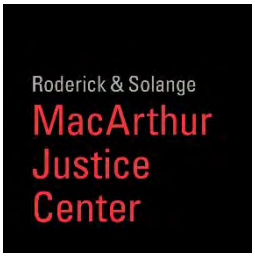


June 30, 2019

VIA U.S. MAIL AND EMAIL

Hon. Robbin J. Stuckert
Chief Judge, 23rd Judicial Circuit DeKalb County Courthouse
Chair, Supreme Court Commission on Pretrial Practices
133 W. State Street
Sycamore, IL 60178

Supreme Court Commission on Pretrial Practices
Pretrial Comment
AOIC Probation Division
3101 Old Jacksonville Road
Springfield, IL 62704
Pretrialhearings@illinoiscourts.gov

Re: Submission to Illinois Supreme Court Commission on Pretrial Practices

> "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal." *Griffin v. Illinois*, 351 U.S. 12, 16 (1956) (citing Leviticus, c. 19, v. 15; Magna Carta).

Dear Members of the Commission:

We write as attorneys who represent individuals subject to wealth-based discrimination in the criminal legal system. The current practices of setting financial conditions of pretrial release in Illinois include widespread and systemic violations of the Equal Protection Clause and Due Process Clause of the Illinois and federal constitutions. No person may, consistent with the Equal Protection Clause, be detained in custody after an arrest because the person is too poor to pay a monetary bond. Unless a court makes a fact-based determination that alternatives are inadequate to meet compelling state interests, imprisonment due to inability to pay "would be contrary to the fundamental fairness required by" both the Equal Protection Clause and Due Process Clause. *Bearden v. Georgia*, 461 U.S. 660 (1983).

Because of the critically important constitutional considerations at issue, it is imperative that the Commission make recommendations that would further the constitutional promise of equal justice for all and decrease the social and financial cost of prolonged pretrial detention. Those recommendations must include adoption of a Supreme Court Rule, proposed in October 2017 by Cook County's Chief Judge, State's Attorney, Sheriff, Board President, Public Defender and the Chair of the County Board Criminal Justice Committee,[1] that would eliminate pretrial incarceration due solely to the inability to pay a money bond.

Throughout the state, including in Cook County, individuals remain in pretrial detention because they cannot pay financial conditions of release imposed by the court system.[2] While the state has a legitimate interest in individuals appearing for future court dates, imposing a financial condition of release that an individual cannot pay does not and cannot incentivize future court appearances; rather, it operates as a detention order. When money bail functions as a *de facto* detention order, the state has a high burden to meet in proving that such a policy is necessary. In *United States v. Salerno*, 481 U.S. 739, 755 (1987), the U.S. Supreme Court stated that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." Because of what *Salerno* held to be the "fundamental" interest in pretrial liberty, a person can only be detained prior to trial if (1) certain essential procedures are followed (including notice of the crucial issues, an opportunity to be heard and to submit and confront evidence, and findings on the record by clear and convincing evidence explaining why detention is necessary), and (2) if the person is such an immitigable risk that no alternative to detention exists. Otherwise, our federal and state constitutions require that people must be released on the least restrictive conditions possible to mitigate against any specifically identified risks.

A court analyzing a future challenge to Illinois' bail-setting practices[3] must, following precedent, apply "heightened scrutiny" to any conduct that infringes on an

---

[1] The October 13, 2017 cover letter and proposed Illinois Supreme Court Rule, as well as a July 9, 2018 letter in support by members of the Illinois legal community, are attached as Exhibit A.

[2] See Office of the Chief Judge, "Bail Reform in Cook County: An Examination of General Order 18.8A and Bail in Felony Cases (May 2019), available at http://www.cookcountycourt.org/Portals/0/Statistics/Bail%20Reform/Bail%20Reform%20Report%20FINAL%20-%20%20Published%2005.9.19.pdf (indicating that more than 18 months after General Order 18.8A went into effect, over 2,000 people remained in Cook County Jail because they could not afford a money bond).

[3] The undersigned previously represented a class of individuals in *Robinson et al. v. Martin et al.*, No. 2016 CH 13587 (Cir. Ct. of Cook Cnty.), which challenged the practices of setting money bond in Cook County. During the pendency of that lawsuit, the Chief Judge of Cook County issued General Order 18.8A, and the case was dismissed on procedural grounds—the Court never reached the question of whether the constitution requires adequate findings that a person can afford the amount of bail being set, or, if making a detention order, the requisite findings under *Salerno*.

individual's fundamental right to bodily liberty.[4] A system that conditions release on the payment of money, without findings on the record either that the accused has the current financial ability to pay the proposed amount or that the resulting detention is necessary, would not survive such scrutiny. The practice of *considering* ability to pay or alternatives to detention, although necessary, is insufficient to satisfy the requirement that the court make *an actual finding* on the record, after having considered alternatives, that detention is necessary because no less-restrictive conditions are adequate to serve the state's interests.

Even under the more forgiving "rational basis review," current practices in Illinois fall short of constitutional standards—that is, the state cannot articulate any governmental interest in detaining indigent individuals while releasing moneyed individuals facing the same charges. In fact, as set forth in both published studies and sworn expert testimony in cases challenging cash bail practices throughout the country, detention due to inability to pay actually *causes* later failures to appear and new criminal activity.[5] It is not rational to pursue a policy that makes it more difficult for the government to achieve its interests.

At the Commission's public hearing on June 17, 2019, Mr. Heaton inquired whether the constitutional analysis would be different in the case of an individual who fails to appear for a court date. The answer to that question is that the same constitutional provisions are applicable. A previous failure to appear would, however, be relevant evidence in a court's inquiry into whether there exist alternative conditions short of pretrial detention of a presumptively innocent person reasonably available to further the court's compelling interest in the person's appearance.

---

[4] *See San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 20-21 (1973); *ODonnell v. Harris County*, 892 F.3d 147, 161– 62 (5th Cir. 2018) (ODonnell I), (relying on *San Antonio Independent School District* in applying heightened scrutiny to wealth-based pretrial detention); *M.L.B. v. S.L.J.*, 519 U.S. 102, 125-127 (1996) (noting that such scrutiny applies where the sanction is "wholly contingent on one's ability to pay, and thus 'visi[ts] different consequences on two categories of persons' . . .[ ]; they apply to all indigents and do not reach anyone outside that class."); *Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972) (holding that wealth-based detention is permissible, but only if a court has determined that "imprisonment of an indigent defendant . . . is 'necessary to promote a compelling governmental interest.'" (citation omitted)).

[5] *See* Ex. B, Memorandum of Eric H. Holder, Jr. to Cook County Public Defenders ("Holder Memo"), July 12, 2017, at 20, 22 ("'Studies show that those who remain in pretrial detention for longer than 24 hours and are then released are less likely to reappear as required than otherwise similar defendants who are detained for less than 24 hours.'") (citations omitted); *see also* Ex. C, Expert Report of Michael R. Jones, Ph.D. ("Jones Report"), *McNeil et al., v. Community Probation Services, et al.*, No. 18-cv-33 (M.D. Tenn.), Dkt. No. 176-61, at ¶ 28 ("Defendants who are released within 2 to 3 days are 17% more likely to engage in new criminal activity up to two years later compared to comparable defendants released within 24 hours.") (citations omitted); Ex. D, Declaration of Stephen Demuth, Ph.D, M.A., B.S., *Daves v. Dallas County, et al.*, No. 18-cv-154 (N.D. Tex.), Dkt. No. 93-6 at ¶ 19 ("[P]retrial detention for more than 24 hours increases the likelihood that the person will fail to appear or will engage in new criminal activity while on pretrial release.").

With regard to this inquiry about nonappearance, it should first be noted that there are jurisdictions that do not impose financial conditions of release, and they have high rates of court appearances.[6] Research in other jurisdictions shows that that the vast majority of people who miss court dates have not fled the jurisdiction, rather, they miss court for reasons such as being unable to secure transportation or child care, or failing to understand the consequences of failing to appear.[7] Additionally, there are alternatives to imposing (or increasing) a bond to ensure appearances at future court dates, which are also more effective. Many studies show that court date reminders are the single most effective pretrial risk management intervention for reducing (including preventing) failures to appear.[8]

As a matter of law, a practice of simply imposing (or raising) a financial condition of release in response to missing a court date would not comport with Illinois law or the Illinois and federal constitutions, especially if such an increase would *de facto* serve as a detention order without the requisite findings. A record of a failure to appear *could* inform the non-monetary conditions of release imposed by a judge, including the requirement of regular and in-person reporting. 725 ILCS 5/110-5(a-5). In an extreme case of willful flight, supported by sufficient evidence and proper findings, the Illinois Supreme Court has held that "if a court is satisfied by the proof that an accused will not appear for trial regardless of the amount or conditions of bail, bail may properly be denied." *People ex rel. Hemingway v. Elrod*, 60 Ill. 2d 74, 80, 322 N.E.2d 837, 841 (1975). Such a denial, however, must comport with *Salerno's* requirement of adequate written findings that no alternative to detention exists. Nothing in the proposed rule prevents the issuance of an arrest warrant for a person who willfully fails to appear so that a hearing applying these constitutional standards may be conducted.

"Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, stand

---

[6] *See* Ex. E, Declaration of Judge Truman Morrison, Senior Judge on the Superior Court of the District of Columbia, *Daves v. Dallas County, et al.*, No. 18-cv-154 (N.D. Tex.), Dkt. No. 93-47 at ¶ 12 ("In 2017, 94% of arrestees were released, and 98% of released arrestees remained free from violent crime re-arrest during the pretrial release period. 86% of released defendants remained arrest-free from all crimes. 88% of arrestees released pretrial made *all* scheduled appearances during the pretrial period. The District accomplishes these high rates of non-arrest and court appearances, again, without using money bonds."); *see also* Ex. B, Holder Memo at 21 ("Studies have repeatedly shown that alternatives to cash bond can be equally effective at ensuring appearance, without the negative consequences of forcing detainees to purchase their freedom or languish in pretrial detention.")

[7] Ex. F, Declaration of Jacob Sills, *Daves v. Dallas County, et al.*, No. 18-cv-154 (N.D. Tex.), Dkt. No. 93-53 at ¶ 4 ("Our research has shown that the vast majority of people who miss court have not fled the jurisdiction. Instead, they miss court for reasons that can be solved: for example, they forgot the court date, were unable to secure transportation or child care, were unable to take time off work or forgot to ask in advance, were scared or confused about going to court, or did not understand the consequences of failing to appear.").

[8] Ex. C, Jones Report, at ¶ 54 (citing studies).

on an equality before the bar of justice in every American court." *Griffin*, 351 U.S. at 17 (citations and quotations omitted). In accordance with the aims of our criminal justice system, this Commission should recommend adoption of the proposed Supreme Court Rule that would require a court to enter a written finding on the record that the accused has the current financial ability to pay the proposed amount of monetary security, or, where the court finds pre-trial release not appropriate under the relevant factors, an order denying pretrial release that includes sufficient written findings supporting that denial, including a finding that there is no condition or combination of conditions that could reasonably mitigate any specific danger posed. And, in order to ensure that these findings are sufficiently accurate, due process requires the robust procedural safeguards upheld in *Salerno*. Any recommendation that did not include these essential findings and procedures would fail to eliminate pretrial incarceration due solely to the inability to pay, and would continue the harms on individuals prohibited by the Illinois and federal constitutions.

Thank you for your time and consideration of this important issue.

Sincerely,

Matthew J. Piers
Chirag G. Badlani
Kate E. Schwartz
HUGHES SOCOL PIERS RESNICK & DYM, LTD.
70 West Madison Street, Suite 4000
Chicago, Illinois 60602
mpiers@hsplegal.com
cbadlani@hsplegal.com
kschwartz@hsplegal.com

Locke E. Bowman
Alexa Van Brunt
RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER
Northwestern Pritzker School of Law
375 E Chicago Ave.
Chicago, Illinois 60611
l-bowman@law.northwestern.edu
a-vanbrunt@law.northwestern.edu

Alec Karakatsanis
CIVIL RIGHTS CORPS
916 G Street NW, Suite 701
Washington, DC 20001
alec@civilrightscorps.org

Enclosures: Exhibits A-F

Exhibit A

Law Office of the

COOK COUNTY PUBLIC DEFENDER

69 W WASHINGTON • 16TH FLOOR • CHICAGO, IL 60602 • (312) 603-0600

Amy P. Campanelli • Public Defender

October 13, 2017

Jan Zekich
Secretary, Illinois Supreme Court Rules Committee
Administrative Office of the Illinois Courts
222 N. LaSalle Street, 13th Floor
Chicago, IL 60601

Sent via email to JZekich@illinoiscourts.gov

Dear Ms. Zekich and Members of the Rules Committee:

Pursuant to Illinois Supreme Court Rule 3, enclosed for your review and consideration is a proposed Illinois Supreme Court Rule which would require an evidentiary hearing and a judicial finding that an accused is able to afford the amount of bail set as a predicate for the setting of monetary bail in criminal cases.

On behalf of the public officials, organizations and individuals listed as signatories at the end of this letter, we hereby request that the Illinois Supreme Court adopt a new rule to eliminate wealth-based pretrial detention and to ensure that judicial decisions about pretrial detention and release of presumptively innocent individuals are based on legitimate considerations rooted in evidence, and provide in essence that:

1) In any case in which a court imposes a financial condition of pretrial release, the court shall conduct an inquiry into the accused person's financial resources and ability to pay.

2) The court shall not impose a financial condition of release unless the court finds, in writing on the record, that the accused has the present ability to pay the financial condition.

We appreciate your consideration of this important reform. Should you have any questions or desire any additional information, please do not hesitate to contact Era Laudermilk, Deputy of Policy & Strategic Planning, Law Office of the Cook County Public Defender at Era.Laudermilk@cookcountyil.gov or (312) 603-8389.

Sincerely,

Amy P. Campanelli

Amy P. Campanelli
Public Defender of Cook County

On behalf of:

Hon. Timothy C. Evans
Chief Judge
Circuit Court Of Cook County

Toni Preckwinkle
President
Cook County Board

Kim Foxx
Cook County State's Attorney

Tom Dart
Cook County Sheriff

Jesus "Chuy" Garcia
7thDistrict Commissioner
Chair of the Criminal Justice Committee
Cook County Board of Commissioners

A Just Harvest
Ali R. Malekzadeh, President, Roosevelt University
Action Now
Adler University Institute on Public Safety & Social Justice
ACLU of Illinois
Asian Americans Advancing Justice | Chicago
Bluhm Legal Clinic at Northwestern Prtizker School of Law
Business and Professional People for the Public Interest (BPI)
Cabrini Green Legal Aid
Representative Carol Ammons, Illinois 103rd District
Centro De Trabajadores Unidos (CTU)
Chicago Appleseed Fund for Justice
Chicago Area Fair Housing Alliance
Chicago Community Bond Fund
Chicago Council of Lawyers
Chicago Lawyers' Committee for Civil Rights
Chicago Urban League
Chicago Votes
Children and Family Justice Center at Northwestern Prtizker School of Law
The Coalition to End Money Bond
Community Activism Alliance
Community Renewal Society
Criminal Justice Task Force, First Unitarian Church
Hughes Socol Piers Resnick & Dym
Illinois Justice Project
Imago Dei
Inner-City Muslim Action Network
John Howard Association
Justice and Witness Ministry of the Chicago Metropolitan Association, Illinois Conference, United Church of Christ
Juvenile Justice Initiative
Kenwood Oakland Community Organization
League of Women Voters of Cook County
League of Women Voters of Illinois
Mothers 4 Peace
Nehemiah Trinity Rising
The Next Movement
Office of the State Appellate Defender
Padres Angeles
The People's Lobby
Pretrial Justice Institute
Robinson Law Group
Roderick and Solange MacArthur Justice Center
Safer Foundation
Sargent Shriver National Center on Poverty Law
Southside Indivisible
Southsiders Organized for Unity and Liberation
TKK Law Firm
Thresholds
Treatment Alternatives for Safer Communities (TASC)
UCC Justice Ministry
Unitarian Universalist Advocacy Network of Illinois
United Congress of Community and Religious Organizations (UCCRO)
Uptown People's Law Center
Workers Center for Racial Justice

cc: Marcia M. Meis, Director, Administrative Office of the Illinois Courts
Enclosures

Rule _____. Hearings on Pretrial Release.

(a) Determination of Entitlement to Pretrial Release. In making a determination of whether an accused is entitled to pretrial release, the court shall impose the least restrictive conditions or combination of conditions necessary to reasonably assure the appearance of the accused, the safety of any person or the community, and the integrity of judicial proceedings.

(1) Upon presentment of the accused after arrest, the court shall conduct a hearing to determine whether pretrial release is appropriate pursuant to the provisions of 725 ILCS 5/110 et seq.

(2) Where the court determines that pretrial release is not appropriate pursuant to 725 ILCS 5/110-4, 6.1, and 6.3 because of the nature of the offense charged, for which the proof is evident or the presumption great that the defendant is guilty, and because the State has presented clear and convincing evidence in an adversarial hearing to support a finding that release of the accused would pose a real and present threat to the physical safety of any person or the community, the court shall enter an order denying pretrial release that includes sufficient written findings supporting that denial, including a finding that there is no condition or combination of conditions that could reasonably mitigate any specific danger posed.

(b) Setting Conditions of Pretrial Release. Where the court determines that pretrial release is appropriate:

(1) Monetary Conditions. There shall be a presumption that any condition of release shall be non-monetary in nature, and no monetary condition may be imposed unless:

A. The court conducts an inquiry into the accused's financial resources and ability to pay monetary security, and

B. The court enters a written finding on the record that the accused has the current financial ability to pay the proposed amount of monetary security.

(2) Nonmonetary Conditions. The court shall impose the least restrictive non-monetary conditions that the court determines are necessary to assure the accused's appearance, protect the community from the accused or ensure the orderly administration of justice pursuant to 725 ILCS 5/110-10. Where the court determines that non-monetary conditions of release are necessary and the accused is indigent or otherwise qualifies for appointment of counsel, the accused will not be charged financial costs in connection with such conditions.

(c) Findings of record. All written findings required by this Rule shall be recorded in an approved form and made a part of the record in every case.

Roderick & Solange
MacArthur
Justice
Center

Roderick and Solange MacArthur Justice Center
375 East Chicago Avenue
Chicago, Illinois 60611-3069
O 312 503 1271
F 312 503 1272

macarthurjusticecenter.org

July 9, 2018

Jan Zekich
Secretary, Illinois Supreme Court Rules Committee
Administrative Office of the Illinois Courts
222 N. LaSalle Street, 13th Floor
Chicago, IL 60601

Re: Proposed Supreme Court Rule on Monetary Bond

Dear Ms. Zekich and Members of the Rules Committee:

We are members of the Illinois legal community—including former state and federal prosecutors, judges, assistant attorneys general, and U.S. Justice Department lawyers—who urge the Illinois Supreme Court to adopt the proposed rule submitted on October 13, 2017 by Cook County's criminal justice stakeholders regarding hearings on pretrial release. Among other provisions, the proposed rule would require an evidentiary hearing and a finding by a judge that an accused person is able to afford the amount of monetary bail set before permitting the setting of cash bail in any criminal case. A rule like the one proposed would ensure fairness and prevent wealth-based deprivations of liberty for those individuals in Illinois who are presumed innocent.

We are deeply concerned about public safety in the State of Illinois. But there simply is no credible evidence that the current application of money bond in Illinois makes our communities safer. If, based on Illinois law, an accused person is too dangerous to be released pending trial, judges in Illinois should hold a hearing and make sufficient written findings denying pretrial release. The current practice of setting of high, unaffordable monetary bonds to *de facto* ensure that an individual remains in custody pending trial does not promote public safety, and it raises serious questions of compliance with Illinois law and the U.S. Constitution. Further, such a practice increases the rate of pretrial detention at great financial cost to the State of Illinois and its counties during a time of fiscal crisis, when public funds can be better spent on community safety initiatives.

We are also deeply committed to ensuring that the courts in this state function efficiently and fairly. However, as found by former U.S. Attorney General Eric Holder in a July 2017 memo, studies have repeatedly shown that alternatives to cash bond can be equally effective at ensuring a defendant's appearance in court, without the negative consequences imposed by a

wealth-based system.[1] These studies have shown that alternative conditions of release, such as pretrial supervision, result in equally good, if not better, appearance rates.[2]

We encourage the Rules Committee to place the proposed rule on the public hearing agenda for a full and fair hearing on these important issues, and to submit the proposal to the Supreme Court Committee with a recommendation for adoption.

Sincerely,

Sergio E. Acosta
Bonnie E. Allen
John M. Bouman
Locke E. Bowman
David J. Bradford
Thomas M. Breen
Jack Carey
Stuart J. Chanen
Robert A. Clifford
Jeffrey D. Colman
William F. Conlon
Vincent J. Connelly
Jeffrey H. Cramer
Matthew C. Crowl
Thomas A. Demetrio
Shari Seidman Diamond
Steven A. Drizin
Thomas A. Durkin
Margareth Etienne
Edward W. Feldman
James R. Figliulo
Claudia M. Flores
Gabriel A. Fuentes
Craig B. Futterman
Chris C. Gair
John N. Gallo
Thomas F. Geraghty
Cynthia Giacchetti
Robert L. Graham
Adam Gross
Ted S. Helwig
Scott Hodes
Patricia Brown Holmes
Gary V. Johnson

[1] *See* Memorandum from Eric H. Holder, Jr. *et al.*, to Amy J. Campanelli, Cook County Public Defender 21 (Jul. 12, 2017), *available at* https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=5cde3253-fd00-4e0e-66b3-94ec6f0b3f75.

[2] *Id.* at 21 n.114 (citing CHRISTOPHER T. LOWENKAMP &MARIE VANNOSTRAND, EXPLORING THE IMPACT OF SUPERVISION ON PRETRIAL OUTCOMES 17 (Nov. 2013) (finding that supervised defendants were significantly more likely to appear for court than unsupervised defendants) and TARA BOH KLUTE &MARK HEVERLY,REPORT ON IMPACT OF HOUSE BILL 463: OUTCOMES, CHALLENGES AND RECOMMENDATIONS 6 (2012) (finding legislation shifting Kentucky's system toward risk-based pretrial supervision, as opposed to reliance on money bail, resulted in lower FTA rates)).

Thomas E. Johnson
Marc R. Kadish
Michael Kanovitz
Roger J. Kiley, Jr.
Scott R. Lassar
Marvin J. Leavitt
Lori E. Lightfoot
Jon Loevy
Steven Lubet
Royal B. Martin
Terri L. Mascherin
Richard H. McAdams
John A. McLees
William A. Miceli
Judson H. Miner
Steven F. Molo
Michael D. Monico
James S. Montana, Jr.
Sheila M. Murphy
David Narefsky
Gordon B. Nash, Jr.
Langdon D. Neal
Nan R. Nolan
Matthew J. Piers
Alexander Polikoff
Mark D. Pollack
Joseph A. Power, Jr.
Kwame Y. Raoul
Daniel E. Reidy
The Hon. Dom J. Rizzi (Ret.)
Leonard S. Rubinowitz
Ronald S. Safer
Zaldwaynaka L. Scott
Alison Siegler
Jeffrey Singer
William S. Singer
Samuel K. Skinner
David J. Stetler
Geoffrey R. Stone
Jeffrey E. Stone
Mary Stowell
James R. Streicker
Jeanette Sublett
Thomas P. Sullivan
Tara Thompson
René A. Torrado, Jr.
Alexander S. Vesselinovitch
The Hon. William A. Von Hoene, Jr.
Daniel K. Webb
Hon. Ann Claire Williams (Ret.)
Standish E. Willis
The Hon. Warren D. Wolfson (Ret.)
Sheldon T. Zenner

Exhibit B

COVINGTON & BURLING LLP

July 12, 2017

Memorandum

To: Amy J. Campanelli, Cook County Public Defender

From: Eric H. Holder, Jr.
Kevin B. Collins
Ryan O. Mowery
Kyle Haley

Re: Cook County's Wealth-Based Pretrial System

> "The defendant with means can afford to pay bail. He can afford to buy his freedom. But the poorer defendant cannot pay the price. He languishes in jail weeks, months, and perhaps even years before trial. He does not stay in jail because he is guilty. He does not stay in jail because any sentence has been passed. He does not stay in jail because he is any more likely to flee before trial. He stays in jail for one reason only – he stays in jail because he is poor."
>
> – President Lyndon Johnson, 1966 –

At any given time, nearly half a million people in the United States who have not been convicted of any crime are imprisoned for one simple reason—they cannot afford to purchase their freedom.[1] The moral and economic effects of wealth-based pretrial detention schemes, in use in the great majority of U.S. states, are devastating. Incarcerated for weeks, months, or even years until trial, presumptively innocent individuals frequently lose their jobs, their homes, and even custody of their children. Numerous studies have shown that defendants who are detained before trial are less able to participate in their defense, have a greater likelihood of being convicted (and if convicted, are likely to receive longer sentences), and are also more likely to commit additional crimes upon release than defendants who were not imprisoned before trial. These consequences are vastly more likely to be visited upon persons of color, who are detained until trial at rates significantly higher than their white counterparts. The burden also falls on taxpayers in these states, who pay the high costs that result from an inflated prison population. And despite these costs, pretrial systems that rely heavily on secured money bail do not achieve

[1] Alec Karakatsanis, Remarks at Cook County Board of Commissioners Meeting (Nov. 17, 2016), *available at* http://cook-county.granicus.com/MediaPlayer.php?view_id=2&clip_id=1676.

more favorable outcomes when it comes to protecting public safety or ensuring the appearance of defendants at trial.

Across the country, momentum is building for reform of pretrial systems in which defendants, otherwise eligible for release, are incarcerated until trial simply because they cannot afford to pay bail. But despite growing critiques of these illogical and illegal schemes, Cook County has continued to operate an unconstitutional wealth-based pretrial system that is irrational, unjust, costly, and disproportionately affects minority communities.

This memorandum addresses Cook County's problematic pretrial practices. Part I reviews Cook County's troubling wealth-based pretrial detention practices. Part II explains why Cook County's current bail practices are illegal and vulnerable to challenge on both state law and federal constitutional grounds. Part III articulates why Cook County's wealth-based pretrial detention practices are not only illegal, but are also irrational, unjust, and inefficient as a matter of public policy. The memorandum closes by setting forth several commonsense reforms Cook County could initiate immediately to improve its pretrial detention practices.

Any scheme in which a defendant's liberty hinges primarily on his or her financial means, and which detains individuals solely because they cannot pay bond, is antithetical to the core principles of our nation's justice system. As the below analysis demonstrates, reform in Cook County is sorely needed.

I. COOK COUNTY'S WEALTH-BASED PRETRIAL DETENTION SCHEME

Pursuant to the Illinois Bail Statute, 725 ILCS 5/110-1 *et seq*., Circuit Court judges in Cook County have several options for handling accused persons. For those defendants eligible for release on bond, two primary options are available: (1) Release on personal recognizance, meaning that the defendant is released without having to deposit funds (an "I-bond"); or (2) Release upon the deposit of cash bail, where the defendant deposits 10 percent of the total bond amount set by the judge (a "D-bond").[2] Some defendants are not eligible for release under any conditions—in the limited circumstances set forth in the statute, judges may deny bond to defendants who have been charged with serious felonies punishable by death, life imprisonment, or (under certain conditions) mandatory prison time. In these cases, the defendant is entitled to a hearing, at which the State must demonstrate by clear and convincing evidence that the defendant poses an immediate threat to the safety of other persons, and that no conditions of release would effectively protect the public.

In recent years, the Cook County pretrial system has garnered increasing attention for its overreliance on a middle option not contemplated by the statute—the pretrial confinement of defendants solely because they cannot afford to pay the bail required to secure their freedom. In these cases, a defendant is eligible for release under the statute, but bail is set at an amount that the defendant cannot afford to pay. As a result, the defendant remains in jail for weeks, months,

---

[2] The Illinois Bail Statute also allows detainees to deposit stocks, bonds, or real estate valued at the amount of the total bond (or for real estate, double the amount of the total bond) in lieu of making a cash deposit of 10% of the bail amount to secure release. 725 ILCS 5/110-8.

or even years until trial, without the hearing, evidentiary showing, and written findings required to order pretrial detention under the statute. Multiple studies from the last five years have reported that more than 90 percent of individuals admitted to the Cook County Jail are pretrial detainees.[3]

Despite the Bail Statute's requirement that money bond be a last resort, and that when necessary, it be "not oppressive" and set in consideration of the financial resources of the accused, Cook County judges set financial conditions for numerous defendants as a matter of course. In 2007, one federal court described Cook County's bond process in this way:

> The holding pens for men are crowded well beyond their capacity. Prisoners are unable to sit, the sick and infirm are not isolated, noise levels are too high, and, at times, temperatures are uncomfortable. The great majority of people are represented by the public defender and have no chance to speak with a lawyer before their cases are called. Instead, each is briefly interviewed by a defense investigator who calls each one forward by name and records information about their residence, employment, family and military service. The information is given to the assistant public defender assigned to the bond court. The crowded conditions preclude private, confidential interviews. Moreover, the investigators, usually two or three, are allowed only 105 minutes to interview 100–150 prisoners. . . .
>
> The usual hearings are short—30 seconds or less. The prosecutor states the charges, and the judge makes a finding of probable cause. The prosecutor asks for high bond, reciting, if possible, prior criminal history and prior failures to appear. The public defender uses the information in the chart to ask for a lower bond. The judge sets bond and continues the case for two to three weeks. As in most courts, including this one, bond hearings are very short. In Central Bond Court, they are sometimes so fast that "it is not uncommon for the proceedings to commence" before the next defendant gets to the podium.[4]

This account is corroborated by more than thirty years of government reports, academic articles, and media coverage exposing the alarming rate at which accused persons are continuously imprisoned until trial in Cook County. In 1987, supported by a grant from the

---

[3] *See, e.g.*, DAVID E. OLSON & SEMA TAHERI, POPULATION DYNAMICS AND THE CHARACTERISTICS OF INMATES IN THE COOK COUNTY JAIL, COOK COUNTY SHERIFF'S REENTRY COUNCIL RESEARCH BULLETIN 5 (Feb. 2012); JUSTICE ADVISORY COUNCIL OF COOK COUNTY, EXAMINATION OF COOK COUNTY BOND COURT (July 12, 2012), *available at* https://www.slideshare.net/cookcountyblog/justice-advisory-council-bond-report-7122012 [hereinafter JAC REPORT].

[4] *Mason v. Cty. of Cook, Ill.*, 488 F. Supp. 2d 761, 762 (N.D. Ill. 2007).

Department of Justice, the Illinois Criminal Justice Information Authority published a report on the pretrial process in Cook County to help inform the creation of pretrial services agencies in Illinois.[5] Describing the pretrial process, the report observed that "the typical bond hearing does not last longer than two minutes (and is frequently shorter)," and added that "[t]he brevity of this procedure highlights the fact that the bond decision rests on one or two determining factors"—namely, criminal history and whether the charged offense is violent or non-violent.[6] The report's analysis of a sample of arrestees reflects the prevalence of money bond. Although only 22.9% of the arrests in the sample were for violent offenses, the report noted that D-bonds were "by far the most frequent bond type, applied in nearly 82 percent of the cases."[7] On the other hand, only 6% of arrestees in the sample received I-bonds, and were released without having to deposit funds.[8]

The report noted that "[i]n a bond system dominated by cash deposits as the means to secure pretrial release, as is the case in Cook County, the ability to secure pretrial release depends not only on the judge's assessment of the likelihood of the defendant's future appearance in court, but also on the defendant's financial resources."[9] In the sample studied for the report, less than half of the defendants assigned D-bonds were able to post the required bond deposit; the rest remained in custody following the bond hearing. Of those defendants unable to afford bail, 20% remained incarcerated because they could not afford a deposit of less than $500.[10]

Nearly 20 years later, in 2005, the Department of Justice (in partnership with American University) released a study reinforcing that the determining factor in the pretrial detention of numerous Cook County defendants is neither the danger they pose to society nor the risk that they will flee prior to their trial, but simply their inability to post bond.[11] The study described bond hearings as "a mass production operation," at which "judges receive no information from a disinterested interviewer as to the relevant facts about the defendant."[12] Once bond is set, judges "have made it clear to defense counsel that bond review applications are not favored and will rarely be granted."[13] Although the investigators noted that increases in statutory penalties

---

[5] *See* CHRISTINE A. DEVITT & JOHN D. MARKOVIC, ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY, THE PRETRIAL PROCESS IN COOK COUNTY: AN ANALYSIS OF BOND DECISIONS MADE IN FELONY CASES DURING 1982–83 (1987).

[6] *Id.* at 16.

[7] *Id.* at 37, 45.

[8] *Id.* at 45.

[9] *Id.* at 55.

[10] *Id.* at 56.

[11] *See* BUREAU OF JUSTICE ASSISTANCE: CRIMINAL COURTS TECHNICAL ASSISTANCE PROJECT, AMERICAN UNIVERSITY, A REVIEW OF THE COOK COUNTY FELONY CASE PROCESS AND ITS IMPACT ON THE JAIL POPULATION (Sept. 26, 2005).

[12] *Id.* at 21.

[13] *Id.* at 22.

resulted in fewer defendants eligible for pretrial release, they "were told by prosecutors, defenders, and court staff that bonds tended to be set at a high level *even in those cases in which the defendants were eligible for release* on bond."[14] Specifically, 2004 data showed that almost half of defendants for whom a bond was set were required to deposit $10,000 or more in order to secure pretrial release. The researchers noted that "many whom the study team interviewed commented on what they perceived to be excessively high bonds frequently set," and given that 72% of the inmates sampled were unemployed, the study concluded that "high cash requirements for release guarantees that many are held in jail until disposition of their case because they cannot raise the money to get out."[15] Even for those defendants that are in the workforce, the high bond amounts set by Cook County judges would frequently require them to deposit a substantial portion of their annual income in order to secure their release—as of November 2016, the average monetary bond in Cook County was over $70,000, significantly more than the $54,648 median household income in the county.[16]

Reports from the last five years show that this disturbing trend has continued. A 2012 report on the bond system by the Justice Advisory Council of Cook County found that over two-thirds of pretrial detainees had a cash bond set at their bond hearing, and the "large majority . . . are unable to post the necessary bond to achieve release."[17] A 2012 research bulletin put out by the Cook County Sheriff's Office showed that rates of release on personal recognizance were strikingly similar to those in the 1987 study: only 8% of those who appeared in Cook County bond court in 2011 received an I-bond.[18] Perhaps even more alarming, the bulletin showed that of those defendants eligible for release on bond, approximately half were required to post $10,000 or more to secure their release.[19]

A 2014 operational review of Cook County's pretrial system undertaken by the Illinois Supreme Court and Administrative Office of the Illinois Courts found that despite the statute's direction "to set monetary bail only when no other conditions of release" are sufficient, money bond was often set as a matter of course, in a process that "generally takes 30 seconds or less per defendant—oftentimes less than 10 seconds."[20] The report noted that although there was at one time an initiative to review the "significant percentage" of cases in which defendants remained

---

[14] *Id.* (emphasis added).

[15] *Id.* at 37–38.

[16] *See* Board of Commissioners of Cook County, Criminal Justice Committee, Public Hearing Notice and Agenda 3 (Nov. 17, 2016), *available at* http://cook-county.granicus.com/MediaPlayer.php?view_id=2&clip_id=1676.

[17] JAC REPORT, *supra* note 3, at 3.

[18] OLSON & TAHERI, *supra* note 3, at 5.

[19] *Id.* at 6.

[20] ILLINOIS SUPREME COURT & ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, CIRCUIT COURT OF COOK COUNTY PRETRIAL OPERATIONAL REVIEW 15, 45 (Mar. 2014) [hereinafter PRETRIAL OPERATIONAL REVIEW].

in custody due to their inability to post a relatively low cash bond (and thus were detained "due to indigence"), that activity was "phased out."[21]

Although a 2016 review of Cook County's Central Bond Court showed modest improvement in the percentage of defendants released pretrial (largely due to the increased use of electronic monitoring as a condition of release), it also showed staggeringly high bond amounts for defendants for whom financial conditions were set.[22] The study showed that the average D-bond was $71,878, and of the 880 defendants who received D-bonds, less than 5% had a bond of less than $10,000.[23] It is therefore unsurprising that only 220 of those defendants (25%) were able to post bond and secure their release within 31 days.[24] Perhaps most discouragingly, the study revealed "a wide disparity in outcomes" depending on the presiding judge, finding that "[b]ond type and bond amount proved to be inconsistent even when controlling for defendants' backgrounds and charges."[25]

New risk assessment measures rolled out in 2015 and 2016 have led to some improvement in the proportion of Cook County defendants released without monetary conditions, and in 2016, Circuit Court Chief Judge Timothy Evans described Cook County as "in a transition period regarding pretrial detention."[26] But other reports from 2016, including the Central Bond Court review, have shown that Cook County judges are not following the recommendations of the pretrial services office.[27] This has prompted concern from Illinois Supreme Court Chief Justice Anne Burke about bond court judges' "unwillingness to apply the risk assessments," and her observation that Cook County judges continue to "refuse to allow eligible individuals to be released on their own recognizance and, instead, continue to require large cash bonds, even for relatively minor, nonviolent crimes."[28]

---

[21] *Id.* at 50.

[22] SHERIFF'S JUSTICE INSTITUTE, CENTRAL BOND COURT REPORT 2 (Apr. 2016) [hereinafter 2016 BOND COURT REPORT].

[23] *Id.* at 1, 2.

[24] *Id.* at 1.

[25] *Id.*; *see also id.* at 13–16 (directly comparing bond outcomes for defendants with similar charges and backgrounds).

[26] Press Release, Statement from Chief Judge Timothy C. Evans (Oct. 24, 2016), *available at* http://www.cookcountycourt.org/MEDIA/ViewPressRelease/tabid/338/ArticleId/2485/Statement-from-Chief-Judge-Timothy-C-Evans.aspx.

[27] 2016 BOND COURT REPORT, *supra* note 22, at 9–10 (demonstrating the disparity between recommendations of pretrial services and bond decisions made by Cook County judges).

[28] Frank Main, *Cook County Judges Not Following Bail Recommendations: Study*, CHICAGO SUN TIMES, July 3, 2016, http://chicago.suntimes.com/news/cook-county-judges-not-following-bail-recommendations-study-find/.

Fortunately, momentum is growing in Cook County for meaningful reform of the pretrial process. In November 2016, the Cook County Board of Commissioners' Criminal Justice Committee held a public hearing focused on the prevalence of monetary bond, at which a number of reform advocates testified about the legal and policy shortcomings of Cook County's wealth-based pretrial system.[29] Major Cook County stakeholders have also publicly advocated for reform, including Cook County Sheriff Tom Dart, who has proposed abolishing cash bond in Cook County altogether.[30] Most recently, State's Attorney Kim Foxx and the Illinois Supreme Court each announced significant reforms in hopes of reducing the number of indigent defendants detained until trial.[31] Under the reform announced by State's Attorney Foxx in June, prosecutors would recommend I-bonds (i.e., release on personal recognizance) for defendants who do not present a risk of violence or flight.[32] And a bill introduced in the Illinois House in February 2017, HB3421, would abolish money bail in Illinois. However, despite these steps forward, significant work remains to be done to ensure that defendants in Cook County are no longer jailed solely because they are poor.

II. COOK COUNTY'S WEALTH-BASED PRETRIAL DETENTION SCHEME IS ILLEGAL

Discussing the well-publicized overcrowding of the Cook County Jail, a three-judge panel of one federal district court recently observed that "[m]any of the pretrial detainees in the Cook County Jail would . . . be bailed on their own recognizance, or on bonds small enough to be within their means to pay, were it not for the unexplained reluctance of state judges in Cook County to set affordable terms for bail."[33] Although the court found that the constitutionality of Cook County's bail practices was not before it, it appears highly likely that Cook County's wealth-based approach to pretrial release violates the U.S. and Illinois constitutions, as well as Illinois state law.

---

[29] For a video of the full hearing, a list of speakers, and key documents presented at the meeting, see http://cook-county.granicus.com/MediaPlayer.php?view_id=2&clip_id=1676.

[30] Frank Main, *Get Out of Jail Free? Sheriff Proposes Scrapping Cash-Bond System*, CHICAGO SUN TIMES, Nov. 15, 2016, http://chicago.suntimes.com/news/sheriff-tom-dart-proposing-to-scrap-illinois-cash-bond-system/.

[31] *See* Steve Schmadeke, *Foxx Agrees to Release of Inmates Unable to Post Bonds of Up To $1,000 Cash*, CHICAGO TRIBUNE, Mar. 1, 2017, http://www.chicagotribune.com/news/local/breaking/ct-kim-foxx-bond-reform-met-20170301-story.html; Press Release, Illinois Supreme Court, Illinois Supreme Court Adopts Statewide Policy Statement for Pretrial Services (Apr. 28, 2017), *available at* http://www.19thcircuitcourt.state.il.us/ArchiveCenter/ViewFile/Item/1203.

[32] Press Release, State's Attorney Foxx Announces Major Bond Reform (June 12, 2017), *available at* https://www.cookcountystatesattorney.org/news/state-s-attorney-foxx-announces-major-bond-reform. Although this policy is undoubtedly a positive step, it applies only to a defined list of charges and may still result in the recommendation of unaffordable cash bail in some cases. And of course, the policy is not binding on Cook County judges, who may continue to set high cash bail notwithstanding the recommendations of the prosecutor in a given case.

[33] *United States v. Cook Cty., Ill.*, 761 F. Supp. 2d 794, 800 (N.D. Ill. 2011).

Both federal and state judicial and legislative bodies have abolished schemes that systematically discriminate against and imprison accused persons solely because they cannot afford bail. The federal government has endorsed these reforms, and in March 2016 issued guidance explicitly instructing judicial and executive officers nationwide that "*any* bail practices that result in incarceration based on poverty violate the Fourteenth Amendment."[34] Consequently, Cook County's current practices expose it to significant litigation risks. In fact, Cook County's bail practices are already the subject of at least one lawsuit—in October 2016, a putative class of pretrial detainees filed suit against county judges and the county sheriff, alleging that Cook County's practice of detaining release-eligible defendants solely because they cannot afford to post the required bail violates the federal and Illinois constitutions, as well as Illinois state law.[35]

Importantly, the legal infirmities of Cook County's pretrial system persist in spite of the fact that Illinois is one of several states to have eliminated commercial bail bonds. Under Illinois law, a defendant's bond may not be paid by a professional bail bondsman.[36] Instead, and as described in more detail below, defendants eligible for bail in Illinois are required in most cases to deposit ten percent of their total bail directly with the court to secure their release.[37] While this system may not suffer from all of the same legal infirmities as those in states with commercial bail bonds, the results are the same: indigent and low-income defendants who cannot afford to pay the required deposit are frequently detained for weeks or months pending trial, despite being otherwise eligible for pretrial release. This practice conflicts sharply with one of the primary purposes of the abolition of commercial bail bonds in Illinois—as the Illinois Supreme Court has explained, "the object of the statutes was to reduce the cost of liberty to arrested persons awaiting trial."[38]

Unsurprisingly, numerous criminal justice, municipal, and legal professional organizations have taken positions opposing wealth-based bail practices similar to those used in

---

[34] U.S. Dep't of Justice, Civil Rights Division, Dear Colleague Letter (Mar. 14, 2016), at 7 (emphasis added), https://www.justice.gov/crt/file/832461/download.

[35] *See Robinson, et al. v. Martin, et al.*, Case No. 2016-CH-13587 (Cook Cty., Ill. Oct. 14, 2016). Sheriff Dart was subsequently dismissed from the case.

[36] *See* 725 ILCS 5/110-15 ("The provisions of Sections 110-7 and 110-8 of this Code are exclusive of other provisions of law for the giving, taking, or enforcement of bail."); 725 ILCS 5/110-13; 725 ILCS 5/103-9 (prohibiting the practice of "bounty hunting" in Illinois); *Schilb v. Kuebel*, 46 Ill. 2d 538, 544, aff'd, 404 U.S. 357 (1971) (explaining that "the central purpose of the legislature in enacting sections 110-7 and 110-8 was to severely restrict the activities of professional bail bondsmen").

[37] 725 ILCS 5/110-7(a) ("The person for whom bail has been set shall execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to 10% of the bail, but in no event shall such deposit be less than $25.").

[38] *Schilb*, 46 Ill. 2d at 544.

Cook County, including the American Bar Association,[39] National Association of Pretrial Services Agencies,[40] National Association of Counties,[41] American Jail Association,[42] International Association of Chiefs of Police,[43] American Council of Chief Defenders,[44] American Probation and Parole Association,[45] the Conference of State Court Administrators,[46] and the

---

[39] AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE, Standard 10-1.4(e)–(f) (3d ed. 2007), at 44 (prohibiting "the imposition of financial conditions that the defendant cannot meet"), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf.

[40] NAT'L ASS'N OF PRETRIAL SERVICES AGENCIES, STANDARDS ON PRETRIAL RELEASE 4 (3d ed. 2004) (citing as a "key principle[]" the use of financial conditions "only when no other conditions will reasonably assure the defendant's appearance and at an amount that is within the ability of the defendant to post"), https://www.pretrial.org/download/performance-measures/napsa%20standards%202004.pdf.

[41] NAT'L ASS'N OF COUNTIES, THE AMERICAN COUNTY PLATFORM AND RESOLUTIONS 2011–2012: JUSTICE AND PUBLIC SAFETY 5 (2012) ("Counties should establish written policies that ensure . . . the least restrictive conditions during the pretrial stage," including release on recognizance, non-financial supervised release, and preventive detention.), http://www.naco.org/sites/default/files/documents/American%20County%20Platform%20and%20Resolutions%20cover%20page%2011-12.pdf.

[42] AM. JAIL ASS'N, RESOLUTION ON PRETRIAL JUSTICE (Oct. 24, 2010) (acknowledging the benefits of pretrial supervision as an alternative to incarceration), https://www.pretrial.org/download/policy-statements/AJA%20Resolution%20on%20Pretrial%20Justice%202011.pdf.

[43] INT'L ASS'N OF CHIEFS OF POLICE, LAW ENFORCEMENT'S LEADERSHIP ROLE IN THE PRETRIAL RELEASE AND DETENTION PROCESS 3, 6 (2011) (noting that "financial bail has little or no bearing on whether a defendant will return to court and remain crime-free"), http://www.pretrial.org/wp-content/uploads/2013/02/IACP-LE-Leadership-Role-in-Pretrial-20111.pdf.

[44] AM. COUNCIL OF CHIEF DEFENDERS, POLICY STATEMENT ON FAIR AND EFFECTIVE PRETRIAL JUSTICE PRACTICES 14 (2011) (noting that "when financial conditions are to be used, bail should be set at the lowest level necessary to ensure the individual's appearance and with regard to a person's financial ability to post bond"), https://www.pretrial.org/download/policy-statements/ACCD%20Pretrial%20Release%20Policy%20Statement%20June%202011.pdf.

[45] AM. PROBATION & PAROLE ASS'N, RESOLUTION, PRETRIAL SUPERVISION (June 2010) ("[P]retrial supervision has been proven a safe and cost effective alternative to jail for many individuals awaiting trial."), https://www.appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IB_Resolution&wps_key=3fa8c704-5ebc-4163-9be8-ca48a106a259.

[46] *See generally* CONFERENCE OF STATE COURT ADMINISTRATORS, 2012–2013 POLICY PAPER: EVIDENCE-BASED PRETRIAL RELEASE (2013), http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/Evidence%20Based%20Pre-Trial%20Release%20-Final.ashx.

Conference of Chief Justices.[47] As noted by Alec Karakatsanis, founder of the Civil Rights Corps and Co-Chair of the ABA Committee on Pretrial Justice, "[t]he absurdity, unfairness, and unconstitutionality of the cash bail system has been definitively condemned by the American Bar Association, the Department of Justice, leading scholars, police chiefs, public defenders, prosecutors, the Cook County Sheriff, the CATO Institute, and a long line of Presidents, Attorney Generals, distinguished judges."[48] Nevertheless, unjust and unconstitutional wealth-based pretrial systems persist across the United States, including in Cook County.

A. Cook County's Judicial Officers Routinely Violate the Illinois Bail Statute

Pretrial release and bail in Illinois are governed primarily by the Illinois Bail Statute, 725 ILCS 5/110-1 *et seq*. For all but a handful of specified—mostly violent—charges, the statute establishes a presumption of release. Thus, the law states that "[a]ll persons shall be bailable before conviction," *except* in the case of certain offenses, and even then, only "where the proof is evident or the presumption great that the defendant is guilty."[49] Those crimes include capital offenses, offenses for which life imprisonment may be imposed, and felony offenses carrying mandatory prison sentences where the court, after a hearing, determines that release of the defendant "would pose a real and present threat to the physical safety of any person or persons."[50] In determining whether a defendant charged with one of these offenses poses the "real and present threat" required for pretrial detention, the Bail Statute explicitly places the burden of proof on the State, which must demonstrate by clear and convincing evidence that "no condition or set of conditions . . . can reasonably assure the physical safety of any other person or persons."[51] If the court determines that pretrial detention is necessary, it must include in its order for detention a summary of the evidence of the defendant's culpability and its reasons for holding the defendant without bail.

For defendants whose offenses do not fall into the above categories, the court must determine the appropriate conditions of release (either financial or non-financial) by taking into account a list of 36 factors set out in Section 110-5(a) of the statute. The stated purpose of these factors is to aid the court in determining the conditions, if any, necessary to reasonably assure the appearance of the defendant and the safety of the community. In addition to a number of factors focused on the nature and circumstances of the charged offense, the statute requires that courts consider the characteristics and circumstances of the defendant, including the

---

[47] CONFERENCE OF CHIEF JUSTICES, RESOLUTION 3 (Jan. 30, 2013) (endorsing the 2012–2013 COSCA policy paper), http://www.pretrial.org/wp-content/uploads/2013/05/CCJ-Resolution-on-Pretrial.pdf.

[48] Karakatsanis, *supra* note 1.

[49] 725 ILCS 5/110-4(a).

[50] *Id.* The statute also specifies three additional crimes that may be non-bailable: stalking, weapons charges taking place in or near a school under Ill. Crim. Code 24-1(a)(4), and making or attempting to make a terroristic threat under Ill. Crim. Code 29D-20.

[51] 725 ILCS 5/110-4(c); 725 ILCS 5/110-6.1(b)(3) & (c)(2); *see also* 725 ILCS 5/110-6.3 (setting forth a nearly identical procedure for defendants charged with stalking offenses).

defendant's financial resources and employment, and the source of any bail funds that the defendant might tender.[52] The court must also consider the sentence or fine that would be applicable if the defendant were convicted of the charged offense.[53]

Illinois courts have broad authority to release defendants on personal recognizance, without additional conditions. When the court determines "from all the circumstances" that the defendant "will appear as required . . . and the defendant will not pose a danger to any person or the community and that the defendant will comply with all conditions of bond," "the defendant may be released on his or her own recognizance."[54] Where the court finds that additional conditions of release are reasonably necessary "to assure the defendant's appearance in court, protect the public from the defendant, or prevent the defendant's unlawful interference with the orderly administration of justice," the court may impose additional, non-financial conditions of release set forth in the statute. Section 110-10(b) provides courts with a variety of options in this regard, from more minor conditions (curfews, work or study requirements, drug testing, or limitations on possession of weapons) to those that are more significant (medical or psychiatric treatment, electronic monitoring, remaining in the custody of a person or organization, restraining orders, or limitations on travel).

The statute specifically states that money bail is to be used as a last resort: "Monetary bail should be set *only* when it is determined that *no other conditions of release* will reasonably assure the defendant's appearance in court, that the defendant does not present a danger to any person or the community and that the defendant will comply with all conditions of bond."[55] In the event the court finds that financial conditions are necessary, the Bail Statute sets out explicitly in Section 110-5(b) the requirements for money bail. Those requirements make clear that money bail is not intended to be used in a manner that results in the pretrial detention of any defendant. First, the statute provides that the defendant's address be provided, kept up to date, and remain "a matter of public record with the clerk of the court." Second, the statute requires that any financial condition be "[n]ot oppressive." Third, financial conditions must be "[c]onsiderate of the financial ability of the accused." The statute provides that defendants for whom money bail is set "shall execute the bail bond and deposit with the clerk of the court . . . a sum of money equal to 10% of the bail."[56] After making this deposit, "the person shall be released from custody subject to the conditions of the bail bond."[57]

None of these provisions suggest that financial conditions may be set at a level that results in the pretrial incarceration of a person because he or she cannot afford to pay the required amount. To the contrary, the statute sets forth in great detail the procedures that must

---

[52] 725 ILCS 5/110-5(a).

[53] *Id.*

[54] 725 ILCS 5/110-2.

[55] *Id.* (emphases added).

[56] 725 ILCS 5/110-7(a). The statute provides that the deposit must not be less than $25.

[57] 725 ILCS 5/110-7(b).

be undertaken to detain a defendant until trial. Namely, for the serious crimes identified in the statute as "non-bailable," the court may impose pretrial detention only where the State demonstrates at a hearing, by clear and convincing evidence, that the defendant poses a risk of dangerousness, and the court makes written findings to that effect. For all other "bailable" offenses, the court may release the defendant on his or her own recognizance or—where necessary to reasonably assure the appearance of the defendant, the safety of the community, and compliance with the conditions of bond—impose additional conditions of release. If "no other conditions of release" would suffice and the court determines that money bail is required, the statue contemplates that it will be set in an amount that is within the means of the defendant to post.[58] The statute does not provide for the protracted, pretrial incarceration of a defendant solely because that defendant cannot afford to pay the required bail deposit.

Courts in Cook County routinely fail to follow the Bail Statute's requirements in two primary ways. First, many courts have failed to observe the statute's requirement that monetary bail "be set *only* when it is determined that *no other conditions of release*" would sufficiently protect the public and assure the appearance of the defendant at trial. As explained above, Cook County judges set secured money bail in the vast majority of cases in which defendants are eligible for release, following bond hearings that last only a matter of seconds. Financial conditions are thus set reflexively, without meaningful consideration of alternative, non-financial conditions of release that would suffice to protect the public and ensure the appearance of the defendant.

Second, courts consistently set money bail in amounts beyond the ability of defendants to afford without consideration of the individual circumstances of each defendant. This practice runs afoul of Section 110-5(a)'s requirement that courts consider the financial resources of the accused before setting conditions of release, and also violates the statute's requirement that any monetary bail be set in an amount that is "[n]ot oppressive" and "[c]onsiderate of the financial ability of the accused."[59] As a result, arrestees in Cook County habitually face extended periods of pretrial detention not as a result of their dangerousness to the community or their risk of non-

---

[58] Many other provisions of the statute reinforce this conclusion. Section 110-10, which sets out the conditions of *release* that a court may impose on a defendant, is titled "Conditions of bail bond." Other parts of the statute refer to "releas[ing] the person on bail," 725 ILCS 5/110-5.1(c), individuals being "free on bail," *see, e.g.*, 725 ILCS 5/110-6(e), and the possibility of an "offense committed on bail," 725 ILCS 5/110-6(b). Even when a defendant is charged with a crime while released on bail, the statute requires that the court hold a hearing on the bond violation "within 10 days from the date the defendant is taken into custody or the defendant may not be held any longer without bail." 725 ILCS 5/110-6(f)(1).

This interpretation is also supported by the Illinois Supreme Court Rules regarding bail, which prescribe limited preset bail schedules "to avoid undue delay *in freeing* certain persons accused of an offense when, because of the hour or the circumstances, it is not practicable to bring the accused before a judge." Ill. Sup. Ct. R. art. V, pt. B. (emphasis added). The Rules also specifically allow for defendants to whom bail schedules would apply to be released on unsecured "individual bonds" if they are "unable to secure release from custody" under the applicable bail schedule. *Id.* at art. V, pt. D, R. 553(d).

[59] 725 ILCS 5/110-5(b).

appearance, but solely because they are unable to pay bail. The extreme levels at which bail amounts are consistently set (and correspondingly high rates of pretrial detention) expose Cook County judicial officers to the claim that they are using unlawfully high bail amounts as a replacement for the hearing, clear and convincing evidence, and written findings required to order pretrial detention under the statute. Courts across the country have found such approaches illegal,[60] and indeed this is one of the specific practices the federal government sought to abolish when it reformed the federal bail system.[61]

The Illinois Supreme Court has held that using high bail as a tool to effect the pretrial detention of defendants violates state law. In *People ex rel. Sammons v. Snow*, the petitioner's bail was set at $50,000 for a charge of vagrancy, which carried a maximum punishment of up to six months' imprisonment and a $100 fine.[62] In setting the bail, the judge explicitly stated: "If I thought he would get out on that I would make it more." The court found that "[t]he amount of $50,000 could have no other purpose than to make it impossible for him to give the bail and to detain him in custody, and is unreasonable."[63] Because setting bail "for the purpose of keeping [the defendant] in jail" effectively "disregarded" the defendant's right to bail, the court vacated and reduced the petitioner's bail.[64] Other courts in Illinois have come to the same conclusion.[65]

The Illinois legislature has made clear that in implementing a pretrial bail system, the law "shall be liberally construed to effectuate the purpose of relying upon contempt of court proceedings or criminal sanctions *instead of financial loss*" to assure the appearance of the

---

[60] *See, e.g.*, *State v. Anderson*, 127 A.3d 100, 127 (Conn. 2015) (quoting *State v. Olds*, 370 A.2d 969 (Conn. 1976)) (noting that Connecticut's bail clause "prevents a court from fixing bail in an unreasonably high amount so as to accomplish indirectly what it could not accomplish directly, that is, denying the right to bail"); *Mendonza v. Commonwealth*, 673 N.E.2d 22, 25 (Mass. 1996) (noting that the similar Massachusetts rule "should end any tendency to require high bail as a device for effecting preventive detention because it directs that all decisions based on dangerousness be made under the procedures set forth for that specific purpose"); *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014) ("Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether.").

[61] *See, e.g.*, *United States v. Orta*, 760 F.2d 887, 890 (8th Cir. 1985) (noting that changes to federal law "eliminate the judicial practice of employing high bail to detain defendants considered dangerous and substitute a procedure allowing the judicial officer openly to consider the threat a defendant may pose"); s*ee also United States v. McConnell*, 842 F.2d 105, 109 (5th Cir. 1988) (explaining that the Bail Reform Act "proscrib[ed] the setting of a high bail as a de facto automatic detention practice").

[62] 340 Ill. 464 (1930).

[63] *Id.* at 469.

[64] *Id.*

[65] *See, e.g.*, *People v. Ealy*, 49 Ill. App. 3d 922, 934 (1977) ("Believing defendant to be a danger to the community, Judge Wendt stated that he purposely set bond high enough to detain defendant until 'some medical people do something with the man.' Yet excessive bail should not be required for the purpose of preventing a prisoner from being admitted to bail.").

defendant and the safety of the community.[66] Cook County's pretrial bail practices routinely fail to follow these principles.

On June 9, 2017, Governor Bruce Rauner signed a bill into law reinforcing the Illinois Bail Statute's existing preference for non-monetary conditions of release.[67] While the bill bolsters existing requirements by stating a "presumption that any conditions of release imposed shall be non-monetary in nature" and requiring courts to "consider the defendant's socio-economic circumstance" [68] and "impose the least restrictive conditions or combination of conditions necessary," it falls short of setting clear limitations on the use of money bail.[69]

Unfortunately, while this law might appear to take a step toward reform, it places no limits on the imposition of unaffordable bail and is unlikely to curb the use of money bail as a means to detain individuals pretrial. Instead, the law will merely serve as another reminder that the existing provisions of Illinois' Bail Statute disfavor imposing money bail absent consideration of an individual's ability to pay—without forcing any tangible changes in the way bond courts actually function.

B. Cook County's Wealth-Based Pretrial Detention Scheme Violates the Fourteenth Amendment

It is evident from the reports and studies cited above, as well as the daily realities of courtrooms and jails in Cook County, that the county's approach to bond disproportionately and irrationally affects the poor. The Supreme Court has long held that such practices violate the Fourteenth Amendment of the U.S. Constitution. Specifically, the Court has found that in criminal proceedings, "a State can no more discriminate on account of poverty than on account of religion, race, or color."[70] These practices likely also violate Illinois' own constitution.[71]

In *Griffin v. Illinois*, the Supreme Court invalidated an Illinois law that prevented indigent defendants from obtaining a trial transcript to facilitate appellate review, explaining that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of

---

[66] 725 ILCS 5/110-2 (emphasis added).

[67] Bail Reform Act of 2017, Ill. Legis. Serv. P.A. 100-1 (West).

[68] *Id*. § 110-5(a-5).

[69] *Id*.

[70] *Griffin v. Illinois*, 351 U.S. 12, 17–18 (1956).

[71] The Illinois Constitution contains a due process and equal protection clause, Ill. Const. 1970 art. I, § 2, and the Supreme Court of Illinois has made clear that because "[o]ur due process and equal protection clauses are nearly identical to their federal counterparts," they are interpreted coextensively unless there is a specific reason to depart from the federal interpretation. *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 49, 991 N.E.2d 745, 758 (Ill. 2013).

money he has."[72] Since *Griffin*, the Supreme Court has held in a long line of cases that individuals may not be incarcerated solely because of their inability to pay.

In *Williams v. Illinois*, the Court confirmed that a state may not subject a defendant to a prison sentence longer than the statutory maximum because he or she cannot afford to pay a fine.[73] The Court explained that "once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency."[74] The Court extended its holding in *Williams* the following year, holding that a state may not impose a prison term solely because a defendant is indigent and cannot afford to pay a fine imposed under a fine-only statute.[75]

In *Bearden v. Georgia*, the Court further held that a defendant's probation may not be revoked for failure to pay a fine or restitution, absent evidence that the failure to pay was willful or that alternative forms of punishment would be inadequate.[76] The Court explained that "[t]o do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment."[77] As a result, the Court held that both the Equal Protection and Due Process Clauses of the Fourteenth Amendment prohibit "punishing a person for his poverty."[78]

The longstanding principle that the criminal justice system should not operate differently depending on the financial resources of the defendant applies with even greater force in the pretrial detention context. In *United States v. Salerno*, the court considered the constitutionality of the Bail Reform Act of 1984, which permits pretrial detention after an adversarial hearing in the face of "clear and convincing" evidence that no conditions of release would adequately assure the safety of the community.[79] Upholding the constitutionality of the statute, the Court made clear that individuals have a constitutionally recognizable "strong interest in liberty" when it comes to pretrial release.[80] The Court further confirmed that "[i]n

---

[72] 351 U.S. at 19.

[73] 399 U.S. 235, 240–41 (1970).

[74] *Id.* at 241–42.

[75] *See Tate v. Short*, 401 U.S. 395, 398 (1971).

[76] 461 U.S. 660, 665 (1983).

[77] *Id.* at 672–73.

[78] *Id.* at 671.

[79] 481 U.S. 739 (1987).

[80] *Id.* at 750.

our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[81]

Courts across the country have invoked this line of cases to find that wealth-based pretrial detention schemes are unconstitutional.[82] Most recently, in April 2017, a federal district court in Texas ruled that Harris County's practice of detaining misdemeanor defendants until trial solely because they cannot afford cash bail violates the Fourteenth Amendment.[83] The court explained that its ruling did not amount to a "right to affordable bail." To the contrary, it acknowledged that Texas judges might in limited cases arrive at a high bail amount after weighing the required state law factors. But the court held that judges "cannot, consistent with the federal Constitution, set that bail on a secured basis requiring up-front payment from indigent misdemeanor defendants otherwise eligible for release, thereby converting the inability to pay into an automatic order of detention without due process and in violation of equal protection."[84] Finding that the plaintiffs had a clear likelihood of success at trial, the court issued an injunction prohibiting Harris County from continuing its "consistent and systematic policy and practice of imposing secured money bail as de facto orders of pretrial detention in misdemeanor cases."[85]

The United States Department of Justice has repeatedly taken a similar position, and has filed statements of interest and amicus briefs in support of the proposition that certain wealth-based bail practices violate the Fourteenth Amendment. For example, in *Walker v. City of Calhoun*, pretrial detainees challenged the City of Calhoun's bail system, which mandated payment of a fixed amount without consideration of other factors, including risk of flight, risk of dangerousness, and financial resources.[86] The trial court invoked the *Griffin* and *Bearden* line of cases, finding that the principle of those cases was especially applicable "where the individual being detained is a pretrial detainee who has not yet been found guilty of a crime."[87] The court found that the system violated the Equal Protection Clause since "incarceration of an individual

---

[81] *Id.* at 755.

[82] *See, e.g.*, *Pugh v. Rainwater*, 572 F.2d 1053, 1056–57 (5th Cir. 1978) (en banc) (recognizing that bail should serve the limited function "of assuring the presence of [the] defendant" at trial, and thus "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible"); *see also Williams v. Farrior*, 626 F. Supp. 983, 985 (S.D. Miss. 1986) ("[I]t is clear that a bail system which allows only monetary bail and does not provide for any meaningful consideration of other possible alternatives for indigent pretrial detainees infringes on both equal protection and due process requirements."); *Alabama v. Blake*, 642 So. 2d 959, 968 (Ala. 1994) (also finding that a wealth-based pretrial bail scheme "violates an indigent defendant's equal protection rights guaranteed by the United States Constitution").

[83] *O'Donnell v. Harris County, Texas*, No. 16-cv-01414, 2017 WL 1735456 (S.D. Tex. Apr. 28, 2017).

[84] *Id.* at 89.

[85] *Id.* at 3.

[86] No. 4:15-cv-0170, Order Granting Preliminary Injunction, Dkt. No. 40 (N.D. Ga. Jan. 28, 2016), at 48–50.

[87] *Id.* at 51.

because of the individual's inability to pay a fine or fee is impermissible," and issued a preliminary injunction halting the city's unconstitutional bail practices.[88] The city appealed to the Eleventh Circuit Court of Appeals, where the Justice Department filed a brief taking the position that bail practices that result in the pretrial incarceration of defendants due to their indigence violate the Fourteenth Amendment.[89]

The Justice Department likewise filed a statement of interest in *Varden v. City of Clanton*.[90] There, the district court approved a settlement agreement creating a new bail scheme and confirmed that the previous scheme was unconstitutional because it allowed for secured bail "without an individualized hearing regarding the person's indigence and the need for bail or alternatives to bail."[91] In doing so, the court observed that "[c]riminal defendants, presumed innocent, must not be confined in jail merely because they are poor. Justice that is blind to poverty and indiscriminately forces defendants to pay for their physical liberty is no justice at all."[92]

As these cases make clear, Cook County's current pretrial scheme is ripe for constitutional challenge under the Fourteenth Amendment and such an attack could very well garner the support of the Justice Department. Indeed, and as noted above, an October 2016 class action lawsuit has raised precisely this claim, arguing that Cook County's pretrial practices violate the Due Process and Equal Protection clauses of the Fourteenth Amendment.[93] The suit also challenges Cook County's bail practices on Eighth Amendment grounds, and in light of Cook County's consistent imposition of extremely high bail amounts, it appears likely that the county's practices routinely violate the Eighth Amendment's right against excessive bail.

C. Cook County's Wealth-Based Pretrial Detention Scheme Violates the Eighth Amendment

In addition to the Fourteenth Amendment's Equal Protection and Due Process clauses, wealth-based pretrial detention schemes like the one used in Cook County contravene the

---

[88] *Id.* at 49–50 (citing *Tate*, 401 U.S. at 397–98).

[89] *See* U.S. Amicus Br., *Walker v. Calhoun*, No. 16-1052 (11th Cir.) (filed Aug. 18, 2016), *available at* https://www.schr.org/files/post/files/2016.08.18%20USDOJ%20AMICUS%20BR.pdf. On March 9, 2017, the Eleventh Circuit remanded the case to the district court for further proceedings, finding that the language of the injunction did not comply with Federal Rule of Civil Procedure 65. *Walker v. City of Calhoun*, No. 16-10521, 2017 WL 929750 (Mar. 9, 2017). The Court of Appeals did not address the substantive propriety of the injunction. *Id.* at *2.

[90] U.S. Dep't of Justice, Statement of Interest of the United States, No. 2:15-cv-34, Dkt. No. 26 (M.D. Ala. Feb. 13, 2015), *available at* https://www.justice.gov/file/340461/download.

[91] No. 2:15-cv-34, Opinion, Dkt. No. 76 (M.D. Ala. Sept. 14, 2015), at 8.

[92] *Id.* at 11.

[93] *Robinson, et al. v. Martin, et al.*, Case No. 2016-CH-13587 (Cook Cty., Ill. Oct. 14, 2016).

Eighth Amendment's proscription of excessive bail.[94] Again, this practice likely violates Illinois' constitution as well.[95]

The seminal case interpreting the Excessive Bail Clause is *Stack v. Boyle*.[96] In *Stack*, the Supreme Court considered the meaning of "excessive" bail, and confirmed that bail has a single purpose: to assure the presence of the accused at trial.[97] Thus, "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment."[98]

Under *Stack*, "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."[99] Other courts have thus held that bail amounts are excessive when they are not narrowly tailored to this purpose.[100] Available evidence suggests that this standard is not being met in Cook County. This reality is more than a legal technicality; it gets to the very heart of judicial fairness and integrity. As Justice Vinson wrote in *Stack*, "[t]o infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act. Such conduct would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against."[101]

III. COOK COUNTY'S WEALTH-BASED PRETRIAL DETENTION SCHEME IS IRRATIONAL, INEFFECTIVE, UNNECESSARILY COSTLY, AND DISPROPORTIONATELY AFFECTS RACIAL MINORITIES

While the adoption of a validated risk assessment tool has led to modest improvements in Cook County's pretrial system, arrestees continue to face an arbitrary, expensive, and biased system in which their freedom depends more on the judge they appear before and their own financial means than on whether their release would threaten public safety or result in a failure

---

[94] U.S. Const. amend. VIII. The Supreme Court has held that the Eighth Amendment's proscription of excessive bail applies to the States through the Fourteenth Amendment. *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971).

[95] Ill. Const. 1970, art. I, § 9 (providing that "[a]ll persons shall be bailable by sufficient sureties" with limited exceptions). Illinois courts have held that "[a] defendant has a constitutional right to reasonable bail," under both the Illinois and federal constitutions. *People v. Valentin*, 135 Ill. App. 3d 22, 46 (citing Section 9 of the Illinois Constitution and the Eighth Amendment of the U.S. Constitution).

[96] 342 U.S. 1 (1951).

[97] *Id.* at 5.

[98] *Id.*

[99] *Id.*

[100] *See, e.g., United States v. Arzberger*, 592 F. Supp. 2d 590, 605 (S.D.N.Y. 2008) ("[I]f the Excessive Bail Clause has any meaning, it must preclude bail conditions that are (1) more onerous than necessary to satisfy legitimate governmental purposes and (2) result in deprivation of the defendant's liberty.").

[101] 342 U.S. at 6.

to appear. As a 2016 review by the Cook County Sheriff's Office demonstrated, judges rarely follow the risk assessment-based release recommendations made by pretrial services, and frequently reach wildly different release decisions for similarly situated arrestees.[102] Without meaningful reforms, Cook County's pretrial detention scheme will continue to unnecessarily deprive individuals of their liberty, at great cost to taxpayers, while failing to advance the goals of reducing flight and protecting public safety.

A. Cook County's Wealth-Based Pretrial Detention Scheme is an Illegitimate, Ineffective, and Irrational Method of Protecting Public Safety

Cook County's pretrial bail scheme, as currently operated, is not properly or rationally related to the goal of protecting public safety for at least three reasons.

First and foremost, money bail is *never* an appropriate tool for protecting public safety. If the government believes that an arrestee poses a legitimate threat to the community, the proper course is to hold a hearing to determine whether pretrial detention is necessary. Using money bail as an end run around established pretrial detention procedures is inappropriate, both from a legal and a policy standpoint.[103]

Furthermore, when release outcomes hinge on a detainee's access to money, wealthy defendants are able to secure release regardless of the threat they may pose to public safety. As a result, Cook County's current wealth-based system can actually lead to the release of higher-risk detainees, thus compromising public safety.[104] For example, a recent analysis by the Chicago Tribune found that "gang members facing felony gun charges often had little problem coming up with the cash to get out of jail, while nonviolent thieves and others languished behind bars, unable to post much lower bonds."[105] The Superintendent of the Chicago Police Department, Eddie Johnson, has echoed this concern, noting: "[i]f you had an organization, and your enforcers were your best people to get done what you wanted to do, wouldn't you spend every resource you had to keep them out?"[106]

---

[102] 2016 BOND COURT REPORT, *supra* note 22, at 8-10.

[103] *See supra* Part II.A (discussing, in part, the pretrial detention procedures outlined in the Illinois Bail Statute).

[104] *See* INT'L ASS'N OF CHIEFS OF POLICE, RESEARCH ADVISORY COMMITTEE RESOLUTION 005.T14, at 15 (2014) (noting that money-based pretrial release systems enable over 50% of defendants who are rated higher risk to be released pretrial).

[105] Todd Lighty & David Heinzmann, *How a Revolving Door Bond System Puts Violent Criminals Back On Chicago's Streets*, CHICAGO TRIBUNE, May 5, 2017, http://www.chicagotribune.com/news/local/ breaking/ct-bond-witness-murder-20170504-story.html.

[106] Bill Ruthhart, *Chicago Police Superintendent Supports Bond Reforms For Gun Crimes*, CHICAGO TRIBUNE, May 7, 2017, http://www.chicagotribune.com/news/ct-eddie-johnson-bond-reform-met-20170507-story.html; *see also* Eddie T. Johnson, Superintendent, Chicago Police Dep't., Remarks at the City Club of Chicago: A

(continued...)

Second, bail amounts are often set without appropriate consideration of an individual's actual risk to the community. As a result, the majority of individuals held on bond were arrested for non-violent offenses,[107] and many detainees rated as low-risk by a pretrial services risk assessment nevertheless face significant bail amounts. For example, during a 2016 review of bond hearings, the Cook County Sheriff's Office observed that 40% of the detainees who were recommended for "release with no conditions" under the County's risk assessment metric instead received D or C bonds,[108] requiring them to post part or all of the bond amount to secure release.[109] In fact, only 11% of these lowest-risk detainees were actually released as recommended—on their own recognizance, with no conditions attached. Moreover, the Sheriff's Office found that judges, when deciding whether to impose bail, only follow the County's risk-based assessment recommendations 15% of the time.[110] As a result, judges often fail to adequately assess each detainee individually and frequently reach unjustifiably different release decisions for similarly situated individuals.[111] This arbitrary and irrational system inflicts considerable harm on individual detainees and their families without advancing the County's interest in ensuring community safety.

Finally, in addition to the profound consequences of depriving individuals of their fundamental right to liberty, pointlessly jailing low-risk individuals can actually deteriorate community safety by increasing the likelihood that they will commit new crimes once released. A 2013 study by the Laura and John Arnold Foundation revealed that, "when held 2-3 days, low-risk defendants were almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours, [and] low-risk defendants who were detained for 31 days or more offended 74 percent more frequently than those who were released within 24 hours."[112]

Candid Conversation with Tom Dart and Eddie Johnson (Dec. 6, 2016) (explaining that no matter how high bail is set, gangs will pay to get their members out).

[107] *See Jail Roulette: Cook County's Arbitrary Bond Court System*, INJUSTICE WATCH (Nov. 29, 2016), http://injusticewatch.org/interactives/jail-roulette/ [hereinafter *Jail Roulette*] ("Thirty to 40 percent of the cases each judge set bonds for involved defendants charged with felony possession of drugs, and close to three-quarters of the cases per judge were for nonviolent crimes.").

[108] Unlike D-Bonds which require detainees to post 10% of the bond amount, C-Bonds require detainees to pay the full cash value of the bond to secure release pending resolution of their cases. COMMUNITY RENEWAL SOCIETY, COOK COUNTY BOND COURT WATCHING PROJECT: FINAL REPORT 15 (Feb. 2016).

[109] 2016 BOND COURT REPORT, *supra* note 22, at 9; *see also Jail Roulette*, *supra* note 107, at 14 (providing examples of low-risk detainees receiving substantial cash bonds).

[110] 2016 BOND COURT REPORT, *supra* note 22, at 8.

[111] *See id*. at 13–16, 25 (comparing release determinations).

[112] *Pretrial Criminal Justice Research*, LJAF RESEARCH SUMMARY (Laura & John Arnold Found.), Nov. 2013, at 4 [hereinafter *Pretrial Criminal Justice Research*], *available at* http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf.

The fact is that Cook County's current reliance on cash bonds frequently deprives individuals of their fundamental rights with no corresponding benefit to the community. At best, individuals are needlessly denied liberty with no resulting improvement in public safety. At worst, public safety is actually eroded by the perverse results of the indiscriminate imposition of money bail. There is simply no justification for continuing to operate a system that exacerbates one of the very concerns it was purportedly established to address.

B. Cook County's Wealth-Based Pretrial Detention Scheme is Not Rationally Related to the Goal of Reducing the Risk of Flight

An individual's wealth does not determine how likely he or she is to appear in court. Studies have repeatedly shown that alternatives to cash bond can be equally effective at ensuring appearance, without the negative consequences of forcing detainees to purchase their freedom or languish in pretrial detention. For example, a 2013 study by the Pretrial Justice Institute found that "unsecured bonds are as effective at achieving court appearances as are secured bonds."[113] Additional studies have reached similar conclusions and noted that alternative conditions of release such as pretrial supervision result in equally good, if not better, appearance rates by defendants.[114]

The lack of a connection between low failure-to-appear ("FTA") rates and secured bail can be seen in the FTA rates of jurisdictions that have already moved away from (or tested alternatives to) money bail systems. For example:

- In the District of Columbia, approximately 85% of arrestees are released pretrial under the District's long-established supervised release program. Of all arrestees, nearly 90% return to appear in court.[115]

- In Kentucky, the court system saw FTA rates remain constant or decrease when it moved away from reliance on traditional money bail and toward a risk assessment and pretrial services system.[116]

---

[113] JUSTICE POLICY INST., UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION 3 (Oct. 2013).

[114] *See, e.g.*, CHRISTOPHER T. LOWENKAMP & MARIE VANNOSTRAND, EXPLORING THE IMPACT OF SUPERVISION ON PRETRIAL OUTCOMES 17 (Nov. 2013) (finding that supervised defendants were significantly more likely to appear for court than unsupervised defendants); *see also* TARA BOH KLUTE & MARK HEVERLY, REPORT ON IMPACT OF HOUSE BILL 463: OUTCOMES, CHALLENGES AND RECOMMENDATIONS 6 (2012) (finding legislation shifting Kentucky's system toward risk-based pretrial supervision, as opposed to reliance on money bail, resulted in lower FTA rates).

[115] Clifford T. Keenan, *We Need More Bail Reform*, THE ADVOCATE FOR PRETRIAL JUSTICE (Pretrial Servs. Agency, D.C.), Sept. 2013.

[116] Klute & Heverly, *supra* note 114, at 6.

- A Colorado study found that a simple reminder call to defendants reduced FTA rates from 21% to 12%.[117]

- A Nebraska study found that even postcard reminders noticeably reduced FTA rates.[118]

- In Multnomah County, Oregon, a significant decrease in FTA rates was achieved by using automated call reminders. This approach resulted in a 41% reduction in non-appearances among individuals who received an automated call.[119]

The use of money bail is not just an ineffective mechanism for improving FTA rates—it may actually *increase* FTA rates in some situations. According to the Laura and John Arnold Foundation, "[s]tudies show that those who remain in pretrial detention for longer than 24 hours and are then released are less likely to reappear as required than otherwise similar defendants who are detained for less than 24 hours."[120]

C. Cook County's Wealth-Based Pretrial Detention Scheme Imposes Significant and Unnecessary Costs on Illinois Taxpayers

Cook County's wealth-based pretrial detention scheme is not only illogical, it is also highly inefficient. These inefficiencies, which are not supported by any rational policy considerations or goals of the criminal justice system, come at a considerable cost to Illinois taxpayers. The estimated cost of housing the average pretrial detainee in Cook County is $143 per day.[121] While the jail population is in constant flux, on any given day around 8,000 individuals are detained in the Cook County Jail[122]—approximately 90% of whom are being held pretrial.[123] Based on these estimates, it costs roughly $1.1 million per day to detain pretrial

---

[117] JEFFERSON COUNTY, COLORADO COURT DATE NOTIFICATION PROGRAM FTA PILOT PROJECT (2005).

[118] Mitchel Herian & Brian Bornstein, *Reducing Failure to Appear in Nebraska: A Field Study*, THE NEBRASKA LAWYER, Sept. 1, 2010, at 12.

[119] Matt O'Keefe, *Court Appearance Notification System: 2007 Analysis Highlights* (Local Pub. Safety Coordinating Council, Multnomah Cty., OR), June 2007, *available at* http://www.pretrial.org/download/research/Multnomah%20County%20Oregon%20-%20CANS%20Highlights%202007.pdf.

[120] *Pretrial Criminal Justice Research*, *supra* note 112, at 5 (finding that "[l]ow risk defendants held for 2-3 days were 22 percent more likely to fail to appear than similar defendants (in terms of criminal history, charge, background, and demographics) held for less than 24 hours.").

[121] Res. 16-6051, Crim. J. Comm., Bd. of Comm'rs of Cook Cty. (2016) [hereinafter Res. 16-6051].

[122] *See* Emily Hoerner & Jeanne Kuang, *Cook County Sheriff Proposes an End to Cash Bail*, INJUSTICE WATCH (Nov. 15, 2016), https://www.injusticewatch.org/news/2016/cook-county-sheriff-proposes-an-end-to-cash-bail/ ("This year, the daily jail population has hovered at just above 8,000"); *see also* Res. 16-6051, *supra* note 121 (noting that "8,248 individuals were being detained at Cook County Jail as of October 17, 2016").

[123] Res. 16-6051, *supra* note 121.

defendants in Cook County. Given that the majority of these individuals are non-violent offenders who pose little to no risk to the community,[124] Illinois taxpayers are left paying a hefty price for an ineffective, irrational, and deeply harmful pretrial system.

Pretrial supervision, on the other hand, is dramatically less expensive than the exorbitant costs of detaining individuals pretrial. For instance, an assessment by the United States Courts determined that "[p]retrial detention for a defendant was nearly *10 times more expensive* than the cost of supervision of a defendant by a pretrial services officer in the federal system."[125] Similar disparities in cost can be found in jurisdictions across the country. For example, in Washington, D.C. the cost of pretrial supervision is approximately $18 per person per day, compared to about $200 per day to detain an individual in jail. Likewise, a 2010 study revealed that Broward County, Florida spent an estimated $107.71 per day to detain each arrestee pretrial, while the cost of providing pretrial services was only $1.48 per person per day.[126]

It is not surprising that those charged with managing local detention facilities have made clear that any conversation about controlling costs must begin with a focus on reducing pretrial detention rates.[127] As one observer noted, "[t]he net result [of] a system that relies on money to determine pretrial release is that when defendants cannot pay, the costs shift to the jail."[128] Given that "[j]ails are becoming more and more facilities whose primary role is to hold persons while the charges against them are resolved," this observer concluded that the current practice "is an antiquated approach that our new economic realities can no longer sustain."[129]

Another costly consequence of Cook County's current money bail system can be found in the legal expenses and settlement payments the County has incurred due to overcrowding and unconstitutional jail conditions.[130] In 2011, a federal court found that overcrowding at the Cook

---

[124] *See supra* Part III.A (arguing that Cook County's pretrial detention scheme, as operated, is not rationally related to the goal of protecting public safety).

[125] *Supervision Costs Significantly Less than Incarceration in Federal System*, United States Courts (July 18, 2013), http://news.uscourts.gov/supervision-costs-significantly-less-incarceration-federal-system (emphasis added).

[126] Adrienne Hurst & Camille Darko, *Reforming Cook County Bail System May Have Side Benefit: Lower Cost*, INJUSTICE WATCH (Nov. 16, 2016), https://www.injusticewatch.org/news/2016/reforming-cook-county-bail-system-may-have-side-benefit-lower-cost/.

[127] *See* NAT'L ASS'N OF COUNTIES, COUNTY JAILS AT A CROSSROADS: AN EXAMINATION OF THE JAIL POPULATION AND PRETRIAL RELEASE 10 (2015) ("The jail population, and especially the pretrial population, is growing, while county corrections costs are registering a steep upward trajectory . . . . County jails understand the need to reduce the jail population, including for particular groups within the jail population that drive up jail costs.").

[128] John Clark, *The Impact of Money Bail on Jail Bed Usage*, AMERICAN JAILS, July-Aug. 2010, at 47, 54.

[129] *Id.* at 48, 54.

[130] *See Change Difficult as Bail System's Powerful Hold Continues Punishing the Poor*, INJUSTICE WATCH (Oct. 14, 2016), https://www.injusticewatch.org/projects/2016/change-difficult-as-bail-systems-powerful-hold-

(continued...)

County Jail was leading to conditions that violated inmates' constitutional rights.[131] The court made clear that the use of unaffordable money bail significantly contributes to the problem of overcrowding, noting that "the unexplained reluctance of state judges in Cook County to set affordable terms for bail" is a significant contributor to the overcrowding.[132]

In sum, wealth-based pretrial policies have an overwhelmingly negative impact on Cook County's finances—the County wastes substantial resources to detain presumptively innocent, low-risk individuals, which in turn increases the rate of recidivism (at great cost to the County) and exacerbates inmate overcrowding (leading to expensive litigation and settlement payments). From a purely financial perspective, Cook County's approach to pretrial justice is clearly unsound and irresponsible.

D. Cook County's Wealth-Based Pretrial Detention Scheme Disproportionately Harms Racial Minorities

Overwhelming evidence shows that Cook County's wealth-based pretrial detention scheme disproportionately affects persons of color. In secured bail schemes minorities are less likely to be released on their own recognizance,[133] and are assessed bail amounts that can often double the amounts imposed on white defendants, even when controlling for severity of offense, number of felony charges, and criminal history.[134] The result is that minorities are more likely to be detained. For example, one analysis determined that African-Americans are 66% more

---

continues-punishing-the-poor/ [hereinafter *Punishing the Poor*] (noting that "Cook County is paying millions each year to settle lawsuits brought by current and former inmates. And so far this year, over 200 federal lawsuits are pending in Chicago, alleging some kind of trouble at the jail.").

[131] *United States v. Cook Cty., Ill.*, 761 F. Supp. 2d at 794.

[132] *Id.* at 800.

[133] JUSTICE POLICY INST., BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 15 (2012) (citing John Wooldredge, *Distinguishing Race Effects on Pre-Trial Release and Sentencing Decisions*, JUSTICE QUARTERLY (2012)); Tina Freiburger, Catherine Marcum, & Mari Pierce, *The Impact of Race on the Pretrial Decision*, 35 AM. J. CRIM. JUSTICE 76 (2010) (finding that race has a strong impact on the probability that a defendant will be released on personal recognizance, with African-Americans being less likely to be released on that basis).

[134] Cynthia Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. OF LEGIS. & PUB. POL'Y 919, 950 (2013) (citing ROBERT R. WEIDNER, RACIAL JUSTICE IMPROVEMENT PROJECT, PRETRIAL DETENTION AND RELEASE DECISIONS IN SAINT LOUIS COUNTY, MINNESOTA IN 2009 & 2010 (2011)) (finding that median bail for minority defendants was twice the amount set for white defendants); *see also* ISAMI ARIFUKU & JUDY WALLEN, RACIAL DISPARITIES AT PRETRIAL AND SENTENCING AND THE EFFECT OF PRETRIAL SERVICES PROGRAMS 7 (2013) (finding that among defendants charged with a felony, Hispanics had an average bail amount of $67,000, African Americans had an average bail amount of $46,000 and Whites had an average bail amount of $37,000); K.B. Turner & James Johnson, *A Comparison of Bail Amounts for Hispanics, Whites, and African Americans: A Single County Analysis*, 30 AM. J. CRIM. JUSTICE 35, 36 (2005) (finding that the average bail for Hispanic defendants was 2.5 times greater than for the average white defendant).

likely to be detained than their white counterparts, and Hispanic defendants are 91% more likely to be detained than white defendants.[135] Other studies have found that racial minorities are more likely than white defendants to be detained because they are unable to post bail, and that the inability to "make bail" is the primary explanation for African-American and Latino defendants' greater likelihood of pretrial detention.[136]

These trends appear to have taken hold in Cook County. As Chicago Appleseed recently reported, "[s]eventy-three percent of the people incarcerated in the Cook County Jail are African American despite the fact that African Americans make up only 25% of Cook County's population."[137] Contributing to this disparity in jail population is a significant shortfall in the number of African American defendants released on bond compared to individuals of other races. Data from 2011 to 2013 analyzed by the MacArthur Justice Center demonstrated that "only 15.8 percent of African Americans charged with Class 4 felonies were released on bond before their trials, as compared to 32.4% of non-African American defendants."[138] Furthermore, studies have shown that minorities represent the vast majority—93%—of individuals who have been detained pretrial for more than *two years* at the Cook County Jail.[139]

Making this disproportionate detainment of minorities even more insidious is the fact that pretrial detention has a ripple effect on a defendant's case. Multiple studies have shown that defendants detained through their pretrial period are more likely to be convicted and more likely to be sentenced to longer periods of incarceration than their released counterparts.[140]

---

[135] Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873, 895 (2003); *see also* Cassia Spohn, *Race, Sex and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 KAN. L. REV. 879, 888–89 (2009) (finding that detention rates were higher among African-American defendants than white defendants).

[136] Demuth, *supra* note 135, at 899.

[137] Sharlyn Grace, *Principles of Bail Reform in Cook County*, CHICAGO APPLESEED (Apr. 25, 2017), http://www.chicagoappleseed.org/introducing-principles-for-bail-reform-in-cook-county.

[138] Sarah Lazare, *Hundreds of Thousands Are Languishing in Jails Because They Can't Afford Bail Bonds: A National Movement Is Building to End This*, JUSTICE POLICY INSTITUTE (Dec. 22, 2016), http://www.justicepolicy.org/news/11103.

[139] Spencer Woodman, *No-Show Cops and Dysfunctional Courts Keep Cook County Jail Inmates Waiting Years for a Trial*, CHICAGO READER, Nov. 16, 2016, http://www.chicagoreader.com/chicago/cook-county-jail-pre-trial-detention-investigation/Content?oid=24346477 (noting that "[m]ore than 1,000 Cook County inmates have been awaiting trial for more than two years").

[140] Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* 3 (Univ. of Pa. Sch. of Law 2016), https://ssrn.com/abstract=2777615 (pretrial detention leads to a 6.6% increase in the likelihood that a defendant will be convicted); Will Dobbie, Jacob Goldin, & Crystal Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* 26 (NBER Working Paper No. 22511), http://www.nber.org/papers/w22511 (finding that "pre-trial release significantly decreases the probability of conviction, primarily through a decrease in guilty pleas");
(continued...)

This disparity of outcomes stems from a number of factors, including defendants' limited access to defense counsel and inability to participate in the preparation of their defenses. A more troubling but equally prevalent explanation for this disparity is that defendants facing the economic hardship of pretrial detention are more likely to enter guilty pleas regardless of actual guilt or innocence. This is especially true for those charged with lower level crimes.[141]

To understand the pressure a detainee may feel to plead guilty—regardless of his or her actual guilt—one need only look at the number of detainees in Cook County whose length of pretrial incarceration eclipses the sentence they would likely face if convicted. According to Cook County Sheriff Tom Dart, in 2016, approximately 1,203 detainees were entitled to immediate release following their convictions because they had already served their full sentences while awaiting trial.[142] In fact, many of these individuals served time well *in excess* of their sentences, resulting in what Sheriff Dart has referred to as "dead days." In 2015 alone, defendants being held in the Cook County Jail served nearly 80,000 days (218 years) in excess of their eventual sentences, with some defendants serving hundreds of excessive days.[143] In 2016, this number increased to a total of 251 years of excessive time served, costing taxpayers around $14.7 million.[144] Given the choice between immediate release upon entry of a guilty plea or indefinite pretrial detention, is it any wonder that individuals would choose to plead guilty to secure their release?

Apart from the moral impetus for reforming Cook County's pretrial system, the County should also be concerned about significant legal liability for its continued operation of a wealth-based bail scheme that disproportionately harms racial minorities. According to a class action lawsuit filed last year, Cook County's bail practices violate not only the federal constitution but also the Illinois Civil Rights Act of 2003, 740 ILCS 23, "because the monetary criterion used to determine whether [detainees] will be released prior to the disposition of their case results in the disproportionate pretrial incarceration of African Americans."[145] In addition to the

---

CHRISTOPHER LOWENKAMP, MARIE VANNOSTRAND, & ALEXANDER HOLSINGER, INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 11 (2013) (low-risk defendants detained pretrial received sentences that were 2.8 times as long as released defendants).

[141] *See, e.g.*, Vanessa Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (Winter 2013); *see also* Nick Pinto, *The Bail Trap*, THE N.Y. TIMES MAGAZINE, Aug. 13, 2015 (noting that data from the New York Criminal Justice Agency indicate that detention itself creates enough pressure to increase guilty pleas).

[142] *Cook County Jail Population Down About 700 People*, DAILY HERALD, Jan. 3, 2017, http://www.dailyherald.com/article/20170103/news/170109830/ [hereinafter *Cook County Jail Population*].

[143] Justin Glawe, *Chicago's Jail Kept Inmates Locked Up for 218 Years Too Long*, THE DAILY BEAST, June 8, 2016, http://www.thedailybeast.com/chicagos-jail-kept-inmates-locked-up-for-218-years-too-long.

[144] *See Cook County Jail Population*, supra note 142.

[145] Class Action Complaint at 31, *Robinson, et al. v. Martin, et al.*, Case No. 2016-CH-13587 (Cook Cty., Ill. Oct. 14, 2016).

constitutional and statutory violations discussed earlier in this paper,[146] violations of the Illinois Civil Rights Act—as alleged in this recent class action complaint—may expose the County to costly litigation and liability absent serious reforms.

E. Cook County's Wealth-Based Pretrial Detention Scheme Increases Recidivism

The empirical evidence shows that pretrial bail schemes further harm communities by increasing recidivism. According to one study, defendants who are detained pretrial are 30% more likely to recidivate when compared to defendants released sometime before trial.[147] Even defendants who are released prior to trial but were detained for several days while securing enough money for bail are 39% more likely to commit a new crime prior to trial than defendants who were never incarcerated.[148] As the authors of this study explained, "[d]etaining low- and moderate-risk defendants, even just for a few days, is strongly correlated with higher rates of new criminal activity both during the pretrial period and years after case disposition; as length of pretrial detention increases up to 30 days, recidivism rates for low and moderate-risk defendants also increases significantly."[149]

The correlation between pretrial detention and recidivism is supported by a recent Texas study on the consequences of pretrial detention for misdemeanor offenses. Based on the results of this study, the researchers estimated that:

> [A] representative group of 10,000 misdemeanor offenders who are released pretrial would accumulate an additional 2,800 misdemeanor charges in Harris County over the next 18 months, and roughly 1,300 new felony charges. If this same group were instead detained they would accumulate 3,400 new misdemeanors and 1,700 felonies, an increase of 600 misdemeanors and 400 felonies. While pretrial detention clearly exerts a protective effect in the short run, for misdemeanor defendants it may ultimately serve to compromise public safety.[150]

Inmate release statistics show that over 50% of detainees released from the Cook County Jail following conviction and sentencing returned to jail within three years.[151] Because these

---

[146] *See supra* Part II (assessing the legality of Cook County's wealth-based pretrial detention scheme).

[147] CHRISTOPHER LOWENKAMP, MARIE VANNOSTRAND, & ALEXANDER HOLSINGER, THE HIDDEN COSTS OF PRETRIAL DETENTION 19 (2013).

[148] *Id.* at 4.

[149] *Id.* at 3.

[150] Paul Heaton, Sandra G. Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 768 (2016).

[151] DAVID E. OLSON, CHARACTERISTICS OF INMATES IN THE COOK COUNTY JAIL, COOK COUNTY SHERIFF'S REENTRY COUNCIL RESEARCH BULLETIN 7 (Mar. 2011).

statistics do not include individuals who were released because they were acquitted, posted bail, or had the charges against them dropped, the actual recidivism rate is, in fact, higher.[152] This high rate of recidivism comes at a great cost. For example, a 2015 study by the Illinois Sentencing Policy Advisory Council found that, over the next five years, recidivism will cost Illinois more than $16.7 billion.[153] As Cook County and other jurisdictions struggle to reduce recidivism rates, continuing to operate a pretrial system that increases the likelihood that detainees will reoffend upon release is clearly illogical.

F. Cook County's Wealth-Based Pretrial Detention Scheme Creates Harmful Externalities

Cook County's money bail scheme not only unnecessarily and irrationally increases pretrial incarceration and long-term recidivism rates, it also wreaks havoc on the social networks of the accused.

A recent article in the Chicago Tribune provides an example of the all too common consequences of Cook County's pretrial system. The article describes the 2015 arrest of a Chicago man who was detained, pretrial, for over a year because he could not come up with $1,000 to buy his way out of jail. During his year behind bars, the man lost his job and his car, missed the birth of his son, and his sister passed away. All of this for the charge of selling $40 worth of cocaine.[154] Unfortunately, this story is far from unique.

The Cook County Sheriff's Office estimates that as many as 300 individuals are detained pretrial because they are unable to scrape together $100 to purchase their release.[155] These individuals, and numerous others who are unable to pay varying amounts in excess of $100, have their lives upended. Detaining a defendant until trial often means a loss of income for the defendant's family, and can lead to much more serious consequences like the loss of a car or home, lost custody over a child, and a host of other negative consequences.

For example, at the opening of the Department of Justice's 2011 National Symposium on Pretrial Justice, it was noted that pretrial detention also impacts health and healthcare costs:

> This link between financial means and jail time is troubling in its own right. But it's compounded by the fact that many inmates

---

[152] *Id.*

[153] *The High Cost of Recidivism*, ILL. RESULTS FIRST (State of Ill. Sentencing Policy Advisory Council), Summer 2015, at 2, *available at* https://www.macfound.org/media/files/Illinois_Results_First.pdf.

[154] Steve Schmadeke, *Cash Bail Under Fire as Discriminatory While Poor Inmates Languish in Jail*, CHICAGO TRIBUNE, Nov. 15, 2016, http://www.chicagotribune.com/news/local/breaking/ct-cook-county-cash-bail-met-20161114-story.html.

[155] *Id.* (citing Sheriff's Office officials); *cf.* BERNADETTE RABUY AND DANIEL KOPF, PRISON POLICY INITIATIVE, DETAINING THE POOR (May 10, 2016) (finding that "most people who are unable to meet bail fall within the poorest third of society").

> become ineligible for health benefits while they're in jail – imposing an additional burden on taxpayers when they're released, and often are forced to rely on emergency rooms for even the most routine medical treatments.[156]

Furthermore, in addition to healthcare concerns, detainees in Cook County may face serious other threats related to the conditions of their confinement. Over the years, Cook County has been subjected to numerous lawsuits alleging poor or unsafe conditions as a result of overcrowding.[157] In fact, a federal investigation into conditions at the Cook County Jail "found that when the [jail] was overcrowded, there was a corresponding increase in fights, uses of force, and weapons, exposing inmates to harm and depriving them of their constitutional rights to safe and humane conditions of confinement."[158]

Frequently, the only way defendants can hope to mitigate these harsh realities is by relying on family and friends to carry the financial burden, often in amounts that are a significant portion of their annual incomes.[159] Our system of justice is predicated on the notion that punishment should not precede a finding of guilt. Imposing on presumptively innocent individuals and their networks unnecessary debt, joblessness, homelessness, and further financial duress prior to trial when the result neither protects communities nor meaningfully impacts trial appearance rates is unconscionable.

IV. REFORMS FOR IMPROVEMENT OF COOK COUNTY'S PRETRIAL DETENTION SCHEME

As detailed above, Cook County's wealth-based pretrial detention scheme, as currently operated, is illegal, harmful, and fails to adequately advance any legitimate policy goals. However, unlike some other jurisdictions around the country in which inadequate statutory schemes and the powerful influence of the bail bond industry have served as obstacles to change, Cook County is well-positioned for meaningful reform today. The deficiencies identified are not inherent in the Illinois Bail Statute, but in how its terms are applied at bond court. Money bond is not currently viewed as a last resort, nor is ability to pay considered on any regular basis. Meaningful reforms to the current system will require the stakeholders in Cook County to accept that money bail is not a guarantee for public safety or appearance in court. Such recognition will lead to significant strides in the application of a bond structure that avoids the negatives of the current wealth-based system. The Illinois Bail Statute—if properly implemented—contains the necessary elements for an effective and equitable pretrial system, and the majority of key stakeholders in Cook County appear to agree that change is necessary. In this context, there are several reforms Cook County should consider to dramatically improve its pretrial system and

---

[156] Eric Holder, Remarks at the National Symposium on Pretrial Justice (June 1, 2011).

[157] *Punishing the Poor*, *supra* note 130, at 8 (discussing various legal actions against the County).

[158] *United States v. Cook Cty., Ill.*, 761 F. Supp. 2d at 798.

[159] *See supra* note 16 and accompanying text (discussing bond amounts relative to the median income in Cook County).

end the practice of needlessly punishing presumptively innocent defendants because they are poor.

A. Judicial Rules

As previously noted, the Illinois Bail Statute includes a provision requiring that any financial conditions of release must be "[c]onsiderate of the financial ability of the accused."[160] Notwithstanding this provision, Cook County judges frequently set bail in amounts that exceed the financial capacity of detainees, resulting in the continued pretrial detention of these individuals based on their inability to pay. The Illinois Supreme Court and the Circuit Court of Cook County should each consider adding provisions to their rules to address this disconnect between what the statute requires and what actually takes place in the courtrooms of Cook County.[161] For example, the following two provisions would help ensure compliance with the law by requiring judges to meaningfully assess the financial capacity of individuals when imposing financial conditions of release:

- *In any case in which a judicial officer imposes a financial condition of pretrial release, the judicial officer shall conduct an inquiry into the accused person's financial resources and ability to pay.*

- *A judicial officer shall not impose a financial condition of release unless the record indicates and the judicial officer finds, in writing on the record, that the accused has the present ability to pay the financial condition without hardship.*

The purpose of these rules is to make clear that judges may not impose a financial condition of release that results in the pretrial incarceration of a person. In combination with effective judicial education, these provisions are designed to shift the focus of pretrial release determinations away from the financial means of the accused, and toward alternatives that are more effective, efficient, just, and consistent with the law.

B. Judicial Education

Educating Cook County judges is critical to the effectiveness of any effort to reform Cook County's pretrial detention scheme. Numerous studies, media reports, and court-watching initiatives have concluded that, despite the increasing availability of risk assessments and other information about defendants, Cook County judges have continued to reflexively impose money bond on defendants without consideration of their ability to pay, and in violation of the Illinois

---

[160] 725 ILCS 5/110-5(b); *see supra* text accompanying note 58 (discussing the statutory requirement to consider the financial ability of detainees when setting financial conditions of release).

[161] The Illinois Supreme Court has the authority to adopt rules and amend its rules pursuant to the procedures outlined in Illinois Supreme Court Rule 3. The Circuit Court of Cook County may make rules "regulating their dockets, calendars, and business" and "governing civil and criminal cases consistent with rules and statutes." Cook Cty. Cir. Ct. R. 0.1(a); *see also* Ill. Sup. Ct. R. 21(a) (requiring agreement of a majority of the circuit judges to adopt a rule).

Bail Statute. Perhaps even more disturbingly, these same sources have revealed dramatic inconsistencies in outcomes among Cook County judges, even when controlling for criminal history and other factors. To create meaningful change, the Circuit Court should educate its members on the efficacy and availability of alternatives to D-bonds, including I-bonds, pretrial supervision or monitoring, drug treatment, and other alternatives set forth in the statute. Judicial education on this topic should incorporate data from all Cook County judges to increase awareness of disparities in bail setting practices and to encourage uniform best practices that are consistent with the goals of an effective and fair pretrial scheme.

C. Data Monitoring

The Circuit Court of Cook County is the largest judicial circuit in Illinois, and one of the largest unified court systems in the world. Although many media outlets, academic researchers, and reform advocates have collected data related to the imposition of money bail in Cook County, the size of the court system makes accessing reliable information about pretrial release outcomes difficult. In order to ensure compliance with the requirements of the Bail Statute, and to avoid the substantial inconsistencies that currently plague the system, the court should track and publically disclose data on pretrial detention and release. Specifically, the court should aim to identify disparities in pretrial release outcomes for similarly situated defendants, including significant differences in the amount of money bail imposed and racial disparities in pretrial release outcomes. The court should also track pretrial release outcomes to determine whether the current system is working effectively to release low-risk defendants while detaining the most dangerous defendants. Enhanced data monitoring will facilitate judicial education and improvements to pretrial services by allowing Cook County officials to identify where the pretrial system is falling short, and effectively focus available resources in those areas.

D. Reforms to Pretrial Services

In addition to the above reforms, the pretrial system in Cook County could benefit enormously from commonsense reforms to Cook County's existing Pretrial Services Division. Cook County's shortcomings in this area are not novel. Three years ago, a report by the Illinois Supreme Court raised concerns about pretrial services in Cook County, explaining that the Pretrial Services Act had "become largely aspirational, rather than a model for everyday procedure."[162] Inadequacies in pretrial services are part of a vicious cycle that undermines pretrial justice in Cook County: "because of a lack of confidence in the credibility of risk assessment and community living information," "reliance upon the work of pretrial services is generally dismissed or minimized" by Cook County judges, which in turn leads to less investment in pretrial services.[163]

Although some changes have already been implemented, effective reform will require a well-funded, independent, social service-oriented pretrial services program. While the details of

---

[162] PRETRIAL OPERATIONAL REVIEW, *supra* note 20, at 5.

[163] *Id.*

pretrial services reform are beyond the scope of this paper, a number of stakeholders have advocated for the following changes:

- Increased training, funding, and organizational structure to enhance the ability of pretrial services to conduct effective pretrial supervision of released individuals;

- Improving conditions for bail hearings, including alleviating overcrowding and providing more private settings for initial interviews;

- Continuing investment in risk assessment and other methods for maximizing the information available to the court at bail hearings; and

- Implementing text message or telephone reminders of upcoming court dates, which have proven to be a low cost method of reducing failures to appear.

These and other possible changes are detailed in the Illinois Supreme Court's 2014 Pretrial Operational Review of Cook County. In response to the Supreme Court's 2014 Review, Cook County Chief Judge Timothy Evans expressed his hope that the report "will serve as a blueprint for the Circuit Court and all of the stakeholders in the system to move forward."[164] But despite the agreement of most Cook County stakeholders that these reforms are essential, many of the same problems continue to plague pretrial services years later. In combination with the other reforms advocated above, enhancing Cook County's pretrial services capabilities will provide meaningful and necessary support to ensure the safety of the community and the appearance of defendants while reducing the pretrial incarceration of individuals who cannot afford their bail.

V. CONCLUSION

During testimony before the Senate Judiciary Committee in 1964, Attorney General Robert F. Kennedy noted that bail practices in the federal system had "become a vehicle of systemic injustice," under which "the rich man and the poor man do not receive equal justice in our courts."[165] Sadly, those comments apply with full force to Cook County's bail practices, under which pretrial detention outcomes have long been detached from valid criminal justice concerns, and have instead been based primarily on the financial means of the accused. Over fifty years after Attorney General Kennedy's words, the time to correct this injustice in Cook County is long overdue.

---

[164] Press Release, Chief Judge Evans Responds to Illinois Supreme Court Report (Mar. 21, 2014), *available at* http://www.cookcountycourt.org/MEDIA/ViewPressRelease/tabid/338/ArticleId/2278/Chief-Judge-Evans-responds-to-Illinois-Supreme-Court-Report.aspx.

[165] *Hearing on S. 2838, S. 2839, and S. 2840 Before the Subcomm. on Constitutional Rights and Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 88th Cong. (1964) (statement of Robert F. Kennedy, Attorney General).

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

KAREN MCNEIL, et al., On behalf of themselves and all others similarly situated, Plaintiffs, v. COMMUNITY PROBATION SERVICES, LLC, et al., Defendants.	Case No. 1:18-cv-00033 Judge Campbell / Frensley

EXPERT REPORT OF MICHAEL R. JONES, Ph.D.

I. Background

1. I am the President of Pinnacle Justice Consulting, which I began in 2017. My associates and I (1) provide training and technical assistance for states, localities, and various justice system stakeholder organizations to enable them to improve their pretrial justice policies and practices based on the most recent research and legal developments; (2) assist states and local jurisdictions to design and implement strategic initiatives to modernize their pretrial justice systems; and (3) perform empirical research, data analysis, system and program evaluation, and expert testimony for criminal justice systems.

2. I have been working since 2004 as a consultant for the U.S. Department of Justice's National Institute of Corrections, providing criminal justice and pretrial training and technical assistance to dozens of jurisdictions nationwide.

3. From 2010 to 2017, I worked at the non-profit Pretrial Justice Institute (PJI) where I served as a Senior Project Associate and then the Director of Implementation. At PJI, I directed the Bureau of Justice Assistance's three-year Smart Pretrial Demonstration Initiative, which was a three-jurisdiction project to test the cost savings and public-safety enhancements that can be achieved by moving to a pretrial justice system that uses research-based risk assessment and risk management strategies to improve pretrial outcomes; provided pretrial training and technical assistance to hundreds of jurisdictions; conducted numerous workshops at national and state conferences; performed empirical research; and developed several resource materials for decision-

makers and practitioners.

4. Before my work at PJI, I served for nine years as a county employee working for a local criminal justice coordinating committee in Jefferson County, Colorado, where I provided information, ideas, and analyses to justice-system decision-makers for local system improvements, including in pretrial justice.

5. During my career, I have written numerous criminal justice, pretrial, and psychological articles that have appeared in peer-reviewed journals and elsewhere.

6. I received my Ph.D. in Clinical Psychology from the University of Missouri-Columbia.

7. A copy of my curriculum vitae summarizing my professional experience and education is attached as Exhibit A. It includes a list of all publications I have authored.

8. I have provided expert testimony on the subjects of this declaration in: *Little v. Frederick*, 17-cv-724 (W.D. La. 2018); *Mock, et al., v. Glynn County, Ga.,* 2:18-cv-0025 (S.D. Ga. 2018); *Daves v. Dallas County, et al.*, 3:18-cv-0154 (N.D. Tex. 2018); *Booth, et al. v. Galveston County, Tex.*, 3:18-cv-0104 (S.D. Tex. 2018); *Schultz, et al. v. State of Alabama, et al.*, 5:17-cv-00270-MHH (N.D. Ala. 2018); *Knight v. Sheriff for Leon County, Fla.*, No. 4:17cv464 (N.D. Fla. 2018); *Buffin v. Hennessy*, 4:15-cv-4959 (N.D. Cal. 2018); *ODonnell v. Harris County*, 251 F. Supp. 3d 1052 (S.D. Tex. 2017).

9. I am being compensated at the rate of $300 per hour for preparation of this report and other substantive work and $150 per hour for travel related to this case. Any court testimony I provide in this case is pro bono.

II. Materials Reviewed and Methodology

10. I have attached as Exhibit B a list of materials that I reviewed when preparing this report. The studies I reviewed evaluate the effects of pretrial release and detention on multiple pretrial and case processing outcomes and the effectiveness of different risk management strategies on several pretrial outcomes.

11. In forming my opinions expressed in this report, I rely on the findings from multiple studies authored by various researchers and scholars in the pretrial justice field, who used data from numerous local and state jurisdictions throughout the United States. These studies use acceptable research methodology[1] and were performed in jurisdictions that have many similarities

[1] Some studies were published in peer-reviewed journals that target academic audiences. Other studies, sometimes by the same researchers, were published in other venues (e.g., by a non-profit organization). Although the academic, peer-review process can improve the quality of empirical research, it is not always necessary. Relevant, high-quality studies have been published elsewhere (see, e.g., Bechtel et al., 2016). Furthermore, the venue of publication (e.g., peer review journal) does not guarantee the usefulness of the study to an issue at hand – in this case, helping local justice system practitioners achieve the best pretrial results they can in their jurisdiction (see, e.g.,

in their policies and practices. Frequently, the results from these studies either complement or replicate one another. I also rely on the knowledge and experience I have gained over the last decade as a national expert and researcher in pretrial justice implementation and evaluation. Because of the research methods used and jurisdictions' similarities, and based on my experience working with hundreds of jurisdictions, I believe and have found that the research findings and practices described below are largely generalizable to other jurisdictions.

12. It is also my belief that the findings and practices described below are generalizable to the probation context, including when a warrant is issued because of an alleged violation of misdemeanor probation.

13. In particular, I believe and have found that the findings from the studies in this report are relevant to persons who are on probation because: (1) several studies referenced in this report include persons who were on community-based supervision, including probation, when they were accused of committing a new offense; and (2) I cannot identify, based on my professional knowledge and experience, any factors or circumstances that would render the studies' findings not applicable to persons who are under probation supervision when they are accused of a new crime or a technical violation. Additionally, I have assisted many jurisdictions in implementing evidence-based practices for pretrial defendants. These jurisdictions have measured the pretrial risk of, and delivered various interventions designed to improve the court appearance and law-abiding performance of, defendants in the community. Neither these jurisdictions' practitioners nor I have identified a difference in these interventions' effectiveness for persons who are or are not on probation or other community-based supervision or release status (e.g., parole, in-home detention, pretrial release, community service) at the time of the new alleged offense.

III. Opinions

14. Plaintiff's counsel asked me to express my opinion on the following five topics:

a) Does pretrial[2] detention for time periods more than 24 hours have adverse consequences for detained persons and for the community?

b) Does pretrial detention for time periods more than 24 hours have an adverse effect on the likelihood that a person will make all court appearances or remain law-abiding while on pretrial release?

Clipper et al., 2017). Researchers' understanding of the relevant issues (e.g., the legal parameters of pretrial decision-making, hypotheses tested, sampling methods used, data collected, and statistical tests used) are useful to assessing the comprehensiveness, validity, generalizability, and usefulness of a study, separate from the venue of publication.

[2] The word "pretrial" is used in this report to refer to the time period of a criminal case prior to adjudication or case disposition.

c) Is there any empirical evidence that secured money bail is more effective than unsecured money bail or non-monetary conditions of release at assuring appearance in court?

d) Is there any empirical evidence that secured money bail is more effective than unsecured money bail or non-monetary conditions of release at assuring public safety?

e) How does secured money bail and unsecured money bail or non-monetary conditions of release affect the speedy release of arrested persons?

f) Are these findings generalizable to the post-arrest, pre-hearing context after a person is accused of violating a condition of probation and before the allegation is adjudicated?

15. In many cases, criminal defendants are ordered released (i.e., they are "bailed") pretrial, but because their release is conditioned on the payment of secured money bail, they nevertheless remain in jail because they are not able to pay secured money bail. In many of these cases, the arrestees do not pose a risk sufficient to justify an order of pretrial detention. For these defendants, a less-restrictive, non-secured-money-bail alternative to pretrial detention would reasonably achieve the government's interests in promoting speedy pretrial release, reasonably assuring public safety, and reasonably assuring court appearance. When guided by empirical research on pretrial release and detention and pretrial risk management, local governments can more effectively manage defendants' pretrial risk without resorting to unaffordable secured money bail that results in unnecessary pretrial detention.

IV. Findings

A. Secured Money Bail Results in Unnecessary Pretrial Detention

16. I express the opinion that the use of secured money bail increases pretrial detention by detaining more defendants for the duration of the pretrial phase of their case and by increasing the length of their detention, because defendants who are unable to afford secured money bail (and thus remain detained prior to trial) would otherwise be eligible and able to obtain prompt release if the jurisdiction instead used unsecured bonds or non-monetary conditions of release.

17. Several studies have shown that secured money bail contributes to unnecessary pretrial detention. Specifically, defendants required to obtain pretrial release with secured money bail (whether in the form of cash, surety, property, or deposit to the court) have lower release rates compared to defendants who are not required to pay secured money bail prior to release. Moreover, people who are required to pay secured money bail to be released wait in jail longer than defendants who are released without being required to make a money payment. Not surprisingly, the higher the money bail amount, the greater the number of defendants who remain in pretrial detention (Reaves, 2013; M. Jones, 2013; Cohen & Reaves, 2007). Phillips (2012) also found a strong link between secured money bail requirements and increased pretrial detention. This is

notable given that approximately 50% of never-released defendants with secured money bail returned to the community at the time of their case adjudication or sentencing (M. Jones 2013). Brooker et al. (2014) found similar results.

18. To test whether secured money bail indeed is the cause of pretrial detention for many defendants, researchers asked defendants *why* they had not posted their money bail. When defendants in four counties in three states were asked, 56% reported that they could not afford the amount set, and 34% reported that their family could not afford the amount set. Only 15% of defendants reported that they had other court issues (e.g., a hold from another jurisdiction) keeping them in detention (defendants could select more than one reason) (Kimbrell & Wilson, 2016). Similarly, other researchers found that nationally in 2002 (the most recent year the U.S. Bureau of Justice Statistics conducted the survey) 128,000 persons were in jail on any given day because they could not afford the monetary amount of their bond, and that pretrial detention has increased by 31% since that time frame (Sawyer, 2018; Rabuy & Kopf, 2016). These results match the findings of a small investigation my staff and I conducted at the request of county-level decision-makers (i.e., local judges, sheriff, city police, defense attorneys, pretrial services) in Jefferson County, Colorado. We found that approximately 75% of defendants who had not posted their bonds within 48 hours said they or their family members were not able to meet their bond's financial condition, and 20% had not posted bond because they had a hold from another case or were serving a sentence on another case. The remaining approximately 5% indicated "other" reasons.

19. The findings of these studies are not surprising given that about 4 in 10 adults in U.S. households would not be able to pay for an unexpected expense of $400 or more unless they sold something, borrowed the money from others, or charged it to a credit card to pay off over time (Federal Reserve Board, 2018).

20. Current pretrial practices, especially ones that are driven largely by the high use of secured money bail, contribute heavily to the nation's prison and jail crowding. Wagner and Sawyer (2018) found that (a) the United States has the world's highest incarceration rate; and (b) all of the increase in the nation's jail population from 2000 to 2016 was caused by an increase in the number of unconvicted persons; the number of convicted/sentenced persons was not a contributing factor.

21. Thus, secured money bail either denies release to, or delays release for, many defendants who otherwise would be releasable immediately on non-monetary conditions and whose risk could be adequately managed in the community. Because Giles County uses secured money bail for many defendants booked into jail, it is likely that these defendants unnecessarily remain in the county jail until they are released on non-monetary conditions (if they are released on non-monetary conditions) or they resolve the allegations against them. Giles County's practices of using secured money bail is likely contributing to higher than necessary pretrial detention.

22. Defendants of color (e.g., African American; Latino) are more frequently ordered to pay money bail prior to release than are white defendants, while controlling for other factors, such as current charges and criminal history. Also, the amounts of money they must pay for release are often higher than the money bail that white arrestees are required to pay. Consequently, persons of color are more often detained than are white arrestees (C. Jones, 2013; Schlesinger, 2005;

Demuth, 2003). Because Giles County uses secured money bail, it is likely that local defendants of color spend more time in local pretrial detention because of money bail than do similarly situated white defendants.

B. Unnecessary Pretrial Detention Often Has Strong Negative Consequences for the Community, the Justice System, and Defendants

23. Multiple studies, as summarized below, have shown that pretrial detention, including for time periods more than 24 hours, leads to negative outcomes for the justice system, the community, and defendants, such as:

a) Decreased rates of court appearance and law-abiding behavior during the shorter-term, pretrial period;

b) Increased rates of recidivism in the longer-term, post-pretrial period;

c) Increased likelihood of convictions, guilty pleas, sentences to incarceration, longer sentence length, and greater jail and prison crowding; and

d) Increased collateral harm to defendants, including negative effects on employment, housing, and the ability to care for dependent family members.

i. Pretrial detention is associated with decreased rates of court appearance and law-abiding behavior during the shorter-term, pretrial period

24. I express the opinion that pretrial or pre-probation-revocation-hearing detention for more than 24 hours increases the likelihood that a person will fail to appear or will engage in new criminal activity while on pretrial / pre-hearing release.

25. Even just a few days in post-arrest / pre-hearing custody can have a negative effect on pre-disposition success. Lower-risk defendants who are detained for two to three days after arrest are 39% more likely to be arrested for new pre-hearing criminal activity than are comparable lower-risk defendants who are released immediately (within one day).[3] As the delay in release becomes longer (5-7 days), the chance of pretrial failure (new arrest) becomes 50% more likely. This likelihood increases to 56% when release is delayed for 8 to 14 days (Lowenkamp et al., 2013a). This study included defendants who were on probation at the time of their post-arrest / pre-hearing release, rendering the findings generalizable to these persons.

[3] The two groups are comparable because they were matched (i.e., they did not statistically differ) on relevant characteristics such as age, race, gender, current charges, and pretrial risk level. Because the groups were matched on the characteristics that could potentially affect the outcome of interest (i.e., new pretrial arrest), the chances that these characteristics could have influenced the observed outcomes are greatly reduced. Thus, the characteristic they did differ on – length of time in pretrial detention – most likely affected the new-pretrial-arrest outcome and accounts for the different rates of new arrest between the two groups. This research method of matching enables researchers to make inferences about causation that would otherwise not be possible.

26. Further, the longer that lower-risk defendants are kept in pretrial detention beyond one day, the greater the likelihood that they will fail to appear in court after they are eventually released, again, when controlling for other relevant characteristics. This pattern of increased likelihood of arrest and decreased likelihood of court appearance as release is delayed also applies to moderate-risk defendants. In contrast, delays in time to release do not affect the behavior of higher-risk defendants; they tend to demonstrate pretrial failure at equal rates whether they are released immediately or after several days or weeks of pretrial detention (Lowenkamp et al., 2013a). Holsinger (2016a) found similar results three years later when studying defendants in a separate jurisdiction near Kansas City, Missouri.

27. As discussed previously, the posting of money bail delays the pretrial release of defendants who eventually are released. Giles County's practices of setting secured money bail for defendants and then releasing these defendants after more than 24 hours of pretrial incarceration likely contributes to these released defendants exhibiting more failures to appear in court and more criminal behavior for which they are arrested during pre-hearing release.

ii. Pretrial Detention is Associated With Increased Longer-Term Recidivism

28. Detaining lower-risk defendants for longer than one day affects the likelihood of criminal activity up to two years later. Defendants who are released within 2 to 3 days are 17% more likely to engage in new criminal activity up to two years later compared to comparable defendants released within 24 hours. For those held 4 to 7 days, this longer-term recidivism worsens to 35%, and when release is delayed for 8 to 14 days, the recidivism rate further increases to 51%. This pattern of worsening recidivism as release is delayed is observed for moderate-risk defendants as well (Lowenkamp et al., 2013a).

iii. Pretrial Detention is Associated With Increased Convictions, Pleas, Sentences to Incarceration, and Sentence Length

29. There is strong evidence from several studies with rigorous research designs that have demonstrated that defendants detained pretrial, often because they did not post their secured money bail, were more likely to plead guilty and/or be convicted than were released defendants with similar demographics, charges, and criminal history (see Heaton et al., 2017; Stevenson, 2017; Leslie & Pope, 2017; Lum et al., 2017; Dobbie et al., 2016; Gupta et al., 2016). Given the strength of this research finding, Giles County's use of secured money bail that leads to unnecessary pretrial detention is likely contributing to harsher outcomes for people who are detained because they do not post the money bail.

30. The rigorous studies above were conducted by different researchers on different populations of defendants, yet they yielded similar findings about the strengths of the relationship between pretrial detention and harsher outcomes for defendants. I summarize a few of them in more detail here:

31. Stevenson (2017) used a natural, quasi-experimental experiment in Philadelphia to test the causal effects of pretrial detention associated with high money bail amounts on pretrial release and detention rates, pleading guilty, and receiving harsher sentences. Stevenson used the natural, by-chance assignment of misdemeanor and felony defendants to different bail magistrates

who made bail decisions based on their personal preferences. That is, these magistrates saw similar defendants but made different money bail decisions differently – some magistrates set higher monetary bail amounts for their defendants while some magistrates set lower amounts. Stevenson found that the likelihood of being detained depended on which bail magistrate presided over the bail hearing. When defendants were detained, that pretrial detention led to an increase in the likelihood that persons would be convicted (up to 30% more), mostly through guilty pleas among people who would have otherwise had charges dropped or been acquitted. These persons also received harsher sentences because their sentences were for longer lengths of time (up to 18 months longer). This study's design and findings provides support for the causal relationship between higher money bail amounts and the resulting pretrial detention, and increased convictions through guilty pleas and harsher sentences.

32. Heaton et al., (2017) similarly measured the effects of pretrial detention on case outcomes as well as on future crime using a naturally occurring, quasi-experimental experiment. They analyzed court data on the nearly every one of the available 380,000+ misdemeanor cases filed in Harris County, Texas, over a five-year period, and compared persons who were booked into jail on Tuesday vs. Thursday. This method simulated random assignment because persons booked into jail on these days are similar on various characteristics, (demographics, current charges, criminal history, money bail amount), but differed only in the day of the week in which they had their bail hearing (i.e., the Thursday group had a higher chance of posting because the bail hearing was closer to the weekend when family members could more easily post money bail. Heaton et al., (2017) found that persons who were more often detained pretrial (the Tuesday group) were 25% more likely to plead guilty and 43% more likely to be sentenced to jail. These jail sentences also were twice as long as the jail sentences for the Thursday group. Finally, they found that detained defendants were more likely to be charged with new felonies and misdemeanors after they were eventually released, showing a criminogenic effect of pretrial detention. Because the researchers ruled out factors that could otherwise explain these findings, these results suggest a causal link between pretrial detention and pleading guilty, harsher sentences, and future crime.

33. Gupta et al. (2016) also used a quasi-experimental approach that took advantage of the equivalent-to-random-way all cases were assigned to different judicial officers in Pittsburgh and Philadelphia during a five-year period. They compared 1) defendants who saw bail-setting judicial officers who were more likely to use secured money bail to 2) defendants who saw judicial officers who less often used money bail. Gupta et al. found that defendants required to pay money bail had a 6% greater chance of conviction and a 4% higher likelihood of committing future crime. They also failed to find a link between money bail and court appearance.

34. Pretrial detention results in a greater likelihood that a defendant will be sentenced to jail and that the sentence will be longer. A recent study compared similar defendants who were detained pretrial to those who were released, finding that detained defendants were four times as likely to be sentenced to jail and three times as likely to be sentenced to prison than those who were released. Furthermore, the jail sentences for the detained group, as compared to the released group, were three times longer and the prison sentences were two times longer (Lowenkamp et al., 2013b).

35. The above finding of harsher sentencing for those who are not able to obtain pretrial release replicates the findings of many other studies (e.g., Oleson et al, 2014; Sacks & Ackerman,

2014; Phillips, 2012; Williams, 2003). Because these studies used methods to ensure the groups did not differ on factors most likely to have influenced the observed outcomes (e.g., demographics, current charge, criminal history), it is most likely that the harsher sentences given are related to defendants' remaining in detention pretrial rather than the other factors.

iv. Pretrial Detention is Associated With Increased Collateral Harm to Defendants

36. Pretrial detention for three days or less has been shown to negatively influence defendants' employment, financial situation, and residential stability, as well as the well-being of dependent children. This negative impact worsened for defendants who were detained pretrial for more than three days (Holsinger, 2016b). Similarly, another recent study found that many defendants who could not afford money bail lost their jobs and/or housing, even when they were detained for three days or less (Kimbrell & Wilson, 2016).

C. Studies That Have Analyzed the Effectiveness of Secured Money Bail and Financially Unsecured Risk Management Conditions Demonstrate That Unsecured Conditions of Pretrial Release are More Effective at Meeting the Government's Three Interests Than is Secured Money Bail

37. All pretrial release conditions can be divided into two types: (1) non-financial (e.g., court date reminders, pretrial monitoring, no contact orders, substance testing, electronic monitoring, car breathalyzers, curfew, etc.); and (2) money bail. Money bail can be further divided into either (a) secured (cash, surety, property, or deposit to the court provided prior to the defendant's release from custody), or (b) unsecured (a promise by the defendant to make a monetary payment to the court if the defendant fails to appear).

38. In 2012, I co-authored with three other researchers and pretrial experts a literature review of the effectiveness of money bail as a tool for managing the risk of new pretrial arrest and failure to appear (Bechtel et al., 2012). We reviewed the studies that had been published to date and that were, at the time, the most relevant, most inquired about, or most cited in the national discussion about using money bail to manage pretrial risk.

39. We found that although a few published studies considered whether a connection existed between money bail and pretrial outcomes, all of them had at least one of the following three serious limitations that impede their usefulness for informing pretrial policy-making and practice.

a. First, some studies (e.g., Helland & Tabarrok, 2004) relied exclusively on data from the Bureau of Justice Statistics' State Court Processing Statistics data series, even though the Bureau itself later cautioned in a Data Advisory that its data should not be used for evaluating the effectiveness of various pretrial release methods (see Bureau of Justice Statistics, 2010). Thus, these studies should not be relied upon for evaluating the effectiveness of secured money bail.

b. Second, some studies investigated the link between secured money bail and only one (court appearance) or occasionally two (court appearance and public safety) pretrial outcomes. Yet, no study looked at the link between money bail and the third goal of any bail determination: pretrial release. Thus, we concluded that these studies were insufficient for guiding pretrial policy-making and practice because they failed to show that money bail could simultaneously and effectively address a jurisdiction's three legally required goals: (1) maximize court appearance, (2) maximize public safety, and (3) maximize release from custody. [4]

c. Third, the methodological design of some other studies did not meet minimal social science standards needed to evaluate the effectiveness of pretrial release conditions.

40. Less than one year after the literature review in 2012, one additional study that purported to investigate the link between money bail and pretrial outcomes was published (see Morris, 2013).[5] Morris' 2013 study—including the data update in 2014 and the 2017 publication of the 2013 study (i.e., Clipper, Morris, & Russell-Kaplan, 2017)—had some of the same shortcomings as the studies in our 2012 literature review.

41. First, the Clipper et al. study only investigated the effects of different pretrial release mechanisms—secured money bail versus non-monetary conditions—on one pretrial goal: maximizing court appearance. However, it did not simultaneously investigate the impact of these release mechanisms on pretrial *release itself*, which is a second legally necessary goal of pretrial release. The authors did acknowledge the importance of pretrial release: They state on page 6 while summarizing the findings of the Austin et al. (1985) study that provides empirical evidence for the effectiveness of pretrial services in ensuring court appearance, "Also worthy of note, all defendants included in the study [i.e., the Austin et al. (1985) study] were previously unable to be released before their trial. As a result, this study [i.e., the Austin et al. (1985) study] provides evidence of the possibility for an effective non-financially based program to achieve the goals of pretrial release (e.g., improving release rates), while additionally preserving community safety and compelling the defendant to return to court." Thus, although the authors of the Clipper et al. study claim to have evaluated the effectiveness of different pretrial release mechanisms, they could not have, because they limited their inquiry to just studying the impact on court appearance while omitting any analysis of the release mechanisms' impact on release itself.

42. Second, the Clipper et al. study purported to analyze which mechanism of release was the most cost-effective. However, as described above, because the study did not investigate

[4] See the American Bar Association's (2007) discussion, citing to U.S. Supreme Court case law and other federal resources, for why release, court appearance, and public safety are all important goals of the pretrial justice system.

[5] This report condenses Morris' study in 2013, the study's data update in 2014 (Morris, 2014), and later publication of the 2013 study (Clipper et al., 2017) into a single discussion because the studies rely on the same or very similar data from the same jurisdiction (Dallas, Texas) in adjacent years, used the same statistical methods, and yielded near-identical findings.

the effect of secured money bail or any other release mechanism on *release rates*, the costs of detention were not included in the cost-analyses. These costs would need to be included to determine which form of release is the most cost-effective. Details on how to properly compute a pretrial cost-benefit analysis can be found in the Crime and Justice Institute's (2015) publication, "A Cost-Benefit Model for Pretrial Justice."

43. Third, the Clipper et al. study did not use the same failure-to-appear outcome measures for each release mechanism because the jurisdiction (Dallas, Texas) uses a form of bail forfeiture for monetary-related release mechanisms and a finding of "insufficiency" for non-monetary pretrial services bonds. Thus, instead of comparing the different release mechanisms on the same outcome, the study used the unusual methodology of comparing different outcome measures for the different release mechanisms. Therefore, the study's claims about the link between the different release mechanisms and failure to appear could be caused by measuring different outcomes rather than the use of different release mechanisms.

44. Fourth, the Clipper et al. study did not report on the link between the different release mechanisms and releasees' criminal activity, even though the Morris (2013) study did. The Morris study found that secured money bail and the other monetary and non-monetary release mechanisms did not differ on their effects on defendant's criminal activity (and a difference would not be expected given that in Texas a monetary bond amount cannot be forfeited when a releasee is arrested for a new crime, rendering any potential incentivizing value of the monetary bond non-existent).

45. To answer important research questions about the effectiveness of secured money bail and non-secured or non-financial release, three studies that address the important shortcomings of the previously discussed studies were conducted. In 2013, I conducted a study that simultaneously looked at all three outcomes (court appearance, public safety, and release/detention rates). To ensure that the two groups of defendants who were compared to one another (those who were released on secured money bail and those who were released on unsecured recognizance) were the same, I did what no other study had done to date: I matched defendants in the different release-type groups (money bail vs. unsecured recognizance) on their pretrial risk levels as measured by an actuarial pretrial assessment tool—the Colorado Pretrial Assessment Tool. Additionally, because this study included defendants who were on probation at the time of their arrest for an alleged new offense, the findings of this study are likely generalizable to people arrested for alleged misdemeanor violations of probation, such as the plaintiff class in this case.

46. I found that for defendants of all pretrial risk levels (lower, moderate, or higher):

a. Releasing a defendant on an unsecured bond (the court may require the defendant to pay money if he/she fails to appear) is as effective at achieving public safety as is secured money bail.

b. Unsecured bond is as effective as secured money bail at achieving court appearance.

c. Unsecured bond frees up more jail beds than does secured money bail because: (a) more defendants with unsecured bonds are released; and (b) defendants with unsecured bonds have faster release-from-jail times, when compared to secured money bail.

d. The higher the secured money bail amount, the greater the pretrial jail bed use; but the higher money bail amounts did not result in higher court-appearance rates.

e. Among the small percentage (approximately 10%) of people in the study who were at-large on a failure to appear warrant up to 19 months after release from jail, people who had been released on unsecured bond and on secured money bail were at-large at equal rates. This finding indicates that the use of secured money bail did not increase the likelihood that a person who missed court would be located and returned to custody. This finding matched another finding I observed a few years prior to this study, following a brief investigation my staff and I conducted at the request of county-level decision-makers (i.e., local judges, sheriff, city police, defense attorneys, pretrial services) in Jefferson County, Colorado. We found that commercial bail bondsmen rarely, if ever, brought defendants who had failed to appear back to jail or court, as evidenced by: (1) Approximately 99% of arrests of people with outstanding FTA warrants were effected by local law enforcement, with the remaining 1% effected by commercial bail bondsmen; (2) in a one-month sample, out of approximately 250 contacts between bail bondsmen and the local criminal court, 100% involved one of the following: bondsmen asking to be absolved of the bond, asking the court for the defendant's current address or contact information, or asking when their client's next court date was scheduled; not one of the contacts involved a bondsman returning to court a defendant who had failed to appear; and (3) law enforcement leaders (including the Sheriff's Patrol Division Chief, several police chiefs from the county's largest municipalities, and the police chiefs' senior staff members) reported that they could not recall any instance in their careers when a bondsman had contacted them to arrest one of their clients.

f. Finally, as the M. Jones (2013) study showed, over half of the defendants who were incarcerated for the pretrial duration of their case were released to the community almost immediately after their case was dropped or not filed or they were sentenced.

47. Based on these results, I concluded that jurisdictions can make data-guided changes to local pretrial case processing that would achieve their desired public-safety and court-appearance results without unnecessarily using jail beds for people who are neither convicted nor sentenced yet on their pending charges. I reached this conclusion because the data show that *if* financial release conditions of any kind were to enhance defendants' court appearance, unsecured bond would achieve the same benefit, but it would accomplish that appearance rate while

increasing defendants' pretrial / pre-hearing release rates, reducing delays in release times, and using far fewer jail beds, all of which avoid economic and social costs to the local justice system and local community (M. Jones, 2013).

48. Brooker et al. (2014) conducted a separate study to answer the same research questions as the M. Jones (2013) study. Brooker was the primary researcher and author of this study, and I served as a contributor. This study used a dataset and methodology different from the M. Jones (2013) study, but found similar results regarding the comparative link between secured or unsecured money bail, and court appearance, public safety, and release from custody, after studying all three simultaneously in one study.

49. Brooker and I found that for defendants who did not differ in their charge level (i.e., the research groups did not differ in the number of arrestees who had felony or misdemeanor charges) and who were ordered to pretrial monitoring:

a. Judges who more frequently authorized release on unsecured bonds achieved the same public-safety rates (defendants with no new arrest or filing while on pretrial release) as did judges who more frequently required secured money bail as a condition of release.

b. Judges who more frequently authorized release on unsecured bonds achieved the same court-appearance rates as did judges who more frequently required secured money bail as a condition of release.

c. Judges who more frequently authorized release on unsecured bonds had a higher release-from-jail-custody rate than did judges who more frequently required secured money bail as a condition of release, thus using fewer jail beds and avoiding the associated cost to the justice system.

d. Judges who more frequently authorized release on unsecured bonds had faster release-from-jail-custody times than did judges who more frequently required secured money bail as a condition of release, thus using fewer jail beds and avoiding costs (see Brooker et al., 2014).

50. These two latter studies (Brooker, 2014; M. Jones, 2013) show that secured money bail detains more defendants in jail and delays their release, if they are released, than does unsecured bail, and does so without improving either public safety or court appearance.

51. Additionally, Brooker (2017) later found a similar pattern of results in Yakima County, a rural jurisdiction in Washington. For a large number of defendants, judges in Yakima County replaced secured money bail with several practices informed by empirical research (e.g., authorizing release on recognizance instead of secured money bail and/or requiring pretrial monitoring for some released defendants). After these changes were made, the jurisdiction observed an increased pretrial-release rate of 20 percentage points with no decrease in public safety or court appearance. Furthermore, racial/ethnic equity in release was improved, with the release

rates for persons of color increasing significantly to become equivalent to the release rates of white people.

D. Secured Money Bail Is No More Effective at Managing Pretrial / Pre-Hearing Risk Than Is Unsecured Money Bail

52. Some judges use secured money bail in an attempt to manage defendants' pretrial / pre-hearing risk of nonappearance and/or new criminal activity. Nationally, judges or other officials set money bail amounts in one of two ways: (1) They use (and/or authorize the local jail to use) a printed secured money bail schedule that assigns a bail amount to the defendant usually based on the defendant's charge(s); or (2) they assign a secured monetary amount in court or on a warrant based on their own judgment, and not from a printed schedule, after considering the defendant's charge(s) and/or sometimes other factors when they are known, such as criminal history. The money bail amounts used in Giles County, which are apparently determined according to the process described in #2 above, do not effectively manage pretrial / pre-hearing risk for several reasons:

a. First, monetary conditions of release can only potentially incentivize court appearance if the monetary amount is posted and the person is released. If the secured financial condition of *release* operates instead to *detain* because the amount is not posted, then whatever incentive the secured financial condition theoretically provides cannot operate. In contrast, when non-financial conditions (e.g., court date reminders or community-based monitoring, as discussed below) are imposed, they are always operative because they do not impede release. Thus, secured money bail is an irrational way to try to incentivize court appearance when it instead results in a person's detention, and research does not support that it incentivizes appearance even when it is posted and the person is released. Secured money bail results in haphazard releases because, at the time the judicial officer sets the amount, whether and when the person will post the monetary amount is unpredictable and outside the control of the judicial officer. Indeed, the posting often depends on whether the person (or person's family) has enough financial resources to pay the monetary amount. In contrast, when judicial officers order persons released on recognizance with individualized, non-financial release conditions as appropriate, or order persons detained pursuant to federal and state law, the judicial officer is in full control of who is released and when.

b. Second, conditions of release—whether monetary or non-monetary—that are based primarily on the person's charge and criminal history, are not well-tailored to address the individual's pretrial risk of nonappearance or new criminal activity. In contrast, actuarial pretrial risk assessment tools, which account for defendants' charges and a variety of other statistically relevant predictive factors, are more accurate tools for predicting pretrial risk of nonappearance or new arrest. They also help a judicial officer to identify appropriately tailored conditions of release that can be expected to mitigate the particular risk(s) the person presents. If current charge is predictive of pretrial risk of nonappearance or new arrest *at all*, it plays an incomplete and relatively small role compared to other characteristics of

defendants (Laura and John Arnold Foundation, 2016). Moreover, there is no evidence that secured money bail as a condition of release incentivizes law-abiding behavior or is otherwise relevant to public safety. This is especially true in jurisdictions like Giles County and other Tennessee jurisdictions where money bail is not forfeited as a result of new criminal activity. Therefore, there is no legal or scientific basis to require a secured payment as a condition of release if the person's risk is to community safety. In contrast, community-based/pretrial monitoring is designed to reduce both failures to appear and new pretrial arrest, and it does not contribute to unnecessary pretrial detention like secured money bail does.

c. Third, higher secured money bail amounts for more serious charges assume that those defendants pose a greater pretrial risk of nonappearance or new criminal activity, and that higher money bail amounts are needed to manage this risk. As discussed in the Risk Management section below, this assumption is flawed and/or is unsupported by empirical research (see also Gouldin, 2018). Specifically, there is no evidence from any study from within Giles County (of which I am aware) or outside of Giles County that particular money bail amounts, compared to other specific amounts (e.g., $250 vs. $325; $1,000 vs. $800) are either necessary for or effective in reducing pretrial / pre-hearing misconduct. The various money bail amounts used in Giles County are not derived from statistical analyses to determine whether they actually are associated with managing pretrial risk. In contrast, as discussed below, there is empirical support that non-financial release conditions are effective at mitigating the risk of pretrial / pre-hearing misconduct.

E. Nonfinancial Conditions of Release Effectively Manage Pretrial / Pre-Hearing Risk Without the Significant Costs Associated With Secured Money Bail

53. In my professional career, I have reviewed and become familiar with several research studies, most of them published in the past four to five years by reputable academic criminal justice researchers, so that I can provide data-guided technical assistance to decision-makers who want to make their pretrial justice systems more cost-effective through non-monetary risk management practices.

54. Many research studies have collectively shown that court date reminders are the single most effective pretrial risk management intervention for reducing (including preventing) failures to appear. These reminders, which can be delivered through in-person meetings, letters, postcards, live callers, robocalls, text messages, and/or email, have improved court appearance by approximately 30 to 50% (VanNostrand et al, 2011; Cooke et al., 2018; National Center for State Courts, 2017; Bornstein et al., 2012; Rosenbaum et al., 2012; Schnacke et al., 2012).

55. Specifically, Bornstein et al. (2012) and Rosenbaum et al. (2012) tested the effectiveness of different written reminders to improve misdemeanor defendants' court appearance rates in Nebraska. Using bilingual postcards, they found that all reminder messages improved court appearance rates, with messages about the potential negative consequences of failing to appear the most effective. They also found that the reminders also improved appearance rates for defendants

who had low trust in the justice system indicating that the reminder worked well for persons who typically have more failures to appear.

56. Cooke et al. (2018) studied the benefit of two interventions to improve court appearance in New York City: (1) redesign of the summons form so that more relevant information (court date and location; negative consequences of failing to act) is included and more noticeable; and (2) delivery of text reminders of upcoming court dates. They found that the redesigned summons reduced failures to appear by 13%. They also found using a randomized control trial that the text notifications reduced failures to appear by 26%. The notifications included information about the consequences of failing to appear as well as prompts on how to plan to appear (e.g., by marking one's calendar, looking up directions, and allowing for sufficient travel time). Lastly, they found that many warrants were avoided when people who had failed to appear were notified to come in to court before the warrant was issued.

57. I have worked with practitioners in multiple jurisdictions who have implemented such reminder systems. They have reported to me that they prefer reminder systems to secured money bail because, as compared to secured money bail, court reminders are relatively low-cost to provide, do not result in unnecessary and expensive pretrial detention by preventing or delaying defendants' release, are not associated with bias on the basis of race and ethnicity, and/or greatly improve the desired outcome of court appearance.

58. Recent research has also indicated that defendants receiving pretrial / pre-hearing monitoring have fewer failures to appear, with higher-risk defendants and then moderate-risk defendants, respectively, benefitting the most. Pretrial monitoring may also mitigate the risk of new arrests (Bechtel et al., 2016; Danner et al., 2015; Lowenkamp & VanNostrand, 2013; Goldkamp & White, 2006; Austin et al., 1985). Risk-informed and research-based pretrial monitoring is more effective than secured money bail at mitigating the risk of new arrest among higher-risk defendants because secured money bail has no relationship to public safety in almost every state, including Tennessee, and because pretrial monitoring, unlike secured money bail, does not result in unnecessary pretrial detention by preventing or delaying defendants' release. Indeed, Phillips (2012) reported that New York City experienced fewer failures to appear when higher-risk defendants posted money bail (for all other defendants, there was no link between money bail and court appearance rates); however, she concluded after her review of the research literature published at the time, and after a decade of empirical research on New York City's pretrial practices, that any benefit in court appearance demonstrated by these select defendants could also be achieved through their receiving pretrial monitoring, which New York City did not regularly use during the study period.

59. Additionally, government officials from New York City (Stringer, 2018) and San Francisco (Cisneros, 2017) and an independent research and educational institution in Ohio (Buckeye Institute, 2018) have recently produced reports that demonstrate the high financial cost of a pretrial system that relies on money bail compared to a system that uses the non-monetary risk management practices discussed previously. The City and County of Denver has also recently realized a net savings of $2 million per year because of a significant reduction in the use of secured money bail and its increased use of risk-informed pretrial monitoring (Pretrial Justice Institute, 2017). Baughman (2017) estimated cost savings in the tens of billions annually for the United States if current pretrial policies were to be similarly changed.

V. Conclusions

60. Empirical studies show that secured money bail is associated with increased pretrial detention, including for lower-risk defendants, because defendants are either never released pretrial or their release is delayed for days or weeks. This increased pretrial detention is further associated with decreased court appearance and increased rates of arrest; increased longer-term recidivism up to two years later; increased rates of conviction, guilty pleas, and jail and prison crowding; and increased collateral harm to defendants.

61. Empirical studies also show that unsecured bond conditions are at least as effective as secured money bail at achieving court appearance, and more effective than secured money bail at achieving public safety, while doing so with much less pretrial jail bed use and fewer costs to the legal system. Furthermore, interventions such as court date reminders and pretrial monitoring for select defendants have been shown to improve court appearance and/or public safety, and they do so without the unnecessary pretrial jail bed use that accompanies the use of secured money bail. Because of this robust research, many local jurisdictions and states are amending their practices and laws or court rules to reduce or eliminate secured money bail and replace it with cost-effective, research-informed practices that effectively manage defendants' pretrial risk.

62. Because Giles County relies on secured money bail and does not rely on research-based risk management practices, including court date notifications or risk-informed pretrial monitoring, County officials and practitioners are missing the opportunity to reduce unnecessary pre-hearing incarceration, its costs, and its associated harm to the community, the justice system, and defendants, while also increasing court appearance and decreasing pre-hearing criminal activity.

63. Overall, I conclude that pretrial / pre-hearing justice practices that include non-monetary (a) research-informed release and detention policies; and (b) research-based risk management strategies, often when used in combination with other practices,[6] are more effective at simultaneously achieving court appearance, protecting public safety, and maximizing the release

[6] Other supporting practices typically include: law enforcement's use of citations instead of custodial arrests to the maximum extent possible; an experienced prosecutor reviewing law enforcement's arrest documents and making a charging decision prior to the first bond setting; defense counsel's representing defendants at all proceedings to determine conditions of release or detention (*see* Colbert et al., 2002, for research showing the benefits to defendants and the justice system when defense counsel participates in bond setting); judicial officers making an intentional, purposeful release-or-detention decision pursuant to federal and state law; and measurement and evaluation of important process-and-outcome measures to inform potential improvements to future practices. All or many of these practices are recommended by the U.S. Department of Justice's National Institute of Corrections (National Institute of Corrections, 2017) and Bureau of Justice Assistance (Bureau of Justice Assistance, 2014); and the American Bar Association (American Bar Association, 2007). Furthermore, as can be seen in Stevenson (2018), when a jurisdiction implements several non-monetary pretrial practices but leaves secured money bail operational, desired pretrial outcomes such as court appearance and reduced jail use are diminished.

of individuals from pretrial custody when compared to pretrial practices based largely on the use of secured money bail. Additionally, I conclude that the robustness of the research summarized above demonstrates that any local and state justice system in the United States, including the system in Giles County, Tennessee, can cost-effectively replace its secured-money-bail-based pretrial policies and practices with non-monetary ones.

64. Based on the research and reports reviewed above, I express the following opinions:

a) Opinion 1: Pretrial detention for time periods more than 24 hours has adverse consequences for detained persons and for the community.

b) Opinion 2: Pretrial detention for time periods more than 24 hours has an adverse effect on the likelihood that a person will make all court appearances or be law-abiding while on pretrial release.

c) Opinion 3: Secured money bail is no more effective than unsecured money bail or non-monetary conditions of release at assuring appearance in court.

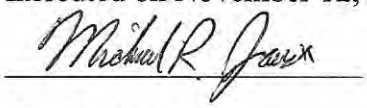
d) Opinion 4: Secured money bail is no more effective than unsecured money bail or non-monetary conditions of release at assuring public safety.

e) Opinion 5: Secured money bail increases pretrial detention, whereas unsecured money bail or non-monetary conditions of release do not.

f) Opinion 6: These findings are generalizable to the post-arrest, pre-hearing context after a person is accused of violating a condition of probation and before the allegation is adjudicated.

I declare under penalty of perjury that the foregoing is true and correct to the best of my ability.

Executed on November 12, 2018



Michael R. Jones

Exhibit D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SHANNON DAVES, *et al.*, On behalf of themselves and all others similarly situated, FAITH IN TEXAS, TEXAS ORGANIZING PROJECT, On behalf of themselves, Plaintiffs, v. DALLAS COUNTY, TEXAS, *et al.*, Defendants.	Case No. 3:18-cv-154

DECLARATION OF STEPHEN DEMUTH, Ph.D, M.A., B.S.

I. Background

1. My name is Stephen Demuth. I have been asked to review empirical studies about forms of pretrial bail, detention, and release in connection with *Daves, et al. v. Dallas County, et al*. I am not being compensated for my preparation of this declaration.

2. I earned a Master's degree in Sociology in 1997 and a Ph.D. in Sociology with a Major in Criminology and a Minor in Methods/Statistics in 2000 from The Pennsylvania State University. I graduated Phi Beta Kappa from Virginia Tech with a B.S. in Sociology and Psychology in 1995.

3. I am a tenured Associate Professor of Sociology at Bowling Green State University, a position I have held since 2006. I was an Assistant Professor of Sociology at Bowling Green from 2000-2006. From 2010-2018, I also served as the Director of Graduate Studies in the Department of Sociology, a doctoral program ranked in the top 20 nationally in research productivity by the National Research Council.

4. My research has primarily focused on the influence of race/ethnicity, gender, and social class on decisions and outcomes at the pretrial and sentencing stages of the criminal case

process. More recently, I have begun to examine the collateral consequences of criminal justice involvement on later-life outcomes. My research on pretrial detention finds that black and Latino arrestees are more likely to be detained pretrial than similarly-situated white arrestees (Demuth 2003). The greater likelihood of detention among non-white arrestees appears to result in part from an accumulation of adverse decisions during the pretrial stage. Minority arrestees are more likely to be denied bail, more likely to receive financial conditions of release, and more likely to be required to pay higher money bail amounts compared to similar white arrestees. But, most of all, pretrial detention is more likely because of a greater inability to "make bail" among non-white arrestees. The use of money bail disproportionately detains arrestees with limited financial means.

5. More recently with a colleague (Dennison and Demuth 2017), we found that the relationship between criminal justice system involvement and social mobility was negative and non-linear. That is, there was an increasingly negative, or accelerating, rate of downward mobility the deeper one's involvement in the system (e.g., conviction versus arrest only). The findings reinforce how readily system involvement undermines future life chances and why we need to be proactive in trying to keep people from being pulled deeper into the system. A detailed summary of my professional experience, training, and subject-matter knowledge is attached to this Declaration.

6. I served as an expert witness in *ODonnell v. Harris County*, No. 4:16-cv-01414 (S.D. Tex.) and *Hester v. Gentry, et al*., No. 5:17-cv-00270 (N.D. Ala). I testified in preliminary injunction hearings in those cases. I provided expert testimony on how the bail system operated in those jurisdictions and also provided opinions about the efficacy of secured money bail.

7. I am not being compensated for my work in this case.

II. Material Reviewed and Methodology

8. I have attached as Exhibit 7 a list of materials that I reviewed in preparing this declaration. The studies I reviewed evaluate the efficacy and effects of different forms of pretrial release and detention.

9. I have reviewed the reports and studies listed in Exhibit 7 and assessed the reliability, accuracy, and generalizability of these studies based on my professional knowledge, training, and experience of statistical methods. My assessment of each of these studies takes into account the statistical models used by the authors, the study design, metrics accounted for (and not) in the statistical models employed by the authors, and the statistical significance of findings in each study, measured by the p-value. The p-value is a widely accepted method of evaluating statistical models and results. The p-value is the probability of finding the observed results when the null hypothesis (i.e., no effect) is true.

10. I have formed opinions about the efficacy and effects of different pretrial detention and release practices based on my review of these studies and my own training and research on these statistical methods and topics. Though my opinions could change in light of new statistical research not evaluated in preparation of this declaration, my opinions are supported by the most robust and reliable empirical findings in current research.

III. Opinions

Opinion 1: The use of secured money bail increases pretrial detention.

11. I am of the opinion that the use of secured money bail increases pretrial detention, i.e., the number of defendants who are detained pretrial and the length of detention, because defendants who are unable to afford secured money bail (and thus, would remain detained prior to trial) would be eligible and able to obtain prompt release if the jurisdiction relied instead on unsecured bond or non-monetary conditions of release.

12. I base my opinion on the following: Jones (2013) showed that release rates were higher for people given unsecured bail than for people required to pay secured bail. While release rates were uniformly high (88% to 96%[1]) for people given unsecured bail across all levels of risk, release rates for people given secured bail dropped from 83% for the lowest risk to 46% for the highest risk. The pre-release payment of money required when a person must post secured bail resulted in a lower likelihood of release. And, as greater amounts of money were required to post secured bonds, release rates dropped. This was not an issue for people who were approved for release on unsecured bail. And, the difference in average time it took to be released on secured bonds as compared to the time it took to be released on unsecured bonds was substantial and resulted in fewer available jail beds at greater cost. This is notable when you consider that at least 50% of never-released, secured bond defendants returned to the community at the time of disposition. Brooker et al. (2014) found similar results. Release rates were higher for people on unsecured bail and the average number of days it took to post bond was considerably greater for people given secured bail.

13. The unaffordability of secured bail for many arrestees translates into higher detention rates for arrestees and higher costs for taxpayers, but with no better court appearance or public safety outcomes than unsecured bail. Furthermore, there is a large and growing literature that demonstrates convincingly that pretrial detention has serious negative consequences for the lives of the detained as well as the broader society (Opinion 2).

Opinion 2: Pretrial detention has severe consequences for the detained and for the community.

14. I am of the opinion that pretrial detention has severe negative consequences for people who are detained and for the community, including (1) increasing the likelihood of a defendant receiving a greater punishment, including an increased likelihood of conviction, and, when convicted, an increased likelihood of being sentenced to prison, given a longer sentence, and higher court fees; (2) increasing the likelihood of wrongful convictions; (3) increasing the likelihood of recidivism while released pretrial and after conviction; and (4) increasing the cost of jailing individuals both pretrial and after conviction, to the extent a longer sentence is likely.

[1] There are a variety of reasons that the release rate for people approved for unsecured bonds does not equal 100%. For example, some of those people may have had holds or immigration detainers, preventing their release, or they may have pled guilty before actually being released. The study does not identify the specific reasons, but the sub-100% release rates for this group are not unexpected.

15. I base my opinion on the following: There is a large and growing research literature that shows quite robustly that pretrial detention has deleterious consequences for the detained, the community at large, and the criminal justice system itself. Several recent studies have been able to leverage the naturally-occurring random assignment of cases to judges or the random nature of when crimes are committed to make what are essentially causal claims about the effect of pretrial detention on various outcomes. Heaton et al. (2017) analyzed misdemeanor cases in Harris County, TX using an instrumental variable approach that took advantage of the essentially equivalent distribution of arrestees across days of the week. The instrumental variable technique is a popular approach in statistics and econometrics for estimating causal relationships when controlled experiments are not feasible or ethical. It relies on a variable (the instrument) that induces variation in another variable (the "treatment"), but has no direct effect on the outcome variable of interest. Despite average case characteristics (including bail amount) being statistically the same across the middle days of the week, it was clear that defendants with bail hearings on Tuesdays were significantly less able to obtain pretrial release than defendants with bail hearings on Thursdays, likely because of greater difficulty accessing friends with cash during earlier days of the week. In this study, the day of the week on which the bail hearing was held was the instrumental variable which was related to the likelihood of remaining detained pretrial (the treatment). The authors then examined a number of outcomes (e.g., the likelihood of future offending) that had no direct relationship to the day of the week (instrument) other than through the variation of the treatment.

16. The easiest way to visualize the natural experiment is to imagine that defendants are randomly assigned to two groups, Tuesday and Thursday. The average characteristics of defendants with bail hearings on Tuesday are statistically equivalent to those of defendants with bail hearings on Thursday. The only difference between the two groups is the likelihood of obtaining release; people with hearings on Tuesday are less likely to obtain release. The "pretrial-detention disadvantage" for Tuesday is the "treatment" compared to Thursday, which serves as the "control group." Because the groups on those two days are statistically equivalent except for their likelihood of pretrial release, the only logical explanation for any differences in later outcomes between the two days can be the difference in detention. Using this natural experiment approach, they found that detained defendants were 25% more likely than equivalent released defendants to plead guilty. Detained defendants were 43% more likely to be sentenced to jail and received sentences that were twice as long. Defendants detained pretrial were more likely to commit crimes upon release than defendants released pretrial. Heaton et al. (2017) used a powerful and novel research design along with many statistical "checks" to ensure robustness of results, providing among the strongest possible evidence that a causal relationship exists between pretrial detention and later case and criminal outcomes. Furthermore, the authors suggest that better pretrial release policies in Harris County could save millions of dollars, increase public safety, and reduce wrongful convictions.

17. Stevenson (2017) and Gupta et al. (2016) also used natural experiment designs to examine the effect of pretrial detention on case outcomes in Philadelphia and Pittsburgh, PA. They relied on a fortunate aspect of the way cases are assigned to judges: they are assigned randomly. In these studies, the judges have different propensities to set high bail amounts that result in higher levels of pretrial detention. So, while the average characteristics of cases assigned to judges are statistically equivalent, the likelihood of pretrial detention varies by judge. Stevenson (2017) found that pretrial detention led to a 13% increase in guilty pleas among defendants who otherwise would

have been acquitted or would have had their charges dropped. Pretrial detention resulted in non-bail court fees that were 41% higher than the fees for people who were released, and in sentence lengths that were 42% longer. Gupta et al. (2016) showed that the use of money bail increased the likelihood of conviction by 12 percent. These robust findings are consistent with the findings of other studies. Using multivariate regression analysis, Phillips (2012) found that pretrial detention had an adverse effect on every case outcome that she examined after controlling for relevant legal and extralegal factors. Defendants who were detained pretrial were more likely to be convicted, less likely to have their charges reduced, and more likely to be sentenced to jail or prison than their similarly situated released counterparts.

18. There are many other studies that add to the overwhelming empirical evidence that pretrial detention creates serious negative consequences for the detained and the community that would not occur with pretrial release. All else being equal, detention is more deleterious to the arrestee, more criminogenic for the community, and costlier for the criminal justice system and taxpayers.

Opinion 3: Pretrial detention for more than 24 hours increases the likelihood that the person will fail to appear or will engage in new criminal activity while on pretrial release.

19. I am of the opinion that pretrial detention for more than 24 hours increases the likelihood that the person will fail to appear or will engage in new criminal activity while on pretrial release.

20. I base my opinion on the following: Although there is less research focusing on the effect of pretrial detention during this initial window of time, the totality of the evidence and my knowledge of the broader literature on the collateral consequences of criminal justice involvement strongly suggest that every effort should be made to release arrestees as soon as possible after contact. Arrest and detention are highly disruptive and can quickly snowball into negative consequences that "punish" the detainee, hurt their future life chances, and create the conditions for future FTA and criminal activity. Lowenkamp et al. (2013a) showed that after controlling for relevant legal and extralegal factors, arrestees detained for 2-3 days were slightly more likely to miss court appearances than were arrestees detained for only one day. The effect was aggravated for the lowest-risk arrestees: among the lowest-risk arrestees, the odds of not appearing were 22% higher among those who were held 2-3 days instead of one day. They found similar results with respect to rates of new criminal activity ("NCA") while on pretrial release. Particularly for the lowest-risk arrestees, the odds of NCA were 39% higher among people detained 2-3 days as compared to the odds of NCA among people detained one day. In sum, although there are limited studies that examine the effect of the shortest periods of pretrial detention on FTA and future offending, I believe the available evidence suggests that detention for longer than 24 hours is likely to contribute to higher levels of FTA and NCA, especially for the lowest risk arrestees.

Opinion 4: Simple court-date-notification systems such as text messaging and call services decrease FTA rates among people released pretrial.

21. There is considerable evidence that court date reminders are effective at increasing appearance rates among people released pretrial. For example, Bornstein et al. (2013), using an experimental design, found that written reminders to appear in court and about the consequences

of nonappearance reduced FTA rates substantially. They also showed that, even though defendants who had more confidence in and felt more fairly treated by the criminal justice system were more likely to appear in court, the effectiveness of reminders was greatest for people with the lowest levels of trust in the courts. Nice (2006) used a quasi-experimental design to show that phone call reminders significantly reduced nonappearance in court. Even without full implementation and only a fraction of all possible calls because of a lack of available phone numbers, the FTA rate was reduced by 37% overall and by between 43% and 45% for people who successfully received calls. The program resulted in significant net cost savings. Rosenbaum et al. (2012) also found significant FTA rate reductions and cost savings with a postcard reminder system. More recently, with technological advances and the wide availability of cell phones, there is growing evidence of the effectiveness of text message reminders to reduce nonappearance. Cooke et al. (2018) used an experimental design to test the effectiveness of text messages to reduce FTA rates and found that the most effective reminder messaging reduced FTAs by 26%. This was in addition to improvements resulting from a redesign of the summons form sent to defendants (which yielded an additional 13% reduction in FTAs). The most effective messaging included information about the consequences of not showing up, what to expect in court, and plan-making information. This messaging helps to overcome many of the reasons that people fail to appear in court, including forgetting, misunderstanding that they need to go to court even for more minor offenses, and overweighing the short-term hassle of appearance and underestimating the long-term consequences of nonappearance. Court notification systems represent a relatively easy and cost effective strategy to reduce FTA rates pretrial.

Opinion 5: Secured money bail is no more effective than unsecured bail or non-monetary conditions of release at promoting appearance in court.

22. I am of the opinion that secured money bail is no more effective than unsecured bail or non-monetary conditions of release at promoting appearance in court.

23. I base my opinion on the following: There are several recent empirical studies that compare the effectiveness of different kinds of release in assuring appearance in court. The majority find no difference in the effectiveness of secured and unsecured bonds (Jones 2013; Brooker et al. 2014; Lowenkamp et al. 2013a), one provides mixed findings concerning the difference between secured bonds and release on recognizance (Phillips 2012), and one problematic study finds that secured bonds are more effective than release without any unsecured or non-financial conditions (Clipper et al. 2017). The balance of the evidence supports the conclusion that secured money bail is no more effective than unsecured bail or non-monetary conditions at assuring appearance in court. Furthermore, unsecured bonds and non-monetary conditions provide additional benefits (e.g., higher rates of release) that help to reduce the negative collateral consequences of pretrial detention (discussed above in Opinion 2).

24. Looking first at the studies that show no difference, Jones (2013) examined differences in court appearance rates between arrestees released on secured and unsecured bonds in ten Colorado counties. After controlling for pretrial risk to ensure an apples-to-apples comparison, he found no statistical difference in average appearance rates between the unsecured bond and secured bond groups. This was notable in that the use of unsecured bonds had the added advantage of higher and faster release rates thus freeing up more jail bed space. Brooker et al. (2014) found similar results in a more focused study of Jefferson County, CO appearance rates.

Taking advantage of the near-random assignment of cases to judges, they showed that the average court appearance rate did not differ statistically between judges who issued more secured bonds and judges who issued more unsecured bonds. They also found that unsecured bonds facilitated pretrial release. This is important in light of multivariate statistical regression findings by Lowenkamp et al. (2013a) that showed in Kentucky that detaining people for longer periods of time pretrial increased the risk of failure to appear before adjudication, especially for the lowest risk arrestees.

25. Analyzing cases in New York City courts, Phillips (2012) provided mixed results. Her study compared arrestees released on recognizance (ROR) with those released on money bond. She found no difference in failures-to-appear (FTA) between ROR and secured money bond cases for low-risk arrestees. However, high-risk arrestees released on money bond had lower FTA rates than high-risk ROR arrestees. But there is an important limitation to this conclusion about high-risk arrestees: the arraignment decisions in New York City were generally limited to "straight" ROR (with no supervision or non-financial conditions) or secured money bail. As such, the conclusion did not take into consideration any "middle ground" options like unsecured money bail or non-financial release with restrictions. Without a comparison to these middle-ground options, the Phillips study does not provide a meaningful analysis of whether other non-financial conditions, or unsecured money bail, may have been equally effective and is therefore not inconsistent with the above studies.

26. Lastly, Clipper et al. (2017) found that arrestees in Dallas County, TX released on commercial bonds had better FTA outcomes than arrestees released on pretrial services bonds, which is a type of personal recognizance bond (Morris 2013). Before discussing my serious concerns about the reliability and validity of this study's findings, I have some fundamental concerns about the measurement of the key outcome.

a. Dallas County did not track FTAs (Morris 2013). The study is predicated on using bond "forfeiture" as a proxy for FTA. There are numerous fatal flaws with this proxy. While forfeiture findings were used to indicate FTAs for surety bonds, a proprietary data-scraping algorithm was used to identify when a pretrial services bond was held "insufficient." That is, there was no record of an FTA for pretrial services bonds. There is no way to verify the accuracy of this proprietary algorithm, which Morris created. I have serious concerns about the rigor of Morris's analysis for the reasons explained by Judge Rosenthal in her April 2017 preliminary injunction decision.

b. Perhaps more importantly, many FTAs did not result in forfeitures at all, and forfeitures are not a good proxy for FTAs because different judges may have very different practices relating to forfeitures. For example, my analysis in Harris County showed that judges treated those released on secured bonds less harshly than those released on unsecured bonds with respect to forfeitures. *See* Exhibit 12, Doc. 402-1, 8–10; Doc. 402-4, 2–4, 5. FTAs represent an objective data point, while forfeitures represent a decision based on judicial discretion. In sum, a fair comparison of FTAs for commercial and pretrial services bonds cannot be made in

this study because there was insufficient underlying data, and the shortcuts used to approximate the data are questionable and were not shown to be reliable.

27. Most importantly, even if FTAs were measured accurately in Dallas County, the results of this study would not tell us anything about the relative effectiveness of secured and unsecured bonds because the study has a more basic flaw: pretrial services bonds in Dallas County were not unsecured bonds, but rather recognizance bonds involving no penalty for nonappearance. Thus, the study does not, even on its own terms, purport to compare secured bonds with unsecured bonds. This same flaw is significant for another reason: Dallas County did not employ other alternative non-financial conditions (such as pretrial supervision, monitoring, text messaging, court reminders, etc…). Thus, the study does not purport to compare secured bonds to pretrial supervision or to compare secured bonds to even the most basic non-financial conditions of release, such as phone and text message reminders, let alone the wide range of alternative non-financial conditions available to modern jurisdictions. Thus, even if the study were methodologically rigorous—and it does not appear to be—it would not provide any meaningful evidence on the question of whether secured bonds outperform available alternatives.

28. Turning to statistical limitations, Clipper et al. (2017) used an approach called propensity score matching to attempt to match cases released on the different bond types across other legal and extralegal case characteristics. The goal was to create "equal" groups and to compare the groups' respective FTA rates. While this method of statistical analysis can, in theory, be quite sophisticated, as a general matter, it is not clear from the evidence provided that the matching was indeed successful. For example, the authors did not provide basic information, typically provided by researchers who use propensity score matching, about the percent of cases that were successfully matched, the equivalence of covariates between the two matched groups, or the size of the final analytic sample used in the analysis. Additionally, the authors used very stringent criteria to match commercial bond and pretrial services bond cases, which likely resulted in a significant percentage of cases going unmatched and, thus, being excluded from the analysis. We therefore cannot tell whether the desired matching was achieved and produced meaningful results.

29. Furthermore, based on my training and experience, I do not believe the statistical technique would be able to adequately overcome the biased process by which cases in Dallas County are "selected" into the commercial and pretrial services bond groups. In most jurisdictions across the country, the decision to assign a secured or unsecured bond, or non-monetary conditions is made at the same time. At the time of this study, the decision in Dallas County was sequential (Morris 2013). Arrestees only became eligible for pretrial services bonds after they had waited in jail overnight (or over the weekend) because they were unable to pay commercial money bail. Furthermore, the pretrial agency in Dallas consisted of only four people working during normal business hours and did not provide any meaningful services or use any non-financial conditions. Also, Dallas County did not use a risk assessment tool to assist in making release decisions. As such, the higher bond-forfeiture rates (Dallas County did not track actual failures to appear) of arrestees released on pretrial services bonds are not surprising, and are not particularly informative about the relative effectiveness of secured and unsecured bonds. Frankly, this unusual system seemed designed to provide commercial bail bondsmen first pick of the least "risky" arrestees,

leaving only the poorest arrestees most in need of services and alternative assistance eligible for pretrial services bonds.

30. Thus, there is no valid basis to conclude that the authors could eliminate this bias through the use of propensity score matching.

31. For all of these reasons, I have no confidence in the ability of the Clipper et al. (2017) findings to inform our understanding of the relative effectiveness of secured and unsecured bonds, let alone the relative effectiveness of secured money bail and other forms of release on various alternative non-financial conditions.

32. Overall, the evidence supports the conclusion that secured money bail is no more effective than unsecured money bail in assuring appearance in court. While the findings of the studies reviewed above are particular to their specific jurisdictions (Colorado, Kentucky, New York City), they suggest that unsecured bail and non-financial conditions of release are likely to be as effective as secured money bail across multiple jurisdictions.

Opinion 6: Secured money bail is no more effective than unsecured bail or non-monetary conditions of release at promoting public safety.

33. I am of the opinion that secured money bail is no more effective than unsecured bail or non-monetary conditions of release at promoting public safety.

34. I base my opinion on the following: Two of the studies I discussed in Opinion 5 (Jones 2013, Booker et al. 2014) also compared the effectiveness of unsecured and secured bonds in achieving public safety. Using the same methodologies as those used to examine court appearance, the authors found that secured money bail is no more effective than unsecured bail at assuring public safety. Jones (2013) showed that unsecured bonds offered the same public safety benefits as secured bonds at each of four levels of risk as determined by the Colorado Pretrial Assessment Tool (CPAT). That is, there was no statistically significant difference in the percentage of defendants charged with a new crime during pretrial release. Brooker et al. (2014) found that there was no statistical difference in the "public safety rate" between two groups of judges with different propensities for assigning secured bonds. On average, the judges using more secured bonds did not have lower arrest or new filing rates than judges using more unsecured bonds.

35. Another study I discussed earlier (Lowenkamp et al. 2013a) speaks to the relationship between the length of pretrial detention and new criminal activity in Kentucky. It is relevant in light of our knowledge that arrestees with secured bonds are less likely to be released (and, if released, are released less quickly) than those with unsecured bonds (see Opinion 1). Lowenkamp et al. (2013a) found that longer periods of pretrial detention were associated with a greater likelihood of new criminal activity pending trial. Among the lowest risk arrestees in particular, individuals detained 2-3 days are 39% more likely than people released within a day to be arrested for new criminal activity during the pretrial period; individuals detained for a month before being released are 74% more likely than those release within a day to be arrested for new criminal activity during the pretrial period. These findings are consistent with a report from Heyerly (2013) that showed that while Kentucky significantly increased the proportion of

defendants released on non-financial conditions, the state saw a decrease in the proportion of defendants re-arrested following pretrial release.

36. In sum, the evidence supports the conclusion that secured money bail is no more effective than unsecured money bail at assuring public safety. And, as noted in Opinion 5, though the studies reviewed above are particular to specific jurisdictions (Colorado, Kentucky), they suggest that unsecured bail and non-financial conditions of release are likely to be as effective as secured money bail across multiple jurisdictions. In any event, because Texas law does not permit forfeiture of money bonds for the commission of a new crime, it would seem impossible for secured money bonds to incentive people to remain crime-free because there is not even a theoretical risk of losing money for committing a new crime while released on secured money bond.

Additional Studies

37. Attached to this declaration as Exhibit 13 is a true and correct copy of the study: Emily Leslie and Nolan G. Pope, The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from NYC Arraignments, published in the peer-reviewed journal, *Journal of Law and Economics*, in 2017. The study measured the impact of pretrial detention on case outcomes in over one million cases in New York City. The study found that being pretrial detention increases the probability of conviction by 13 percentage points for felony defendants. It also found that pretrial detention increases the chances that a person would commit a crime within two years of disposition.

38. Attached to this declaration as Exhibit 14 is a true and correct copy of the study: Kristian Lum, Erwin Ma, and Mike Baiocchi, The causal impact of bail on case outcomes for indigent defendants in New York City, published in the peer-reviewed journal, *Observational Studies*, in 2017. The study measured the impact of pretrial detention on case outcomes in over 60,000 cases handled by the New York Legal Aid Society in 2015. The study found strong evidence of a causal relationship between setting bail and case outcomes. Specifically, it found that setting bail results in a 34% increase in the likelihood of conviction for the cases in their analysis. And the effect of setting bail is likely stronger among vulnerable populations, such as those who rely on public defenders.

I declare under the pains of perjury that the foregoing is true and correct to the best of my ability.

7-16-18
Date

Stephen Demuth, Ph.D., M.A., B.S.

Exhibit E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SHANNON DAVES, *et al*., On behalf of themselves and all others similarly situated, FAITH IN TEXAS, TEXAS ORGANIZING PROJECT, On behalf of themselves, Plaintiffs, v. DALLAS COUNTY, TEXAS, *et al.*, Defendants.	Case No. 3:18-cv-154

DECLARATION OF JUDGE TRUMAN MORRISON

Background

1. My name is Truman Morrison. I am a Senior Judge on the Superior Court of the District of Columbia. In 1971 I began work as a lawyer at the District of Columbia Public Defender Service. In 1975, I was named head of the trial division where I supervised 40 lawyers trying cases ranging from delinquency matters to first-degree murder. I worked in that position until my appointment to the District of Columbia Superior Court by President Jimmy Carter in 1979.

2. In my thirty-seven continuous years as a trial judge, I have handled family, domestic violence, civil, and criminal cases. I sit regularly as a Senior Judge, hearing mainly criminal cases.

Overview

3. In this affidavit, I will give an overview of the pretrial justice decision-making system in Washington, D.C. I will explain how Washington, D.C.'s pretrial system operates effectively and safely without using money bail to decide detention or release of defendants

based on their wealth-status. This overview is based on my 45 years of experience with the court as well as statistics from the District of Columbia's Pretrial Services Agency ("PSA").

4. I am receiving no compensation for my preparation of this affidavit.

Analysis

5. Our bail law in Washington, D.C. is rooted in the premise that a defendant's inability to pay money bail should not determine whether he is detained before trial. Release or detention prior to trial is instead to be based upon a determination of whether and which conditions of release are adequate to meet the government's legitimate interests in court appearance and community safety.

6. Prior to 1994, Washington, D.C. operated its pretrial decision-making scheme in largely the same way that virtually all jurisdictions now operate: defendants were given arbitrary amounts of money as bail amounts, and those who could afford to pay the amount were released regardless of risk. Those who could not pay remained in jail, also regardless of risk. In other words, the system was totally based on wealth-status.

7. In 1994, the D.C. Code was amended to state that financial conditions could be utilized to reasonably assure appearance only if they do not result in pretrial detention. In other words, if money is used, defendants are entitled to a bond they can meet. It has always been our law that money may never be used to attempt to assure community safety. In practice today, financial conditions of release are almost never used for any purpose.

8. The District of Columbia now operates an "in or out" pretrial decision-making system. Decisions about release or detention are made transparently with open courtroom discussions of any accused person's actual potential risk. The court employs a preventive detention statute that provides a Due Process-appropriate hearing for fairly determining who is too dangerous or too much of a flight risk to be released. The use of preventive detention has been appropriately limited to less than 10–15% of all defendants. Everyone else is released on his or her promise to appear in court or on conditions supervised by our Pretrial Services Agency. Neither money bond nor private bail bond companies play any role in release decision-making (although both are technically legal in Washington today).

9. The overall post-arrest process for arrestees in Washington, D.C. is as follows: After an arrest, law enforcement agencies process arrestees at one of the city's local police districts. Arrestees charged with nonviolent misdemeanors may receive a citation release from the police station, with a future court date provided. Otherwise, after processing, arrestees are transferred to the court for an arraignment (for misdemeanors) or presentment (for felonies) hearing. At this initial appearance, the judge considers whether the defendant should be released or briefly detained pending a formal detention hearing within three to five days. After a formal hearing, the judge can order a person detained pretrial if she concludes that a defendant presents an unmanageable risk of flight or harm to the community.

10. Our Pretrial Services Agency conducts a risk assessment for defendants to assist judicial officers in release/detention determinations. The risk assessment process consists of two components: conducting a background investigation and interviewing defendants. PSA interviews defendants and collects and verifies information on each defendant's community ties, criminal history, physical and mental health status, substance abuse, and current supervision status with probation or parole agencies. It also uses a scientifically determined set of factors to assess risk. This process takes place for most defendants within 24 hours of arrest.

11. When ordered to do so, PSA supervises defendants released during the pretrial period by monitoring their compliance with certain conditions of release and helping to assure that they appear for scheduled court hearings. There are a number of programs and supervision conditions that can be assigned to defendants based on their risk and needs. Last year, we released about one third of arrested persons with no special supervision conditions, asking them only to return to court and not break the law.

12. In the District of Columbia, in recent years we release between 85% and 92% of all arrestees, a much higher percentage than all but a few court systems in the United States. In 2017, 94% of arrestees were released, and 98% of released arrestees remained free from violent crime re-arrest during the pretrial release period. 86% of released defendants remained arrest-free from all crimes. 88% of arrestees released pretrial made *all* scheduled appearances during the pretrial period. The District accomplishes these high rates of non-arrest and court appearances, again, without using money bonds.

13. Our system, simply stated, seeks to scientifically assess risk and then attempts to mitigate that assessed risk using a variety of lawful, science-based strategies, maximizing release. For those relatively few persons for whom risk cannot be effectively mitigated while released, we order bondless detention pending an expedited trial. There is no guesswork as to their status. Rich or poor, they are detained. Last year, we preventively detained only 6% of all arrestees.

14. We have learned that we have numerous tools at our disposal to maximize court appearance and public safety for the vast majority of defendants without resorting to detention. Stay-away order (for example, in shoplifting, assault, or domestic violence cases); counseling; drug, mental health, and alcohol treatment programs; reporting to pretrial services; mail, phone and text message reminders of court dates; drug testing; and electronic and GPS monitoring can all be employed to reasonably assure high rates of court appearance and public safety.

Conclusion

15. Washington, DC operates a substantially safe, effective, transparent, and fair system of pretrial justice decision-making. We have empirically demonstrated that this can be done over time without the use of money bond.

I swear under penalty of perjury that the foregoing is true and correct to the best of my ability.

Judge Truman Morrison

Date 7/15/18

Exhibit F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SHANNON DAVES, *et al*., On behalf of themselves and all others similarly situated, FAITH IN TEXAS, TEXAS ORGANIZING PROJECT, On behalf of themselves, Plaintiffs, v. DALLAS COUNTY, TEXAS, *et al.*, Defendants.	Case No. 3:18-cv-154

DECLARATION OF JACOB SILLS

1. My name is Jacob Sills. I earned an M.B.A. from the Wharton School, University of Pennsylvania, and a B.A. from Cornell University.

2. I have previously worked as a Senior Associate with TEM Capital, a private equity fund focused on renewable energy and as an Investment Banking Analyst at Bank of America Securities. In each of these positions I conducted financial analysis, provided strategic advice, and analyzed potential investments.

3. I am Co-Founder and CEO of Uptrust, a company that uses cutting edge technology and behavioral research to help people charged with crimes show up for their court dates.

4. Our research has shown that the vast majority of people who miss court have not fled the jurisdiction. Instead, they miss court for reasons that can be solved: for example, they forgot the court date, were unable to secure transportation or child care, were unable to take time off work or forgot to ask in advance, were scared or confused about going to court, or did not understand the consequences of failing to appear.

5. Failure-to-appear risk is different from flight risk. Although flight risk is difficult to mitigate, most FTAs, and the bench warrants that issue as a result of failing to appear, can be avoided if assistance is provided to defendants to help them get to court.

6. Uptrust accomplishes this by sending text message reminders to people's cell phones.

7. In the counties where we are operating, we integrate our software with the jurisdiction's pre-existing case management system. Arrestees provide their name, cell phone number, court date and time, whether they have a daily obligation, whether they have children under the age of 10, and how they plan to get to court (or if they are not sure).

8. Using that information, Uptrust sends a series of text messages to defendants about a week, and then a few days, before their court dates, reminding the person of the court date and the fact that failing to appear could result in a bench warrant.

9. Uptrust is a fully customizable system. It can text referrals and reminders about anything. For example, if someone lacked employment, Uptrust can refer them to county job opportunities. If a defendant has a young child, Uptrust can refer them to a local childcare facility. In two counties, Uptrust alerts defendants with children of the availability of childcare at the courthouse.

10. The technology permits two-way communication, so the person can text back to provide information about any conflict that has come up or any anticipated problems getting to court. That response will be forwarded to a case manager or the defendant's lawyer. In the event that the client does not have an attorney, Uptrust can send 1-way text reminders to the client.

11. Uptrust has historically worked with county and statewide public defender and alternative defender offices. However, Uptrust can also work with any assigned counsel, assuming it receives accurate information on the attorney and their client.

12. This simple technology has provided dramatic improvements in appearance rates in jurisdictions where Uptrust is currently operating.

13. In Contra Costa County, CA (population: 1,049,025), the FTA rate of Public Defender clients receiving text messages decreased from approximately 20% to below 5%. A 95% court appearance rate is a stellar accomplishment given my examination of typical appearance rates in American jurisdictions.

14. In Luzerne County, Pennsylvania (population: 320,918), the FTA rate of low-income defendants (clients of the public defender) dropped from an estimated 15% to less than 6%. Put another way, people showing up for court increased from approximately 85% to 94%.

15. Uptrust engages low-income defendants; approximately 30% of recipients of our text reminders reply to our messages. The top responses from defendants are "Thank You" and "Ok."

16. Uptrust is expanding its services to a variety of new jurisdictions, large and small, across the United States. We recently launched with the Office of the Public Defender of Maryland to provide court reminders to Baltimore (population: 611,648). In April 2018, Uptrust launched its service with the statewide Virginia Indigent Defense Commission in two locations, Richmond (population: 223,170) and Petersburg (population: 32,420). Uptrust is currently completing integrations with 7 counties, including Spokane, WA (population: 471,221) and San Bernardino, CA (population: 2,035,210). Uptrust is currently in discussions with several other counties and states to provide its services. By 2019, Uptrust hopes to be operational in jurisdictions representing 25 million in population and with over 500,000 low-income defendants per year.

17. Uptrust utilizes software to remind people of court; this allows counties and states to provide pretrial assistance at a cost much lower than probation or court-run pretrial services / supervision. The cost to operate our services is $2 per client inclusive of unlimited messaging and referrals. We also charge a one-time fee of $20,000 to customize our service to a given location and integrate with the local case management system(s).

18. Eliminating bench warrants can save a county money by eliminating the costs associated with the subsequent, avoidable incarceration. Also, law enforcement can spend more time on higher-priority matters when the number of people arrested for non-violent, technical violations such as an FTA is minimized.

19. Around the country, Uptrust is collaborating with local community bail funds and participatory defense networks. In any jurisdiction where it operates, Uptrust will donate a version of its software to non-profit organizations helping people attend court.

20. We are also preparing to provide additional services in jurisdictions where we operate, such as connecting people with free rides to Court or childcare on the day of court. Even in a large county such as Dallas, the cost of coordinating these services (to only those that require assistance) is far cheaper than the cost of incarcerating someone for days or weeks prior to trial. Uptrust has experience identifying which defendants require extra assistance.

21. Attached to this declaration as **Exhibit 54** is a true and correct copy of the study: Brice Cooke et al., *Using Behavioral Science to Improve Criminal Justice Outcomes Preventing Failures to Appear in Court*, Ideas41 and The University of Chicago Crime Lab. The study found that redesigning summons forms to promote plain, understandable language reduced the FTA rate by 13%, while text message court date reminders reduced FTA rates by as much as 26%.

22. Attached to this declaration as **Exhibit 55** is a true and correct copy of the paper: Pretrial Justice Center for Courts, *Use of Court Date Reminder Notices to Improve Court Appearance Rates*, Pretrial Justice Brief 10, 2010. The paper discusses how in Coconino County, AZ, live phone call reminders reduced FTA rate from 25.4% to 5.9% when caller received the live call. In Jefferson County, Colorado, a pilot court reminder program increased court appearance rate to 92%.

23. These two exhibits further suggest the value of straightforward reminders to improve court appearance rates.

I declare under penalty of perjury that the foregoing is true and correct.

Jacob Sills — 7/16/18

Jacob Sills — Date