

VIRGINIA PRETRIAL JUSTICE COMMITTEE

THE KEY COMPONENTS OF A PRETRIAL JUSTICE SYSTEM IN THE COMMONWEALTH OF VIRGINIA

RISK-INFORMED PRETRIAL DECISION MAKING IN THE COMMONWEALTH OF VIRGINIA



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The Key Components of a Pretrial Justice System in the Commonwealth of Virginia

Introduction

On May 30, 2014, the Virginia Community Criminal Justice Association (VCCJA) and the Virginia Department of Criminal Justice Services (DCJS) sponsored a collaborative Pretrial Symposium. The purpose of that Symposium was to educate and challenge stakeholders to begin the transition from a “charge-based” decision making system to a “risk-based” or “risk-informed” approach. Overall, the Symposium highlighted an abundance of research demonstrating that a risk-informed approach is more likely than a charge-based approach to achieve desired outcomes – reducing crime, maintaining the integrity of the judicial process through court appearance, and upholding defendants’ due process interests in liberty. Approximately 70 stakeholders attended the event.

The vision of the Pretrial Justice Subcommittee is that available data shall inform release and supervision decisions to assure court appearance, public safety and adherence to the Constitution.

—Virginia Pretrial Justice Subcommittee

An outcome of the Symposium was the formation of a Pretrial Justice Committee to consider steps to transform the Virginia pretrial system to one that is risk-informed. Information and discussion at the symposium provided the Committee with concrete suggestions for action planning. On September 15, 2014, that Committee met in Richmond, Virginia, and developed an action plan as well as guiding principles for an effective pretrial justice system in Virginia. Those principles are as follows:

- **Risk Informed** – Pretrial practices should be informed by risk of misconduct rather than solely by criminal charge
- **Assessment Guided** – Pretrial practices should be guided by actuarial instruments, such as the Virginia Pretrial Risk Assessment Instrument, and that this tool should be used by all pretrial services throughout the state
- **Uniform** – Pretrial functions should be uniform throughout the state while respecting local differences (e.g., rural versus urban) and taking into account community values and expectations
- **Statewide** – Every locality in Virginia should have pretrial services
- **Provided at the Earliest Possible Stage of Processing** – Information on pretrial risk should be provided at the earliest point of entry into the justice system
- **Transparent** – Pretrial practices should be understood by all parties and not subject to ambiguous or inconsistent practices
- **Devoid of Unnecessary Financial Considerations** – The system should exercise caution in using financial conditions of release
- **Guided by Research and Data** – Pretrial policies should be developed by using the best available research and data

Meeting attendees also recommended creating a document articulating the key components of a pretrial system in Virginia, and they created a Subcommittee to author this document. This document is the result of that recommendation, and is intended to serve as a guide for future discussions by local criminal justice systems who hope to achieve the Committee’s guiding principles.

Mounting evidence shows that when criminal justice decision makers combine research-based information with their professional judgment, outcomes improve.¹ Localities that have implemented risk-informed strategies have demonstrated that pretrial release rates can be increased without decreasing appearance and public safety rates. Policy statements issued

¹ Andrews, D.A., Bonta, J. (2010). *The psychology of criminal conduct (5th ed.)*. Cincinnati, OH: Anderson.

by numerous national criminal justice entities as well as national public opinion surveys show overwhelming support for pretrial improvements that are risk-informed. Overall, emphasizing pretrial risk-informed strategies and expanding existing pretrial services can be effective in reducing unnecessary detention and in better protecting public safety during the pretrial stage of the criminal case. This emphasis is the foundation for this document, which provides key components for an effective pretrial justice system in Virginia.²

All of the 32 pretrial services agencies in Virginia, serving 99 of the state’s 133 localities, use a research-based, validated pretrial risk assessment, known as the Virginia Pretrial Risk Assessment Instrument (VPRAI). The VPRAI measures the defendant’s likelihood of failure to appear in court and new arrest during the pretrial release period. The results of the VPRAI are shared with the judge, Commonwealth’s Attorney, and defense attorney as a foundation for bail decision making. In general, use of a validated pretrial assessment tool facilitates discussions of release conditions based on pretrial risk, and aids the court in imposing the least restrictive conditions. This, in turn, limits the potential for excessive bail and for unnecessarily detaining low risk defendants in jail. Along with a legal framework designed to facilitate lawful evidence-based practices at bail, risk assessment and risk-informed supervision are often key prerequisites to achieving an optimal pretrial system, and Virginia is fortunate to have these important components in most jurisdictions.

Nevertheless, enhancing Virginia’s risk-informed pretrial decision-making capacity, including providing the key components listed in this document to all Virginia localities, involves system-wide collaboration. Based on principles first articulated in the 1960s but relevant today,³ American consensus is that justice system collaboration is the key to making improvements to practices touching on numerous decisions made by multiple criminal justice actors. Thus, recognizing the pretrial justice system as a “system” by understanding differing roles (albeit with common concerns) is likely the first crucial step toward implementing a series of recommendations which, together, comprise a fair and effective pretrial system. Because collaboration is key, this document ends by emphasizing the need for interdisciplinary education and communication among all key stakeholders. That particular component could appropriately be listed first, or even as some over-arching premise upon which all other components are discussed. Whom to release and detain at the pretrial stage and how to do it are questions of profound importance to all justice system leaders as well as the general public. The answers to the questions come from working together.

² Other entities have discussed and made recommendations concerning “key” components of a highly effective pretrial justice system. In the main, this document does not contradict those other recommendations and does not supplant underlying concepts found in most lists, which maintain broad consensus across America. This document merely highlights key components for the Commonwealth of Virginia, given the Subcommittee’s focus and the unique mix of Virginia’s pretrial laws, policies, and practices.

³ See generally *The Challenge of Crime in a Free Society* (GPO, 1967) [hereinafter *Challenge*], found at www.ncjrs.gov/pdffiles1/nij/42.pdf; *Ten Steps to System Change* (JSP/MacArthur Found. 2015), found at www.safetvandjusticechallenge.org/wp-content/uploads/2015/08/10-Steps-To-System-Change_JSP-Brief.pdf.

KEY COMPONENT 1:

Law enforcement officers shall issue a summons for misdemeanors committed in their presence and for other authorized offenses rather than making a custodial arrest.

Law enforcement officers stand at the entry point of the criminal justice system, and those officers often make more decisions concerning the pretrial release or detention of a person than any other criminal justice actors. How law enforcement officers treat these important initial contacts has a significant effect on the rest of the criminal justice system. The pretrial justice issues concerning law enforcement's role in the pretrial system are twofold: (1) the initial police contact presents a crucial decision-making juncture for those officers to consider alternatives (such as summonses or citations) to pretrial detention and the need for bond; (2) some law enforcement agencies have embraced the use of actuarial risk instruments to help identify those persons suitable for summons release or who are eligible for diversion from the criminal justice system.

Overall, Virginia law contains seemingly clear preferences for release through a summons versus arrest and secured detention in certain circumstances. Nevertheless, practices appear to vary across the state and the use of summonses appears underused.

Policies Favoring Use of Summonses

Nationally, there is support for increasing the use of summonses or citations in many cases so long as public safety is not compromised. The Pretrial Justice Institute,⁴ International Association of Chiefs of Police,⁵ and the United States Department of Justice⁶ have all cited and supported The American Bar Association's (ABA) Standards for Criminal Justice (Pretrial Release), which recommend policies favoring issuance of summonses. Standard 10-2.1 states, "It should be the policy of every law enforcement agency to issue citations [hereinafter "summonses" as used in Virginia] in lieu of arrest ... to the maximum extent consistent with the effective enforcement of the law."⁷ Standard 10-1.3 favors issuing summonses as an extension of the notion of using least restrictive conditions.⁸ Standard 10-2.2 recommends mandatory issuance of summonses for minor offenses, except when certain circumstances exist, and would require a law enforcement officer to indicate his or her reasons for jailing a defendant on a minor offense.⁹ Standard 10-2.3 recommends law enforcement agencies promulgate regulations designed to increase the use of citations/summonses to the degree consistent with public safety.¹⁰

⁴ See the Pretrial Justice Institute website at www.pretrial.org/solutions/citation/.

⁵ See *Law Enforcement's Leadership Role in the Pretrial Release and Detention Process* (IACP, 2011), found at www.iacp.org/Law-Enforcements-Leadership-Role-in-the-Pretrial-Release-and-Detention-Process.

⁶ See *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (NIC, 2014), found at www.clebp.org/images/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf [hereinafter *Fundamentals*]; *National Symposium on Pretrial Justice: Summary Report of Proceedings* (BJA/PJI, 2011), found at www.pretrial.org/download/infostop/NSPJ%20Report%202011.pdf.

⁷ American Bar Association Standards for Criminal Justice – Pretrial Release, Std. 10-2.1, at 63 (3rd ed., 2007) [hereinafter ABA Standards].

⁸ *Id.* Std. 10-1.3, at 41.

⁹ *Id.* Std. 10-2.2, at 65-66. The Standards use the term "minor offense" rather than misdemeanors, but Standard 10-1.3 equates minor offenses to lower-level misdemeanors. In determining whether an offense is minor, the Standard states that consideration should be given to whether the alleged crime involved the use or threatened use of force or violence, possession of a weapon, or violation of a court order protecting the safety of persons or property.

¹⁰ *Id.* Std. 10-2.3, at 69. This issue is tied to the issue of judicial officers issuing summonses in lieu of arrest warrants, a topic discussed at length in Part III of the ABA Standards.

Assessing Risk

The ABA Standards recognize the need for assessment of risk for flight and danger when making the decision to release through a summons versus arrest to secured custody. Thus, the ABA Standards state that agency regulations should require officers to inquire (as is practicable) into the nature of the alleged offense, the defendant’s place and length of residence, family relationships, references, present and past employment, criminal record, and any other facts relevant to appearance in response to a summons or citation. Likewise, commentary to Standard 10-2.1 describes the following components of an effective summons system:

1. Accurate and reliable information about the background and living situation of the person whose release is being considered;
2. Workable criteria for release or detention, with presumption of release;
3. Qualified decision makers making the release decision (for example, trained police officers);
4. A short time period between the issuance of the court summons and the date of the individual’s scheduled court appearance as shown on the summonses; and
5. The capacity for rapid follow-up in the event of non-appearance in court.¹¹

These notions have been part of a fairly recent discussion involving law enforcement’s use of actuarial instruments to help assess risk for flight or danger when making the arrest decision. While there appear to be no clear policy statements concerning the use of statistically-derived actuarial instruments at the point of police contact, there are likely both pros and cons, depending on how those instruments are used.

Practices in Other Jurisdictions

Some states enumerate specific offenses for which summonses are presumptively required to be issued, such as possession of marijuana, prescription medication and drug paraphernalia, disorderly conduct, driving on a suspended license, and theft that is not shoplifting. Within these provisions, officers are still able to use their judgment and make arrests if they deem that public safety is at risk or that the individual is at risk for failure to appear in court. In addition, officers must articulate their reasons for making arrests, which is consistent with the ABA Standards but not a requirement found in the Virginia statutes. Nevertheless, since 2011 when this law went into effect, Kentucky data indicate a steady increase in the number of releases on court summonses, while court appearance and public safety outcomes have improved.¹² Moreover, press reports indicate a sharp decrease in arrests with seemingly minimal impact on court appearance and public safety.¹³

Police discretion exists when officers have some leeway or choice in how to respond to a situation. The fewer the rules about handling incidents and situations, the more discretion officers can exercise. Discretion involves both action and inaction.

—*Arrest Decision of Police Officers: The Impact of Varying Organizational Structures*; Groeneveld, R.F.

Many states allow a summons release for most misdemeanors with the common exception of domestic violence.¹⁴ At least two states, Louisiana and Oregon, have enacted legislation to permit the use of summons releases for some non-violent felonies. Specifically, Louisiana allows a summons release for felonies that involve “theft or illegal possession of stolen things

¹¹ *Id.* Std. 10-2.1 (commentary), at 65.

¹² See *Report on Impact of House Bill 463: Outcomes, Challenges, and Recommendations* (KY Pretrial Servs., 2012), found at www.pretrial.org/download/law-policy/Kentucky%20Pre%20Post%20HB%20463%20First%20Year%20Pretrial%20Report.pdf.

¹³ See, e.g., Jason Riley, *Arrests for Marijuana, Other Misdemeanors Plummet Since Law Change* (WDRB.com, Aug. 15, 2014), found at www.wdrb.com/story/26291478/sunday-edition-lmpd-now-ticketing-offenders-with-small-amounts-of-pot.

¹⁴ See generally National Conference of State Legislatures (NCSL) website, found at www.ncsl.org/research.civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.

when the thing of value is \$500 or more, but less than \$1,000.”¹⁵ Oregon allows a summons release for felonies authorized by law to be reduced to a misdemeanor.¹⁶ In most states, summons release for non-violent felonies is not mandatory, and the laws are typically written so that officers either may or must make an arrest if one or more of the following circumstances are present:

- There are reasonable grounds to believe the person will not appear for court or the person has a history of not appearing. Officers are to consider the arrestee’s residency, family, employment and other ties to the community, as well as matters of character in making this determination.
- There are reasonable grounds to believe a person poses a danger to himself or others, to property, to the community, or that the person will not cease committing the alleged crime.
- The criminal record of the arrestee shows outstanding warrants.
- Detention upon arrest is deemed necessary to carry out legitimate investigation, or if prosecution of the current or other alleged offenses would be jeopardized if defendant not taken into custody.
- The arrestee requires physical or mental health care or if the person is not able to care for himself or herself or if the person is intoxicated or under the influence of drugs or alcohol.¹⁷

Concerning the issue of law enforcement using actuarial instruments, in 2012, Eau Claire, Wisconsin, developed a Pre-Charge Diversion Program, which was premised on the principle that low-risk offenders are somewhat self-correcting. When the officer comes into contact with a person, that officer uses a proxy form that will help determine that person’s risk level. The decision to arrest or release on a summons is then based on statutory requirements and officer discretion. The proxy form is forwarded to the District Attorney’s office, where it is used to determine if the defendant is suitable for the Program. If suitable, the defendant is then referred to the Program and participates in classes that, if successfully completed, will result a decision by the prosecutor not to prosecute.

There are indications that this Program has freed valuable resources within the court and the prosecutor’s office, allowing for a greater focus on more serious and complex cases. A 2014 study found that the recidivism rate for those who completed the Program was 12.3%, which was 48.6% lower than the control group whose members did not participate.¹⁸ The Program not only educates participants and helps to keep low risk offenders out of the criminal justice system; it also allows successful participants to maintain a clean criminal record.

Virginia Law

In Virginia, as in many states, law enforcement officers have discretion to release individuals on a summons or place them under custodial arrest for certain offenses. In Virginia, this discretion is guided by the *Code of Virginia*, local agency policies, and training.

Overall, Virginia’s statutes direct when an officer shall issue a summons to a defendant and when an officer shall place the defendant under arrest.¹⁹ With respect to misdemeanors committed in the presence of the officer, with only a few exceptions, the law requires an officer to issue a summons to the defendant.²⁰ The exceptions are (i) if the defendant fails or

¹⁵ La. Code Crim. Proc. § 211, found at <http://law.justia.com/codes/louisiana/2011/ccrp/ccrp211>.

¹⁶ Or. Rev. Stat. § 133.055, found at www.oregonlaws.org/ors/133.055.

¹⁷ See NCSL website, *supra* note 15, found at www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.

¹⁸ See Sean Callister & Angie Braaten, *An Evaluation of the Eau Claire County Pre-Charge Diversion Program as Measured by One-Year Recidivism Rates* (Dec. 30, 2014), found at <http://ebdmoneless.org/wp-content/uploads/2015/12/ECC-Pre-Charge-Diversion-Evaluation.pdf>.

¹⁹ See *Virginia Code* §§19.2-74, 19.2-80, 19.2-81, 19.2-81.3, 19.2-81.6, 19.2-82. As with the national standards, the *Virginia Code* also addresses the parallel issue of judicial officers issuing summonses in lieu of warrants. See, e.g., *Virginia Code* § 19.2-73. That Section, in particular, allows broad discretion for magistrates to issue a summons “when there is reason to believe that the person charged will appear,” but there are no provisions mandating a summons in any particular case. In addition to the recommendations contained herein concerning law enforcement, the Subcommittee believes that judicial officers acting pursuant to § 19.2-73 should attempt to increase their issuance of summonses versus arrest warrants by following the policies concerning risk-informed practices articulated within this report.

²⁰ See *Virginia Code* § 19.2-74.

refuses to discontinue the unlawful act, (ii) if the officer believes the defendant is likely to disregard the summons, (iii) if the officer reasonably believes the defendant is likely to cause harm to himself or any other person, or (iv) if the defendant refuses to give the written promise to appear, in which case the officer may arrest the defendant. The statute also makes exceptions for certain offenses. For example, while public drunkenness is a Class 4 misdemeanor and is not a jailable offense, the statute expressly excludes it from the mandatory summons provisions, presumably allowing discretion either to arrest or transport to a court-approved detoxification center pursuant to *Virginia Code* § 18.2-388.

With respect to misdemeanors *not* committed in the presence of the officer, the *Code* provides specific offenses and circumstances for which the officer may arrest a defendant without a warrant or a *capias*. Of those offenses, however, the only provision in this Section referencing release on a summons is for a defendant charged with misdemeanor shoplifting.²¹ For other misdemeanor offenses not committed in the presence of the officer, the alleged victim or agency will typically seek a process of arrest from the magistrate or other issuing authority. Process of arrest for a misdemeanor may be either a summons or an arrest warrant. However, when issuing an arrest warrant for a misdemeanor, the judicial officer must indicate on the warrant whether it is “permitted at the officer’s discretion” or “not permitted.” *Virginia Code* § 19.2-74 authorizes judicial officers to issue an arrest warrant that may be executed as a summons by the serving officer when charging an offense for which a summons may be issued.

The *Code* mandates a custodial arrest for certain offenses, including but not limited to domestic violence, violation of a protective order, remaining at the place of a riot, and public intoxication.²²

An officer may arrest a defendant without a warrant for any crime committed in his presence and for any felony even if not committed in his presence.²³ While this language is discretionary, the lack of express provisions dealing with summonses has the propensity to increase the use of arrest in most cases regardless of the nature of the offense.

Interestingly, pursuant to *Virginia Code* § 19.2-73.1, when a warrant or summons has been issued “in any misdemeanor case or in any class of misdemeanor cases and in a Class 5 or Class 6 felony case,” the chief law enforcement officer (police chief or sheriff) in the jurisdiction in which the case is pending may notify a defendant of the issuance of the warrant or summons and direct the defendant to appear at the time and place directed for the purpose of the execution of the summons or warrant. This Section appears to provide discretion to law enforcement in the specified cases to avoid a custodial arrest of a defendant by allowing a process outside of the usual arrest procedure, although there is no data to show how often this procedure is used.

Virginia Practice

This Subcommittee believes current practices indicate a need for greater consistency among jurisdictions regarding the use of summonses versus arrest as well as a tendency to favor arrests which, in turn, likely leads to unnecessary pretrial detention. During fiscal year 2015, 152,516 jailable misdemeanant defendants had an arrest event where a release on summons was authorized by *Virginia Code*. Of the 152,516 misdemeanants, 63,118 were released on summons (48%).²⁴ It should be noted that these figures exclude criminal traffic violations under Title 46.2 of the *Code* and charges filed in Juvenile and Domestic Relations Court. The percentage of releases on summons varied greatly among localities, even those of similar size. These data are somewhat limited in that they do not appear to differentiate between a Virginia Uniform Summons issued by a law enforcement officer, which does not involve a custodial arrest, and the issuance of a summons in lieu of an arrest warrant by a magistrate after a law enforcement officer has made a custodial arrest. Further, it is not clear whether the data include situations where a law enforcement officer serves a “permitted” arrest warrant as a summons,

²¹ See *Virginia Code* § 19.2-81(G).

²² See *id.*, § 19.2-81.3, § 19.2-74. Section 19.2-81.6 also requires an officer to arrest a person if the officer receives confirmation that the person is an alien illegally present in the United States and has previously been convicted of a felony in the United States and deported or left the United States after such conviction.

²³ See *id.*, § 19.2-81.

²⁴ Data source: Office of the Executive Secretary of the Supreme Court of Virginia – General District Court Case Management System (CMS).

pursuant to *Virginia Code* § 19.2-74, in lieu of making a custodial arrest. Accordingly, in addition to the general recommendations contained herein, the Subcommittee encourages the collection of more precise and meaningful data in a uniform statewide manner.

Variation in practices, alone, suggests the need for more uniform policies to following existing law favoring summonses over arrests in many cases because local practice allows officers to treat similar defendants differently in ways that can be harmful to society. Consider the example of two defendants who are similarly situated regarding criminal history, residential stability, employment stability, etc., and who are committing trespasses in the presence of law enforcement officers in neighboring localities. In the first jurisdiction, the arresting officer might release the defendant on a summons, but in the second jurisdiction, the officer might take the defendant into custody, resulting in vastly dissimilar outcomes for similarly situated persons. For the detained defendant, those outcomes can include lengthy confinement and/or a financial requirement for release, which causes undue hardship for the defendant as well as an increased danger for the general public.²⁵ Increased training concerning both mandatory and discretionary use of summonses, along with encouragement for statewide practice to lean more toward summons release when public safety is not clearly at stake, should help to create a more effective and less burdensome pretrial system.

Moreover, the Subcommittee believes that Virginia should explore greater use of summonses for defendants facing non-violent felony charges to avoid unnecessary pretrial detention.²⁶ The most current research on pretrial risk illuminates that people facing felonies are simply not high risk either to flee or commit additional crimes while on pretrial release. Understanding that notion should lead to more robust discussions about the validity of any generally held beliefs that higher charges necessarily mean higher risk mandating a more serious procedural response.

Use of Actuarial Risk Assessments by Law Enforcement

The research concerning pretrial risk, coupled with fundamental American legal principles such as using least restrictive conditions of release, underscore the need to employ practices that treat lower risk defendants in ways that avoid pretrial detention. The use of a research-based risk tool at the point of law enforcement contact can be helpful to a determination by law enforcement that a defendant can be summonsed to court or otherwise diverted from the criminal process, rather than arrested.

The work done in Eau Claire, Wisconsin, appears promising, and the Subcommittee recommends that Virginia explore and consider approaches to pre-charge diversion in appropriate cases (recognizing that some changes to law may be necessary). Moreover, policies should address criteria for determining the risk related to future appearance in court and public safety. A broader philosophical discussion on risk assessment at first contact is advisable, however, to avoid having actuarial risk tools lead toward unacceptable detention rates for relatively less-serious crimes. So far in America, law enforcement has used risk assessment tools to guide them toward releasing defendants traditionally heading toward detention. Nevertheless, without boundaries, risk assessment tools could easily guide law enforcement toward detaining defendants facing charges traditionally heading toward release.

Best Practices Under Current Law

Overall, the Subcommittee supports encouraging the issuance of summonses for minor violations of law whether or not they are committed in the presence of law enforcement officers. In some instances, this means changing the legislative framework to permit a broadening of the cases affected. In other instances, it means encouraging or mandating officers to issue summonses where no encouragement exists or when discretion allows for a choice. And in still other instances, it

²⁵ See generally Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (Laura & John Arnold Found. 2013), found at www.pretrial.org/download/research/The%20Hidden%20Costs%20of%20Pretrial%20Detention%20-%20LJAF%202013.pdf.

²⁶ The Subcommittee recognizes that this practice would likely require legislative action to authorize law enforcement and judicial officers to issue summonses for specified offenses if the defendant meets certain criteria, and possibly to amend a number of statutes pertaining to criminal procedure, e.g., *Virginia Code* §§ 19.2-120, 19.2-123.

simply means making law enforcement officers aware of existing law that mandates release on a summons versus a custodial arrest.

Specifically, the Subcommittee recommends the following:

- Law enforcement officers shall issue summonses for all misdemeanors committed in their presence, except when there is a statutory exception or the defendant fails or refuses to stop the unlawful act.²⁷
- Law enforcement officers shall issue summonses for all misdemeanors committed in their presence unless an officer believes the defendant to be likely to disregard a summons or to cause harm to himself or to any other person.²⁸
- Law enforcement officers shall issue summonses for defendants charged with shoplifting in violation of *Virginia Code* §§ 18.2-96 or 18.2-103, whether or not those offenses are committed in the officers' presence.²⁹
- Law enforcement officers should issue a summons instead of securing a warrant to a defendant suspected of driving while intoxicated who has been taken to a medical facility for treatment or evaluation of his medical condition, while on the premises of the medical facility, for violations of *Virginia Code* Sections 18.2-266, 18.2-266.1, 18.2-272, 46.2-341.24, and for refusal of tests in violation of §§ 18.2-268.3 or 46.2-341.26:3.³⁰
- In any misdemeanor case or class of misdemeanor cases, and in a Class 5 or Class 6 felony case, the chief of police of the jurisdiction or his designee, or the sheriff or deputy sheriff if the jurisdiction has no police department, should notify a defendant of the issuance of a warrant or summons and direct the defendant to appear at the time and place directed for execution of the summons or warrant in a manner that does not involve taking a defendant into secured custody.³¹

²⁷ See *Virginia Code* § 19.2-74.

²⁸ See *id.*, § 19.2-74.

²⁹ See *id.*, § 19.2-81.

³⁰ See *id.*, § 19.2-73.

³¹ See *id.*, §19.2-73.1.

KEY COMPONENT 2:

Judicial officers shall set bail balancing individual risk factors with the least restrictive conditions.

A judicial officer’s decision to release or detain a defendant at the pretrial stage is the focal point of a defendant’s first appearance, and arguably the most important decision made during the pretrial phase of a criminal case. The decision has significant consequences for the defendant and his or her case as well as for the public at large. Doing it right requires judicial officers to fully understand what one author has called the “fundamentals” of bail,³² which include the history of bail, the legal foundations, the pretrial research (especially the research concerning pretrial risk), and the definitions of various terms and phrases. For the most part, the fundamentals of bail point to the judicial decision to release or detain to be a simple and purposeful in-or-out decision, unimpeded by any extraneous factors.

While complex, the judicial officer’s decision need not be daunting. Indeed, if the judicial officer focuses primarily on (1) setting bail based on individual pretrial risk, and (2) using least restrictive conditions, much of the complexity fades. Virginia does not have a constitutional right to bail (instead, the right is statutory), so it does not have the same hurdles faced by other states seeking to align their laws with what is known today about risk and the law. In the meantime, however, judicial officers in Virginia can make significant headway toward best practices within the current statutory framework simply by following the two principles listed above.

Policies and Principles Favoring the Management of Individual Risk Using Least Restrictive Conditions

Preliminarily, there are a few key principles underlying the judicial decision to release or detain. The first is that, historically and legally, bail should equal release. Many states confuse bail with money, and thus incorrectly fail to recognize an actual right to release in their laws. Virginia, on the other hand, correctly defines bail as “the pretrial release of a person from custody upon those terms and conditions specified by order of an appropriate judicial officer.”³³ Thus, the definition aligns not only with history – throughout the history of bail, the right to bail equaled a right to release – but also with the United States Supreme Court’s opinion in *Stack v. Boyle*, in which the Court equated the right to bail with “the right to release before trial,” and the “right to freedom before conviction.”³⁴

The second principle is that the right to bail or release extends to most defendants, and likely to far more defendants. As noted above, in its opinion in *United States v. Salerno*, the Supreme Court wrote, “In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”³⁵ This quote, alone, might point to the need for some preferred ratio of bailable to unbailable defendants. Reading the opinion, however, one sees that it is the creation of a rational bail scheme that ultimately leads to an acceptable ratio. In *Salerno*, the Court pointed to a scheme that carefully limited detention only to the most serious of offenses, that included a process further limiting detention by requiring a due process hearing, and that placed burdens of proof upon the government to show that no conditions or combination of conditions would suffice to provide reasonable assurance for either public safety or court appearance. The crux of *Salerno* is not only that detention must be reserved for very few defendants. *Salerno* also instructs that the process of concluding detention matters too.

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 ... Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

—*Stack v. Boyle*, Chief Justice Vinson

³² See *Fundamentals*, *supra* note 7.

³³ See *Virginia Code* § 19.2-119.

³⁴ *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

³⁵ *United States v. Salerno*, 481 U.S. 739, 755 (1987).

The third principle is that research tells more about actual pretrial risk. In many American pretrial risk tools, defendants are often labeled high risk, even though they are likely to succeed more often than fail. Moreover, when courts release high risk defendants even on minimal supervision, those defendants often succeed at rates much higher than expected, meaning a high risk person can be made into medium risk simply through differential pretrial supervision. Coupled with the facts that risk assessment can never predict individual risk (it can only compare a defendant to aggregate group risk) and that high charge does not necessarily mean high risk, this research suggests that the only rational scheme for pretrial detention is likely one based on an extremely narrow charge-based eligibility net and on using bail revocation to respond to the inevitable and yet unpredictable failures. This, in turn, points to a cultural change requiring deep and conscious thought about who Virginia wants to release and detain pretrial and settling on the most rational way to do it.

Individual Risk Factors

These preliminary principles or notions help jurisdictions to draw a line between release and detention, but even when that line is already drawn, as it is in every state and Virginia, the fundamental legal principle of individualization is a key component in setting bail for all who enjoy the right to release.³⁶ In *Stack v. Boyle*, the Supreme Court wrote that, “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 [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.”³⁷ 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 existing federal rules. As noted by Justice Jackson, “Each defendant stands before the bar of justice as an individual.”³⁸

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.

— *Stack v. Boyle*, Chief Justice Vinson

Standards – when lawful and objective – keep things from being arbitrary, and by requiring individual standards at bail, the Court was essentially telling the states and the federal system to make sure that bail is never arbitrary. Of course, since *Stack* was decided, America has recognized a second constitutionally valid purpose for limiting pretrial freedom: public safety. Thus, the lesson from *Stack* is that states must apply individualizing factors designed to avoid arbitrary bail settings to each bailable defendant for purposes of attaining reasonable assurance of either court appearance or public safety. This is where pretrial risk assessment may play an important role.

While perhaps not appropriate for determining who is bailable and unbailable in the first instance, statistically-derived, multi-jurisdictional risk assessment instruments help assure that bail is not arbitrary by assessing defendants for their individual risk for missing court or committing new crimes. This, in turn, allows judicial officers to set rational conditions of release designed to mitigate or manage risk in ways that can essentially make high risk defendants medium risk and medium risk defendants low risk.³⁹ The literature suggests that risk instruments generally are significantly better than clinical (i.e., largely subjective) prediction. As noted by researchers Sarah L. Desmarais and Jay P. Singh, “There is overwhelming evidence to suggest that assessments of risk completed using structured approaches produce estimates that are both more accurate and more consistent across assessors compared to subjective or unstructured approaches.”⁴⁰ This is true in the pretrial

³⁶ A valid “no bail” or detention process would also include individualization through the due process hearing, which the Supreme Court believed to be an essential ingredient for the detention process.

³⁷ 342 U.S. 1, 5 (1951) (internal citations omitted).

³⁸ *Id.* at 9.

³⁹ Because of the relatively low risk presented by defendants, the field is even considering abandoning the label “risk level,” and instead using a label more appropriately reflecting reality, such as “success level.”

⁴⁰ Sarah L. Desmarais and Jay P. Singh, *Risk Assessment Instruments Validated and Implemented Across Correctional Settings in the United States* (CSG, 2013), found at <http://nicic.gov/library/028352>.

setting, and using these tools – empirically-based actuarial instruments that classify defendants by differing levels of pretrial risk through weighted factors – is considered to be an evidence-based practice, and is often a critical prerequisite to adopting other best practices in the pretrial field.⁴¹ Moreover, by assessing risk in a more nuanced way, these tools also help jurisdictions to follow the so-called “risk principle,” which instructs those jurisdictions to expend less or no resources on lower risk persons and more resources on higher risk persons, and which thus includes a requisite finding of risk to allocate resources properly. The risk principle is well known in the post-conviction field, and has equal relevance to pretrial release and detention decisions.⁴²

Least Restrictive Conditions

Pairing risk assessment with the law is crucial to doing “legal and evidence-based practices” at bail,⁴³ and this is especially true with pairing assessment of risk with the fundamental legal principle of using the “least restrictive conditions” to respond to that risk. Because the phrase “least restrictive conditions” is sometimes misunderstood, occasionally used to misrepresent, and frequently ignored in many American jurisdictions, it requires some explanation.

Commentary to the ABA Standard recommending release under the “least restrictive conditions” states:

*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.*⁴⁴

This principle is foundational, and is expressly reiterated throughout the Standards when, for example, those Standards recommend citation release or summonses versus arrest.⁴⁵ Moreover, the Standard’s overall scheme creating a presumption of release on recognizance,⁴⁶ followed by release on nonfinancial conditions,⁴⁷ and finally by release on financial conditions⁴⁸ is directly tied to this foundational premise. Indeed, the principle of least restrictive conditions transcends the Standards and flows from even more basic 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.⁴⁹

More specifically, however, the ABA Standards’ explicit commentary on financial conditions makes it clear that the Standards consider secured bonds to be a more restrictive alternative to both unsecured bonds and nonfinancial conditions: “When financial conditions are warranted, the least restrictive conditions principle requires that unsecured bond be

⁴¹ See Pretrial Justice Institute, *Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants* (PJI, 2015), found at [www.pretrial.org/download/advocacy/Issue%20Brief-Pretrial%20Risk%20Assessment%20\(May%202015\).pdf](http://www.pretrial.org/download/advocacy/Issue%20Brief-Pretrial%20Risk%20Assessment%20(May%202015).pdf).

⁴² See Anne Milgram, Alexander M. Holsinger, Marie VanNostrand, & Matthew W. Allsdorf, *Pretrial Risk Assessment: Improving Public Safety and Fairness in Pretrial Decision Making*, 27 Fed. Sentencing Rep. 4:216, (2015) Marie VanNostrand & Gena Keebler, *Pretrial Risk Assessment in the Federal Court* (Washington, D.C.: Office of Federal Detention Trustee, 2009).

⁴³ This phrase was coined by Dr. Marie VanNostrand in the NIC paper titled, *Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services* (NIC, 2007), found at <http://info.nicic.gov/nicrp/?q=node/178>. For more information on how to pair the law with the evidence during the decision to release or detain pretrial, see Timothy R. Schnacke, *Money as a Criminal Justice Stakeholder: The Judge’s Decision to Release or Detain a Defendant Pretrial* (NIC 2014), found at www.clebp.org/images/2014-11-05_final_nic_money_as_a_stakeholder_september_8,_2014_ii.pdf.

⁴⁴ ABA Standards, *supra* note 8, Std. 10-1.2 (commentary), at 39-40 (internal citations omitted).

⁴⁵ See *id.*, Std. 10-1.3, at 41.

⁴⁶ *Id.* Std. 10-5.1, at 101.

⁴⁷ *Id.* Std. 10-5.2, at 106-107.

⁴⁸ *Id.* Std. 10-5.3, at 110-111.

⁴⁹ See generally *Fundamentals*, *supra* note 7, at 71-75.

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 It is reasonably clear that secured financial conditions (requiring up-front payment) are always more restrictive than unsecured ones, even to the wealthiest defendant. Additionally, in the aggregate, secured conditions are often the only condition precedent to release,⁵² and thus are highly restrictive compared to all nonfinancial conditions and unsecured financial conditions in that they tend to cause pretrial detention.⁵³ Like detention itself, any condition causing detention should be considered highly restrictive.

The overall intent of bail is to grant the release of defendants accused of criminal offenses during the pretrial stage. Bail and individually tailored conditions of bail are designed to provide reasonable assurance of court appearance and community safety while facilitating release. Setting conditions beyond what is reasonably necessary to achieve those two purposes is excessive. Bail is not a tool for purposefully detaining a defendant in jail or imposing punishment before trial. Using targeted conditions based on a defendant’s risk level and specific factors can significantly reduce the likelihood that a defendant will not flee or commit new crimes during the pretrial stage.

Practices in Other Jurisdictions

The District of Columbia provides the best example of an in-or-out bail scheme that uses risk-based non-financial and individualized conditions of release to provide reasonable assurance of public safety and court appearance for released defendants. The District of Columbia typically detains approximately 10% of all defendants brought to court for first advisement.⁵⁴ Those defendants are detained only after a fair and transparent due process hearing of the kind approved in *United States v. Salerno*.⁵⁵ The remaining approximately 90% of defendants are released without money conditions and under varying levels of supervision. Of released defendants, approximately 90% remain arrest free, with 98% not committing any new violent crime, and approximately 90% make all scheduled court appearances.⁵⁶ By all accounts, persons working within that system – prosecutors, defense attorneys, law enforcement, judges etc. – are pleased with these outcomes.

Kentucky provides another good example, although that state still uses money, a practice that likely hinders its attempts to create a pure in-or-out system and that also likely dampens its otherwise excellent outcomes. Kentucky is exceptionally good at providing judges with information based on its statistically-derived risk assessment instrument, which leads to individualized bail settings and the use of least restrictive conditions. Indeed, while Kentucky Pretrial Services provides monitoring and court date notifications for all released defendants, only 3% of the remaining released defendants are supervised beyond that, and Kentucky pretrial officials have found that minimal supervision can be highly effective for all risk levels. For example, high risk defendants (12% of all arrested persons) in Kentucky have standard supervision entailing only one phone or in-person contact per month in addition to court notification and compliance verification. Even with minimal supervision, though, the success rates for these high risk defendants are good, with nearly 80% showing up for all court hearings and 86% remaining arrest free.⁵⁷

⁵⁰ *Id.* Std. 10-1.4 (c) (commentary), at 43-44.

⁵¹ *Id.* Std. 10-5.3 (a) (commentary), at 112.

⁵² Most conditions of release are conditions subsequent – that is, release is obtained, but if the condition occurs (or fails to occur, depending on its wording) it will trigger some consequence, and sometimes bring pretrial freedom to an end. Secured money at bail is the quintessential, and typically the only condition precedent; unlike other conditions, some or all of a secured financial condition often must be paid first in order to initially gain release from jail.

⁵³ See Thomas H. Cohen and Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts*, 1990-2004 (BJS, 2007) at 3 (“There was a direct relationship between the bail amount and the probability of release...[t]he higher the bail amount the lower the probability of pretrial release.”).

⁵⁴ Based on data obtained from the District of Columbia Pretrial Services Agency.

⁵⁵ See 481 U.S. 789 at 751-52.

⁵⁶ See D.C. Pretrial website on performance measures, found at www.psa.gov/?q=data/performance_measures.

⁵⁷ See Charlotte McPherson, *Pretrial Supervision, Like Detention, Should be Carefully Limited*, found at www.pretrial.org/pretrial-supervision-like-detention-carefully-limited/.

Virginia Law

While Virginia law correctly defines bail as release, and articulates a right to bail unless there is probable cause to believe that the defendant will not appear for trial or that “his liberty will constitute an unreasonable danger to himself or the public,”⁵⁸ the numerous instances in which there are rebuttable presumptions toward detention may erode this right, especially if they are treated more like mandatory detention provisions.⁵⁹ These presumptions can be especially problematic when bail is set by magistrates, as the law forbids setting bail in cases involving the presumptions unless the magistrate secures the concurrence of a Commonwealth Attorney.⁶⁰ In addition to these concerns, while the statute lists factors (standards) for “fixing [the] terms of bail,”⁶¹ these factors have not necessarily been tested for their predictive ability, and they have not been weighted in any manner, as they would be in a statistically-derived risk assessment instrument.

“In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”

—*United States v. Salerno*,
Chief Justice Rehnquist

Instead, the factors are embodied in the Supreme Court of Virginia’s Form DC-327. The *Code* does not require magistrates to complete this checklist, even though judicial officers are required to consider the factors that make up the checklist. The DC-327 is not scored, and is not intended to be a predictive tool. Rather, it merely provides questions related to the factors listed in §19.2-121 with a space for answers. The primary benefit of the form is that its use assures that the required questions are asked and that a judge later reviewing the magistrate’s decision is aware of the information considered by the magistrate at the initial bail hearing.

If there is no presumption toward detention (or if the prosecuting attorney concurs to a bail setting involving a presumption and the presumption is subsequently rebutted), a magistrate has the options available in *Virginia Code* §19.2-123, which includes a catch-all that allows a judicial officer to impose “any other condition deemed reasonably necessary to assure appearance as required, and to assure his good behavior pending trial.” As in many states, while the law provides for a broad range of conditions and supervision strategies, many jurisdictions are nonetheless hindered by the lack of available resources to effectuate those options.

There are other somewhat unfortunate statutory provisions affecting both release (for example, the statute requires secured money bonds in certain cases) and detention (for example, the law appears to lack most, if not all of the due-process protections for detention approved by the Court in *Salerno*, likely making the rebuttable presumption provisions appear as de facto mandatory no bail provisions in most cases),⁶² but overall the law does not necessarily hinder judges from attempting to make more individualized bail determinations through the use of a validated risk tool and using least restrictive conditions for clearly releasable defendants.

⁵⁸ *Virginia Code* § 19.2-120 (A).

⁵⁹ *See id.*, § 19.2-120 (B).

⁶⁰ *Id.* § 19.2-120 (D).

⁶¹ *Id.* § 19.2-121.

⁶² Indeed, the *Magistrate Manual for Bail Procedures*, published by the Office of the Executive Secretary, itself suggests that any policy favoring release articulated by *Stack v. Boyle*, 342 U.S. 1 (1951) has been restricted to cases only “in which the defendant does not pose a flight risk or a threat to public safety, cases not falling within the statutory presumptions found in *Virginia Code* §§ 19.2-120 and 19.2-120.1, cases not requiring a secure bond as provided for in *Virginia Code* § 19.2-123, and to those cases not covered by the narrow no-bail requirement of *Virginia Code* § 19.2-102.” *Magistrate Manual: Bail Procedures* (OES, 2016) (emphasis added), found at www.courts.state.va.us/courtadmin/aoc/djs/programs/mag/resources/magman/chapter04.pdf.

Virginia Practice

Unfortunately, there are little data available to analyze what happens to defendants after the initial bail hearing, with the best available analysis coming from a study referred to as the 2011 “October Study,” which was conducted by the Virginia Community Criminal Justice Association to better understand the release decisions and outcomes for pretrial defendants. In 2012, DCJS completed its own study using the 2011 methodology.⁶³ Using the Pretrial and Community Corrections case management system, in conjunction with the Virginia Compensation Board’s Local Inmate Data System, DCJS studied the outcomes of pretrial screenings, and, as with the 2011 report, reviewed the jail status (released vs. detained in jail) of investigated defendants seven days after their initial appearance. In addition, bond types, secured bond amounts, and risk levels identified using the Virginia Pretrial Risk Assessment Instrument (VPRAI) were examined for each group (Released/Detained).

The data show that over half of the defendants (53%) who were originally detained by the magistrate were still in jail seven days after their pretrial screenings. This included defendants identified as being below average or low risk by the VPRAI. The average secured bond amounts for those still in jail was generally (though not always) higher than for those released, suggesting that in Virginia – as has been shown nationally – the size of the bond may be related to an individual’s release.

Of those investigated in October 2012, 47% (n=1,668) were released after seven days, 42% (n=1,477) were held without bond, and 11% (n=381) were still in custody due to an inability to meet the requirements of a secured bond. Of those still held without bond seven days after screening (1,477), 29% were identified as having a risk level of average or less by the VPRAI. Of those given a secured bond (381 cases) but remaining in jail after seven days, 43% were identified as having a risk level of average or less by the VPRAI, and 92% were held on bonds of \$5,000.00 or less.

For defendants released within seven days of their screening, the most serious committing offenses were typically nonviolent/non-drug misdemeanors (33%), or non-violent/non-drug felonies (24%). For defendants still held without bond seven days after screening, the most serious committing offenses were typically non-violent/non-drug felonies (36%), or violent felonies (28%). For defendants given a secured bond but remaining in jail after seven days, the most serious committing offenses were typically non-violent/non-drug felonies (41%), or non-violent/non-drug misdemeanors (34%).

These data indicate that better use of pretrial services to assist the courts in making risk-based pretrial release or detention decisions earlier in the process might have a significant impact on average length of stay in jail for releasable defendants awaiting trial.

Best Practices for Judicial Officers

While an overall assessment of Virginia’s bail statute is likely warranted, best practices for judicial officers under the current bail law include: (1) using a more risk-informed process, including reference to a statistically-derived pretrial assessment tool administered through effective pretrial services agency functions; (2) coupling that risk-informed process with the use of least restrictive conditions to better assure that defendants are not unnecessarily detained prior to trial. Thus, the Subcommittee recommends that the Office of the Executive Secretary of the Supreme Court of Virginia identify a pretrial risk assessment for use by magistrates to determine the least restrictive conditions for individual defendants. In many cases (including non-violent felony cases), this will entail expanding the use of recognizance and unsecured bonds as the less-restrictive alternatives to secured bonds. Further training for judicial officers will undoubtedly help with understanding the mechanics of the tool, and how that tool can be coupled with fundamental legal principles to better achieve constitutionally valid goals. Until then, judicial officers who are not already doing so should begin completing the current DC-327 checklist, and include relevant comments for more meaningful review.

⁶³ See October Study of 2012, found at www.dcms.virginia.gov/sites/dcms.virginia.gov/files/publications/corrections/october-study-pretrial-screenings-2012.pdf; see also *A New Norm for Pretrial Justice in the Commonwealth of Virginia* (DCJS, 2013), found at www.dcms.virginia.gov/sites/dcms.virginia.gov/files/publications/corrections/new-norm-pretrial-justice-commonwealth-virginia.pdf.

KEY COMPONENT 3:

A meaningful review of bail shall occur at first court appearance or as soon as possible for defendants detained in jail.

In Virginia, the first court appearance is the first part of the criminal procedure that occurs in a courtroom before a judge, and happens whenever a person is charged with an offense that carries a possible jail or penitentiary sentence. The primary purpose of the first court appearance (sometimes called an “advisement”) is to advise the defendant of his rights and the criminal charges against him. In particular, the court will advise the defendant of his right to counsel and ascertain whether he wants to waive counsel and represent himself (ensuring that such a waiver is knowing and voluntary), hire his own attorney, or be considered for a court appointed attorney or public defender. The two main pretrial justice issues concerning first court appearances are (1) whether they are prompt, and (2) whether they are meaningful.

Policies Favoring Prompt and Meaningful First Court Appearances

“The defendant’s first appearance in court following arrest is the start of a judicial process that is important for both the individual and society.”⁶⁴ Decisions made at this stage are “crucially important,”⁶⁵ and have “serious implications for the quality and circumstances of the defendant’s life prior to trial as well as for the defendant’s ability to defend against criminal charges.”⁶⁶ These decisions are made while balancing the three underlying purposes underlying the bail process: (1) maximizing release (protecting the defendant’s liberty interest); while (2) maximizing court appearance; and (3) maximizing public safety.

The Constitution guarantees that a defendant shall be informed of the nature and cause of the accusation against them, and that excessive bail shall not be required.

As concerns the promptness of the hearing, the ABA Standards state:

*[t]he defendant should be presented at the next judicial session within [six hours] after arrest. In jurisdictions where this is not possible, the defendant should in no instance be held longer than 24 hours without appearing before a judicial officer. Judicial officers should be readily available to conduct first appearances within the time limits established by this Standard.*⁶⁷

These fixed time limits have been recommended primarily because many states only require that a defendant be presented “promptly” or “without unnecessary delay,” which are ambiguous terms that make enforcement of the right to prompt presentment “problematic.”⁶⁸ While both ABA and NAPSA Standards recognize that the United States Supreme Court has accepted a 48 hour period as constitutionally acceptable for making determinations of probable cause, both sets of standards recommend shorter time periods for initial appearances as desirable. This, of course, often requires that jurisdictions make resources available to have more frequent first court appearances and bail-settings.⁶⁹

Fairly recent research also suggests empirical reasons for holding prompt bail review or appeal. While detention for a defendant’s entire pretrial period has decades of documented negative effects, recent research by the Laura and John Arnold Foundation has demonstrated that even small amounts of pretrial detention – perhaps even the few days necessary to secure funds to pay cash or a fee for a surety bond, or even the few days required to hold a bond hearing – have negative impacts on defendants and the general public.⁷⁰ Specifically, the researchers found that when compared to defendants held

⁶⁴ Standards on Pretrial Release (3rd ed.) (Nat’l Assoc. of Pretrial Servs. Agencies, 2004) [hereinafter NAPSA Standards], commentary at 28.

⁶⁵ *Id.*

⁶⁶ ABA Standards, *supra* note 8, Std. 10-4.3 (commentary), at 94.

⁶⁷ *Id.* Std. 10-4.1 (b), at 77.

⁶⁸ *Id.* Std. 10-4.1 (commentary), at 79.

⁶⁹ *Id.* Std. 10-4.1 (commentary), at 81.

⁷⁰ See generally Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (Laura & John Arnold Found. 2013).

no more than 24 hours, low risk defendants who were held for two to three days were 40% more likely to commit new crimes before trial and 22% more likely to fail to appear, and if held for 31 days or more were 74% more likely to commit new crimes pretrial and 31% more likely to fail to appear. Moderate risk defendants showed the same correlations, albeit at different rates. Moreover, the researchers found, low risk defendants held two to three days were more likely to commit a new crime within two years, and defendants held for eight to 14 days were 51% more likely to recidivate long-term than defendants detained less than 24 hours.⁷¹ Interestingly, for high risk defendants there was no relationship between pretrial detention and increased crime, “suggest[ing] that high risk defendants can be detained before trial without compromising, and in fact enhancing, public safety and the fair administration of justice.”⁷² This research provides compelling reasons for moving quickly with most defendants because doing so leads to better outcomes, including public safety.

As to whether the hearing is meaningful, both the NAPSA and the ABA Standards focus on making sure first appearances are not hurried or perfunctory, are held in appropriate facilities, and with each case treated individually. The two sets of standards differ slightly in form, though not necessarily in substance, on the important issue of lawyer representation during the first court appearance, with both sets recommending defense attorney presence at first appearance.⁷³ This is bolstered by empirical research, which shows that lawyer presence helps defendants (and thus the general public) in significant ways.⁷⁴ While the national best-practice standards appear to assume that prosecutors will be present at first appearances (and the ABA Standards on the Prosecutor’s Function encourages prosecutor presence),⁷⁵ Standards promulgated by the National District Attorneys Association (NDAA) do not require it.⁷⁶ Nevertheless, the NDAA Standards stress both the importance of screening cases and of weighing in on the bail decision, and thus having experienced prosecutors screen cases early in the criminal process has become somewhat of a consensus best practice as it speeds up charging decisions that are crucial to the bail determination.⁷⁷

Practices in Other Jurisdictions

Efforts to make first appearances prompt and meaningful are too numerous to document; indeed, national efforts concerning defense counsel at bail have evolved into a somewhat separate movement, with groups dedicated solely to the issue. Most of the reasons for improving these areas are based in law. For example, if a defendant has a right to counsel, counsel should be present to make that right meaningful. Accordingly, jurisdictions like Colorado have eliminated barriers to attorney representation found in its laws, and encouraged defense counsel at all first appearances.⁷⁸ Likewise, understanding the appellate process as a catalyst for improvements, Kentucky defenders have begun making more objections and seeking more appeals of bail issues, leading to improved practices that better follow the law.⁷⁹ As another example, having an experienced prosecutor screen cases when that screening may lead to altered charges or even

⁷¹ *Id.* at 3.

⁷² See *Research Summary: Pretrial Criminal Justice Research*, at 4 (LJAF, 2013), found at www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf. Of course, purposefully detaining high risk defendants in any way other than the legally prescribed method for no bail would be unlawful.

⁷³ See ABA Standards, *supra* note 8, Std. 10-4.3 (c), at 92; *Id.* (commentary), at 96. NAPSA Standards, *supra* note 63, Std. 2.2 (d), at 27. Both sets of Standards were released prior to the U.S. Supreme Court’s decision in *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2592 (2008), in which the 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’s right to counsel.” The Court did not go so far as to say, however, that the first appearance is a “critical stage,” necessarily triggering any requirement to make counsel available.

⁷⁴ See Douglas L. Colbert, Ray Paternoster, and Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail*, 32 *Cardozo L. Rev.* 1719 (2002).

⁷⁵ See American Bar Association, *Criminal Justice Standards for the Prosecutor Function*, Std. 3-5.1, found at www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html.

⁷⁶ National District Attorneys Association *Prosecution Standards*, Std. 4-5.2, found at www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf.

⁷⁷ See PJI website section on early prosecutor screening, found at <http://www.pretrial.org/solutions/early-screening/>.

⁷⁸ See *The Colorado Bail Book: A Defense Practitioner’s Guide to Adult Pretrial Release* (Colo. Crim. Defense Inst./Colo. Public Defender/NACDL, 2015) (documenting efforts), found at www.bja.gov/publications/colorado_bail_book_pretrial_release.pdf.

⁷⁹ See *Kentucky Pretrial Release Manual* (Ky. Dept. of Pub. Advocacy, 2013), found at <http://dpa.ky.gov/NR/rdonlyres/D45BB632-4BCA-4BE6-B396-8CB20D917352/0/PretrialReleaseManualFINAL071713.pdf>.

dismissing the case is simply a better practice than waiting some additional time to do the same task. Accordingly, jurisdictions like the District of Columbia place experienced prosecutors at first advisements not only to provide input on pretrial release and detention, but also to decide whether to “paper” (bring formal charges) cases, a process that effectively and efficiently weeds out cases that are simply not prosecutable.⁸⁰

Virginia Law and Practice

As in most states, Virginia law concerning timing and nature of the first court appearance is somewhat sparse. Virginia uses the typical language requiring presentment of an arrested defendant to a judicial officer “forthwith” or “without unnecessary delay” for an “immediate” bail hearing.⁸¹ Section 19.2-158 further states that whenever persons are charged with offenses having a penalty of death or confinement in jail or prison, and they “are not free on bail or otherwise,” they “shall be brought before the judge of a court not of record ... at which time the judge shall inform the accused of the amount of his bail and his right to counsel.”⁸² This Section does not mean that a judge will discuss or otherwise modify conditions of bail. Instead, the statutes overall contemplate a bifurcated system,⁸³ with magistrates conducting a bail hearing and setting bail (when allowed – see *Virginia Code* § 19.2-120 (D)), and with judges reviewing bonds only through motions for hearings to discuss bail and conditions, which are to be held “as soon as practicable but in no event later than three calendar days, excluding Saturdays, Sundays, and legal holidays, following the making of such motion.”⁸⁴

Concerning defense counsel at bail, Section 19.2-157 provides:

*Whenever a person charged with a criminal offense the penalty for which may be death or confinement in the state correctional facility or jail, including charges for revocation of suspension of imposition or execution of sentence or probation, appears before any court without being represented by counsel, the court shall inform him of his right to counsel. The accused shall be allowed a reasonable opportunity to employ counsel or, if appropriate, the statement of indigence provided for in § 19.2-159 may be executed.*⁸⁵

Although a bail setting by a magistrate is likely to significantly affect a defendant’s liberty for several days or longer even when that defendant is ultimately released, the law also appears only to contemplate meaningful representation later in the process, through a bond hearing following a motion. It is not uncommon that judges at the first court appearance will not hear anything related to bail, thus placing the burden upon defendants or their attorneys to file motions for bond hearings.

Best Practices for Meaningful Review of Bail Under Current Law

The defendant should be brought before the court the first day court is in session, following his arrest and detention (see *Virginia Code* §19.2-158 involving Circuit Court cases where the District Court is in session prior to a date when Circuit Court is in session). Court appointed counsel/public defenders should be present for counsel hearings, so that, if appointed, they may immediately meet with their clients, gather contact information, and schedule bond hearings, if requested.

Bond hearings shall be conducted as soon as practical following the first court appearance, but in no case later than three days following the making of a request. Nevertheless, if a defendant has indicated that he wants to hire his own attorney, but he is being held without bond (or with a bond that he is unable to post), then the court should ask the defendant if he wants his bond reviewed that day without an attorney, or wants to wait until he has an attorney hired (this allows the

⁸⁰ See *Processing Arrestees in the District of Columbia: A Brief Overview* (D.C. Pretrial, 2012), found at www.pretrial.org/download/law-policy/Processing%20Arrestees%20in%20the%20District%20of%20Columbia-%20A%20Brief%20Overview.pdf.

⁸¹ See *Virginia Code* §§19.2-76; 19.2-80.

⁸² *Id.* § 19.2-158.

⁸³ This type of system can, itself, be a cause of unnecessary pretrial detention due to somewhat needless and inefficient layers of bail settings, and any review of Virginia’s bail laws should include an analysis of this process.

⁸⁴ *Virginia Code* §§19.2-76; 19.2-80.

⁸⁵ See *id.*, §19.2-157

defendant the opportunity to be heard on bond, but does not force him to participate in a bond hearing). If the defendant wants a bond hearing that day, without counsel, then the court should give the hearing, but also reconsider bond once the defendant does hire an attorney if he continues to be held.

Best practice would be to hold bond hearings every day, at a set time each day, so that all parties are aware of that time and schedule, and for a defendant to be able to have his bond reviewed on the date of his first court appearance.

Defense attorneys and prosecutors should be present at any bond hearing. In all cases, defense counsel should have the opportunity to meet with their new client prior to a bond hearing being held, and other procedures should be employed to either facilitate defense attorney presence or to avoid having the act of obtaining an attorney lead to delay the bail setting/review hearings. Prosecutors should have the opportunity to run a criminal record check and to obtain a copy of the police report (if there is one) prior to a bond hearing, and should make efforts to thoroughly review the cases prior to a bond hearing to see if an agreement on bond may be reached. Both parties should have the benefit of a pretrial services investigation report.

If available, a member of the pretrial services staff should be present at the bond hearing.

KEY COMPONENT 4:

Defendants with special needs or status, such as mental illness, should be identified at the pretrial stage.

When identifying the key components of a pretrial justice system, jurisdictions often incorrectly assume that improvements in traditional bail practices will provide a good fit for everyone. This is not always true, however, and bail simply is not always the appropriate mechanism with which to fix more systemic social problems posed by defendants with special needs. Mental health, homelessness, drug addiction, and special needs posed by individual groups, such as veterans, for example, are often the most vexing problems when trying to force them into a release and detention scheme built on certain assumptions tied to the traditional criminal justice system. These groups are simply different, due not only to their unique circumstances, but also to America’s historic and current response to the group issues.

In many cases, these differences mean that jurisdictions need to focus resources on criminal prevention efforts – that is, evidence-based programs designed to reach people early in their lives to thwart substance abuse and criminal behavior sometimes thirty years later. In other cases, the differences suggest solutions better found in sentencing, rehabilitation, and post-conviction treatment. In still others, they suggest diversion from the justice system altogether. Nevertheless, in all cases solutions require early identification and proper collaboration in order to address both the discreet needs of individual defendants and larger-systemic responses to the underlying issues.

Mental health, homelessness, drug addiction, and special needs posed by individual groups, such as veterans, for example, are often the most vexing problems when trying to force them into a release and detention scheme built on certain assumptions tied to the traditional criminal justice system.

Policies Favoring Early Identification of Defendants with Special Needs

Every social issue raised above has its own literature addressing how best to respond to it, and while that literature might be somewhat less than desirable, it nonetheless reaches far beyond the recommendations in this document. For example, various studies in the field of mental health have shown the inadequacies of imposing a traditional criminal pretrial model on defendants suffering from mental illness,⁸⁶ and so there exists a similarly robust literature reviewing various responses to mental illness in the justice system, such as mental health courts and other diversion mechanisms, community based re-entry and case management, and increasing access to mental health treatment.⁸⁷

Likewise, in addressing mental health, many jurisdictions, including Virginia, have used the “Sequential Intercept Model,”⁸⁸ designed by the National Gains Center of the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services, for help in identifying both defendant populations and intervention options. That model outlines five potential intercept points, and encourages jurisdictions to map their system along those points to develop a comprehensive plan that increases the community’s responsiveness to defendants with mental health issues.

⁸⁶ See, e.g., *Mentally Ill Offenders in the Criminal Justice System: An Analysis and Prescription* (The Sentencing Project, 2002), found at www.sentencingproject.org/wp-content/uploads/2016/01/Mentally-Ill-Offenders-in-the-Criminal-Justice-System.pdf.

⁸⁷ See, e.g., KiDeuk Kim, Miriam Becker-Cohen, & Maria Serakos, *The Processing and Treatment of Mentally Ill Persons in the Criminal Justice System*, found at www.urban.org/sites/default/files/alfresco/publication-pdfs/2000173-The-Processing-and-Treatment-of-Mentally-Ill-Persons-in-the-Criminal-Justice-System.pdf.

⁸⁸ See Rebecca A. Clay, *Treatment as an Alternative to Jail for People With Mental Illness* (SAMSHA, 2009), found at http://archive.samhsa.gov/samhsaNewsletter/Volume_17_Number_2/TreatmentAlternative.aspx.

Implementing this framework identifies gaps in services and helps prioritize the types of services and interventions. The framework itself has been tailored to Virginia by the Virginia Department of Behavioral Health & Developmental Services.⁸⁹

This mapping exercise can lead to the implementation of effective programs designed specifically for intervention in one of the five areas. One example is Crisis Intervention Team (CIT) Training. CIT is a “model for community policing that brings together law enforcement, mental health providers, hospital emergency departments and individuals with mental illness and their families to improve responses to people in crisis. CIT programs enhance communication, identify mental health resources for assisting people in crisis and ensure that officers get the training and support that they need.”⁹⁰ In 2001, the first Virginia Crisis Intervention Team (CIT) was established in the New River Valley. There and elsewhere, law enforcement officers responding to crisis situations are trained to identify persons exhibiting mental illness, substance abuse, or both, and can lead to officers diverting persons with mental health issues from the justice system altogether. Virginia statutes provide for CIT training, with expressly articulated goals of reducing the likelihood of physical confrontation, decreasing arrests and use of force, and identifying underserved populations with mental illness, substance abuse problems or both, and linking them to appropriate services.⁹¹ CIT members include law enforcement, mental health treatment providers, hospital/emergency medical staff, other first responders, jail staff, and family advocates. Overall, this collaborative effort and specialized training streamlines services and promotes better understanding of people living with mental health and/or substance abuse issues.

Various national organizations support the use of alternatives to the traditional criminal justice system for persons facing special needs. For example, the American Bar Association Standards for Criminal Justice (Pretrial Release) state: “In addition to employing release conditions outlined in Standard 10-1.4, jurisdictions should develop diversion and alternative adjudication options, including drug, mental health and other treatment courts or other approaches to monitoring defendants during pretrial release.”⁹² Commentary to the Standard further explains:

*This Standard calls upon jurisdictions to take advantage of the growing numbers and types of alternatives to adjudication that complement pretrial release conditions. These alternatives include specialized courts to deal with problems frequently associated with defendants entering the criminal justice system. Drug courts, domestic violence courts, mental health courts, and related treatment-oriented court programs have demonstrated their utility in many places across the nation.*⁹³

Within the assessment, recommendation, and supervision functions of a pretrial services agency, the various national standards recognize the importance of agencies identifying and managing defendants with special needs. For example, the ABA Standards recommend gathering information useful to courts in assessing whether a defendant is eligible and appropriate for various diversion options.⁹⁴ Likewise, the NAPSA Standards recommend that pretrial services assist defendants released prior to trial “in obtaining any necessary medical services, drug or mental health treatment, legal services or other social services that would increase the chances of successful compliance with conditions of pretrial release.”⁹⁵

⁸⁹ See Virginia Department of Behavioral Health & Developmental Services website for training and resources, found at www.dbhds.virginia.gov/professionals-and-service-providers/forensic-services/training-resources, or see presentation, *Mental Illness and the Law: A Guide for Legal Professionals*, at www.dbhds.virginia.gov/library/forensics/fofo-%20legal%20training%20module%201.pdf

⁹⁰ What is CIT? (NAMI), found at www.nami.org/Law-Enforcement-and-Mental-Health/What-Is-CIT.

⁹¹ See *Virginia Code* §9.1-187.

⁹² ABA Standards, *supra* note 8, Std. 10-1.5, at 47.

⁹³ *Id.* (commentary) at 47-48 (internal footnote omitted).

⁹⁴ See ABA Standards, *supra* note 8, Std. 10-4.2 (g)(vi), at 85.

⁹⁵ NAPSA Standards, *supra* note 63, Std. 3.5 (a)(5), at 65.

Virginia Law and Practice

Courts that are served by pretrial services agencies can take advantage of their ability to assess and recommend appropriate responses to defendants with special needs. Virginia law provides for adult drug courts,⁹⁶ but at least one effort to significantly increase the overall creation of alternative problem solving dockets through legislation did not succeed.⁹⁷ Nevertheless, one can find jurisdictions in Virginia that have implemented mental health, DUI, and veteran's dockets. These dockets appear sporadic, though, and do not therefore represent a statewide response to these important issues. Obviously, changes to the law can facilitate not only the creation of these dockets and diversion programs (as well as guide them toward best practices), but also crime prevention programs and other empirically-based solutions designed to address the underlying issues leading to involvement in the traditional criminal process.

Best Practices for Identifying Defendants with Special Needs at the Pretrial Stage

Training and collaboration are essential to address the special needs of defendant populations. Recognizing mental illness or other conditions deserving of special attention during the initial encounter is just as important as later referrals for services.

To facilitate identification, all communities should minimally have some system in place for identifying persons with special needs as early as possible in the criminal justice process. If that system is done through a pretrial services agency, agency officers should use validated tools for screening, such as the Brief Jail Mental Health Screen,⁹⁸ which is designed to identify individuals with mental illness early in the criminal justice process and to facilitate intervention or diversion at the earliest possible opportunity. Pretrial staff should also communicate with jail administrators and/or jail medical or mental health staff to further identify special needs and to coordinate and address any release requirements or concerns. These early identification techniques should then be coupled with research-based strategies to reduce any harm in or out of the jail that might occur by not providing interventions.

Pretrial agency staff (or anyone else with knowledge of a defendant's special needs) should communicate these needs to judicial officers, prosecutors, and defense attorneys for purposes of pretrial placement as well as for purposes of assessing risk for flight or public safety while on pretrial release. If the defendant is placed on supervision, pretrial officers should meet with the defendants and connect them to local human/social services, mental health providers, or substance abuse treatment and appropriate support groups, when it is lawful to do so. Pretrial officers should also communicate with service providers to monitor compliance with treatment objectives.

More broadly, jurisdictions in Virginia should explore the Sequential Intercept Model as an effective way to map their system responses to defendants with special needs. While that Model is primarily designed as a tool for responding to mental health issues, the general mapping process can be broadened to include other defendant populations posing different issues, whether or not those needs include a mental health component. Identifying those defendants can lead both to broad interventions (such as development of specialty dockets) as well as to discreet and narrower solutions, such as assuring the availability of appropriate treatment, affordable medication, family support, or transitional care.

Virginia is now also participating in the Evidence-Based Decision Making (EBDM) Initiative at the statewide level.⁹⁹ EBDM is a process for identifying needs at various criminal justice decision points and using research and collaboration to address

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⁹⁶ See *Virginia Code* §18.2-254.1.

⁹⁷ See, e.g., S.B. 903, which passed the Senate but was left in the House Committee on Courts and Justice; see also Sydney Haanpaa, *Veteran Treatment Dockets Struggle to Find Support in Virginia General Assembly*, found at <https://vetlawandbenefits.org/2016/03/31/veteran-treatment-dockets-struggle-to-find-support-in-virginia-general-assembly/>.

⁹⁸ See Brief Jail Mental Health Screen, found at www.prainc.com/wp-content/uploads/2015/10/bjmhsform.pdf.

⁹⁹ See *Evidence Based Decision Making: What Does It Mean For Virginia?*, found at [www.vcsc.virginia.gov/2016meetings/EBDM%20in%20Va%20-%20Lester%20Wingrove%20\(Apr%204%202016\).pdf](http://www.vcsc.virginia.gov/2016meetings/EBDM%20in%20Va%20-%20Lester%20Wingrove%20(Apr%204%202016).pdf).

those needs to reduce community harm, including recidivism. Many jurisdictions in Virginia have done extensive work in the EBDM Initiative, including work toward more lawful and effective pretrial release and detention practices. To the extent it has not already done so, this Initiative should specifically address defendant populations with special needs and consider models for interventions – including diversion from the criminal justice system – shown to work to address risk and to reduce community harm.

KEY COMPONENT 5:

Every locality should have access to pretrial services, using legal and evidence-based practices and validated risk assessment.

To make appropriate decisions concerning pretrial release and detention, judicial officers must have “specific, relevant, timely, and accurate information,” as well as “a range of relevant options from which to choose when making a decision.”¹⁰⁰ Without this information or range of options (as well as the ability to monitor defendants placed on those options), courts are hampered in their ability to safely release defendants at the pretrial stage, frustrating several foundational principles of American jurisprudence, including due process, equal protection, and the presumption of innocence.¹⁰¹ In countless jurisdictions across this country, pretrial services agencies are the only entities capable of providing this information and ensuring that adherence to these legal principles is maintained.

The importance of professional pretrial services functions, no matter where they are operationally housed, and no matter how large or small they may be, cannot be overstated. “Pretrial programs are a vitally important part of [a criminal justice system] because they perform functions that, in their absence, are often performed inadequately or not at all.”¹⁰² When these functions are performed well, the benefits are significant: “Jurisdictions can minimize unnecessary pretrial detention, reduce jail crowding, increase public safety, ensure that released defendants appear for scheduled court events, and lessen the invidious discrimination between rich and poor in the pretrial process.”¹⁰³ Pretrial services functions were considered to be a prerequisite to enacting the in-or-out federal system revisions based on assessment and supervision for public safety in 1984, and they are no less an important prerequisite today. By putting to use the latest research concerning best practices, including research informing jurisdictions about defendant risk and differential supervision, these pretrial agencies are vital to creating a release and detention scheme that is rational, transparent, and fair.

Policies Favoring Jurisdictions Having Access to Pretrial Services

Both the American Bar Association and the National Association of Pretrial Services Agencies’ Standards contain recommendations concerning pretrial services. The ABA Standards provide:

*Every jurisdiction should establish a pretrial services agency or program to collect and present the necessary information, present risk assessments, and, consistent with court policy, make release recommendations required by the judicial officer in making release decisions, including the defendant’s eligibility for diversion, treatment, or other alternative adjudication programs, such as drug or other treatment courts. Pretrial services should also monitor, supervise, and assist defendants released prior to trial, and review the status and release eligibility of detained defendants for court on an ongoing basis.*¹⁰⁴

The ABA Standards list the functions that a pretrial agency should perform, including, among other things: (1) making pre-first appearance fact inquiries; (2) administering risk assessments and making recommendations corresponding to those risk assessments to the judicial officer; (3) providing “appropriate and effective supervision” for defendants released pretrial; (4) creating policies for operating (or contracting for) appropriate facilities for the custody, care, and supervision of persons using a range of release options; (5) monitoring defendant compliance with conditions of release; and (6) performing ongoing status checks on detained defendants “for any changes in eligibility for release options and [to] facilitate their

¹⁰⁰ John Clark & D. Alan Henry, *The Pretrial Release Decision Making Process: Goals, Current Practices, and Challenges*, at 7 (Pretrial Servs. Res. Ctr. 1996).

¹⁰¹ See generally, Marie VanNostrand, *Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC, 2007).

¹⁰² NAPSA Standards, supra note 63, Std. 1.3 (commentary), at 15.

¹⁰³ Barry Mahoney, Bruce D. Beaudin, John A. Carver, III, Daniel B. Ryan, & Richard B. Hoffman, *Pretrial Services Programs: Responsibilities and Potential*, at 1 (NIJ, 2001), found at www.ncjrs.gov/pdffiles1/nij/181939.pdf.

¹⁰⁴ ABA Standards, supra note 8, Std. 10-1.10, at 54.

release as soon as feasible and appropriate.”¹⁰⁵ According to John Clark of the Pretrial Justice Institute, “This standard [ABA Std. 1-1.10] can be viewed as the objectives for achieving the goals of maximizing release while minimizing misconduct [i.e., failure to appear and new criminal activity while on pretrial release].”¹⁰⁶

Likewise the NAPSA Standards state:

*Every jurisdiction should have the services of a pretrial services agency or program to help ensure equal, timely, and just administration of the laws governing pretrial release. The pretrial services agency or program should provide information to assist the court in making release/detention decisions, provide monitoring and supervisory services in cases involving released defendants, and perform other functions as set for the in these Standards.*¹⁰⁷

Research plays an important part in driving the field of pretrial release and detention, and research showing what does and does not work to simultaneously achieve the goals of maximizing release, court appearance, and public safety, also helps to illuminate which practices are potentially unlawful. In particular, risk assessment can be a useful tool in determining how to maximize court appearance and public safety rates for released defendants. Because of how they are created and what they measure, however, these tools must be used with caution and likely never should be used solely to determine initial detention eligibility.¹⁰⁸ Nevertheless, these tools are crucial to individualizing the bail decision, and can be immensely helpful with adhering to the “risk principle” with released defendants by illuminating who would benefit most from increased resources pretrial.

Virginia Law and Practice

Virginia statutes allow judicial officers to place any defendant “in the custody and supervision of a designated person, organization, or pretrial services agency.”¹⁰⁹ The law expressly provides for the creation of pretrial services and agencies,¹¹⁰ and provides duties and responsibilities of local pretrial services officers.¹¹¹

Pursuant to this enabling legislation, Virginia has created a uniform statewide pretrial system through DCJS, which includes common case management and data systems as well as validated risk assessment and standards of supervision. The agencies are administered and operate locally with funding from their local jurisdictions and DCJS. Currently in Virginia there are 32 pretrial services agencies serving 99 of the state’s 133 localities, which equates to coverage of approximately 86% of Virginia’s population. In those un-served localities that lack pretrial services, system actors, including magistrates and judges, prosecutors, and defense counsel do not have verified and detailed background information and do not have the benefit of pretrial supervision for defendants released into the community.

Virginia has been a leader in implementing research-driven practices in pretrial services. Virginia pretrial services agencies currently use an objective and research-based pretrial risk assessment, the Virginia Pretrial Risk Assessment Instrument (VPRAI), to assess risk of flight and danger to the community posed by pretrial defendants. The VPRAI, which is itself a

Virginia has created a uniform statewide pretrial system through DCJS, which includes common case management and data systems as well as validated risk assessment and standards of supervision.

¹⁰⁵ *Id.* Std. 10-1.10 (b), at 54-55.

¹⁰⁶ John Clark, *A Framework for Implementing Evidence-Based Practices in Pretrial Services*, Topics in Community Corrections, at 5 (NIC, 2008). Maximizing release while maximizing court appearance and public safety (minimizing misconduct for the two constitutionally valid purposes for limiting release) are at the heart of the history of bail, the legal foundations underpinning bail, the pretrial research, and the national standards. See *Fundamentals*, *supra* note 7, at note 127 and accompanying text.

¹⁰⁷ NAPSA Standards, *supra* note 63, Std. 1.3 (a), at 13.

¹⁰⁸ See discussion under Key Concept 2, *supra*. While the ABA Standards note the usefulness of statistical predictive estimates of risk, they also caution against using this without other sources of relevant information. See ABA Standards, *supra* note 8, Std. 10-1.10 (b) (ii) (commentary), at 57-58.

¹⁰⁹ *Virginia Code* § 19.2-123 (A).

¹¹⁰ *Id.* § 19.2-152.2.

¹¹¹ *Id.* § 19-2-152.4:1; 152.4:3.

validated instrument, is nationally recognized and has been used and validated in other jurisdictions across the country. The VPRAI reduces subjective pretrial decision making practices that are prone to demographic disparities and that may produce poor results from a public safety perspective. National research in this area has demonstrated that actuarial risk assessment tools have higher predictive validity than clinical or professional judgment alone.¹¹² The VPRAI examines eight risk factors that are weighted to create a risk score, and defendants are assigned to one of five risk levels ranging from low to high. The risk levels represent the likelihood of pretrial failure including failing to appear in court and danger to the community pending trial.

In addition, DCJS, in conjunction with the National Center for State Courts and the Virginia Community Criminal Justice Association, developed a document entitled, “Measuring for Results in Pretrial Services Performance and Outcome Measures.”¹¹³ Identified in this document are the following key performance measures outlined for all pretrial services agencies:

- Pretrial Court Appearance Rate
- Public Safety Rate (including the percentage of supervised defendants who are not charged with a new offense while under pretrial supervision, the rate of defendants who are supervised due to a pending domestic violence charge who are not arrested for a new domestic violence charge, and the percentage of defendants on pretrial supervision who are not arrested for a violent misdemeanor or felony offense)
- Success Rate (success rate within the different risk levels)
- Investigation Rate (Rationale or reasons investigations were not completed)
- Recommendation Rate (Release Decision Concurrence Rate and Supervision Level Concurrence Rate)
- Average Length of Pretrial Supervision

Best Practices for Pretrial Services

Effective pretrial services agencies and functions assist judicial officers in making release and detention decisions that further the underlying purposes of bail by (1) gathering information, (2) making recommendations, (3) monitoring conditions and supervising defendants released during the pretrial stage, and (4) monitoring detained defendants and informing judicial officers of changes in circumstances. As a part of this process, effective and fair pretrial services strategies are designed to achieve lawful outcomes by being risk-informed and guided by legal and evidence-based practices, including the proper use of validated actuarial risk assessments and differential supervision techniques. Pretrial services entities use a balanced approach that monitors compliance while providing community resources to intelligently mitigate pretrial risk. They maintain practices that are aligned with state standards as well as nationally recognized and research-proven practices. Finally, they benefit from using established and uniform practices and policies to assure accurate collection and evaluation of data to make informed program decisions. For all these reasons, every locality in Virginia should have access to pretrial services that use legal and evidence-based practices and a statistically-derived and validated risk assessment instrument.

¹¹² See notes 40-42, *infra*, and accompanying text.

¹¹³ See Tara L. Kunkel, and Michelle T. White, *Measuring for Results in Pretrial Services: Performance and Outcome Measures* (DCJS, 2014). The measurements are substantially similar to those found in *Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field* (NIC, 2011), found at www.pretrial.org/download/performance-measures/Measuring%20What%20Matters.pdf.

KEY COMPONENT 6:

Interdisciplinary education and communication among key stakeholders promotes effective pretrial services planning, implementation, and operations.

The pretrial phase of a criminal case has many decision points: summons or arrest decisions by law enforcement; initial bail decisions by magistrates; decisions concerning assessment and recommendations by pretrial services staff; various decisions surrounding the bail process by prosecutors and defense attorneys; and decisions to release or detain by judges. With different criminal justice disciplines intersecting in a relatively short but crucial time in the court process, it is only prudent for the persons within these entities to collaborate, understand each other's roles, and come to value each other's individual contribution. It is important for these persons to look for opportunities to include another discipline's purpose into their training curriculum, and to look for opportunities to bring together differing organizations in meaningful collaborative conversation and education to maintain a high level of professionalism among criminal justice practitioners.

"Pretrial Justice Systems achieve better outcomes when interdisciplinary components collaborate. Continuing pretrial justice education and training promotes understanding, implementation, and operations which enhances the effective use of local resources while maintaining public safety."

—Virginia Pretrial Justice Workgroup

Policies Favoring Education and Collaboration

Starting in the 1960s, American consensus has been that criminal justice systems operate most fairly and efficiently when the various entities in those systems work together to apply the research and knowledge of what works to achieve system goals to various decision points. In 1967, the President's Commission on Law Enforcement and Administration of Justice released "The Challenge of Crime in a Free Society," a document that first articulated the need for taking a criminal justice system (versus a silo) perspective and doing research-based decision making through criminal justice "planning and advisory boards."¹¹⁴ Since then, numerous documents have echoed the premises outlined in that paper, focusing on systemic thinking, coordination and collaboration, and the education necessary to do evidence or research-based decision making.¹¹⁵

Most recently, the National Institute of Corrections, along with the Center for Effective Public Policy, the Pretrial Justice Institute, the Justice Management Institute, and The Carey Group, began the Evidence-Based Decision Making (EBDM) Initiative, which was designed to help jurisdictions succeed in identifying and implementing criminal justice system improvements.¹¹⁶ Again following the overall premises of the 1967 paper, the current description of the initiative states:

*EBDM is a strategic and deliberate method of applying empirical knowledge and research-supported principles to justice system decisions made at the case, agency, and system level and seeks to equip criminal justice local and state policymakers with the information, processes, and tools that will result in measurable reductions of pretrial misconduct, post-conviction reoffending, and other forms of community harm resulting from crime.*¹¹⁷

It is, essentially, the structured use of education and collaboration to get things done.

¹¹⁴ See *Challenge*, *supra* note 4.

¹¹⁵ See, e.g., *Getting It Right: Collaborative Problem Solving for Criminal Justice* (NIC, 2006), found at <http://nicic.gov/library/019834>; see also *National Symposium on Pretrial Justice: Summary Report* (BJA/PJI, 2011) (providing recommendations for all system entities), found at www.pretrial.org/wpfb-file/nsj-report-2011-pdf/; *Fundamentals*, *supra* note 7 (recommending system change through collaboration, education, and research-based decision making in pretrial practice).

¹¹⁶ See *A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems* (NIC, JMI, CEPP, PJI, & The Carey Group, 2010) [hereinafter *Framework*], found at <http://nicic.gov/library/024372>.

¹¹⁷ See *Evidence Based Decision Making in Local Criminal Justice Systems*, found at <http://info.nicic.gov/ebdm/?q=node/8>.

Virginia is one of three states that were selected to participate in Phase V of the EBDM Initiative.¹¹⁸ Phase V follows the foundational work outlined in the initial Framework document along with various other resources, such as the EBDM Starter Kit published by the Center for Effective Public Policy.¹¹⁹ As it pertains to pretrial justice, Virginia participants are using the Framework to find, assess, and develop the information, processes, and tools necessary to make risk-informed release and detention decisions resulting in measurable reductions of pretrial misconduct, post-conviction reoffending, and other forms of community harm resulting from crime. In short, the Initiative is providing Virginia with the opportunity to examine its pretrial process and to align data and research to improve decision making among the various stakeholders.

The Virginia team includes six sites across the state, which are working closely with the state team comprised of agency heads from all branches of state government. Specifically, teams from Prince William/Manassas/Manassas Park, Staunton/Augusta/Waynesboro, and Chesterfield/Colonial Heights as well as the cities of Richmond, Petersburg and Norfolk were selected to participate.

Earlier phases of this Initiative included seven local criminal justice systems throughout the nation and included the City of Charlottesville and Albemarle, which both built their capacity to: (1) improve the quality of information used to make individual case decisions in local systems; and (2) engage these systems as policymaking bodies to improve the effectiveness of their decisions collectively at identified decision points. Local officials involved in those initiatives likewise included judicial officers, prosecutors, public defenders, police, sheriffs, human service providers, county executives, probation staff, and pretrial services directors.

Overall, EBDM has four guiding principles that the Pretrial Justice Subcommittee used in preparation of this document. Those principles are:

1. The professional judgment of criminal justice system decision makers is enhanced when informed by evidence-based knowledge;
2. Every interaction within the criminal justice system offers an opportunity to contribute to harm reduction;
3. Systems achieve better outcomes when they operate collaboratively; and
4. The criminal justice system will continually learn and improve when professionals make decisions based on the collection, analysis, and use of data and information.¹²⁰

Each of these principles is supported by research, which, in turn, reaffirms American consensus on best practices for criminal justice system improvement since 1967.

Best Practices for Implementing Interdisciplinary Education and Communication Among Key Stakeholders

Virginia should undertake a planned, systematic educational effort with all stakeholders, including law enforcement, judges, magistrates, prosecutors, defense attorneys, victim’s representatives, jail administrators, local and state officials, the general public, and the media. This effort should include pretrial presentations at all disciplines’ annual trainings and conferences and other public discussions whenever possible.

Key stakeholders should be kept apprised of new pretrial initiatives and be invited to all applicable pretrial symposiums. To remain current and to better facilitate dissemination of relevant local and national research developments to other stakeholders, however, pretrial services personnel themselves must attend educational and training sessions and events within their field.

¹¹⁸ Phase V of the EBDM initiative includes Virginia, Wisconsin, and Indiana.

¹¹⁹ See *EBDM Starter Kit*, found at <http://starterkit.ebdmoneless.org/starter-kit/ebdm-starter-kit-introduction/>.

¹²⁰ See *Framework*, *supra* note 118, at 25-29.

Education and communication of all relevant pretrial research – legal, historical, social science, opinion, and observational – should lead to Virginia communities fully understanding the bases for improving the state’s system for pretrial release and detention. With that understanding will come assurance that resources for pretrial detention will be reserved only for those defendants who pose a high risk to the community or who are likely to fail to appear in court, thus upholding the constitution while expending public funds in a fair, efficient, and responsible manner.

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Virginia Code Sections Cited

- § 19.2-73. Issuance of summons instead of warrant in certain cases.
- § 19.2-73.1. Notice of issuance of warrant or summons; appearance; failure to appear.
- § 19.2-74. Issuance and service of summons in place of warrant in misdemeanor case; issuance of summons by special conservators of the peace.
- § 19.2-80. Duty of arresting officer; bail.
- § 19.2-80.1. When arrested person operating motor vehicle; how vehicle removed from scene of arrest.
- § 19.2-81. (Effective until July 1, 2018) Arrest without warrant authorized in certain cases.
- § 19.2-81.3. Arrest without a warrant authorized in cases of assault and battery against a family or household member and stalking and for violations of protective orders; procedure, etc.
- § 19.2-81.6. Authority of law-enforcement officers to arrest illegal aliens.
- § 19.2-82. Procedure upon arrest without warrant.
- § 19.2-119. Definitions.
- § 19.2-120. Admission to bail.
- § 19.2-120.1. Presumption of no bail for illegal aliens charged with certain crimes.
- § 19.2-121. Fixing terms of bail.
- § 19.2-123. Release of accused on secured or unsecured bond or promise to appear; conditions of release.
- § 19.2-152.2. Purpose; establishment of pretrial services and services agencies.
- § 19.2-152.4:1. Form of oath of office for local pretrial services officer; authorization to seek *capias*.
- § 19.2-152.4:3. Duties and responsibilities of local pretrial services officers.
- § 19.2-157. Duty of court when accused appears without counsel.
- § 19.2-158. When person not free on bail shall be informed of right to counsel and amount of bail.
- § 19.2-159. Determination of indigency; guidelines; statement of indigence; appointment of counsel.
- § 46.2-936. Arrest for misdemeanor; release on summons and promise to appear; right to demand hearing immediately or within twenty-four hours; issuance of warrant on request of officer for violations of §§ 46.2-301 and 46.2-302; refusal to promise to appear; violations.

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