

February 27, 2019

Comments to The Task Force to Examine the Ohio Bail System

Dear Task Force,

I am writing as an academic scholar and expert on bail and pretrial processes to provide some background research findings on the efficacy of secured money bail, the serious negative consequences of pretrial incarceration, and the challenges facing jurisdictions using risk assessment tools. I hope you will consider this information as you work to strengthen and make additional amendments to Criminal Rule 46 to ensure a fair and constitutional process for the accused at the pretrial stage.

I am a tenured Associate Professor of Sociology at Bowling Green State University. My research focuses 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. I also examine the collateral consequences of criminal justice involvement on later-life outcomes. My research shows that the use of money bail disproportionately detains arrestees with limited financial means and disproportionately disadvantages blacks and Latinos relative to whites (e.g., Demuth 2003). My research on the effects of criminal justice involvement also reinforces 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 (e.g., Dennison and Demuth 2018).

I serve pro bono as an expert for plaintiffs in a number of current class action lawsuits brought against counties for their bail and pretrial practices. I have provided data analysis support, expert reports, and/or testimony in the following cases: *ODonnell, et al. v. Harris County, Texas, et al.*, *Hester v. Gentry, et al.* (Cullman County, Alabama), *Daves, et al. v. Dallas County, Texas, et al.*, and *Booth, et al. v. Galveston County, Texas, et al.* I also gave opinions about empirical studies on bail, pretrial detention and release, the efficacy of secured money bail, and the consequences of pretrial detention. The evidence presented below has been accepted by the federal courts with jurisdiction over Harris, Cullman, and Dallas Counties to successfully obtain preliminary injunctions against their bail practices. The court is drafting its opinion in the Galveston County case. Please consider the opinions below in your determination to further modify Criminal Rule 46.

***Opinion 1: Secured money bail is no more effective than unsecured bail or non-monetary conditions of release at assuring appearance in court.***

I am of the opinion that secured money bail is no more effective than unsecured bail or non-monetary conditions of release at assuring appearance in court. I base my opinion on the following: There are several recent empirical studies that compare the effectiveness of different kinds of bonds 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. 2013), one provides mixed findings (Phillips 2012), and one problematic study finds that secured bonds are more effective (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 below in Opinion 4).

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. (2013) 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.

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 are generally limited to “straight” ROR (with no supervision) 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.

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. 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. Dallas County did not track FTAs. 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. Also, many FTAs did not result in forfeitures and commercial bondsmen were more successful at litigating against forfeiture than individuals on pretrial services bonds. 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. Furthermore, even if FTAs were measured accurately, the results would not tell us anything about the relative effectiveness of secured and unsecured bonds, because pretrial services bonds in Dallas County were not unsecured bonds, but rather recognizance bonds involving no penalty for nonappearance.

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 from which to compare FTA rates. While this approach is quite sophisticated on its face, it is not clear from the evidence provided that the matching was indeed successful. 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. 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 FTA rates of arrestees released on pretrial services bonds are not surprising, if 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 wealthiest arrestees, leaving only the poorest arrestees eligible for pretrial services bonds. There is no valid basis to conclude that the authors could eliminate this bias through the use of propensity score matching. I therefore 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.

In conclusion, I believe all of the studies reviewed above except for the Clipper et al. (2017) study are sufficiently rigorous to inform our understanding of the effectiveness of unsecured bonds and secured bonds. 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 2: Secured money bail is no more effective than unsecured bail or non-monetary conditions of release at assuring public safety.***

I am of the opinion that secured money bail is no more effective than unsecured bail or non-monetary conditions of release at assuring public safety. I base my opinion on the following: Two of the studies I discussed in Opinion 1 (Jones 2013; Brooker 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, they 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.

Another study I discussed earlier (Lowenkamp et al. 2013) speaks to the relationship between the length of pretrial detention and new criminal activity (NCA) in Kentucky. It is relevant in light of our knowledge that arrestees with secured bonds are less likely to be released (and less quickly) than those with unsecured bonds (see Opinion 3). Lowenkamp et al. (2013) found that longer periods of pretrial detention were associated with a greater likelihood of new criminal activity pending trial. For the lowest risk arrestees in particular, people detained 2-3 days have an odds of NCA that are 39% higher than the odds of NCA for people released within a day; for people released after one month, the odds are 74% higher than for those release within a day. These findings are consistent with a report from Heyerly (2013) that showed while significantly increasing the proportion of defendants released on non-financial

conditions, Kentucky saw a decrease in the proportion of defendants re-arrested following pretrial release.

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 1, though the studies reviewed above are particular to their 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.

***Opinion 3: The use of secured money bail increases pretrial detention.***

I am of the opinion that the use of secured money bail increases pretrial detention, i.e., the number of defendants who are held pretrial and the length of detention, because defendants who are unable to afford secured money bail (and thus, would remain detained) would be eligible and able to obtain prompt release under other systems like unsecured bond or non-monetary conditions of release.

I base my opinion on the following: Jones (2013) showed that release rates were higher for people given unsecured bail than secured bail. While release rates were uniformly high (88% to 96%) 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 for secured bail resulted in a lower likelihood of release. And, as more money was required for secured bonds, release rates dropped. This was not an issue for people given unsecured bail. And, the difference in average time it took to be released on secured bonds vis-a-vis unsecured bonds was substantial and resulted in fewer available jail beds at greater cost. This is notable when you consider that 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.

In addition to Constitutional requirements that “liberty is the norm,” maximizing pretrial liberty is a desirable goal for a number of other reasons. Relying heavily on secured money bail needlessly frustrates that goal because detention rates are higher with its use while offering no appreciable benefit for court appearance or public safety. First, there is a large and growing literature that demonstrates very convincingly that pretrial detention has serious negative consequences for the lives of the detained as well as the broader society, including actually being criminogenic (Opinion 4).

Second, a pretrial release policy based on secured money bail or the use of a money bond schedule, by definition, leads to higher detention rates for arrestees who are economically disadvantaged compared to arrestees with money arrested for the same crimes and with the same criminal history. A recent study on the economic well-being of U.S. households reports that 40% of adults had insufficient funds to cover an unexpected \$400 expense without selling something or borrowing money (Board of Governors of the Federal Reserve System 2018).

Third, a major driver of racial and ethnic disparities in pretrial release is that minorities are disproportionately less wealthy and less able to afford secured money bail than whites arrested for the same crimes and with the same criminal history (Demuth 2003; Stevenson 2017).

Fourth, pretrial detention resulting from an inability to pay secured money bail is a costly and ineffective allocation of system resources. As Jones (2013) showed, about half of people detained because they could not afford a secured money bond were immediately returned to the community at the time of disposition through case dismissal or a community-based option. If there was a public safety justification for detaining the person, their immediate release into the community upon disposition suggests that pretrial release remains a viable option. We also know that people who are able to gain release pretrial are less likely to be convicted and more likely to have their cases dismissed (Heaton et al. 2017; Stevenson 2017). People detained pretrial are significantly more likely to plead guilty than similarly situated people who obtain release. The implication is that a sizeable percentage of people who are detained have relatively weak evidence against them and that they plead guilty to gain release. It does not appear to be an effective use of jail space or financial resources to 1) detain people pretrial only to release them at disposition and 2) detain people who would not even be convicted if they had been able to purchase their release.

Based on these findings of the shortcomings of secured money bail, Stevenson and Mayson (2017) suggest a couple reforms to procedural practices (beyond limiting the use of secured money bail) that hold promise for reducing pretrial detention without increasing risks to the community or raising costs. First, jurisdictions should consider using citations rather than arrests and allowing direct release from the police station for some categories of crime. Even for crimes requiring arrest, risk assessment tools could provide useful information to aid the court's assessment in an evidentiary hearing, identifying those arrestees with little risk of flight or dangerousness who the court could then choose to release pretrial. Second, they suggest that engaging in more deliberate bail hearings and providing counsel for indigent defendants enable a more accurate assessment of risk and ability to pay secured money bail. They also allow for a more effective presentation and contesting of evidence. While longer bail hearings and improved access to counsel increase costs in select cases, reducing the number of cases that requires a bail hearing reduces costs. The reforms constitute a "triage" approach to case management whereby more time is given to release-detention decisions in riskier cases while less risky cases are released through citations or unsecured bonds. Feedback to judges is important to ensure they understand how their pretrial decisions influence overall detention outcomes. For example, Stevenson (2017) found that 40% of Philadelphia defendants with bail set at \$500, needing only to secure a \$50 deposit, remained detained pretrial.

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 very convincingly that pretrial detention has serious negative consequences for the lives of the detained as well as the broader society (Opinion 4).

***Opinion 4: Pretrial detention has severe consequences for the detained and for the community.***

I am of the opinion that pretrial detention has severe consequences for the detained and for the community, including (1) increasing the likelihood of a defendant receiving a greater punishment, including increased court fees, prison sentence, and sentence length; (2) increasing the likelihood of wrongful convictions; (3) increasing the likelihood of recidivism while released pretrial and after conviction; (4) decreasing prospects for future employment in the formal labor market; and (5) increasing the cost of jailing individuals both pretrial and after conviction, to the extent a longer sentence is likely.

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. A popular approach in statistics and econometrics for estimating causal relationships when controlled experiments are not feasible or ethical, the instrumental variable technique 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. 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.

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 likelihoods of pretrial detention are not. Stevenson (2017) found that pretrial detention led to a 13% increase in guilty pleas among defendants who otherwise would have been acquitted or had their charges dropped. Pretrial detention resulted in non-bail court fees that were 41% higher than those for people who were released and 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.

Dobbie, Goldin, and Yang (2018) used a natural experiment involving randomly assigned judges to examine the effect of pretrial detention on future crime and employment. Using data from court and tax records, they found that pretrial detention increased the likelihood of conviction primarily through higher rates of pleading guilty. While pretrial detention appeared to have no net effect on crime (i.e., the short-term incapacitation effect offset the long-term criminogenic effects of detention), they found that pretrial detention decreased formal labor market employment. Their results are consistent with the idea that pretrial detention weakens defendants’ bargaining positions before trial and that the stigma of a criminal conviction hurts defendants’ prospects in the labor market. They also conducted a cost-benefit analysis taking into account administrative jail expenses, the cost of apprehending defendants, the cost of future crime, and the economic impact of defendants. They estimated the net benefit of

pretrial release is between \$55,143 and \$99,124 per defendant, finding that the significant collateral costs of having a criminal conviction on labor market outcomes greatly exceeded the lower costs of arresting defendants who failed to appear in court.

There are many other studies also supporting these findings not reviewed in this report (e.g., Leslie and Pope 2017; Lum, Ma, and Baiocchi 2017), but suffice it to say that there is overwhelming empirical evidence that pretrial detention creates serious negative consequences for the detained and the community than would occur with pretrial release. All else equal, detention is more deleterious to the arrestee, more criminogenic for the community, and more costly for the criminal justice system and taxpayers.

***Opinion 5: 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.***

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. I base my opinion on the following: There is less research focused on the effect of this narrow window of pretrial detention, but the totality of the evidence and my knowledge of the broader literature on the collateral consequences of criminal justice involvement suggest that every effort should be made to release arrestees as soon as possible after contact. To paraphrase Chief Justice Rehnquist in *United States v. Salerno*: liberty is supposed to be the norm and pretrial detention is supposed to be the exception. 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. (2013) showed that after controlling for relevant legal and extralegal factors, arrestees detained for 2-3 days were slightly more likely to FTA than arrestees detained for only one day. The effect was aggravated for the lowest risk arrestees; the odds of FTA were 22% higher for people held 2-3 days instead of one day. They found similar results for New Criminal Activity (NCA) while on pretrial release. In particular for the lowest risk arrestees, the odds of NCA were 39% higher for people detained 2-3 days than for people detained one day. In sum, while 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 6: Simple court-date-notification systems such as text messaging and call services decrease FTA rates among people released pretrial***

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. Indeed, Phillips' (2012) found that the majority of FTAs were not "willful," i.e., an attempt to evade justice. Court notification systems represent a relatively easy and cost effective strategy to reduce FTA rates pretrial.

In conclusion, I believe the empirical research on bail, pretrial release, and detention supports a need for court rules that limit the use of money bond, encourage pretrial release, and provide clear guidance on how judges can set bail in a manner that is constitutional. The key to jurisdictions implementing successful bail reform appears to be creating a judicial culture that "buys in" to a philosophy of maximizing release while also maximizing appearance and public safety. There are many opportunities for win-win-win situations, but it requires a cultural shift away from money and detention, or what appear to be easy, quick fixes such as "risk assessment tools." While risk assessments can provide useful information to inform judicial decisions, they are not a panacea and may actually be counterproductive (e.g., see Mayson 2019). Ultimately, it is the judges themselves and their discretion that prove decisive. But, interestingly, new research suggests that ending prosecutorial requests for cash bail in a large variety of misdemeanor and felony cases can also greatly increase rates of release on unsecured bonds with no increase in rates of FTA or NCA (Ouss and Stevenson 2019). No matter the origin of the reform, reforming bail practices and maintaining those reforms require constant attention by the court in order to change the cultural goals and the standards by which success is measured. There is considerable evidence that overall outcomes are improved when system actors respond to risk with support rather than control (Mayson 2019). Clear guidance from the Rules Commission and the Supreme Court of Ohio to strengthen and make additional amendments to Criminal Rule 46 will go a long way to achieving these necessary reforms.

Sincerely,

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## Reports and Studies

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