

4.5 Policy Considerations

A. Policies, Forms, Practices, and Criteria Influencing Pretrial Decisions

Generally. Indigent defenders should coordinate with other court actors, including prosecutors, pretrial services programs, court officials, and police, to determine whether any practices, guidelines, forms, or policies employed in the pretrial release process may contribute to racial disparities in pretrial outcomes. A helpful starting point in determining whether pretrial practices in your county conform with best practices is to consult the protocols for pretrial decisions developed by the National Association of Pretrial Services Agencies (NAPSA), which aim to reduce the potential for disparities. NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, [STANDARDS ON PRETRIAL RELEASE](#) (3d ed. 2004).

Risk assessment tool in Minnesota’s Fourth Judicial District. In Minnesota’s Fourth Judicial District (covering Hennepin County and the City of Minneapolis), researchers recently evaluated the pretrial risk assessment tool utilized by the Community Corrections Pretrial Unit. This tool used certain factors to evaluate pretrial risk. Researchers considered whether reliance on these factors resulted in racial disparities in pretrial detention. They concluded that three of the nine factors employed in evaluating risk—whether a weapon was used during the commission of the crime, whether the defendant lived alone, and whether the defendant was under age 21 when booked—bore little relation to flight risk or reoffending, but were strongly correlated with race. The court adopted a recommendation to eliminate these three factors correlating with race but not with risk, and put a new risk assessment tool in place. ASHLEY NELLIS ET AL., *THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS* 11 (2d ed. 2008) (summarizing FOURTH JUDICIAL DISTRICT OF MINNESOTA RESEARCH DIVISION, [FOURTH JUDICIAL DISTRICT PRETRIAL EVALUATION: SCALE VALIDATION STUDY \(2006\)](#)). North Carolina statutes require magistrates to defer setting pretrial release conditions if they find that a person is charged with a felony or Class A1 misdemeanor involving a firearm and the person is currently on pretrial release for or has been convicted of another such offense. G.S. 15A-533(f). The statute does not preclude a judge from setting pretrial release conditions in these circumstances, however. G.S. 15A-533(g).

Bail reform by Duluth Racial Justice Task Force. In Saint Louis County (which includes the City of Duluth), Minnesota, a racial justice task force supported by the Criminal Justice Section of the American Bar Association’s Racial Justice Improvement Project, spent two years evaluating and addressing racial disparities in bail and pretrial detention/release. *See* Cynthia E. Jones, “*Give Us Free*”: *Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 919, 946–55 (2013); ROBERT R. WEIDNER, [RACIAL JUSTICE IMPROVEMENT PROJECT: PRETRIAL DETENTION & RELEASE DECISIONS IN ST. LOUIS COUNTY, MN, IN 2009 & 2010: INTERIM FINDINGS](#) (2011). The task force consisted of the County Attorney (the county’s chief prosecutor), the Chief Public Defender, the Deputy Chief of Police, a trial judge, a representative of the

American Indian Commission, the head of probation/pretrial services, a representative from the local jail, and an administrative coordinator. The project was divided into three stages: investigation, education, and implementation. In the investigation stage, the task force:

- collected data from the court on bail determinations;
- retained a criminologist from a local university to analyze the data (he concluded that White defendants were twice as likely as defendants of other races to be released on their own recognizance, racial minorities were more likely to have money bond imposed, and the median bond imposed on African American defendants was twice that of the bond amounts set for White defendants);
- formed a subcommittee that met with each arraignment court judge in the county and asked them how they weighed the statutory factors governing bail determinations; and
- interviewed the probation office, which in Saint Louis County supervises defendants placed on supervised pretrial release, regarding their practices in arraignment court.

Based on its investigation, the task force concluded that: (1) judges typically make bail determinations without critical information relevant to the determination; (2) money bonds are overused, and this practice has a disparate impact on African Americans and Native Americans; and (3) probation officers were imposing strict standards on defendants on supervised release that were more appropriate for post-conviction defendants on probation. The task force also concluded that certain logistical factors may contribute to disparities in bail determinations. For example, judges reported that probation officers, when advising the court regarding pretrial decisions, would tell the court when they would prefer not to supervise defendants who lived far from probation offices. Because of the distance between the probation office and the Native American reservation in the county, this recommendation resulted in the disproportionate pretrial confinement of Native Americans.

In the next stage of the project (education), task force members attended trainings on best practices in bail determinations and pretrial services, including conferences by the ABA Racial Justice Improvement Project and by the National Association of Pretrial Services (NAPSA). As a result of the NAPSA conference, the Duluth trial judge who attended concluded he had been overusing money bonds and changed his bail determination practices. Cynthia E. Jones, *“Give Us Free”*: *Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 919, 953 (2013). This stage of the project also included a day-long training by the task force for all judges and probation officers, including training on laws, pretrial release standards, best practices for imposing supervised release, and discussion of the task force’s findings regarding racial disparities in local bail determinations.

The last stage of the task force project (implementation) involved the following initiatives:

- ensuring that judges have bail reports (reports prepared by the probation office including background information on each arrestee) in all felony cases before making bail determinations;
- improving risk assessment tools to reduce the risk of subjective biases;
- preparing a chart for judges to use when making pretrial release determinations that sets forth the range of available non-financial release options;
- expanding community release options;
- collecting data regularly to monitor racial disparities.

Owing in large part to the commitment and involvement of all local court actors, as well as support from national organizations and experts involved in pretrial release issues, the task force's work may serve as a model for other communities seeking to revise their bail determination practices. "Other jurisdictions faced with similar bail practices, and similar patterns of racial disparities, will likely find the formula successfully executed in Duluth to be [a] useful model for pretrial reform." *Id.* at 955.

North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System Pretrial Subcommittee. The North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System (NCCRED), comprised of prosecutors, defense attorneys, police chiefs, judges, and community advocates, is an organization aimed at reaching a consensus on the presence and causes of racial disparities in particular areas of the criminal justice system and making recommendations for reform that have the support of representatives of a broad range of criminal justice stakeholders. See North Carolina Advocates for Justice, [North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System](#), NCAJ.COM (last visited July 23, 2014). The Commission's Pretrial Subcommittee (PTSC), funded in part by the American Bar Association's Racial Justice Improvement Project, is currently collecting data in an urban area, Guilford County, and a rural area, Halifax County, to examine whether there are disparate outcomes for minority defendants at the pretrial stage of the criminal process. See North Carolina Advocates for Justice, [NCCRED Pretrial Subcommittee](#), NCAJ.COM (last visited July 23, 2014). The data collected includes bond amounts and conditions for defendants charged with Class H felonies. This effort involves data collection and analysis by race and ethnicity across a range of variables, including age, sex, economic status, employment, mental and physical health, case disposition, length of time in custody, bond amount, method of posting bond, criminal history, and failure to appear history. The PTSC currently expects that the collected data will be presented to the Commission as a whole in 2014. After that presentation, the Commission intends to explore the factors contributing to any racial disparities and try to identify an approach to eliminate or minimize them.

UNC MPA Student's Examination of Wake County Bail Determinations. A study undertaken by UNC School of Government Master of Public Administration (MPA) graduate student Johanna Hawfield Foster examined arrest data and jail admissions records in Wake County to determine whether race was playing a role in pretrial release determinations. She concluded that African American defendants pay 16 percent more in

bail than White defendants. *See* Johanna Hawfield Foster, *Striving for Equity in Criminal Justice: An Analysis of Variability of Bail Bonds in the Tenth Judicial District of North Carolina* (also finding that, in the Tenth Judicial District, mean bail exceeded the upper limit of the bond's suggested policy guidelines by at least 30 percent) in the Race Materials Bank at www.ncids.org (select "Training & Resources"). Subsequently, the Tenth Judicial District adopted a policy of requiring magistrates to record reasons supporting any secured release imposed outside of the recommended guidelines for the offense class. *See* Administrative Order Setting 10th Judicial District Pretrial Release Policies in the Race Materials Bank at www.ncids.org (select "Training & Resources"). Lawyers seeking information on the racial and ethnic demographics of arrestees and pretrial jail detainees may consult the databases utilized in this study: a City County Bureau of Identification (CCBI) database with information regarding race, ethnicity, sex, place of resident, country of origin, employment, information on prior arrests, and court appearance history; and the County Sheriff's Office's database with bail bond amounts and charge descriptions. For assistance interpreting the data, you may wish to seek help from graduate students in public administration or political science who are capable of performing regression analysis to control for variables affecting pretrial release decisions.

Pretrial Release Project in Baltimore, Maryland. Another study of bail practices in a single locale was conducted by the Abell Foundation's Pretrial Release Project (PRP). The study, which compared bail practices in the City of Baltimore to statewide averages, was authorized by the Maryland Court of Appeals following a request by the Maryland State Bar Association. Like the Duluth task force study discussed above, the PRP concluded that judicial officers were making bail determinations with insufficient information and relied too heavily on financial release; and that African American men were detained pretrial due to their inability to satisfy financial conditions of release at a "strikingly higher rate" than their representation in the overall population. THE ABELL FOUNDATION, [THE PRETRIAL RELEASE PROJECT: A STUDY OF MARYLAND'S PRETRIAL RELEASE AND BAIL SYSTEM](#) 28 (2001).

B. Collaborative Partnerships with Other Stakeholders in the Justice System

Defense attorneys and other stakeholders in the justice system may share overlapping interests in pretrial release procedures. For example, former Mecklenburg County Chief District Judge Lisa Bell, when interviewed about the county's new bail policy in 2010, observed that, because of better access to information under the new policy, "your incarceration isn't tied to your ability to pay money. People without means don't necessarily have a higher risk associated with them." Jeff Atkinson, [Mecklenburg Courts – New Bail Policy](#), WBTV 3 NEWS (July 6, 2010) (reviewing new policy and finding that dangerous offenders, who present a greater risk to the community, will have higher bonds while defendants who pose little risk will have the opportunity to get out of jail). Additionally, many counties have a concern about the cost of pretrial detention. This concern presents opportunities for partnerships to reduce reliance on pretrial detention. Partnerships with stakeholders in the criminal justice system—including prosecutors, pretrial services officers, diversion programs, social service programs, faith-based

organizations, local and state bar associations, and representatives from minority communities—may result in:

- development of training programs on issues of race in pretrial decision-making for all actors involved in the pretrial release process, including magistrates, judges, prosecutors, and defense attorneys;
- development of community education programs that help people understand how to navigate the pretrial process;
- public education campaigns regarding the importance of pretrial release;
- examination of the pretrial process to determine if racial disparities are present in pretrial release decisions, including release on a written promise to appear, setting of bail amounts, or consideration for diversion programs resulting in deferred prosecution;
- assignment of a bond prosecutor to the county jail to facilitate early risk assessments and the release of unnecessarily detained arrestees, as is currently done in Durham County;
- examination of the jail population to determine the percentage of the population detained pretrial because of an inability to post bond;
- development of additional community-based programs and resources that may be used as an alternative to pretrial detention when appropriate;
- funding for indigent people ordered to participate in fee-based pretrial programs such as continuous alcohol monitoring pursuant to S.L. 2012-146, as amended by S.L. 2012-194 (expanding authorization for the use of continuous alcohol monitoring (CAM));
- understanding of the importance of early release and the early involvement of defense counsel in the pretrial process, including consistent representation of defendants in bail hearings;
- development of standardized, evidence-based, validated risk assessments to determine who may safely be released into the community;
- development of increased oversight and accountability measures in the bail determination process, including the adoption of policies requiring magistrates to make written findings supporting bail and pretrial release determinations.