
Pretrial Release & Detention: Comparing Model Jurisdictions



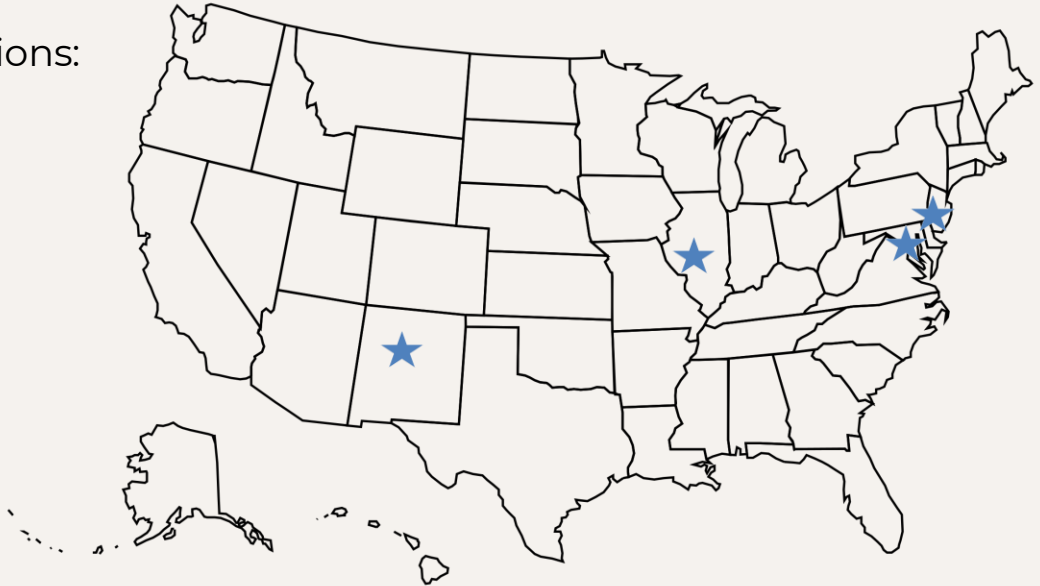
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Connecticut Sentencing Commission

This presentation is adapted from the comparative section of the forthcoming pretrial justice report.

In this section, we explore similarities and differences in the jurisdictions that employ a risk-based system of pretrial release and detention (rather than a money-based system).

We examine four “model” jurisdictions:

1. New Jersey (NJ)
2. Illinois (IL)
3. New Mexico (NM)
4. Washington D.C. (DC)



Pretrial Risks

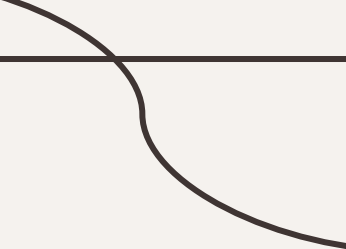
- Failure to appear in court
- Rearrest
- Obstruction

Competing Societal Interests



Release Conditions

- Monetary
- Non-monetary



Model Jurisdiction Approach

- **Intentional** release or detention decision
 - Elimination or severely decreased reliance upon monetary conditions
 - Structure designed to guide the exercise of judicial and prosecutorial discretion towards safe pretrial release
 - Structure affects outcomes
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Structure

- Detention Eligibility Nets
 - Initial
 - Secondary
- Presumptions
 - Release
 - Detention
- Release Conditions & Hierarchy
- Release/Detention Factors
- Risk Assessment Tools
- Pretrial Services Recommendations
- Monitoring and Enforcement of Release Conditions
 - Adjustments
 - Revocation
- Detention Hearing Rights and Formality
- Speedy trial

Detention Eligibility Nets

Detention eligibility criteria is designed to channel the exercise of prosecutorial and judicial discretion.

● Primary/Initial net

- In NM, any felony.
- In NJ, IL, and DC
 - Enumerated felony offenses, and
 - Enumerated non-felony domestic violence assaults and violations of domestic violence protective orders.
- In NJ and DC, a "catch-all" exists for any crime, even if not enumerated, where a prosecutor determines that a defendant poses a "serious" risk of flight, risk of obstruction, or danger to the community.

● Secondary/Revocation net

- In all model jurisdictions, applies to a defendant who was released pretrial, but who subsequently failed to appear in court, committed a new crime, obstructed justice, or failed to otherwise comply with their release conditions.
- In all jurisdictions, this secondary net is much broader than the initial detention eligibility net.

- Pretrial release is conditional.

Presumption of Release

In all model jurisdictions, it is presumed that the accused shall be released on the least restrictive non-monetary conditions that will reasonably ensure court appearance, the safety of other persons and the community, and the integrity of the justice process.

- This presumption is rebuttable by clear and convincing evidence that such conditions do not exist.
 - In NM and IL, this presumption always applies.
 - In DC and NJ, this presumption applies unless a presumption of detention applies.
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Presumption of Detention

In DC and NJ, the presumption of detention is charge based, triggered by certain enumerated offenses, which may include violent offenses, firearm offenses, and offenses committed while on supervision.

- It is presumed that that no mitigating conditions exist if there is probable cause that the defendant committed an enumerated offense.
 - This presumption is rebuttable upon the production of some evidence that such mitigating conditions exist.
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Release Conditions & Hierarchy

- Each model jurisdiction has a continuum of nonmonetary release conditions which always includes court appearance, no rearrest, and no obstruction.
 - Can include other conditions, such as periodic reporting and no contact
- Release hierarchy requires that these conditions must be the least restrictive that will reasonably ensure court appearance and community safety.
 - Risk tools and pretrial recommendations may be considered.
- In NJ, NM, and DC, both monetary and nonmonetary conditions can be imposed.
 - Monetary can only be used to address flight risk, not danger.
 - Monetary can only be used when nonmonetary are insufficient to address flight risk.
- In IL, only nonmonetary conditions can be imposed.
 - Monetary have been eliminated.
 - Nonmonetary can be used to address both flight risk and danger.

Detention/Release Factors

To determine whether there are any conditions of release which will reasonably ensure the defendant's appearance in court and protect the safety of any person and the community, there is broad agreement on six factors:

1. Nature and circumstances of charged offense
2. Weight of evidence
3. History and characteristics of defendant
4. The defendant's character, physical/mental condition, family ties, financial resources, employment status and history, financial resources, length of residence in the community, community ties, history relating to drug or alcohol abuse, criminal history, and record for appearance at court proceedings
5. Whether at the time of the current offense or arrest, the defendant was on parole, probation, or release pending trial, sentencing, appeal, or completion of sentence for an offense
6. Nature and seriousness of the danger posed to any person or the community that would be posed by the defendant's release

Risk Assessment Tools

Risk assessment tools are evidence based, actuarial algorithms used by pretrial service agencies to assess a defendant's risk of rearrest and/or failure to appear as required.

Such tools combine various factors (including criminal history and current charge) to produce a unique "risk score."

All model jurisdictions allow for the use of a pretrial risk assessment tool.

- NJ uses the Public Safety Assessment (PSA).
 - The PSA is a standardized, empirically-validated tool developed by the Arnold Foundation.
 - The PSA generates two distinct risk scores: one for the likelihood of failing to appear in court and another for the risk of rearrest while on pretrial release. Additionally, the PSA flags defendants who may pose a higher risk for violent rearrest.
- DC uses a district-specific risk assessment tool.
- IL and NM have a patchwork system of risk assessment.
 - Some counties use the PSA, some use another standardized tool, some use a county-specific tool, some do not conduct a pretrial risk assessment.

Consideration of Risk Scores & Pretrial Services Recommendations

- In all model jurisdictions, risk scores may be considered in the release/detention decision.
 - They can never be the sole factor.
 - In DC and NJ, risk scores can also inform Pretrial Services recommendations that no mitigating conditions exist.
 - In all model jurisdictions, courts are not required to follow Pretrial Services recommendations.
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Monitoring & Enforcement of Release Conditions

- In all model jurisdictions, Pretrial Services monitors compliance with release conditions and reports to court.
- Court may adjust conditions downwards (less rigorous) to reflect compliance and upwards (more rigorous) to reflect noncompliance.
- If no mitigating conditions exist, then release may be revoked upon prosecutor motion.

Detention Hearing: Formality

For all model jurisdictions:

- Detention hearings are not trials on the merits.
- Detention hearings are not discovery devices.
- The rules of evidence do not apply at detention hearings.

While all model jurisdictions permit both the prosecutor and defense to proceed by proffer, the frequency of live testimony differs by jurisdiction.

- In NJ, IL, and NM, prosecutors rarely call any witnesses.
 - In DC, law enforcement officers provide limited testimony in nearly all detention hearings, swearing to the accuracy of the criminal complaint and responding to direct and cross-examination.
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Detention Hearing: Defendant Rights

All model jurisdictions recognize that the accused has the following rights at a detention hearing:

1. To be represented by counsel
2. To testify
3. To present witnesses
4. To cross examine witnesses who appear at the hearing
5. To present information by proffer or otherwise

In all model jurisdictions, counsel is appointed no later than the defendant's initial appearance.

- At that time, the accused is released unless the prosecutor files a detention motion.
 - The accused is temporarily detained until the detention hearing is held or until a judicial officer approves release conditions jointly recommend by the parties.
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Detention Hearing: Discovery

- In all model jurisdictions, defendants receive the charging document and a report from pretrial service agencies.
 - Model jurisdictions diverge in their treatment of police reports and witness statements.
 - In DC, prosecutors are not statutorily required to produce any police reports until after a witness testifies, but routinely do so as professional courtesy and to avoid potential constitutional claims.
 - In NJ and NM, prosecutors must disclose all reports relating to the affidavit of probable cause and to the detention factors the State will advance.
 - In IL, the statute appears to be much broader than the NJ and NM rules and may require the “full” discovery of police reports, including those not relevant to the detention application.
 - Enhancement of discovery obligations impacts information technology capacity and resource allocation.
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Reopening a Detention Hearing

- To reopen a detention hearing, all model jurisdictions except IL require a motion setting forth new information that has a material bearing on the detention decision.
 - Although IL trial courts must make a finding that detention continues to be “necessary” each time a defendant appears in court, appellate review requires a motion for reconsideration, which effectively requires new material information.
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Speedy Trial

- Statutory or rule based speedy trial provisions expressly apply to all detained defendants in all model jurisdictions, except NM.
- Provides a practical disincentive for prosecutors to move for detention.