

CONNECTICUT SENTENCING COMMISSION

Evaluation of Pretrial Release and Detention in Connecticut

Introduction

Every time a person is arrested, justice system authorities must decide whether to release or detain that person before trial. These decisions balance the defendant's constitutional liberty interest with the important governmental goals of ensuring the defendant's good behavior during the pretrial period and the defendant's return to court. Pretrial judicial decisions regarding the release or detention of the accused can have enormous consequences on the safety of the community, the integrity of the judicial process, and the utilization of criminal justice resources.

In recent years, there has been a marked increase in the amount of historical, legal, and pretrial research encouraging states to change their policies, practices, and laws to reflect what has been termed "legal and evidence-based practices" at bail. States that have examined this topic in depth have uniformly concluded that certain remedies are necessary to address what is, essentially, the fundamental question in the country today with regard to "bail" and "no bail": Are we releasing and detaining the wrong people?¹

More specifically, the constitutional and statutory law broadly requires states to release most defendants pretrial, but it nonetheless allows states to detain a much smaller percentage of those defendants who cannot be effectively managed in the community. Within those boundaries, states can determine for themselves which defendants should be released and which should be detained. Moreover, the law allows for two constitutionally valid purposes for limiting or conditioning pretrial freedom: to secure the court appearance of the accused and public safety. States can use a variety of methods to achieve those purposes.

There is a question as to whether some of those incarcerated pretrial individuals present a substantial risk of failure to appear in court or a threat to public safety, or whether they simply lack the financial means to be released. Despite the presumption of innocence, some individuals may warrant pretrial detention because of the risk of flight or threat to public safety. However, some defendants with financial means may be released despite a risk of flight or threat to public safety. These defendants have the ability to post bond with the use of the bond system.

Pretrial release mitigates the collateral consequences of spending weeks or months awaiting trial or plea agreement. Pretrial detention can result in loss of employment and disintegrated social relationships, which in turn may increase the likelihood of reoffending upon release.

¹ The term "bail" is defined differently by different jurisdictions. The definition most conforming to the English and American history of bail as well as the laws that have grown around that history (including U.S. Supreme Court language), however, equates "bail" with release or a process of conditional release, and "no bail" with detention or a process of detention. See Timothy R. Schnacke, *Fundamentals of Bail, A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (NIC 2014).

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The challenge of the pretrial release and detention is to effectively balance the presumption of innocence, the assignment of the least restrictive intervention for defendants, and the need to ensure community safety.

This document defines the parameters of the Connecticut Sentencing Commission's evaluation of pretrial release and detention, establishes a timeframe for completion of the evaluation and its component parts, and provides context for said evaluation.

Foundational Principles

- *Presumption of Innocence* – A fundamental principal of U.S. Criminal Law is that an individual accused of a crime is presumed to be innocent until convicted.²
- *Right to Counsel* – A defendant has a right under the Sixth Amendment to assistance of counsel for his or her defense. The U.S. Supreme Court has held that “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and the liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”³
- *Right against Self-Incrimination* – Under the Fifth Amendment applicable to the states through the Fourteenth Amendment, no person “shall be compelled, in any criminal case, to be a witness against himself....”
- *Right to Due Process of Law* – The Fifth Amendment provides that “No person shall be ...deprived of life, liberty, or a property without due process of law.” The Fourteenth Amendment places the same restrictions on the states.
- *Right to Equal Protection under the Law* – Under the Fourteenth Amendment, no state shall “deny to any person within its jurisdiction the equal protection of the laws.”
- *Right to Bail that is not Excessive*- The Eighth Amendment provides that “excessive bail shall not be required,” when bail is granted. The Eighth Amendment does not guarantee the right to bail as it is silent in regard to the initial determination of whether to grant bail at all.
- *Connecticut State Constitution* - Article First, §8, of the Connecticut State Constitution provides: “In all criminal prosecutions, the accused shall have a right...to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great....”

² “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” *Coffin v. United States*, 156 U.S. 432, 453 (1895)

³ *United States v. Gouveia*, 467 U.S. 180, 188 (1984)

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Pretrial Decision-Making in Connecticut

In Connecticut, the purpose of bail is twofold. First, bail serves to ensure that the accused will stand trial and submit to sentencing if found guilty. Second, bail serves to ensure the accused's good behavior upon release.

Multiple criminal justice entities play a role in the decision to release or detain a defendant before trial. In Connecticut, bail is set by the police, a bail commissioner or intake assessment and referral specialist (bail staff), and judges of the superior court. Police officers set bail at the time of arrest and are required to notify bail staff when a defendant cannot post the bond amount that they set. Bail staff then conduct an interview to get personal information from the defendant and review the bond amount set by the police. Bail staff may increase or decrease the amount set by the police.

In order to post a bond, a defendant can either post the full cash value or contract with a licensed bail bondsman or a commercial bond company that posts a defendant's bail for a fee. Other types of bond mechanisms include a real estate bond and 10% cash bail where the defendants pay 10% cash to the court and get that amount back at the conclusion of the proceedings. Bail may be posted at a police department where a defendant is locked up, at a courthouse or at a correctional facility where the defendant is being held.

Bail staff use a validated risk instrument to guide their decisions regarding pretrial release and detention.⁴ The instrument factors are called "weighted release criteria" and include factors such as, (1) the nature and circumstances of the offense; (2) prior convictions; (3) prior failure to appear in court; (4) employment record; (5) financial resources, character, and mental condition; (6) the defendant's family ties; and (7) community ties.

The bail commissioner or the court may impose nonfinancial conditions of release, which may require that the defendant to do any of the following: remain under the supervision of a designated person or organization; comply with restrictions on the person's travel, people they associate with or where they live; not engage in specified activities, including the use or possession of a dangerous weapon, an intoxicant or controlled substance; avoid all contact with the alleged victim of the crime or with a potential witness who may testify about the offense; or satisfy any other condition that is reasonably necessary to assure that the person comes to court.

If a defendant violates the conditions of release, he or she can be charged with a new crime or the bond can be modified or revoked by the court and a new bond imposed.

If the released defendant misses his or her court date, a judge may order a failure to appear warrant for that defendant's arrest or the issuance of a bail commissioner's letter with a new court date.

After every arraignment when the defendant is incarcerated because he or she cannot post the money bail, jail re-interview staff review every bond less than \$100,000 within 5 days. Jail re-interview is a program designed to help defendants who have not posted bond. As a result of a re-interview, the

⁴ Connecticut's risk assessment instrument was revalidated in 2015.

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amount of the bond or the conditions of release may be modified. The jail re-interview staff may also refer defendants for treatment. These treatment plans are presented at the defendant's next date through the bond modification process.

Existing Research on Pretrial Decision-Making

Pretrial research is critical in informing decision-makers on what works to maximize release while simultaneously ensuring a defendant's good behavior during the pretrial period and court appearances. Several publications go into great detail about the historical and legal foundations of pretrial justice and the current practices being implemented across the country.⁵

Improving bail administration and pretrial decision-making are topics that have been consistently addressed in the academic literature since the 1950s. This research has typically focused on the effects of pretrial detention on subsequent trial outcomes; the factors that influence bail decisions; and the factors that suggest failure to appear or reoffending while the client is out on bail.

Research on pretrial risk assessment and supervised pretrial release and other conditions of pretrial release is a body of literature that is still developing. Recently, pretrial risk assessment instruments have been developed and tested in different jurisdictions across the country. Researchers have also attempted to determine to what extent, if any, secured monetary forms of pretrial release improve the likelihood of court appearance and ensuring a defendant's good behavior during the pretrial period over non-monetary forms of pretrial release.

Governor's Request

On November 5, 2015, Governor Dannel Malloy wrote a letter to the Connecticut Sentencing Commission requesting a study of "Connecticut's current bail bond system and the possibility of its reform."

The Governor asked the Commission to focus on the non-violent, low level pretrial population. These defendants may be incarcerated not because they are dangerous or a flight risk, but simply because they do not have the financial resources to post bond. Nevertheless, in asking the Commission to examine bail systems and reform efforts in other American jurisdictions, the Governor also requested that the Commission provide "an analysis of potential ways Connecticut can focus pretrial incarceration efforts on individuals who are dangerous and/or a flight risk, as well as ways to reduce 'bail inflation'" in the state. Thus, the request covers both "bail" and "no bail" – detention and release– and therefore provides an excellent opportunity for Connecticut to thoroughly and thoughtfully examine the current state of its pretrial justice system.

The letter concludes by asking the Commission to let the Governor's office know by January 15, 2016, how soon the Commission could provide recommendations on the raised topics.

⁵ See Federal Journal (September 2007) Volume 71, Number 2, Special Issue on the 25th Anniversary of Pretrial Services in the Federal System. See also the Pretrial Justice Institute's webpage on the history of bail: <http://www.pretrial.org/pages/history-of-bail.aspx>.

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Objective

The primary objective of this evaluation is to identify the current strengths and barriers of the Connecticut pretrial justice system as it relates to maximizing the right to release, maximizing court appearance, and maximizing public safety.

Areas of Analysis

This evaluation will:

- Examine Connecticut’s current pretrial release and detention process and complete a gap analysis of its elements. This will include but is not limited to:
 - the methods for pretrial risk assessment
 - the methods for assigning pretrial release conditions
- Analyze Connecticut’s and other states’ laws and practices in the pretrial justice system.
- Include a comprehensive jail population analysis
- Include a survey of best practices nationwide
- Identify factors that are predictive of pretrial misconduct including failure to appear (FTA), rearrests, and danger to the community.
- Explore the process of preventive detention and its connection to promoting public safety.
- Examine the efficacy of financial conditions of release in ensuring a defendant’s good behavior during the pretrial period
- Examine the racial and socioeconomic impact, if any, of Connecticut’s current pretrial release and detention practices.

Successful Models

States that have made successful strides toward improving their release and detention systems appear to be following a single pattern. First, those states bring together criminal justice leaders into a group with statewide representation and influence to begin the analysis. Creating such a group follows well-known criminal justice research and literature going back decades and consistently illustrating the best way to make improvements to criminal justice practices, which is to follow a “systems approach.” A systems approach recognizes that the various agencies and levels of government, while autonomous, are nonetheless linked in many ways, where one agency’s activities can affect other agencies within criminal justice system. Included in the broader system, of course, is the pretrial justice system, which involves interactions among police and other law enforcement entities, jail staff, pretrial services agency personnel, general government leaders, court staff, prosecutors, defense attorneys, judges, and even local treatment providers. The Sentencing Commission is ideally positioned to create such a study group with its broad membership representing all the major criminal justices agencies in the state.

Second, that group typically undertakes a period of intense education, focusing on the topics needed to make intelligent recommendations for reform. The education process involves several aspects that bail scholars have concluded are necessary to fully understand the issues. They include:

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- (1) the need for reform (as suggested above, research and education will help the study group discover its most pressing issues, which may be unique to Connecticut);
- (2) the history of release and detention, a topic that is crucial for understanding bail reform generally in addition to discreet bail issues, such as those highlighted in the recent Connecticut Supreme Court opinion in *State v. Anderson*, 319 Conn. 288 (2015).
- (3) federal and state pretrial legal foundations, which include the presumption of innocence; due process, the right to non-excessive bail, counsel, and equal protection; the freedom from compulsory self-incrimination; individualization; and the right to bail itself (a complete legal analysis involves comparing fundamental legal principles of national application with the various elements of the state's legal "mix," including its constitutional bail provisions, statutes, court rules, and case law);
- (4) the pretrial research, which includes the most recent research on risk assessment and risk mitigation; and
- (5) the national best practice standards for pretrial release and detention.

All of these foundational aspects of pretrial release and detention are studied together with research on policies and practices currently used in Connecticut. Not surprisingly, this study may point to the need for a completely different focus from the one in another state. For example, after individual studies in three different jurisdictions, one jurisdiction might find that law enforcement arrest and citation practices need particular attention; another may find an acute need to incorporate a statistically derived risk assessment instrument; still another may focus on the use of money as a condition of release. Although some aspects of "bail reform" are universal, much of what must be done is recognized only after some period of education and study of a particular state's various needs. Because of increased attention, research and literature recently focused on pretrial release and detention, we can expect to complete a comprehensive study of this issue in a matter of months. Nevertheless, as in other states, specific attention will most assuredly be devoted to assessing Connecticut's specific legal and practical infrastructure for application to its law enforcement and judicial evidence-based practices. The study will include a review of pretrial risk assessments and whether differential supervision is done in fair, effective, and nondiscriminatory ways.

Third, once this period of education is complete, the group typically puts forth findings and recommendations for making changes to (or maintaining current) policies, practices, and statutes.

Project Timeline

Following the model used by other states, we can predict with some confidence that once the study group is created, it will likely be able to make substantial recommendations within approximately one year, completing its work before the beginning of the 2017 legislative session. The Commission will utilize technical assistance from the National Institute of Corrections (NIC), an agency within the U.S. Department of Justice, and will collaborate with other state and national stakeholders to complete the evaluation.

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January – February 2016: Present draft evaluation scope to the Sentencing Commission, the Governor’s office and legislative leaders.

February – June 2016: With the technical assistance of the National Institute of Corrections, involve key stakeholders by establishing a multi-disciplinary project advisory group, conduct a legal analysis of Connecticut’s pretrial release and detention laws, compile background information; review current pretrial justice system and agency functions, conduct interviews with agency staff, commercially licensed bail bondsmen, bail enforcement agents, and pretrial defendants; examine systems and reform efforts in other states.

March 10, 2016: The National Institute of Corrections (NIC) will present on pretrial release and detention at the Sentencing Commission meeting. This presentation will include the nature and scope of their technical assistance to support the Commission’s evaluation of pretrial release and detention.

March 11, 2016: The National Institute of Corrections will meet with Commission staff and the Commission’s pretrial release and detention advisory group. The advisory group will meet as needed over the course of the evaluation and will consist of the following members of the Commission or their designees:

- John Santa, Vice Chairman of the Sentencing Commission
- Judge Patrick Carroll, III, Chief Court Administrator
- Stephen Grant, Court Support Services Division
- Chief Kulhawik, Norwalk Police Department
- Kevin Kane, Chief State's Attorney
- Susan Storey, Chief Public Defender
- Commissioner Scott Semple, Department of Correction
- Natasha Pierre, State Victim Advocate

April-May: The National Institute of Corrections will work with Sentencing Commission staff to develop an in-depth action plan which will be the guide to reach the goals of the evaluation.

May – October 2016: With the technical assistance of the National Institute of Corrections, conduct analyses using information gathered from pretrial system and agency functions, utilization of bonds, relationship of financial conditions of release to defendant detention.

November – December 2016: Compile findings and submit recommendation to the Sentencing Commission.

December 2016: Sentencing Commission votes on the recommendations and submits final report to the Governor and the General Assembly.