suggesting that allowing the magistrates to respond differently to the various changes that occur during the period of my analysis increases the power of the instrument. Covariates are added in Column 3 and the effect sizes either increase (Panel A) or remain constant (Panel B). Columns 4-6 allow the bail setting habits of the magistrates to vary according to offense, criminal history and demographics of the defendant. In Column 4, the magistrate dummies are interacted with dummies for the five most common lead charges: drug possession, first offense DUI, robbery, selling drugs, and aggravated assault. In Column 5 I add interactions between magistrate dummies and the number of prior cases/prior violent crimes, dummies for having at least one prior case, having a detainer, and being African-American or female. In Column 6 I add interactions between the magistrate dummies and the other most common crime types as listed in Table 2. The number of instruments per specification as well as the F statistic of joint significance on the first stage instruments

are included in the bottom panel.

Both effect sizes and standard errors decrease as instruments are added. This suggests two things: that allowing the bail-setting habits of the magistrates to vary across defendant characteristics both increases the power and reduces non-monotonicity bias in the results. In particular, if treatment effects are smaller among crime types for which the monotonicity assumption is violated, then the estimates in Columns 1-3 will be biased upwards. It should be noted, however, that non-monotonicity bias will not generate spurious results if no treatment effects exist. Under the null hypothesis it would be very unlikely to see effect sizes as large as those shown in Table 5.

My preferred specification is the one where magistrate's preferences are allowed to vary across all 16 of the most common crime types, across the criminal history, race, and gender of the defendant, and over the three time periods. I estimate that pretrial detention leads to a 6.6 percentage point increase in the likelihood of being convicted and a 5.3 percentage point increase in the likelihood of pleading guilty. Compared to the means for each dependent variable, that converts into a 13% increase in the probability of conviction and a 21% increase in the likelihood of pleading guilty.

Table 6 shows how pretrial detention affects conviction rates, guilty pleas, court fees, the likelihood of being incarcerated, and both the maximum and minimum incarceration sentence.[22] Panel A shows results from the jackknife instrumental variables method with the most fully interacted specification and Panel B shows results from an OLS regression controlling for the full set of offense, criminal history, demographic and time controls. With the exception of court fees and the incarceration dummy, results do not vary substantially between IV and OLS. This suggests that researchers who are interested in estimating the effects of pretrial detention in other jurisdictions may be able to achieve reasonable results with standard court data even in the absence of a natural experiment.

The IV estimates suggest that pretrial detention leads to an average increase of $128 in non-bail court fees owed. Conditional on being convicted, court fees average at $775, and $1250 if convicted of a felony. For the tens of thousands of people convicted as a result of pretrial detention – many of whom were unable to pay even fairly small amounts of bail – these court fees may pose a significant burden. The IV results for the likelihood of being incarcerated and the maximum incarceration sentence are positive but noisy, however the estimates on the minimum incarceration sentence are more precise. Pretrial detention leads to an expected increase of 140 days in sentence length before being eligible for parole. Conditional on receiving a sentence of incarceration, defendants spend an average of 22 months in jail before being eligible for parole.

In results not shown here, I test to see if pretrial detention affects post-disposition

[22]Sentence length is coded as zero for individuals who do not receive an incarceration sentence.

crime. The estimates are noisy but are generally negative, suggesting that some crimes may be averted as a result of increased incapacitation. Forthcoming work will provide a cost-benefit analysis of the impact pretrial detention has on pretrial crime, including novel estimates of the cost of incarceration to the incarcerated (Mayson and Stevenson, 2016).

8 Results for various subsamples

In Table 7 I show results for misdemeanors and felonies using both IV and OLS techniques; the discussion below focuses on the IV results.[23][24] The effect sizes of the felony sample are similar in magnitude to the full sample, but are noisy. The effects among misdemeanors are more precisely measured and are slightly larger than the full sample estimates, especially in relation to the means of the dependent variables. In fact, pretrial detention among misdemeanor defendants leads to a statistically significant increase in all outcomes. The effects on punishment are particularly large: those detained will be 8 percentage points more likely to receive a sentence of incarceration over a mean 16 percentage point incarceration rate. While the expected increase in sentence length is only a month or two, this represents more than a 100% increase relative to the mean.[25] Those who are given an incarceration sentence for a misdemeanor crime will spend an average of 9 months in jail before being eligible for parole.

In Table 8 I compare effect sizes across weak-evidence crimes and strong-evidence crimes. Many of the strong-evidence crimes are possession crimes, where drugs or illegal firearms were found on the defendant's body or in her home or car. Shoplifting crimes usually entail store merchandise found on the defendant's person as they walk out of the store. In DUI's, the defendant was found behind the wheel with an elevated blood alcohol level, and prostitutes are usually arrested after soliciting from an undercover officer. The main piece of evidence among strong-evidence crimes is the police officer's statement and/or a lab report; these types of charges can be difficult to contest.

Most weak-evidence crimes are complainant offenses (an arrest was made as a result of a complaint). Evidence in these types of crimes are much more likely to consist of victim testimony, eyewitness accounts, surveillance/bystander video, alibis, character

[23]The felony sample is defined as those who were charged with at least one felony at the time of the bail hearing; many of these had their charges downgraded to misdemeanors only by the time of the arraignment.

[24]The IV specifications allow the magistrate preferences to vary across time and across defendant characteristics, as shown in Column 6 of Table 5.

[25]This increase in sentence length could not be explained solely by detained defendants being released with time-served. If all of the defendants who were convicted as a result of detention were given time served this would result in an average increase of only 12.24 days. (The average number of days detained for those unable to make bail within 3 days is 144, I estimated that detention leads to a 8.5 percentage point increase in conviction. $144 * 0.085 = 12.24$)

testimonials, identification from police lineups, etc. With this type of evidence it can be harder to discern the facts of the case. Assaultive crimes in particular may have multiple conflicting accounts of what occurred and why. Witness testimony can be inconsistent, videos blurry, alibis hard to verify, and police lineup identification is notoriously unreliable. While a number of theft crimes are included in this category, possession of a stolen object does not automatically imply culpability. For example, passengers in a stolen car may not be aware that the car was stolen.

My hypothesis is that extra-legal factors such as detention status will have less effect on cases where the evidence is strong than they will in cases where the facts are difficult to discern. Prosecutors are unlikely to drop charges if the evidence is strong, nor will they lose if the case is brought to trial. While a detained defendant may plead guilty sooner or to more unfavorable terms, the effect on conviction should be minimal. In a weak-evidence case, however, the defendant's willingness to wait may prove important. Cases where the evidence is weak are much more likely to be dropped, or to result in acquittal at trial. Furthermore, such cases may rely on the testimony of witnesses who are reluctant to cooperate or whose memory fades over time. In fact, if the prosecution's key witnesses fail to appear four times in a row, the case is dropped. If detention leads defendants to plead guilty or move to trial quicker than they would otherwise this could be a significant disadvantage.

Detention status may also directly affect the evidence available among weak-evidence crimes. 75% of the sample is represented by a public or court appointed attorney; the high case volumes handled by these attorneys suggest that they may not have the time to do as much investigative work as is necessary. A released defendant can contact eyewitnesses, secure surveillance video, take photos of the crime scene, and otherwise collect exculpatory evidence. A released defendant can also pressure witnesses, destroy evidence, or otherwise impede the investigation.

While the standard errors in the IV estimates are large enough that definitive conclusions can't be drawn, the results generally suggest that effect sizes are larger among weak-evidence crimes. The difference is particularly striking for sentence length: those detained on a weak-evidence crime can expect to be sentenced to an additional 18 months in prison before being eligible for parole. With the exception of court fees, the IV effects for strong-evidence crimes are close to zero and are not statistically significant.

The OLS results also support the hypothesis that effect sizes are larger among weak-evidence crimes. The OLS estimates of the effect pretrial detention has on conviction are 0.098 among weak-evidence crimes and 0.007 among strong-evidence crimes. Figure 4 shows OLS effects by crime category (the IV results are too noisy for such small samples). Strong-evidence crimes are at the top and weak-evidence crimes are at the

bottom. The coefficient plot, which shows the estimated effect that pretrial detention has on guilty pleas, again suggests that effect sizes are larger among weak-evidence crimes.

Table 9 shows IV results for blacks, whites, young defendants, older defendants, those with one or no prior arrests, and those with more extensive criminal history. Overall, there is nothing to suggest that effect sizes differ across race. The point estimates are generally quite similar, although the subsample is small enough that many are not statistically significant. Results are also similar among younger and older defendants. The point estimates for sentence outcomes are greater among the younger defendants, but the standard errors are large as well. We do, however, see suggestive evidence that effect sizes are larger for those with limited prior interactions with the criminal justice system. Among first or second time arrestees, pretrial detention leads to a 12 percentage point increase the likelihood of pleading guilty and a 17 percentage point increase in the likelihood of being convicted.[26]

9 Robustness checks and effect sizes for varying definitions of pretrial detention

In Table 10 I present several robustness checks for the full sample results. Panel A is identical to Panel A of Table 6 except that magistrate dummies are also included as controls in the second stage regression. Controlling for the eight magistrate dummies implies that the impact pretrial detention has on case outcomes is being identified solely off of within-magistrate variations in detention rates. In particular, these controls will absorb any other fixed aspects of the magistrates that may affect the results. For example, the most lenient magistrate may also be particularly encouraging or supportive during the bail hearing. If this affects the defendant's expectations of success at trial – and thus their willingness to accept a guilty plea – this would undermine the exogeneity assumption. If the effect sizes change greatly as a result of including magistrate fixed effects as controls this would raise concerns that the magistrates are affecting case outcomes through channels other than pretrial detention. Panel A shows that although the inclusion of magistrate fixed effects increases the standard errors, the effect sizes are not changed dramatically.

Panel B is identical to Panel A of Table 6 except that controls for attorney type are added. While attorney type is likely to be endogenous to both the bail amount and detention status, a large change in effect size as a result of these controls would raise concerns that the effects are being driven by variations in the magistrate's willingness

[26]The sample of first time arrestees is so small that the IV results are hard to interpret.

to grant public defense. Alternatively, it could suggest that the effects seen are not as a result of pretrial detention per se, but rather the wealth affects of bail and the ability to hire a quality lawyer. However the inclusion of controls for having a public defender, a court-appointed attorney, or a private attorney have only trivial results on the estimates.

In Figure 5 I look at how effect sizes differ if pretrial detention is defined as spending at least one night in jail after the bail hearing, more than two weeks, more than thirty days, or still being in jail at the time of disposition. The figures show regression estimates from the IV specification where magistrate's preferences are allowed to vary over time and according to defendant characteristics. Figures 5a and b show results for the full sample, Figure 5c shows the weak-evidence sample and Figure 5d shows cases for first or second time arrestees. The outcome in Figure 5b is conviction and the outcome for all other figures is guilty pleas.

In each subplot, the effect size increases as the number of days detained increases. The standard errors increase as well. This is because the initial bail amount set by the magistrate becomes less relevant to detention status as time goes on (future judges may revise bail downward).[27] However despite the noisy estimates, the lower bound on the 95% confidence interval is far from zero in some of these specifications. Among weak-evidence crimes, the lower bound of the effect of being detained throughout the entire pretrial period on the likelihood of pleading guilty is almost 10 percentage points.

10 Conclusion

Using a natural experiment in Philadelphia where the likelihood of being detained pretrial is exogenously affected by the magistrate who presides over the bail hearing, I find that pretrial detention leads to an increase in the likelihood of being convicted, mostly by increasing the likelihood that defendants, who otherwise would have been acquitted or had their charges dropped, plead guilty. The effects are larger among first or second time arrestees and among crime types where evidence tends to be weak.

In Philadelphia, almost 80 percent of arrestees have bail set at $10,000 or less. These arrestees would only need to pay up to a $1000 deposit to secure their release, an amount that is likely to be had in savings or available to borrow by most middle and upper middle class Americans. Yet 60% of arrestees with a $10,000 bail are unable to pay this amount within three days and 34% remain in jail at the time of disposition.

Some argue that money bail is unconstitutional since it is so difficult to ensure that the price of bail is set proportional to one's means in a way that precludes detention

[27] I chose 'detained more than three days' as my preferred measure since it seemed a reasonable balance between strength of instrument and size of the effect.

based on wealth. In fact, many jurisdictions do not take ability to pay into account at all when setting bail, a practice that is clearly a violation of the Equal Protection Clause.[28] A nonprofit legal organization called Equal Justice Under Law has been filing a series of lawsuits to ensure that the defendant's ability to pay is taken into account in the setting of bail.

Yet this is not the only important legal/policy question which hinges, at least partly, on the full costs of pretrial detention to the defendant. Another as-of-yet-unanswered question is whether defendants have a right to counsel at the bail hearing. The Supreme Court has ruled that the state must pay for indigent defendants to have an attorney at all 'critical stages' of the criminal proceedings, but what exactly constitutes a critical stage is not completely clear. Many jurisdictions, including Philadelphia, do not provide counsel to indigent clients at the bail hearing.

Another outstanding question is whether detention places undue coercive pressure on defendants to plead guilty. Guilty pleas are required to be voluntary by the Due Process Clauses of the Fifth and Fourteenth Amendments and if the 'punishment' of waiting in jail until trial is worse than the penalties involved with pleading guilty then a plea may might not be considered voluntary. Finally, the Eighth Amendment prohibits 'excessive bail'. Since the full costs of bail include its effect on case outcomes, bail amounts that might have been considered reasonable when only weighing the costs of a pretrial loss of liberty against the benefits of averted crime may seem excessive when including all the downstream effects of pretrial detention.[29]

The findings presented in this paper, taken in context of these four highly policy-relevant questions, suggest several things. First they suggest that jurisdictions should move away from a means-based method of determining who is detained pretrial, as the socio-economic disparities of such a system ripple far beyond the pretrial period. Second, they suggest that the bail hearing is indeed a critical stage, and indigent defendants should have the right to counsel. Third, they suggest that low risk defendants – for whom the 'punishment' of pretrial detention is worse than the expected punishment for the crime – should not be detained as detention may result in coerced guilty pleas. Finally, while determinations of 'excessiveness' are beyond the scope of this paper, the evidence suggests that the costs of detention are high and, if justified, the benefits must be high as well.

[28]The Department of Justice issued a Statement of Interest in Varden v. City of Clanton (February 2015) declaring that fixed bail bond schedules that do not take indigence into account are a violation of the Fourteenth Amendment.

[29]For a more detailed discussion of the constitutional questions which hinge at least partly on how pretrial detention affects case outcomes see (Heaton et al., 2016).

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Table 1: Summary statistics

	Released	Detained	Total
Age	32.9	32.0	32.5
Male	0.79	0.89	0.83
Caucasian	0.30	0.26	0.29
African-American	0.53	0.65	0.57
Missing race	0.15	0.05	0.11
Number of prior cases	4.14	6.25	4.97
Has felony charge	0.36	0.75	0.51
Number of charges	4.95	6.71	5.64
Bail	$3,345	$63,336	$26,877
Bail=$0	0.54	0.01	0.33
Detained>3 days	0	1	0.41
Never released	0.00	0.58	0.23
All charges dropped	0.48	0.48	0.48
Case went to trial	0.32	0.19	0.27
Not guilty on all charges	0.03	0.03	0.03
Guilty of at least one charge	0.49	0.49	0.49
Pled guilty to at least one charge	0.21	0.33	0.26
Court fees charged	$386	$211	$317
Sentenced to incarceration	0.18	0.34	0.24
Days of incarc. sentence	94	585	292
Days before elig. for parole	42	331	159
Observations	197,775	133,840	331,615

Note: Summary statistics are presented for those who are released within three days of the bail hearing (Column 1), those who are detained for more than three days after the bail hearing (Column 2) and the entire sample (Column 3). All offense variables refer to the charges present at the time of the bail hearing. The statistic shown is the mean and, unless otherwise indicated, variables are dummies where 1 indicates the presence of a characteristic. Age is measured in years, those marked "Number..." are count variables, and those expressed in dollar amounts are currency. The bottom two rows refer to the maximum number of days of the incarceration sentence and the minimum number of days before the defendant is eligible for parole. The sentence is coded as zero if the defendant did not receive an incarceration sentence.

Table 2: Main offenses

DUI, 1st offense	0.065
Prostitution	0.020
Shoplifting	0.042
Small amount marijuana	0.022
Illegal firearms (F2 and F3)	0.036
Drug possession	0.14
Buying drugs	0.053
Selling drugs	0.13
Car theft	0.021
Theft	0.042
Robbery	0.073
Burglary	0.046
Murder	0.021
Vandalism	0.011
Simple assault	0.065
Aggravated assault	0.091
Observations	331615

Note: The statistic shown is the fraction of the overall sample whose lead charge is as listed. Crime types are listed according to strength of evidence; crime types at the top of the list tend to have stronger evidence than those at the top of the list. Strength of evidence is measured both by a poll of criminal justice lawyers and by average conviction rate. The horizontal line separates those placed in the 'weak-evidence' category and those placed in the 'strong-evidence' category

Table 3: How do race and neighborhood wealth relate to bail amount and pretrial detention?

	(1) Log bail amount	(2) Pretrial detention
African-American	0.00197	0.0278****
	(0.0125)	(0.00178)
Log income (average per zip code)	-0.0451***	-0.0217****
	(0.0144)	(0.00205)
Observations	251236	251236
R^2	0.584	0.336
Demographic controls	Y	Y
Criminal history controls	Y	Y
Offense controls	Y	Y

Standard errors in parentheses

Heteroskedastic-Robust Standard Errors

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$, **** $p < 0.001$

Note: This table shows the how race and neigborhood wealth correlate with bail amount and pretrial detention status, after controlling for offense, criminal history, age, gender and time. Only the subset of defendants for whom zipcode and race information was available were included

Table 4: Covariate balance across magistrates

Summary statistics for defendant characteristics	F statistic	Empirical p value
Predicted likelihood of pretrial detention	1.84	0.96
Predicted likelihood of pleading guilty	2.59	0.56
Predicted likelihood of conviction	1.91	0.58

Note: The predicted likelihoods described in the left-most columns are the predicted values from a regression of pretrial detention, guilt, and conviction, respectively, on offense, criminal history, demographics and time controls. The F statistics are the F statistics in a test of joint significance of eight magistrate dummies when regressing the predicted values on the magistrate dummies and controls for the time and date of the bail hearing. The empirical p values show the likelihood of seeing an F statistic as big or bigger if the magistrate seen was due to chance; this is calculated as the fraction of 'false' F statistics as big or bigger in a permutation test.

Table 5: How does pretrial detention affect conviction rates and guilty pleas?

Panel A: Full sample (IV)	Conviction (mean dep. var.= 0.49)					
	(1)	(2)	(3)	(4)	(5)	(6)
Pretrial detention	0.166**	0.181***	0.252***	0.122***	0.0871**	0.0665**
	(0.0734)	(0.0653)	(0.0794)	(0.0411)	(0.0369)	(0.0293)
Panel B: Full sample (IV)	Guilty pleas (mean dep. var.=0.25)					
	(1)	(2)	(3)	(4)	(5)	(6)
Pretrial detention	0.124**	0.174***	0.175**	0.104***	0.0582*	0.0531**
	(0.0617)	(0.0561)	(0.0715)	(0.0364)	(0.0329)	(0.0265)
Magistrate X 3 time periods		Y	Y	Y	Y	Y
Magistrate X top 5 crimes				Y	Y	Y
Magistrate X crim. history					Y	Y
Magistrate X demographics					Y	Y
Magistrate X top 16 crimes						Y
Time controls	Y	Y	Y	Y	Y	Y
Covariates			Y	Y	Y	Y
Observations	331615	331615	331615	331615	331615	331615
First stage F	34.87	19.53	26.09	21.87	14.75	11.65
Number of instruments	8	8	19	59	107	203
Mean indep. var	0.41	0.41	0.41	0.41	0.41	0.41

Standard errors in parentheses

Heteroskedastic-Robust Standard Errors

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$, **** $p < 0.001$

Note: The dependent variable in Panels A and B respectively is a dummy equal to one if the defendant is convicted on at least one charge and a dummy equal to one if the defendant pled guilty on at least one charge. The instruments in the first two columns are the eight magistrate dummies; in the subsequent columns the instruments include interactions between the magistrate dummies and three time period fixed effects, the five most common crime types, a variety of criminal history variables, defendant demographics, and the remainder of the 16 most common crime types as shown in Table 2. The first two columns control only for the time and date of the bail hearing, all subsequent columns include the full set of controls as described in Footnote 21. The F statistic on the exogenous first stage instruments is listed at the bottom, as are the number of instruments used in that specification and the mean of the independent variable. A linear jackknife instrumental variables regression is used. The R^2 is not reported due to difficulties of interpreting this statistic in an IV regression.

Table 6: Full sample results - jackknife IV and OLS

	(1) Conv-iction	(2) Guilty plea	(3) Court Fees	(4) Incarc-eration	(5) Max days	(6) Min days
Panel A: Full sample (IV)						
Pretrial detention	0.0665**	0.0531**	128.7****	0.0193	119.3	140.6**
	(0.0293)	(0.0265)	(33.59)	(0.0251)	(73.40)	(61.86)
Panel B: Full sample (OLS)						
Pretrial detention	0.0355****	0.0558****	-103.0****	0.1000****	136.9****	69.88****
	(0.00197)	(0.00181)	(2.621)	(0.00166)	(3.430)	(2.518)
Observations	331615	331615	331615	331615	331613	331613
First stage F	11.65	11.65	11.65	11.65	11.65	11.65
Mean dep. var.	0.49	0.25	$312	0.24	292	155
Mean indep. var.	0.41	0.41	0.41	0.41	0.41	0.41

Standard errors in parentheses

Heteroskedastic-Robust Standard Errors

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$, **** $p < 0.001$

Note: This table shows how pretrial detention affects various case outcomes using both a jackknife IV regression (Panel A) and an OLS regression (Panel B). The outcome variables are dummies for being convicted/pleading guilty, total non-bail court fees in dollars, a dummy for whether or not the defendant receives an incarceration sentence, the maximum days of that incarceration sentence and the minimum days the defendant must serve before being eligible for parole. In all of the IV specifications magistrate preferences are allowed to vary across three time periods and according to offense, criminal history and demographics of defendants. The F statistic on the first stage of the jackknife IV are shown in the sub-panel, as are the means of the dependent and independent variables. All regressions include the full set of controls as described in Section 6.

Table 7: Comparing results for misdemeanors and felonies

	(1) Conv-iction	(2) Guilty plea	(3) Court Fees	(4) Incarc-eration	(5) Max days	(6) Min days
Panel A: Misdemeanors (IV)						
Pretrial detention	0.0850**	0.0684**	93.48**	0.0851***	66.00***	30.68**
	(0.0366)	(0.0300)	(37.85)	(0.0279)	(21.64)	(12.13)
Panel B: Misdemeanors (OLS)						
Pretrial detention	0.0190****	0.0515****	-13.34****	0.0513****	39.23****	19.62****
	(0.00298)	(0.00249)	(3.081)	(0.00213)	(2.087)	(1.401)
Observations	163125	163125	163125	163125	163124	163124
First stage F	12.82	12.82	12.82	12.82	12.82	12.82
Mean dep. var.	0.50	0.16	$351	0.16	48	19
Mean indep. var.	0.23	0.23	0.23	0.23	0.23	0.23
Panel C: Felonies (IV)						
Pretrial detention	0.0598	0.0545	136.7**	-0.0214	147.5	179.0
	(0.0433)	(0.0414)	(53.66)	(0.0398)	(135.3)	(115.2)
Panel D: Felonies (OLS)						
Pretrial detention	0.0514****	0.0589****	-174.2****	0.134****	194.7****	98.10****
	(0.00266)	(0.00259)	(4.023)	(0.00244)	(5.583)	(4.053)
Observations	168490	168490	168490	168490	168489	168489
First stage F	7.92	7.92	7.92	7.92	7.92	7.92
Mean dep. var.	0.47	0.35	$274	0.32	528	294
Mean indep. var.	0.58	0.58	0.58	0.58	0.58	0.58

Standard errors in parentheses

Heteroskedastic-Robust Standard Errors

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$, **** $p < 0.001$

Note: This table shows effect sizes in misdemeanor crimes (Panels A and B) and felonies (Panel C and D). The outcome variables are dummies for being convicted/pleading guilty, total non-bail court fees in dollars, a dummy for whether or not the defendant receives an incarceration sentence, the maximum days of that incarceration sentence and the minimum days the defendant must serve before being eligible for parole. In all IV specifications magistrate preferences are allowed to vary across three time periods and according to offense, criminal history and demographics of defendants. The F statistic on the first stage of the jackknife IV are shown in the sub-panel, as are the means of the dependent and independent variables. All regressions include the full set of controls as described in Footnote 21.

Table 8: Effect sizes by strength of evidence

	(1) Conv-iction	(2) Guilty plea	(3) Court Fees	(4) Incarc-eration	(5) Max days	(6) Min days
Panel A: Weak-evidence crimes (IV)						
Pretrial detention	0.0415	0.0735*	-42.86	-0.00348	516.3****	541.1****
	(0.0421)	(0.0383)	(44.04)	(0.0354)	(141.7)	(124.1)
Panel B: Weak-evidence crimes (OLS)						
Pretrial detention	0.0983****	0.0894****	-67.93****	0.131****	171.3****	83.71****
	(0.00316)	(0.00285)	(3.797)	(0.00250)	(7.089)	(5.703)
Observations	122742	122742	122742	122742	122741	122741
First stage F	9.10	9.10	9.10	9.10	9.10	9.10
Mean dep. var.	0.35	0.25	$158	0.20	466	276
Mean indep. var.	0.56	0.56	0.56	0.56	0.56	0.56
Panel C: Strong-evidence crimes (IV)						
Pretrial detention	0.0308	0.0277	206.1****	0.0132	3.994	0.857
	(0.0415)	(0.0369)	(49.26)	(0.0357)	(37.54)	(17.61)
Panel D: Strong-evidence crimes (OLS)						
Pretrial detention	0.00707**	0.0379****	-111.3****	0.0832****	98.36****	47.45****
	(0.00289)	(0.00273)	(4.167)	(0.00262)	(3.568)	(1.809)
Observations	165488	165488	165488	165488	165488	165488
First stage F	13.29	13.29	13.29	13.29	13.29	13.29
Mean dep. var.	0.60	0.27	$435	0.27	187	88
Mean indep. var.	0.27	0.27	0.27	0.27	0.27	0.27

Standard errors in parentheses

Heteroskedastic-Robust Standard Errors

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$, **** $p < 0.001$

Note: Panels A and B show effect sizes in case types where evidence tends to be relatively weak (murder, aggravated assault, simple assault, vandalism, burglary, theft, robbery, car theft) and Panels C and D show case types where evidence tends to be relatively strong (DUI, drug possession, illegal firearms, drug sale, drug purchase, prostitution, shoplifting). The outcome variables are dummies for being convicted/pleading guilty, total non-bail court fees in dollars, a dummy for whether or not the defendant receives an incarceration sentence, the maximum days of that incarceration sentence and the minimum days the defendant must serve before being eligible for parole. In all specifications magistrate preferences are allowed to vary across three time periods and according to offense, criminal history and demographics of defendants. The F statistic on the first stage of the jackknife IV are shown in the sub-panel, as are the means of the dependent and independent variables. All regressions include the full set of controls as described in Footnote 21.

Table 9: Comparing results across defendant characteristics

	(1) Conv-iction	(2) Guilty plea	(3) Court Fees	(4) Incarc-eration	(5) Max days	(6) Min days
Panel A: White defendants (IV)						
Pretrial detention	0.0700	0.0265	52.43	-0.0253	146.7	186.0*
	(0.0596)	(0.0557)	(75.81)	(0.0541)	(129.6)	(102.1)
Observations	93937	93937	93937	93937	93937	93937
Mean dep. var.	0.55	0.29	$361	0.27	254	124
Panel B: Black defendants (IV)						
Pretrial detention	0.0698*	0.0355	136.4***	-0.00125	75.48	116.2
	(0.0400)	(0.0359)	(45.19)	(0.0342)	(111.3)	(94.53)
Observations	191200	191200	191200	191200	191199	191199
Mean dep. var.	0.49	0.25	$296	0.25	357	196
Panel C: Defendants under 30 (IV)						
Pretrial detention	0.0487	0.0909	87.38	-0.0106	296.2	286.8
	(0.0658)	(0.0598)	(79.66)	(0.0573)	(214.3)	(187.3)
Observations	167392	167392	167392	167392	167391	167391
Mean dep. var.	0.47	0.27	$304	0.24	348	193
Panel D: Defendants over 30 (IV)						
Pretrial detention	0.0748**	0.0553*	174.0****	0.0254	18.56	55.91
	(0.0359)	(0.0326)	(40.90)	(0.0308)	(74.48)	(60.45)
Observations	164194	164194	164194	164194	164193	164193
Mean dep. var.	0.51	0.25	$320	0.24	235	117
Panel E: First or second time arrestees (IV)						
Pretrial detention	0.175**	0.122*	-40.23	-0.0333	194.0	300.5
	(0.0751)	(0.0686)	(95.65)	(0.0588)	(225.8)	(192.3)
Observations	113932	113932	113932	113932	113930	113930
Mean dep. var.	0.41	0.22	$313	0.17	202	108
Panel F: Defendants with two or more prior arrests (IV)						
Pretrial detention	0.0541*	0.0387	170.6****	0.0736***	185.8**	180.6***
	(0.0317)	(0.0286)	(36.03)	(0.0282)	(75.66)	(63.08)
Observations	217683	217683	217683	217683	217683	217683
Mean dep. var.	0.53	0.28	$312	0.27	339	180

Standard errors in parentheses

Heteroskedastic-Robust Standard Errors

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$, **** $p < 0.001$

Note: This table shows effect sizes among black defendants (Panel A), white defendants (Panel B), defendants under 30 (Panel C), defendants over 30 (Panel D), first or second time arrestees (Panel E) and defendants with two or more prior arrests (Panel F). In all specifications magistrate preferences are allowed to vary across three time periods and according to offense, criminal history and demographics of defendants.

Table 10: Robustness checks

Panel A: Full sample, controlling for magistrate fixed effects (IV)						
	(1) Conv-iction	(2) Guilty plea	(3) Court Fees	(4) Incarc-eration	(5) Max days	(6) Min days
Pretrial detention	0.0371	0.0413	106.0***	0.00242	85.32	160.0**
	(0.0326)	(0.0298)	(37.28)	(0.0283)	(92.73)	(79.78)
Observations	331615	331615	331615	331615	331613	331613
Panel B: Full sample, controlling for attorney type (IV)						
	(1) Conv-iction	(2) Guilty plea	(3) Court Fees	(4) Incarc-eration	(5) Max days	(6) Min days
Pretrial detention	0.0731**	0.0587**	124.3****	0.0258	114.4	134.9**
	(0.0287)	(0.0260)	(33.56)	(0.0247)	(73.05)	(61.70)
Observations	331615	331615	331615	331615	331613	331613

Standard errors in parentheses

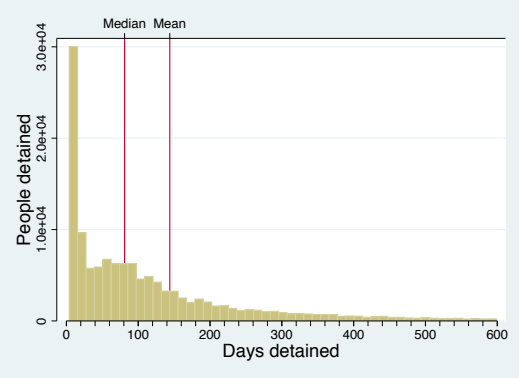
Heteroskedastic-Robust Standard Errors

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$, **** $p < 0.001$

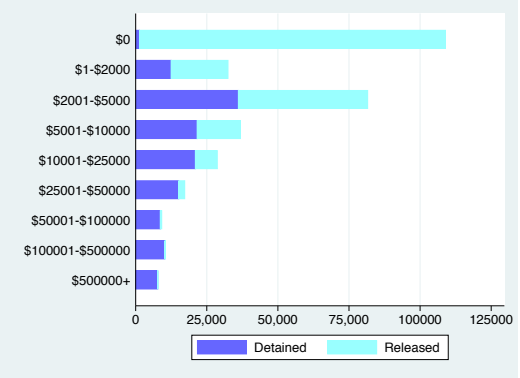
Note: This table presents robustness checks for the main results. Panel A includes magistrate fixed effects as controls; the effects of pretrial detention are thus identified solely off of within-magistrate variation in detention rates. Panel B includes controls for attorney type: public defender, court-appointed attorney, and private. The outcome variables are dummies for being convicted/pleading guilty, total non-bail court fees in dollars, a dummy for whether or not the defendant receives an incarceration sentence, the maximum days of that incarceration sentence and the minimum days the defendant must serve before being eligible for parole. In all specifications magistrate preferences are allowed to vary across three time periods and according to offense, criminal history and demographics of defendants. All regressions include the full set of controls as described in Footnote 21.

Figure 1: Descriptive graphs

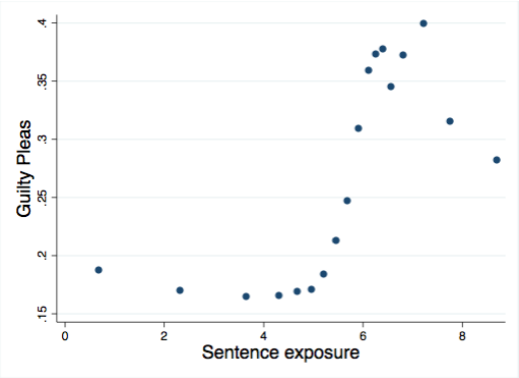
(a) Days detained pretrial, conditional on being detained more than three days



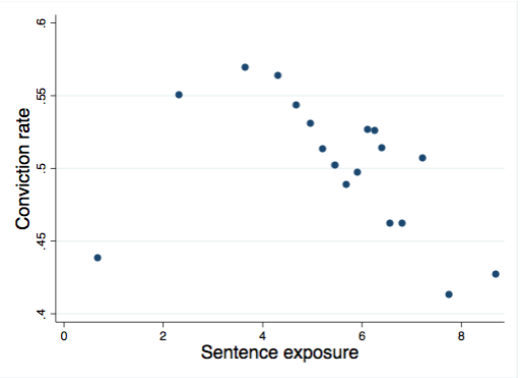
(b) Bail amounts and detention status



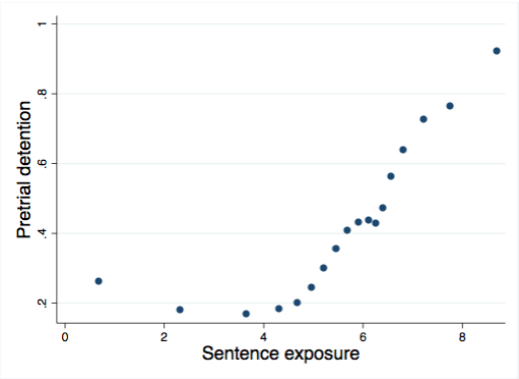
(c) Likelihood of pleading guilty at different levels of sentence exposure



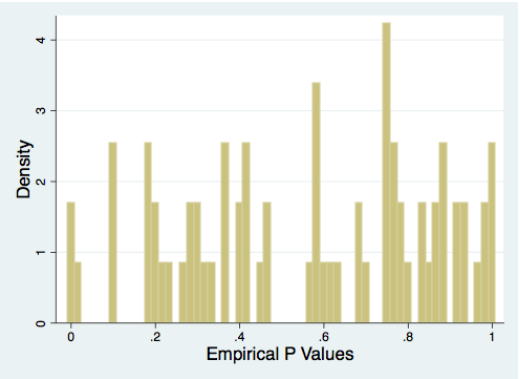
(d) Likelihood of conviction at different levels of sentence exposure



(e) Likelihood of being detained pretrial at different levels of sentence exposure



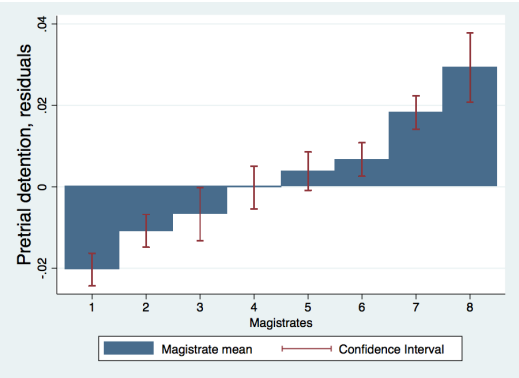
(f) Distribution of 69 'empirical p values' from permutation test



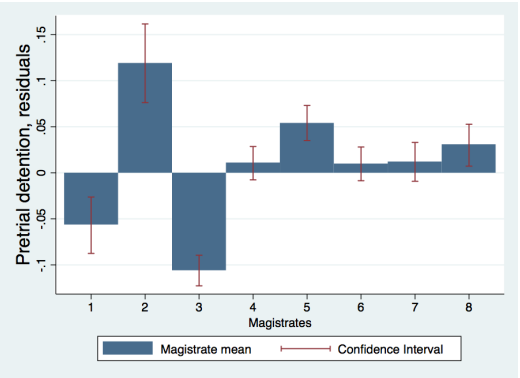
Note: Figure 1a shows the number of people detained/released at various levels of bail. Figure 1b shows the number of days detained pretrial for those who are detained for more than three days. Figures 1c, d and e are a binned scatterplots showing the fraction pleading guilty, convicted, and detained pretrial at various levels of sentence exposure. 'Sentence exposure' is a log transform of the predicted value from a regression of days of the incarceration sentence on offense, criminal history, demographics and time controls, with the sample limited to those who were found guilty at trial. Figure 1f is a histogram of the 'empirical p values' of 69 different permutation tests to evaluate covariate balance across magistrates.

Figure 2: Average detention rates by magistrate for different offense types

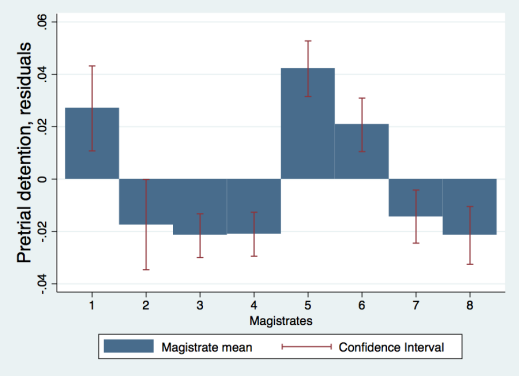
(a) All cases (n=331,615, F=38.56)



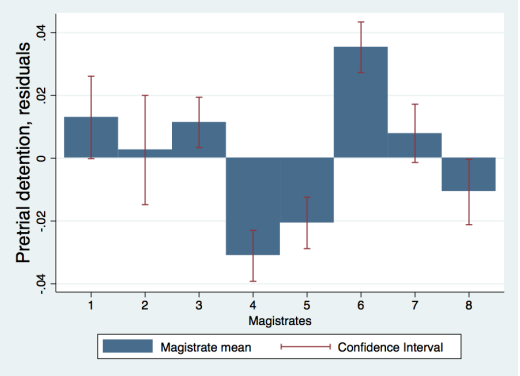
(b) Shoplifting (n=15,775, F=31.82)



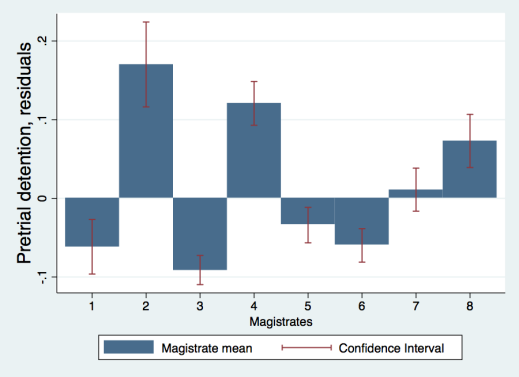
(c) DUI, 1st offense (n=25,850, F=25.88)



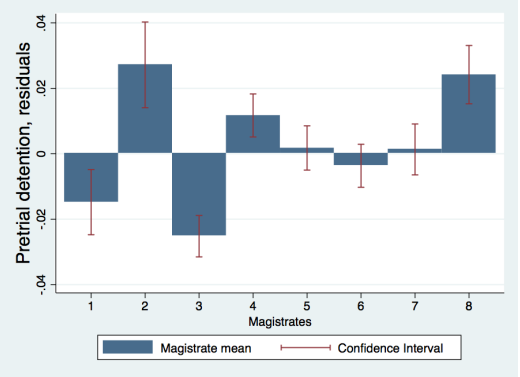
(d) Simple assault (n=85,396, F=24.93)



(e) Prostitution (n=6,529, 42.14)



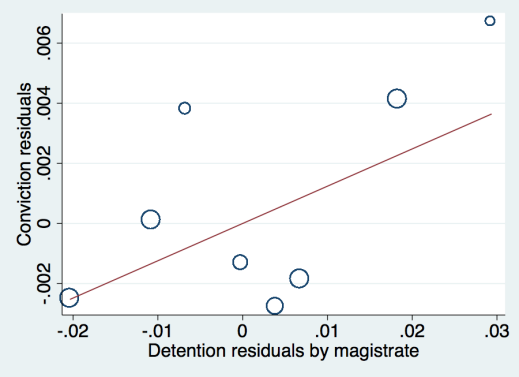
(f) Drug possession (n=109,042, F=18.61)



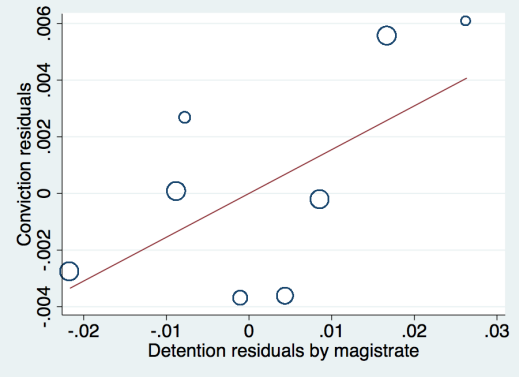
Note: This figure shows pretrial detention rates by magistrate over the whole sample (Figure 2a), and for different offense categories (Figure 2b-f). The numbers 1 through 8 delineate the different magistrates. The y axes show the residuals from a regression of pretrial detention on time controls. The error bars indicate 95% confidence intervals for the mean. n indicates the number of observations per category, and the F statistic refers to a joint F statistic on the eight magistrate dummies when regressing pretrial detention on the magistrate dummies and time controls. The numbering of the magistrates is consistent across all samples.

Figure 3: Visual IV

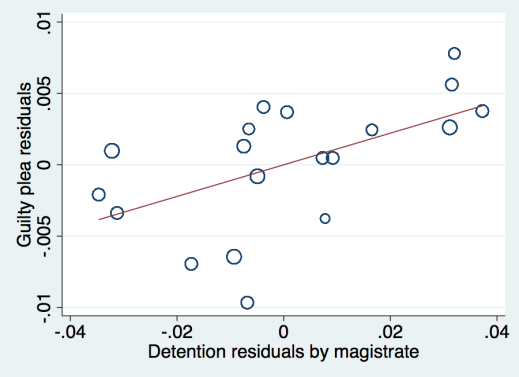
(a) Full sample – conviction rates and pretrial detention are residualized over time controls



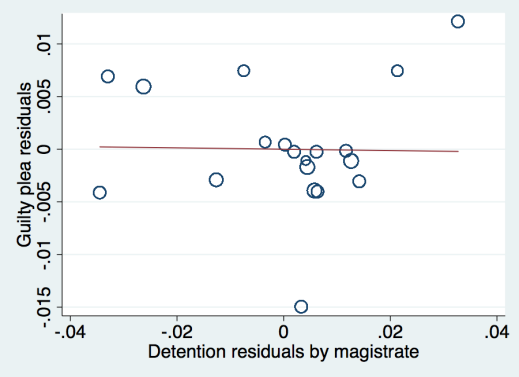
(b) Full sample – conviction rates and pretrial detention are residualized over time controls, offense, criminal history and demographics



(c) Weak-evidence crimes – guilty plea rate and pretrial detention are residualized over time controls, offense, criminal history and demographics

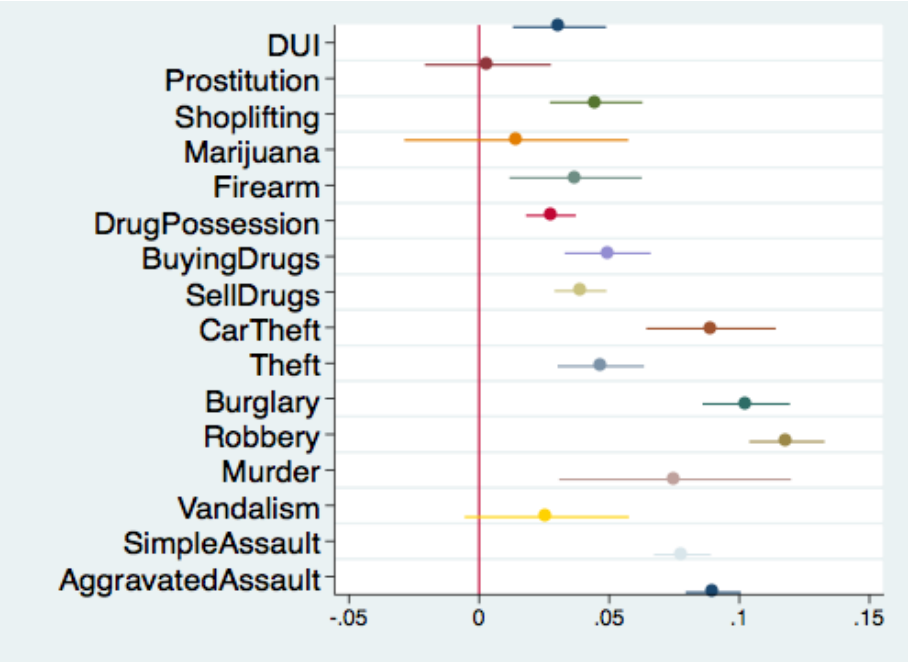


(d) Strong-evidence crimes – guilty plea rate and pretrial detention are residualized over time controls, offense, criminal history and demographics



Note: The y and x axes in Figure 3a show the residuals from a regression of a dummy for conviction and pretrial detention (respectively) on controls for the time and date of the bail hearing. Figure 3b is the same, except conviction and detention have been residualized over offense, criminal history and demographic covariates as well as time controls. The circles in Figures 3a-b show the average detention and conviction residuals for each magistrate; the size of the circle is proportional to the number of cases seen by that magistrate. The y and x axes in Figures 3c-d are residuals from a regression of pleading guilty on offense, criminal history, demographic and time controls. Figure 3c shows the weak-evidence sample and Figure 3d shows the strong-evidence sample. Here the circles represent the average detention and guilty plea residuals per-magistrate-per-time period. There are three time periods as separated by February 23, 2009 and February 23, 2011.

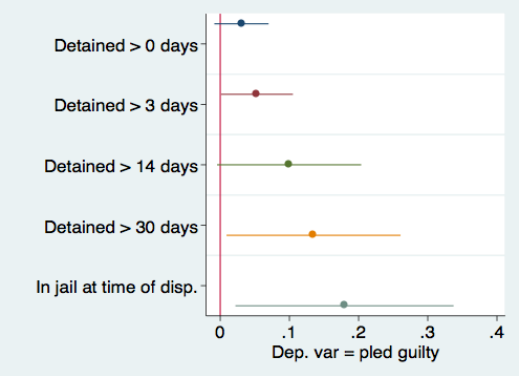
Figure 4: OLS estimates of the impact pretrial detention has on guilty pleas within different offense categories, ordered by strength of evidence



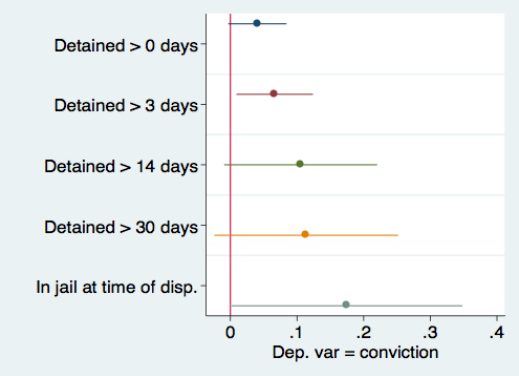
Note: The above coefficient plots show the OLS estimates of the impact pretrial detention has on guilty pleas for different offense, as labeled on the left. The offenses are ordered according to the strength of evidence that tends to be present for different case types; the offenses on the top tend to have the strongest evidence. Each dot represents the estimated coefficient on pretrial detention, the line represents the 95% confidence interval.

Figure 5: Coefficient plots showing the impact of pretrial detention on case outcomes using various definitions of 'pretrial detention'

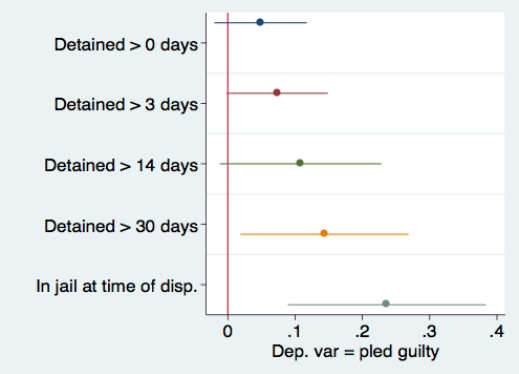
(a) Full sample



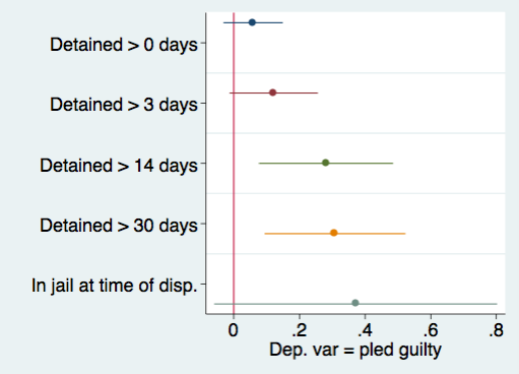
(b) Full sample



(c) Weak-evidence crimes



(d) First or second arrest



Note: The above coefficient plots show jackknife IV regression results where the endogenous independent variable is defined as being detained at least one day, greater than three days, greater than 14 days, greater than 30 days, or until the time of disposition. The top two plots show results from the full sample, the bottom left plot shows results from the 'weak-evidence' sample and the bottom right shows results from the sample for first or second time arrestees. The instruments in all specifications are the magistrate dummies interacted with offense, criminal history, race, gender, and three time periods; the full set of controls are included. The dot shows the magnitude of the coefficient estimate as indicated on the x axis and the line indicates a 95% confidence interval.

Chapter 15

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15.1 General Approach

A. Five Basic Steps

This chapter outlines a five-step approach for analyzing typical "street encounters" with police. It covers situations involving both pedestrians and occupants of vehicles. For a fuller discussion of warrantless searches and seizures, see WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (5th ed. 2012) [hereinafter LAFAVE, SEARCH AND SEIZURE] and ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA (UNC School of Government, 4th ed. 2011) [hereinafter FARB].

Two additional resources on North Carolina law are: Jeff Welty, *Traffic Stops* (UNC School of Government, Mar. 2013) [hereinafter Welty, *Traffic Stops*] (reviewing permissible grounds for and actions during traffic stop), *available at* http://nccriminallaw.sog.unc.edu/wp-content/uploads/2013/03/2013-03-Traffic-Stops.pdf; and Jeffrey Welty, *Motor Vehicle Checkpoints*, ADMINISTRATION OF JUSTICE BULLETIN No. 2010/04 (UNC School of Government, Sept. 2010) [hereinafter Welty, *Motor Vehicle Checkpoints*], *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1004.pdf.

The five steps are:

1. Did the officer seize the defendant?
2. Did the officer have grounds for the seizure?

3. Did the officer act within the scope of the seizure?
4. Did the officer have grounds to arrest or search?
5. Did the officer act within the scope of the arrest or search?

Generally, if an officer lacks authorization at any particular step, evidence uncovered by the officer as a result of the unauthorized action is subject to suppression. A flowchart outlining these steps is attached to this chapter as Appendix 15-1.

B. Authority to Act without Warrant

In many (although not all) of the situations described in this chapter, an officer may act without first obtaining a warrant. The courts have long expressed a preference, however, for the use of both arrest and search warrants—even in situations where a warrant is not required. *See State v. Hardy*, 339 N.C. 207, 226 (1994) ("search and seizure of property unaccompanied by prior judicial approval in the form of a warrant is per se unreasonable unless the search falls within a well-delineated exception to warrant requirement"); *State v. Nixon*, 160 N.C. App. 31, 34–35 (2003), *relying on Aguilar v. Texas*, 378 U.S. 108, 110–11 (1964) ("informed and deliberate determinations of magistrates . . . are to be preferred over the hurried action of officers" (citation omitted)), *abrogated on other grounds by Illinois v. Gates*, 462 U.S. 213 (1983); *see also Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) (court states that "warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement"; court rejects any "homicide crime scene" exception to warrant requirement); *United States v. Ventresca*, 380 U.S. 102, 106 (1965) ("in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall"); *Beck v. Ohio*, 379 U.S. 89, 96 (1964) ("arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause").

C. Effect of Constitutional and State Law Violations

Most of this chapter deals with violations of the U.S. Constitution, for which the remedy is suppression of evidence that is unconstitutionally obtained.

To the extent it provides greater protection, state constitutional law provides a basis for suppression of illegally obtained evidence. In the search and seizure context, the North Carolina courts have found that protections under the North Carolina Constitution differ from federal constitutional protections in limited instances. *See State v. Carter*, 322 N.C. 709 (1988) (rejecting good faith exception to exclusionary rule under state constitution); *see also supra* "Good faith exception for constitutional violations not valid in North Carolina" in § 14.2B, Search Warrants (discussing case law and impact of recent legislation). Several states have recognized additional circumstances in which their state constitutions provide greater protections than under the U.S. Constitution. Examples are cited in this chapter. North Carolina defense counsel should remain alert to opportunities for differentiating the North Carolina Constitution from more limited federal protections.

Substantial statutory violations also may warrant suppression under Section 15A-974 of

the North Carolina General Statutes (hereinafter G.S.). In 2011, the N.C. General Assembly amended G.S. 15A-974, effective for trials and hearings commencing on or after July 1, 2011, to provide a good-faith exception to the exclusionary rule for statutory violations. *See* 2011 N.C. Sess. Laws Ch. 6 (H 3). For a further discussion of statutory violations and the effect of the 2011 legislation, see *supra* "Good faith exception for constitutional violations not valid in North Carolina" in § 14.2B, Search Warrants, and § 14.5, Substantial Violations of Criminal Procedure Act.

Violations of other states' laws, not based on federal constitutional requirements or North Carolina law, generally do not provide a basis for suppression. *See State v. Hernandez*, 208 N.C. App. 591, 604 (2010) (declining to suppress evidence for violation of New Jersey state constitution); *see also Virginia v. Moore*, 553 U.S. 164 (2008) (Virginia law enforcement officers who had probable cause to arrest defendant for a misdemeanor did not violate Fourth Amendment when they arrested him and conducted search incident to arrest although state law did not authorize an arrest); *cf. State v. Stitt*, 201 N.C. App. 233 (2009) (even if State did not fully comply with 18 U.S.C. 2703(d) of the Stored Communications Act in obtaining records pertaining to cell phones possessed by defendant, federal law did not provide for suppression remedy).

15.2 Did the Officer Seize the Defendant?

The Fourth Amendment prohibits an officer from stopping, or "seizing," a person without legally sufficient grounds, and evidence obtained by an officer after seizing a person may not be used to justify the seizure. *See* FARB at 27. It is therefore critical for Fourth Amendment purposes to determine exactly when a seizure occurs.

A. Consensual Encounters

"Free to leave" test. As a general rule, a person is seized when, in view of all of the circumstances, a reasonable person would have believed that he or she was not "free to leave." *See United States v. Mendenhall*, 446 U.S. 544 (1980); *Florida v. Royer*, 460 U.S. 491 (1983); *see also Florida v. Bostick*, 501 U.S. 429 (1991) (when a person's freedom of movement is restricted for reasons independent of police conduct, such as when a person is a passenger on a bus, the test is whether a reasonable person would have felt free to decline the officer's requests or terminate the encounter).

The "free to leave" test used to determine whether a person has been seized requires a lesser degree of restraint than the test for "custody" used to determine whether a person is entitled to *Miranda* warnings. *See State v. Buchanan*, 353 N.C. 332 (2001) (test for custody is whether there was formal arrest or restraint on freedom of movement of degree associated with formal arrest); *see also infra* § 15.4G, Does *Miranda* Apply? (discussing circumstances in which *Miranda* warnings may be required following a seizure).

A seizure clearly occurs if an officer takes a person into custody, physically restrains the person, or otherwise requires the person to submit to the officer's authority. An encounter

may be considered "consensual" and not a seizure, however, if a person willingly engages in conversation with an officer.

Factors. Factors to consider in determining whether an encounter is consensual or a seizure include:

- number of officers present,
- display of weapon by officer,
- physical touching of defendant,
- use of language or tone of voice indicating that compliance is required,
- holding a person's identification papers or property,
- blocking the person's path, and
- activation or shining of lights.

See State v. Farmer, 333 N.C. 172 (1993) (discussing factors); *see also* Jeff Welty, *Is the Use of a Blue Light a Show of Authority?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 7, 2010) (suggesting that use of blue light is "conclusive" as to existence of seizure), http://nccriminallaw.sog.unc.edu/?p=1804.

Cases finding a seizure include: *State v. Icard*, 363 N.C. 303 (2009) (defendant was seized where officer initiated encounter, telling occupants of vehicle that the area was known for drug crimes and prostitution; was armed and in uniform; called for backup assistance; illuminated vehicle in which defendant was sitting with blue lights; knocked twice on defendant's window; and when defendant did not respond opened car door and asked defendant to exit, produce identification, and bring purse; backup officer also illuminated defendant's side of vehicle with take-down lights); *State v. Harwood*, ___ N.C. App. ___, 727 S.E.2d 891 (2012) (defendant was seized when officers parked directly behind his stopped vehicle, drew their firearms, ordered the defendant and his passenger to exit the vehicle, and placed defendant on the ground and handcuffed him); *State v. Haislip*, 186 N.C. App. 275 (2007) (defendant was seized where officer fell in behind defendant, activated blue lights, and after defendant parked car, got out, and began walking away, approached her and got her attention), *vacated and remanded on other grounds*, 362 N.C. 499 (2008) (remanded to trial court for written findings of fact and conclusions of law).

Cases not finding a seizure include: *State v. Campbell*, 359 N.C. 644 (2005) (defendant was not seized when officer parked her car in lot without turning on blue light or siren, approached defendant as defendant was walking from car to store, and asked defendant if she could speak with him; after talking with defendant, officer asked defendant to "hold up" while officer transmitted defendant's name to dispatcher; assuming that this statement constituted seizure, officer had developed reasonable suspicion by then to detain defendant); *State v. Williams*, 201 N.C. App. 566, 571 (2009) (officer parked his patrol car on the opposite side of the street from the driveway in which defendant was parked, did not activate the siren or blue lights on his patrol car, did not remove his gun from its holster, or use any language or display a demeanor suggesting that defendant was not free to leave); *State v. Johnston*, 115 N.C. App. 711 (1994) (defendant was not seized

where trooper drove over to where defendant's car was already parked, defendant voluntarily stepped out of car before trooper arrived, and trooper then exited his car and walked over to defendant).

B. Chases

Even if a reasonable person would not have felt "free to leave," the U.S. Supreme Court has held that a seizure does not occur until there is a physical application of force or submission to a show of authority. *See California v. Hodari D.*, 499 U.S. 621 (1991) (when police are chasing person who is running away, person is not "seized" until person is caught or gives up chase); *State v. Eaton*, 210 N.C. App. 142 (2011) (defendant was not seized before he discarded plastic baggie containing pills); *State v. Leach*, 166 N.C. App. 711 (2004) (following *Hodari D.* and holding that officers had not seized defendant until they detained him after high speed chase); *State v. West*, 119 N.C. App. 562 (1995) (following *Hodari D.*).

For example, under *Hodari D.*, if an officer directs a car to pull over, a seizure occurs when the driver stops, thus submitting to the officer's authority. A seizure also could occur when a person tries to get away from the police in an effort to terminate a consensual encounter. *See United States v. Wilson*, 953 F.2d 116 (4th Cir. 1991) (defendant initially agreed to speak with officer and produced identification at officer's request, but then declined request for consent to search and tried to leave; officer effectively seized defendant by following defendant and repeatedly asking for consent to search); *see also infra* § 15.3D, Flight (flight from consensual or illegal encounter does not provide grounds to stop person for resisting, delaying, or obstructing officer).

Generally, evidence observed or obtained before a seizure is not subject to suppression under the Fourth Amendment. *See State v. Eaton*, 210 N.C. App. 142 (2011) (defendant was not seized before he discarded plastic baggie containing pills; because defendant abandoned baggie in public place and seizure had not yet occurred, officer's recovery of baggie did not violate Fourth Amendment). If a defendant discards property as a result of illegal police action, however, he or she may move to suppress the evidence as the fruit of illegal action. *See State v. Joe*, ___ N.C. App. ___, 730 S.E.2d 779 (2012) (officers did not have grounds to arrest defendant for resisting an officer for ignoring their command to stop; bag of cocaine cannot be held to have been voluntarily abandoned by defendant when abandonment was product of unlawful arrest; suppression motion granted), *review granted*, ___ N.C. ___ , 736 S.E.2d 187 (2013).

C. Race-Based "Consensual" Encounters

If officers select a defendant for a "consensual" encounter because of the defendant's race, evidence obtained during the encounter potentially could be suppressed on equal protection and due process grounds. *See Whren v. United States*, 517 U.S. 806 (1996) (Equal Protection prohibits selective enforcement of law based on considerations such as race); *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997); *United States v. Taylor*, 956 F.2d 572 (6th Cir. 1992); *see also United States v. Washington*, 490 F.3d 765 (9th Cir.

2007) (in totality of circumstances, encounter between two white police officers and African-American defendant was not consensual, as a reasonable person in defendant's circumstances would not have felt free to leave; court relied on, among other things, strained relations between police and African-American community and reputation of police among African-Americans).

If an officer's actions amount to a stop, racial motivation also may undermine the credibility of non-racial reasons asserted by the officer as the basis for the stop. *See infra* § 15.3M, Race-Based Stops.

In recognition of the potential for racial profiling, North Carolina law requires the Division of Criminal Information of the N.C. Department of Justice to collect statistics on traffic stops by state troopers and other state law enforcement officers. *See* G.S. 114-10.01. This statute also requires the Division to collect statistics on many local law enforcement agencies. Unless a specific statutory exception exists, records maintained by state and local government agencies are public records. *See generally News and Observer Publishing Co. v. Poole*, 330 N.C. 465 (1992).

D. Selected Actions before Seizure Occurs

Running tags. *See State v. Chambers*, 203 N.C. App. 373, at *2 (2010) (unpublished) ("Defendant's license tag was displayed, as required by North Carolina law, on the back of his vehicle for all of society to view. Therefore, defendant did not have a subjective or objective reasonable expectation of privacy in his license tag. As such, the officer's actions did not constitute a search under the Fourth Amendment.").

Installation of GPS tracking device. *See United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945 (2012) (Government's attachment of GPS device to vehicle to track vehicle's movements was search under the Fourth Amendment); *see also* Jeff Welty, *Advice to Officers after Jones*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 30, 2012) (observing that *Jones* requires that officers ordinarily obtain prior judicial authorization to attach GPS device to vehicle), http://nccriminallaw.sog.unc.edu/?p=3250.

15.3 Did the Officer Have Grounds for the Seizure?

A. Reasonable Suspicion

Officers may make a brief investigative stop of a person—that is, they may seize a person—if they have reasonable suspicion of criminal activity by the person. *See Terry v. Ohio*, 392 U.S. 1 (1968); *see also State v. Styles*, 362 N.C. 412 (2008) (holding that U.S. Constitution allows traffic stop based on reasonable suspicion); *State v. Duncan*, 43 P.3d 513 (Wash. 2002) (holding that although *Terry* authorizes stop based on reasonable suspicion of criminal offense and possibility of noncriminal traffic violation, it does not authorize stop based on reasonable suspicion of other noncriminal infractions). For a further discussion of the standard for traffic stops, see *infra* § 15.3E, Traffic Stops.

Factors to consider in determining reasonable suspicion include:

- the officer's personal observations,
- information the officer receives from others,
- time of day or night,
- the suspect's proximity to where a crime was recently committed,
- the suspect's reaction to the officer's presence, including flight, and
- the officer's knowledge of the suspect's prior criminal record

See also United States v. Foster, 634 F.3d 243, 248 (4th Cir. 2011) (in holding that stop was not supported by reasonable suspicion, court stated, "[w]e also note our concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity" and "we are deeply troubled by the way in which the Government attempts to spin these largely mundane acts into a web of deception").

B. High Crime or Drug Areas

Presence in a high crime or drug area, standing alone, does not constitute reasonable suspicion. Other factors providing reasonable suspicion must be present. *See Brown v. Texas*, 443 U.S. 47 (1979) (defendant's presence with others on a corner known for drug-related activity did not justify investigatory stop); *State v. Fleming*, 106 N.C. App. 165 (1992) (following *Brown*); *see also United States v. Massenburg*, 654 F.3d 480, 488 (4th Cir. 2011) (disallowing stop and frisk of person based on generic anonymous tip; court states that allowing officer's actions "would be tantamount to permitting a regime of general searches of virtually any individual residing in or found in high-crime neighborhoods").

Although not extensively discussed in the North Carolina cases, some courts have questioned the characterization of a neighborhood as a high crime area and have required the State to make an appropriate factual showing. For example, the First Circuit Court of Appeals has held that, when considering an officer's testimony that a stop occurred in a "high crime area," the court must identify the relationship between the charged offense and the type of crime the area is known for, the geographic boundaries of the allegedly "high crime area," and the temporal proximity between the evidence of criminal activity and the observations allegedly giving rise to reasonable suspicion. *United States v. Wright*, 485 F.3d 45 (1st Cir. 2007), *cited with approval in United States v. Swain*, 324 F. App'x. 219, at *222 (4th Cir. 2009) (unpublished) ("Reasonable suspicion is a context-driven inquiry and the high-crime-area factor, like most others, can be implicated to varying degrees. For example, an open-air drug market location presents a different situation than a parking lot where an occasional drug deal might occur."); *see also United States v. Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. 2000) ("[t]he citing of an area as 'high-crime' requires careful examination by the court, because such a description, unless properly limited and factually based, can easily serve as a proxy for race or ethnicity").

Cases finding a stop in a "high-crime" area not to be based on reasonable suspicion include:

State v. White, ___ N.C. App. ___, 712 S.E.2d 921, 928 (2011) (reasonable suspicion did not exist where officers responded to a complaint of loud music in a location they regarded as a high crime area but officers did not see the defendant engaged in any suspicious activity and did not see any device capable of producing loud music; that the defendant was running in the neighborhood did not establish reasonable suspicion; "[t]o conclude the officers were justified in effectuating an investigatory stop, on these facts, would render any person who is unfortunate enough to live in a high-crime area subject to an investigatory stop merely for the act of running")

State v. Hayes, 188 N.C. App. 313 (2008) (reasonable suspicion did not exist where defendant and another man were in area where drug-related arrests had been made in past, they were walking back and forth on a sidewalk in a residential neighborhood on a Sunday afternoon, the officer did not believe they lived in the neighborhood, and the officer observed in the car they had exited a gun under the seat of the defendant's companion but not of the defendant)

Cases finding a stop in a "high-crime" area to be justified by additional factors showing reasonable suspicion include:

State v. Butler, 331 N.C. 227 (1992) (presence of an individual on a corner specifically known for drug activity and the scene of multiple recent arrests for drugs, coupled with evasive actions by defendant, were sufficient to form reasonable suspicion to stop)

State v. Mello, 200 N.C. App. 437 (2009) (holding that the defendant's presence in a high-drug area, coupled with evasive action on the part of individuals seen interacting with defendant, provided reasonable suspicion to support a stop), *aff'd per curiam*, 364 N.C. 421 (2010)

In re I.R.T., 184 N.C. App. 579 (2007) (discussing factors relevant to whether an officer had reasonable suspicion)

C. Proximity to Crime Scenes or Crime Suspects

A factor similar to presence in a high-crime area, discussed in subsection B., above, is proximity to a crime scene. Without more, this factor does not establish reasonable suspicion. *See State v. Brown*, ___ N.C. App. ___, 720 S.E.2d 446 (2011) (proximity to area in which robbery occurred four hours earlier insufficient to justify stop); *State v. Chlopek*, 209 N.C. App. 358 (2011) (no reasonable suspicion to stop truck that drove into subdivision under construction and drove out thirty minutes later at a time of night when copper thefts had been reported in other parts of the county); *State v. Murray*, 192 N.C. App. 684 (2008) (officer did not have reasonable suspicion to stop vehicle when officer was on patrol at 4:00 a.m. in area where there had been recent break-ins; vehicle was not breaking any traffic laws, officer did not see any indication of any damage or break-in

that night, vehicle was on public street and was not leaving parking lot of any business, and officer found no irregularities on check of vehicle's license plate); *State v. Cooper*, 186 N.C. App. 100 (2007) (no reasonable suspicion where defendant, a black male, was in vicinity of crime scene and suspect was described as a black male); *compare State v. Campbell*, 188 N.C. App. 701 (2008) (court states that proximity to crime scene, time of day, and absence of other suspects in vicinity do not, by themselves, establish reasonable suspicion; however, noting other factors, court finds that reasonable suspicion existed in all the circumstances of the case).

Likewise, proximity to a person suspected of a crime or wanted for arrest, without more, does not establish reasonable suspicion. *See State v. Washington*, 193 N.C. App. 670 (2008) (defendant drove to and entered home of person who was wanted for several felonies; defendant and person came out of house a few minutes later and drove to nearby gas station, parked in lot, and got out of car, where officers arrested other person and ordered defendant to stop; trial court's finding that officer had right to make investigative stop of defendant because he transported wanted person was erroneous as matter of law).

D. Flight

Generally. In *Illinois v. Wardlow*, 528 U.S. 119 (2000), the U.S. Supreme Court held that the defendant's headlong flight on seeing the officers, along with his presence in an area of heavy narcotics trafficking, constituted reasonable suspicion to stop. The Court reaffirmed that mere presence in a high drug area does not constitute reasonable suspicion and cautioned that reasonable suspicion is based on the totality of the circumstances, not any single factor. *See also In re J.L.B.M.*, 176 N.C. App. 613 (2006) (officer did not have reasonable suspicion to stop in following circumstances: officer received police dispatch of suspicious person, described as Hispanic male, at gas station; when officer drove up, he saw a Hispanic male in baggy clothes, who spoke to someone in another car and then walked away from location of officer's patrol car).

Flight from consensual or illegal encounter not RDO. If an officer has grounds to seize a person, the person's flight may constitute resisting, delaying, or obstructing an officer in the lawful performance of his or her duties (RDO). *See, e.g., State v. Lynch*, 94 N.C. App. 330 (1989). If the initial encounter between an officer and defendant is consensual and not a seizure, however, a defendant's attempt to leave would not constitute RDO. *See, e.g.*, *State v. Joe*, ___ N.C. App. ___, 730 S.E.2d 779 (2012), *review granted*, ___ N.C. ___, 736 S.E.2d 187 (2013); *State v. White*, __ N.C. App. __, 712 S.E.2d 921, 927–28 (2011) (so holding); *In re A.J. M.-B.*, 212 N.C. App. 586 (2011) (same); *State v. Sinclair*, 191 N.C. App. 485, 490–91 (2008) ("Although Defendant's subsequent flight may have contributed to a reasonable suspicion that criminal activity was afoot thereby justifying an investigatory stop, Defendant's flight from a consensual encounter cannot be used as evidence that Defendant was resisting, delaying, or obstructing [the officer] in the performance of his duties."); *compare State v. Washington*, 193 N.C. App. 670 (2008) (officer had reasonable suspicion to stop defendant, so defendant's flight constituted RDO). For a discussion of the difference between consensual encounters and seizures, see *supra* § 15.2A, Consensual Encounters.

Likewise, if an officer illegally stops a person, the person's attempt to leave thereafter ordinarily would not give the officer grounds to stop the person and charge him or her with RDO. *See, e.g.*, *White*¸ ___ N.C. App. ___, 712 S.E.2d 921 (if officer is attempting to effect unlawful stop, defendant's flight is not RDO because officer is not discharging a lawful duty); *Sinclair*, 191 N.C. App. 485 (same); *State v. Swift*, 105 N.C. App. 550 (1992) (recognizing that person may flee illegal stop or arrest); JOHN RUBIN, THE LAW OF SELF-DEFENSE IN NORTH CAROLINA 137–38 (UNC Institute of Government, 1996) (person has limited right to resist illegal stop). *But cf. State v. Branch*, 194 N.C. App. 173 (2008) (officer had reasonable suspicion to stop defendant but did not have grounds to continue detention after completing purpose of stop; defendant had right to resist continued detention but used more force than reasonably necessary by driving away while officer was reaching into vehicle; officer therefore had probable cause to arrest defendant for assault); *In re J.L.B.M.*, 176 N.C. App. 613 (2006) (juvenile could be adjudicated delinquent of obstructing officer for giving false name to officer during illegal stop).

E. Traffic Stops

Standard for making stop. An officer may not randomly stop motorists to check their driver's license or vehicle registration; an officer must have at least reasonable suspicion of criminal activity. *See Delaware v. Prouse*, 440 U.S. 648 (1979). Police may establish systematic checkpoints, without individualized suspicion, under certain conditions. *See infra* § 15.3J, Motor Vehicle Checkpoints.

The N.C. Court of Appeals previously held in several opinions that when an officer makes a traffic stop based on a readily observed traffic violation, such as speeding or running a red light, the stop had to be supported by probable cause. In contrast, according to these decisions, reasonable suspicion was sufficient if the suspected violation was one that could be verified only by stopping the vehicle, such as impaired driving or driving with a revoked license. *See State v. Baublitz*, 172 N.C. App. 801 (2005) and cases cited therein; *see also State v. Ivey*, 360 N.C. 562 (2006) (suggesting under U.S. and N.C. constitutions that probable cause may be required to stop for any traffic violation). The N.C. Supreme Court has since held that reasonable suspicion, not probable cause, is sufficient for a traffic stop, regardless of whether the traffic violation is readily observed or merely suspected. *See State v. Styles*, 362 N.C. 412 (2008). *But cf.* G.S. 15A-1113(b) (an officer who has probable cause of a noncriminal infraction may detain the person to issue and serve a citation); *State v. Day*, 168 P.3d 1265 (Wash. 2007) (officer may not make investigatory stop for parking violation); *State v. Holmes*, 569 N.W.2d 181 (Minn. 1997) (to same effect).

Standing of passenger to challenge stop. In *Brendlin v. California*, 551 U.S. 249 (2007), the U.S. Supreme Court held that a passenger in a car is seized under the Fourth Amendment when the police make a traffic stop, and the passenger may challenge the stop's constitutionality. *Accord State v. Canty*, ___ N.C. App. ___, 736 S.E.2d 532 (2012). Consequently, when evidence incriminating a passenger is obtained following an illegal stop, the passenger has standing to move to suppress the evidence. This ruling

overrules any contrary authority in North Carolina. *See State v. Smith*, 117 N.C. App. 671 (1995) (suggesting that a passenger did not have standing to move to suppress). The North Carolina Court of Appeals has recognized under *Brendlin* that a passenger also has standing to challenge the duration of a stop. *See State v. Jackson*, 199 N.C. App. 236 (2009).

If a stop is valid, a passenger's standing to challenge actions taken during the stop (such as frisks or searches) will depend on whether the officer's actions infringe on the passenger's rights. *See State v. Franklin*, ___ N.C. App. ___, 736 S.E.2d 218 (2012) (although a passenger who has no possessory interest in a vehicle has standing to challenge a stop of the vehicle, that passenger does not have standing to challenge a search of the vehicle).

F. Selected Reasons for Traffic Stops

Delay at light. *Compare, e.g., State v. Barnard*, 362 N.C. 244 (2008) (driver's unexplained thirty-second delay before proceeding through green traffic light gave rise to reasonable suspicion of impaired driving in all the circumstances), *with State v. Roberson*, 163 N.C. App. 129 (2004) (defendant's eight to ten second delay after light turned green did not give officer reasonable suspicion to stop for impaired driving).

Failure to use turn signal. *Compare, e.g., State v. Ivey*, 360 N.C. 562 (2006) (failure to use turn signal when making turn did not give officer grounds to stop; failure to signal did not affect operation of any other vehicle or any pedestrian), *and State v. Watkins*, ___ N.C. App. ___, 725 S.E.2d 400 (2012) (suggesting that unsignaled lane change was insufficient to justify stop), *with State v. Styles*, 362 N.C. 412 (2008) (failure to use turn signal gave officer grounds to stop because failure could affect operation of another vehicle, in this case vehicle driven by officer, which was directly behind defendant), *and State v. McRae*, 203 N.C. App. 319 (2010) (similar).

Speeding or slowing. *See, e.g., State v. Canty*, ___ N.C. App. ___, 736 S.E.2d 532 (2012) (no reasonable suspicion; car touched fog line and slowed to 59 m.p.h. in 65 m.p.h. when officers passed car, and driver and passengers appeared nervous and failed to make eye contact with passing officer); *State v. Royster*, ___ N.C. App. ___, 737 S.E.2d 400 (2012) (officer had sufficient time to form opinion that defendant was speeding); *State v. Barnhill*, 166 N.C. App. 228 (2004) (officer's estimate that defendant was going 40 m.p.h. in 25 m.p.h. zone justified stop); *State v. Aubin*, 100 N.C. App. 628 (1990) (driving excessively slowly and weaving in own lane justified stop); *see also* Welty, *Traffic Stops*, at 3 (noting that "if a vehicle is speeding only slightly, an officer's visual estimate of speed may be insufficiently reliable and accurate to support a traffic stop"; citing cases), *available at* http://nccriminallaw.sog.unc.edu/wp-content/uploads/2013/03/2013-03-Traffic-Stops.pdf.

Weaving. Numerous cases address "weaving" in one's own lane. While weaving is not a traffic violation and alone may not provide reasonable suspicion, it may provide reasonable suspicion to stop when combined with other factors or when severe. *See also* Jeff Welty, *Weaving and Reasonable Suspicion*, N.C. CRIM. L., UNC SCH. OF GOV'T

BLOG (June 19, 2012), http://nccriminallaw.sog.unc.edu/?p=3677.

Cases not finding grounds for a stop include: *State v. Canty*, ___ N.C. App. ___, 736 S.E.2d 532 (2012) (no reasonable suspicion; car touched fog line and slowed to 59 m.p.h. in 65 m.p.h. when officers passed car and driver and passengers appeared nervous and failed to make eye contact with passing officer); *State v. Peele*, 196 N.C. App. 668 (2009) (single instance of weaving in own lane, without more, did not constitute reasonable suspicion to stop; officer's reliance on dispatcher's report of impaired driving in the area, in addition to officer's observation of weaving, did not provide reasonable suspicion; dispatcher's report was treated as based on anonymous tip, as State provided no evidence that report of bad driving came from identified caller); *State v. Fields*, 195 N.C. App. 740 (2009) (weaving in own lane three times, without more, did not establish reasonable suspicion to stop for impaired driving; defendant violated no other traffic laws, was driving at 4:00 p.m. in afternoon, which was not unusual hour, and was not near places that furnished alcohol); *see also State v. Tarvin*, 972 S.W.2d 910 (Tex. App. 1998) (trial court granted motion to suppress, observing that driving a car, in and of itself, is "controlled weaving"; appellate court upholds suppression of stop).

Cases finding grounds for a stop include: *State v. Kochuk*, ___ N.C. ___, 742 S.E.2d 801 (2013), *rev'g per curiam for reasons stated in dissenting opinion*, ___ N.C. App. ___, 741 S.E.2d 327 (2012); *State v. Otto*, 366 N.C. 134 (2012) (traffic stop justified by the defendant's "constant and continual" weaving for three quarters of a mile at 11:00 p.m. on Friday night); *State v. Fields*, ___ N.C. App. ___, ___, 723 S.E.2d 777, 778 (2012) (officer followed defendant for three quarters of a mile and saw him "weaving in his own lane . . . sufficiently frequent[ly] and erratic[ally] to prompt evasive maneuvers from other drivers"); *State v. Simmons*, 205 N.C. App. 509, 525 (2010) (stop was supported by reasonable suspicion where the defendant "was not only weaving within his lane, but was also weaving across and outside the lanes of travel, and at one point actually ran off the road"); *State v. Jacobs*, 162 N.C. App. 251, 255 (2004) (court recognizes that "defendant's weaving within his lane was not a crime," but finds that all of the facts—slowly weaving within own lane for three-quarters of a mile, late at night, in area near bars—justified stop); *State v. Thompson*, 154 N.C. App. 194 (2002) (weaving within the lane and touching the centerline with both left tires, combined with speeding and other factors, justified stop); *State v. Watson*, 122 N.C. App. 596 (1996) (driving on center line and weaving in own lane at 2:30 a.m. near nightclub justified stop); *State v. Aubin*, 100 N.C. App. 628 (1990) (driving excessively slowly and weaving in own lane justified stop); *see also State v. Hudson*, 206 N.C. App. 482 (2010) (crossing center line and fog line twice provided probable cause for stop for violation of G.S. 20-146(a), which requires driving on right side of highway).

Proximity to bars. *See, e.g.*, *State v. Roberson*, 163 N.C. App. 129 (2004) (driving at 4:30 a.m. in area with several bars and restaurants did not increase level of suspicion and justify stop; by law, those establishments must stop serving alcohol at 2:00 a.m.); *State v. Watson*, 122 N.C. App. 596 (1996) (proximity to nightclub at 2:30 a.m., combined with driving on center line and weaving in own lane, justified stop).

Anonymous tip of impaired driving. *See infra* § 15.3G, Anonymous Tips.

Ownership and registration. *See, e.g., State v. Burke*, 212 N.C. App. 654 (2011) (stop based merely on low number of temporary tag not supported by reasonable suspicion), *aff'd per curiam*, 365 N.C. 415 (2012); *State v. Hess*, 185 N.C. App. 530 (2007) (owner of car had suspended license; absent evidence that owner was not driving car, officer had reasonable suspicion to stop car to determine whether owner was driving); *State v. Hudson*, 103 N.C. App. 708 (1991) (officer had reasonable suspicion that faded, temporary registration had expired and that vehicle was improperly registered); *see also United States v. Wilson*, 205 F.3d 720 (4th Cir. 2000) (Fourth Amendment does not allow traffic stop simply because vehicle had temporary tags and officer could not read expiration date while driving behind defendant at night).

For a discussion of limitations on an officer's actions after discovering that a car was not improperly registered, *see infra* § 15.3L, Mistaken Belief by Officer.

Seatbelt violations. *See, e.g., State v. Villeda*, 165 N.C. App. 431 (2004) (trooper did not have grounds to stop defendant for seat belt violation; evidence indicated that trooper could not see inside vehicles driving in front of him at night on stretch of road on which defendant was stopped).

G. Anonymous Tips

General test. Information from informants is evaluated under the "totality of the circumstances," but the most critical factors are the reliability of the informant and the basis of the informant's knowledge. *See Alabama v. White*, 496 U.S. 325 (1990).

When a tip is anonymous, the reliability of the informant is difficult to assess, and the tip is insufficient to justify a stop unless the tip itself contains strong indicia of reliability or independent police work corroborates significant details of the tip. *See State v. Johnson*, 204 N.C. App. 259, 260–61 (2010) (finding tip insufficient under these principles; anonymous caller merely alleged that black male wearing a white shirt in a blue Mitsubishi with a certain license plate number was selling guns and drugs at certain street corner); *see also State v. Watkins*, 337 N.C. 437 (1994) (upholding stop based on corroboration), *rev'g* 111 N.C. App. 766 (1993); *State v. Harwood*, ___ N.C. App. ___, ___, 727 S.E.2d 891, 899 (2012) (uncorroborated, anonymous tip did not provide basis for stop; "tip in question simply provided that Defendant would be selling marijuana at a certain location on a certain day and would be driving a white vehicle"); *State v. Peele*, 196 N.C. App. 668 (2009) (officer's reliance on dispatcher's report of impaired driving in the area along with observation of single instance of weaving did not provide reasonable suspicion; dispatcher's report was treated as based on anonymous tip, as State provided no evidence that report of bad driving came from identified caller); *see also State v. Coleman*, ___ N.C. App. ___, 743 S.E.2d 62 (2013) (even though caller gave her name, court concluded that information that defendant had open container of alcohol was no more reliable than information provided by anonymous tipster; caller did not identify or describe the defendant, did not provide any way for the officer to assess her credibility,

failed to explain the basis of her knowledge, and did not include any information concerning defendant's future actions).

A tip from a person whom the police fail to identify might not be considered anonymous, or at least not completely anonymous, if the tipster has put his or her anonymity sufficiently at risk. *See State v. Maready*, 362 N.C. 614 (2008) (driver who approached officers in person to report erratic driving was not completely anonymous informant even though officers did not take the time to get her name; also, informant had little time to fabricate allegations); *State v. Allen*, 197 N.C. App. 208 (2009) (tip was not anonymous; victim had face-to-face encounter with police when reporting alleged assault); *State v. Hudgins*, 195 N.C. App. 430 (2009) (caller, although not identified, placed his anonymity at risk; he remained on his cell phone with the dispatcher for eight minutes, gave detailed information about the person who was following him, followed the dispatcher's instructions, which allowed an officer to intercept the person who was following the caller, and remained at scene long enough to identify person stopped by the officer).

Weapons offenses. In *Florida v. J.L.*, 529 U.S. 266 (2000), the Court found that an anonymous tip—stating that a young black male was at a particular bus stop wearing a plaid shirt and carrying a gun—did not give officers reasonable suspicion to stop. The tip lacked sufficient indicia of reliability and provided no predictive information about the person's conduct. The Court refused to adopt a "firearm exception," under which a tip alleging possession of an illegal firearm would justify a stop and frisk even if the tip fails the standard test for reasonable suspicion. *See also State v. Hughes*, 353 N.C. 200 (2000) (following *Florida v. J.L.*, court finds anonymous tip insufficient to support stop); *State v. Brown*, 142 N.C. App. 332 (2001) (to same effect).

Impaired driving cases. *Florida v. J.L.* indicates that the standard for evaluating anonymous tips should be the same regardless of the type of offense involved, with possible exceptions for certain offenses (such as offenses involving explosives).

In cases in North Carolina in which the police have received a tip about impaired or erratic driving, the courts have applied the same standard for assessing reasonable suspicion as in cases involving other offenses. They have not recognized an exception for impaired driving. *See State v. Maready*, 362 N.C. 614 (2008) (finding in totality of circumstances that tip about erratic driving and other information gave officers reasonable suspicion to stop); *State v. Peele*, 196 N.C. App. 668 (2009) (following *Maready*, court finds that tip about erratic driving and other information did not give officers reasonable suspicion to stop). However, a tip might not be treated as completely anonymous if the tipster placed his or her anonymity sufficiently at risk. *See supra* "General test" in this subsection G.

Drug cases. An anonymous tip to police that a person is involved in illegal drug sales is not sufficient, without more, to justify an investigatory stop. *See State v. McArn*, 159 N.C. App. 209 (2003) (anonymous tip that drugs were being sold from particular vehicle was not sufficient to justify stop of vehicle); *compare State v. Sutton*, 167 N.C. App. 242 (2004) (tip from pharmacist with whom officer had been working on ongoing basis to

uncover illegal activity involving prescriptions, combined with officer's own observations, provided reasonable suspicion to stop defendant after defendant left pharmacy).

H. Information from Other Officers

Generally. An officer may stop a person based on the request of another officer if:

- the officer making the stop has reasonable suspicion for the stop based on his or her personal observations;
- the officer making the stop received a request to stop the defendant from another officer who, before making the request, had reasonable suspicion for the stop; or
- the officer making the stop received information from another officer before the stop, which when combined with the stopping officer's observations constituted reasonable suspicion.

See State v. Battle, 109 N.C. App. 367, 371 (1993) (discussing general standard for stops based on collective knowledge); *State v. Bowman*, 193 N.C. App. 104 (2008) (collective knowledge of team of officers investigating defendant imputed to officer who conducted search of vehicle); *State v. Watkins*, 120 N.C. App. 804 (1995) (information fabricated by one officer and supplied to stopping officer may not be used to show reasonable suspicion, even if stopping officer did not know that the information was fabricated); *see also State v. Harwood*, ___ N.C. App. ___, 727 S.E.2d 891 (2012) (anonymous tip did not provide basis for stop; court appears to reject argument that officers could rely on outstanding arrest warrant unknown to stopping officers when they stopped defendant); Jeff Welty, *Fascinating Footnote 3*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 13, 2012) (discussing *Harwood*), http://nccriminallaw.sog.unc.edu/?p=3815.

Police broadcasts. Police broadcasts may or may not be based on an officer's observations. Without any showing as to the basis of the broadcast, it should be given no more weight than an anonymous tip. *See State v. Peele*, 196 N.C. App. 668 (2009) (dispatcher's report of impaired driving was treated as based on anonymous tip, as State provided no evidence that report of driving came from identified caller); *see also supra* § 15.3G, Anonymous Tips.

I. Pretext

In some instances, a court may find that a stop or search is unconstitutional because the purported justification for the stop or search is a pretext for an impermissible reason.

Stops based on individualized suspicion. The U.S. Supreme Court has significantly cut back the pretext doctrine. Generally, an officer's subjective motivation in stopping a person or vehicle is irrelevant under the Fourth Amendment if the officer has probable cause to make the stop. In *Whren v. United States*, 517 U.S. 806 (1996), the Court held that an officer's actual motivation in making a stop (for example, to investigate for drugs) is generally irrelevant if the officer has probable cause for the stop and could have

stopped the person for that reason (for example, the person committed a traffic violation). *Accord State v. McClendon*, 350 N.C. 630 (1999) (adopting *Whren* under state constitution); *State v. Hamilton*, 125 N.C. App. 396 (1997) (court recognizes effect of *Whren* under U.S. Constitution); *compare State v. Ladson*, 979 P.2d 833 (Wash. 1999) (rejecting *Whren* under state constitution). Before *Whren*, the test in many jurisdictions, including North Carolina, was what a reasonable officer "would have" done in a similar circumstance, not what an officer lawfully "could have" done. *See State v. Hunter*, 107 N.C. App. 402 (1992) (stating former standard), *overruled on other grounds by State v. Pipkins*, 337 N.C. 431 (1994); *State v. Morocco*, 99 N.C. App. 421 (1990) (to same effect).

Whren did not specifically address whether a defendant may challenge as pretextual a stop based on reasonable suspicion. *See also Hamilton*, 125 N.C. App. 396 (dissent notes that *Whren* left this question open). It seems unlikely, however, that *Whren* would not apply to circumstances in which officers have reasonable suspicion to stop, a lesser degree of proof than probable cause but still a form of individualized suspicion. *See Ashcroft v. al-Kidd*, ___ U.S. ___, 131 S. Ct. 2074 (2011) (in upholding validity of material-witness arrest warrant requiring less than probable cause for issuance, Court states that subjective intent is pertinent only in cases not involving individualized suspicion).

Facts known to officer. *Whren* and cases following it consider the objective facts supporting a stop. Consequently, if the facts known to an officer amount to a violation of the law, the stop is valid even though the officer may have made the stop for a different reason. *See State v. Barnard*, 362 N.C. 244 (2008) (based on defendant's thirty-second delay after traffic light turned green, officer stopped defendant for impaired driving, for which there was reasonable suspicion, and for impeding traffic, which was not a traffic violation; court upholds stop, reasoning that its constitutionality depends on the objective facts observed by officer, not the officer's subjective motivation); *State v. Osterhoudt*, ___ N.C. App. ___, 731 S.E.2d 454 (2012) (trooper had reasonable, articulable suspicion to stop defendant based on observed traffic violations notwithstanding his mistaken belief that defendant violated different traffic law).

Relatedly, facts unknown to the officer at the time of the stop do not provide a basis for a stop. *See Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) ("[w]hether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest"; officer's subjective reason for making arrest need not be criminal offense as to which known facts provide probable cause); *see also* 2 LAFAVE, SEARCH AND SEIZURE § 3.2(d), at 57–58 (for actions without warrant, information to be considered is totality of facts available to officer). For a discussion of reliance on the collective knowledge of the investigating officers, see *supra* § 15.3H, Information from Other Officers.

Accordingly, if the facts known to an officer do not satisfy the State's burden of showing grounds for the stop, the stop is invalid. This result does not depend on whether the stop was or was not pretextual, although as a practical matter judges may scrutinize more

closely whether grounds existed for the stop if they believe an officer acted for a pretextual reason. *See infra* § 15.3M, Race Based Stops (discussing cases); *see also State v. Franklin*, ___ N.C. App. ___, 736 S.E.2d 218 (2013) (Elmore, J., dissenting) (finding that evidence failed to show that officer observed seat belt violation and therefore failed to show officer possessed probable cause for stop).

Exceptions. There are some limits to *Whren*.

- *Whren* itself stated that a defendant may challenge as pretextual inventory searches or administrative inspections because they are not based on individualized suspicion.
- Likewise, a defendant may challenge as pretextual a license or other checkpoint when the real purpose is impermissible. *See infra* "Pretextual checkpoints" in § 15.3J, Motor Vehicle Checkpoints.
- A stop for a traffic violation or other matter still violates the Fourth Amendment if the officer exceeds the scope of the stop—for example, the officer unduly detains the defendant about a matter unrelated to the purpose of the stop without additional grounds to do so. *See infra* § 15.4E, Nature, Length, and Purpose of Detention.
- If an officer stops a defendant because of his or her race, the stop may violate equal protection regardless of whether probable cause exists. *See supra* § 15.2C, Race-Based "Consensual" Encounters. Or, the racial motivation may undermine the credibility of the officer's stated reason for the stop. *See infra* § 15.3M, Race-Based Stops.

Effect of not issuing citation. The failure of an officer to issue a citation for the traffic violation that was the basis of a traffic stop does not affect the stop's validity if objective circumstances indicate that the defendant committed a violation. *See State v. Baublitz*, 172 N.C. App. 801 (2005) (officer's "objective observation" that defendant's vehicle twice crossed center line of highway provided officer with probable cause to stop for traffic violation, regardless of officer's subjective motivation for making stop; court finds it irrelevant that officer did not issue traffic ticket to defendant after arresting him for possession of cocaine).

Nevertheless, a stop would be unlawful if the circumstances indicate that the officer did not have grounds for the stop—for example, the officer could not have observed the alleged traffic or other violation. *See State v. Villeda*, 165 N.C. App. 431 (2004) (trooper did not have probable cause to stop defendant for seat belt violation; evidence indicated that trooper could not see inside vehicles driving in front of him at night on stretch of road on which defendant was stopped). The failure to issue a citation, along with other factors, may bear on the credibility of the officer's claimed observation of a violation. *See State v. Parker*, 183 N.C. App. 1, 8 (2007) (noting rule in *Baublitz* that failure to issue citation for violation that was basis of stop does not affect validity of stop if objective circumstances support stop, but also noting holding in *Villeda* that evidence may not support officer's claimed observations).

J. Motor Vehicle Checkpoints

The discussion below reviews selected principles governing motor vehicle checkpoints. For an in-depth discussion of checkpoints as well as additional information on some of the issues discussed below, see Welty, *Motor Vehicle Checkpoints*, *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1004.pdf.

License and registration checkpoints. In *Delaware v. Prouse*, 440 U.S. 648 (1979), the U.S. Supreme Court held that officers may not randomly stop motorists to check their driver's license or vehicle registration; the Court indicated, however, that checkpoints at which drivers' licenses and registrations are systematically checked may be permissible. *See also State v. Sanders*, 112 N.C. App. 477 (1993) (upholding license checkpoint under authority of *Prouse*). Motor vehicle checkpoints are authorized in North Carolina under G.S. 20-16.3A, which allows checkpoints for the purpose of determining compliance with G.S. Chapter 20. The N.C. Court of Appeals has questioned whether it is constitutionally permissible to set up a checkpoint to check for "any and all" motor vehicle violations; subsequent decisions have not specifically addressed the question. *State v. Veazey*, 191 N.C. App. 181, 189 (2008) (questioning whether it is constitutionally permissible to set up a checkpoint to check for "any and all" motor vehicle violations), *appeal after remand*, 201 N.C. App. 398 (2009) (finding that checkpoint was for lawful purpose of checking licenses and that checkpoint was tailored to that purpose); *see also* 5 LAFAVE, SEARCH AND SEIZURE § 10.8(b), at 420–22 (suggesting that vehicle safety checkpoints may be permissible if they do not involve unrestrained discretion and are not a subterfuge for other purposes). *But cf. infra* § 15.3K, Drug and Other Checkpoints (noting disapproval of general crime control checkpoints).

A license and registration checkpoint must comply with both constitutional limitations and the procedures in G.S. 20-16.3A. For a further discussion of these limitations, see Welty, *Motor Vehicle Checkpoints*, *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1004.pdf.

DWI checkpoints. The U.S. Supreme Court has upheld the constitutionality of impaired-driving checkpoints conducted under guidelines regulating officers' discretion. *See Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990). Impaired-driving checkpoints in North Carolina must comply with both constitutional limitations and the procedures in G.S. 20-16.3A. For a further discussion of these limitations, see Welty, *Motor Vehicle Checkpoints*.

Pretextual checkpoints. A license or impaired-driving checkpoint is subject to challenge as pretextual under the Fourth Amendment. *See City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (checkpoint is unconstitutional if primary purpose is unlawful; checkpoint was unlawful in this case because primary purpose was to investigate for drugs).

Avoiding checkpoint. In *State v. Foreman*, 351 N.C. 627 (2000), the North Carolina Supreme Court held that avoidance of a lawful checkpoint constituted reasonable suspicion to stop to inquire why the defendant turned away from the checkpoint. Cases since *Foreman* have looked at the totality of the circumstances, implicitly recognizing

that turning away from a checkpoint may not always constitute reasonable suspicion to stop. *See State v. Griffin*, ___ N.C. ___, ___ S.E.2d ___ (2013) (defendant made three-point turn in middle of road, not at intersection, to avoid checkpoint where police lights were visible; court states that "even a legal turn, when viewed in the totality of the circumstances, may give rise to reasonable suspicion" and finds that "place and manner of defendant's turn in conjunction with his proximity to the checkpoint" provided reasonable suspicion to stop); *White v. Tippett*, 187 N.C. App. 285 (2007) (from a combination of the driver's evasion of the checkpoint, odor of alcohol surrounding the driver, and brief conversation with the driver, the officer had reasonable grounds to believe that the driver had committed an implied-consent offense); *State v. Bowden*, 177 N.C. App. 718 (2006) (defendant broke hard before checkpoint, causing front of car to dip, abruptly turned into parking lot, pulled in and out of parking space, headed toward exit, and pulled into another space when officer drove up; totality of circumstances justified officer in pursuing and stopping defendant's car).

Challenge to illegal checkpoint by person who turns away. The N.C. Court of Appeals has held that the illegality of a checkpoint is not relevant when a driver turns away from the checkpoint because the checkpoint is not the basis for the stop in those circumstances. *See State v. Collins*, ___ N.C. App. ___, 724 S.E.2d 82 (2012); *see also White v. Tippett*, 187 N.C. App. 285 (2007) (so stating in civil license proceedings). (These decisions are inconsistent with the decision of another panel of the court of appeals, but the decision of that panel was vacated and remanded for other reasons. *See State v. Haislip*, 186 N.C. App. 275 (2007) (if checkpoint is unconstitutional, turning away from checkpoint would not be grounds to stop defendant), *vacated and remanded on other grounds*, 362 N.C. 499 (2008) (remanded to trial court for written findings of fact and conclusions of law).)

The above principle does not necessarily end the inquiry. In remanding the case for further findings, the court in *Collins* recognized that an officer must have reasonable suspicion to stop a defendant who turns away from an unconstitutional checkpoint; mere turning away may not be sufficient. *See also State v. Griffin*, ___ N.C. ___, ___ S.E.2d ___ (2013) (stating that court did not need to address alleged unconstitutionality of checkpoint because in circumstances of case officer had reasonable suspicion to stop defendant). Also at play is the principle that a person has the right to avoid an illegal action. Turning away from an illegal checkpoint, along with other factors, may provide reasonable suspicion, just as running on foot from an unlawful stop, along with other factors, may provide reasonable suspicion. Without more, however, merely failing to obey an unlawful action by the police may not constitute reasonable suspicion. *See supra* § 15.3D, Flight; *see also* Jeff Welty, *Ruse Checkpoints*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 1, 2011) (citing cases holding that a person's avoidance of a "ruse" checkpoint—that is, one in which officers put up signs warning of a checkpoint ahead that does not actually exist or that is illegal so that officers may observe drivers' reactions—does not without more provide reasonable suspicion to stop), http://nccriminallaw.sog.unc.edu/?p=2516.

Limits on detention at checkpoint. Although motorists may be briefly stopped at an impaired driving checkpoint, detention of a particular motorist for more extensive

investigation, such as field sobriety testing, requires satisfaction of an individualized suspicion standard. *See Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990). For a further discussion of these issues, see Welty, *Motor Vehicle Checkpoints*, at 6–7 (questions 10 and 11), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1004.pdf.

K. Drug and Other Checkpoints

Drug and general crime control checkpoints. Drug checkpoints and general crime control checkpoints are not permissible. *See City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

Information-seeking checkpoints. Distinguishing *Edmond*, 531 U.S. 32, which found drug checkpoints unconstitutional, the Court held that brief stops of motorists at a highway checkpoint at which police sought information about a recent fatal hit-and-run accident on that highway were not presumptively invalid under the Fourth Amendment. *See Illinois v. Lidster*, 540 U.S. 419 (2004).

Public housing checkpoints. *See State v. Hayes*, 188 S.W.3d 505 (Tenn. 2006) (identification checkpoint at entrance to public housing development violated Fourth Amendment where goal was to reduce crime, exclude trespassers, and enforce lease agreement provisions to decrease crime and drug use; checkpoint was aimed at general crime control); *Wilson v. Commonwealth*, 509 S.E.2d 540 (Va. Ct. App. 1999) (drug checkpoint inside entrance to public housing project unconstitutional).

L. Mistaken Belief by Officer

A mistaken belief by an officer may or may not justify a stop depending on the nature of the belief. If a mistake of "law," the mistake generally does not justify a stop; if a mistake of "fact," the mistake may not invalidate the stop. Distinguishing between a mistake of law and mistake of fact may be difficult in some cases.

Mistake of law. Generally, a stop based on observed facts that do not amount to a violation of the law—a mistake of "law"—violates the Fourth Amendment. *See State v. McLamb*, 186 N.C. App. 124 (2007) (officer stopped defendant for speeding for going 30 m.p.h. in what the officer thought was a 20 m.p.h. zone; speed limit was actually 55 m.p.h., and stop violated Fourth Amendment); *State v. Schiffer*, 132 N.C. App. 22 (1999) (officer was mistaken in believing that out-of-state vehicle was subject to North Carolina's window-tinting restrictions; however, officer had reasonable suspicion to stop vehicle for violation of North Carolina's windshield-tinting restrictions, which do apply to out-of-state vehicles); *see also State v. Hopper*, 205 N.C. App. 175, 182–83 (2010) (upholding trial court's finding that defendant was driving on public street and therefore was subject to traffic laws; therefore, case was distinguishable "from the line of decisions holding that a law enforcement officer's mistaken belief that a defendant had committed a traffic violation is constitutionally insufficient to support a traffic stop" [this opinion supersedes the court of appeals' prior opinion in this case, which was withdrawn, discussing whether the officer made a mistake of law or fact about whether the defendant

was on a public street]); *cf. State v. Osterhoudt*, ___ N.C. App. ___, 731 S.E.2d 454 (2012) (trooper had reasonable suspicion to stop vehicle based on observed traffic violations even where trooper was mistaken about which motor vehicle statute had been violated).

In a 4 to 3 decision, the N.C. Supreme Court recognized an exception to the rule that a mistake of law will not support a stop. The Court held that if an officer makes a stop based on an objectively reasonable mistake of law, the stop is not invalid because of the mistake. *See State v. Heien*, 366 N.C. 271 (2012) (holding that although law requires vehicle to have only one working brake light, stop by officer based on mistaken belief that vehicles must have two working brake lights was objectively reasonable). This decision may have a limited impact. The court in *Heien* noted that North Carolina's brake light requirements were particularly ambiguous and, until this case, had not been interpreted by the appellate courts. In cases in which the legal requirements are clearer or more established, an officer's mistake would not meet the standard announced in *Heien*. *See State v. Coleman*, ___ N.C. App. ___, 743 S.E.2d 62 (2013) (finding that mistake of law about lawfulness of possession of open container of alcohol in public vehicular area was not reasonable).

The dissenters in *Heien* argued that the majority's decision is inconsistent with North Carolina cases refusing to recognizing a good faith exception to the exclusionary rule in search warrant cases and other instances in which the police rely on official records. The majority did not overrule or question that line of cases, however. *See supra* "Good faith exception for constitutional violations not valid in North Carolina" in § 14.2B, Search Warrants (discussing case law and impact of recent legislation).

Mistake of fact. A stop based on an officer's incorrect assessment of the facts—that is, a mistake of fact—does not violate the Fourth Amendment *if* the officer's mistake was reasonable. *See State v. Smith*, 192 N.C. App. 690 (2008) (so holding); *see also State v. Williams*, 209 N.C. App. 255 (2011) (officers had reasonable suspicion to stop a vehicle in which defendant was a passenger based on the officers' good faith belief that the driver had a revoked license and information about the defendant's drug sales, corroborated by the officers, from three reliable informants; the officer's mistake about who was driving the vehicle was reasonable under the circumstances).

Once the officer realizes his or her mistake, the officer must terminate the encounter unless he or she has developed additional reasonable suspicion for the stop. *See, e.g.*, *State v. Diaz*, 850 So. 2d 435 (Fla. 2003) (once officer determined that temporary license tag on defendant's automobile was valid, any further detention violated defendant's Fourth Amendment rights); *McGaughey v. State*, 37 P.3d 130 (Okla. Crim. App. 2001) (although initial stop of truck was permissible based on officer's belief that truck's taillights were not working, officer could not continue to detain truck once officer saw that both taillights were working); *State v. Lopez*, 631 N.W.2d 810 (Minn. Ct. App. 2001) (officer, who stopped car for having no license plates but then discovered when approaching car that car had lawful temporary sticker, could continue stop long enough to

explain to driver that he was free to go; when officer approached driver, odor of alcohol coming from interior of car provided officer with reasonable suspicion to continue detention and investigate).

M. Race-Based Stops

The North Carolina appellate courts have taken a closer look at stops that may have been motivated by the defendant's race. Although the Fourth Amendment does not prohibit a stop if the objective facts known to the officer justify the stop (*see supra* "Facts known to officer" in § 15.3I, Pretext), the courts have sometimes found that an officer's asserted, non-racial basis for the stop was not credible or not sufficient to support the stop. *See State v. Ivey*, 360 N.C. 562, 564 (2006) (court states that it could not determine whether stop of car driven by black male was "selective enforcement of the law based upon race," which would be a violation of equal protection; court states, however, that it "will not tolerate discriminatory application of the law" based on race and finds that officer did not have grounds to stop defendant for failure to use turn signal), *abrogated on other grounds by State v. Styles*, 362 N.C. 412 (2008); *In re J.L.B.M.*, 176 N.C. App. 613 (2006) (officer did not have reasonable suspicion to stop in following circumstances: officer received police dispatch of suspicious person, described as Hispanic male, at gas station; when officer drove up, he saw Hispanic male in baggy clothes, who spoke to someone in another car and then walked away from location of officer's patrol car); *State v. Villeda*, 165 N.C. App. 431 (2004) (court reviews at length evidence that trooper's stop of Hispanic driver was racially motivated; court upholds trial court's finding that trooper was not able to observe whether driver was wearing seat belt).

A stop based on race also may violate Equal Protection. *See supra* § 15.2C, Race-Based "Consensual" Encounters.

N. Limits on Officer's Territorial Jurisdiction

If an officer acts outside his or her territorial jurisdiction, the actions may constitute a substantial statutory violation under G.S. 15A-974 and warrant the exclusion of any evidence discovered. *See generally* FARB at 14–17, 89–90 (discussing territorial jurisdiction of city officers, campus officers, and others, and cases addressing motions to suppress); G.S. 20-38.2 ("[a] law enforcement officer who is investigating an implied-consent offense or a vehicle crash that occurred in the officer's territorial jurisdiction is authorized to investigate and seek evidence of the driver's impairment anywhere in-state or out-of-state, and to make arrests at any place within the State"); *cf. Parker v. Hyatt*, 196 N.C. App. 489 (2009) (State wildlife officer had authority to make warrantless stop for impaired driving).

A statutory violation by an officer may be excused if based on an objectively reasonable, good faith belief in the lawfulness of the action. *See* G.S. 15A-974(a); *see also supra* § 14.5, Substantial Violations of Criminal Procedure Act.

O. Community Caretaking

A detention may be constitutionally permissible if it is reasonably conducted in furtherance of the government agent's community caretaking function and is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *See Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (defendant, who was police officer and was apparently drunk, was in car accident and was taken to local hospital; permissible for other officers to return to car, which had been towed to garage and left outside on street, to look for and retrieve defendant's service revolver from car as public safety measure; *State v. Maddox*, 54 P.3d 464 (Idaho Ct. App. 2002) (stop of motorist not justified by community caretaking function; evidence did not show that motorist needed assistance); *see also* G.S. 15A-285 (authorizing non-law-enforcement actions when urgently necessary); *State v. Hocutt*, 177 N.C. App. 341 (2006) (officers were authorized to take defendant to jail to "sober up" under G.S. 122C-303; defendant was very intoxicated and was staggering, barefoot, dirty, and very scratched up on shoulder of highway in isolated area late at night).

15.4 Did the Officer Act within the Scope of the Seizure?

This part concentrates on the restrictions on an officer's investigation following a stop of a person based on reasonable suspicion. The same principles generally apply to stops for traffic violations, whether based on reasonable suspicion or probable cause. *See Arizona v. Johnson*, 555 U.S. 323, 330 (2009) ("most traffic stops . . . resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*" (citations omitted)); *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) ("the usual traffic stop is more analogous to a so-called 'Terry stop' . . . than to a formal arrest"); *State v. Styles*, 362 N.C. 412, 414 (2008) ("Traffic stops have 'been historically reviewed under the investigatory detention framework first articulated in *Terry*." (citation omitted)).

A. Frisks for Weapons

Grounds for frisk. An officer who has reasonable suspicion to stop a person does not automatically have the right to frisk the person for weapons. The officer must have reasonable suspicion that the person has a weapon and presents a danger to the officer or others. *See Terry v. Ohio*, 392 U.S. 1 (1968); *State v. Morton*, 363 N.C. 737 (2009) (per curiam) (finding frisk permissible for reasons stated in section one of dissenting opinion from court of appeals), *rev'g* 198 N.C. App. 206 (2009); *State v. Pearson*, 348 N.C. 272 (1998) (officer did not have grounds for weapons frisk during traffic stop; defendant's consent to search of car did not authorize frisk of person); *State v. Phifer*, ___ N.C. App. ___, 741 S.E.2d 446, 449 (2013) ("nervous pacing of a suspect, temporarily detained by an officer to warn him not to walk in the street," was insufficient to warrant further detention and frisk for weapons); *State v. Rhyne*, 124 N.C. App. 84 (1996) (insufficient grounds for weapons frisk; drugs discovered during frisk suppressed); *State v. Artis*, 123 N.C. App. 114 (1996) (suppressing evidence for same reason); *see also United States v.*

Burton, 228 F.3d 524 (4th Cir. 2000) (in absence of reasonable suspicion, officer may not frisk person merely because officer feels uneasy for his or her safety).

Factors. Circumstances to consider include:

- the nature of the suspected offense,
- a bulge in the person's clothing,
- observation of an object that appears to be a weapon,
- sudden, unexplained movements by the person,
- failure to remove a hand from a pocket, and
- the person's prior criminal record and history of dangerousness

Other protective measures. Whether officers may take other protective measures in connection with a weapons frisk depends on the circumstances of the case. *See State v. Carrouthers*, ___ N.C. App. ___, 714 S.E.2d 460 (2011) (handcuffing permissible during stop if special circumstances exist and handcuffing is least intrusive means reasonably necessary to carry out purpose of investigatory stop); *State v. Campbell*, 188 N.C. App. 701 (2008) (handcuffing reasonable in light of previous occasions in which defendant had fled from law enforcement); *State v. Smith*, 150 N.C. App. 317 (lifting of long shirt to expose pants pocket during frisk was reasonable under circumstances), *aff'd per curiam*, 356 N.C. 605 (2002); *State v. Sanchez*, 147 N.C. App. 619 (2001) (multiple occupants of vehicle were briefly handcuffed while officers frisked for weapons and then handcuffs were removed; handcuffing did not exceed scope of stop and convert stop into arrest); *see also State v. Gay*, 748 N.W.2d 408 (N.D. 2008) (although officer had reasonable grounds to handcuff defendant initially, officer acted unreasonably by failing to remove handcuffs once frisk revealed no weapons and the officer's concerns were dissipated; evidence discovered thereafter was subject to suppression); *People v. Delaware*, 731 N.E.2d 904 (Ill. App. Ct. 2000) (stop was converted into arrest, requiring probable cause, when officers kept defendant handcuffed after patdown search revealed no weapons).

If protective measures are excessive, the stop may become a de facto arrest, for which probable cause is required. *See Carrouthers*, ___ N.C. App. at ___, 714 S.E.2d at 464 (so stating). If probable cause does not exist, evidence discovered following a de facto arrest is subject to suppression.

An officer likely does not have the authority to direct a suspect to empty his or her pockets as part of the officer's authority to frisk or take other protective action during a stop. *See In re V.C.R.*, ___ N.C. App. ___, 742 S.E.2d 566 (2013) (directing juvenile to empty pockets was unlawful, nonconsensual search); Jeff Welty, *Empty Your Pockets*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 29, 2011), http://nccriminallaw.sog.unc.edu/?p=2924. A frisk during a consensual encounter likewise would be unauthorized in most circumstances. *See* Jeff Welty, *Terry Frisk During a Consensual Encounter?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 22, 2009), http://nccriminallaw.sog.unc.edu/?p=937.

B. Vehicles

Ordering driver to exit vehicle. On a stop based on reasonable suspicion, an officer may require the driver to exit the vehicle without specifically showing that requiring such an action was necessary for the officer's protection. *See Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *see generally* 5 LAFAVE, SEARCH AND SEIZURE § 10.8(d), at 450–51 (in context of impaired-driving checkpoints, there is not automatically a need for self-protective measures and therefore an officer may not order a motorist out of a vehicle at such a checkpoint either as a matter of routine or on a hunch); Jeff Welty, *Traffic Stops, Part II*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 28, 2009) (questioning whether officer may routinely require occupant of vehicle to sit in patrol car during stop), http://nccriminallaw.sog.unc.edu/?p=811.

Ordering passengers to exit or remain in vehicle; frisking of passengers. Under earlier decisions, officers could require passengers to exit the vehicle only if the officers had grounds to do so. *See State v. Hudson*, 103 N.C. App. 708 (1991) (officer had reasonable belief that passenger might be armed); *State v. Adkerson*, 90 N.C. App. 333 (1988) (officer arrested defendant for driving while impaired and had right to require passenger to exit vehicle so officer could search vehicle incident to arrest of driver). In *Maryland v. Wilson*, 519 U.S. 408 (1997), the Court held that an officer making a traffic stop may order the passengers out of the car, without specific grounds, pending completion of the stop. *Compare Commonwealth v. Gonsalves*, 711 N.E.2d 108 (Mass. 1999) (based on state constitution, court rejects rule that officer may automatically order driver or passenger to exit vehicle).

The Court in *Maryland v. Wilson* expressed no opinion on whether an officer may automatically detain a passenger during the duration of the stop. *See Wilson*, 519 U.S. at 415 n.3. In *Arizona v. Johnson*, 555 U.S. 323 (2009), the Court indicated that officers may detain passengers to frisk them if they reasonably believe the passengers are armed and dangerous, observing that officers are not constitutionally obligated to allow a passenger to depart without first ensuring that they are not "permitting a dangerous person to get behind" them. *Id.* at 334; *see also Owens v. Kentucky*, ___ U.S. ___, 129 S. Ct. 2155 (2009) (court summarily vacates state court decision authorizing automatic pat down of passengers when officers arrest a vehicle occupant and are preparing to conduct search incident to arrest; case remanded). Relatedly, officers may order a passenger to remain temporarily in the vehicle for safety reasons. *State v. Shearin*, 170 N.C. App. 222 (2005) (majority finds that officer had grounds to order passenger to remain temporarily inside vehicle).

These decisions do not resolve whether officers may continue to detain passengers once they have addressed safety concerns. Cases after *Wilson*, although before *Johnson*, indicate that an officer must have reasonable suspicion to do so. *See State v. Brewington*, 170 N.C. App. 264 (2005) (officer had reasonable suspicion of criminal activity by passenger to require that passenger remain at scene); *Shearin*, 170 N.C. App. at 235 (Wynn, J., concurring) (concurring judge disagrees with majority opinion to extent it suggests that officer may require passenger to remain in vehicle during traffic stop

without any reason to believe that passenger poses threat to safety or is engaged in criminal activity).

Regardless whether officers may detain a passenger during a stop, a passenger may challenge the validity and duration of the stop and thus may suppress the results of any investigation after an invalid stop or unduly extended stop. *See supra* "Standing of passenger to challenge stop" in § 15.3E, Traffic Stops.

Other actions involving passengers. *See Arizona v. Johnson*, 555 U.S. 323 (2009) (questioning of passengers during traffic stop that did not relate to justification for stop did not measurably lengthen stop and was constitutionally permissible); *Illinois v. Harris*, 543 U.S. 1135 (2005) (court summarily vacates Illinois Supreme Court decision, which found that officers could not run warrant check on passenger that did not prolong otherwise valid traffic stop).

Sweep of interior of vehicle. Officers may conduct a protective sweep of the passenger compartment of a vehicle in areas where a weapon may be located—in other words, they may conduct a "vehicle frisk" but not a search for evidence—if the officers reasonably believe that the suspect is dangerous and may gain immediate control of a weapon. *See Michigan v. Long*, 463 U.S. 1032 (1983) (stating standard); *State v. Minor*, 132 N.C. App. 478 (1999) (officer had insufficient grounds to search car for weapons); *State v. Green*, 103 N.C. App. 38 (1991) (officer could not look in glove compartment of defendant's car as part of protective weapons search; officer had already placed defendant in patrol car and defendant could not obtain any weapon or other item from car); *State v. Braxton*, 90 N.C. App. 204 (1988) (facts did not warrant belief that suspect was dangerous and could gain control of weapon); *see also infra* § 15.6B, Search Incident to Arrest (discussing *Arizona v. Gant*, 556 U.S. 332 (2009), which precludes search of vehicle incident to arrest of occupant if purpose is to prevent occupant from obtaining weapon or destroying evidence and occupant has already been secured by officers).

For a further discussion of car sweeps, see Welty, *Traffic Stops*, at 7 (reviewing cases and observing that "North Carolina's appellate courts have been fairly demanding regarding reasonable suspicion in this context, several times finding ambiguously furtive movements, standing alone, to be insufficient"), http://nccriminallaw.sog.unc.edu/wp-content/uploads/2013/03/2013-03-Traffic-Stops.pdf.

License, warrant, and record checks. *See* Welty, *Traffic Stops*, at 7 (reviewing authorities and observing that "courts have generally viewed these checks, and the associated brief delays, as permissible" during a traffic stop); *see also infra* § 15.4E, Nature, Length, and Purpose of Detention.

C. Plain View

Generally, observations by officers of things in "plain view" do not constitute a search. Under the Fourth Amendment, a seizure is lawful under the plain view doctrine if the officer is lawfully in a position to observe the items and it is immediately apparent to the

officer that the items are evidence of a crime, contraband, or otherwise subject to seizure. *See Horton v. California*, 496 U.S. 128 (1990) (discovery of evidence need not be inadvertent if these two conditions are met). *But see* G.S. 15A-253 (under North Carolina law, discovery of evidence in plain view during execution of search warrant must be inadvertent).

Shining a flashlight into a vehicle that has been lawfully stopped is ordinarily not considered a search, so objects that officers observe thereby are considered to be in plain view. *See Texas v. Brown*, 460 U.S. 730 (1983); *see also* 1 LAFAVE, SEARCH AND SEIZURE § 2.2(b), at 617–18 (discussing limits on this doctrine—for example, officer may not open door to shine flashlight into car unless officer has grounds to open door); *Kyllo v. United States*, 533 U.S. 27 (2001) (use of sense-enhancing technology—in this case, a thermal imager that detected relative amounts of heat within home—constituted search).

A defendant still may have grounds to suppress plain-view observations if the initial stop was invalid or, at the time of the observation, the officer was engaged in activity beyond the scope of the stop.

D. "Plain Feel" and Frisks for Evidence

General prohibition. An officer who stops a person on reasonable suspicion may not frisk the person for evidence. *See Ybarra v. Illinois*, 444 U.S. 85 (1979).

"Plain feel" exception. Under what has come to be known as the "plain feel" doctrine, when an officer conducts a proper weapons frisk and has probable cause to believe that an object is evidence of a crime, then the officer may remove it. But, if an officer does not *immediately* recognize that the object is evidence of a crime, he or she may not manipulate or explore the object further; such action constitutes a search, which is not authorized as part of a weapons frisk. *See Minnesota v. Dickerson*, 508 U.S. 366 (1993) (officer's continued exploration of lump until he developed probable cause to believe it was cocaine was an unlawful search); *In re D.B.*, ___ N.C. App. ___, 714 S.E.2d 522 (2011) (during frisk of juvenile for weapons, officer's removal of credit card, which turned out to be stolen, was not permissible; officer could not seize card on basis that juvenile did not identify himself and officer believed that card was identification card); *State v. Williams*, 195 N.C. App. 554 (2009) (under "plain feel" doctrine, officer must have probable cause to believe object is contraband; reasonable suspicion is insufficient); *State v. Wise*, 117 N.C. App. 105 (1994) (officer lawfully stopped vehicle for speeding and lawfully patted down defendant, but officer lacked probable cause to open non-transparent aspirin bottle that officer found on defendant); *State v. Beveridge*, 112 N.C. App. 688 (1993) (in frisking defendant for weapons, officer noticed cylindrical bulge that felt like plastic baggie; once officer determined that bulge was not weapon, he could not continue to search defendant to determine whether baggie contained illegal drugs), *aff'd per curiam*, 336 N.C. 601 (1994); *see also State v. Graves*, 135 N.C. App. 216 (1999) (warrantless search of wads of brown paper that fell from defendant's clothing not justified under plain view doctrine because it was not immediately apparent that wads contained contraband); *State v. Sapatch*, 108 N.C. App. 321 (1992) (under plain view

doctrine, officers did not have probable cause to believe film canisters contained evidence of crime and, therefore, were not justified in opening canisters); *compare State v. Robinson*, 189 N.C. App. 454 (2008) (it was immediately apparent to officer that film canister contained crack cocaine).

Even if an officer has probable cause to remove an object when frisking a person for weapons, the officer may need a search warrant before inspecting the interior of the object. *See infra* "Containers" in § 15.6D, Probable Cause to Search Person.

E. Nature, Length, and Purpose of Detention

Generally. As a general rule, an investigative detention must be temporary and last no longer than necessary to effectuate the purpose of the stop. *See Florida v. Royer*, 460 U.S. 491 (1983) (officers exceeded limits of *Terry*-stop and required probable cause); *see also* G.S. 15A-1113(b) (an officer who has probable cause to believe a person has committed an infraction may detain the person for a reasonable period of time to issue and serve citation). Whether an officer has exceeded this general limit has been the subject of considerable litigation, discussed below.

Requests for consent and questioning. Numerous cases have addressed whether an officer's questioning of a defendant or request for consent to search are permissible during a stop based on reasonable suspicion. In arguing that questioning or a request for consent were beyond the permissible scope of the stop, and therefore that evidence and information discovered as a result must be suppressed, the defendant is in the strongest position if the following factors are present: (1) the detention had not ended (that is, a reasonable person would not have felt free to leave) at the time of the request for consent or questioning; (2) the request or questions were not related to the basis for the stop; (3) the request or questions unduly prolonged the detention beyond what was necessary to effectuate the purpose of the stop; and (4) the officer had not developed reasonable suspicion of additional criminal activity. *See State v. Jackson*, 199 N.C. App. 236 (2009) (driver and passengers were detained when officers had not yet returned license and registration to driver; request for consent to search after reason for stop had ended unconstitutionally prolonged stop); *State v. Myles*, 188 N.C. App. 42 (2008) (nervousness of defendant and other passenger did not justify continued detention, questioning, and request for consent to search after officer considered traffic stop complete; search of defendant's car was unlawful), *aff'd per curiam*, 362 N.C. 344 (2008); *State v. Parker*, 183 N.C. App. 1, 9 (2007) ("[w]ithout additional reasonable articulable suspicion of additional criminal activity, the officer's request for consent exceeds the scope of the traffic stop and the prolonged detention violates the Fourth Amendment"; in this case, officer had reasonable suspicion to request that passenger consent to search of her purse after discovering what appeared to be a controlled substance in the door of the car next to where passenger was sitting); *State v. Hernandez*, 170 N.C. App. 299 (2005) (trooper expanded scope of stop for seat belt violation by asking defendant about contraband and weapons, but reasonable suspicion of criminal activity supported further detention); *State v. Sutton*, 167 N.C. App. 242 (2004) (questioning of defendant during stop was permissible; questions were brief and directly related to suspicion that gave rise to stop);

State v. Jacobs, 162 N.C. App. 251 (2004) (after traffic stop for erratic driving, officer developed reasonable suspicion that other criminal activity may have been afoot; officer could continue to detain defendant and ask for consent to search for drugs, and officer need not have had specific reasonable suspicion for requesting consent); *State v. Castellon*, 151 N.C. App. 675 (2002) (during traffic stop officer developed reasonable suspicion that defendant was engaged in illegal drug activity and was justified in asking for permission to search vehicle); *State v. Beveridge*, 112 N.C. App. 688 (1993) (once officer had frisked defendant for weapons, officer could not continue to search or question defendant), *aff'd per curiam*, 336 N.C. 601 (1994).

Whether questioning or a request for consent unduly prolongs a detention has become particularly important. This area of law is continuing to develop. In *Muehler v. Mena*, 544 U.S. 93 (2005), the Court held that it was not unconstitutional during the execution of a search warrant for officers to question a lawfully detained person about her immigration status. The Court reasoned that the officers did not require reasonable suspicion to ask the person for identifying information because the questioning did not prolong the detention. In *Arizona v. Johnson*, 555 U.S. 323 (2009), the Court held that an officer's questioning of passengers on matters unrelated to the justification for the traffic stop was constitutionally permissible because it did not measurably extend the duration of the stop. *See also infra* "Drug dog sniff during traffic stop" in § 15.4F, Drug Dogs (discussing cases in which courts have permitted de minimus delay for drug dog sniff during traffic stop).

Applying *Muehler* and *Johnson*, the Fourth Circuit Court of Appeals has recognized an important qualification on the duration of a traffic stop. The lawfulness of a delay in completing a stop depends not only on the length of the delay but also on whether the officer diligently pursued investigation of the purpose of the stop. If an officer abandons pursuit of the justification for the traffic stop and embarks on a sustained course of investigation into unrelated matters, the delay violates the Fourth Amendment and renders inadmissible evidence discovered during the unlawful detention. *United States v. Guijon-Ortiz*, 660 F.3d 757 (4th Cir. 2011); *United States v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011).

The North Carolina appellate courts may treat requests for consent to search differently than questioning during a traffic stop, requiring reasonable suspicion to support a request for consent unrelated to the purpose of the stop. *See State v. Parker*, 183 N.C. App. 1, 9 (2007) (so stating).

The U.S. Supreme Court has declined to impose a time limit on the length of an investigative stop. *See United States v. Sharpe*, 470 U.S. 675 (1985). One writer suggests that, unless circumstances warrant a longer stop, "an officer normally should not detain a suspect the officer has stopped longer than twenty minutes." FARB at 43–44.

Consent after detention has ended. If the detention has ended and the person is free to leave, an officer generally may request consent to search. *See State v. Heien*, ___ N.C. App. ___, 741 S.E.2d 1 (2013) (over a dissent, majority concluded that after return of

documentation by police during traffic stop, defendant was aware that purpose of initial stop had been concluded and that further conversation, including request for and consent to search, was consensual); *State v. Morocco*, 99 N.C. App. 421 (1990) (trooper did not detain defendant in patrol car longer than necessary to write citation, and after detention ended defendant consented to search); *see also State v. Kincaid*, 147 N.C. App. 94 (2001) (questioning unrelated to traffic stop was permissible where defendant consented to being questioned after detention had ended).

In *Ohio v. Robinette*, 519 U.S. 33 (1996), the state supreme court held that officers must clearly inform a motorist that a traffic stop has ended and that the motorist is free to go before requesting consent to search on an unrelated matter. Without this warning, the state court held, the motorist's consent is involuntary. The U.S. Supreme Court rejected such a requirement, holding that the voluntariness of a motorist's consent is evaluated under the totality of circumstances. *Robinette* does not affect the law on the permissible duration of a stop. If an officer detains a person longer than necessary to effectuate the purpose of the stop, a request for consent to search may exceed the scope of the stop and violate the Fourth Amendment. *See, e.g., State v. Robinette*, 685 N.E.2d 762 (Ohio 1997) (on remand from U.S. Supreme Court, state supreme court found that officer exceeded scope of stop and that consent was therefore invalid). Any consent given must also be voluntary. *See infra* § 15.5D, Consent.

The return of paperwork to a driver may signal the end of a traffic stop, but it is not necessarily dispositive. *See* Welty, *Traffic Stops*, at 10 (so stating and reviewing North Carolina decisions and other authorities), *available at* http://nccriminallaw.sog.unc.edu/wp-content/uploads/2013/03/2013-03-Traffic-Stops.pdf.

F. Drug Dogs

When a drug dog sniff is a search. Walking a drug dog around a vehicle during a lawful traffic stop (discussed further below) is generally not considered a search. *See Illinois v. Caballes*, 543 U.S. 405 (2005); *State v. Branch*, 177 N.C. App. 104 (2006) (following *Caballes*); *United States v. Place*, 462 U.S. 696 (1983) (use of a drug dog to sniff luggage in public place was not a search under Fourth Amendment). *But cf. Florida v. Jardines*, 569 U.S. ___, 133 S. Ct. 1409 (2013) (entering homeowner's property and using drug-sniffing dog on homeowner's porch to investigate contents of home is a "search" within the meaning of the Fourth Amendment). These and other cases suggest that a drug dog sniff of a person would generally be subject to Fourth Amendment limitations. *See* Shea Denning, *Dog Sniffs of People and the Fourth Amendment*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 9, 2012), http://nccriminallaw.sog.unc.edu/?p=3911; 1 LAFAVE, SEARCH AND SEIZURE § 2.2(g), at 703–04 (discussing issue).

Effect of alert. An "alert" by a drug dog to a vehicle may constitute probable cause to search the vehicle if a sufficient showing is made as to the dog's reliability to detect the presence of particular contraband. *See Florida v. Harris*, 568 U.S. ___, 133 S. Ct. 1050 (2013) (holding that dog sniff provided probable cause to search vehicle and refusing to set inflexible evidentiary requirements regarding a dog's reliability; also indicating that

certification of dog by bona fide organization creates presumption of reliability, which defendant may rebut by other evidence); *see also* Jeff Welty, *Supreme Court: Alert by a Trained or Certified Drug Dog Normally Provides Probable Cause*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Feb. 20, 2013), http://nccriminallaw.sog.unc.edu/?p=4111; LeAnn Melton, *Drug Dogs—Reliability Issues and Case Law: How Good is that Doggie's Nose?* (North Carolina Fall Public Defender Seminar, Nov. 29, 2007), *available at* www.ncids.org/Defender%20Training/2007%20Fall%20Conference/DrugDogs.pdf.

A drug dog's positive alert to a vehicle does not give officers probable cause to search recent occupants of the vehicle. *State v. Smith*, ___ N.C. App. ___, 729 S.E.2d 120 (2012). For a discussion of related issues, see *infra* "Drug cases" in § 15.6E, Probable Cause to Search Vehicle.

Drug dog sniff during traffic stop. Although a drug dog sniff of the exterior of a vehicle is generally not considered a search, use of a drug dog is impermissible if it unduly prolongs the stop and the officer does not have reasonable suspicion to justify the delay. *See State v. McClendon*, 350 N.C. 630 (1999) (canine unit did not arrive until 15 to 20 minutes after conclusion of traffic stop, but officer had reasonable suspicion beyond basis for traffic stop); *State v. Sellars*, ___ N.C. App. ___, 730 S.E.2d 208 (2012) (four-minute, 37-second delay to conduct drug dog sniff did not unduly prolong stop); *State v. James Branch*, 194 N.C. App. 173 (2008) (officer did not have grounds to detain defendant for canine unit to arrive after officer finished checking defendant's license and registration); *State v. Brimmer*, 187 N.C. App. 451 (2007) (ninety-second delay for dog sniff was de minimus extension of traffic stop and did not require additional reasonable suspicion); *State v. Euceda-Valle*, 182 N.C. App. 268 (2007) (relying on *McClendon*, court finds that officer had reasonable suspicion to detain defendant for canine sniff of exterior of vehicle after officer handed defendant warning ticket and traffic stop ended); *State v. Monica Branch*, 177 N.C. App. 104, 107 n.1 (2006) (suggesting that if drug dog sniff extends duration of stop, it may be unconstitutional); *State v. Fisher*, 141 N.C. App. 448 (2000) (detaining defendant after traffic stop for drug dog sniff exceeded scope of stop); *State v. Falana*, 129 N.C. App. 813 (1998) (officer exceeded scope of traffic stop by detaining defendant for dog to do drug sniff).

As with questioning and requests for consent during a traffic stop (*see supra* "Requests for consent and questioning" in § 15.4E, Nature, Length, and Purpose of Detention), the length of detention has become a significant factor in evaluating the lawfulness of drug dog sniffs unrelated to the purpose of a traffic stop. This area of law is continuing to develop. The Fourth Circuit Court of Appeals has recognized an important qualification on the duration of a traffic stop. The lawfulness of a delay in completing a stop depends not only on the length of the delay but also on whether the officer diligently pursued investigation of the purpose of the stop. If an officer abandons pursuit of the justification for the traffic stop and embarks on a sustained course of investigation into unrelated matters, the delay violates the Fourth Amendment and renders inadmissible evidence discovered during the unlawful detention. *United States v. Guijon-Ortiz*, 660 F.3d 757 (4th Cir. 2011); *United States v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011).

A drug dog sniff is also impermissible if it intrudes into protected areas—for example, the sniff is of the interior of the vehicle or of an occupant. If conducted at a license checkpoint, a drug dog sniff may indicate that the purpose of the checkpoint is general criminal investigation and thus impermissible. *See supra* § 15.3J, Motor Vehicle Checkpoints; § 15.3K, Drug and Other Checkpoints.

G. Does *Miranda* Apply?

A person generally is not entitled to *Miranda* warnings on a stop. *See Berkemer v. McCarty*, 468 U.S. 420 (1984); *State v. Braswell*, ___ N.C. App. ___, 729 S.E.2d 697 (2012) (traffic stops are typically non-coercive in nature and do not amount to custodial interrogations). Once taken into custody, a person is entitled to *Miranda* warnings before police questioning. *See Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (in case involving allegedly impaired driver who had been taken into custody, *Miranda* warnings were required for police question calling for testimonial response).

Some stops may amount to custody for *Miranda* purposes even though the person may not be under arrest. *See* Mark A. Godsey, *When* Terry *Met* Miranda: *Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715 (1994); *see also State v. Buchanan*, 353 N.C. 332 (2001) (test for custody is whether there was formal arrest or restraint on freedom of movement of degree associated with formal arrest); *State v. Washington*, 330 N.C. 188 (1991) (on facts presented, defendant was in custody for *Miranda* purposes when officer placed him in back seat of patrol car), *rev'g* 102 N.C. App. 535 (1991); *State v. Hemphill*, ___ N.C. App. ___, 723 S.E.2d 142, 147 (2012) (holding that "a reasonable person in Defendant's position, having been forced to the ground by an officer with a taser drawn and in the process of being handcuffed, would have felt his freedom of movement had been restrained to a degree associated with formal arrest"); *State v. Johnston*, 154 N.C. App. 500 (2002) (defendant who was ordered out of his vehicle at gun point, handcuffed, placed in the back of a patrol car, and questioned by detectives was in custody for *Miranda* purposes).

H. Field Sobriety Tests

North Carolina cases have assumed (although have not specifically decided) that during a stop based on reasonable suspicion of impaired driving, field sobriety tests and questioning related to possible impairment are within the scope of the stop. *See generally Blasi v. State*, 893 A.2d 1152 (Md. Ct. Spec. App. 2006) (finding field sobriety tests permissible on traffic stop if officer has reasonable suspicion that driver is under the influence of alcohol); *see also State v. Worwood*, 164 P.3d 397 (Utah 2007) (off-duty officer had reasonable suspicion to stop driver for impaired driving, but stop became de facto arrest and violated Fourth Amendment when off-duty officer transported driver more than a mile away from the scene for on-duty officer to conduct field sobriety tests).

Conversely, if officers do not have reasonable suspicion of impaired driving, field sobriety tests are not within the permissible scope of the stop. *See* Jeff Welty, *Field Sobriety Tests During Traffic Stops*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG **(**Apr. 14, 2009) (reviewing

cases from other jurisdictions), http://nccriminallaw.sog.unc.edu/?p=245.

Once the defendant is considered to be in custody, *Miranda* warnings are required for questions calling for a testimonial response. *See supra* § 15.4G, Does *Miranda* Apply? Field sobriety tests may not require a testimonial response, however. *See State v. Flannery*, 31 N.C. App. 617, 623–24 (1976) ("the physical dexterity tests are not evidence of a testimonial or communicative nature . . . and are not within the scope of the *Miranda* decision"; court therefore holds that admitting evidence of defendant's refusal to do tests did not violate his Fifth Amendment right against self-incrimination; court also notes that *Miranda* warnings are not required for similar reasons before a breath test); *see also State v. White*, 84 N.C. App. 111, 115–16 (1987) (*Miranda* warnings not required before administering a breath test because results not testimonial).

I. Defendant's Name

In *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004), the U.S. Supreme Court upheld a defendant's conviction under a state statute requiring an individual stopped by police on the basis of reasonable suspicion to identify himself or herself. The Court stated, "Although it is well established that an officer may ask a suspect to identify himself in the course of a *Terry* stop, it has been an open question whether the suspect can be arrested and prosecuted for refusal to answer." *Id.* at 186–87. The Court held in this case that the stop was justified and the request for the defendant's name was reasonably related in scope to the circumstances that justified the stop (a suspected assault); therefore, enforcement of the state law requirement that the defendant give his name during the stop did not violate the Fourth Amendment. The Court also found no violation of the defendant's Fifth Amendment privilege against self-incrimination because in this case the defendant's refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him or would furnish a link in the chain of evidence needed to prosecute him.

North Carolina does not have a statute comparable to Nevada's statute requiring a person who is the subject of an investigative stop, other than a person driving a vehicle, to disclose his or her name. *See* G.S. 20-29 (person operating motor vehicle may be required to give his or her name). "Officers who lawfully stop someone for investigation may ask the person a moderate number of questions to determine his identity . . . ." *State v. Steen*, 352 N.C. 227, 239 (2000) (citing *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)). However, a person's mere refusal to disclose his or her name (when the person is not driving a vehicle) would appear insufficient to support a charge of violating G.S. 14-223 (resisting, delaying, or obstructing officer). *See also In re D.B.*, __ N.C. App. __, 714 S.E.2d 522 (2011) (officers may not search person during investigative stop to determine his or her identity).

J. VIN Checks

Officers may make a limited warrantless search of a vehicle when they need to determine its ownership. *See New York v. Class*, 475 U.S. 106 (1986) (check of vehicle

identification number valid); *State v. Green*, 103 N.C. App. 38 (1991) (check invalid on facts of case).

15.5 Did the Officer Have Grounds to Arrest or Search?

A. Probable Cause

Required for arrest or search. Although reasonable suspicion may be sufficient to support an officer's initial stop and certain investigative actions during the stop, an officer must have probable cause to make an arrest or probable cause or consent to search for evidence. *See, e.g.*, *State v. Joe*, ___ N.C. App. ___, 730 S.E.2d 779 (2012) (officers did not have probable cause to arrest, and evidence discovered as a result of illegal arrest suppressed), *review granted*, ___ N.C. ___ , 736 S.E.2d 187 (2013); *State v. Wise*, 117 N.C. App. 105 (1994) (officer lawfully stopped vehicle for speeding and lawfully patted down defendant, but officer lacked probable cause to open non-transparent aspirin bottle that officer found on defendant); *State v. Pittman*, 111 N.C. App. 808 (1993) (initial encounter was consensual and subsequent stop was supported by reasonable suspicion, but officers did not have probable cause to search). *Compare Maryland v. Pringle*, 540 U.S. 366 (2003) (police officer had probable cause to believe that defendant, who was the front-seat passenger in vehicle, committed the crime of possession of cocaine, either solely or jointly with other occupants of vehicle; defendant was one of three men riding in the vehicle at 3:16 a.m., $763 of rolled-up cash was found in the glove compartment directly in front of defendant, five plastic baggies of cocaine were behind the back-seat armrest and accessible to all three vehicle occupants, and the three men failed to offer any information with respect to the ownership of the cocaine or money; defendant's admissions to police after lawful arrest and *Miranda* warnings not subject to suppression).

Scope of search. The permissible scope of a search depends on whether the officers have probable cause to arrest or probable cause to search. For a further discussion of whether officers have probable cause to arrest or search and the permissible scope of the search, including in drug cases, see *infra* § 15.6, Did the Officer Act within the Scope of the Arrest or Search?

B. Circumstances Requiring Arrest Warrant and Other Limits on Arrest Authority

Arrest warrant. Usually, when an officer develops probable cause to arrest during a stop, the officer may make the arrest without a warrant. In some instances, however, a warrant may be required. An officer who has probable cause to arrest for a criminal offense may make an arrest without a warrant in the following circumstances: (a) the crime is committed in the officer's presence; or (b) the crime was not committed by the person in the officer's presence but (i) the crime is a felony; (ii) the crime is one of certain listed misdemeanors; or (iii) the crime is a misdemeanor and, unless arrested immediately, the person will not be apprehended or may cause physical injury or property damage. *See*

G.S. 15A-401(b) (also authorizing warrantless arrest for violation of pretrial release conditions).

Violations not subject to arrest. The U.S. Supreme Court has held that officers do not violate the Fourth Amendment if they have probable cause to make an arrest for a criminal offense even if state law does not authorize an arrest for that offense. *See Virginia v. Moore*, 553 U.S. 164 (2008) (Virginia law enforcement officers who had probable cause to arrest defendant for a misdemeanor did not violate Fourth Amendment when they arrested him and conducted search incident to arrest although state law did not authorize an arrest); *see also Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (Fourth Amendment does not bar officer from making warrantless arrest for criminal offense punishable by fine only, in this case a seat belt violation, a misdemeanor under Texas law).

An arrest permitted by the U.S. Constitution but in violation of North Carolina law may still be subject to suppression under G.S. 15A-974. Under North Carolina law, an officer has no authority to arrest for infractions, such as seat belt violations, which are noncriminal violations of law in North Carolina. *See* G.S. 15A-1113; FARB at 82 (noting limitation). An arrest for a noncriminal infraction also may violate the U.S. Constitution. *See Moore*, 553 U.S. 164 (U.S. Constitution authorizes arrest for minor misdemeanors; Court does not address noncriminal infractions).

An officer has no authority to arrest for a wildlife violation, whether a misdemeanor or infraction, by an out-of-state resident if the other state is a member of the interstate wildlife compact, the person agrees to comply with the terms of any citation, and the person provides adequate identification. *See* G.S. 113-300.6, art. III.

For a further discussion of the effect of state law violations, see *supra* § 14.5, Substantial Violations of Criminal Procedure Act.

C. Circumstances Requiring Search Warrant

For search of person. If officers have probable cause to arrest a person, they may search the person incident to arrest without a warrant. For cases discussing probable cause to arrest and potential limits on a search of a person incident to arrest, see *infra* § 15.6B, Search Incident to Arrest; § 15.6C, Other Limits on Searches Incident to Arrest.

If officers have probable cause to search a person, but not arrest him or her, the officers must have exigent circumstances to conduct the search without a warrant. For a discussion of exigent circumstances and potential limits on searches, see *infra* § 15.6D, Probable Cause to Search Person.

For search of vehicle. Generally, if officers have probable cause to search a vehicle, they may search without a warrant. For a discussion of probable cause to search a vehicle and limits on such searches, see *infra* § 15.6E, Probable Cause to Search Vehicle.

D. Consent

Officers may search without probable cause and without a warrant if they obtain consent. For various reasons a purported consent to search may be invalid or insufficient.

Effect of illegal detention. If a person is detained illegally, a consent to search obtained thereafter is subject to suppression on two potential grounds. First, the consent is generally considered the fruit of the poisonous tree because the consent is obtained as a result of the illegal seizure. *See generally Wong Sun v. United States*, 371 U.S. 471 (1963); *see also supra* § 14.2F, "Fruits" of Illegal Search or Arrest. Second, the consent may be involuntary in the totality of the circumstances, including the circumstances surrounding the illegal detention.

Length of detention. Officers may not unduly detain a person for the purpose of requesting consent to search. *See supra* § 15.4E, Nature, Length, and Purpose of Detention.

Clarity of consent. "There must be a clear and unequivocal consent" to authorize a consent search. *State v. Pearson*, 348 N.C. 272, 277 (1988) (consent to search of car was not consent to search of person; acquiescence to frisk when officer told defendant he was going to frisk him also was not consent to search).

Voluntariness of consent. Consent must be voluntary. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (voluntariness determined from totality of circumstances); *State v. Crenshaw*, 144 N.C. App. 574 (2001) (State has burden of proving voluntariness); *United States v. Guerrero*, 374 F.3d 584 (8th Cir. 2004) (reasonable officer would not have believed that Spanish-speaking driver knowingly and voluntarily consented to search of his car; driver's signature on consent-to-search form written in Spanish was not sufficient); *United States v. Worley*, 193 F.3d 380 (6th Cir. 1999) (defendant did not give voluntary consent when he said, "You've got the badge, I guess you can" in response to officer's request to search); *see also supra* § 14.2H, Invalid Consent.

A threat to obtain a search warrant may affect the voluntariness of consent in some circumstances. *See* Jeff Welty, *Consent to Search under Threat of Search Warrant*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 10, 2010) (observing that threat alone may not render consent involuntary but may be considered as part of totality of circumstances), http://nccriminallaw.sog.unc.edu/?p=1741; 4 LAFAVE, SEARCH AND SEIZURE § 8.2(c), at 92–100 (indicating circumstances in which such a threat may render a consent involuntary).

Miranda warnings are not required on a request for consent to search. *See State v. Cummings*, 188 N.C. App. 598 (2008) (so holding in reliance on federal cases, in which courts reasoned that request for consent to search does not constitute interrogation for *Miranda* purposes because the giving of consent is not an incriminating statement).

Authority to consent. The person must have authority to consent or, at least, the officer

must reasonably believe the person has authority. *See Illinois v. Rodriguez*, 497 U.S. 177 (1990) (officers must reasonably believe person has authority to give consent); G.S. 15A-222 (to same effect); *compare State v. McLees*, 994 P.2d 683 (Mont. 2000) (rejecting apparent authority doctrine under state constitution; for consent to be valid against defendant, third party must have actual authority to give consent to search); *State v. Lopez*, 896 P.2d 889 (Haw. 1995) (to same effect).

Whether an officer's belief is reasonable depends on the facts of each case. *See State v. Jones*, 161 N.C. App. 615 (2003) (after seeing police, defendant entered car, removed his jacket, put it on back seat, and then exited, wearing t-shirt in freezing winter weather; driver had authority to give consent to search entire car, including jacket left by defendant); *State v. McDaniels*, 103 N.C. App. 175 (1991) (passenger failed to object when driver consented to search of car and contents; search of contents upheld), *aff'd per curiam*, 331 N.C. 112 (1992); *compare United States v. Purcell*, 526 F.3d 953 (6th Cir. 2008) (female's apparent authority to consent to search of luggage dissipated once officers realized that luggage contained only male's effects); *State v. Frank*, 650 N.W.2d 213 (Minn. Ct. App. 2002) (driver lacked authority to consent to search of defendant's suitcase in trunk of driver's car; officer has obligation to ascertain ownership of items not owned by or within control of the person purportedly giving consent when circumstances do not clearly indicate that the person is the owner or controls item to be searched); *State v. Matejka*, 621 N.W.2d 891, 894 n.3 (Wis. 2001) (collecting cases on consent to search passenger's belongings); *People v. James*, 645 N.E.2d 195 (Ill. 1994) (driver consented to search outside of hearing of defendant-passenger; consent did not authorize police to search purse on passenger's seat). *See also* 4 LAFAVE, SEARCH AND SEIZURE § 8.3(g), at 232–52 (discussing significance of reasonable but mistaken belief by police that third party has authority over place searched).

See also infra "Passenger belongings" in § 15.6C, Other Limits on Searches Incident to Arrest; "Passenger belongings" in § 15.6E, Probable Cause to Search Vehicle.

Scope of consent. General consent does not necessarily extend to all places within the area to be searched. *See Florida v. Jimeno*, 500 U.S. 248 (1991) (consent to general search of car would lead reasonable officer to believe that consent extended to unlocked containers that might hold object of search); *State v. Stone*, 362 N.C. 50 (2007) (officer exceeded scope of consent by pulling sweat pants away from defendant's body and shining flashlight on defendant's groin area); *State v. Pearson*, 348 N.C. 272 (1998) (defendant's consent to search of car did not authorize search of his person); *State v. Neal*, 190 N.C. App. 453 (2008) (female defendant knowingly and voluntarily consented to strip search by female officer); *State v. Johnson*, 177 N.C. App. 122 (2006) (consent to search of van did not authorize officer to pry open wall panel of van; general consent did not include intentional infliction of damage to vehicle), *vacated in part on other grounds*, 360 N.C. 541 (2006) (vacating portion of opinion finding that officers lacked probable cause, independent of consent, to pry open wall panel and remanding case to trial court for further findings of fact). *See also* Jeff Welty, *Scope of Consent to Search a Vehicle*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Mar. 15, 2012) (suggesting that consent to search vehicle does not authorize damaging of vehicle), http://nccriminallaw.sog.unc.edu/?p=3402.

Withdrawal of consent. A person may withdraw consent at any time before completion of the search. *See* 4 LAFAVE, SEARCH AND SEIZURE § 8.1(c), at 57–65. Before withdrawal of consent, however, officers may have uncovered sufficient evidence to justify continuing the search regardless of the presence or absence of consent.

15.6 Did the Officer Act within the Scope of the Arrest or Search?

A. Questioning Following Arrest

Following a lawful arrest, officers must give an in-custody defendant *Miranda* warnings before questioning him or her. For a discussion of *Miranda* principles, see *supra* § 14.3B, *Miranda* Violations.

B. Search Incident to Arrest

Of person. Officers may search a person incident to a lawful arrest of that person. *See United States v. Robinson*, 414 U.S. 218 (1973). Whether officers may search containers in the person's possession is discussed further *infra* in "Containers" in § 15.6C, Other Limits on Searches Incident to Arrest.

Of vehicle. Previously, officers could search the passenger compartment of a vehicle, including containers found within, incident to a lawful arrest of an occupant. *See State v. Logner*, 148 N.C. App. 135 (2001) (warrantless search of defendant's vehicle proper incident to arrest of passenger). The stated rationale for this rule was that officers needed a bright-line rule allowing them to search in areas where an arrestee might be able to use a weapon or destroy evidence. *See New York v. Belton*, 453 U.S. 454 (1981) (stating basic rule); *see also State v. Andrews*, 306 N.C. 144 (1982) (applying *Belton* principles to search of vehicle incident to arrest); *State v. Cooper*, 304 N.C. 701 (1982) (to same effect).

In *Arizona v. Gant*, 556 U.S. 332 (2009), the U.S. Supreme Court held that lower courts had read *Belton* too broadly and ruled that the permissible scope of a search of a vehicle incident to the arrest of an occupant of the vehicle was much narrower. The Court ruled that an officer may search the passenger compartment of a vehicle incident to the arrest of an occupant only if (1) the arrestee is within reaching distance of the passenger compartment and thus able to obtain a weapon or destroy evidence or (2) it is reasonable to believe evidence relevant to the crime of arrest may be found. *Gant* overrules North Carolina decisions allowing an unlimited search of the passenger compartment of a vehicle incident to arrest of an occupant of the vehicle. *See State v. Carter*, 191 N.C. App. 152 (2008) (holding that *Belton* does not require that search incident to arrest of occupant of vehicle be only for evidence connected to the crime charged), *vacated and remanded*, ___ U.S. ___, 129 S. Ct. 2158 (2009), *on remand*, 200 N.C. App. 47 (2009) (suppressing evidence in light of *Gant* and lack of any other ground to uphold search).

Generally, once officers have secured an arrestee—by, for example, handcuffing the

arrestee—they may not search the vehicle based on the first ground identified in *Gant.* Most post-*Gant* cases have therefore involved the second ground for a search of a vehicle and focused on whether it was reasonable for the officer to believe evidence of the crime of arrest would be in the vehicle. *See State v. Mbacke*, 365 N.C.403 (2012) (analogizing the "reasonable to believe" standard in the second prong of *Gant* to the "reasonable suspicion" standard of a *Terry* stop).

Typically, an arrest for a motor vehicle offense will not justify a search incident to arrest on the second *Gant* ground because it will not be reasonable for an officer to believe that evidence relevant to the motor vehicle offense may be found in the vehicle. *See* FARB at 225–26 (so stating). A number of cases have reached this result. *See Meister v. Indiana*, ___ U.S. ___, 129 S. Ct. 2155 (2009) (court summarily vacates state court decision allowing search of vehicle incident to arrest of driver for suspended driver's license; case remanded for reconsideration in light of *Gant*); *State v. Johnson*, 204 N.C. App. 259 (2010) (disallowing search following arrest for suspended license); *State v. Carter*, 200 N.C. App. 47 (2009) (disallowing search following arrest for driving with expired registration tag and failing to notify Division of Motor Vehicles of change of address).

It is also unlikely that officers would have grounds to search a vehicle incident to arrest of an occupant for an outstanding arrest warrant. *See* FARB at 226.

In cases involving gun and drug offenses, courts have found that the officers had a reasonable basis to believe evidence of the offense of arrest could be found in the vehicle. The N.C. Supreme Court has cautioned, however, that a search of a vehicle incident to arrest of an occupant may "not routinely be based on the nature or type of the offense of arrest and that the circumstances of each case ordinarily will determine the propriety of any vehicular searches conducted incident to an arrest." *See State v. Mbacke*, 365 N.C. 403 (2012) (upholding search following arrest for carrying concealed weapon); *State v. Watkins*, ___ N.C. App. ___, 725 S.E.2d 400 (2012) (upholding search following arrest for possession of drug paraphernalia); *State v. Foy*, 208 N.C. App. 562 (2010) (upholding search following arrest for carrying concealed weapon); *see also State v. Toledo*, 204 N.C. App. 170 (2010) (holding that officers had probable cause to search vehicle for marijuana; also suggesting that officers may have had grounds to search vehicle incident to arrest of defendant for possession of marijuana).

C. Other Limits on Searches Incident to Arrest

Arizona v. Gant, discussed in subsection B., above, significantly limits the circumstances in which officers may search a vehicle incident to the arrest of a vehicle's occupant. Additional limits on searches of people and vehicles incident to arrest are discussed below, based on additional case law and *Gant.*

Citations. Officers may not search a person or vehicle incident to issuance of a citation if they do not arrest the person. *See Knowles v. Iowa*, 525 U.S. 113 (1998); *State v. Fisher*, 141 N.C. App. 448 (2000) (defendant had been issued citation for driving while license revoked but had not been placed under arrest; search could not be justified as search

incident to arrest); *see also Sibron v. New York*, 392 U.S. 40, 63 (1968) ("It is axiomatic that an incident search may not precede an arrest and serve as part of its justification."); FARB at 223 (search may be made before actual arrest if arrest is made contemporaneously with search, but whatever is found during search before formal arrest cannot be used to support probable cause for the arrest).

Area and people. Cases before *Gant* permitted a search of the passenger compartment of a vehicle incident to arrest of an occupant of a vehicle, but not other areas, such as the vehicle's trunk, and not other occupants of the vehicle.

Gant does not appear to modify these limitations. *See* FARB at 226 (so stating); *see also Owens v. Kentucky*, ___ U.S. ___, 129 S. Ct. 2155 (2009) (court summarily vacates state court decision authorizing automatic pat down of passengers when officers arrest a vehicle occupant and are preparing to conduct search incident to arrest; case remanded for reconsideration in light of *Gant*); *State v. Schiro*, ___ N.C. App. ___, 723 S.E.2d 134 (2012) (search of trunk of vehicle not valid as search incident to arrest of vehicle occupant; however, search was valid based on defendant's consent).

Containers. Before *Gant*, the North Carolina Court of Appeals held that officers may not search locked containers incident to arrest of a person. *See State v. Thomas*, 81 N.C. App. 200 (1986) (officers could not search, incident to arrest, locked suitcase arrestee was carrying); *cf. State v. Brooks*, 337 N.C. 132 (1994) (officers may search locked compartments within vehicle as part of search incident to arrest).

Gant may limit searches of containers, whether locked or unlocked or whether following arrest of a person or arrest of an occupant of a vehicle. If officers cannot satisfy either ground identified in *Gant* for a search incident to arrest—that is, if the arrestee was secured and could not reach the container, and there was not a reasonable basis to believe that the container contained evidence related to the offense of arrest—officers may not be able to search containers incident to arrest. *See* Jeff Welty, *Is Arizona v. Gant Limited to Automobiles?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 2, 2010) (making this point and citing cases from other jurisdictions to that effect), http://nccriminallaw.sog.unc.edu/?p=1565; FARB at 224–25 n.338;

Cell phones. Cell phones are a form of container but, because of the wide range of data they may contain, may present tricky issues about the permissible scope of a search incident to arrest. The N.C. Supreme Court has upheld the search of a cell phone found on a person incident to arrest of the person, but did not specifically consider the impact of *Arizona v. Gant* or other potential issues. *State v. Wilkerson*, 363 N.C. 382, 432–34 (2009); *see also* Jeff Welty, *Warrantless Searches of Computers and Other Electronic Devices*, at 7–8 (UNC School of Government, Apr. 2011) (listing cases from around the country on this issue), *available at* http://nccriminallaw.sog.unc.edu//wp-content/uploads/2011/05/2011-05-PDF-of-Handout-re-Warrantless-Searches.pdf; Jeff Welty, *Georgia Case on Searching Cell Phones Incident to Arrest*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 20, 2010)

(discussing potential issues), http://nccriminallaw.sog.unc.edu/?p=1835; FARB at 189–90.

Non-contemporaneous search of vehicle. Before *Gant*, some courts precluded a non-contemporaneous search of a vehicle following arrest of an occupant. *See Preston v. United States*, 376 U.S. 364 (1964) (where vehicle had been towed to garage, search of vehicle was not contemporaneous with arrest and was disallowed); *United States v. Vasey*, 834 F.2d 782 (9th Cir. 1987) (search of vehicle was not contemporaneous with arrest where search took place 30 to 45 minutes after occupant had been arrested, handcuffed, and placed in back of patrol car).

This limitation is implicit in the first ground for a search permitted by *Gant* because in virtually all instances the arrestee will not be within reaching distance of the vehicle at the time of a non-contemporaneous search. The courts also may be unwilling to allow vehicle searches long after arrest based on the "reasonable to believe" standard described in *Gant* and may require full probable cause or other grounds for non-contemporaneous searches. *See infra* § 15.6E, Probable Cause to Search Vehicle; § 15.6F, Inventory Search.

Strip search during search incident to arrest. A roadside strip search incident to arrest of a person may be impermissible unless probable cause to search and exigent circumstances exist. *See State v. Battle*, 202 N.C. App. 376, 387–88 (2010) (opinion for court so states); *accord State v. Fowler*, ___ N.C. App. ___, 725 S.E.2d 624, 628 (2012) (adopting language from *Battle*). For a discussion of the validity of strip searches based on probable cause, see *infra* "Strip searches based on probable cause" in § 15.6D, Probable Cause to Search Person.

Recent occupancy. In *Thornton v. United States*, 541 U.S. 615 (2004), a majority of the Court held that the *Belton* doctrine allowed a search of the passenger compartment of a vehicle after arrest of an "occupant" or "recent occupant." In *Thornton*, the Court found that the defendant was a recent occupant when he parked his car and exited right before the officer could pull the car over. *Thornton* appears to remain good law after *Gant.* Thus, if a person is not a "recent occupant" of the vehicle in question when approached by officers, a search of the vehicle incident to arrest of the person remains impermissible. *See State v. Dean*, 76 P.3d 429 (Ariz. 2003) (officers could not search defendant's car incident to arrest; defendant was not "recent occupant" of car when he had not occupied car for some two-and-one-half hours and his arrest occurred not in close proximity to automobile, which was parked in his driveway, but inside his residence). If a person is a recent occupant, officers still must meet one of the two grounds identified in *Gant* for a search of a vehicle incident to arrest of the person.

Passenger belongings. A passenger has standing to contest a search of his or her belongings within a vehicle, such as a purse, incident to arrest of an occupant of the vehicle. *See State v. Mackey*, 209 N.C. App. 116 (2011) (recognizing principle but holding that passenger asserted no possessory interest in vehicle or contents and did not have standing to contest search of vehicle resulting in discovery of weapon under seat).

Pretext. Before *Whren* (discussed *supra* § 15.3I, Pretext), it could be argued that a search incident to arrest violates the Fourth Amendment if the officers arrest the person, rather than issue a citation, as a pretext to search the person incident to arrest. In *Arkansas v. Sullivan*, 532 U.S. 769 (2001), the Court extended the rule in *Whren* to arrests, holding that an officer's decision to arrest a person for a traffic violation, if supported by probable cause, is not invalid even though the arrest is a pretext for a narcotics search incident to arrest. (On remand, the Arkansas Supreme Court held that a pretextual arrest violates the state constitution. *See State v. Sullivan*, 74 S.W.3d 215 (Ark. 2002).)

D. Probable Cause to Search Person

Person. Officers may conduct a warrantless search of a person whom they have not arrested if both probable cause to search and exigent circumstances exist. *See, e.g.*, *State v. Williams*, 209 N.C. App. 255 (2011) (probable cause existed to believe defendant possessed illegal drugs and exigent circumstances existed based on belief that defendant was attempting to swallow them; permissible for officer to conduct warrantless search of the defendant's mouth by grabbing him around the throat, pushing him onto the hood of a vehicle, and demanding that he spit out whatever he was trying to swallow); *State v. Yates*, 162 N.C. App. 118 (2004) (officer had probable cause to search defendant based on strong odor of marijuana about defendant's person; exigent circumstances justified immediate warrantless search); *State v. Smith*, 118 N.C. App. 106, *rev'd on other grounds*, 342 N.C. 407 (1995); *State v. Watson*, 119 N.C. App. 395 (1995).

Containers. Officers may conduct a warrantless search of a container found on a person whom they have not arrested if both probable cause to search *and* exigent circumstances exist. If exigent circumstances do not exist, they must obtain a search warrant. *See State v. Simmons*, 201 N.C. App. 698 (2010) (officers did not have probable cause to search bag or vehicle based on defendant's statements that bag contained cigar guts); FARB at 216–17 (discussing rule and exceptions); *State v. Gilkey*, 18 P.3d 402 (Or. Ct. App. 2001) (officers could seize chapstick container found during frisk but could not open it without a warrant).

Strip searches based on probable cause. Because of their intrusiveness, roadside strip searches require a greater justification than other warrantless searches based on probable cause. Officers must have specific probable cause that the defendant is hiding the items (usually, drugs) on his or her person. Further, there must be "exigent circumstances that show some significant government or public interest would be endangered were the police to wait until they could conduct the search in a more discreet location." *State v. Fowler*, ___ N.C. App. ___, 725 S.E.2d 624, 628 (2012) (citation omitted). The strip search also must be conducted in a reasonable manner. *See also supra* "Strip search during search incident to arrest" in § 15.6C, Other Limits on Searches Incident to Arrest (applying similar standard).

Appellate judges have divided over whether strip searches meet these higher standards. *Compare State v. Battle*, 202 N.C. App. 376 (2010) (finding strip search unconstitutional), *with State v. Robinson*, ___ N.C. App. ___, 727 S.E.2d 712 (2012)

(stating that showing of exigent circumstances was not required where officer had specific basis for believing weapons or contraband were under defendant's clothing) *and Fowler*, ___ N.C. App. ___, 725 S.E.2d 624 (finding exigent circumstances and upholding strip search). *See also State v. Smith*, 118 N.C. App. 106 (1995) (court of appeals holds that although officers' warrantless search was supported by probable cause and exigent circumstances, search was unreasonable where officers required defendant to pull down his pants on public street, shined a flashlight on his scrotum, and reached underneath his scrotum to remove paper towel), *rev'd in pertinent part*, 342 N.C. 407 (1995) (court adopts dissenting opinion, which found that search was not unreasonable under circumstances).

E. Probable Cause to Search Vehicle

Generally. Officers may conduct a warrantless search of an automobile, including the trunk and closed containers, if they have probable cause to believe the objects of the search may be located there. The rationale for what is known as the automobile exception to the warrant requirement is that cars are capable of being moved quickly and people have a reduced expectation of privacy in cars. *See California v. Acevedo*, 500 U.S. 565 (1991) (stating general standard); *State v. Holmes*, 109 N.C. App. 615 (1993) (to same effect); *State v. Corpening*, 109 N.C. App. 586 (1993) (to same effect); *see also Florida v. White*, 526 U.S. 559 (1999) (police do not need warrant to seize vehicle from public place when they have probable cause to believe that vehicle itself is forfeitable contraband). If probable cause exists to search an automobile, officers may conduct an immediate search at the scene, or a later search at the police station, without a warrant. *See Acevedo*, 500 U.S. at 570.

The scope of a warrantless search of a vehicle based on probable cause is broad but not unlimited. "The scope of a warrantless search of an automobile . . . is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *See United States v. Ross*, 456 U.S. 798, 824–25 (1982) (holding that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search; also observing that "[p]robable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab").

Passenger belongings. In *Wyoming v. Houghton*, 526 U.S. 295 (1999), the Court held that officers with probable cause to search a car may search passengers' belongings found in the car that are capable of concealing the object of the search. *Compare State v. Boyd*, 64 P.3d 419 (Kan. 2003) (distinguishing *Houghton*, the court held that officers could not search a passenger's purse as part of their search of a car when they had ordered her to leave her purse in the car and they did not have probable cause to search the car or passenger at the time they gave the order).

Probable cause to search a car and its contents does not necessarily authorize officers to search passengers themselves. Nor does it necessarily authorize searches of passengers'

belongings in other contexts—for example, when the driver but not the passenger consents to a search. *See supra* § 15.5D, Consent.

Seizure of object. Before seizing an object found during a search of a vehicle, officers must have probable cause to believe that the object constitutes evidence of a crime. *See State v. Bartlett*, 130 N.C. App. 79 (1998) (no probable cause to seize plastic-like substance found in car, which upon later laboratory analysis turned out to be controlled substance, because officers admitted that they did not know what substance was at time of seizure).

Drug cases. In *Maryland v. Dyson*, 527 U.S. 465 (1999), the Court reaffirmed that a finding of probable cause that a vehicle contains contraband satisfies the automobile exception to the search warrant requirement. At issue in such cases are what circumstances amount to probable cause to search and where officers may search. *See generally State v. Poczontek*, 90 N.C. App. 455 (1988) (officer lacked probable cause to search car for drugs based on informant's tip and officer's observations after stop).

When an officer detects the odor of marijuana emanating from a vehicle, probable cause exists for a warrantless search of the vehicle for marijuana. *See State v. Smith*, 192 N.C. App. 690 (2008) (so holding). Officers may search in areas of the car where they reasonably believe marijuana may be found. *See State v. Toledo*, 204 N.C. App. 170 (2010) (officer noted odor of marijuana from spare tire in the luggage area after defendant had validly consented to a search of the vehicle; after conducting a "ping test" by pressing the tire valve of the spare tire and noting a very strong odor of marijuana, officer searched second spare tire located under the vehicle; court finds that after first ping test, officer had probable cause to search second tire); *compare Commonwealth v. Garden*, 883 N.E.2d 905 (Mass. 2008) (odor of burnt marijuana on clothes of vehicle's occupant gave officer probable cause to search passenger compartment of vehicle; officer did not have probable cause, however, to search vehicle's trunk because officer could not reasonably believe that source of smell of burnt marijuana would be found in trunk), *abrogated on other grounds, Commonwealth v. Lobo*, 978 N.E.2d 807 (Mass. App. Ct. 2012).

Probable cause to search a vehicle for drugs does not necessarily give officers probable cause to search recent occupants of the vehicle. *See State v. Smith*, ___ N.C. App. ___, 729 S.E.2d 120 (2012) (drug dog's positive alert to a vehicle does not give officers probable cause to search recent occupants of the vehicle); *see also Bailey v. United States*, 568 U.S. ___, 133 S. Ct. 1031 (2013) (search warrant does not justify the detention of occupants beyond the immediate vicinity of the premises covered by a search warrant; in this case, the defendant left the premises before the search began and officers waited to detain him until he had driven about one mile away, which was impermissible in absence of other grounds for detention). *But cf. State v. Mitchell*, ___ N.C. App. ___, 735 S.E.2d 438 (2012) (possession of marijuana blunt by passenger gave officer probable cause to search car in which passenger was riding).

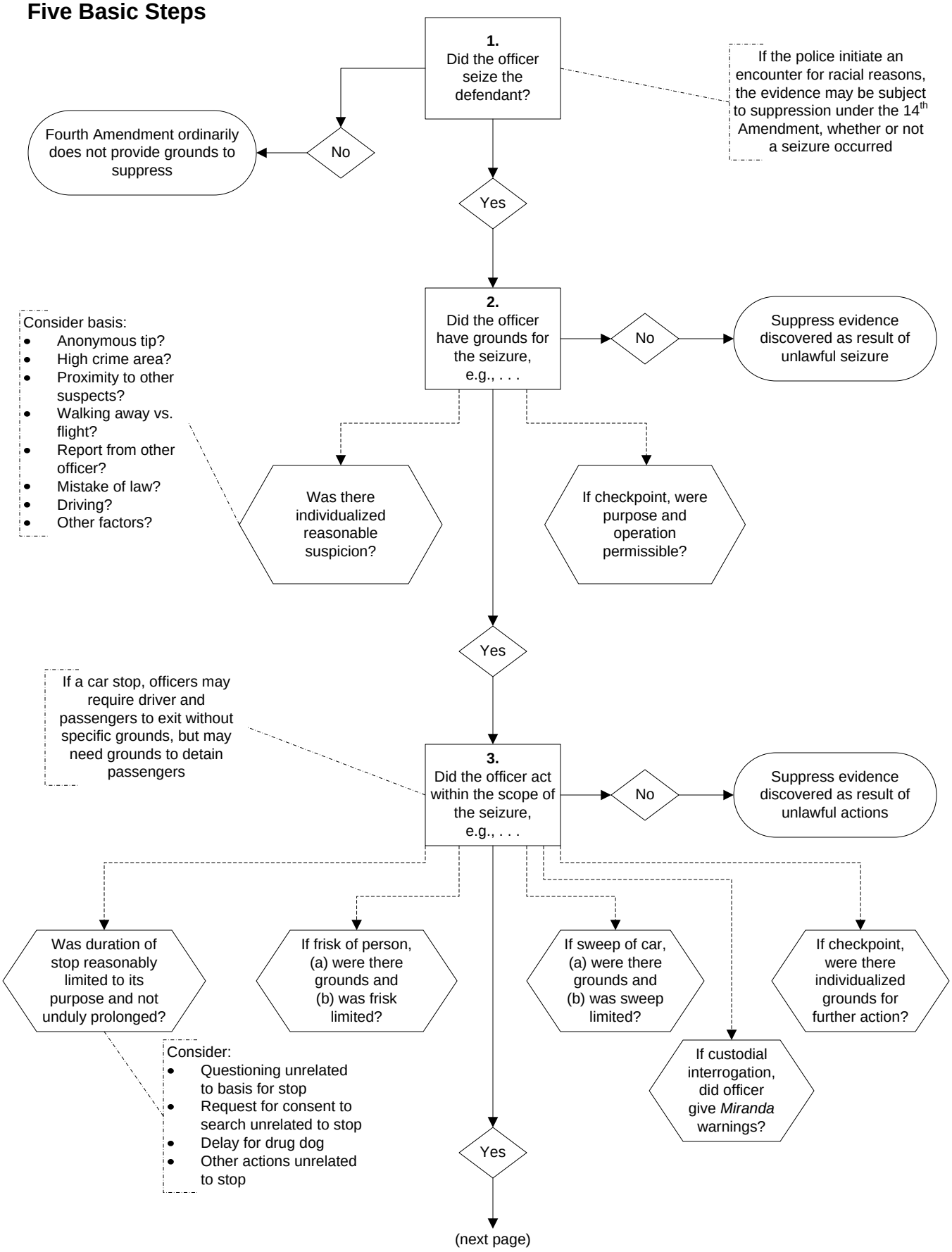
F. Inventory Search

Arrestees. Officers may search and inventory possessions of arrestee. *See* FARB at 229.

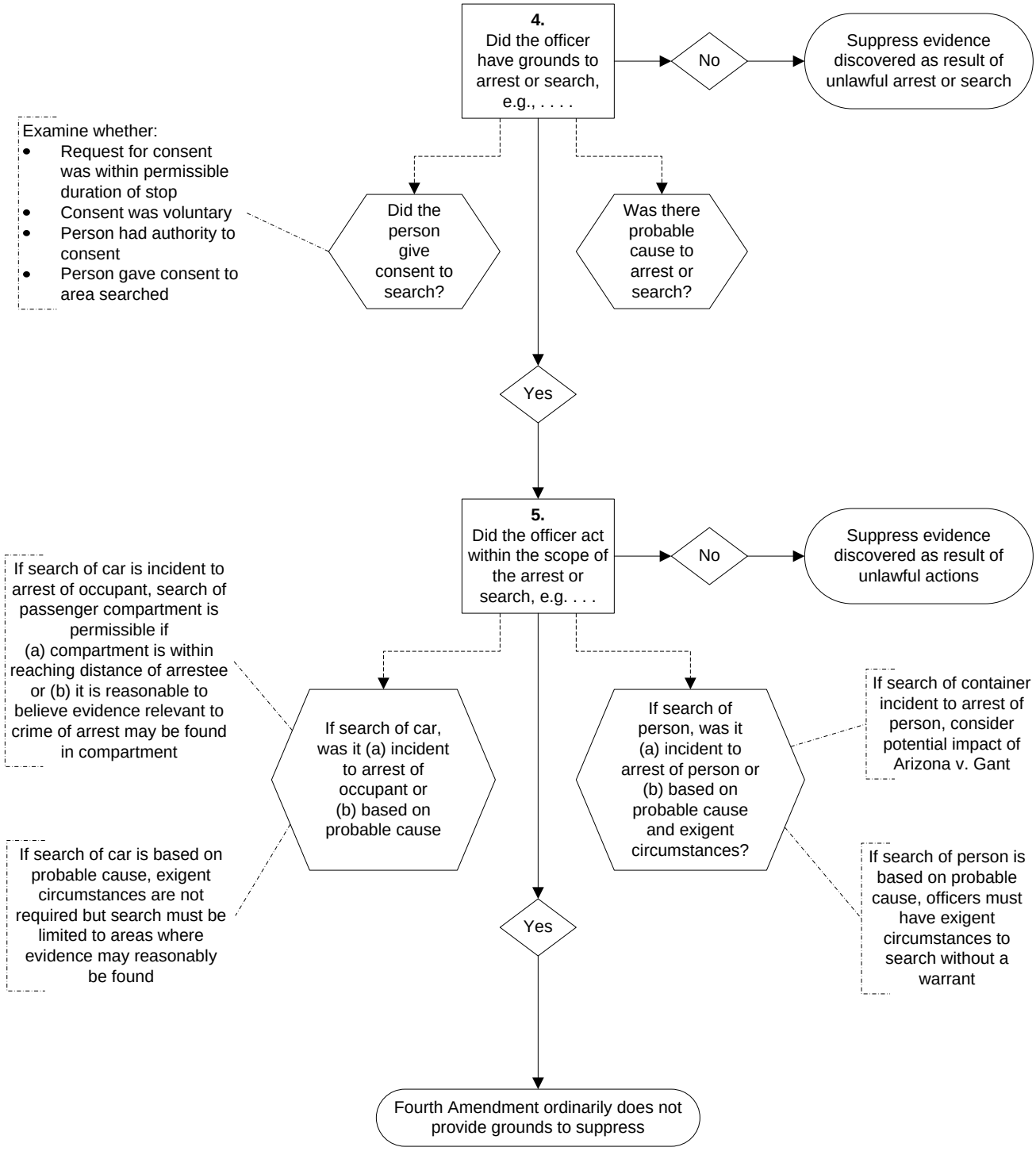
Vehicles. Officers may *impound* a vehicle if pursuant to departmental policy and grounds for impoundment exist, such as the need to safeguard the vehicle and its contents. Officers may *inventory* the vehicle and its contents if pursuant to departmental policy. *See State v. Phifer*, 297 N.C. 216 (1979) (failure to follow standardized procedure; inventory search suppressed); *State v. Peaten*, 110 N.C. App. 749 (1993) (inadequate grounds to impound vehicle; inventory search suppressed); FARB at 233–34 (discussing impoundment and inventory of vehicles).

Pretext. Inventory searches may be challenged as pretextual. *See supra* § 15.3I, Pretext.

Appendix 15-1
Stops and Warrantless Searches: Five Basic Steps



Five Basic Steps (cont'd)



Traffic Stops

Jeff Welty

August 2015

INTRODUCTION

This paper is intended to serve as a reference regarding the Fourth Amendment issues that arise in connection with traffic stops. It begins by addressing officers' conduct before a stop, proceeds to discuss making the stop itself, then considers investigation during traffic stops, and finally covers the termination of traffic stops.[1]

BEFORE THE STOP

"RUNNING TAGS"

Sometimes, an officer will decide to "run" a vehicle's "tag" – that is, run a computer check to determine whether the license plate on the vehicle is current and matches the vehicle, and perhaps whether the vehicle is registered to a person with outstanding warrants or who is not permitted to drive. When this is done randomly, without individualized suspicion, defendants sometimes argue that the officer has conducted an illegal search by running the tag. Courts have uniformly rejected this argument, finding that license plates are open to public view. See, e.g., State v. Chambers, 203 N.C. App. 373 (2010) (unpublished) ("Defendant's license tag was displayed, as required by North Carolina law, on the back of his vehicle for all of society to view. Therefore, defendant did not have a subjective or objective reasonable expectation of privacy in his license tag. As such, the officer's actions did not constitute a search under the Fourth Amendment."); Jones v. Town of Woodworth, 132 So.3d 422 (La. Ct. App. 2013) ("[A] survey of federal and state cases addressing this issue have concluded that a license plate is an object which is constantly exposed to public view and in which a person, thus, has no reasonable expectation of privacy, and that consequently, conducting a random license plate check is legal."); State v. Setinich, 822 N.W.2d 9 (Minn. Ct. App. 2012) (rejecting a defendant's challenge to an officer's suspicionless license plate check because "[a] driver does not have a reasonable expectation of privacy in a license plate number which is required to be openly displayed"); State v. Davis, 239 P.3d 1002 (Or. Ct. App. 2010) (upholding a random license check and stating that "[t]he state can access a person's driving records by observing a driver's registration plate that is displayed in plain view and looking up that registration plate number in the state's own records"), aff'd by an equally divided court, 295 P.3d 617 (2013); State v. Donis, 723 A.2d 35 (N.J. 1998) (holding that there is no reasonable expectation of privacy in the exterior of a vehicle, including the license plate, so an officer's ability to run a tag "should not be limited only to those instances when [the officer] actually witness[es] a violation of motor vehicle laws"). Cf. New York v. Class, 475 U.S. 106 (1986) (finding no reasonable expectation of privacy in a vehicle's VIN number because "it is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile"). See also infra p. 8 (discussion under heading "Driver's Identity" and cases cited therein).

[1] The organization of this paper was inspired in part by Wayne R. LaFave, The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment, 102 Mich. L. Rev. 1843 (2004).

MAKING THE STOP

LEGAL STANDARD

"Reasonable suspicion [is] the necessary standard for stops based on traffic violations." State v. Styles, 362 N.C. 412 (2008) (rejecting the argument that full probable cause is required for stops based on readily observable traffic violations). That is the same standard that applies to investigative stops in connection with more serious offenses. Terry v. Ohio, 392 U.S. 1 (1968). An officer may have reasonable suspicion of a traffic violation if a law is "genuinely ambiguous," and the officer reasonably interprets it to prohibit conduct that the officer has observed, even if the officer's interpretation of the law turns out to be mistaken.[2]

PRETEXTUAL STOPS

If an officer has reasonable suspicion that a driver has committed a crime or an infraction, the officer may stop the driver's vehicle. This is so even if the officer is not interested in pursuing the crime or infraction for which reasonable suspicion exists, but rather is hoping to observe or gather evidence of another offense. Whren v. United States, 517 U.S. 806 (1996) (emphasizing that the "[s]ubjective intentions" of the officer are irrelevant); State v. McClendon, 350 N.C. 630 (1999) (adopting Whren under the state constitution).[3] However, if an officer makes a pretextual traffic stop and then engages in investigative activity that is directed not at the traffic offense but at another offense for which reasonable suspicion is absent, the officer may exceed the permitted scope of the traffic stop. This issue is addressed below, in the section of this paper entitled Investigation During the Stop.

Because the officer's subjective intentions regarding the purpose of the stop are immaterial, whether "an officer conducting a traffic stop [did or] did not subsequently issue a citation is also irrelevant to the validity of the stop." State v. Parker, 183 N.C. App. 1 (2007).

WHEN REASONABLE SUSPICION MUST EXIST

[2] Heien v. North Carolina, __ U.S. __, ___, 135 S. Ct. 530, 541 (2014) (Kagan, J., concurring). In Heien, an officer stopped a motorist for having one burned-out brake light. The court of appeals ruled that the applicable statute required only one working brake light and that the stop was therefore unreasonable. The Supreme Court reviewed the case and ruled that the brake light statute was sufficiently difficult to parse that the officer's interpretation was reasonable even if mistaken, rendering the stop reasonable also. The majority opinion does not set forth a standard for when an officer's mistaken interpretation of law is reasonable, but Justice Kagan's concurrence argues that such an interpretation is reasonable only when the law itself is "genuinely ambiguous."

[3] Indeed, a stop may be legally justified even where the officer is completely unaware of the offense for which reasonable suspicion exists and makes the stop based entirely on the officer's incorrect belief that reasonable suspicion exists for another offense. See, e.g., Devenpeck v. Alford, 543 U.S. 146 (2004) ("[A]n arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." (internal citations omitted)); State v. Osterhoudt, 222 N.C. App. 620 (2012) (an officer stopped the defendant based on the officer's mistaken belief that the defendant's driving violated a particular traffic law; the court of appeals concluded that the law in question had no application to the defendant's driving, but upheld the stop because the facts observed by the officer provided reasonable suspicion that the defendant's driving violated a different traffic law, notwithstanding the fact that the officer did not act on that basis).

Normally, a law enforcement officer will attempt to develop reasonable suspicion before instructing a motorist to stop. But what if the officer does not have reasonable suspicion at that point, yet develops reasonable suspicion prior to the person's compliance with the officer's instruction? In California v. Hodari D., 499 U.S. 621 (1991), the United States Supreme Court held that a show of authority is not a seizure until the subject complies. Because the propriety of a seizure depends on the facts known at the time of the seizure, it appears that events after an officer's show of authority, but before a driver's submission to it, may be used to justify the stop. For example, an officer who activates his blue lights after observing a driver traveling 45 m.p.h. in a 55 m.p.h. zone may be without reasonable suspicion. But if the driver initially ignores the blue lights, continues driving, and weaves severely before stopping, the seizure may be upheld based on the driver's weaving in addition to his slow rate of speed. State v. Atwater, __ N.C. App. __, 723 S.E.2d 582 (2012) (unpublished) (adopting the foregoing analysis and concluding that "[r]egardless of whether [the officer] had a reasonable suspicion that defendant was involved in criminal activity prior to turning on his blue lights, defendant's subsequent actions [erratic driving and running two stop signs] gave [the officer] reasonable suspicion to stop defendant for traffic violations"); United States v. Swindle, 407 F.3d 562 (2d Cir. 2005) (reluctantly concluding that a court may "consider[] events that occur[] after [a driver is] ordered to pull over" but before he complies in determining the constitutionality of a seizure); United States v. Smith, 217 F.3d 746 (9th Cir. 2000) (relying on Hodari D. to reject the argument that "only the factors present up to the point when [the officer] turned on the lights of his patrol car can be considered in analyzing the validity of the stop"). Cf. United States v. McCauley, 548 F.3d 440 (6th Cir. 2008) ("We determine whether reasonable suspicion existed at the point of seizure – not . . . at the point of attempted seizure."); United States v. Johnson, 212 F.3d 1313 (D.C. Cir. 2000) (similar). Cf. generally 4 Wayne R. LaFave, Search and Seizure § 9.4(d) n.198 (5th ed. 2012) (collecting cases) (hereinafter, LaFave, Search and Seizure).

COMMON ISSUES

SPEEDING

Many traffic stops based on speeding are supported by radar or other technological means. However, an officer's visual estimate of a vehicle's speed generally is also sufficient to support a traffic stop for speeding. State v. Barnhill, 166 N.C. App. 228 (2004) (upholding a traffic stop based on the estimate of an officer who had no special training that the defendant was speeding 40 m.p.h. in a 25 m.p.h. zone, and stating that "it is well established in this State, that any person of ordinary intelligence, who had a reasonable opportunity to observe a vehicle in motion and judge its speed may testify as to his estimation of the speed of that vehicle"). However, if a vehicle is speeding only slightly, an officer's visual estimate of speed may be insufficiently reliable and accurate to support a traffic stop. Compare United States v. Sowards, 690 F.3d 583 (4th Cir. 2012) (officer's visual estimate that the defendant was speeding 75 m.p.h. in a 70 m.p.h. zone was insufficient to support a traffic stop; the officer also expressed some difficulty with units of measurement), with United States v. Mubdi, 691 F.3d 334 (4th Cir. 2012) (traffic stop was justified when two officers independently estimated that the defendant was speeding between 63 m.p.h. and 65 m.p.h. in a 55 m.p.h. zone), vacated on other grounds, __ U.S. __, 133 S. Ct. 2851 (2013).

DRIVING SLOWLY

Driving substantially under the posted speed limit is not itself necessarily unlawful. In fact, it is sometimes required by G.S. 20-141(a), which states that "[n]o person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing." On the other hand, in some circumstances, driving slowly may constitute obstruction of traffic under G.S. 20-141(h) ("No person shall operate

a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movement of traffic . . . ."), or may violate posted minimum speed limits under G.S. 20-141(c) (unlawful to operate passenger vehicle at less than certain minimum speeds indicated by appropriate signs). Furthermore, the fact that a driver is proceeding unusually slowly may contribute to reasonable suspicion that the driver is impaired. See, e.g., State v. Bonds, 139 N.C. App. 627 (2000) (driver's blank look, slow speed, and the fact that he had his window down in cold weather provided reasonable suspicion; opinion quotes NHTSA publication regarding the connection between slow speeds, blank looks, and DWI); State v. Aubin, 100 N.C. App. 628 (1990) (fact that defendant slowed to 45 m.p.h. on I-95 and weaved within his lane supported reasonable suspicion of DWI); State v. Jones, 96 N.C. App. 389 (1989) (although the defendant did not commit a traffic infraction, "his driving 20 miles per hour below the speed limit and weaving within his lane were actions sufficient to raise a suspicion of an impaired driver in a reasonable and experienced [officer's] mind").

Whether slow speed alone is sufficient to provide reasonable suspicion of impairment is not completely settled in North Carolina. The state supreme court seemed to suggest that it might be in State v. Styles, 362 N.C. 412 (2008) ("For instance, law enforcement may observe certain facts that would, in the totality of the circumstances, lead a reasonable officer to believe a driver is impaired, such as weaving within the lane of travel or driving significantly slower than the speed limit."), but the court of appeals stated that it is not in a subsequent unpublished decision, State v. Brown, 207 N.C. App. 377 (2010) (unpublished) (stating that traveling 10 m.p.h. below the speed limit is not alone enough to create reasonable suspicion, but finding reasonable suspicion based on speed, weaving, and the late hour). The weight of authority in other states is that it is not. See, e.g., State v. Bacher, 867 N.E.2d 864 (Ohio Ct. App. 2007) (holding that "slow travel alone [in that case, 23 m.p.h. below the speed limit on the highway] does not create a reasonable suspicion," and collecting cases from across the country).

It is also unclear just how slowly a driver must be travelling in order to raise suspicions. Of course, driving a few miles per hour under the posted limit is not suspicious. State v. Canty, 224 N.C. App. 514 (2012) (fact that vehicle slowed to 59 m.p.h. in a 65 m.p.h. zone upon seeing officers did not provide reasonable suspicion). Ten miles per hour under the limit, however, may be enough to contribute to suspicion. Brown, 207 N.C. App 377 (finding reasonable suspicion where defendant was driving 10 m.p.h. under the speed limit and weaving within a lane); State v. Bradshaw, 198 N.C. App. 703 (2009) (unpublished) (late hour, driving 10 m.p.h. below the limit, and abrupt turns provided reasonable suspicion). Certainly, the more sustained and the more pronounced the slow driving, the greater the suspicion.

WEAVING

G.S. 20-146 requires that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

ACROSS LANES

Absent exceptional circumstances, weaving across lanes of traffic generally violates this provision and supports a traffic stop. See, e.g., State v. Osterhoudt, 222 N.C. App. 620 (2012) (where the "defendant crossed [a] double yellow line . . . he failed to stay in his lane and violated" G.S. 20-146); State v. Hudson, 206 N.C. App. 482 (2010) (where the defendant "crossed the center line of I–95 and pulled back over the fog line twice," an officer was justified in stopping him for a violation of G.S. 20-146). See also State v. Kochuk, 366 N.C. 549 (2013) (per curiam) (adopting the analysis of the dissenting opinion in the court of appeals where it was explained that a driver "momentarily crossed the right dotted line once while in the middle lane" and "later drove on the fog line twice";

the opinion cites Hudson, supra, and appears to suggest that a stop was justified under G.S. 20-146; however, the opinion focuses primarily on the presence of reasonable suspicion of impaired driving as a basis for the stop); State v. Simmons, 205 N.C. App. 509 (2010) (without discussing G.S. 20-146, the court ruled that a stop was supported by reasonable suspicion of DWI where the defendant "was not only weaving within his lane, but was also weaving across and outside the lanes of travel, and at one point actually ran off the road"). But cf. State v. Derbyshire, __ N.C. App. __, 745 S.E.2d 886 (2013) (holding that a stop was not supported by reasonable suspicion of DWI because it was based on only "one instance of weaving," even though "the right side of Defendant's tires crossed into the right-hand lane" during the weaving; the court did not address G.S. 20-146 as a possible basis for the stop).

Driving so that one's tires touch, but do not cross, a lane line should be treated as weaving within a lane, not weaving across lanes. Shea Denning, Keeping It Between the Lines, N.C. Crim. L. Blog (Mar. 11, 2015), http://nccriminallaw.sog.unc.edu/keeping-it-between-the-lines/ (discussing this point and citing State v. Peele, 196 N.C. App. 668 (2009), where the court ruled that there was no reasonable suspicion to stop a defendant whose tires touched the lane lines twice; although the court's discussion focuses on the presence or absence of reasonable suspicion of DWI and does not cite G.S. 20-146, the court does characterize the defendant's driving as weaving "within" a lane).

WITHIN A LANE

Weaving within a single lane does not violate G.S. 20-146 and so is not itself a crime or an infraction. In some circumstances, however, weaving within a single lane may provide, or contribute to, reasonable suspicion that a driver is impaired or is driving carelessly.

- *Moderate Weaving within a Lane: Weaving Plus.* In State v. Fields, 195 N.C. App. 740 (2009), the court of appeals held that an officer did not have reasonable suspicion that a driver was impaired where the driver "swerve[d] to the white line on the right side of the traffic lane" three times over a mile and a half. However, the court stated that weaving, "coupled with additional . . . facts," may provide reasonable suspicion. The court cited cases involving additional facts such as driving "significantly below the speed limit," driving at an unusually late hour, and driving in the proximity of drinking establishments. Thus, Fields stands for the proposition that moderate weaving within a single lane does not provide reasonable suspicion, but that 'weaving plus' may do so. Fields has been applied in cases such as State v. Wainwright, __ N.C. App. __, 770 S.E.2d 99 (2015) (mistakenly analyzing weaving across a lane line as if it were weaving within a lane, then finding reasonable suspicion of impaired driving based in part on the weaving and in part on the late hour and the proximity to bars); State v. Kochuk, 366 N.C. 549 (2013) (ruling that reasonable suspicion supported a stop where the defendant was weaving and it was 1:10 a.m.); State v. Derbyshire, __ N.C. App. __, 745 S.E.2d 886 (2013) (holding that weaving alone did not provide reasonable suspicion to support a stop, that driving at 10:05 p.m. on a Wednesday is "utterly ordinary" and insufficient to render weaving suspicious, and that having "very bright" headlights also was not suspicious); and State v. Peele, 196 N.C. App. 668 (2009) (finding no reasonable suspicion of DWI where an officer received an anonymous tip that defendant was "possibl[y]" driving while impaired, then saw the defendant "weave within his lane once").

- *Severe Weaving within a Lane.* While moderate weaving within a single lane is insufficient by itself to support a traffic stop, severe weaving may suffice. In State v. Fields, 219 N.C. App. 385 (2012), the court of appeals upheld a traffic stop conducted by an officer who followed the defendant for three quarters of a mile and saw him "weaving in his own lane . . . sufficiently frequent[ly] and erratic[ly] to prompt evasive maneuvers from

other drivers." The officer compared the defendant's vehicle to a "ball bouncing in a small room." The extensive weaving enabled the court of appeals to distinguish the precedents discussed in the preceding paragraph. See also State v. Otto, 366 N.C. 134 (2012) (traffic stop justified by the defendant's "constant and continual" weaving at 11:00 p.m. on a Friday night).

SITTING AT A STOPLIGHT

Like weaving within a single lane, remaining at a stoplight after the light turns green is not, in itself, a violation of the law. But also like weaving, it may provide or contribute to reasonable suspicion that the driver is impaired.[4] An important factor in such cases is the length of the delay. Compare State v. Barnard, 362 N.C. 244 (2008) (determining that reasonable suspicion supported an officer's decision to stop the defendant where the defendant was waiting at a traffic light in a high-crime area, near several bars, at 12:15 a.m., and "[w]hen the light turned green, defendant remained stopped for approximately thirty seconds" before proceeding), with State v. Roberson, 163 N.C. App. 129 (2004) (finding no reasonable suspicion where the defendant sat at a green light at 4:30 a.m., near several bars, for 8 to 10 seconds, and stating that "[a] motorist waiting at a traffic light can have her attention diverted for any number of reasons. . . . [so] a time lapse of eight to ten seconds does not appear so unusual as to give rise to suspicion justifying a stop").

UNSAFE MOVEMENT/LACK OF TURN SIGNAL

Under G.S. 20-154(a), "before starting, stopping or turning from a direct line[, a driver] shall first see that such movement can be made in safety . . . and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required." Litigation under this statute has focused on the phrase "the operation of any other vehicle may be affected." Generally, the appellate courts have held that a driver need not signal when making a mandatory turn, but must if the turn is optional and there is another vehicle following closely. Compare State v. Ivey, 360 N.C. 562 (2006) (the defendant was not required to signal at what amounted to a right-turn-only intersection; a right turn was the "only legal movement he could make," and the vehicle behind him was likewise required to stop, then turn right, so the defendant's turn did not affect the trailing vehicle), and State v. Watkins, 220 N.C. App. 384 (2012) (suggesting that there was insufficient evidence of unsafe movement where the defendant changed lanes without signaling while driving three to four car lengths in front of a police vehicle on a road with heavy traffic, because it was not clear that another vehicle was affected), with State v. Styles, 362 N.C. 412 (2008) (where the defendant changed lanes "immediately in front of" an officer, he violated the statute; "changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle"), and State v. McRae, 203 N.C. App. 319 (2010) (similar).

LATE HOUR, HIGH-CRIME AREA

The United States Supreme Court has held that presence in a high-crime area, "standing alone, is not a basis for concluding that [a person is] engaged in criminal conduct." Brown v. Texas, 443 U.S. 47 (1979). Although the stop in Brown took place at noon, presence in a high-crime area at an unusually late hour is also alone insufficient to provide reasonable suspicion. State v. Murray, 192 N.C. App. 684 (2008) (no reasonable suspicion to stop defendant, who was driving in a commercial area with a high incidence of property crimes at 3:41 a.m.). But the

[4] Under some circumstances, it might also constitute obstructing traffic in violation of G.S. 20-141(h).

incidence of crime in the area and the hour of night are factors that, combined with others such as nervousness or evasive action, may contribute to reasonable suspicion. Cf. In re I.R.T., 184 N.C. App. 579 (2007) (listing factors); State v. Mello, 200 N.C. App. 437 (2009) (holding that the defendant's presence in a high-drug area, coupled with evasive action on the part of individuals seen interacting with defendant, provided reasonable suspicion supporting a stop).

COMMUNITY CARETAKING

The court of appeals recognized the community caretaking doctrine as a basis for a vehicle stop in State v. Smathers, __ N.C. App. __, 753 S.E.2d 380 (2014). In Smathers, an officer stopped the defendant to make sure that she was OK after her car hit a large animal that ran in front of her. The court ruled that the stop was justified, finding an objectively reasonable basis for the caretaking stop that outweighed the intrusion of the stop on the driver's privacy. The court set out a flexible test for community caretaking, yet cautioned that the doctrine should be applied narrowly, so its precise scope remains uncertain.

TIPS

Whether information from a tipster provides reasonable suspicion to stop a vehicle depends on the totality of the circumstances. Whether the tipster is identified is a critical factor, so this paper treats anonymous tips separately from other tips.

ANONYMOUS TIPS

Historically, information from an anonymous tipster has been viewed as insufficient to support a stop, at least without unusual indicia of reliability, such as very detailed information or meaningful corroboration of the tip by the police. State v. Coleman, __ N.C. App. __, 743 S.E.2d 62 (2013) (a tip that the court treated as anonymous did not provide reasonable suspicion, in part because it "did not provide any way for [the investigating officer] to assess [the tipster's] credibility, failed to explain her basis of knowledge, and did not include any information concerning defendant's future actions"); State v. Blankenship, __ N.C. App. __, 748 S.E.2d 616 (2013) (taxi driver's anonymous call to 911, reporting that a specific red Ford Mustang, headed in a specific direction, was "driving erratically [and] running over traffic cones," was insufficient to support a stop of a red Mustang located less than two minutes later headed in the described direction; officers did not corroborate the bad driving and the tip had "limited but insufficient indicia of reliability"); State v. Johnson, 204 N.C. App. 259 (2010) (stating that "[c]ourts have repeatedly recognized, as a general rule, the inherent unreliability of anonymous tips standing on their own" unless such a tip "itself possess[es] sufficient indicia of reliability, or [is] corroborated by [an] officer's investigation or observations"); State v. Peele, 196 N.C. App. 668 (2009) (an anonymous tip that the defendant was driving recklessly, combined with an officer's observation of a single instance of weaving, was insufficient to give rise to reasonable suspicion). This skepticism was rooted in part in Florida v. J.L., 529 U.S. 266 (2000), a non-traffic stop case in which the Court stated that "[u]nlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated . . . an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," and so rarely provides reasonable suspicion. *Id.* (internal quotation marks and citation omitted.)

However, the Supreme Court recently decided Navarette v. California, 572 U.S. __, 134 S. Ct. 1683 (2014), ruling that a motorist's 911 call, reporting that a specific vehicle had just run the caller off the road, was an

anonymous tip that provided reasonable suspicion to stop the described vehicle 15 minutes later. The Court first ruled that the tip was reliable. It reasoned that the caller effectively claimed first-hand knowledge of the other vehicle's dangerous driving; that the call was "especially reliable" because it was contemporaneous with the dangerous driving; and that the call was made to 911, which "has some features [like recording and caller ID] that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity." Then the Court held that running another vehicle off the road "suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues," and so provided reasonable suspicion of DWI. Because the Court found reasonable suspicion based on a garden-variety anonymous 911 call that the officers did little to corroborate, Navarette almost certainly changes the law in North Carolina regarding anonymous tips and reasonable suspicion.[5] However, it is unclear how far Navarette will extend. Will it apply when the tip is received through a means other than 911? When it concerns a completed traffic offense rather than an ongoing one like DWI? These issues will need to be decided in future cases.

OTHER TIPS

Where an informant "willingly place[s] her anonymity at risk," by identifying herself or by speaking to an officer face to face, courts more readily conclude that the information provides reasonable suspicion. State v. Maready, 362 N.C. 614 (2008) (court gave significant weight to information provided by a driver who approached officers in person, thereby allowing officers to see her, her vehicle, and her license plate, notwithstanding the fact that the officers did not in fact make note of any identifying information about her). See also State v. Hudgins, 195 N.C. App. 430 (2009) (a driver called the police to report that he was being followed, then complied with the dispatcher's instructions to go to a specific location to allow an officer to intercept the trailing vehicle; when the officer stopped the second vehicle, the caller also stopped briefly; the defendant, who was driving the second vehicle, was impaired; the stop was proper, in part because "by calling on a cell phone and remaining at the scene, [the] caller placed his anonymity at risk").[6]

DRIVER'S IDENTITY

[5] North Carolina's appellate courts could adhere to the previous line of authority by ruling that the North Carolina Constitution provides greater protection than the Fourth Amendment, but that is unlikely given the courts' repeated statements that the state and federal constitutions provide coextensive protection from unreasonable searches and seizures. See, e.g., State v. Verkerk, __ N.C. App. __, 747 S.E.2d 658 (2013) (stating that "this Court and the [state] Supreme Court have clearly held that, as far as the substantive protections against unreasonable searches and seizures are concerned, the federal and state constitutions provide the same rights," and citing multiple cases holding that the two constitutions are coextensive in this regard), rev'd on other grounds, 367 N.C. 483 (2014).

[6] The Hudgins court emphasized that the caller remained at the scene of the stop, thereby relinquishing his anonymity. By contrast, in State v. Blankenship, __ N.C. App. __, 748 S.E.2d 616 (2013), a taxi driver called 911 on his cell phone to report an erratic driver. The taxi driver did not give his name, but "when an individual calls 911, the 911 operator can determine the phone number used to make the call. Therefore, the 911 operator was later able to identify the taxicab driver." Nonetheless, the court treated the call as an anonymous tip because "the officers did not meet [the taxi driver] face-to-face," and found that the tip failed to provide reasonable suspicion to support a stop of the other driver. See also State v. Coleman, __ N.C. App. __, 743 S.E.2d 62 (2013) (treating a telephone tip as anonymous even though "the communications center obtained the caller's name . . . and phone number").

"[W]hen a police officer becomes aware that a vehicle being operated is registered to an owner with a suspended or revoked driver's license, and there is no evidence appearing to the officer that the owner is not the individual driving the automobile, reasonable suspicion exists to warrant an investigatory stop." State v. Hess, 185 N.C. App. 530 (2007). See also State v. Johnson, 204 N.C. App. 259 (2010) ("[T]he officers did lawfully stop the vehicle after discovering that the registered owner's driver's license was suspended."). Presumably, an officer would also be justified in stopping a vehicle if he determined that the registered owner was the subject of an outstanding arrest warrant or other criminal process and if the officer could not rule out the possibility that the owner of the vehicle was driving.[7]

INVESTIGATION DURING THE STOP

ORDERING OCCUPANTS OUT OF THE VEHICLE

In the interest of officer safety, an officer may order any or all of a vehicle's occupants out of the vehicle during a traffic stop. Pennsylvania v. Mimms, 434 U.S. 106 (1977) (driver); Maryland v. Wilson, 519 U.S. 408 (1997) (passengers). Likewise, an officer may order the vehicle's occupants to remain in the vehicle. State v. Shearin, 170 N.C. App. 222 (2005); Robert L. Farb, Arrest, Search, and Investigation in North Carolina 45 & n.191 (4th ed. 2011) (collecting cases). Whether, and under what circumstances, an officer can order a driver or passenger into the back seat of the officer's cruiser is an open question in North Carolina and is the subject of a split of authority nationally. Jeff Welty, Traffic Stops, Part II, N.C. Crim. L. Blog (October 28, 2009), http://nccriminallaw.sog.unc.edu/traffic-stops-part-ii/.

FRISKING OCCUPANTS

A frisk does not follow automatically from a valid stop. It is justified only if the officer reasonably suspects that the person or people to be frisked are armed and dangerous. Terry v. Ohio, 392 U.S. 1 (1968). For example, a frisk was justified when a driver "had prior convictions for drug offenses, [an officer] observed [the driver's] nervous behavior inside his vehicle, and [the officer] saw him deliberately conceal his right hand and refuse to open it despite repeated requests." State v. Henry, __ N.C. App. __, 765 S.E.2d 94 (2014). An officer may frisk a passenger based on reasonable suspicion that the passenger is armed and dangerous, even if the officer does not suspect the passenger of criminal activity. Arizona v. Johnson, 555 U.S. 323 (2009).

"CAR FRISKS"

In Michigan v. Long, 463 U.S. 1032 (1983), the Supreme Court held that "the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses [reasonable suspicion] that the suspect is dangerous and the suspect may gain immediate control of weapons." Although Long was decided in the context of what might be described as a Terry stop rather than a traffic stop – because the vehicle in Long had already crashed when officers stopped to investigate – the two types

[7] In State v. Watkins, 220 N.C. App. 384 (2012), the court of appeals upheld a stop based in part on the fact that the registered owner of a vehicle had outstanding warrants even though the officers involved in the case were "pretty sure" that the driver was not the owner. The court noted that the defendant "was driving a car registered to another person," that the registered owner had outstanding warrants, and that there was a passenger in the vehicle who could have been the registered owner.

of stops are similar if not identical,[8] and the concept of a car frisk applies with equal force to traffic stops. State v. Hudson, 103 N.C. App. 708 (1991) (upholding car frisk arising out of a traffic stop).

Whether there is reasonable suspicion that a person is dangerous is similar to the inquiry that must be made in the Terry frisk context. Factors that courts have mentioned in the car frisk context include: furtive movements by the occupants of the vehicle; lack of compliance with police instructions; belligerence; reports that the suspect is armed; and visible indications that a weapon may be present in the car. See, e.g., State v. Edwards, 164 N.C. App. 130 (2004) (finding a car frisk justified where a sexual assault suspect was reported to have a gun; was noncompliant; and appeared to have reached under the seat of his vehicle); State v. Minor, 132 N.C. App. 478 (1999) (holding a car frisk not justified where a suspect appeared to access the center console of the vehicle and later rubbed his hand on his thigh near his pocket; these movements were not "clearly furtive"); State v. Clyburn, 120 N.C. App. 377 (1995) (ruling a car frisk justified where officers suspected that the defendant was involved in the drug trade and the defendant was belligerent during the stop).

Whether an officer's belief that a suspect may gain immediate control of a weapon is reasonable depends on the particular circumstances of a given traffic stop including the suspect's location relative to the vehicle and whether the suspect has been handcuffed. Compare Edwards, 164 N.C. App. 130 (defendant suspected of possessing handgun who was handcuffed and sitting on the curb was in sufficiently "close proximity to the interior of the vehicle" to gain access to a weapon), and State v. Parker, 183 N.C. App. 1 (2007) (defendant was handcuffed in the backseat of his own car when he disclosed that there was a gun in the car; two other passengers were also in the car; "these circumstances were sufficient to create a reasonable belief that defendant was dangerous and had immediate access to a weapon"), with State v. Braxton, 90 N.C. App. 204 (1988) (it was "uncontroverted that defendant [stopped for speeding] could not obtain any weapon . . . from the car" where he was not in the car and detective testified that defendant could not have reached the area searched).

As to the proper scope of a car frisk, there is little North Carolina law on point. In Parker, 183 N.C. App. 1, the court held that an officer properly searched "a drawstring bag located underneath a piece of newspaper that fell to the ground" as he assisted an occupant out of the vehicle. The court noted that the bag was located near a firearm and "was at least large enough to contain methamphetamine and a 'smoking device," perhaps suggesting a willingness to err on the side of officer safety when confronted with ambiguous facts.

LICENSE, WARRANT, AND RECORD CHECKS

Officers frequently check the validity of a driver's license, registration, and insurance during a traffic stop, and may also check for any outstanding arrest warrants against the driver. In Rodriguez v. United States, __ U.S. __, 135 S. Ct. 1609 (2015), the Supreme Court ruled that "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance" are routine and permissible parts of an ordinary traffic stop.

This statement is consistent with prior North Carolina case law allowing these checks, and the associated brief delays. State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (2014) (finding "no . . . authority" for the

[8] Berkemer v. McCarty, 468 U.S. 420 (1984) ("[T]he usual traffic stop is more analogous to a so-called 'Terry stop' than to a formal arrest." (internal citations omitted)); State v. Styles, 362 N.C. 412 (2008) ("Traffic stops have 'been historically reviewed under the investigatory detention framework first articulated in Terry.'" (citation omitted)).

defendant's claim that a document check exceeded the scope of a speeding stop, and noting that "officers routinely check relevant documentation while conducting traffic stops"); State v. Hernandez, 170 N.C. App. 299 (2005) (holding that "running checks on Defendant's license and registration" was "reasonably related to the stop based on the seat belt infraction"); State v. Castellon, 151 N.C. App. 675 (2002) (twenty-five minute "detention for the purpose of determining the validity of defendant's license was not unreasonable" when officer's computer was working slowly). See also, e.g., United States v. Villa, 589 F.3d 1334 (10th Cir. 2009) ("It is well-established that [a] law enforcement officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation." (citation omitted)); See generally Wayne R. LaFave, The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment, 102 Mich. L. Rev. 1843, 1874-85 (2004) (noting that most courts have permitted license, warrant, and record checks incident to traffic stops, though criticizing some of these conclusions) [hereinafter LaFave, "Routine"].

Checks that focus on a motorist's criminal history rather than his or her driving status and the existence of outstanding arrest warrants may be permissible also, though the issue is less clearly settled. The Rodriguez Court briefly suggested that criminal record checks may be permissible as an officer safety measure. 135 S. Ct. at 1616 (citing United States v. Holt, 264 F.3d 1215 (10th Cir. 2001) (en banc), for the proposition that running a motorist's criminal record is justified by officer safety). However, the Court did not address the issue in detail and at least one state court has since found one variety of record check to be improperly directed at detecting evidence of ordinary criminal wrongdoing. United States v. Evans, 786 F.3d 779 (9th Cir. 2015) (ruling that an officer improperly extended a traffic stop to conduct an "ex-felon registration check," a procedure that inquired into a subject's criminal history and determined whether he had registered his address with the sheriff as required for certain offenders in the state in which the stop took place).

QUESTIONS ABOUT UNRELATED MATTERS

The United States Supreme Court held in Muehler v. Mena, 544 U.S. 93 (2005), that questioning is not a seizure, so the police may question a person who has been detained about matters unrelated to the justification for the detention, even without any individualized suspicion supporting the questions. Although Muehler involved a person who was detained during the execution of a search warrant, not the subject of a traffic stop, its reasoning applies equally in the traffic stop setting. The Court has recognized as much. Arizona v. Johnson, 555 U.S. 323 (2009) ("An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."). See also e.g., United States v. Olivera-Mendez, 484 F.3d 505 (8th Cir. 2007); United States v. Stewart, 473 F.3d 1265 (10th Cir. 2007).

It should be emphasized that the questioning in Muehler did not extend the subject's detention; whether a traffic stop may be prolonged for additional questioning is discussed below.

USE OF DRUG-SNIFFING DOGS

Having a dog sniff a car is not a search and requires no quantum of suspicion. Illinois v. Caballes, 543 U.S. 405 (2005). Therefore, a dog sniff is permitted during any traffic stop, so long as the sniff does not extend the stop. Whether a traffic stop may be prolonged for a dog sniff is discussed below.

ASKING FOR CONSENT TO SEARCH

Requests to search made during a traffic stop probably should be analyzed just like any other inquiry about matters unrelated to the purpose of the stop: because such a request is not, in itself, a seizure, it does not implicate the Fourth Amendment unless it extends the duration of the stop. 4 LaFave, Search and Seizure § 9.3(e). See also United States v. Turvin, 517 F.3d 1097 (9th Cir. 2008) (because "officers do not need reasonable suspicion to ask questions unrelated to the purpose of an initially lawful stop," a request for consent to search that did not substantially prolong a traffic stop was permissible).

However, at least one North Carolina Court of Appeals case has stated that "[i]f the officer's request for consent to search is unrelated to the initial purpose for the stop, then the request must be supported by reasonable articulable suspicion of additional criminal activity." State v. Parker, 183 N.C. App. 1 (2007). The court's reasoning appears to have been that such a request inherently involves at least a minimal extension of the stop and is therefore unreasonable.[9] But cf. State v. Jacobs, 162 N.C. App. 251 (2004) ("Defendant argues alternatively that the State failed to establish that Officer Smith had sufficient reasonable suspicion to request defendant's consent for the search [during an investigative stop]. No such showing is required.").

PROLONGING THE STOP TO INVESTIGATE UNRELATED MATTERS

In Rodriguez v. United States, __ U.S. __, 135 S. Ct. 1609 (2015), the Supreme Court ruled that an officer could not briefly extend a traffic stop to deploy a drug sniffing dog. The Court reasoned that a stop may not be extended beyond the time necessary to complete the "mission" of the stop, which is "to address the traffic violation that warranted the stop . . . and attend to related safety concerns." That is, "[a]uthority for the seizure ends when tasks tied to the traffic infraction are – or reasonably should have been – completed." Because a dog sniff is not a task "tied to the traffic infraction," but rather is "aimed at 'detect[ing] evidence of ordinary criminal wrongdoing,'" any delay to enable a dog sniff violates the Fourth Amendment. The Court rejected the idea, widely endorsed by the lower courts,[10] that "de minimis" delays of just a few minutes did not rise to the level of Fourth Amendment concern. It therefore effectively overruled State v. Sellars, 222 N.C. App. 245 (2012) (delay of four minutes and thirty-seven seconds to allow a dog sniff to take place was de minimis and did not violate the Fourth

[9] This may not be so in some cases, as when one officer asks for consent to search while another is writing a citation. The issue of delays is addressed later in this manuscript.

[10] See, e.g., United States v. Rodriguez, 741 F.3d 905 (8th Cir. 2014) (a seven- or eight-minute delay to deploy a drug-sniffing dog was "a de minimis intrusion" that did not implicate the Fourth Amendment), vacated, __ U.S. __, 135 S. Ct. 1609 (2015); United States v. Green, 740 F.3d 275 (4th Cir. 2014) (running a "criminal history check added just four minutes to the traffic stop" and "at most, amounted to a de minimis intrusion . . . [that] did not constitute a violation of [the defendant's] Fourth Amendment rights"); United States v. Mason, 628 F.3d 123 (4th Cir. 2010) ("The one to two of the 11 minutes [that the stop took] devoted to questioning on matters not directly related to the traffic stop constituted only a slight delay that raises no Fourth Amendment concern."); United States v. Harrison, 606 F.3d 42 (2d Cir. 2010) (per curiam) (five to six minutes of questioning unrelated to the purpose of the traffic stop "did not prolong the stop so as to render it unconstitutional"); Turvin, 517 F.3d 1097 (asking a "few questions" unrelated to the stop that prolonged the stop by a "few moments" was not unreasonable, and collecting cases). See generally United States v. Everett, 601 F.3d 484 (6th Cir. 2010) (collecting cases and concluding that whether a delay is de minimis depends on all the circumstances, including whether the officer is diligently moving toward a conclusion of the stop, and the ratio of stop-related questions to non-stop-related questions).

Amendment), and State v. Brimmer, 187 N.C. App. 451 (2007) (delay of approximately four minutes to allow a dog sniff to take place was de minimis).[11]

The reasoning of Rodriguez extends beyond dog sniffs. The case clearly implies that an officer may not extend a stop in order to ask questions unrelated to the purpose of the stop, such as questions about drug activity. Lower courts have uniformly understood that implication. See, e.g., United States v. Archuleta, __ F. App'x __, 2015 WL 4296639 (10th Cir. July 16, 2015) (unpublished) (citing Rodriguez while ruling that a bicycle stop was improperly prolonged "in order to ask a few additional questions" unrelated to the bicycle law violations that prompted the stop); Amanuel v. Soares, 2015 WL 3523173 (N.D. Cal. June 3, 2015) (unpublished) (extending a traffic stop by 10 minutes to discuss a passenger's criminal history, ask whether the passenger had been subpoenaed to an upcoming criminal trial, and caution the passenger against perjuring himself, would amount to an improper extension of the stop in violation of Rodriguez); United States v. Kendrick, 2015 WL 2356890 (W.D.N.Y. May 15, 2015) (unpublished) (agreeing that "absent a reasonable suspicion of criminal activity, extending the stop . . . in order to conduct further questioning of the driver and the occupants about matters unrelated to the purpose of the traffic stop would appear to violate the . . . rule announced in Rodriguez," though finding that reasonable suspicion was present in the case under consideration).[12]

Presumably, Rodriguez also makes it improper for an officer to extend a stop in order to seek consent to search. See United States v. Hight, __ F. Supp. 3d __, 2015 WL 4239003 (D. Colo. June 29, 2015) (an officer stopped a truck for a traffic violation, ran standard checks on the driver and spoke briefly with him, and decided that he wanted to ask for consent to search; the officer called for backup and spent at least nine minutes waiting for another officer and working on a consent form; when backup arrived, the officer terminated the stop, then asked for and obtained consent; the court ruled that the nine-minute extension of the stop was improper and that it required suppression even if consent to search was obtained voluntarily after the stop ended). Of course, as noted above, Parker, 183 N.C. App. 1, is also a relevant precedent in this area.

Officers may respond to Rodriguez by multitasking: deploying a drug dog while waiting for a response on a license check, or asking investigative questions of the driver while filling out a citation. Defendants may argue that such multitasking inherently slows an officer down. Whether that is so in a particular case is a factual question. At least in two early cases on point, courts seem to have accepted officers' multitasking. See, e.g., State v. Jackson, __ N.E.3d __, 2015 WL 3824080 (Ohio Ct. App. 2015) (a traffic stop conducted by one Trooper was not impermissibly extended when a different Trooper conducted a dog sniff while the first Trooper investigated the defendant's background and wrote a traffic citation); Lewis v. State, 773 S.E.2d 423 (Ga. Ct. App. 2015) (similar). It may be worth noting that both Jackson and Lewis involved multiple officers, with one handling the dog while the other addressed the traffic violation.

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[11] Even before Rodriguez, the North Carolina Court of Appeals had limited Brimmer and Sellars in State v. Cottrell, __ N.C. App. __, 760 S.E.2d 274 (2014), where the court stated that it did "not believe that the de minimis analysis applied in Brimmer and Sellars should be extended to situations when, as here, a drug dog was not already on the scene."

[12] Even before Rodriguez, it was risky for an officer to measurably extend a stop to ask questions unrelated to the purpose of the stop in light of State v. Jackson, 199 N.C. App. 236 (2009) (finding that an officer unreasonably extended a traffic stop when she asked just a handful of drug-related questions).

One question that arises from Rodriguez is what sorts of conversation relate to the traffic stop. May an officer engage in brief chit-chat with a motorist, or does such interaction constitute an extension of the stop? What about inquiring about a motorist's travel plans, or a passenger's, where such inquiries may bear on the likelihood of driver fatigue but also may be used to seek out inconsistencies that may be evidence of illicit activity? One early case of note is United States v. Iturbe-Gonzalez, __ F. Supp. 3d __, 2015 WL 1843046 (D. Mont. April 23, 2015), where the court indicated that an officer may make "traffic safety-related inquiries of a general nature [including about the driver's] travel plans and travel objectives," and said that "any suggestion to the contrary would ask that officers issuing traffic violations temporarily become traffic ticket automatons while processing a traffic violation, as opposed to human beings." Of course, even if Iturbe-Gonzalez is correct that a question or two about travel plans are sufficiently related to the purpose of a traffic stop, a court might take a different view of an officer's extended discussion of itineraries with multiple vehicle occupants.

TOTAL DURATION

There is no bright-line rule regarding the length of traffic stops. As a rule of thumb, "routine" stops that exceed twenty minutes may deserve closer scrutiny. See Robert L. Farb, Arrest, Search, and Investigation in North Carolina 43 (4th ed. 2011). Stops of various lengths have been upheld by the courts. See, e.g., State v. Heien, __ N.C. App. __, 741 S.E.2d 1 (2013) (thirteen minutes was "not unduly prolonged"), aff'd per curiam, 367 N.C. 163 (2013), and aff'd on other grounds, __U.S. __, 135 S. Ct. 530 (2014); State v. Castellon, 151 N.C. App. 675 (2002) (twenty-five minutes, though some portion of that time may have been after reasonable suspicion developed); United States v. Rivera, 570 F.3d 1009 (8th Cir. 2009) (seventeen minutes); United States v. Eckhart, 569 F.3d 1263 (10th Cir. 2009) (twenty-seven minutes); United States v. Muriel, 418 F.3d 720 (7th Cir. 2005) (thirteen minutes).

TERMINATION OF THE STOP

WHEN TERMINATION TAKES PLACE

As a general rule, "an initial traffic stop concludes . . . after an officer returns the detainee's driver's license and registration." Jackson, 199 N.C. App. 236; State v. Heien, __ N.C. App. __, 741 S.E.2d 1 (2013) ("Generally, the return of the driver's license or other documents to those who have been detained indicates the investigatory detention has ended."), aff'd per curiam, 367 N.C. 163 (2013), and aff'd on other grounds, __ U.S. __, 135 S. Ct. 530 (2014). When an officer takes other documents from the driver, such as registration and insurance documents, these, too must be returned before the stop ends. State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (2014) (even though an officer had returned a driver's license and issued a warning citation, "[t]he purpose of the stop was not completed until [the officer] finished a proper document check [of registration, insurance, and other documents the officer had taken] and returned the documents"). As the Fourth Circuit explains, when an officer returns a driver's documents, it "indicate[s] that all business with [the driver is] completed and that he [is] free to leave." United States v. Lattimore, 87 F.3d 647 (4th Cir. 1996).

This rule is not absolute and specific circumstances may dictate a different result. The North Carolina Court of Appeals has held, in at least one case, that under the totality of the circumstances, the occupants of a vehicle remained seized even after the return of the driver's paperwork, in part because the officer "never told [the driver] he was free to leave." State v. Myles, 188 N.C. App. 42 (2008), aff'd per curiam, 362 N.C. 344 (2008). See also State v. Kincaid, 147 N.C. App. 94 (2001) (suggesting that the return of a driver's license and registration is a necessary, but not invariably a sufficient, condition for the termination of a stop).

Some commentators have argued that many motorists will not feel free to depart until they are expressly permitted to do so. LaFave, "Routine" at 1899-1902. Certainly many officers mark the end of a stop by saying "you're free to go" or "you can be on your way" or something similar. Nonetheless, the United States Supreme Court has rejected the idea that drivers must expressly be told that they are free to go before a stop terminates. Ohio v. Robinette, 519 U.S. 33 (1996) (adopting a totality of the circumstances approach).

EFFECT OF TERMINATION

Once a stop has ended, the driver and any other occupants of the vehicle may depart. Any further interaction between the officer and the occupants of the vehicle is, therefore, consensual. The officer may ask questions about any subject at all, at any length; may request consent to search; and so on. In other words, the "time and scope limitations" that apply to a traffic stop cease to be relevant. LaFave, "Routine" at 1898.

2017 New Misdemeanor Defender

THE ETHICS PRESENTATION

Ethics for Public Defense

Ethics for Public Defense: What are the Rules?

Attorney/Client Relationship
- Confidences
- Rights

Attorney/Others Relationship
- Honesty and Candor
- Overreaching

Rule 1.6 (a) Lawyer may not reveal information acquired during professional relationship without consent, unless permitted by (b)

Exceptions?

- RPC/court order
- Commission of a crime
- Reasonably certain death or bodily harm
- Prevent or mitigate client's crime or fraud in using lawyer services

Competing Obligations:

Rule 1.2 (d) - Shall not counsel a client to engage in conduct lawyer knows to be criminal or fraudulent, but may discuss the legal consequences of any proposed course of conduct.

Competing Obligations:

Rule 3.1- May not assert factually or legally frivolous positions, but a criminal defense lawyer may defend a proceeding by requiring that all element of the case be established.

Competing Obligations:

Rule 3.3 - Candor Toward Tribunal: may not make false statement of material fact or offer evidence that the lawyer knows to be false

- may refuse to offer evidence she reasonably believes to be false
- Exception: defendant's testimony

Competing Obligations:

Rule 4.1 - Truthfulness In Statements to Others. Must be truthful, but no obligation to inform opposing party of relevant facts.

Cases and Rulings

- CPR 313(lawyer may not volunteer confidential information about client's prior conviction)
- RPC 33(1988) (Attorney has no affirmative duty to disclose client's false name and record but cannot allow client to commit perjury)
- 98 FEO 5 (lawyer may remain silent when ADA misrepresents client's record but may not seek limited privilege)
- 2008 FEO 1 (lawyer may not offer evidence using undisclosed alias of client, at least in civil case)

Cases and Rulings

Rule 1.14 Client With Diminished Capacity:
(a) As far as reasonable, maintain a normal client-lawyer relationship

(b) When client is at risk of substantial physical, financial or other harm and cannot act in own interest, lawyer may take protective action

(c) Must keep client's information confidential, and is only authorized to reveal information about client to extent necessary to protect client's interests.

Cases and Rulings

2014 Formal Ethics Opinion 5:
In civil case, attorney must advise client regarding legal impact of postings on social media sites. If counsel determines that removing existing postings does not constitute spoilation, counsel may advise client to remove postings, but should advise client to retain a copy. Counsel may advise client to increase privacy settings if such advice does not violate the law or a court order. [But see Rule 3.4]

Cases and Rulings

98 Formal Ethics Opinion 2: Attorney may explain the effects of service of process but may not advise client to evade service

Cases and Rulings

Rule 3.4 A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

Cases and Rulings

RPC 221 (1995) – Absent legal authority, lawyer may
- take possession,
- examine,
- return evidence to its source, and
- advise source of legal consequences of possession or destruction of evidence)

Cases and Rulings

RPC 221 (1995) – Absent legal authority, lawyer may
- take possession,
- examine,
- return evidence to its source, and
- advise source of legal consequences of possession or destruction of evidence)

BUT
2007 FEO 2 – lawyer may not take possession of contraband)

Cases and Rulings

Rule 1.2(a)(1): defendant has the authority to decide
- Plead guilty/ go to trial
- Testify

after consultation with the lawyer

Cases and Rulings

Rule 1.2(a)(1): defendant has the authority to decide
- Plead guilty/ go to trial
- Testify

after consultation with the lawyer

Rule 1.4: attorney must keep client informed
- Giving client sufficient information to make informed decisions

Cases and Rulings

Rule 1.2(a)(1): defendant has the authority to decide
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after consultation with the lawyer

Rule 1.4: attorney must keep client informed
- Giving client sufficient information to make informed decisions
  - ✓ can fulfill by providing a summary and consulting with the client about relevance

Cases and Rulings

Rule 1.2(a)(1): defendant has the authority to decide
- Plead guilty/ go to trial
- Testify

after consultation with the lawyer

Rule 1.4: attorney must keep client informed
- Giving client sufficient information to make informed decisions
  - ✓ can fulfill by providing a summary and consulting with the client about relevance unless client objects to summary

Cases and Rulings

Rule 3.4 A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

Cases and Rulings

Rule 1.7 Conflict of Interest: Current Clients
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

Cases and Rulings

Rule 1.7 Conflict of Interest: Current Clients
(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if
the lawyer:
- reasonably believes she can provide competent and diligent representation to each affected client

AND the representation is
- not prohibited by law
- does not involve a claim by one client against the other AND

AND the client
- gives written informed consent

Cases and Rulings

Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules
(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

Cases and Rulings

Rule 1.9 Duties to Former Clients
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Cases and Rulings

Rule 1.9 Duties to Former Clients
(c) A lawyer who has formerly represented a client in a matter shall not:

- use information relating to the representation to the disadvantage of the former client except as the rules allow or require, or when the information has become generally known; or
- reveal information relating to the representation except as the rules allow or require

Cases and Rulings

2010 Formal Ethics Opinion 3: A lawyer who represents a client who is a witness in a matter in which the lawyer represents another client, and to effectively represent the client on trial the lawyer must cross-examine the client-witness, then there is a concurrent conflict of interest, and that conflict cannot be waived

Cases and Rulings

2011 Formal Ethics Opinion 2: Delay on the part of a former client in objecting to conflict of interest is not, by itself, a waiver of the conflict, but is one factor to consider in whether the lawyer must now withdraw from representing their current client

Cases and Rulings

2011 Formal Ethics Opinion 3: You may not assist client in fraudulent conduct, but under Rule 1.(d) may advise client on consequences of any proposed course of conduct. You may therefore tell client that posting bond may speed up deportation and result in dismissal of the case.

Cases and Rulings

2011 Formal Ethics Opinion 3: You may not enter a notice of appeal simply for delay or for a frivolous reasons. Seeking to enforce your client's constitutional right to a trial de novo is not simply for delay or frivolous and therefore you may enter notice of appeal

Cases and Rulings

2005 Formal Ethics Opinion 3: Attorney may not threaten to report an opposing party or witness to immigration to gain advantage in civil settlement

2009 Formal Ethics Opinion 5: Attorney may seek information about immigration status in discovery, but may not report status to ICE unless required to do so by law

Cases and Rulings

2005 Formal Ethics Opinion 3: Attorney may not threaten to report an opposing party or witness to immigration to gain advantage in civil settlement

2009 Formal Ethics Opinion 5: Attorney may seek information about immigration status in discovery, but may not report status to ICE unless required to do so by law

Cases and Rulings

Rule 4.2. (A) - During the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless with consent of other lawyer or authorized by law.

Cases and Rulings

RPC 93 - Counsel may not speak with represented persons, even when not technically co-defendants, and even when persons initiate contact, without permission of their counsel

Cases and Rulings

Rule 3.4 - A Lawyer shall not: (f) request a person, other than a client, to refrain from voluntarily giving relevant information to another party unless that person is an employee or relative of the client and the lawyer reasonably believes the person will not be adversely affected by not giving the information

Cases and Rulings

79 DHC 10: (Censured for informing party that his client would not testify against him if other party would also plead the Fifth)

State Bar v. Graves, 50 N.C. App. 450 (1981)(although it is not unethical to advise a witness to take the Fifth, it is unethical to tell witness that if they do not testify, the defendant will also not testify)

Cases and Rulings

In re Palmer, 296 N.C. 638 - (1979)(censuring lawyer for not moving to withdraw when learned of "scheme" in which co-defendants agreed to switch who was driver in fatal accident)

State v. Rogers, 68 N.C. App. 358 - (1984)(affirming conviction of attorney for telling them they could leave court after agreeing to pay damages)

IDS' Mission, Resources & Policies

2017 New Misdemeanor Defender Program

Presented By:
Thomas K. Maher
Executive Director IDS

Overview

- IDS' Mission
- Relationship Between IDS and AOC
- Resources
- Policies & Procedures
- Current challenges and initiatives
- What do PD Offices, PAC, and Contract Attorneys Need from IDS?

Effective July 2001, IDS was created to:

- Improve quality of representation and ensure independence of counsel
- Generate reliable statistical information to evaluate services provided and funds expended
- Deliver services in most efficient and cost-effective manner without sacrificing quality representation

In "Short" …..

- IDS' statutory mission is to enhance quality, uniformity, efficiency, accountability, and cost-effectiveness of indigent defense services in North Carolina
- IDS' policies are all aimed at fulfilling one or more aspect of that statutory mission

In "Short" ….

- In order to fulfill its mission, IDS needs:
  - Defense counsel who have experience, skill, passion and resources:
    - Time to work with clients
    - Access to investigators and other experts
    - Willingness to help IDS collect data

Relationship Between IDS and AOC

(See G.S. 7A-498.2)

IDS Independence

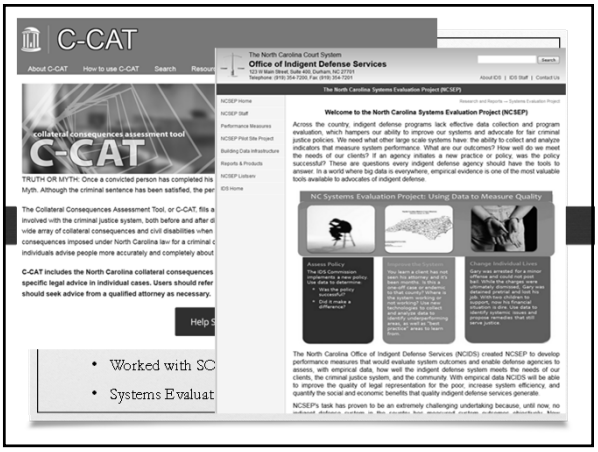
- Although IDS is largely independent of AOC, we work with AOC in fulfilling our mission:
  - IDS' budget is separate from AOC's budget, but AOC has the authority to modify IDS' budget
  - IDS exercises its powers independently of AOC
  - AOC budget policies—such as limitations on hiring and travel, mileage reimbursement rate, etc.—do not apply to IDS unless IDS Director chooses to apply them

Continuing AOC Support

- AOC has the statutory obligation to provide general administrative support to IDS, including purchasing, payroll, human resources, and similar services
- AOC Human Resources is there to serve PD offices along with the rest of the Judicial Branch
  - AOC's workplace harassment policies apply to your offices
  - If you have any concerns about workplace harassment, please notify AOC HR and IDS immediately

Legislative Advocacy for Public Defense

- IDS regularly advocates for public defense at the General Assembly
  - Needed increases in the budget for PAC and PD
  - Substantive changes, such as allowing APD's to engage in pro bono legal work
- IDS works closely with NC Advocates for Justice and other groups on various initiatives impacting defense function



- Worked with SC
- Systems Evaluat

Public Defense Resources

Improved Defender Training

- IDS has a standing contract with the School of Government ("SOG") to provide defender education programs for PDs and for private assigned counsel ("PAC") and contract attorneys who do a significant amount of indigent work
- Thanks to the hard work of SOG faculty and staff, IDS has developed a number of new and innovative training programs

Some Examples of Programs

- 5-day trial advocacy school for public defenders and PAC
- Specialized programs for attorneys who handle appellate cases, involuntary commitment cases, juvenile delinquency cases, and abuse/neglect/dependency and TPR cases
- Specialized training in forensics, capital defense and other topics
- Regional training for contractors
- Training for public defender staff investigators

On-Line Training

- In response to continuing budget limitations, SOG has also concentrated on new on-line training programs, such as:
  - "Webinars on demand"
  - "Virtual CLEs:" Self-paced on-line presentations that may be accessed from any computer with an Internet connection

NCAJ Membership

- IDS has a contract with the NC Advocates for Justice, which entitles APDs to some benefits of NCAJ membership, including
  - Subscription to NCAJ criminal defense listserv
  - 80 pre-paid CLEs, with IDS paying for additional CLEs at public service rate
  - Each APD receives CD-ROM of NCAJ's DWI Trial Notebook
- We hope this benefit is helpful to your practices

Non-IDS Programs

- IDS sometimes approves requests for APDs to attend specialized training programs that are sponsored by groups other than IDS and SOG, especially if they address topics that are not covered by the IDS-SOG calendar and the attendee is willing to serve as a future trainer on the topic

Available on

IDS Listservs

- IDS has created a number of listservs to facilitate communication with and between attorneys across the state who handle various types of cases
- Listservs have proven to be a great way to enhance communication and resource-sharing

IDS Listservs

- Chief public defenders and assistant public defenders
- Investigators in public defender offices and private investigators
- Public defender support staff
- Capital trial attorneys
- Capital post-conviction attorneys
- Appellate attorneys
- Attorneys who represent parent-respondents in A/N/D and TPR cases
- Attorneys who handle juvenile delinquency cases
- Attorneys who handle involuntary commitment cases
- Attorneys who handle child-support contempt cases
- IDS contract attorneys

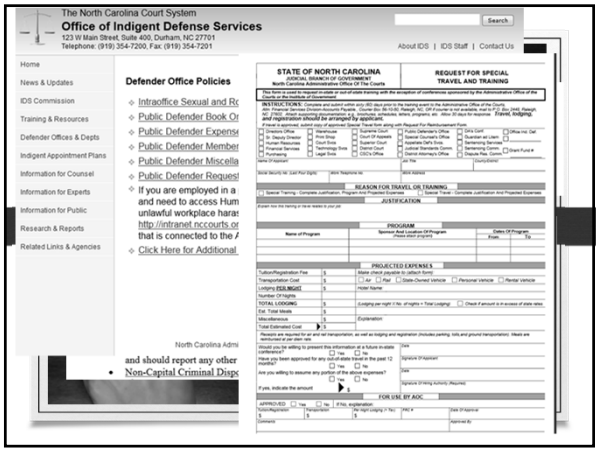
Performance Guidelines

- IDS has developed performance guidelines for:
  - non-capital criminal cases at trial level
  - juvenile delinquency proceedings
  - abuse/neglect/dependency and termination of parental rights cases
- All guidelines are posted on IDS website

What Guidelines Are and Are Not

- Guidelines *are*:
  - Checklist of best practices and things counsel should consider at each stage of a proceeding
  - Training tool
  - Resource for new and experienced attorneys
  - Tool for legislative advocacy and systemic reform
- Guidelines are *not* absolute standards or mandates

Public Defense Policies



What IDS Needs From PD Offices

IDS Needs PD Offices to:

1. Provide Quality Legal Services for Clients
2. Report Data Accurately & Reliably
3. Submit Fee Applications to Judges in Cases that End in Conviction

Quality Legal Services for Clients

- Most importantly, IDS wants PD offices . . . and PAC . . . and contract attorneys to provide quality legal representation for indigent clients
- We hope the resources we provide help you do your jobs better
- If we can provide other resources that would assist you, please let us know

Accurate & Reliable PD Data Reporting

It all hinges on your fee applications …

- After a PD office completes a case, a fee application is prepared
- Each fee application is then compiled into an on-line disposition reporting system that documents the number of cases disposed by highest charge and attorney
  - Rules for counting closed cases are posted on IDS website

We Collect this Data Because it is Required by Law

G.S. 7A-498.9:

The IDS Office must report to the General Assembly by March 1 of each year about the following matters:

(1) **The volume and cost of cases handled in each district by assigned counsel or public defenders;**

(2) Actions taken by the Office to improve the cost-effectiveness and quality of indigent defense, including the capital case program;

(3) Plans for changes in rules, standards, or regulations in the upcoming year; and

(4) Any recommended changes in law or funding procedures that would assist the Office in improving the management of funds expended for indigent defense services.

It's Also in Our Interests

- To justify our budget requests, IDS needs data that shows why we need more money
- Overall court data alone would suggest that IDS' budget should not be increased, because the total number of court dispositions over the past several years has remained relatively flat
- But percentage of cases funded out of IDS' budget has steadily increased over same time period

Your Chief PD Needs this Data:

- To assess APD caseloads
- To assess demands on support staff
- To demonstrate with hard data the needs of your office
- To support a request for a new attorney or support staff position when authorized by the Legislature

Recoupment: Fee Applications in Cases that End in Conviction

- G.S. 7A-455 provides that, in all cases that end in a conviction, the court shall direct entry of a civil judgment against the indigent person for the money value of services rendered by a public defender
- Thus, in all such cases, public defenders are required by statute to complete a fee application and submit it to the Court

Recoupment Helps Fund the Indigent Defense System

- All funds collected through recoupment go back to the indigent defense fund to pay for services to future clients, and IDS' projected receipts from recoupment are added into our budget each year
- In FY14, IDS collected a total of $12.9 million in recoupment revenues
- Due to changes in tax withholding, recoupment has declined and was approximately $10 million in FY16.
- AOC audited PD submission of fee applications and found offices were effective in submitting fee applications
- Advocate for your client on financial obligations, but do not underreport hours and continue to file fee applications.

Current Challenges and Initiatives

Challenges

Initiatives

- Fee Schedule Pilot
  - PAC paid according to a fee schedule for all cases resolved in district court in six pilot counties
- Public Defender Workload Study
  - IDS, with input from AOC, is working with the National Center for State Courts to develop a workload formula that will be used for recommendations on staffing levels
- Indigency Determination
  - AOC, with input from IDS, is studying development of a more formal system of indigency determination

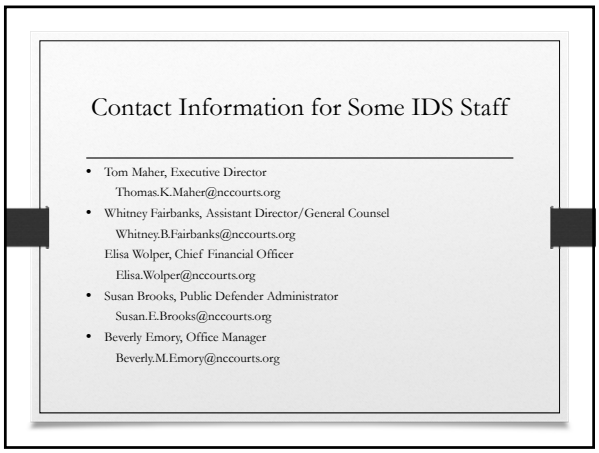
What do PD Offices, PAC, and Contract Attorneys Need from IDS?

We're Interested in Your Thoughts

- Even if there is not a legislative directive for IDS to investigate and propose reforms in a specific area, we are always interested in systemic reforms that would enhance quality and efficiency
- If you have ideas based on your work on the front lines, please let us know!

How Can IDS Help You?

- We want to know how IDS can help you, and welcome all feedback and suggestions
- Contact information for some IDS staff members is listed on the next screen
- Do you have any questions or comments to share at this time?


Contact Information for Some IDS Staff
• Tom Maher, Executive Director
Thomas.K.Maher@nccourts.org
• Whitney Fairbanks, Assistant Director/General Counsel
Whitney.B.Fairbanks@nccourts.org
Elisa Wolper, Chief Financial Officer
Elisa.Wolper@nccourts.org
• Susan Brooks, Public Defender Administrator
Susan.E.Brooks@nccourts.org
• Beverly Emory, Office Manager
Beverly.M.Emory@nccourts.org

'Y'all got your Daddy back'

How an innovative community in an old tobacco town is rebuilding shattered lives

By Claire Campbell | The Upbeat – Wed, May 29, 2013


Elisha Gahagan

For Elisha Gahagan, it was the day she lost custody of her kids. She'd been using since she was 12 years old — first wine coolers and pot, then cocaine, eventually heroin — but she had always promised herself that she would not turn out like this, just like her own mother, an opiate addict who spent her days chasing pain pills. Gahagan was supposed to be the June Cleaver mom she'd always wanted in her own life, but when the time came she found that she could not pull her head above water. The physical addiction had her in its grasp, and every move she tried to make toward a normal life was thwarted by a need she could not control.

Her quest to get clean took her through rehab and methadone clinics and a string of ever more desperate situations, until finally even the detox center turned her away because she'd been there too many times. That's when she found TROSA.

Tucked into a quiet neighborhood in Durham, N.C., TROSA — Triangle Residential Options for Substance Abusers — is an outpost for addicts who have run out of options. The people who come here are among the hardest cases in the substance abuse world. They've been battling addictions for years — sometimes decades — and have burned through whatever support networks they once had. They come with tragic pasts and mental health issues and criminal records. Some lived comfortable middle-class lives until their addictions drained everything away; others have been camping out in cars and under bridges for years. They come in their 20s and in their 50s. Many are high school dropouts. Some don't know how to read.

But more remarkable than the people TROSA takes in are the ones it turns out. Unlike typical treatment centers, which run for a few weeks or months and focus mostly on getting clean, TROSA is a two-year, live-in program that helps addicts rebuild their lives from the ground up. People come here to get off the drugs but also to dig deep, to discover who they really are and what they're capable of doing. Those who didn't finish school will earn GEDs; others can attend college classes. Everyone who graduates from the program will leave with a job. And everything they need along the way, from toiletries to interview coaching, will be provided. For free.

This is the other unusual thing about TROSA: It costs nothing to attend. Instead of paying for housing or meals, the people who come here work. Nearly half the money needed to fund the program comes from businesses run by the residents themselves, including a moving company, a lawn care service, and a frame shop. Residents also take jobs in the offices, kitchens, and garage on campus. This model has earned TROSA a reputation among some on the streets as a "work camp,"

but staff and residents insist the work is a central piece of the recovery process. It helps people build job skills, resumes — and most importantly, a work ethic. That work ethic, combined with the program's overall mission, has generated a lot of good will and repeat business in the community. The moving company regularly pulls in "best of" awards, and locals are quick to praise the drive and discipline of TROSA crews. As Marge Nordstrom, who has used the lawn care service for several years, explains, "These are men [and women] who are trying to get their lives back together and learn a trade so they stay out of trouble. And if I can help them to do that, I'm game."

* * *

For Ashley Hill, it was the day she sat in a holding cell in a Georgia jail, waiting to be led off to prison. She was 21 years old and had been in and out of trouble ever since an arrest for possession at 17. She'd even done a six-month stint in rehab for cocaine addiction but had come out "cross-addicted" to opiates; her peers in the program talked up the high so much she was hooked. By the time she was busted for her fourth or fifth probation violation, her lawyer told her there was nothing he could do. She watched the guards come to take her away, but by some lucky mathematical error in court — a twist of fate she still can't explain — they led her out to her family instead. "I got a second chance," she says, "so I knew I had to do something. I wasn't getting any better."

Her parents suggested TROSA, but to Hill it seemed extreme. She didn't want to be so far from home for so long. She dragged her feet and found reasons to put off leaving. Finally, one night, she nearly overdosed. Her parents stood firm: If you don't go now, we're done. She went.

A lawn care worker outside the gym

Newcomers to TROSA learn quickly that they're not just along for a ride. For the first 30 days they're put on "internship," tasked with emptying trash cans, sweeping the halls, and attending therapy sessions as they come down off the drugs. Their days are scheduled from 6:30 a.m. until 11 p.m. The rules are many and strict: No cursing. No talking back. No makeup. No dating. No unmade beds. And no contact with family members for the first several months. Comings and goings around campus are tracked with sign-in logs and monitored by leaders. People caught breaking the rules are called into a place known as the "Blue Room" and confronted about their behavior. Then they're punished with "contracts" — extra work duty — and sent back out stinging.

Later, the people who make it through the program will thank the staff and senior residents for this "tough love," but at the time it can be hard to swallow. For Hill, it was like nothing she'd ever known. At other programs, she says, "you could fail drug tests, and your punishment was that you couldn't go lay out at the pool that weekend." Here, on top of the physical torment of withdrawal, she found herself being called out again and again — sometimes for things she didn't even realize she was doing. No one had ever held her so accountable for her behavior. She panicked. More than once she called her parents from the Blue Room to beg them to come pick her up. She didn't know if she could make it.

* * *

In 1993, Kevin McDonald was working at a gang parolee program in Los Angeles when a group from Durham called. The city needed his help, they said; the drug situation was taking a steep toll. They knew he had set up a treatment program in Greensboro, N.C. — could he do the same here? Eventually he accepted, and with just $18,000 and a four-burner electric stove, he set up shop in an abandoned elementary school in a "transitional" part of town. The school was in shambles, the basement so flooded he thought it was a swimming pool. He paid the neighborhood kids a dollar a week to stop throwing

rocks through the windows. He had no written marching orders — just an understanding of how addicts think and a determination to give them another chance at life.


Dorms on the main TROSA campus

Today the main campus of TROSA is a cluster of more than a dozen buildings on land that was once a Flav-O-Rich dairy. What started as a 30-bed program now houses 431 residents — here and at a number of smaller properties around the city. Aside from the old dairy structures, everything on campus has been built by the residents themselves. The two-story dorms line meticulously landscaped quads. Inside, shoes are arranged under the beds in pairs, clothes hung neatly in closets. Against the walls stand scuffed wooden dressers. “Donated by Duke,” McDonald points out.

The word “donated” figures prominently in a tour of TROSA — if something wasn’t built by residents, chances are it was donated. “This kitchen? Donated.” Conference table? Donated. Blue-and-white diner booths? You guessed it. An entire department is devoted to reaching out to companies across the country to ask for things the program needs; McDonald estimates their efforts saved the organization up to $3 million last year. Residents even drive to local bakeries each day to pick up unwanted pastries for the snack bar.

“You’ve got to hustle,” McDonald says with a wink, and this seems to be one of the keys to the program’s success over the years: seeing opportunity where others don't. As the organization has expanded, it has snapped up run-down buildings in overlooked parts of town and transformed them into useful spaces — a pattern Durham Mayor Bill Bell says has had a “very positive effect.” Instead of walling itself off, TROSA has made its presence felt throughout the city.

As he crosses the campus, McDonald calls out to every resident he passes: “Hey, man, how you doing?” and “Good to see you, man.” They clasp hands; sometimes they hug. This, too, is part of the therapy: to be recognized as visible, a human being.

* * *

One thing recovering addicts will tell you about themselves is that they are self-centered. That after being driven by their own needs for so long, they have forgotten how to care about other people.

Vinicent Alexander came to TROSA after he looked up on Thanksgiving Day 2010 and realized he was sitting alone in his apartment with a bag of drugs. He had waded so far into his “obsession” that he’d pushed everyone away. “Something’s got to change,” he thought.

Because Alexander had run his own tailoring business for decades, the structure and discipline at TROSA weren’t so jarring; for him the hard part was being held responsible for other people's recovery. The proverb “each one, teach one” is a core philosophy here, emblazoned on signs and repeated in the hallways. It means, essentially, that one day you come in and learn how to sweep the floors, and the next you’re showing someone else how to do it.

But Alexander ended up teaching far more than one. At the end of his first 30 days, instead of being sent out to train at the moving company or one of the other businesses, he was named intern crew boss, which meant that he was on call around the clock, serving as a mentor, enforcer, and father figure to new waves of people coming in. For more than a year, as he counseled the interns through various crises, he found himself reliving his own intense transition to recovery again and

again. Soon he realized that helping others was doing more than anything else to change his way of thinking. It had awakened something in him. He had really started to care.

For this reason, even residents assigned to other training schools during the day are given a “people business” to manage on the side — a handful of more junior residents to monitor and guide. Often “guiding” means laying down the law. Strict as the program is, it runs largely on the honor system — so it’s up to the residents to blow the whistle when someone screws up. “That’s a really hard thing,” Kevin McDonald says, “because you want people to like you. And you don’t know how to get people to like you without [drugs]. ... But if you really care about somebody and they’re doing something wrong, you’ve got to say something.” Speaking up makes residents more invested in the whole process — and reminds them what they’re here to do.

* * *

As visitors approach an office, the word “Tour!” ripples through the room and instantly everyone rises. The men wear crisp button-down shirts and ties. The women are in slacks and business-casual blouses. One by one they introduce themselves.

My name is Krystal. Robert. Tyrone.

I’ve worked in this office five months. Eighteen months. Twenty-one months.

I started drinking alcohol when I was 11.

I’ve been using since I was 15, and my addiction was crack cocaine.

My addiction was opiates — pills and heroin.

I started out using crystal meth, and then it was pretty much anything.

I was in my addiction for 13 years. It tore my life apart.

At TROSA this is an everyday part of the culture: owning your addictions, putting your story front and center, talking about the darkest chapters of your life in the same tone someone else might use to lament a bad investment they made years ago. This openness is also one of the main points of departure from programs that emphasize anonymity. McDonald appreciates what those organizations have done to help people, but to him the thinking is backward. “You have to educate people,” he says — which means sharing what you’ve done in the past and who you are now.

A common frustration for those who work in the substance abuse world is the belief that addiction is a choice, that addicts go back to using because they are weak. “The perceptions haven’t caught up with the science,” says Paul Nagy, a clinical associate in Duke’s Department of Psychiatry and Behavioral Sciences who serves as an adviser to TROSA. “The science is very clear that it is a brain-based disorder.” A person may choose to use drugs at the beginning, but then the drugs create physical changes in the brain, disrupting the normal communication and reward systems in ways that inhibit the user’s self-control and drive more and more compulsive behavior. Some people are more susceptible to this than others, thanks largely to their genes. Recovery is a complex and ongoing process.

But for McDonald, it’s important to show the world that it’s possible — that addicts are people “who can get healed.”


TROSA founder and president Kevin McDonald

"We're not lepers," he says. "We're not society's garbage. We're not people who shouldn't be around people." TROSA members interact with the community through the moving company and other businesses, but they also go on speaking engagements around Durham in the hopes that their stories will inspire others to get help and shed light on the larger issue of substance abuse.

"People can't — from the top down — acknowledge what a serious problem this is in our country today," McDonald says. According to the Substance Abuse and Mental Health Services Administration, an estimated 21.6 million Americans needed special treatment for a drug or alcohol problem in 2011 — but only 2.3 million received it. Many won't admit they have a problem unless they're pressured by loved ones or caught in the criminal justice system. Meanwhile they're out on the streets, posing a danger to themselves and possibly others.

Cumulatively, the effects of addiction are staggering. The National Institute on Drug Abuse estimates that substance abuse costs the U.S. more than $600 billion annually — factoring in health care, lost productivity, and crime — and emphasizes that even that number doesn't reflect the full destructive effect on society: the disintegration of families, domestic violence and child abuse, and failure in schools. More than 10,000 people are killed in alcohol-related driving accidents each year.

"Why wouldn't we be doing more?" McDonald asks. By more, he means not just getting people into treatment, but also funding research and development into better ways to stop the destructive cycle of behavior. Over the years he's seen so many people conquer their addictions only to suddenly relapse. "Why does that moth go to that flame?" he says. "That's what we've got to figure out."

In the meantime, he's doing what he can to put a human face on the issue and raise awareness beyond TROSA's gates. He hopes that among the dozens of groups that tour the center every year — including students from Duke and other schools — there are future leaders who will have a better understanding of what's at stake, thanks to what they've seen and heard.

"That's what we have to think about," he says. "Not just TROSA, but this whole field. Until somebody's directly affected by [substance abuse], they don't get it."

* * *

Kevin McDonald started using alcohol when he was 13 years old. He was living in Germany, where his dad was stationed in the Air Force. He was a shy kid. His mother was abusive. He had trouble connecting with people. When the family moved back to California, McDonald tried to fall in with the hippie crowd — "weed, hash, regular stuff" — but he didn't quite fit there, either. Soon he turned to heroin and the rougher scene that came with it. The heroin took over his life and kept him from holding down a job. He overdosed multiple times but kept going back for more. His father didn't understand why he couldn't just quit. Eventually, McDonald began robbing pharmacies to feed his addiction. That's when he landed in jail.

From there McDonald caught a lucky break — after a few months, he was released into the Delancey Street Foundation, a therapeutic community in San Francisco that inspired the underlying model of TROSA. Hardened by years of abuse and paranoid from his time behind bars, McDonald was skeptical of these people who wanted him to share his feelings. He was in his early 30s then and hadn't cried since he was a teen. "I was thinking, 'I don't know if I can handle this,'" he says. "I was burnt, you know. I was crisp." He spent his days and nights on edge, half-waiting to get jumped. But eventually the anxiety

subsided, and he learned to open up. Here were people who truly wanted to know how he was doing every morning. Who wanted to give him tools he could use in the world. “All I knew when I got there was anger and hate,” he says, “and to change that around was life-saving.”

At TROSA, McDonald has borrowed many of the core elements of the Delancey Street model — most importantly peer mentoring and job training — but he’s also added other pieces over the years. Unlike Delancey Street, TROSA has a paid staff. They use evidence-based therapy and Seeking Safety (a program geared toward post-traumatic stress disorder) in their work with residents. McDonald has also brought in psychiatric support through Duke, which allows TROSA to help more people with mental health issues.

That mental health component has become increasingly important, says adviser Paul Nagy. In recent years he’s seen more and more residents come in with co-occurring disorders, especially depression and anxiety, and with histories of PTSD — not from war but from “life trauma” and abuse.

* * *

Behind a set of blacked-out glass doors a “dissipation” is in full swing. Here, residents who have been at TROSA long enough to build a solid foundation gather for 24 hours to unleash whatever demons still need freeing. Some come to purge deep-seated guilt over the things they’ve done in the past — to confess and seek forgiveness. Others come to work out anger at their families or fellow residents. “It’s very raw,” McDonald warns, and indeed when the door opens the air is charged. A group of 15 to 20 residents sit facing one another on couches arranged in a square, the lights so dim their expressions are barely visible. A man is gesturing and shouting at his neighbor.

One of the old dairy structures

“The stories I’ve heard in dissipations for 30 years...” McDonald says. “What people will do to each other and what people will do for dope is just mind-blowing. Nothing comes before it, when you get to a certain point. It’s just horrific.”

Equally horrific is what some of the residents have endured before coming here. Nearly everyone has been abused in some way, McDonald says. He tells the story of a recent graduate who grew up with a schizophrenic mom, was adopted by a violently abusive aunt, and then molested by her own father. He tells the story of Susan, who jumped off a bridge and broke her neck but survived — only to be attacked with a claw hammer in an attempted rape.

Upstairs, in the intake office, resident Dawn Sakowski hears stories like these every day. Before she came to TROSA, Sakowski spent years on the streets of Philadelphia, living in abandoned cars and turning to prostitution and theft to fund her crack cocaine habit. From the calls she makes as she’s screening applicants, it’s clear: “It’s still the same out there.” This week the reality of that hit home in a much more personal way, when her 22-year-old daughter was admitted to the program. Sakowski is glad she’s here, getting the help she needs, but “it’s hard to see,” she says. She fights off tears as she speaks.

* * *

At TROSA, time is measured in days and months. At 30 days, residents can write and receive mail. Ninety days until phone privileges. Six months to a wristwatch and an MP3 player. At 12 months, they’re called onstage to receive a medal, and new worlds begin to open up: They’re allowed to date. Families can come to campus to visit and, soon after, they can visit their

families at home. At 21 months, they go on “work-out,” taking a job in the community.

Not everyone finds success at TROSA. The graduation rate hovers around 30%, and the average stay is 11 months. Most of those who leave do so in the first two months, when emotions are running high and the transition is most difficult. Some leave later, after six or 12 or 18 months, because they think they’ve healed enough to strike out on their own. Others are sent away — for breaking the rules too many times, for health issues TROSA can’t accommodate, or for making threats. (Violence — even the threat of it — is not tolerated at TROSA; the program won’t accept rapists and certain other offenders for this reason. “There are wolves and lambs in the substance abuse world,” McDonald explains. ”You’ve got to equal the playing field. There has to be a safe feeling.”)

Elisha Gahagan quit TROSA at six months. She thought she had everyone fooled into believing she was a “goody-goody addict,” but then she broke a couple of rules and was presented with a contract. Suddenly she realized that these people were just like her; they could see through the manipulations and weren’t going to fall for her “crap.” She decided she didn’t need their help — she was off the drugs, she could handle herself now — so she called her ex to pick her up. The kids were thrilled to have her home, but within hours she realized she hadn’t thought it through. She had nothing — no change of clothes, no way to get to and from a job. Intense anxiety kicked in, and she found herself reaching for a beer. The kids watched her in disbelief. The next day she called TROSA and begged to return. When she came back, she started the program all over again.

“It was the best thing that could have ever happened to me,” she says, “because at that point I realized what I was doing. Everything hit me. I’ve got to really dig deep. I’ve got to take advantage of this opportunity and find out who I am and why I do the things I do. And to try to change and be a different person.”

Those who stick it out through graduation receive jobs and diplomas, but also continued access to inexpensive TROSA-owned housing and transportation to and from work. When donations allow, they’re given a car. Some stay on to finish their studies or train for full-time positions on staff (more than half of the 50-person staff went through the program). As the rest venture out into the world, they can stay connected to TROSA through group activity nights and, if they need them, free meals. They’re still not “cured,” Paul Nagy points out, even after two years — because there is no permanent cure for addiction. They’ve started on the total life change required for recovery, but they will be working at it every day for the rest of their lives. And they’ll need all the help they can get.

* * *

It’s Sunday afternoon — Mother’s Day — and a group of black-robed graduates is gathering for a picture under a concrete awning. “Everybody say, '1, 2, 3 ... sh-t!'” McDonald jokes. “It’s a special occasion.”

Less than two miles away, Melinda Gates has just finished addressing 5,000 graduates on the campus of Duke University, and celebratory horns can still be heard in the distance. Here, as the crowd files into the TROSA gymnasium, there’s a different kind of energy: excitement mixed with relief, wariness, and hope.

Ashley Hill is here, adjusting her cap and gown. It’s the day after her 24th birthday and two years since the near-overdose. In the end, all that trouble she got into early on paid off — she got tired of losing her free time to extra duty and started focusing on the future. “I proved to myself my strength,” she says. “I’m really proud of myself today.” She’ll be staying on at TROSA to finish her associate degree so she can transfer to a four-year college. She waves to her parents as they arrive.


Ashley Hill with her parents

As the ceremony begins, a static recording of “Pomp and Circumstance” leads the graduates to the stage, where one by one they collect their diplomas and rings and stop in front of the microphone to address the audience. They offer variations on refrains one hears a lot at TROSA: “This place saved my life” and “I don’t know where I would be.”

“You talkin’ 'bout a miracle?” asks Robert Murphy. “You’re looking at it. Right here.”

TROSA is not a religious program, but nearly everyone thanks God. They thank the staff for that “tough love” and “extra therapy” they hadn’t known they’d needed. They assure the interns in the crowd that it will all make sense in the end.

Then they turn to the families, who are the other stars of this day. “I’d like to ask my family to rise.” Each time, the crowd turns and erupts in applause.

Ashley Hill looks out at her parents: “I apologize for the things I put you guys through. I can’t imagine what it was like for you to watch me go through that.”


Vinicent Alexander on graduation day

Vinicent Alexander promises his family: “I am a better man and will be a better man until the day I die.”

Men of all ages speak to loved ones they left behind:

“You’ve got your son back.”

“You’ve got your brother back.”

“Y’all got your Daddy back.”

Will Crooks points out his brother, who graduated from law school the previous day: “I am so proud of him.” He tells the crowd about his mother, who passed away when he was 19. “I had to watch her as she slipped away,” he says, “and I sat there and promised her, ‘Mom, I’m going to change. I’m going to be a different man.’ And today, I am changed. This is for my mother. Happy Mother’s Day, Mom.”

After the ceremony, Elisha Gahagan mingles with the graduates and staff. She shares a text message she just received from her 11-year-old daughter. “Happy Mother’s Day,” it reads. “I love you more than words can express.”

Gahagan finally collected her ring and diploma last year; today she works at TROSA as one of the president’s assistants. She still lives on campus but has reconnected with her kids and sees them regularly. Her life, she says, is complete: “I look at everything, day in and day out, and it is so perfect right now that I wouldn’t change a thing. I wouldn’t change my past. I wouldn’t change the experiences that I had. This is how I had to get here. I’m just glad I got here.”

Members of the graduating TROSA class celebrate after the ceremony

The Story of the Case: Factual and Emotional Case Theory

D. Tucker Charns
Indigent Defense Services
Regional Defender, Jud. Div. I, III
tucker.charns@nccourts.org
919-475-6957 (mobile)

Start off with something "unlawyerly".

Think of the last time something moved you.

Think of something heroic.

Write a quick note to yourself about this thought.

Factual and Emotional Theory of the Case

Why Have One
What It Is Not
What It Is
How to Get One

Why have one?

Imagine a tool, a hack,
a shortcut that:

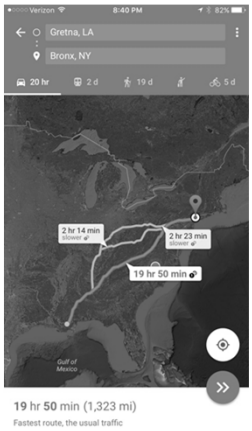
- Helps a helpless person
- Puts a stop to bullying
- Makes your job easier and you look great while you do it

Magic**?**

A Hack?

A factual and emotional case story gets you where you want to go and stops you from going where you don't.

A Map

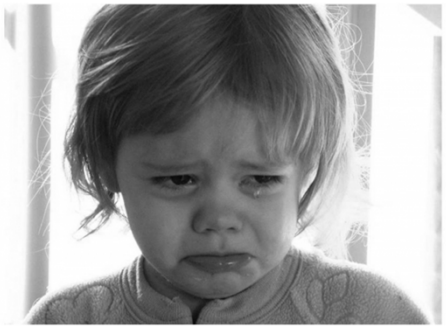


Emotional and Factual Theory

- You can tell a busy ADA or judge what your case is about in 30 seconds
- You are always ready to argue your case
- It gives you swagger
- It makes you THAT lawyer

Without an emotional and factual theory, you are lost.

Without an emotional and factual theory, your client loses.



Every bad case is better with a factual and emotional case story.

Every
case.
Every time.

- The Three Little Pigs
- The Real Story of the BB Wolf

What is not an emotional and factual case theory.

Reasonable Doubt

Nothing factual or emotional.

Here is a reasonable doubt test: ask a mother.

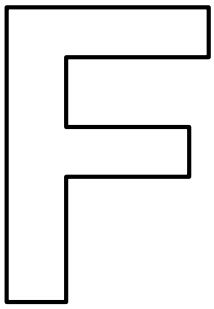
- Mom, did anyone *actually* see me blow down that straw house?
- Mama, I don't really know what happened and no one can said I did.
- Mommy, you know those pigs have never liked me and you know you should never believe a pig.

Would a mother believe that?

If your mother wouldn't believe you, the judge won't believe you.

And your mother likes you.

You go with reasonable doubt as your case theory, you will fail.



Your client is F’ed
The case is F’ed
You are F’ed

Legalese won't help.

Legalese is a dead language and will kill your case:

- Alibi
- Self-defense
- Voluntary intoxication
- Entrapment

There is no emotion behind these words.

There are no facts behind these words.

- He was at Lowe's,loading mulch when he heard the fire trucks race to Mr. A. Pig's house.
- Mr. A. Pig came at him with a steak knife, screaming, spitting and Mr. BB Wolf had seconds to fight back before he was killed

I'm waiting….

What *is* an Emotional and Factual Case Theory?

It is one central story that has the factual, emotional and legal reason why the right outcome for the judge is something good for your client. It is your client's story of innocence, of less blame or unfairness. It is what guides you through every part of the trial. It resolves problems and questions for the judge, it does not hide from them.

Elements of Factual and Emotional Case Theory

- One central story
- With factual, emotional and legal reasons why the judge should do the right thing
- Story of innocence, less blame or unfairness
- It is what guides you

It is one central story.

One story line.

Do not compete with yourself.

- Story of a wolf, just trying to borrow a cup of sugar when he accidentally blew down his neighbor's straw house. The neighbor was a pig anyway, who has a record for driving drunk and cannot be trusted. Besides, cross-species identification is unreliable. And that house was old anyway.

Factual, emotional and legal reasons why judge should do the right thing.

Facts, Emotion, Law

- Facts bring out emotion and move people.
- Nobody likes being told what to do or what to feel.
- The law is the background music.
- Find the right facts, the judge will find the right law.

Which moves you?

- Pigs are not reliable witnesses. You should not believe them.
- Mr. B.A. Pig, the brother of Mr. A. Pig, was scared when he saw a wolf knocking at his brother's house. He turned away quickly to call 911.

Which moves you?

- There is no evidence that my client had the intent to hurt anyone. The State has not one witness that can say he did.
- BB Wolf went to borrow a cup of sugar for his grandmother's cake. All he was looking for was a little help.

Which moves you?

- The evidence shows that Mr. BB Wolf was voluntarily intoxicated when he blew down Mr. A. Pig's house.
- Mr. BB Wolf, not understanding measurements and how much alcohol is in vanilla extract, was not thinking straight and thought he was at his grandmother's house when he knocked on Mr. A. Pig's door.

Story of innocence, less blame or unfairness.

Let me tell you a story…

- Think about the best storytellers.
  - They get us right at the start
  - They know how they want you to feel
  - They know not to waste audience's time

Think about the worst

- Unfocused
- No set theme
- "And then she said..and then I told her…wait, never mind, but listen…."

It is what guides you through every part of the trial.

An emotional and factual case theory gives you checklists.

CHECKLIST

- Opening:
  - Story can be the opening
  - If your story is about an accident, don't talk about mis-identification

CHECKLIST

- Cross-examination:
  - What points to make
  - What points don't help
  - What to leave alone

If your emotional and factual theory is mistaken identification, don't go after the witness's prior record.

CHECKLIST

- Direct
  - What points to make
  - What points don't advance the story

If your emotional and factual theory is that the event never happened, don't talk about self-defense.

I want one! How do I get one?

FIVE STEPS

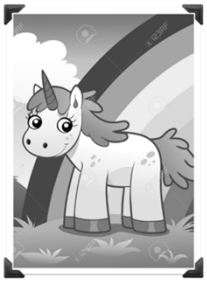
- Find your facts.
- Pick your brand (genre).
- Choose your three best and worst facts.
- Write a headline.
- Write a lead-in paragraph.

1. FACTS

- Find all the facts you can.
- Talk to your client, listen to your client.
- Read every piece of paper.
- Talk and listen to every witness.
- Field trip!

THAT'S THE IDEAL WORLD.

REAL WORLD?



REAL WORLD.

- Find all the facts you can.
- Talk to your client, listen to your client.
- Read every piece of paper.
- Talk and listen to every witness.
- Field trip.

2. Pick Your Genre

- **It just never happened** (mistake)
- **It happened but I didn't do it** (mistaken identification, alibi)
- **It happened, I did it but it was not a crime** (self-defense, accident, missing elements)
- **It happened, I did it, it was a crime but not *this* crime** (lesser included or another crime)
- **It happened, I did it, it was the charged crime, but I'm not responsible** (insanity, voluntary intoxication, duress)
- **It happened, I did it, it was a crime, I'm responsible, so what?** (jury nullification)

Tips on Choices

- Gets harder as you go down the list
- Mistake over lies almost every time
- Less you have to take on, the better

For Mr. BB Wolf

- Never happened?
- It happened but I didn't do it?
- It happened, I did it, but it is not a crime?
- It happened, I did it, it is a crime but not this crime?
- It happened, I did it, it's this crime but I'm not responsible?
- It happened, I did it, it's this crime but so what?

For Mr. BB Wolf

- It happened, I did it, but it is not a crime: ACCIDENT.

3. Choose Your Facts

- Three best that support your theory.
- Three not so good that you need to address to support your theory.

Three Good Facts

- He has allergies
- He was baking a cake for his grandmother
- He still had the empty cup in his hand

Three Bad Facts

- He blew down Mr. A. Pig's house.
- He and Mr. A. Pig were enemies.
- He was eating Mr. A. Pig when the police arrived.

4. Write a Headline

Headline is to help focus.

Headline How-To: U

- Unique
- Urgent
- Ultra-Specific
- Useful

UNIQUE

- Remember your audience
- Stand out in a busy court
- Grab attention

URGENT

- Get to the point
- Don’t delay
- Think about the subject lines of emails

ULTRA-SPECIFIC

- Legalese is not specific
- Neither is DEFENDANT
- Paint a picture

USEFUL

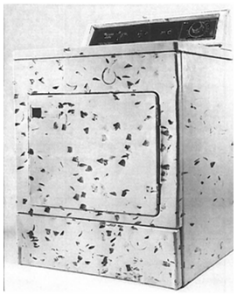
- It will explain your case and why you should get what you are requesting
- It tells you what to focus on
- It reminds you what the case is about

Mr. BB Wolf

AN INTENT TO BORROW TURNS TO SORROW:

Grandson's Generosity and a Pig's Prejudice Results in Accidental Death

Practice Make Perfect



Red Honda Cuts In Traffic as Mom Races to Store to Beat Closing Time

Exhausted Man Works All Night to Pay Fine to Avoid Day in Jail

Husband Walks by Dirty Dishes, Wife Walks Out

5. WRITE A PARAGRAPH FOR YOUR FACTUAL AND EMOTIONAL CASE THEORY

"I would have written you a shorter letter if I had had the time".

Mark Twain

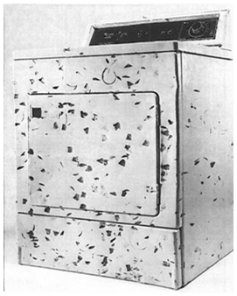
Stories take time

- Taking time up front saves you time and your client from doing time

Telling the Story

- Wordsmithing
- Use facts to bring out the emotion
- Let the reader lead
- Paint a picture
- Emotionally hook your judge
- Turn the chronology around: start from the end
- Quotes from the case

Practice Make Perfect



"I didn't hurt anybody and I am going to jail?"; that's what 19 year old Shawn Shaw asked when he got to the police station in March. He got a speeding ticket last summer, 64 in a 55. He got sick and lost his job at Wendy's. He could not pay his ticket. He got his job back in February and was on his way home at 11:30 one night when he came to a DWI checkpoint. He was sober but tired. When the officer discovered that his license was revoked, he arrested Mr. Shaw and he went to jail that night. His mother got him out of jail the next night but he lost his job again. "I didn't hurt anybody and I am going to jail?" What can the answer be to that question?

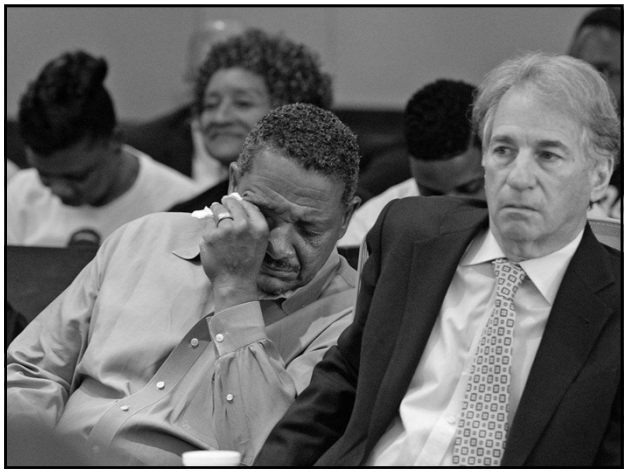
- The red Honda, the down payment coming from her last paycheck from McDonald's, pulled in front of me. Her "My Kids An Honor Student" bumpersticker had to be older than that kid was now. She drove like the wind. ABC stores close at 9.

For BB Wolf's grandmother's birthday, he always baked a cake. That morning, he woke up, suffering from his usual allergies: coughing and roof-raising sneezing. He was not going to disappoint her. He got out the mixing bowl, the flour, the butter and saw he was out of sugar. He didn't have time to walk into town. He decided that, although his neighbors were not his best friends, they would want to help him with his grandmother's cake and loan him some sugar.

He knocked on the door of A. Pig's straw house, softly at first and then, as he heard voices, a bit harder. Each knock made dust fly. As hard as he tried, he could not hold back a great sneeze. To his shock, that sneeze leveled that straw house. He stepped carefully inside, calling out to A. Pig. Silence. He could, however, smell bacon and saw why: A. Pig had been blown into the fireplace. And rather than waste a good breakfast, the most important meal of the day as his grandmother taught him, BB had a few slices of pork belly, And that is what the police saw when they arrived: a wolf eating breakfast, still holding an empty cup for the sugar for his grandmother's birthday cake.

The End.

Wait. Remember those heroic slides?



Judges want to be heroes, too.

So do assistant district attorneys.

Let them.

COMMENTS,
QUESTIONS?

Think you can do it?
Think you should?

Creating a Theory of Defense

A theory of defense is a short written summary of the factual, emotional, and legal reasons why the jury (or judge) should return a favorable verdict. It gets at the essence of your client's story of innocence, reduced culpability, or unfairness; provides a roadmap for you for all phases of trial; and resolves problems or questions that the jury (or judge) may have about returning the verdict you want.

Steps in creating a theory of defense

Pick your genre

1. It never happened (mistake, setup)
2. It happened, but I didn't do it (mistaken id, alibi, setup, etc.)
3. It happened, I did it, but it wasn't a crime (self-defense, accident, elements lacking)
4. It happened, I did it, it was a crime, but it wasn't this crime (lesser offense)
5. It happened, I did it, it was the crime charged, but I'm not responsible (insanity)
6. It happened, I did it, it was the crime charged, I'm responsible, so what? (jury nullification)

Identify your three best facts and three worst facts

- Helps to test the viability of your choice of genre

Come up with a headline

- Barstool or tabloid headline method

Write a theory paragraph

- Use your headline as your opening sentence
- Write three or four sentences describing the essential factual, emotional, and legal reasons why the jury (or judge) should return a verdict in your favor
- Conclude with a sentence describing the conclusion the jury (or judge) should reach

Develop recurring themes

- Come up with catch phrases or evocative language as a shorthand way to highlight the key themes in your theory of defense and move your audience

If You Build It, They Will Come: Creating and Utilizing a Meaningful Theory of Defense

by Stephen P. Lindsay

Stephen P. Lindsay is a senior partner in the law firm of Cloninger, Lindsay, Hensley & Searson, P.L.L.C, in Asheville. His firm specializes in all types of litigation. Lindsay focuses primarily on criminal defense in both state and federal courts. He graduated from Guilford College with a BS in Administration of Justice and earned his JD from the University of North Carolina School of Law. A faculty member of the National Criminal Defense College in Macon, Georgia, Lindsay dedicates between four and six weeks per year teaching and lecturing for various public defender organizations and criminal defense bar associations both within and outside of the United States.

So the file hits your desk. Before you open to the first page you hear the shrill noise of not just a single dog, but a pack of dogs. Wild dogs. Nipping at your pride. You think to yourself, "Why me? Why do I always get the dog cases? It must be fate." You calmly place the file on top of the stack of ever-growing canine files. Your reach for your cup of coffee and seriously consider upping your membership in the S.P.C.A. to "Angel" status. Just as you think a change in profession might be in order, your coworker steps in the door, new file in hand, lets out a piercing howl and says, "This one is the dog of all dogs. The mother of all dogs!" Alas. You are not alone.

Dog files bark because there does not appear to be any reasonable way to mount a successful defense. Put another way, winning the case is about as likely as a crowd of people coming to watch a baseball game at a ballpark in a cornfield in the middle of Iowa. According to the movie, *Field of Dreams,* "If you build it, they will come . . ." And they came. And they watched. And they enjoyed. Truth be known, they would come again, if invited —even if they were not invited.

Every dog case is like a field of dreams: nothing to lose and everything to gain. Believe it or not, out of each dog case can rise a meaningful, believable, and solid defense—a defense that can win. But as Kevin Costner's wife said in the movie, "[I]f all of these people are going to come, we have a lot of work to do." The key to building the ballpark is in designing a theory of defense supported by one or more meaningful themes.

What Is a Theory and Why Do I Need One?

Having listened over the last 20 years to some of the finest criminal defense attorneys lecture on theories and themes, it has become clear to me that there exists great confusion as to what constitutes a theory and how it differs from supporting themes. The words "theory" and "theme" are often used interchangeably. However, they are very different concepts. So what is a theory? Here are a few definitions:

- *That combination of facts (beyond change) and law which in a common sense and emotional way leads a jury to conclude a fellow citizen is wrongfully accused.*—Tony Natale
- *One central theory that organizes all facts, reasons, arguments and furnishes the basic position from which one determines every action in the trial.* —Mario Conte
- *A paragraph of one to three sentences which summarizes the facts, emotions and legal basis for the citizen accused's acquittal or conviction on a lesser charge while telling the defense's story of innocense or reduces culpability.* —Vince Aprile

Common Thread Theory Components

Although helpful, these definitions, without closer inspection, tend to leave the reader thinking "Huh?" Rather than try to decipher these various definitions, it is more helpful to compare them to find commonality. The common thread within these definitions is that each requires a theory of defense to have the same three essential elements:

1. a factual component (fact-crunching/ brainstorming);
2. a legal component (genre); and
3. an emotional component (themes/ archetypes).

In order to fully understand and appreciate how to develop each of these elements in the quest for a solid theory of defense, it

is helpful to have a set of facts with which to work. These facts can then be used to create possible theories of defense. The Kentucky Department of Public Advocacy developed the following fact problem:

State v. Barry Rock, 05 CRS 10621 (Buncombe County)

Betty Gooden is a "pretty, very intelligent young lady" as described by the social worker investigating her case. Last spring, Betty went to visit her school guidance counselor, introducing herself and commenting that she knew Ann Haines (a girl that the counselor had been working with due to a history of abuse by her uncle, and who had recently moved to a foster home in another school district).

Betty said that things were not going well at home. She said that her stepdad, Barry Rock, was very strict and would make her go to bed without dinner. Her mother would allow her and her brother (age 7) to play outside, but when Barry got home, he would send them to bed. She also stated that she got into trouble for bringing a boy home. Barry yelled at her for having sex with boys in their trailer. This morning, she said, Barry came to school and told her teacher that he caught her cheating—copying someone's homework. She denied having sex with the boy or cheating. She was very upset that she wasn't allowed to be a normal teenager like all her friends.

The counselor asked her whether Barry ever touched her in an uncomfortable way. She became very uncomfortable and began to cry. The counselor let her return to class, then met her again later in the day with a police officer present. At that time, Betty stated that since she was 10, Barry had told her if she did certain things, he would let her open presents. She explained how this led to Barry coming into her room in the middle of the night to do things with her. She stated that she would try to be loud enough to wake up her mother in the room next door in the small trailer, but her mother would never come in. Her mother is mentally retarded, and before marrying Barry, had quite a bit of contact with Social Services due to her weak parenting skills. She stated that this had been going on more and more frequently in the last month and estimated it had happened 10 times.

Betty is an A/B student who showed no sign of academic problems. After reporting the abuse, she has been placed in a foster home with her friend Ann. She has also attended extensive counseling sessions to help her cope. Medical exams show that she has been sexually active.

Kim Gooden is Betty's 35-year-old mentally retarded mother. She is a "very meek and introverted person" who is "very soft spoken and will not make eye contact." She told the investigator she had no idea Barry was doing this to Betty. She said Barry made frequent trips to the bathroom and had a number of stomach problems that caused diarrhea. She said that Betty always wanted to go places with Barry and would rather stay home with Barry than go to the store with her. She said that she thought Betty was having sex with a neighbor boy, and she was grounded for it. She said that Betty always complains that she doesn't have normal parents and can't do the things her friends do. She is very confused about why Betty was taken away and why Barry has to live in jail now. An investigation of the trailer revealed panties with semen that matches Barry. Betty says those are her panties. Kim says that Betty and her are the same size and share all of their clothes.

Barry Rock is a 39-year-old mentally retarded man who has been married to Kim for five years. They live together in a small trailer making do with the Social Security checks that they both get due to mental retardation.

Barry now adamantly denies that he ever had sex and says that Betty is just making this up because he figured out she was having sex with the neighbor boy. After Betty's report to the counselor, Barry was interviewed for six hours by a detective and local police officer. In this videotaped statement, Barry is very distant, not making eye contact, and answering with one or two words to each question. Throughout the tape, the officer reminds him just to say what they talked about before they turned the tape on. Barry does answer "yes" when asked if he had sex with Betty and "yes" to other leading questions based on Betty's story. At the end of the interview, Barry begins rambling that it was Betty that wanted sex with him, and he knew that it was wrong, but he did it anyway.

Barry has been tested with IQs of 55, 57, and 59 over the last three years. Following a competency hearing, the trial court found Barry to be competent to go to trial.

The Factual Component

The factual component of the theory of defense comes from brainstorming the facts. More recently referred to as "fact-busting," brainstorming is the essential process of setting forth facts that appear in discovery and arise through investigation.

It is critical to understand that facts are nothing more—and nothing less—than just facts during brainstorming. Each fact should be written down individually and without any spin. Non-judgmental recitation of the facts is the key. Do not draw conclusions as to what a fact or facts might mean. And do not make the common mistake of attributing the meaning to the facts that is given to them by the prosecution or its investigators. It is too early in the process to give value or meaning to any particular fact. At this point, the facts are simply the facts. As we work through the other steps of creating a theory of defense, we will begin to attribute meaning to the various facts.

Judgmental Facts (WRONG)	Non-Judgmental Facts (RIGHT)
Barry was retarded	Barry had an IQ of 70
Betty hated Barry	Barry went to Betty's school, went to her classroom, confronted her about lying, accused her of sexual misconduct, talked with her about cheating, dealt with her in front of her friends
Confession was coerced	Several officers questioned Barry, Barry was not free to leave the station, Barry had no family to call, questioning lasted six hours

The Legal Component

Now that the facts have been developed in a neutral, non-judgmental way, it is time to move to the second component of the theory of defense: the legal component. Experience, as well as basic notions of persuasion, reveal that stark statements such as "self-defense," "alibi," "reasonable doubt," and similar catch-phrases, although somewhat meaningful to lawyers, fail to accurately and completely convey to jurors the essence of the defense. "Alibi" is usually interpreted by jurors as "He did it, but he has some friends that will lie about where he was." "Reasonable doubt" is often interpreted as, "He did it, but they can't prove it."

Thus, the legal component must be more substantive and understandable in order to accomplish the goal of having a meaningful theory of defense. Look at Hollywood and the cinema; thousands of movies have been made that have as their focus some type of alleged crime or criminal behavior. According to Cathy Kelly, training director for the Missouri Pubic Defender's Office, when these types of movies are compared, the plots, in relation to the accused, tend to fall into one of the following genres:

1. It never happened (mistake, set-up);
2. It happened, but I didn't do it (mistaken identification, alibi, set-up, etc.);
3. It happened, I did it, but it wasn't a crime (self-defense, accident, claim or right, etc.);
4. It happened, I did it, it was a crime, but it wasn't this crime (lesser included offense);
5. It happened, I did it, it was the crime charged, but I'm not responsible (insanity, diminished capacity);
6. It happened, I did it, it was the crime charged, I am responsible, so what? (jury nullification).

The six genres are presented in this particular order for a reason. As you move down the list, the difficulty of persuading the jurors that the defendant should prevail increases. It is easier to defend a case based upon the legal genre "it never happened" (mistake, set-up) than it is on "the defendant is not responsible" (insanity).

Using the facts of the Barry Rock example as developed through non-judgmental brainstorming, try to determine which genre fits best. Occasionally, facts will fit into two or three genres. It is important to settle on one genre, and it should usually be the one closest to the top of the list; this decreases the level of defense difficulty. The Rock case fits nicely into the first genre (it never happened), but could also fit into the second category (it happened, but I didn't do it). The first genre should be the one selected.

But be warned. Selecting the genre is not the end of the process. The genre is only a bare bones skeleton. The genre is a legal theory, not your theory of defense. It is just the second element of the theory of defense, and there is more to come. Where most attorneys fail when developing a theory of defense is in stopping once the legal component (genre) is selected. As will be seen, until the emotional component is developed and incorporated, the theory of defense is incomplete.

It is now time to take your work product for a test drive. Assume that you are the editor for your local newspaper. You have the power and authority to write a headline about this case. Your goal is to write it from the perspective of the defense, being true to the facts as developed through brainstorming, and incorporating the legal genre that has been selected. An example might be:

Rock Wrongfully Tossed from Home by Troubled Stepdaughter

Word choice can modify, or entirely change, the thrust of the headline. Consider the headline with the following possible changes:

Rock →	***Barry, Innocent Man, Mentally Challenged Man***
Wrongfully Tossed →	***Removed, Ejected, Sent Packing, Calmly Asked To Leave***
Troubled →	***Vindictive, Wicked, Confused***
Stepdaughter →	***Brat, Tease, Teen, Houseguest, Manipulator***

Notice that the focus of this headline is on Barry Rock, the defendant. It is important to decide whether the headline could be more powerful if the focus were on someone or something other than the defendant. Headlines do not have to focus on the defendant in order for the eventual theory of defense to be successful. The focus does not even have to be on an animate object. Consider the following possible headline examples:

Troubled Teen Fabricates Story for Freedom

Overworked Guidance Counselor Unknowingly Fuels False Accusations

Marriage Destroyed When Mother Forced to Choose Between Husband and Troubled Daughter

Underappreciated Detective Tosses Rock at Superiors

Each of these headline examples can become a solid theory of defense and lead to a successful outcome for the accused.

The Emotional Component

The last element of a theory of defense is the emotional component. The factual element or the legal element, standing alone, are seldom capable of persuading jurors to side with the defense. It is the emotional component of the theory that brings life, viability, and believability to the facts and the law. The emotional component is generated from two sources: archetypes and themes.

Archetypes, as used herein, are basic, fundamental, corollaries of life that transcend age, ethnicity, gender and sex. They are truths that virtually all people in virtually all walks of life can agree upon. For example, few would disagree that when one's child is in danger, one protects the child at all costs. Thus, the archetype demonstrated would be a parent's love and dedication to his or her child. Other archetypes include love, hate, betrayal, despair, poverty, hunger, dishonesty and anger. Most cases lend themselves to one or more archetypes that can provide a source for emotion to drive the theory of defense. Archetypes in the Barry Rock case include:

- The difficulties of dealing with a stepchild
- Children will lie to gain a perceived advantage
- Maternity/paternity is more powerful than marriage
- Teenagers can be difficult to parent

Not only do these archetypes fit nicely into the facts of the Barry Rock case, each serves as a primary category of inquiry during jury selection.

In addition to providing emotion through archetypes, attorneys should use primary and secondary themes. A primary theme is a word, phrase, or simple sentence that captures the controlling or dominant emotion of the theory of defense. The theme must be brief and easily remembered by the jurors.

For instance, a primary theme developed in the theory of defense and advanced during the trial of the O.J. Simpson case was, "If it doesn't fit, you must acquit." Other examples of primary themes include:

- One for all and all for one
- Looking for love in all the wrong places
- Am I my brother's keeper?
- Stand by your man (or woman)
- Wrong place, wrong time, wrong person
- When you play with fire, you're going to get burned

Although originality can be successful, it is not necessary to redesign the wheel. Music, especially country/western music, is a wonderful resource for finding themes. Consider the following lines taken directly from the songbooks of Nashville (and assembled by Dale Cobb, an incredible criminal defense attorney from Charleston, South Carolina):

Top 10 Country/Western Lines (Themes?)

10. Get your tongue outta my mouth 'cause I'm kissin' you goodbye.
9. Her teeth was stained, but her heart was pure.
8. I bought a car from the guy who stole my girl, but it don't run so we're even.
7. I still miss you, baby, but my aim's gettin' better.
6. I wouldn't take her to a dog fight 'cause I'm afraid she'd win.
5. If I can't be number one in your life, then number two on you.
4. If I had shot you when I wanted to, I'd be out by now.
3. My wife ran off with my best friend, and I sure do miss him.
2. She got the ring and I got the finger.
1. She's actin' single and I'm drinkin' doubles.

Incorporating secondary themes can often strengthen primary themes. A secondary theme is a word or phrase used to identify, describe, or label an aspect of the case. Here are some examples: a person—"never his fault"; an action—"acting as a robot"; an attitude—"stung with lust"; an approach—"no stone unturned"; an omission—"not a rocket scientist"; a condition—"too drunk to fish."

There are many possible themes that could be used in the Barry Rock case. For example, "blood is thicker than water"; "Bitter Betty comes a calling"; "to the detectives, interrogating Barry should have been like shooting fish in a barrel"; "sex abuse is a serious problem in this country—in this case, it was just an answer"; "the extent to which a person will lie in order to feel accepted knows no bounds."

Creating the Theory of Defense Paragraph

Using the headline, the archetype(s) identified, and the theme(s) developed, it is time to write the "Theory of Defense Paragraph." Although there is no magical formula for structuring the paragraph, the following template can be useful:

Theory of Defense Paragraph
- Open with a theme
- Introduce protagonist/antagonist
- Introduce antagonist/protagonist
- Describe conflict
- Set forth desired resolution
- End with theme

Note that the protagonist/antagonist does not have to be an animate object.

The following examples of theory of defense paragraphs in the Barry Rock case are by no means first drafts. Rather, they have been modified and adjusted many times to get them to this level. They are not perfect, and they can be improved upon. However, they serve as good examples of what is meant by a solid, valid, and useful theory of defense.

Theory of Defense Paragraph One

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. "Barry, if you just tell us you did it, this will be over and you can go home. It will be easier on everyone." Barry Rock is a very simple man. Not because of free choice, but because he was born mentally challenged. The word of choice at that time was "retarded." Despite these limitations, Barry met Kim Gooden, who was also mentally challenged, and the two got married. Betty, Kim's daughter, was young at that time. With the limited funds from Social Security Disability checks, Barry and Kim fed and clothed Betty, made sure she had a safe home in which to live, and provided for her many needs. Within a few years, Betty became a teenager, and with that came the difficulties all parents experience with teenagers: not wanting to do homework, cheating to get better grades, wanting to stay out too late, experimenting with sex. Mentally challenged, and only a stepparent, Barry tried to set some rules—rules Betty didn't want to obey. The lie that Betty told stunned him. Kim's trust in her daughter's word, despite Barry's denials, hurt him even more. Blood must be thicker

than water. All Barry wanted was for his family to be happy like it had been in years gone by. "Everything will be okay, Barry. Just say you did it and you can get out of here. It will be easier for everyone if you just admit it."

Theory of Defense Paragraph Two

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. Full of despair and all alone, confused and troubled, Betty Gooden walked into the guidance counselor's office at her school. Betty was at what she believed to be the end of her rope. Her mother and stepfather were mentally retarded. She was ashamed to bring her friends to her house. Her parents couldn't even help her with homework. She couldn't go out as late as she wanted. Her stepfather punished her for trying to get ahead by cheating. He even came to her school and made a fool of himself. No—of her!!! She couldn't even have her boyfriend over and mess around with him without getting punished. Life would be so much simpler if her stepfather were gone. As she waited in the guidance counselor's office, *Bitter Betty* decided there was no other option—just tell a simple, not-so-little lie. *Sex abuse is a serious problem in this country.* In this case, it was not a problem at all—because it never happened. *Sex abuse was Betty's answer.*

The italicized portions in the above examples denote primary themes and secondary themes—the parts of the emotional component of the theory of defense. Attorneys can strengthen the emotional component by describing the case in ways that embrace an archetype or archetypes—desperation in the first example, and shame towards parents in the second. It is also important to note that even though each of these theories are strong and valid, the focus of each is from a different perspective. The first theory focuses on Barry, and the second on Betty.

The primary purpose of a theory of defense is to guide the lawyer in every action taken during trial. The theory will make trial preparation much easier. It will dictate how to select the jury, what to include in the opening, how to handle each witness on cross, how to decide which witnesses are necessary to call in the defense case, and what to include in and how to deliver the closing argument. The theory of defense might never be shared with the jurors word for word; but the essence of the theory will be delivered through each witness, so long as the attorney remains dedicated and devoted to the theory.

In the end, whether you choose to call them dog cases, or to view them, as I suggest you should, as fields of dreams, such cases are opportunities to build baseball fields in the middle of cornfields in the middle of Iowa. If you build them with a meaningful theory of defense, and if you believe in what you have created, the people will come. They will watch. They will listen. They will believe. "If you build it, they will come . . ." ▪

CROSS EXAMINATION

2017 MISDEMEANOR DEFENDER

PHIL DIXON
DEFENDER EDUCATOR

WHY CROSS?

- To Advance your theory of the case
- To Discredit Prosecution case
- To get ammo for closing argument
- If cross isn't serving these purposes, you don't need to cross

HOW TO GET READY FOR CROSS?

- Know your case
- Have a theory of innocence
- Think about the state's case
- Organize your trial file – especially impeachment material

HOW TO PREPARE A CROSS

- Write out questions or points to be made
- Organize points and questions by chapters
- Begin thinking about the order of your chapters

HOW TO CROSS

- Simple, short questions – One fact per question
- Have the witness confirm or deny your facts (no more or less)
- ONLY USE LEADING QUESTIONS

HOW TO CROSS

- Utilize all relevant facts (but only ask questions with a purpose)
- Start and End Strong – Primacy and Recency
- LISTEN – to the direct testimony, and to their answers on cross
- Use Transitions – "Now I'd like to talk to you about . . ."

HOW NOT TO CROSS

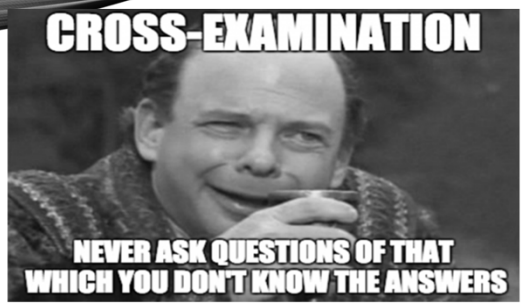
- Don't be unnecessarily combative or rude
- Don't argue with the witness (just impeach them)
- Lose the tags – "correct?" "ok" "um"
- Don't ask questions for which you don't know the answer

MORE NOT TO DO ON CROSS

- Don't repeat the direct examination
- Don't ask the ultimate question (So, . . .)
- Don't let the witness explain

MORE NOT TO DO ON CROSS

- Don't let the witness avoid the question
- Don't be a smartass (usually)
- Lose the lawyer/cop talk
- Don't cross just for the sake of asking questions



COMMON GROUNDS OF IMPEACHMENT

- Bias, Memory, Perception of Witness
- Prior Convictions
- Character for Truthfulness
- Contradictions, inconsistencies, failure to investigate

ADVANCED CROSS TECHNIQUES

- Stretching
- Looping
- Use of Latent Facts
- Impeachment by Prior Statement

FINAL THOUGHTS

- Don't take notes from the movies
- Do take notes from YouTube- Gerry Spence and Irving Younger
- Watch trials, study what works for people
- Develop your own style
- Prepare, prepare, prepare

BASIC LAW OF CROSS

- Good Faith Requirement
- Rules of Evidence Apply (402, 403, 404, 608, 609, 611)
- No undue harassment, embarrassment

BASIC LAW OF CROSS

- Wide-Open Cross (but watch for opening doors . . .)
- Courts have wide discretion to limit for relevance, cumulative evidence, badgering, etc.
- 5th and 6th Amendments protect Defendant's right to present a defense, to a full and fair cross-examination, and to confront their accusers.

QUESTIONS?

- PHIL DIXON
- DIXON@SOG.UNC.EDU
- 919-966-4248

The Basics of Cross-Examination

The Purpose of Cross-Examination:
Obtain FACTS that will be used in closing argument (*as opposed to making a closing argument during cross-examination*). [There is crucial difference between eliciting facts from a witness and making an argument to a jury based upon those facts.]

I. Preparation

1) List all of the facts you need from each witness.

2) Organize, by topic, how you want to elicit (or present) the facts. Use one page for each topic or major fact (i.e., the "chapter" method).

3) On each page, list all of the predicate (or foundation) questions required to get the fact or cover the topic.

II. Courtroom Technique

1) Never ask a question when you do not know the answer.

2) Always ask leading questions.

3) Always ask one-fact questions.

CROSS-EXAMINATION SKILLS

Fred T. Friedman
Chief Public Defender
Sixth District
Minnesota
218/733-1027
218/733-1034 (fax)

CROSS-EXAMINATION PURPOSES

Cross-examination is the process of questioning an adverse party or witness. Cross-examination questions should be limited to those which reveal information necessary to support statements made in the closing argument. Cross-examination usually consists of narrow, leading questions calling for "yes" or "no" or specific answers. There are exceptions to this generalization which are most likely to occur during supportive cross-examination. Careful consideration must be given, however, before open-ended questions are asked on cross-examination.

Cross-examination serves two primary purposes:

Destructive Cross. Cross-examination can be used to discredit the testifying witness or another witness. This may be accomplished in several ways including attacking the credibility of the witness or testimony. Most of the questions asked on cross-examination will be designed to reduce the credibility or persuasive value of the opposition's evidence.

Supportive Cross. Cross-examination can be used to bolster evidence that supports the cross-examiner's theory of the case. Cross-examination may be used to independently develop favorable aspects of the case not developed on direct examination.

PREPARATION AND ORGANIZATION

A. Background. Full preparation, including knowledge of the facts, evidence, law opponent, and witness, will facilitate cross-examination. All available discovery and investigation techniques should be used to learn everything there is to know about the case.

B. Anticipation. Anticipation of the opponent's side of the case is essential. Considerations include what all the witnesses will testify to, how the other side will try the case,

how both sides of the case can be attacked, and what evidence can be kept out under the rules.

C. Scope of Cross-Examination. The scope of cross-examination is limited to questions involving the subject matter of the direct examination or the credibility of a witness. The outside limits of cross-examination fall within the discretion of the trial judge.

If an area of inquiry extends beyond the scope of direct and does not involve credibility, the cross-examiner has at least two options. The attorney can request the judge to permit a broader inquiry, or the attorney can call the witness to testify as an adverse or hostile witness during the presentation of the case in chief or during rebuttal.

D. Credibility. Factors involved in evaluating and attacking the credibility of a witness include bias, interest, association with the other side, motive, experience, accuracy, memory, demeanor, candor, style, manner of speaking, background, and intelligence. See Section 8l5.

The following areas should be considered when weighing the credibility of the testimony:

1. Is the testimony consistent with common sense?
2. Is the testimony consistent within itself?
3. Is the testimony consistent with other testimony presented in the case?
4. Is the testimony consistent with the established facts of the case?

E. Should there be a Cross-Examination? The most important decision in cross-examination is whether to cross-examine. The following should be weighed in making that determination:

1. Has the witness hurt the case?
2. Is the witness important to the other side?
3. Will the jury expect cross-examination?
4. Will it affect the case if no cross-examination is done?
5. Was the witness credible?
6. Did the witness leave something out on direct examination that might get in if there is cross-examination? Was the omission set up as a trap for the inexperienced cross-examiner?

7. Will cross-examination unavoidably bring out information that is harmful to the case?
8. Are questions being asked only for the sake of questions?
9. Does the witness know more than the attorney does about the case?
10. Will the witness be very difficult to control?
11. Has the witness been deposed or given statements?

F. Preparing Written Questions in Advance. Cross-examination is most effective when questions are prepared in advance. Most prepared questions will not be significantly altered during the trial, but an attorney must retain flexibility to adapt to new material or inconsistencies as they arise.

G. Structure. The areas selected for cross should be structured in a way that clearly shows their purpose and helps the fact-finder remember that point. The attorney should begin and end the cross with strong points.

H. Attention. Close attention to the witnesses on direct examination may reveal signs of deception, lack of assurance, or bluffing that can be explored on cross-examination. The attention shown by the jury or judge may also be a clue.

PRESENTATION AND DELIVERY

A. Confidence. A confident attitude will assist in making the cross-examination effective and persuasive.

B. Not Repeating Direct Examination. Generally, repetition of the direct examination only emphasizes the opponent's case. Repetition of any part of the direct that is supportive of the cross-examiner's case, however, may be effective and justify the use of an open-ended question.

C. Leading the Witness. Questions that suggest or contain the answer should be asked on cross. Questions that require "yes," "no," or short anticipated answers help control the witness, so the testimony develops as anticipated. The questions "why" and questions requiring explanations should be avoided because they call for uncontrolled open-ended answers.

D. Simple, Short Questions. Short, straightforward questions in simple, understandable language are most effective. Broad or

confused questions create problems of understanding for witnesses, attorneys, the jury, and the judge.

E. Factual Questions. Questions that seek an opinion or conclusory response may allow the witness to balk or explain an answer. Questions which include fact words and accurate information force the witness to admit the accuracy of the question.

F. Controlling the Witness. The most effective way to control a witness is to ask short factual questions. Some witnesses must be politely directed to respond; some witnesses may require the intervention and control of the judge.

G. Maintaining Composure. An attorney who displays a temper or argues with a witness may irritate the court and the jury, causing them to side with the witness or the opponent and may draw objections.

H. Adopting Appropriate Approach. Some witnesses may require righteous indignation, others may be attacked, but most need to be carefully and courteously led. A cross-examiner can be very effective by being politely assertive and persistent without having to attack a witness.

I. Stopping When Finished. When the planned questions are asked and the desired information is obtained, the attorney should stop. The case may be harmed more by asking too many questions than by not asking enough.

J. Good Faith Basis. An attorney cannot ask a question on cross unless the attorney has proof of the underlying facts. An attorney cannot fabricate innuendos or inferences on cross-examination. The attorney must have a good faith basis which includes some proof of such facts.

K. Witnesses Requiring Special Consideration. Certain witnesses require special consideration in both the formulation and delivery of questions. These witnesses include children, relatives, spouses, experienced witnesses, investigators, experts, the aged, the handicapped, and those with communication problems. Outside resources may be used to assist in developing tactics to deal with special witnesses.

EXPERT WITNESSES

Areas for cross-examination of experts parallel areas for lay witnesses and permit additional areas of inquiry regarding:

1. Their fees
2. The number of times they have testified before
3. Whether they routinely testify for the plaintiff or defendant
4. Their failure to conduct all possible tests
5. The biased source of their information
6. Their lack of information
7. The existence of other possible causes or opinions
8. The use of a treatise to impeach

The cross-examiner must develop absolute mastery of the expert's field before examining the expert in a specific area. A well-constructed concise hypothetical question may be effective if it elicits an opinion contrary to the testimony on direct examination.

IMPEACHMENT

A. Factors. Impeachment discredits the witness or the testimony. To evaluate whether impeachment is appropriate, the following should be considered:

1. How unfavorable is the testimony and how much did it hurt the case?
2. Will impeachment be successful?
3. Is there a sound basis for impeachment and can it be accomplished?
4. Is the impeachment material relevant to the facts or the credibility of the witness?
5. Is the impeachment material within the court's discretion and not too remote or collateral?

B. Sources of Impeachment. The credibility of a witness may be attacked in any number of ways. Many witnesses, however, will not have obvious or apparent weaknesses in their testimony. The following factors represent the more common and frequent matters employed to reduce the credibility of a witness.

1. *Misunderstanding of Oath.* The witness may not understand the oath or know the difference between telling the truth and telling a lie. This situation rarely arises.
2. *Lack of Perception.* The witness may not have actually observed the event, or the witness may have perceived something through the senses (sight, taste, hearing, smell or touch). It can be shown that conditions were not favorable to that perception.
3. *Lack of Memory.* The witness may not have a sound, independent memory of what was observed.
4. *Lack of Communication.* The witness may be unable to adequately communicate what was perceived.
5. *Bias, Prejudice, or Interest.* The witness may have a personal, financial, philosophical, or emotional stake in the trial.
6. Prior Criminal Record. The witness may have a prior criminal conviction which may be admissible. See Fed.R.Evid. 609. Local law and practice may limit the use of the information.
7. Prior Bad Acts. The testimony concerning a witness' prior bad conduct may sometimes be used to impeach a witness if it is probative of untruthfulness.
8. Character Evidence. A witness may be impeached by a character witness who is familiar with the reputation of the witness for truth and veracity or who has an opinion regarding the truthfulness of the witness. See Fed. R. Evid. 608(a).
9. Prior Inconsistent Statements or Omissions. The witness may have made former contradictory or inconsistent oral statements or may have omitted some facts during previous testimony or in a prior statement. If the witness denies these prior statements, a copy of the statement or another witness may be needed to prove them.

C. Extrinsic Evidence and Collateral Matters. An attorney may be able to introduce extrinsic evidence if a witness denies a cross-examination impeachment question. Extrinsic evidence is evidence introduced through a source other than the witness, such as another witness or document. Whether extrinsic evidence is admissible depends on whether the facts are "collateral" or "non-collateral" to the case. A matter is collateral and not admissible if it has no connection to the case. A matter is non-collateral and admissible if it has a relationship to the case.

D. Use of Inconsistent Statements for Impeachment. The statements must be inconsistent or contradictory to be used. The document referred to must be available to prove the

inconsistency. Federal Rule of Evidence 613 provides the option of not showing the prior statement to the witness, but this option may be altered by tactical considerations or by local rule or practice.

The introduction of prior inconsistent statements or omissions usually include three phases:

1. The cross-examiner commits the witness to the direct examination testimony. This may be done by having the witness repeat the testimony to reaffirm the evidence.
2. The cross-examiner next leads the witness through a series of questions describing the circumstances and setting of the prior inconsistent statement.
3. The cross-examiner then introduces the prior inconsistency. This may be done in several ways. The attorney may read from the prior statement or have the witness read it.

A fourth possible stage involves the attorney exploring both statements with the witness, but this may provide the witness with a chance to explain the discrepancy.

If the witness admits the prior statement, the impeachment process is concluded. If the witness denies the prior statement, the exhibit should be marked, identified, and offered as evidence. Proper foundation must be laid for its admission.

The opposing lawyer can request that other portions of the prior statement be introduced contemporaneously with the impeaching testimony to prevent a cross-examiner from introducing selective facts out of context. See Fed. R. Evid. 106. On redirect the opposing lawyer will usually have the witness explain or clarify any discrepancy or rehabilitate the witness with a prior consistent statement, if available. See Fed.R.Evid.801(d)(1)(B).

e. Cross-examination of Character Witness. Character witnesses may be impeached like any other witness. They may also be cross-examined regarding their knowledge of specific instances of bad conduct by the person whose character they praised. Some jurisdictions limit the specific acts of areas that are probative of the untruthfulness of the person. See Fed.R.Evid.608(b).

ADDITIONAL CONSIDERATIONS--THE TEN COMMANDMENTS

Irving Younger’s Ten Commandments for cross-examination are worth remembering:

1. Be brief
2. Ask short questions and use plain words

3. Never ask anything but a leading question
4. Ask only questions to which you already know the answers
5. Listen to the answer
6. Do not quarrel with the witness
7. Do not permit a witness on cross-examination to simply repeat what the witness said on direct examination
8. Never permit the witness to explain anything
9. Avoid one question too many
10. Save it for summation

These suggestions will not be applicable to all cases and all situations. The cross-examiner who has a legitimate reason for asking a question – whether or not that reason "violates" one of the ten commandments – will conduct an effective cross-examination.

AVOIDING MISTRIALS AND REVERSALS

A. Do Not Harass or Embarrass the Witness. Using accusatory questions to seek answers that would harass or embarrass witnesses, even though true, and which are irrelevant to the issues in the case is unethical. DR 7-106(C)(1),(2); Model Rule 3.4; see also Fed R.Evid.611(b). For example, in a motor vehicle accident case, defense counsel bringing out that the plaintiff's child is illegitimate is unethical.

B. Avoid Innuendoes Based on Untrue Facts. Since the lawyer is allowed to use leading questions during cross-examination, there is a great opportunity for abuse. Questions might be asked which discredit a witness before the witness even answers. This can be accomplished by sneers and innuendoes as well as by asking questions that the lawyer knows cannot be proved by any evidence.

C. Do Not Elicit Irrelevant and Prejudicial Responses. Other questioning may not be harassing or damaging to a particular witness, but may be irrelevant and so prejudicial as to warrant a new trial. For example, in a wrongful death action, it is unethical for the plaintiff's attorney to ask the defendant's expert witness if he didn't say to the plaintiff's attorney, off the record during the deposition, that plaintiff's attorney "had a good case and knew it."

THE THREE P'S OF DIRECT EXAMINATION

2017 New Misdemeanor Defender Program

Susan Brooks, IDS

#1: PLAYERS

Select witnesses who advance your theory of the case

#2: PREPARATION

a) Think about your questions
   i. Open-ended
   ii. Specific
b) Prepare and practice with the witness

#3: PRODUCTION

a) Remember primacy and recency
b) Use chapters and signposts
c) Elicit factual details
d) Tap into your frustrated inner actor
e) Have a conversation
f) LISTEN

THE END

Take a bow and SIT DOWN

DIRECT EXAMINATION:

"ALLOWING OTHERS TO HELP TELL THE STORY"

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Prepared by and reprinted with the permission of Phyllis Subin and Dan Shemer

I. A Few Key Concepts

A. Persuasive Storytelling: The Goal of direct examination is to persuasively have others tell your story or to discredit the prosecutor's case.

B. The SIX Ps: **"P**roper **P**reparation **P**revents **P**iss **P**oor **P**erformance**!"** (John Delgado, Esq.)

C. **Advances the Theory of Defense**

D. You must have an **"AURA"** about yourself:

A = **ATTENTION** Get and Keep Your Jurors' **ATTENTION**.
U = **UNDERSTAND** Make Sure The Jurors **UNDERSTAND** Your Witness' Testimony.
R = **REMEMBER** Make Sure The Jurors **REMEMBER** Your Witness' Testimony.
A = **ACCEPT** Make Sure The Jurors **ACCEPT** Your Witness' Testimony.

E. Keep the **Jury in Mind**

1. What you do must be considered from the perspective of the jury (or your trier of fact).

2. Try viewing your ideas through the eyes and minds of your potential jurors.

3. While delivering your direct, always consider the juror's ability to see, hear, understand, etc.

F. YOUR Witness: The witness is in your possession and it is your responsibility to do all you can to ensure that your witness' testimony is successful.

G. Persuasion

1. Communication is 65% non-verbal.

2. Use non-verbal communication (body language, key words, tone, pitch, pace, movement, gestures, etc.) to <u>reinforce</u> your message.

3. If you communicate one message with your words and a different one non-verbally, the trier of fact will believe the non-verbal message or not know which one to believe.

H. Your witness is the Attraction: On cross examination, the focus is on you. On direct, the focus must be on your witness

II. Do I Put <u>This</u> Witness On?

A. Does your theory of defense require you to put on this witness?

1. Test your theory of defense with this witness and without. Which is better? Why?

2. Benefits of calling this witness

    a. Directly supports your theory of defense
    b. Damage the prosecutor's version.
    c. Corroboration by witness supports theory.

3. Benefits of NOT calling this witness

    a. Good defense witnesses can help. Bad defense witnesses can destroy. Weigh the benefits against possible damage. Do you need it? Is it valuable enough?
    b. Keeps spotlight on the prosecution's case. Limits prosecutor's case and arguments.
    c. Even truthful witnesses may not be believed.
    d. Defense witnesses can fill or fix holes in the prosecutor's case.

B. Choose quality over quantity.

1. Put up the best evidence and witnesses to back up your theory of defense.

2. Having the body to say the words, does not make a defense. They must say it well!

III. INVESTIGATING For Direct Examination

A. Investigation concepts.

1. Investigation Fact finding

    a. What are the facts? What does the witness have to say?
    b. Does the witness seem credible? Will s/he be a good witness?
    c. Help decide theory of defense?

2. Investigation Fact development

    a. Find facts that support or enhance your theory of defense.
    b. Seek details that make the witness' testimony real and believable.
    c. Collect corroborating documentation and locate other supporting witnesses.

B. What do you need to know about your witness? **EVERYTHING.**

1. **History (background**) - educational, employment, military, family, criminal history, religious affiliations, health, vision problems, hearing problems, etc.

2. **Relations -** to client, other parties, witnesses, relatives of witnesses or parties

3. **Knowledge** - facts of the case, other witnesses or other parties, source of knowledge and reason for recollection

4. **Quality** - demeanor and attitudes, intelligence, willingness to cooperate, communication skills, ability to survive cross examination, etc.

5. **Actions** - With whom has this witness spoken about the case? police? prosecutor? written statements? contact with other witness? nature of that contact?

C. Is this witness essential to the theory of defense or case?

1. Is there a less dangerous means of presenting the evidence than through a witness who may be subject to cross examination? A document? A less "attackable" witness?

2. Is the witness' testimony cumulative, trivial or peripheral?

IV. PREPARING The Direct Examination: 13 STEPS

Once you have decided that your theory of defense allows and requires to call *this* witness, you must have an organized method of preparing. There are many methods of preparation. What follows is one method. It is one method of many, but it is one that may work for you. Whether you use this one or another is immaterial, so long as you develop one that works for you.

A. STEP 1: Review Everything

1. Read everything document in the file. Then re-read everything that you have about this witness.

2. **"Stream of consciousness note taking"** - anything that pops into your mind about this witness or this witness' testimony should be jotted down. By writing down these thoughts and ideas, you preserve your initial reactions, as well as those flashes of brilliance (that arrive invariably while you are in the shower!) about trial tactics and direct examination techniques that will be perfect for this case and/or this witness.

3. Brainstorm with others – including others who are not lawyers.

B. STEP 2: Juror Questions and Emotions Lists

1. **Anticipate the jurors thoughts about and reaction to your witness and your witness' testimony. (Assess your witness).** This includes the factual thoughts and the "gut" or emotional reactions.

2. **Juror Questions List**

   a. What questions will “normal” people i.e. non-lawyers ask about this witness? about the witness' testimony? What are the motives of the witness?
   b. **Write them down.**
   c. Which questions work for you? against you?

3. **Juror Emotions List**

   a. What will the jurors "feel" about your witness and his/her testimony?
   b. **Write them down.**
   c. Which emotions work for you? against you?

C. **STEP 3: Determine your Objectives**

1. How will this witness advance your theory of defense?

2. What are your **legal, factual, emotional and "believability enhancement" themes and objectives with this witness?**

3. **Factual Themes**

   a. What do you want the jurors to believe after hearing from this witness?
   b. Every objective must advance your theory.
   c. Develop objectives that appeal to people, not lawyer.

4. **Emotional Themes**

   a. How do you want the jurors to **feel** when the witness is finished testifying?
   b. What words would you like them to use to describe the witness?
   c. Emotional objectives must advance your theory.

5. **"Believability Enhancement" Objectives**

   a. Make the witness be and appear to be believable in the eyes of your jurors.
   b. What facts can you bring out? What things can you have the witness do? What can you do to make this witness more believable?
   c. Develop in the jury one of the following reactions: **Identification,** "The Witness is like me;" or **Understanding,** "The Witness is nothing like me, but I understand how s/he came out that way."
   d. Create a connection between the witness and juror i.e. “That’s what I would have done.”

6. **Legal objectives**

   a. Is this witness necessary to establish a legal point?
      - the absence of an element?
      - an affirmative defense?
      - to generate an issue?
      - to lay an evidentiary foundation?
   b. List the legal point(s) that must be established.
   c. List the legal point(s) that <u>this witness</u> must establish.
   d. List the facts that this witness must testify to, to satisfy the legal objective(s).

7. Re-evaluate and Reduce

   a. We all have limited attention spans. Re-evaluate your objectives, reducing them to the essentials. Discard any that you believe are not important.
   b. Select, from among all of the objectives lists, only those objectives that are critical for this witness.

D. **STEP 4: Marshal the facts**

1. Ask yourself, “what am I trying to achieve, and why?”

2. For EVERY THEME, list EVERY SUPPORTING FACT.

3. Consider every fact in the case in light of the particular theme. Repeat this process for each objective, going through the facts over and over, considering the next objective each time.

4. Don't settle for just the obvious facts. Develop reasonable and logical extrapolations.

5. Ask yourself: Which facts lead you to believe that the stated objective is true. Write those facts down. Then look for more!

6. Marshaling the facts develops depth and believability in your theory. It provides new facts that support your objectives that had not been identified before.

E. **STEP 5: Develop story(s), images and key words**

1. Identify and develop the **witness' story(s)** and develop **key words.**

2. Whatever information you want the witness to convey, put it in story form.

3. **Why Stories?**

   a. Stories create and maintain interest.
   b. Stories provide a context into which the jurors may understand and place the facts. It allows the jurors to discern which facts are important and which are insignificant.
   c. Stories enhance recall.
   d. Stories encourage empathy and increase believability.

4. **Identify the witness' story(s).**

   a. A single witness may have one or several relevant stories. Whatever the witness has to offer, be it short or long, consider how to present it in story form.
   b. Gives your jurors a better sense of the witness and makes the witness more "real".
   c. You work with the witness as they are the storyteller. The lawyer's role is that of facilitator.

5. **Develop key words**

   a. "Words Are Magic". Maximize the effectiveness of a witness' testimony e.g. "scared" or "in fear" is less compelling than "terrified," or "I knew I was about to die."
   b. Consider the best words and the worst words that the witness can use. The witness must use the best language to make their point and avoid the bad phrases.
   c. Develop word that **maximize or minimize** the desired impression.
   d. Develop descriptive, poetic language.

F. **STEP 6: Organize persuasively**

1. Organize your themes and your witness' story(s) persuasively and effectively. Organization is a key tool of persuasion.

2. Where To Begin Your Direct

   a. Traditional Organization**:** Ease-In
      - Allows the witness to get comfortable on the stand.
      - Allow the witness to ease into the testimony.
      - Allows the witness to get over the nervousness of being on the stand.
      - Allows better communication of the important points better.

   b. Modern Organization: Primacy and Recency
      - We remember best what we hear first and last.
      - Jurors will perceive the first and last points as most important.
      - Identify your best one or two points. This points should be the first and last points you have the witness make.
      - Consider starting with questions that establish the theme of the witness' testimony superficially, turning to background information and returning to the theme.

3. Other Organizational Issues

   a. Background / Scene / Action organization - This approach is logical and easy to follow.
      (1) Witness background
      (2) Event background
      (3) Scene of the action described
      (4) Action described
   b. Logical progression of your questions; from general to specific
   c. Complete a topic before moving to another.

4. Do you disclose weaknesses?

   a. The **"majority opinion**" recommends that you disclose weaknesses to maintain credibility and take the "sting" out of disclosure by the adversary. The disclose must be made in a way that reduces the impact of the weakness.
   b. The **"minority opinion**," sometimes referred to as the "sponsorship" theory, recommends that you do not disclose weaknesses because doing so increases, rather than reduces, the impact of the weaknesses. "If they are admitting that much, imagine how bad it really is" is representative of this view.
   c. **If you do plan to disclose weaknesses**, consider the following:
      - Place it in the middle where it is least likely to have a major impact and least likely to be remembered.
      - Only disclose weakness that you are sure will come out.
      - Present the **good stuff before the bad stuff.**
      - Present the weakness in the best possible light.
      - Attempt to reasonably minimize the weakness by using minimizing words and questioning about it briefly.

G. **STEP 7: Anticipate cross examination**

1. Anticipate the weaknesses in witness' attitude, testimony and history for cross examination.

2. What are the weaknesses of this witness?

    a. Easily riled?
    b. Have an "attitude?"
    c. Will s/he hold up on cross?
    d. Does s/he answer well, volunteer too much or shade the answers?

3. What are the weaknesses of this witness' testimony?

    a. Holes in the story
    b. Unbelievable story
    c. Absence of expected corroboration

4. What attitude/demeanor do you anticipate from the prosecutor during cross.

H. **STEP 8: Prepare re-direct examination**

1. Be very careful with re-direct. Use it to rehabilitate or introduce something that is necessary and failed to introduce during direct (if you can).

2. Re-direct can be dangerous. Because it is difficult to plan the result, often questions that are unartfully crafted, open doors, and permits re-cross providing the prosecutor with another chance to hurt your client and the witness.

3. If re-direct is necessary be brief. It is not necessary to refute or respond to every point made by the prosecutor on cross examination. Stick to the important ones.

I. **STEP 9: Prepare Your Trial Props**

1. Doing things and using things during the trial heighten interest, clarify facts, increase recall and promote acceptance.

2. Using slides, videos, pictures, etc., or moving around during the presentation usually is more interesting than just standing still and talking. Appeal to the jurors' senses.

3. Use actions and creations during trial

    a. Use re-enactments, demonstrations by the witness
    b. Create and use maps, diagrams, pictures, things written on flip charts
    c. Rebuild the interrogation room where your client confessed in the courtroom.
    d. Use clothing, toy guns, knives or weapons similar to the ones involved in the case. Use Sweet N' Low packets to show a gram of cocaine, or an ounce of oregano to show an ounce of marijuana. Such things help illustrate the witness' testimony.

J. **STEP 10: Prepare the other parts of the trial to aid your direct examination**

1. The trial is an "integrated whole." Each part of the trial should be used to support and advance the other parts of the trial and the theory of defense.

2. Think about how each part of the trial can be used to aid the testimony of this witness. The other part of the trial may be used to undercut anticipated cross, to minimize weaknesses, to corroborate strengths, etc.

    a. What **pre-trial motions** can/must be filed to aid the direct examination of this witness?
        - During a suppression motion, "lock down" a witness' testimony that will corroborate the direct of a defense witness.
        - File a Motion In Limine to determine whether a particular defense witness' prior conviction or an item of evidence will be admissible.
    b. What **voir dire questions** can be asked to aid the direct examination of this witness?
    c. What **types of jurors** are most desirable considering this witness and his/her testimony?
    d. What can/must be said in **opening statement** to aid the direct examination of this witness?
    e. What **cross examination** of state's witnesses can/must be conducted to aid the direct examination of this witness?
    f. What **jury instructions** can/must be requested/given to aid the direct examination of this witness?
    g. What must be said in **closing argument** to aid the direct examination of this witness?

K. **STEP 11: Prepare your <u>questions</u>**

1. Review your themes & objectives lists and marshal the facts sheet.

2. Should you write out your questions for each theme? It depends on your organizational style.

    a. Writing out your questions can be beneficial however it is time consuming and may prevent you from actually listening to the answers.
    b. It requires you to think about the best way to ask the question. It also encourages better use of good key words.
    c. If you don't write out your questions, write out the themes and facts that must be covered.
        - Use a separate page for each theme / objective (Posner and Dodd)
        - Easy to re-organize or discard.

3. Choreograph the direct

    a. Build movement into your direct. The absence of movement during the direct will add to the boredom potential substantially. Movement adds interest to the exam.
    b. Plan when, where and how YOU and YOUR WITNESS will move.
    c. Plan how to use your voice; loud, soft, when to use the appropriate tone of voice, etc.

L. **STEP 12: Practice**

1. Practice your questions and practice with props and demonstrations.

2. If you don't practice out loud, alone or in front of someone else, at least, go through the questions and movements in your head. Ideally, ask a friend, spouse, etc. for feedback. If not, a mirror will do.

3. Sometimes ideas that seem wonderful in your mind or on paper, don't work when given sound. Try it, and find out before you are standing before a jury.

4. Practice demonstrations and practice with demonstrative aids or items of tangible evidence. A great demonstration about the ease of misfiring a gun may fall flat if you can't get the gun open when standing before the jury.

M. **STEP 13: Tune-up**

Review and refine your direct examination. This is the time to tighten-up your examination, to add anything necessary, to discard anything unnecessary, etc.

V. PREPARING <u>Your Witness</u>:

N. General thoughts

1. **The witness stand is an alien environment.** It has strange rules, a foreign language and an odd Q & A style of communication. Keep this in mind when preparing the witness for testimony.

2. **Don't forget to ask your witness.** S/he may have good suggestions and insights about what will work.

3. **Explain why**. Your witness must understand why everything that s/he is to do or say is necessary. If your witness understands "why", s/he will respond better on direct and cross.

O. **STEP 1: The Basics**

1. **Logistics**

   a. The physical layout of the courtroom
   b. Courtroom location, number, directions, etc.
   c. Court reporters, sheriffs, bailiffs, jail guards, etc.
   d. Time to arrive, where to wait, what to do upon arrival, who will meet the witness
   e. How the witness will be called into the courtroom, the oath, etc.

2. Basics of law, procedure and evidence

P. **STEP 2: Explain Witness' Role**

1. Explain your **theory of defense**, the **witness' role** in that theory and it's **importance.**

   a. If the witness understands the **big picture,** this will help the witness to know what is important to tell you and tell the jury.
   b. **Beware** giving too much detail or explaining too much to a potentially hostile witness, as they may use this information against you or tell your adversary what they learned.
   c. Your explanation should clarify what information is required of the witness, how it fits in with the overall theory and why it is important.

Q. **STEP 3: Discuss Appearance and Communication Skills**

1. Refine the witness' appearance and communication skills.

2. Discuss how to dress for court

   a. Proper dress is about **respect** for the court, the trial process and the jury.
   b. Be **specific.** Don't merely say, "Dress nicely," or "Wear what you would wear to worship services."

3. **Discuss non-verbal communication and refine these skills**

   a. May require **Q & A sessions**
   b. **Explain** what non-verbal communication is and its **impact**
      - what the jurors believes
      - the jurors' impression of the witness
      - believability
   c. **Body language**
   d. **Voice and manner**
      - volume - loud enough for the farthest juror to hear
      - tone - should be conversational but congruent with the content of the testimony
      - polite, always polite
      - pause before answering to ensure that the question is completed; to ensure that witness understands the question and, on cross, to permit you to object
      - Nervousness is OK - Acknowledge witness' reality
   e. **Words Choice**
      - Encourage **Simple words** - "bar" talk, per Terry MacCarthy e.g. "Told me" rather than "indicated"
      - Encourage **Fact words** - not opinions, characterizations or conclusions; "6'2" and 240 lbs." rather than "big"; "Light blue button down shirt, khaki pants and docksiders" rather that "preppie attire"
      - Encourage **Power words** - Words that communicate certainty.
      - Avoid **Hedge words** (I think, probably, I submit, we contend, etc.)
      - Avoid **Unnecessary intensifiers** (really, very, extremely, etc.)
      - **Hesitations or filler words** (ah, ladies and gentlemen, well, etc.)
      - **Question intonation** (when your voice goes up at the end of a sentence)

R. **STEP 4: Review Prior Statements**

1. Review all of the witness' prior statements with your witness.

2. Let your witness read all of his/her prior statements, especially those given to the State.

S. **STEP 5: Practice Questions and Answers**

1. Practice and refine your questions and answers with the witness.

2. Encourage **NARRATIVE ANSWERS** by the witness

3. **Conduct a mock direct examination** session with your witness.

    a. **Ask the exact questions** and explain why you are asking those questions; don't merely talk about the topics you plan to ask about.
    b. **Get the exact answers the witness will give** - as they will answer in the courtroom.
        - Improve the quality of the answer - The answer may not be clear, may not bring out all of the facts, use poor language, include irrelevant information, etc. You must help the witness answer clearly and effectively.
        - You are not putting words into the witness' mouth. You are ensuring that the words that do come out are clear, complete and effectively communicate the information.

4. Tell the witness to look at the jury, where appropriate or at the questioning lawyer.

T. **STEP 6: Practice Cross and Re-direct**

1. Prepare your witness for **cross examination and re-direct** examination.

2. **Explain "typical" cross examination objectives and tactics**.

    a. Leading questions
    b. Attempts to limit the witness to "yes" or "no" answers
    c. Efforts to show that the witness is unsure, mistaken, biased or lying
    d. Efforts to show that the witness is not reliable or a believable person
    e. Efforts to get the witness upset or angry, in the hope that the witness will appear violent, rash, less believable, or will say something foolish or wrong.

3. **Explain "typical" cross examination techniques** that you expect will be used.
    a. Asking about the witness' recollection about other days around the time of the crime.
    b. Asking why didn't the witness tell this information to the police.
    c. Asking how does the witness recall this particular date.
    d. Exploiting the witness' relationship with the client to suggest that the witness is lying.
    e. Making big issues out of minor variations or inconsistencies with the testimony of others witnesses or with the witness' prior statements.
    f. Asking the "lying then or lying now" question.
    g. The old, "You say A. Witness X says B. Is Witness B lying or mistaken?" technique.
    h. You discussed this information with the defense attorney and others and were told what to say.

4. **Explain <u>this</u> prosecutor's anticipated cross examination objectives and why.**

5. **Practice cross Q & A session.**

    a. Have someone else play the prosecutor's role. Don't take it easy on the witness.
    b. Consider several different styles - an aggressive, fast paced, in-your-face style or a friendly disarming pleasant style cross.

6. **Explain the rules of re-direct and your objectives.**

    a. Explain your **objectives,** why and how they fit in with the theory

b. Conduct a **Q & A** session for the re-direct questions.

VI. DELIVERING Your Direct Examination.

U. Remember your **"AURA"** and being **jury centered**!

V. **Your Organization - Start Well**

1. **Traditional or modern "primacy" approach**

2. **Primacy** - You may start with the **ultimate question.**

3. **Traditional** - You may wish to **ease in** to the exam

W. **Your Movement, Body and Voice**

1. **Your movement**

a. Movement **adds interest.** Exciting movies aren't called "action" pictures for nothing!
b. Your movement should **not detract** or distract attention from the witness
c. Your movement should be intentional. **Limit** your movement.

2. **Your witness' movement**

a. **Build in** as much movement of this witness as is possible e.g. witness draw diagrams, show photos, demonstrate actions, handle exhibits, etc.
b. Good witness? Get him or her off the stand and as close to the jury as much as possible.

3. **Your Voice**

a. A lack of variety in the examination makes any direct **boring.**
b. Inflection in your voice will create interest. If your tone of voice is monotone, your witness will begin to answer in the same monotone. If you sound interested, your witness will sound interested and be more interesting to your jurors.
c. **Variety in your voice:** Pace, tone, volume, pitch
d. **Belief -** Your belief in your witness must come across. If you do not believe your witness, do not put the witness on the stand.

4. **Congruity**

a. You and your questions must be congruent. Your tone, volume, pace, word choice, etc. must be congruent with the content of the question and the content of the witness' testimony.
b. **Mirror the emotion**
c. Your pace, tone, etc. must be congruent with the message

X. **Basic Questioning Thoughts and Techniques**

1. **Main objective: Get THE WITNESS to speak**. The witness must be the focus of attention, not the attorney.

2. **LISTEN** to your witness and her answers.

3. **Avoid Prosecutorial techniques**

   a. The "What, if anything,..." questions.
   b. The "And then what happened?" or the "What happened next?" questions.
   c. These are examples of being unprepared

4. **Simple and short questions**

   a. **Single issue** or single point per question
      - Avoid compound, long questions
      - Simple questions are understood easily by your witness and your jurors.

5. **Open-ended questions**

   a. Ask questions that seek and solicit a **NARRATIVE** response.
   b. **Journalism questions** - Ask questions that begin with **who, what, when, where, why, how, tell us, describe, explain**, etc. These are the questions that will let the witness speak, the objective of direct examination.

6. **Leading questions? RARELY.**

   a. Leading questions reduce your and your witness' credibility and the impact of the witness' testimony because it appears that you are putting words into your witness' mouth.
   b. Leading <u>sometimes</u> is okay
      - Preliminary or inconsequential matters
      - Hostile witness

7. Avoid or clarify **"quibble"** words

   a. "Quibble" words are unhelpful qualifiers and words that are subject to interpretation. Unhelpful qualifiers are words like very, really, extremely, so, etc.
   b. Words that are subject to interpretation usually are adjectives, such as upset, big, fast.
   c. These words do not clearly define the testimony for the trier of fact. How upset is upset? Is really upset any clearer?
   d. Prepare your witness not to use these words. Prepare them to offer the facts instead. If they do use them, ask a clarifying question.

8. **Transitions**

   a. Transitions are used to let everyone know that you are changing the subject or to highlight an important question or answer.

b. **Pauses**

- Those golden moments of silence in the courtroom, the ones that terrify lawyers. Those moments of silence are powerful weapons and should be used.
- A moment of silence between topics signals a change in the subject matter of the questions to the witness and the trier of fact.
- Silence lets the good stuff sink in and lets the jurors think about and **feel the emotional impact** of the testimony

c. **Headlines**

- Use to **change topic or objectives**
- **Orient the jurors** and make the testimony easier to follow
- **Orient the witness** and make the questions easier to answer e.g. "I'd like to ask you about the lighting in the alley"; "Lets talk about the moment when you first saw Mr. Violent."; "Can I stop you right there. What was going through your mind at that moment.";"I have some questions about your relationship with Mr. Smith."

9. **Avoid "recollection stage" of questions and answers.**

a. The recollection stage, ("Do you recall seeing....") can lead to confusing and inefficient responses.
b. For example, if you ask "Do you recall if the person had a moustache?" and the witness says "No," does the witness mean that she didn't see a moustache or that she doesn't recall seeing a moustache or doesn't recall whether the person had a moustache or not. To avoid the problem, leave the "do you recall" part of the question out.
c. Further, including this stage in the question suggests uncertainty. If the question suggests uncertainty, the witness may become or appear uncertain.

Y. Advanced Questioning Thoughts and Techniques

1. **Present tense questions**
   a. Ask questions in the present tense, rather than the past tense.
   b. This techniques adds interest and immediacy to your witness' testimony. If you ask the questions in the present tense, the witness will begin to answer in the present tense.
   c. Q: Where were you on May 2, 1993 at 1 a.m.? A: I was in Red Alley.
      Q: Now Mr. Client, it <u>is</u> May 2, 1993 at 2 a.m. in Red Alley. What <u>are</u> you doing?
      A: I am standing there and this big guy is walking toward me.

2. **Sense questions**

a. Ask questions that seek answers that focus on the **senses**. These questions seek evocative answers to which the trier of fact will relate.
   - **Hear**
   - **See**
   - **Smell**
   - **Taste**
   - **Touch**
   - **Feel physically**
   - **Feel emotionally.**

b. Focusing on colors and familiar objects at the scene will make the scene come to life f or the jurors.

3. **Looping technique**

   a. Use the words of a question or answer in a succeeding question or questions.
   b. These can be planned and/or spontaneous.
      Q: How big was the man? A: He was 6'2" and weighed about 225.
      Q: What was the 6'2", 225 lb. man doing when you saw him? A: Hitting Mr. Client.
      Q: When the 6'2", 225 lb man was hitting Mr. Client, what was Mr. Client doing?

4. **Juror's Voice Technique**

   a. Ask the questions that are in the jurors' minds. (See your "juror questions list")
   b. Ask the questions using the same words and the same tone of voice that the juror would use if asking the question. Hear it in your head.
   c. You become the juror's representative. The jurors will come to rely on you to ask the things they want to know. This also takes the sting out of the prosecutor's points
   d. For example:
      Q: How could you have seen it wasn't Mr. Client when you were driving the car at the same time as you say you were watching the fight?
      Q: How could you possibly recall such details about a single day 14 months ago?
   e. A well prepared witness will knock these questions out of the ballpark!

5. **Jury instruction questions.** Use the language of the anticipated jury instructions in framing questions and refining answers.

6. **"What were you thinking / feeling" questions**

   a. Ask questions that disclose the witness' thoughts, feelings and motivations, particularly at the critical time for the witness.
   b. These question humanize the witness and help juror identification.
      Q: "As you saw the person being robbed, what were you thinking?"
      Q: "When you heard that your son was charged with shooting someone on Saturday, May 3, what went through your mind?"
      Q: "You told us that he came at you with a knife. What were you feeling at that moment?"

7. **Emphasis**

   a. Highlights, clarifies and adds interest
   b. Placing **emphasis** on a particular word in a sentence can change the meaning or focus of the question.
      Q: **WHERE** was Fred when you first saw him?
      Where **WAS** Fred when you first saw him?
      Where was **FRED** when you first saw him?
      Where was Fred **WHEN** you first saw him?
      Where was Fred when **YOU** first saw him?
      Where was Fred when you **FIRST** saw him? etc.

c. **Pausing** after a particular word in a sentence can change the meaning or focus of the question.
   Q: Where..... was Fred when you first saw him?
   Where was..... Fred when you first saw him?
   Where was Fred..... when you first saw him?

8. **Flagging** a question will give it emphasis.

Q: "Now, Mr. Witness, this question is very important, so please listen carefully before answering...."
Q: "What is the one thing that stands out most in your mind?"

9. **Stretch out / shrink down technique**

a. The **"stretch out"** technique seeks to maximize the impact of information by "stretching out" answers. It can be used to make something big seem bigger, something far seem farther, something slow seem slower, etc. For example:
   To show that the client stood <u>far</u> from the shooting and, therefore, was not involved;
   Q: You told us that Mr. Client was across the street from where the shooting took place. I'd like to ask you about how far away he was. First, is there a sidewalk?
   Q: How wide is it?
   Q: Is there a lane where cars park on the south side of the street?
   Q: How many lanes of traffic going south?
   Q: How many lanes of traffic going north?
   Q: Is there a lane where cars park on the north side of the street? etc.

b. The **"shrink down"** technique seeks to minimize the impact of information by "shrinking it down." It can be used to make something fast seem faster, something minor seem even more minor, something close seem closer, etc. For example:
   To show client stood <u>close</u> to the shooting and therefore, was not involved:
   Q: You told us that Mr. Client was across the street from where the shooting took place. How close was he to Mr. Decedent at the time the shots were fired?
   A: Pretty close. He was just across the street. He's lucky he didn't get hit himself.

10. **Influencing words**

a. The words included in the question can influence the answer.
b. Decide what answer you want and use the language of the desired answer to ask the question.
   - If you want something to seem far, ask "How far?"
   - If you want something to seem close, ask "How close?"
   - Short/tall; big/small; fast/slow. etc.
c. Your question may presuppose a desired fact. "Did you see <u>THE</u> gun?" versus "Did you see <u>A</u> gun?" This presumes the existence of the gun. The jurors and the witness are more likely to believe that a gun was involved and seen by the witness.

11. **Stop action or Freeze frame technique**

    a. Have the witness focus on a specific moment or part of an event and have her describe it in detail. For example:
       Q: "Let me stop you there. Please describe Mr. Aggressor at that moment."
       Q: "Where was the knife?"
       Q: "Where was his other hand?"
       Q: "What was he saying?"
    b. This technique brings a critical moment to life by presenting substantial detail.

Z. **Techniques for Problem Witnesses**

1. Non-responsive answers or who won't stay on the subject

    a. Take the blame - "I'm sorry, my question wasn't clear. Let me try again."
    b. Explain what you want - "Mr. Witness, I'm trying to find out about whether you got a look at the face of the attacker. Do you understand that? Now, did you see his face? Can you please tell us about it?"

2. Who has a bad attitude (occasionally, your client)

    a. Confront it.
    b. Your jurors are taking it in. "Mr. X, you seem upset. Would you like to tell the ladies and gentlemen of the jury why you are upset?"

3. Who repeatedly refer to **inadmissible evidence:** Explain the rules, but be nice!
   Q: "Mr. Witness, the law doesn't allow you to offer your opinion about Mr. Victim. When I ask you a question about him, please just tell us the facts that answer the question. OK?"
   Q: "Ms. Witness, the law doesn't permit you to tell us what you heard in the neighborhood. That is called hearsay. You can tell us only what <u>you</u> saw, <u>you</u> heard. Not what someone else told you. Do you understand what I mean by that?"

4. Who gives an **unexpected bad / fatal answer**

    a. Prevention, through preparation, is the best technique.
    b. There are no good ways to handle this. Seek the lesser of evils.
       - Ignore it and hope the jurors didn't hear it. At least you aren't making a big deal out of it for the jurors.
       - Claim surprise and cross examine the witness.
       - "You just said.... Is that what you meant to say?"
       - Refresh recollection with previous interview notes. Q: "You and I just spoke about this yesterday, didn't we?" Q: "Didn't you say X, not Y?" Q: "Can you explain that?"
       - **Fail-safe response** - Approach the bench and hope for a good plea!

5. Who is **forgetful**

    a. Refresh recollection
    b. Use a document as "past recollection recorded"
    c. Ask for a recess

d. Lead the witness - option of last resort

AA. **Storytelling and picture painting techniques**

1. **Scene Before Action.**

a. Before describing the action of a story, tell the jurors about the place where the events are happening. This gives context for the story; gives the jurors a place to put the people and events to follow.

b. Sometimes a **physical description** of the location is required.
Q: I'd like you to tell the ladies and gentlemen of the jury about Red Alley. Can you please describe it?
Q: If I were walking in it, what things would I see?
Q: What does it smell like?

c. Sometimes the **emotional landscape** must be described.
Q: What kind of place is Joe's Bar? A: It's a filthy biker's bar.
Q: Can you describe the people who have been there when you've been there in the past?
A: They're all biker's, big guys with tattoos who get drunk and like to mess with people.
Q: What activities have gone on there when you've been there? A: There are always fights, every night I was ever there.

d. Having set the scene, you can describe the action using any of the techniques described below.

2. **Flashback** or **flash forward** - Start the story at the point that is most critical for your theory. Then, flash back to something earlier or forward to something later. For example:
Q: Mr. Client, why did you hit Mr. Jones?
A: He threw a beer in my face and was reaching for a pool stick. I hit him before he got the stick and smacked me with it.
Q: Let's back up a moment, and please, tell us how this all started?
A: I was in the bar with a few friends and this guy was drunk and ....

3. **Parallel action development** - Present the story of different parties separately, a little at a time, until you bring them together at the critical moment. For example:
Q: Ms. Witness, what was Mr. Client doing at this time?
A: He was sitting there minding his own business, drinking a beer at the bar.
Q: While Mr. Client was minding his own business, what was Mr. Accuser doing?
A: He was shooting pool.
Q: How was he acting?
A: He was screaming at some guy, accusing him of taking his quarter. He was pretty drunk and pretty loud.
Q: How did Mr. Client come to fight with Mr. Accuser?
A: Mr. Accuser swung the pool stick at the guy he was playing pool with and missed. He hit Mr. Client. As Mr. Accuser was winding up again, that's when Mr. Client hit him.

4. **Freeze frame** - Select the critical moment in light of the specifics of your theory and paint it in minute detail so that your jurors see it exactly as it was. For example:

Q: Mr. Witness, you told us that you saw the whole thing. Can you tell us what you saw?
A: Yes, I saw Mr. Deceased running at Mr. Client with a table leg and Mr. Client shot him.
Q: I'd like you to tell us about Mr. Deceased and what he was doing. First, How big is he?
A: He is a big man, 6'2", maybe 225 lbs.
Q: How was he built?
A: He was real strong. Built kinda like a weightlifter. Big arms and all.
Q: Tell us about his clothes?
A: He had on a black tank top with something like "...Meanest SOB in the valley" on it.
Q: What else was he wearing?
A: Jean shorts, cutoffs, black combat boots....

5. The **Interview** or the **Investigation** - Tell the story by following the police investigation or the interview of an important witness.
   Q: Officer Jones you told us that you were the investigating officer? Was Mr. Witness on the scene when you got there? A: Yes
   Q: Did you talk to him? A: Yes.
   Q: Did he tell you he saw the guy who did it? A: Yes
   Q: Did you ask him whether he could describe the guy?
   A: Yes. He said he could.
   Q: Tell us about the questions that you asked him?

6. **Panorama to zoom** - Put the story into context. Question the witness about the big picture and move to questions about the specific important things. For example:
   Q: Can you tell us about the area?
   A: It's a nice neighborhood. There are row houses on both sides of the street. Cars park on both sides too. There's a little Ma & Pa grocery on the corner. It's nice.
   Q: What kind of day was it?
   A: It is a beautiful day. Real sunny, the sky was blue and it was real warm. In the street, some of the kids were playing stickball.
   Q: Did you see Mr. Violent in the area?
   A: Yeah, on the corner with a group of guys, wearing a blue coat and had a black steel revolver in his right hand.
   Q: Tell us about the gun?

7. **The walk through.** Directional comments are confusing and meaningless too often. Think about the homicide police report; "The body was lying in a northerly direction with the head facing in a westerly direction and the feet facing the southeast...." Not very helpful. Instead, select a place to start and question the witness about the things they see to their right, their left, in front, etc. as they walk through the scene. For example:
   Q: Officer Jones when you walked into the alley, what did you see?
   A: I saw a body.
   Q: Please describe the way the body was lying as you were looking at it?
   A: It was face down. The person's face was to the left...
   Q: Whose left?
   A: My left and his left. His face was facing kind of away from me.

8. **Chronological** - Easy to follow, but it's less interesting and harder to highlight the important stuff.

BB. **Objections**

1. **Your objections to the prosecutor's cross examination.**

   a. Can you object? Is the prosecutor doing something improper? Can you win? at what cost?
   b. Should you object?
      - Your objections must be consistent with your theory.
      - Does the question hurt the witness? damage your theory? If the answer is no, why object?
      - Jurors dislike objections. They feel excluded and believe that you are hiding something from them. So, even if the objection is proper, is it worth the price?
   c. Protect your witness. If your witness needs help, step in with a proper objection.
      - Harassment, too fast paced
      - Prosecutor won't let witness answer
      - Interrupting the witness
      - Remember, a good witness may be able to handle it.

2. **Objections by the prosecutor to your direct examination**

   a. Prevention; don't ask objectionable questions.
   b. Make 'em pay
      - Tell the jury that you won; "Thank you, your Honor. Mr. Witness the Judge has ruled that the question is proper. You may answer the question."
      - Repeat the question; "Let me state the question again. Why do you say that Mr. State's Witness is known to be a lying scumbag in the neighborhood?"
      - Summarize what the witness said; "Before the objection, you told us that Mr. Victim was drunk, had a large knife and was looking for my client. Had you finished the answer or is there more you'd like to add?"
   c. Don't apologize or withdraw the question. Rephrase the question so that the judge will allow it.
   d. Use proffers and other strategies to get the court to allow an important question.

CC. **FINISH STRONG:** You should save something with high impact and substance for your last point.

VII. Your Client in the Courtroom and on the Stand

A. **To Testify or Remain Silent**

1. There should be no set rule. Like any other witness, the decision to have a client testify depends on the quality of the client as a witness and the value and necessity of his/her testimony. Remember, this is the client's decision, but should be reached with the advice of counsel.

2. Recent research suggests that juror's expect the client to testify and held it against him or her when s/he didn't. However, the same study found that when the client did testify, the testimony did more harm than good far more often than not.

B. **Should the client show emotion?**

1. Traditional wisdom suggests that clients shouldn't show emotion in front of the trier of fact. However, a lack of emotion under the circumstances seems unnatural. Your call.

2. If the client will be emotional, be sure that the emotion is consistent with the theory of defense.

3. Anger and violence are not suggested, but frustration and righteous indignation may be fine.

C. **Over preparation? No such thing with your client**

1. Everything done to prepare a witness for direct, should be done to prepare your client.

2. Discuss how your client should behave in the courtroom. Remind her that someone on the jury will always be watching.

3. Practice denials: Just saying "no" may not have enough force. Tell your client to give the denial some verbal "ummph" and add something like "No, I didn't do it," "No, that is not true" or the like.

D. **References to your client**

1. **Physical reference.**

   a. Do not have witnesses point at your client. You shouldn't do it either.
   b. You and/or the witness become just another accusing finger. Clients have suggested that this makes them uncomfortable.
   c. If you must, gesture to your client using an open hand, palm up. Preferably, walk over to the client or ask the client to stand.

2. **Verbal reference**

   a. Have witnesses call your client by name, preferably a less formal name. John is better than Mr. Client. If a judge won't permit this, call him John Client. CAVEAT: If you are considerably younger than your client or circumstances suggest that it will appear disrespectful to use the client's first name alone, don't do it.
   b. Never use the dehumanizing phrase "the defendant." The only way to ensure that you do not use this phrase during the trial is not to use it at all. Calling your client by name will help you to see him or her as a person. Where a generic name is needed, such as in motions, substitute the word "accused" for defendant.

E. Beware of, and counsel against, **overly broad responses**

1. **Opens the door** to otherwise irrelevant and inadmissible testimony.

2. Avoid generalizations like:
   a. "I never have done...."
   b. "I wouldn't even know what that stuff looks like."

3. This is a good suggestion to discuss with all witnesses.

F. **Organization for the client's direct**

1. The beginning (The important stuff)

   a. Consider beginning with an absolute denial and brief explanation why. Client wants to say it and jurors want to hear it. The explanation orients the jurors. A simple "No" isn't enough. A little added punch is necessary.
   b. Q: "Mr. Client, did you do it?"
      A: "No, I didn't."
      Q: "If you didn't do it, where were you at the time of the shooting?"
      A: "I was home with my mother and girlfriend the whole night." .....(Pause)
      Q: "Can you tell us about yourself?"

2. The middle (The bad or less important stuff)
   a. Confront prior record, prior inconsistent statements and other bad stuff in the middle where they are more likely to be minimized or forgotten.

3. The end (More important stuff or the same important stuff from the beginning)
   a. Select a second strong point and question about it here. Alternatively, repeat the same point with which you began.
   b. Consider ending with a denial again, if asked in a slightly different way to avoid an objection.
   c. Consider closing with a trilogy.
      You may close with a trilogy
      Q: On June 1st did you point a gun at Mr. Jones? A: No, I didn't.
      Q: On June 1st did you shoot a gun at Mr. Jones? A: No, absolutely not.
      Q: On June 1st did you have a gun? A: No, I didn't have a gun at all.

      PAUSE
      Thank you. I don't have any other questions.

G. **Humanize the client.**

1. Lots of background information, whenever you can

2. All the good stuff and Even the bad stuff, playing up the rough upbringing angle to develop understanding or sympathy.

H. **Corroboration.** Seek as much corroboration of the client's testimony as is possible, but don't get bogged down in details.

VIII. Conclusion

Direct examination is too important to surrender to prosecutors. If you prepare yourself, your case and your witness well, direct examination and the techniques set forth here will help you win cases. Remember the "Six Ps" and always remember your "AURA."

Daniel Shemer

“I was an Assistant Public Defender in Maryland from 1980 until 1999. The material included in this handout was shamelessly stolen from numerous parties and publications. I have listed many of the subjects of my theft below. My thanks to the ingenious authors, actors and lawyers, particularly, the many other Maryland Public Defenders, for creating and sharing this wealth of ideas. May your creative juices continue to bubble up and ‘may justice flow down like the waters and mercy like an everflowing stream.’”

1. "Direct Examination: Strategic Planning, Preparation and Execution." by Phyllis H. Subin, Esq., Director Of Training and Recruitment, Defender Association Of Philadelphia.
2. The ABA Journal, Litigation Section, by James McElhaney, Esq.
3. "The Art Of Formulating Questions: Preparation Of Witnesses." by Neal R. Sonnett, Esq., 2 Biscayne Blvd., 1 Biscayne Tower, Ste.2600, Miami, Fla. 33131
4. "The Drama and Psychology of Persuasion in the Defendant's Opening Statement," by Jodie English, Esq. (I know this outline is about direct examination, but this is an exceptional article that explains the psychological bases for many of the techniques recommended in this outline.)
5. Joe Guastaferro, Actor, Director and Trial Consultant. 4170 N. Marine Drive, #19L, Chicago, Ill. 60613. Just about anything Joe has ever said or done!
6. "Jury Psychology" by Paul Lisnek, J.D., Ph.D., Trial Consultant. 612 N. Michigan Ave., Suite 217, Chicago, Ill. 60611.

Any thoughts, comments or suggestions to improve this outline? Share them, please. Write me at Office of the Public Defender, Training and Continuing Education Division, 6 St. Paul Street, Baltimore, Maryland 21202, call me at (410) 767-8466 or FAX to me at (410) 333-8496. Thank you.

THE THREE P'S OF DIRECT EXAMINATION

1. PLAYERS

   Select witnesses who advance your theory of the case

2. PREPARATION

   a. Think about your questions

      i. Open-ended

      - Who
      - What
      - When
      - Where
      - How
      - Why
      - Tell us about/Describe

      ii. Specific

   b. Prepare and practice with the witness

3. PRODUCTION

   a. Remember primacy & recency

   b. Use "chapters" and "signposts"

   c. Elicit factual details

   d. Tap into your frustrated inner actor

   b. Have a conversation with the witness

   f. LISTEN

State v. Big Bad Wolf

Leading Questions

- Rule 611(c) "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony."

Hearsay

- Rule 801(c) " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted."
- Rule 802: "Hearsay is not admissible except as provided by statute or these rules."

Lack of Personal Knowledge

- Rule 602: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."

Speculation

- Rule 602 "Lack of Personal Knowledge"
- Rule 701: "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perceptions of the witness, and (b) is helpful to a clear understanding of his testimony or determination of a fact in issue."

You can lead on cross

- Rule 611 (c): "Ordinarily leading questions should be allowed on cross examination."

Impeachment

- A prior statement that is inconsistent with the witnesses testimony may be used to impeach that witness.

Right to confrontation

- Sixth Amendment to the United States Constitution: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."
- Crawford v. Washington, 541 U.S. 36 (2004)

Other crimes evidence

- Rule 404(b): "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident."
- Rule 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Privileges

- Husband-wife (communications) N.C Gen. Stat. 8-57
- Doctor-patient 8-53
- Clergyman-communicants 8-53.2
- Psychologist-patient 8-53.3
- Social worker privilege 8-53.7
- Optometrist-patient privilege 8-53.9
- Attorney client privilege

Polygraphs

- The results of polygraph examinations are strictly forbidden to be placed into evidence.

Rule 702

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

Opinion on truth telling

- Improper opinion evidence under Rule 701 and improper expert evidence under Rule 702.

Evidence of prior crimes for impeachment purposes subject to limitations

- Rule 609 "General rule.--For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.

  (b) Time limit.--Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence."

Can't ask about bad, but not dishonest, misconduct

- Rule 608(b) "Specific instances of conduct.--Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

Can't ask a witness about their religious beliefs

- Rule 610: "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced; provided, however, such evidence may be admitted for the purpose of showing interest or bias."

Corroboration

- In North Carolina, prior consistent statements of the witness may be introduced to corroborate that witness's testimony.

Third party guilt evidence

The admissibility of evidence of the guilt of one other than the defendant is governed now by the general principle of relevancy. Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party. Under Rule 401 such evidence must tend *both* to implicate another *and* [to] be inconsistent with the guilt of the defendant.

State v. Cotton, 318 N.C. 663, 351 S.E.2d. 277 (1987)

Out of court statements not hearsay if not being offered for truth of the matter asserted.

Hearsay exception: statement against interest

- Rule 804(b) ( ) "(b) Hearsay exceptions.--The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
- Statement Against Interest.--A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement."