



ABA Restoring the Presumption of Innocence Project

Tips for Defense Counsel to Improve Pretrial Release

Advocating for a pre-trial risk analysis

- Only 10% of jurisdictions currently use one, so you may need to advocate for it.¹
- It doesn't require an interview.¹
 - Saves time
 - Saves money
- Assesses defendants based on their prior records.
 - Pending cases, prior convictions, active warrants¹
- There are four main principles to be used within effective classifications: risk principle, needs principle, responsivity principle, and professional discretion principle.¹²
- It is unlikely for a single instrument to have universal applicability across various offending populations, therefore there is a necessity to validate risk assessment instrument to each specific target population within an agency or jurisdiction.¹²
- The risk analysis creates a risk-level, the risk levels help predict Failure to Appear (FTA) and New Criminal Activity (NCA) levels
 - The lower the risk level of assessed, the lower the likelihood of FTA/NCA¹
 - By having an assessment will reveal the risk levels, for defendants who are assessed to be low risk or low-moderate risk, they have less than a 10% or 16% (respectively) likelihood of FTA/NCA.¹
 - Even having been assessed as a moderate risk, the FTA/NCA likelihood is only 25%.¹
- A defendant's odds of FTA were .40 times lower in counties that used quantitative risk assessments rather than qualitative risk assessments. Even a mix of quantitative and qualitative measures lowers risk of FTA compared to just qualitative risk assessments. Additionally, defendants are also less likely to be arrested.⁵
 - Pretrial programs that use a combination of objective and subjective criteria in risk assessment has increased from 42% in 2001 to 64% in 2009.⁶

- Despite a broader definition of “pretrial failure”, violation rates declined or remained stable since the implementation of objective risk assessments.⁵
- Structured assessment tools predict pretrial misconduct and risk of re-offense more effectively than professional judgment alone.⁷
- These statistics, coupled with the research about pretrial detention and its long-lasting repercussions can be used to persuade a judge to avoid pretrial detention
- Defendants who are charged with violent, property, or drug offenses are approximately 2.4 times as likely to FTA as defendants who are charged with a public order offense.⁸
- Defendants who are charged with a violent, property, or drug offense are approximately 1.5 times as likely to be rearrested as defendants who are charged with some other public order offense.⁸
- Defendants whose most serious charge is a misdemeanor are approximately 1.5 times as likely to FTA as defendants whose most serious charge is a felony.⁸
 - So a felony charge doesn’t necessarily mean they are more likely to FTA. This could be used to counter an unwillingness to release an accused facing felony charges.
- Defendants who have three or more prior misdemeanor convictions are approximately 1.6 times as likely to FTA as defendants who have less than three prior misdemeanor convictions.⁸
- Defendants who do not have three or more prior felony convictions are approximately 2.2 times as likely to FTA as defendants who have less than 3 felony convictions.⁸
- Defendants who have two prior FTAs are approximately 1.5 times as likely to FTA as defendants who have less than two prior FTAs.⁸
- Defendants who have two prior FTAs are approximately 2.4 times as likely to be rearrested as defendants who have less than two prior FTAs.⁸
- Defendants who have three or more prior FTAs are approximately 2.5 times as likely to FTA as defendants who have less than three prior FTAs.⁸
- Defendants who have three or more prior FTAs are approximately 2.9 times as likely to be rearrested as defendants who have less than 3 prior FTAs.
- Defendants who are under 21 at the time of preliminary arraignment are approximately 1.7 times as likely to FTA as defendants who are 21 or older at the time of the preliminary arraignment.⁸
- Defendants who are under 21 at the time of the preliminary arraignment are approximately 2.2 times as likely to be rearrested as defendants who 21 or older at the time of the preliminary arraignment.⁸
- A 12% reduction in FTA rates in the cited and released defendants during a one year period has a potential dollar value of approximately of \$90,000 in increased revenues to the Justice Court.¹¹
 - This comes from a reduction in warrants issued and jail bed days saved.¹¹

- Since each FTA arrest currently experiences an average of 7.7 days in custody, the potential jail bed savings could be close to 1,000. At a value of \$60 per bed (rental value), the savings to the jail district could be \$60,000. In addition to calculable dollar value, the cost in lost time resulting from FTAs, extra paperwork, warrants issuance, follow up letters, sending notices to the DMV and execution of the warrants.¹¹
- There is no significant gender difference in the likelihood of pretrial misconduct.¹⁵
- There is no significant difference between African-Americans v. whites in the likelihood of pretrial misconduct.¹⁵
- The number of prior felony convictions is not a significant predictor of pretrial misconduct.¹⁵
- Only 5 percent of all arrestees ultimately go to prison, yet almost 50 percent of those arrested are incarcerated pending the outcomes of their case(s).¹⁶
- The average pretrial jail bed costs \$60 per day – as much as \$200 per day in some jurisdictions – with a total cost to the country of \$9 billion per year.¹⁶
- Unsecured bonds are as effective at achieving public safety as secured bonds.¹⁷
- Unsecured bonds are as effective at achieving court appearance as secured bonds.¹⁷
- Higher dollar amounts of secured bonds are associated with more pretrial jail bed use but not increased court appearance rates.¹⁷
- Unsecured bonds use far fewer jail beds than do secured bonds because more releasable defendants leave jail (94% unsecured versus 61% secured), and leave sooner.¹⁷
- Unsecured bonds are as effective at preventing defendants who failed to appear from remaining at-large on a warrant as secured bonds.¹⁷
- Conviction rates for pretrial release programs were similar to those defendants not released.¹⁸
- Case processing times for released defendants were similar as well.¹⁸

Effects of Pretrial detention

- Pretrial detention can have long-lasting repercussions:²
 - They are more likely to be sentenced to jail/prison time
 - Defendants who are detained are 4.44 times more likely to be sentenced to jail and 3.32 times more likely to be sentenced to prison.²
 - This risk is strongest amongst the low risk defendants. (5.41 times more likely to receive a jail sentence and 3.76 times more likely to receives a prison sentence)²
 - Their prison/jail sentences are likely to be longer²

- Defendants who are detained receive sentences 2.78 times longer for jail and 2.36 times longer prison.²
 - The risk is strongest among low risk defendants who receive jail sentences 3.49 times longer and prison sentences that are 2.84 times longer.²
- Research dating back 50 years has consistently shown that pretrial detention increases post-conviction incarceration.¹³
- Studies show that defendants detained in jail while awaiting trial plead guilty more often, are convicted more often, are sentenced to prison more often, and receive harsher prison sentences than those who are released pretrial.¹³
- The odds of FTA and NCA increase for any amount of detention greater than 1 day³
- The odds of new criminal activity post disposition increase at both the 12 month and the 24 month periods.³
- Detaining someone for more than a day has long-term repercussions for defendants, which is strongest for the low-risk defendants.³
 - Therefore, it become even more important to have this risk assessment performed to prevent low-risk defendants from being detained and increasing their FTA/NCA/NCA-PD likelihood³
- The average cost of detaining a defendant pending trial is \$19,253 while the average cost of releasing a defendant pending trial to the alternatives to detention program (including cost of supervision, the alternatives to detention, and fugitive recovery) is \$3,860.⁹
 - That's a savings of \$15,393 per defendant.
- In 2010, the United States had the world's highest total number of pretrial detainees, approximately 476,000.¹⁴
- In 2010, the United States had the fourth-highest rate of pretrial detention, approximately 158 per 100,000.¹⁴
- In 2010, taxpayers paid approximately \$9 billion on pre-trial detainees.¹⁴
- The most recent national data indicates that 61% of jail inmates are in an un-convicted status. This is up from just over half in 1996.¹⁴
- A study of all nonfelony cases in New York City in 2008 found that for cases in which bail was set at less than \$1,000 (19,617 cases), in 87% of those cases defendants were unable to post bail at arraignment and spent an average of 15.7 days in pretrial detention, even though 71.1% of these defendants were charged with nonviolent, non-weapons-related crimes.¹⁴
- A study that sampled felony cases in 40 of the 75 largest counties nationwide found that, between 1990 and 1996, 27% of white defendants were held in jail throughout the pretrial period because they could not post bond, compared to 36% of African-American defendants and 44% of Hispanic defendants.¹⁴
- Defendants who are not released are less likely to obtain good legal counsel.¹⁵

- Defendants who are not released are disconnected from family and friends, from health providers, and from opportunities for gainful post-adjudication employment.¹⁵

Pretrial Supervision

- Supervising defendants showed to decrease their likelihood to FTA and/or NCA will awaiting trial⁴
- This can be offered as an option to help convince judges that release a defendant rather than risk the long-term consequences of pretrial detention.⁴
- However, the exact components of supervision were defined independently of the study, therefore they were uncontrolled by the study and could vary from component to component.⁴
- The first eight months of 2007, the Court Appearance Notification System (CANS) helped prevent over 750 instances of FTA and 300 FTA warrants in Multnomah County.¹⁰
 - CANS places an automated telephone call to defendants prior to their court hearing to remind them of where and when to appear.¹⁰
 - The avoidances resulted in approximately \$1 million of net cost avoidance. With a minimum of \$1.6 million in costs avoided projected for the full 2007.¹⁰
- FTA rates for hearings successfully receiving CANS reminder calls resulted in approximately a 41% versus FTA rates for hearings not receiving reminder calls.¹⁰
- A pretrial program's ability to report to a court with a request for action in response to non-compliance with supervision conditions lowers the likelihood of failure to appear.¹⁵
- The number of follow-up responses a pretrial program has to failure to appear, the lower the likelihood of a defendant failing to appear.¹⁵
- The number of sanctions a pretrial program can impose in response to non-compliance with supervision conditions lowers the likelihood of a defendant's rearrest at the 90 percent level.¹⁵

Alternatives to Pretrial Detention

- Pretrial alternatives to detention are greatly overused on low-risk defendants.⁵
 - Low-risk defendants placed on location monitoring had an increased risk of pretrial failure than those not placed on location monitoring.⁵
 - In some areas, low-risk defendants with location monitoring were 112 percent more likely to fail than if not on this type of monitoring.⁵

- Substance abuse testing and treatment, third-party custody, and halfway house placements negatively impact low-risk defendants.^{5,7}
- With the exception of mental health treatment when appropriate, alternatives to detention decrease likelihood of success and should be recommended sparingly.⁵
- Release conditions that include alternatives to pretrial detention generally decrease the likelihood of success pending trial for lower risk defendants and should be required sparingly (excluding mental health treatment which, when appropriate, is beneficial regardless of risk).⁹
- On average, low-risk (levels 1 & 2) defendants released to alternatives to detention programs were less likely to be successful pending trial.^{5,7}
 - This is because programming can expose offenders to higher risk cases and disrupt prosocial networks.¹²
 - Additionally, existing laws in most states establish a presumption of release on the least restrictive conditions necessary to reasonably assure the safety of the community and the defendant's appearance in court.¹³
- Moderate to high risk (levels 3, 4, & 5) were more likely to be successful if released to the alternatives to detention programs.^{5,7}
 - The intensity of the program should be modified to match the risk level of the defendant.⁵
 - Recidivism rates are reduced an average of 30% when medium and high risk offenders receive appropriate behavior changing programs.⁷
 - Cognitive behavioral programs are generally the most effective programming interventions for higher risk offenders.⁷
 - The net value (cost of program less the savings derived from preventing crime) of the average targeted, evidence-based cognitive behavioral program, using a cost/benefit formula is \$10,299 per adult offender.⁷
- Alternatives to pretrial detention are most appropriate for moderate and higher risk defendants as it allows for pretrial release while generally increasing pretrial success. Alternatives to pretrial detention should be imposed for this population when a defendant presents a specific risk of pretrial failure that can be addressed by a specific alternative.⁹
- Defendants identified as moderate and higher risk are most suited for pretrial release – both programmatically and economically – with conditions of alternatives to pretrial detention. The pretrial release of these defendants can be maximized by minimizing the likelihood of pretrial failure through participation in alternatives to detention.⁹
- Low risk defendants are most likely to succeed if released pending trial and release should be recommended in most cases.⁵
- Mental health treatment was the only alternative to detention to positively impact defendants at all levels of risk, provided there was a demonstrated need.⁵

- Violent defendants fail at higher rates than other defendant offense categories.⁵
- A pretrial program's ability to supervise the mentally ill reduces the likelihood of a defendant's rearrest.¹⁵
- A pretrial program's ability to impose administrative sanctions appears to raise the likelihood of a defendant's rearrest.¹⁵
- Sanctions, if backed by the courts, reduce the likelihood of pretrial misconduct.¹⁵

Additional Resources for Defense Counsel

1. "Assessing Pretrial Risk Without Defendant Interview" by Laura and John Arnold Foundation Criminal Justice Research Summary Reports (<http://www.arnoldfoundation.org/research/criminaljustice>)
2. "The Effect of Pretrial Detention on Sentencing" by Laura and John Arnold Foundation Criminal Justice Research Summary Reports (<http://www.arnoldfoundation.org/research/criminaljustice>)
3. "The Hidden Costs of Pretrial Detention" by Laura and John Arnold Foundation Criminal Justice Research Summary Reports (<http://www.arnoldfoundation.org/research/criminaljustice>)
4. "The Impact of Pretrial Supervision" by Laura and John Arnold Foundation Criminal Justice Research Summary Reports (<http://www.arnoldfoundation.org/research/criminaljustice>)
5. "The Re-validation of the Federal Pretrial Services Risk Assessment (PTRA)" by Timothy Cadigan, James L. Johnson, & Christopher T. Lowenkamp in the September 2012 issue of *Federal Probation* (Volume 76, Number 2)
6. "Pretrial Justice Institute's 2009 Survey of Pretrial Services Programs" Pretrial Justice Institute(<http://www.pretrial.org/infostop/>)
7. Pretrial Justice Institute's 2010 EDBM Framework "A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems" (<http://www.pretrial.org/infostop/>)
8. "The Transformation of Pretrial Services in Allegheny County, Pennsylvania: Development of Best Practices and Validation of Risk Assessment" by the Pretrial Justice Institute (October 9, 2007) (<http://www.pretrial.org/infostop/>)
9. "Alternatives to Pretrial Detention: Southern District of Iowa" by Marie VanNostrand, Ph.D. (June 30, 2010) (<http://www.pretrial.org/infostop/>)
10. "Court Appearance Notification System: 2007 Analysis Highlights" LPSCC, by Matt O'Keefe (June 2007) (<http://www.pretrial.org/infostop/>)
11. "Court Hearing Call Notification Project" Criminal Justice Coordinating Council & Flagstaff Justice Court Coconino County, Wendy F. White (May 17, 2006) (<http://www.pretrial.org/infostop/>)
12. "Creation and Validation of the Ohio Risk Assessment System: Final Report" University of Cincinnati School of Criminal Justice Center for Criminal Justice Research, Edward Latessa, Paula Smith, Richard Lemke, Matthew Makarios, and Christopher Lowenkamp (July 2009) (<http://www.pretrial.org/infostop/>)
13. "Dispelling the Myths: What Policy Makers Need to Know about Pretrial Research: Executive Summary" Pretrial Justice Institute (November 2012) (<http://www.pretrial.org/infostop/>)
14. "2012-2013 Policy Paper Evidence-Based Pretrial Release" by Arthur W. Pepin Conference of State Court Administrators
15. "Examining the Efficacy of Pretrial Release Conditions, Sanctions and Screening with the State Court Processing Statistics Dataseries" by David Levin, Ph.D. for the Presentation at the Annual Meeting of the American Society of Criminology, Atlanta, GA, November 14-16.
16. "Implementing the Recommendations of the National Symposium on Pretrial Justice: The 2013 Progress Report" Released by the Pretrial Justice Institute. Washington D.C., 2014. (<http://www.pretrial.org/infostop/>)

17. “Unsecured Bonds Fact Sheets: The Effective and Most Efficient Pretrial Release” by Pretrial Justice Institute
18. “CJA’s Queens County Supervised Release Program: Impact on Court Processing and Outcomes” by Freda F. Solomon for the New York City Criminal Justice Agency, Inc. www.cjareports.org/reports/qsr.pdf