Legal Analysis of Pretrial Law for Yakima County, Washington

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Executive Summary

As part of the Bureau of Justice Assistance/Pretrial Justice Institute sponsored Smart Pretrial Demonstration Initiative, Tim Schnacke, Executive Director of the Center for Legal and Evidence Based-Practices from Golden, Colorado, visited Yakima County, Washington, and provided oral presentations concerning the fundamentals of bail (release) and no bail (detention) as well as a more in-depth written analysis of Washington law and legal foundations. The following is a brief summary of those presentations and analysis.

To implement legal and evidence-based practices at bail, jurisdictions must know the fundamentals of bail. The fundamentals include: (1) why we need pretrial justice; (2) the history of bail (release) and no bail (detention); (3) the legal foundations; (4) the pretrial research; (5) the national standards on release and detention; and (6) universally true definitions surrounding pretrial release and detention. Those fundamentals, in turn, help jurisdictions to understand their own policies, practices, and laws, which might run counter to the fundamentals, hinder legal and evidence-based practices at bail, and require change.

One fundamental, in particular, deserves special attention: the legal foundations underlying both bail and no bail. The "L" in legal and evidence-based practices ("LEBP") requires one to consider the law for its boundaries and parameters, for its unique mix within jurisdictions, and for its requirement that the evidence – no matter how strong – be fair and just. To understand the fundamentals of bail, jurisdictions should read the following two documents published by the National Institute of Corrections: *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform,* found at http://www.clebp.org/images/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf, and *Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial,* found at http://www.clebp.org/images/2014-11-05_final_nic_money_as_a_stakeholder_september_8,_2014_ii.pdf.

Through researching Washington law, the author found both broad and discreet legal issues. Broad issues included Washington's constitutional right to bail provision, the interplay between Washington's statutes and court

rules, general issues shown by a sampling of the case law, and reports by the Bail Practices Work Group and the County's Law and Justice Panel Review Committee. More discreet legal issues were discussed based on whether they helped or hindered Yakima County in implementing legal and evidence-based practices, and how to avoid complications through laws that the County has little ability to change on its own. The written analysis detailed the discreet issues by moving through the criminal process, step-by-step, and by making recommendations concerning policies, practices, or changes in the laws.

During the presentations, Washington's substantive laws were compared to other states, and those comparisons were revealing of the need for further education and possible improvements to the law. Washington case law, for example, is like most other states – fairly scant, giving slight guidance on certain fundamental areas such as excessive bail, and often only addressing important but somewhat tangential issues routinely addressed across America, such as bail on appeal, or bail in capital cases. There were two exceptions to this overall assessment, however, which include the courts' progressively more accurate statement of the purpose of bail over time, and the 2014 Washington Supreme Court opinion in *State v. Barton*. In particular, and unlike many other states, the Washington courts have gradually articulated a purpose of bail that focuses on release, rather than exclusively on court appearance and public safety, which are more accurately defined as the purposes for limiting or conditioning bail and not for bail itself. Moreover, through the recent case of *State v. Barton,* Washington is likely facing the need to make significant changes to the way it views bail and no bail practices across the state. Nevertheless, knowing the fundamentals of bail means that a case like *Barton* should have been expected.

Compared to other states, Washington is unique in that its court rules concerning bail can supersede statutory bail provisions, leading to a potentially more rational and flexible legal scheme, free from the vagaries of politics. As mentioned in the presentations, however, a closer look at both the statutes and rules surrounding issues at pretrial reveal good, bad, and ugly provisions (using the well-known movie for pedagogical purposes). For example, some portion of the statutes – especially those enacted in 2010 to create a transparent process for detention – are good. Moreover, compared to virtually all of the other statutory provisions, the court rules are quite good. In particular, those rules include an express presumption of release on

recognizance, a separation of considerations for court appearance and public safety, the use the important pretrial phrase "least restrictive conditions," a fairly comprehensive list of allowable conditions made available to judges to mitigate risk, and an express requirement for judges to consider the defendant's financial means when setting financial conditions.

Nevertheless, there are also many provisions in the law that might be considered "bad," including most of the rest of the bail statute beyond the 2010 amendments, the lack of a decent purpose, and the lack of a decent definition of bail ("bail," in context, appears to be defined mostly as money, which has unfortunate consequences for any state). Moreover, even though the court rules are quite good, they nonetheless allow for money to be set to protect the public (which is improper for many reasons), they have no express provisions dealing with empirical risk assessment, and they lack a great deal of what we call "best practice" provisions, as articulated by the national standards, and as found in model bail schemes. Finally, Washington law permits bail schedules, which likely should never be permitted, and contain a great number of provisions concerning commercial sureties, which are not now, and never were a legal and evidence-based practice. Indeed, the best research we have today indicates that that within only twenty years of adopting the commercial surety system at bail in about 1900, America recognized that system to be a failure and in need of reform.

Finally, there are a few provisions that are aptly described as "ugly" within the law. Those include a requirement that judges make a record for releasing people on personal recognizance bonds (the more lawful approach is to require records when releasing persons on *more* restrictive conditions, not less), a provision requiring judges to set a "payment of bail" before a pretrial services program may agree to supervise a defendant, and at least one other blanket bail condition based on charge.

By far, however, the biggest issue facing jurisdictions in Washington today concerns the state's constitutional bail/no bail dichotomy. Although Washington's constitutional right to bail provision was amended in 2010, the amendment did not take advantage of research indicating that the state could have created its detention eligibility net based on risk instead of charge. Today, in jurisdictions across Washington, there are likely extremely high risk defendants who are not eligible for detention through a constitutionally valid no bail or detention process. When money is left in system like this, judges tend to use money to purposefully detain bailable yet high risk

defendants, a practice that has never been lawful in America. Moreover, when money is left in a system like this, that money tends to drift downward into all bail settings, also causing the unintentional detention of bailable defendants, which, in addition to being wasteful and unfair, is gradually being challenged in the courts under a number of legal theories.

Overall, there appear to be no laws significantly hindering Yakima County in its quest to implement legal and evidence-based practices for roughly 90% of its defendant population once it has created a viable infrastructure for assessing and mitigating risk through some sort of supervision. Following the legal and evidence based recommendations found in the NIC's paper *Money as a Criminal Justice Stakeholder,* and in addition to using non-financial conditions, the County should set unsecured bonds on low, medium, and even some high risk defendants, thus assuring an immediate release of defendants deemed manageable in the community without negatively affecting court appearance or public safety rates. The County will have difficulty, however, when it is faced with extremely high risk defendants not falling within the detention eligibility net of its constitutional "no bail" provision. In those cases, and as explained in the body of the analysis, the County should at least provide the same sort of due process hearing that detention-eligible defendants would receive.

Based on the entirety of the law as well as the "other material" found in Washington State, including the reports by the Bail Practices Work Group and the Law and Justice Panel Review Committee, the author recommends that Yakima County lead the state in a comprehensive educational process designed to learn the fundamentals of bail. As in other states, this process should lead naturally to a full understanding of the need for further legal improvements to every part of Washington's legal mix.

Introduction

The Bureau of Justice Assistance's (BJA's) Smart Pretrial Demonstration Initiative "seeks to build upon analysis-driven, evidence-based pretrial justice by encouraging local and tribal jurisdictions to effectively implement risk assessment and appropriate supervision and/or diversion strategies targeting pretrial outcomes within their jurisdictions."[1] The goal of the Initiative "is to test the cost savings and public safety enhancements that can be achieved when jurisdictions move to a pretrial model that uses risk assessment to inform decisionmaking and employs improved risk management strategies (supervision and diversion)."[2]

BJA gave funding to the Pretrial Justice Institute (PJI) to provide training and technical assistance for the Initiative. As a part of that assistance, PJI contracted with the Center for Legal and Evidence-Based Practices' Executive Director, Tim Schnacke, to provide a legal analysis for Yakima County, "including recommendations for how the site[s] can implement legal and evidence-based pretrial practices [for example, based upon the Smart Pretrial Initiative's key elements and the national pretrial best-practices for pretrial release and detention] given the totality of the law."[3] This document provides the written portion of that legal analysis.

Caveats

There are a few significant caveats to this analysis. First, a proper legal analysis would likely take much longer than the time allotted to this project. As many attorneys already know, a single subject covered by any particular legal foundation, such as excessive bail, might require months to research and volumes to report. Accordingly, this analysis is, by necessity, quite broad. Moreover, this analysis is really only the start of a continuous evaluation of the law – federal, state, and local – and how it either promotes or hinders best practices in the administration of bail in Yakima County. Indeed, in several states, jurisdictional improvements in pretrial practices have themselves often caused changes in the laws through reactionary bills seeking to either foster or to undo those improvements. Thus, this document

[1] Smart Pretrial Demonstration Initiative FY 2014 Competitive Grant Announcement (BJA) at 4, found at https://www.bja.gov/Funding/14SmartPretrialSol.pdf.
[2] *Id.* at 6.
[3] Consultant Agreement, Attachment A -- Scope of Work (proprietary).

should be seen as a living document, which can be improved upon incrementally.

Second, despite my experience with other states' laws, I do not presume to know Washington law better than anyone living and working in Washington. The value of the instant legal analysis is not necessarily as a summary of Washington law or legal principles; instead, its value lies in an overall comparison of the major elements of Washington law with other state laws (including those considered to be "model laws"), the fundamental legal principles of national application, the national best practice pretrial standards, and other fundamental concepts (such as the history of bail), to make realistic recommendations based on a global perspective of pretrial justice.

Third, much of what is happening today in pretrial justice is happening for the first time, and yet we are experiencing rapid change. Some of that change is coming from jurisdictions deciding to improve on their own, but some of it is being forced upon them. Accordingly, this legal analysis should also serve as a document that can assist the State of Washington in the event that it is forced into rapid change. It might be somewhat of a surprise to learn that the closer one looks at any particular state's laws concerning pretrial justice, the more one sees that often core elements of the law – such as statutes or opinions that have been part of the state's jurisprudence for decades or longer – are seemingly flawed and likely to require change. An ongoing legal assessment surrounding all pretrial issues – and especially those representing laws, policies, or practices that are most vulnerable to forced improvement – is likely the best way to prepare any particular jurisdiction for an unpredictable catalyst that forces seemingly urgent change.

Fourth and finally, this legal analysis bases certain recommendations on information found primarily in two documents published by the National Institute of Corrections in 2014. The first, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform,*[4] is a document intending to get all American states on the same page when thinking about improvements to the criminal pretrial process. The second, *Money as a Criminal Justice Stakeholder: The Judge's Decision to*

[4] *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform,* (NIC 2014) [hereinafter *Fundamentals*], found at http://www.clebp.org/images/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf.

Release or Detain a Defendant Pretrial,[5] is a document that illustrates how the fundamentals of bail lead naturally to particular way of looking at the judge's release or detention decision – that is, as an in-or-out proposition, effectuated immediately and with nothing left to chance. For the present legal analysis to make the most sense, I emphatically recommend a thorough reading those NIC documents. Knowledge of the fundamentals of bail is crucial for explaining both exemplary and less-than-exemplary statutes, rules, opinions, and other legal sources.

Fundamentals of Bail

In order to fully understand "legal and evidence-based pretrial practices," one must have some basic understanding of each fundamental of bail and what it means in the national pretrial justice movement. The first fundamental – why we need pretrial justice – is crucial for understanding what solutions are necessary to address the issues. When this latest iteration of a national pretrial justice movement began, one of the most frequently uttered objections to improvements was the phrase, "if it ain't broke, don't fix it." We still hear that phrase, but only in isolated areas by mostly uninformed people. Nevertheless, having a common understanding of the need for reform is crucial to American pretrial improvements, and knowing the problems means that we are halfway toward implementing the solutions.

Despite our acceptance and understanding of many of the problems in the pretrial phase, two stand out as particularly acute. The first problem deals with the fact that American law is designed for us to embrace the risk of release of virtually all bailable defendants – using existing criminal laws to address the inevitable failures – and yet, many Americans (and especially those in the criminal justice system) have actually become unacceptably risk averse. The current generation of pretrial reform includes a great deal of discussion about assessing and mitigating risk, but very little discussion about taking those risks to begin with. The second problem deals with the fact that Americans often focus on a desire for increased cost effectiveness and system efficiency at bail at the expense of justice, even though some of the needed reforms might be less efficient or actually cost more. Fairness in

[5] *Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial* (NIC 2014) [hereinafter *Money*], found at http://www.clebp.org/images/2014-11-05_final_nic_money_as_a_stakeholder_september_8,_2014_ii.pdf.

the American system of justice often comes at the expense of efficiency and saving money, and this can be especially true in bail and no bail.

Each of these problems comes to light most quickly when discussing money at bail. The tendency to address risk assessment and mitigation techniques without specifically addressing secured financial conditions at bail as a hindrance to release is fundamentally flawed, and our inability to deal with secured money at bail has been the main reason for continued reform since 1900. Likewise, to address fairness without focusing on secured money as a singularly unfair condition of release is to avoid pretrial justice altogether.

The second fundamental – the history of "bail" and "no bail" in both England and America – gives us answers to virtually every seemingly insoluble problem during the pretrial phase. The history explains why there have been two generations of bail reform in America, why we are currently in a third, and how to avoid a fourth. Specifically, the history tells us that bail should be viewed as "release," just as "no bail" should be viewed as detention, and it tells us that whenever (1) bailable defendants (or those who we feel should be bailable) are detained, or (2) unbailable defendants (or those who we feel should be unbailable) are released, history demands a correction in the way of reform. Despite knowing these lessons, however, we have been largely incapable of fully understanding that it is our switch to mostly secured bonds administered through commercial sureties that caused both of these problems in our system of release and detention for over 100 years. Nevertheless, knowledge of the historical need for correction of these problems, by itself, provides a roadmap for reform that has a high likelihood of success.

Perhaps more importantly, however, the history of bail gives special insight into any state's particular laws. For example, with knowledge of the history of bail in America in the 20th Century, one can quickly assess early 1900s court opinions or 1960s and 1980s statutory enactments corresponding to various periods of reform. In short, because the history and the fundamental pretrial legal principles are intertwined, knowledge of that history is the only way to make sense of the law.

The third fundamental – the legal foundations – provides the framework and boundaries for all that we do in the pretrial field. Each fundamental principle of national applicability, from probable cause and individualization to excessiveness, due process, and equal protection, is thus a rod by which we

measure our daily pretrial practices so that they further the lawful goals underlying the bail process. In many cases, the legal principles point to the need for drastic changes to those practices. Moreover, in this generation of bail reform, we are beginning to learn that even our current state and local laws are also in need of revision when held up to the broader legal foundations. Accordingly, as changing concepts of risk are infused into our knowledge of bail, shedding light on local laws that once seemed practical but now might be considered irrational, the fundamental legal principles rise up to instruct us on how to change our state constitutions and bail statutes so that they again make sense.

The fourth fundamental – the pretrial research (and, most particularly, the social science pretrial research) – is crucial because it drives the field. All research, including legal, historical, opinion, observational, etc., is valuable research, but social science research tells us what works to achieve our lawful goals, and can actually influence the law. For example, knowing that the research shows that a particular condition of release or limitation on pretrial freedom does not work to achieve our goals, or that the condition can actually cause outcomes that are the opposite of our goals,[6] can lead an appellate court to conclude that the condition is irrational or unreasonable, and thus likely unlawful, based on multiple legal theories.

The fifth fundamental – the national pretrial standards – allows us to see how a combination of the history, the law, and the research can be written into workable recommendations for daily pretrial practice. Even though the field is developing rapidly, these standards, which have been crafted and molded over decades to reflect the consensus of all legitimate criminal justice practitioners, continue to act as additional rods by which we can measure our discreet pretrial practices.

The sixth fundamental – our terms and phrases at bail – is a natural outgrowth of all other fundamentals. When one knows why we need pretrial justice, the history, the law, the research, and the national standards, one sees the emergence of universally true definitions of pretrial terms and phrases

[6] An example is found in judges setting secured financial conditions. Typically, judges following the law set conditions of release for the purpose of gaining reasonable assurance of either public safety or court appearance. Recent research shows us, however, that if judges set secured financial conditions that lead to prolonged detention of lower and medium risk defendants, those defendants will actually become higher risk both short and long-term for new crimes and for failure to appear for court. Because the outcomes are seemingly the opposite of the goals, such a condition would appear to be irrational, and thus likely unlawful based on any legal theory requiring at least rationality as its basis.

that often conflict with how we use those terms today. Knowing whether one's important definitions line up with the fundamentals is the first step toward truly understanding many issues raised by a proper state legal analysis.

The Law and "Legal and Evidence-Based Practices"

Of these six fundamentals, the law is perhaps the most important part of any process designed to assess and possibly improve pretrial practices. Over the years, jurisdictions seeking to make improvements to the pretrial phase of a criminal case quickly learn that their current legal structure can either help or hinder implementing best practices based on the evidence, notions of fairness, or even logic. Indeed, a number of entities interested in pretrial reform are now discovering that the typical legal structure surrounding the pretrial release and detention decision in America is archaic, often cobbled together through decades of isolated attempts at change, and in need of a complete overhaul. The following explanation makes this last point abundantly clear: for over 100 years, we have been using a mostly criminal charge and secured money system of deciding who should be released or detained pretrial, but our current focus on using statistically validated risk assessment instruments as a more reliable predictor than criminal charge and on using only risk mitigation strategies that are both effective and fair (which often leads to reducing or eliminating the use of secured money conditions) means that virtually every state bail statute and state constitutional right to bail provision must be changed.

Unlike many other fields, and even unlike many other areas of criminal justice, we speak of using "evidence-based practices" to achieve the lawful goals of the discipline. For a number of reasons, however, such as the preeminence of the law at bail combined with our occasional tendency to ignore that law, we have coined a new term, "legal and evidence-based practices."[7] The phrase legal and evidence-based practices acknowledges the fact that in bail and pretrial justice, the empirical evidence, no matter how strong, is always subservient to fundamental legal foundations based on fairness and equal justice.

[7] *See* Marie VanNostrand, *Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC 2007) [hereinafter VanNostrand].

Thus, the term legal and evidence-based practices encompasses the whole of what jurisdictions must do to make pretrial improvements, and requires practitioners always to consult the law no matter how strong or weak any particular evidence may seem. This point is so crucial, and yet so often overlooked, that it requires some additional explanation.

Fields that attempt to follow evidence-based practices are attempting to find out what works to achieve their lawful goals. In some fields, such as the medical field, these goals are seemingly easy to articulate and apply, and might include reducing hospital stays, eradicating illness, etc. In fields within the sphere of criminal justice, the goals are often dictated by the law. For example, in probation, a typical probation statute might articulate as many as 10-15 valid goals, from retribution and rehabilitation to "promoting respect for the law." However, in probation, these goals are not obviously competing goals,[8] and thus jurisdictions are free to do things to probationers – such as conditioning freedom – so long as the conditions line up with at least one lawful goal. Moreover, because they are not obviously competing goals, researchers are free to examine the effects of one particular treatment, such as drug testing as a condition of probation, on a single goal, such as reducing recidivism.

At bail, however, the underlying goals are obviously competing: the underlying goals of bail, or release, are to (1) maximize release, while (2) maximizing public safety, and (3) maximizing court appearance. Because they are obviously competing, the goals must be constantly balanced. And because they must be constantly balanced, criminal justice actors cannot do anything in the pretrial phase of the case that does not consider all three of these goals together. For example, it is not enough to say that one has a technique for achieving a 100% public safety rate without also explaining how that same technique affects court appearance and release rates. Likewise, it is not enough to announce a new method of releasing a vast number of defendants without also assessing that technique for its effects on public safety and court appearance.

This issue comes up most frequently when jurisdictions endeavoring to follow the research are given "studies" or "evidence" claiming that surety bonds are best at achieving higher court appearance rates. Such studies –

[8] There may be some competition among goals to the extent that the law still affords constitutional protection despite a probationer's legal status, but never to the extent as seen in bail.

even if they are unbiased and not flawed for other invalidating reasons – must be held up to the law, which would require jurisdictions to also assess surety bonds for their effects on release and public safety. If these studies adequately address how surety bonds affect all three purposes underlying the bail or release process, then they are at least useful studies. Mostly, however, they do not.[9]

In short, the law requires that everything a jurisdiction does during the pretrial phase of a criminal case line up with the lawful goals underlying either bail or no bail. When it comes to bail, the law presumes, if not demands the release of bailable defendants, but it also allows for conditioning release to provide reasonable (not complete) assurance of public safety and court appearance. Release, public safety, and court appearance during the pretrial phase of the criminal case are the lawful goals, and the evidence, policies, and practices, must constantly consider each one as well as the three together.

Three Important Considerations Concerning the Law

Given the importance of the law in pretrial justice, it is imperative that jurisdictions make an ongoing study and analysis of the law as a significant part of its plan for improvement. While doing so, however, they must recognize three important considerations. The first, which I have already stressed in passing, is that the history of bail and the law are intertwined, and so the law is best understood through a thorough understanding of the history of bail and no bail. Indeed, one premise of the NIC's *Fundamentals* document is that people should learn each of the fundamentals in equal measure for there to emerge a truly national movement toward pretrial justice. In the pretrial phase, it is not enough for a judge to say, for example, "I know the law, and that is enough." Instead, the law is informed by the history, which connects the research, the national standards, and the terms and phrases together. Indeed, being a bail-setting judge is more akin to being a drug court judge, who must constantly consider a somewhat foreign body of literature in addition to any legal considerations that might arise.

[9] Indeed, the use of surety bonds typically does not affect (and thus has no relevance to) public safety because the money on a surety bond cannot be forfeited for new crimes. The effect of surety bonds on release, as one would surmise, is that these types of bonds delay release for some, and deny it for others.

The second is that each jurisdiction has its own "mix" of sources of laws, which makes a true comparison of states difficult. The mix is comprised of state constitutions and statutes, state and federal court (including the Supreme Court) opinions, court rules, municipal codes, and administrative regulations. A single aberrational provision in any of these areas can have a profound effect on any particular jurisdiction's practices. Some are difficult to spot; indeed, in Colorado, a single Colorado Court of Appeals opinion, written by a single panel of the appellate court with no binding authority even on any other panels of the same court, caused profound changes (and, more often, hesitancy to make changes) in bail practices in Colorado for decades.

The third is that the case law concerning bail and no bail is exceedingly sparse compared to other legal topics. Normally, sparseness in a legal field would cause persons to pay great attention to the few relevant opinions, but in bail we often still see jurisdictions actually ignoring the few opinions that do exist. For example, the United States Supreme Court in *United States v. Salerno* gave the federal system and the states important guidance on exactly how to do "no bail," or detention, in order to follow basic concepts of due process. Nevertheless, many states have enacted "no bail" provisions or engage in detention practices that would obviously fail if held up to *Salerno's* clear language.[10]

Methods and Process

A typical state legal assessment involves consulting the constitution, state statutes, relevant court rules, and important court opinions. Each is important, but researching and assessing court opinions takes the most time, depending on the state. Accordingly, when I search for court opinions from a distance, I typically look mostly to Supreme Court (or equivalent) opinions, but I will often read appellate court opinions as well as both published and unpublished trial court opinions if tied directly to important pretrial issues. I read both old and new cases for various reasons, including to assess how the courts have defined "bail," whether they have kept up with historical and legal changes, whether and how they address certain core legal principles such as excessive bail and due process in the pretrial phase, and to determine

[10] In fact, recently the Ninth Circuit Court of Appeals held up an Arizona "no bail" constitutional provision against the opinion in *Salerno* and declared the Arizona provision unconstitutional. *See Lopez-Valenzuela v. Arpaio,* No. 11-16487 (9th Cir. 2014).

their overall focus as a collection of cases. Ironically, it is the relative scarcity of bail opinions that makes such an assessment even possible. The more a state appellate court fully fleshes out its bail jurisprudence, the more that jurisprudence becomes difficult to assess.

A typical state legal analysis includes looking at the main bail and no bail provisions in the constitution, statutes, court rules, and court opinions,[11] and assessing them for: (1) how the state uses terms and phrases at bail and whether there is an overall articulated purpose underlying the legal scheme; (2) how the state determines its bail/no bail dichotomy based on its right to bail and eligibility for detention; (3) how the state does its "no bail" or detention process; (4) how the state does its "bail" or release process; and (5) whether the state has or lacks various other provisions considered to be best-practice provisions based on the history, legal foundations, national standards, and pretrial research. Due to the broader nature of the Smart Pretrial Demonstration Initiative, the current analysis looks at various ancillary provisions – such as citation and summons laws or diversion provisions – that affect the overall pretrial process. In the main, the present analysis follows the structure found in a document created in 2009 for the Jefferson County, Colorado, criminal justice system, which addressed issues as they arose somewhat chronologically as a typical defendant made his or her way through the system.[12]

In the end, a typical state legal analysis takes everything into account to make an overall assessment of the state legal scheme, noting exceptional provisions that might help or hinder attempts to improve pretrial justice, and providing an opinion of the state's place on the continuum of all American state bail laws.

Accordingly, the remainder of this paper will first examine broad pretrial issues identified through the research. It will then provide detail on each relevant area of the law as it affects defendants moving through the system, paying particular attention to how the laws either hinder or help the implementation of legal and evidence-based pretrial practices. Finally, it will give an overall assessment of Washington law and, in my own opinion, an

[11] I was also loaned two volumes authored by Royce Ferguson on criminal practice and procedure from West's Washington Practice Series, which I consulted on various points, but which was only partially useful due to being updated only to 2009.

[12] *See* Michael R. Jones, Claire M.B. Brooker, and Timothy R. Schnacke, *A Proposal to Improve the Administration of Bail and the Pretrial Process in Colorado's First Judicial District* (Feb. 19, 2009) [hereinafter *Proposal*], available from the authors.

assessment of where the legal scheme fits along the continuum of poor to excellent bail laws in the United States.

Broad Issues Identified by the Research

My research of Washington law identified several broad issues. They include Washington's constitutional right to bail provision, the interplay between Washington's statutes and court rules, general issues shown by a sampling of the case law, the report by the Bail Practices Work Group, and, potentially an issue for the future, the effect of a significant Native American population.

Note: *While visiting Yakima County to summarize the results of this legal analysis, I was made aware of an additional relevant document, the Law and Justice Panel Review Committee Report, written by James Hutton, David Thorner, and David Connell. I briefly discuss that report near the end of this analysis, immediately before the conclusion, so as not to imply that it was a part of my initial analysis.*

Constitutional Right to Bail Provision

Until 2010, Washington was in the category of states having what legal scholars call "broad right to bail" provisions in their constitutions. When adopted in 1889, this provision read, "All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great."[13] In 2010, however, after the highly publicized murders of four police officers by a released defendant not facing a capital offense, Washington amended its constitution to allow for the detention of defendants "punishable by the possibility of life in prison upon a showing by clear and convincing evidence of a propensity for violence that

[13] Wash. Const. Art I, § 20. This is substantially similar to the 1878 version found in Article V, Section 8, which was not approved by Congress, and which read, "All persons shall, before conviction, be bailable by sufficient sureties, except for murder in the first degree and treason, where the proof is evident or the presumption great." Inclusion of the crime of treason would not, by itself, place Washington in a category other than that having a broad right to bail provision. The provision of 1878 was undoubtedly borrowed from the Pennsylvania law of 1682 (or other states using that model), which was the template for most state right to bail provisions. The adoption of the Washington provision came at a time in American history when we were struggling to find ways to release bailable defendants who had no access to personal sureties and who could not afford the amount of the financial condition itself.

creates a substantial likelihood of danger to the community or any persons, subject to such limitations as shall be determined by the legislature." This amendment technically put Washington in a new category of states that have amended their earlier language by including so-called "preventive detention" provisions.

Unfortunately, however, the amendment only added a new layer (even if unacceptably broad) to the charged-based eligibility net for the "no bail" or detention process. Accordingly, Washington still faces essentially the same problem that it faced prior to the 2010 amendment. If an extremely high risk defendant is not charged with a capital offense or an offense in which he or she faces life in prison, he or she may not be detained without bail. Moreover, history has shown that if states enact preventive detention provisions – and especially preventive detention provisions using a charge-based eligibility net – but leave secured money bonds as options for mitigating risk to those released on bail, those states will avoid using the formal detention provisions and instead continue using money to detain extremely high risk defendants who are not eligible for "no bail." Use of money for this purpose (which is likely an unconstitutional purpose) leads inevitably to the use of more money overall, and so we tend to see the same problems in "preventive detention states," like Washington, as we do in all others: money causing the unnecessary detention of lower risk and bailable defendants, and allowing the unwise release of extremely high risk defendants.

In this generation of pretrial reform, states are currently trying to figure out how to incorporate risk into their constitutional provisions and to reduce, eliminate, or otherwise change their practices surrounding money at bail so as not to allow these problems to happen. Even though Washington amended its constitutional right to bail provision in 2010, it is likely that many in the state will soon see the need to amend it once again to fully incorporate risk. Moreover, occasionally a state supreme court will issue an opinion that adds to any constitutional dilemma faced by any particular state. This was done in Washington in 2014 in the case of *State v. Barton*,[14] which is discussed later in this paper. Nevertheless, until Washington's constitutional dilemma is fully addressed, criminal justice systems operating within the state will have difficulty in using a mostly risk-based or risk-informed system. This

[14] *State v. Barton*, 331 P. 3d 50 (2014).

difficulty is not insurmountable, however, and a potential solution to the dilemma is posed later under the section dealing with the decision to release or detain defendants.

Interplay Between Washington Statutes and Court Rules

Washington is relatively unique because its constitution does not expressly address rules of procedure for the courts, and thus the Washington Supreme Court has ruled that it has the power to dictate its own rules of practice and procedure, even if those rules contradict statutes enacted by the legislature. This, combined with the fact that the Supreme Court has also said that bail is a matter of procedure, makes Washington State relatively unique in that, theoretically, and so long as the rules provide a proper framework for legal and evidence-based pretrial practices, criminal justice systems do not have to worry about the various unfortunate statutory enactments often seen in other states. This interplay between court rules and statutes, however, makes assessing the law much more complicated. For example, most states have only one provision dealing with the "factors" judges must consider in setting conditions of bond or limitations on pretrial freedom. Washington has two – one in the rules and one in the bail statute. In most cases, when the Washington Court Rules address a particular topic, any conflicting statutory provision is deleted from the database. Statutory provisions left in that database are thus assumed to supplement and not contradict the rules. The fact that Washington has two sets of factors, then, leads one to believe that they must differ in ways requiring them to exist separately. Fortunately, because both sets of factors are somewhat deficient for the same reason (as discussed later), there is no real need to parse the language.

In any particular state, the only downside to having court rules trump the statute occurs when the Supreme Court knows less about bail than the legislature, and this is rarely, if ever, the case. In my opinion, because of its decision regarding the mix of its rules and statutes at bail, Washington enjoys a distinct advantage over other states that must often suffer through each legislative session as bills are enacted often encouraging the *opposite* of legal and evidence-based practices.

General Issues Illustrated by a Sampling of the Case Law

As the case law is the most time consuming and complex feature of a state pretrial legal analysis, the results can only provide broad generalities gleaned from just a sampling of the opinions. Even though cases discussing bail are relatively scarce (as compared to, for example, opinions discussing probation or any other punishment or sentence), there are still many hundreds of cases to sort through in any particular state. The various ways of narrowing that field – by looking at earliest, latest, most relevant, and most cited cases using a variety of search terms – allows me to find cases that appear to reflect the state of Washington law as gleaned by its court opinions.

For the most part, the cases I found in Washington are similar to those found in many other states. Early opinions are most interesting by placing Washington bail law into context with historical developments in the pretrial field. For example, in 1910, the Washington Supreme Court announced the rejection of the public policy against indemnifying sureties, a move made systematically across America and formally ushering in the commercial surety industry.[15] Knowledge of the history of bail provides a full explanation of cases such as this (as well as later Washington cases further discussing the history of bail) and tends to reinforce the notion that the history is not merely academic.

Also in 1910, in *Ex Parte Rainey,* the Washington Supreme Court provided an early prototype for many future opinions discussing excessive bail, which included a statement of the issue, a brief recitation of the facts, charge and potential penalty, and then a conclusion the amount was not "unreasonable."[16] In *State v. Johnson* in 1912, we see the first of many cases

[15] *See Essig v. Turner*, 110 P. 998 (1910).

[16] *Ex. Parte Rainey*, 110 P. 7 (1910). Even now, excessive bail opinions in Washington, and especially Washington Court of Appeals opinions, appear to be quite limited in providing guidance for excessive bail analysis with few, if any, cases giving any more than a brief and mostly conclusory opinion. *See, e.g., State v. Goodwin,* 4 Wash. App. 484 P.2d 1155, 1156 (Wash. Ct. App. 1971) ("The third contention goes to the trial court's discretion in establishing the amount of bail. Our review of the instant record does not reveal any abuse thereof which would warrant our consideration of this argument."); *State v. Jones,* 303 P.3d 1084 (Wash. Ct. App. 2013) (finding "no manifest abuse of discretion" by judge who set a $5 million financial condition when the record indicated a serious charge and "some evidence" that the defendant posed a flight risk.). Many court of appeals opinions, albeit unpublished ones, merely list the excessive bail argument as one of those that are simply "without merit." The lack of jurisprudence on excessive bail is not unique to Washington, however, and, while unfortunate, it should not be seen as aberrational.

dealing with money and what to do with it in the event of forfeiture.[17] The case is also important, though, for the following statement: "It is the manifest policy of the [bail] statute to encourage the giving of bail in proper cases, rather than to hold in custody at the state's expense persons accused on bailable offenses."[18] This statement illustrates two things. First, the court seems to implicitly tie bail to release by comparing it to the alternative of detention. Nevertheless, it stops short of saying that bail must equal release. In this sense, the statement reflects the law of virtually all American states, which have strayed from the original meaning of bail as release (and the right to bail as the "right to release," as articulated by the United States Supreme Court) and toward an historically perverted system of bail in which defendants may be ordered released but nonetheless detained through unattainable release conditions.

Early cases tend also to indicate how Washington has used the terms "bail" and "bond," with that usage often affecting the way bail is administered even today.[19] For example, in 1919, the Washington Supreme Court used the phrase "money as bail" and discussed the concept of depositing "money in lieu of bail."[20] Such usage, which apparently sees "bail" only as the opportunity of release through a surety, but cash as something other than merely a condition of release, sets in motion the use of a vocabulary at bail that does not always square with the history, the law, the national standards or the pretrial research. Nevertheless, this early usage tends to explain more recent cases in which the courts have examined the right to bail in terms of providing sureties, have rejected the use of "cash only" bonds without access to sureties, and have considered release on personal recognizance to not be bail at all, apparently due to its lack of a secured money or third-party surety component.

Overall, a broad review of the cases reveals that Washington is like many other states, which tend to lack opinions that fully address important issues and give full explanations and guidance at bail. Many of the reported cases deal with issues that are fairly well settled or at least routinely addressed

[17] *State v. Johnson*, 126 P. 56 (1912).
[18] *Id.* at 57.
[19] Early cases, including territorial cases, frequently used the word "bail" to mean a person acting as a surety, which, at the time, was an un-indemnified and unremunerated personal surety, and a 'bail bond' to be an obligation between the state and the defendant.
[20] *Kellogg v. Witte*, 182 P. 570 (1919). The phrase "cash in lieu of bail" was used as early as the early 1890s in Washington, when courts were obviously still struggling with how to release bailable defendants who had no access to personal sureties.

across America, such as bail in capital cases, bail pending appeal, bail and its effect on speedy trials or time served in sentencing, and "bail jumping."

Moreover, as in other states, the opinions tend to follow the history of bail – at least in the 20th Century – in that the cases explain elements of bail before, during, and after large reform periods in the 1950s to the 1990s. And, like other states, a large percentage of the bail cases tend to deal primarily with money and what to do with it. One need only to look at the statutory annotations to see the relatively large number of cases dealing with financial condition forfeiture, exoneration, and judgement provisions compared to cases dealing with statutory sections setting out more substantive bail concepts.[21] Overall, the overwhelming focus on money – and especially on money associated with commercial sureties – indicates a state system that is heavily reliant upon the traditional money bail system, administered primarily by commercial sureties using secured bonds. Indeed, of the major cases I was able to review, I saw only two published opinions dealing primarily with non-financial conditions.[22] There may be more, and as money is being used less across the United States, we expect to see more cases dealing with the various legal parameters of setting nonfinancial conditions.

Unlike courts in many other states, however, the Washington courts have done a good job in attempting to articulate the purpose of bail. Historically and legally, the purpose of bail in America is to release defendants, and the purpose of limiting that release is either to protect the public or to provide reasonable assurance of court appearance. Many courts have difficulty in grasping these concepts, though, and so one often sees opinions confusing bail with one of its conditions (money) by writing statements such as, "The purpose of bail is to ensure the appearance of the defendant." In some states, courts have clung to this definition even though the purposes for limiting pretrial freedom have been expanded to also allow for public safety. In Washington, however, the Supreme Court in *Wallen v. Noe* better explained the purpose of bail in a criminal proceeding by writing that, "Its true purpose

[21] Substantive provisions would include such issues as release "types," release or detention factors and proof, conditions of release, and release or detention orders. Most states have a similar imbalance, but not to the extent as Washington, which may be due, in part, to its heavier reliance on court rules.

[22] *See Butler v. Kato*, 154 P.3d 259 (Wash. Ct. App. 2007); *State v. Rose,* 191 P.3d 83 (Wash. Ct. App. 2008). The overall focus on money in Washington might also explain why the Supreme Court has apparently never cited to the ABA's national best-practice standards on pretrial release, even though it has cited to a number of other of the ABA's Criminal Justice Standards. A system that is heavily reliant upon secured money bonds or commercial sureties would be significantly at odds with the national standards on pretrial release.

is to free the defendant from imprisonment and to secure his presence before court at an appointed time. It serves to recognize and honor the presumption under law that an accused is innocent until proven guilty."[23] And although the Washington Supreme Court wrote in passing in 2009 that "the object of bail is to insure the attendance of the principal and his obedience to court orders and judgement of the court" (still confusing a condition of release with release itself),[24] the notion of a broader and more correct purpose of bail was emphasized in the 2014 case of *State v. Barton*, in which the Court wrote that a "co-equal purpose" of bail was "to protect the defendant from detention before conviction."[25]

This is not exactly a fully correct statement of purpose, legally and historically speaking, but its articulation of release as a purpose of bail makes it better than the statements of purpose in most American states. Nevertheless, this notion – that a purpose of bail is to afford release – combined with the Washington Supreme Court's articulation of a definition of "bail" that distinguishes it from both cash and personal recognizance, helps to explain its opinion in the 2014 *Barton* case as somewhat, if not completely, predictable. There is still considerable confusion in Washington concerning what, exactly, the definition of "bail" is. If a state believes bail to be money – i.e., a single condition of bail – then its statements concerning the purpose of bail will continue only to add to the overall confusion.[26]

When looking at case law, I am looking at progression of the law (such as courts defining its terms and phrases at bail over time) and trends (such as cases showing courts fully developing a proper articulation of the purpose of bail), but I am also looking for big cases with opinions that directly and significantly affect bail setting in local courts. In my somewhat limited search, and beyond those I have previously cited to show those trends and progressions, I have found four cases that fit this definition.[27]

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[23] *Wallen v. Noe*, 475 P.2d 787 (1970). In 1970 the United States Supreme Court had not yet identified public safety as a proper purpose for limiting pretrial freedom.
[24] *State v. Kramer*, 219 P.3d 700, 702 (2009) (quoting *State v. Jakshitz*, 136 P. 132 (1913)).
[25] *State v. Barton*, 331 P. 3d 50, 55 (2014).
[26] It can also lead courts to avoid citing to certain seminal bail cases, such as *Stack v. Boyle,* 342 U.S. 1,4 (1951), which equates the right to bail with the "right to release before trial" and the "right to freedom before conviction."
[27] A possible fifth case is *State v. Goodwin,* which is still cited for the proposition that defendants "[do] not have an absolute right to release on . . . oral recognizance prior to trial." 484 P. 2d 1155, 1156 (Wash. Ct. App. 1971). While that statement might seem to affect a great number of bail settings, it (1) is really no different from case law prevalent in America announcing that there is no constitutional right to a financial condition that one can make, and (2) still does not mandate financial conditions. Thus, the opinion should not be seen as a barrier to legal and evidence-based pretrial practices. A possible sixth case is *In re*

The first, *State v. Jakshitz,*[28] is still apparently cited for the Washington Supreme Court's broad statement concerning the right to bail and the reasons for allowing it:

> The right to bail is so fundamental that it is guaranteed in the Bill of Rights. The giving of bail should be encouraged for various reasons: That the state may be relieved of the burden of keeping an accused person; that the innocent shall not be confined pending a trial and formal acquittal; that in cases of flight a recapture may be aided by the bondsmen, who, it is presumed, will be moved by an incentive to prevent judgement or, if it has been entered, to absolve it and to mitigate its penalties.[29]

This statement is not unlike many other states that have articulated that the right to bail is "fundamental" or "absolute," but it differs in further articulating concepts of release and by mentioning bail bondsmen in particular. Moreover, this case appears to have begun a jurisprudential trend toward liberality in vacating judgments on forfeitures, and, perhaps unknowingly, likely invited many future appeals concerning forfeitures. Nevertheless, the concept that bail is fundamental and associated with release foreshadows the Court's more recent cases tending to require as many options as possible so as to provide for the release of bailable defendants.

Marriage of Bralley, 855 P.2d 1174 (Wash. Ct. App. 1993), but only as a cautionary tale concerning defining key terms and phrases when states have preconceived notions of those definitions. For example, the *Bralley* court wrote that "the definitions highlight the fact that a person who posts a *bond*, or a surety, has a special role in the production and security of the accused." Thus, the court appears to be saying that only sureties post bonds; however, the definitions used by the court leading to this statement clearly allowed for bonds to be posted by defendants as well. The court also distinguished between "bond" and "cash bail," but quoted a definition from Black's Law Dictionary defining a "cash bail bond" as something that can be posted by a defendant or another person. Definitions in bail also tend to change over time, and so jurisdictions should never be afraid to change them. For more current definitions based on bail's history, the law, current practices, and various other secondary sources, including Black's, jurisdictions should consult the electronic glossary on the website of the Pretrial Justice Institute, found at http://www.pretrial.org/glossary-terms/.

[28] 136 P. 132 (1913).

[29] *Id.* at 133. In 1913, commercial bail bondsmen would have been a relatively new phenomenon, and considered to be a possible remedy to the historical issue of the detention of bailable defendants due to their inability to find personal sureties.

The second case is *Westerman v. Cary,*[30] in which the Washington Supreme Court announced that the judicial determination of bail or release "must be made as soon as possible, no later than the probable cause determination [i.e., 48 hours], and as with probable cause, may be determined by a judge prior to the preliminary hearing."[31] The opinion is laudable for addressing the promptness of the first appearance, a topic that is often ignored by state courts. However, it should be noted that the national standards on pretrial release and detention contemplate even quicker release and detention hearings. American Bar Association (ABA) Standard 10-4.1 states that,

> [t]he defendant should be presented at the next judicial session within [six hours] after arrest. In jurisdictions where this is not possible, the defendant should in no instance be held by police longer than 24 hours without appearing before a judicial officer. Judicial officers should be readily available to conduct first appearances within the time limits established by this Standard.[32]

Moreover, the ABA Standards recommend that "a defendant's first appearance should not ordinarily be delayed in order to conduct in-custody interrogation or other in-custody investigation."[33] Finally, "a defendant who is not properly presented should be entitled to immediate release under appropriate conditions unless pretrial detention is ordered as provided in Standards 10-5.8 through 10-5.10."[34]

These fixed time limits have been recommended primarily because many states require only that a defendant be presented "promptly," or "without unreasonable delay," which are ambiguous terms that make enforcement of the right to prompt presentment "problematic."[35] While the ABA Standards recognize that the United States Supreme Court has accepted a 48 hour period as constitutionally acceptable for making probable cause determinations, those Standards recommend the shorter time periods (no more than 24 hours and optimally closer to the ABA's 6 hours) as "desirable."[36] The Standards further explain that the shorter time limits

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[30] 892 P.2d 1067, 1975 (1994).
[31] *Id.* at 1075.
[32] *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007), Std. 10-4.1(b), at 77 [hereinafter *ABA Standards*].
[33] *Id.*
[34] *Id.*
[35] *Id.* (commentary), at 79.
[36] *Id.* (commentary), at 80.

"contemplate[] that judicial officers will be available for a sufficient number of hours on weekends and legal holidays."[37] Moreover, the Standards presume that jurisdictions will make resources available to ensure that the shorter time limits can be met. According to the relevant ABA Standard commentary,

> A requirement of prompt presentment is meaningless if judicial officers are not available to conduct initial proceedings within the prescribed period. The Standard contemplates that sufficient means exist to ensure such availability. Such means may include utilizing 'on-call' or 'back-up' judges, commissioners or magistrates; may involve flexible scheduling of the time of judicial officers, and may make use of recent technology such as interactive video or computer-assisted pretrial services interviews and background investigations.[38]

Finally, while the Court in *Westerman* expressly announced its intention not to foreclose the use of bail schedules, it specifically mentioned that those schedules were developed to allow *earlier* release. Money bail schedules are addressed later in this paper.

The third case is a court of appeals case, *Yakima v. Mollet,* holding that CrR 3.2(b)(5), which allowed the judge to "require the execution of a bond with sufficient solvent sureties, or the deposit of cash in lieu thereof" [did] "not authorize 'cash only' bail to the exclusion of a bond."[39] The court's reasoning – that a deposit of cash is "an option the trial court may order along with the primary condition of a bond" – is somewhat confusing, and does not completely follow the statutory reasoning of the Ohio opinion on which it relies. The Ohio court, when faced with similar language, reasoned that once the judge set the condition and amount, that judge may not further specify the form of the bond, essentially giving the defendant a choice of how he or she meets the amount and thus the condition.[40] Nevertheless, according to the *Mollett* court, the Ohio opinion also reasoned that "the

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[37] *Id.*
[38] *Id.*at 81.
[39] *Yakima v. Mollet* , 63 P.3d 177, 180 (Wash. Ct. App. 2003).
[40] In *State v. Barton*, 331 P.3d 50, 59 (2014), the Washington Supreme Court appears to have adopted a "defendant choice" argument surrounding CrR 3.2(b)(5) as an option "that will often be less restrictive than the [section allowing a 10% cash deposit]."

result of 'cash only' bail would be to 'restrict the accused's access to a surety' in violation of the Ohio Constitution."[41]

Interestingly, the court in *Mollett* also rejected the argument that a judge could set a cash-only bond through the Rule's catch-all condition provision that allows judges to impose "any condition other than detention to assure appearance as required, assure noninterference with the trial and reduce danger to others or the community." In doing so, the court referred again to the Ohio opinion, in which it was written that "the only apparent purpose in requiring a 'cash-only' bond to the exclusion of the other forms provided in [the rules] is to restrict the accused's access to a surety and, thus, to detain the accused in violation of [the State constitution]."

Despite these brief references to the constitutional argument raised in the Ohio case, though, *Mollett* did not directly answer whether a cash-only bond would violate the Washington Constitution. In the fourth significant case, however, the Washington Supreme Court held that the constitutional provision articulating that all criminal defendants "shall be bailable by sufficient sureties" requires courts to allow defendants to use a surety whenever "bail" is set. The case, *State v. Barton*,[42] appears well known, at least by Washington criminal justice leaders, and so a detailed summary is unnecessary.[43] Nevertheless, there are a several points about the case that might need some explanation.

First, this sort of case is not new, and, as noted in the opinion, other states have come to different conclusions about the meaning of "sufficient sureties" in their constitutions. Second, the case is yet another reminder that the history of bail is not merely academic, and that both knowledge and ignorance of the history can guide courts in different ways. Third, it is further reminder, as well, that proper and universally accepted definitions of key terms and phrases would likely diminish the confusion some states have in interpreting other state's opinions (i.e., states that define bail as money will be somewhat confused by court opinions looking at the right to bail as a right to release, just as some states would likely be confused by the

[41] *Mollett,* 63 P.3d 177, 180 (quoting *State ex rel. Jones v. Hendon,* 609 N.E. 2d 541, 544 (1993)).
[42] *State v. Barton,* 331 P.3d 50 (2014).
[43] Essentially, the bail setting court, following CrR 3.2 (b)(4) – the court rule allowing for a 10% deposit bond – set a defendant's bond at $500,000 and required him to deposit post $50,000 in cash or other security with the court. Defendant claimed that the order violated Washington's right to bail "by sufficient sureties" provision. The Supreme Court agreed, and while that Court did not invalidate the rule, it held that the cash-only deposit portion of the order violated the constitution because it did not allow the defendant the option of having a third-party surety.

Washington Court's statement that personal recognizance is not "bail"). Indeed, because of confusion caused by the various definitions of certain key pretrial terms and phrases, many states are opting to simply eliminate using the terms "bail" and "sufficient sureties" due to their somewhat antiquated and confusing nature.

Fourth, the rule at issue – a provision providing for a so-called 10% deposit option, has its own history in American bail, which is useful to understand as a backdrop to this case. In sum, a 10% provision was first adopted in Illinois, but was made mandatory to purposefully eliminate commercial sureties. Today, although many states have created 10% deposit provisions, they are only provided as an option but are used, nonetheless, to avoid commercial sureties. Moreover, like all secured financial conditions, these provisions can also be abused to purposefully detain otherwise bailable defendants. Even though the 10% option found its way into the ABA Standards on Pretrial Release as well as statutes based on those Standards (and thus, perhaps, the Washington Rule), the use of a 10% cash to the court option is now seen as a provision that only perpetuates the traditional money bail system in America.

Fifth, the outcome of *Barton*, itself, was fairly predictable, given that throughout the entirety of English and American bail history, the detention of bailable defendants has always led to efforts to reform the system and to free those defendants. This was perhaps especially likely in Washington, which has court opinions expressing the right to bail to be "fundamental," and with rules expressing the desire to release defendants under "least restrictive conditions." Sixth, despite being heralded by the commercial bail industry as an endorsement of commercial sureties, nowhere does the opinion distinguish between commercial and non-commercial sureties and, in fact, the opinion goes out of its way to explain its application to all third-party surety arrangements.

Seventh, and finally, the crux of the decision appears only to significantly affect a judge's ability to detain an extremely high risk defendant who is otherwise bailable under the Washington Constitution. This requires a bit of explanation.

In a model jurisdiction with a legal scheme designed to fully implement legal and evidence-based practices, a risk assessment instrument would determine all defendants' risk for pretrial misbehavior (missing court or

committing new crimes). The law would then allow for the detention of extremely high risk persons through a process of detention like the one discussed by the United States Supreme Court in *United States v. Salerno*.[44] Pursuant to that scheme, those extremely high risk defendants might be detained, but could be released after an appropriate due process hearing. Low to medium risk defendants would be considered releasable or "bailable" and all (or virtually all) would be released immediately or quickly on least restrictive conditions that do not themselves cause detention.

Unfortunately, most states do not have a legal scheme set up to fully implement legal and evidence-based practices. Indeed, state constitutions with provisions similar to Washington's – providing a detention net based initially on the criminal charge – have difficulty when faced with extremely high risk defendants who are nonetheless "bailable" or releasable. Often, because they are required to "set bail" for these high risk defendants, judges will set high, typically "unattainable" cash bonds. The word unattainable is in quotes only because there have been documented cases of defendants meeting "cash-only" financial conditions in the millions of dollars. The bonds are typically "cash-only" because judges know that sureties are not responsible for supervising defendants for public safety (the money on the bond is not forfeitable for breaches in public safety) and that some bail agents help defendants get out of jail with no money down and on payment plans. Finally, and adding to the overall complexity, these types of bonds are likely altogether unlawful when they are set pursuant to an improper purpose at bail – to detain bailable defendants by skirting the lawful detention procedure already enacted in the constitution.

Barton says that pursuant to the constitution, "*when bail is required*, the accused may access it by surety."[45] Accordingly, to the extent that judges in Washington State were using cash-only bonds (i.e., a financial condition of release) to detain high risk defendants, *Barton* would seemingly force judges to set *extraordinarily* high amounts to achieve the same results by accounting for sureties. Unfortunately, extraordinarily high amounts still might not achieve these results and would likely be even more vulnerable to a constitutional attack based on multiple legal theories.

There are no real hindrances to releasing low to medium risk defendants, though. Pursuant to the history, the law, the pretrial research, and the

[44] 481 U.S. 739 (1987).
[45] *Id.* at 56 (emphasis in original).

national standards, these defendants could all be released on personal recognizance or unsecured appearance bonds without affecting either public safety or court appearance rates (as compared to secured bonds). Many high risk defendants, too, could be released safely into the community using either personal recognizance bonds with nonfinancial conditions, or unsecured financial conditions, or, when absolutely necessary, with attainable (either through the defendant or a surety) secured financial conditions. But extremely high risk defendants – so high that a judge feels the defendant should be detained pretrial – would pose a problem based on *Barton* unless that defendant was facing a charge that triggers the constitutional detention provisions.

Other states, and virtually all states having either broad right to bail provisions or charge-based preventive detention provisions in their constitutions, face the same dilemma. The only true solution is to change those constitutional provisions, and therefore many states are beginning the slow process of amending their constitutions to account primarily for pretrial risk versus charge. In the meantime, however, I believe there is only one acceptable option available to judges attempting to detain otherwise bailable defendants who are deemed to pose an extremely high risk for pretrial misbehavior. That option is to provide the same sort of due process hearing approved by the Court in *Salerno* for any bailable defendant who may be or actually is detained through the setting of unattainable conditions. Even if a financial condition is extraordinarily high – say, a $50 million surety bond – an appellate court will have a slightly more difficult time declaring it unlawful if the defendant received the same due process he or she would have received prior to a legitimate detention hearing.[46]

Report by the Bail Practices Work Group

In the *Barton* opinion, the Court recognized a "bail practices work group" that was created by the legislature in the wake of a quadruple murder that led to the 2010 changes to the Washington Constitution. The bill authorizing the Work Group required it to examine the bail system "in a comprehensive and well-considered manner from all aspects including, but not limited to,

[46] This should never be considered the best or permanent option, but only one that can help judges attempt to follow the law while protecting the community in light the current constitutional dilemma. Every jurisdiction in Washington should be concerned that its constitution likely needs yet another amendment to avoid continual perversion of the legal and historical bail/no bail system. Moreover, this option only deals with legal objections based on the lack of procedural due process. Other challenges based on different legal theories might still prevail despite holding a due process hearing.

judicial discretion, bail amounts and procedures, public safety, variations in county practices, constitutional restraints, and cost to local government."[47] It is clear from this mandate (as well as the more particular issues discussed in the bill) that the group would require a great deal of time to fully consider the issues and to make recommendations. However, the Work Group's final report indicates that the group met only for a total of two days, in increments of four hours each for four sessions. In addition, subcommittees met for a total of four, six, or eight hours, depending on the topic.

Not surprisingly, then, and with all due respect to the people who were appointed, the recommendations from that group appear to reflect mostly what members of the group already knew going into the sessions, and not the sort of recommendations that come from a systematic and thorough examination of a state's bail laws, policies, and practices in light of the fundamentals of bail. Indeed, one of the recommendations – to create a generally recognized definition of the meaning of bail – should have clearly pointed to the need for further study.

This is not meant to disparage anyone participating in this group. Across America, jurisdictions are learning that bail is different, and that there is a dire need to undergo deep and thorough education on bail issues before trying to solve complex "bail" and "no bail" problems. Pretrial reform in the states requires extensive pretrial education, and that education tends to take longer than most states are used to.[48]

Issues Raised by the Native American Population

American Indian or Native American law can be an extremely complicated and highly specialized subject. Due to Yakima County's geography, however, there is a possibility that certain issues primarily concerning that body of law will arise. Moreover, some persons have raised issues of practicality – such as sharing information with tribes, etc., that may cause slight hindrances to Yakima County's desire to fully implement legal and evidence-based practices. In my limited review, I did not see any provision posing any obvious hindrance to Yakima County's goals. A thorough discussion of Indian law and the various issues raised by the Native

[47] S.B. 6673 (2010).

[48] The State of Colorado spent over one year studying the fundamentals of bail, and only then recognized that many of its previous formal recommendations considered, at the time, to be "bail reform" recommendations were actually uninformed and inadequate.

American population are well-beyond the scope of this paper; accordingly, if issues arise, Yakima County should request the assistance of someone with expertise in that body of law and its intersection with criminal justice.

Washington's Constitution, Statutes, and Rules Affecting LEBP

Constitution

As noted previously, Washington's constitution poses perhaps the biggest issue for any local jurisdiction trying to accomplish legal and evidence-based practices. The 2010 amendment to the constitution, while allowing for the preventive detention of a larger class of defendants, is still primarily based initially upon the criminal charge, and thus does not take advantage of this generation of bail reform's knowledge of infusing risk into a jurisdiction's bail/no bail dichotomy. Extremely high risk defendants who are nonetheless bailable will have to have bail "set," which means that they will be ordered released with conditions to provide reasonable assurance of public safety and court appearance. If, in the past, judges have attempted to detain otherwise bailable defendants by using unattainable cash-only amounts, they may no longer do so pursuant to Washington case law. Moreover, any attempt by judges to set extraordinarily high financial conditions to accomplish the same purpose while accounting for the surety option might not accomplish that purpose either, and will likely be eventually deemed unlawful in any event. As mentioned previously, the solution to this is to once again change Washington's constitutional right to bail provision.[49] In the meantime, however, and following the best research we have in pretrial justice, judges should release virtually all low and medium risk defendants, and even some high risk defendants using unsecured bonds, or through personal recognizance and nonfinancial conditions. Exceedingly high-risk defendants who are nonetheless bailable under the constitution (which should represent an extremely low percentage of defendants overall) should be given a due process hearing – like the one reviewed In *United States v. Salerno* – before setting any condition likely or intending to detain the defendant. Even then, judges should be prepared for the inevitable appeal and possible reversal.

[49] This assumes Washington residents would want the change. In this generation of pretrial reform, we are asking states whether they like their current "bail/no bail" dichotomies, and offer to help only when those jurisdictions desire change.

Statutes and Rules Following a Typical Criminal Case

Preface

As noted previously, the interplay between the statutes and rules in Washington means that the statutes are somewhat sparse compared to other states. In addition, the statutes still in force (including those labeled as "probably superseded" by any particular rule) appear somewhat archaic,[50] leading to the same confusion suffered by states that have not updated the entirety of their statutes to best intersect with the rules. These more archaic provisions stand out especially when juxtaposed against the various "modern" provisions, such as those borrowed from the federal statute and enacted into Washington law in 2010.

Moreover, two or three statutory sections, one of which was obviously enacted with a knowledge of the court rules in mind, indicate a fundamental misunderstanding of the bail process altogether. For example, Section 10.19.170 reads: "Notwithstanding CrR 3.2, a court who releases a defendant arrested or charged with a violent offense . . . on the offender's personal recognizance or personal recognizance with conditions must state on the record the reasons why the court did not require the defendant to post bail."[51] In addition to confusing the term offender with defendant, this section would appear to require reasons for not imposing financial conditions for purposes of public safety, which is flawed from both a legal and empirical sense. Moreover, the national standards as well as the model statutes based on those standards typically require reasons for setting the *more* restrictive bond types, not the *less* restrictive types, all of which comports with American law generally.[52]

Another example, found in Section 10.21.015, forbids a pretrial services program from supervising persons charged with certain violent offenses or sex offenses unless those persons also are required to provide "a payment of

[50] These include provisions such as those allowing for "recognizances to keep the peace" after conviction – a historical, but mostly discarded phrase today – in addition to provisions to "recognize witnesses" and authorize warrants sent by telegraph or teletype.
[51] Wash. Rev. Code § 10.19.170.
[52] A requirement to provide reasons for deciding to detain a defendant is nonetheless found in Wash. Rev. Code Section 10.21.080, which was apparently part of the revisions adopted in 2010 that are substantially similar to the federal requirements.

bail,"[53] again showing a fundamental misunderstanding of legal and evidence-based pretrial practices that would tend toward reducing the use of money at bail, and especially for purposes of public safety. A third example is found in Wash. Rev. Code Section 10.21.055, which requires "blanket" conditions for persons arrested on certain offenses involving alcohol.[54] Blanket conditions, as well as the issues raised in the previous two examples, can be complex (and the language of any particular section can be parsed a number of ways), but the fundamental and overall point of highlighting these sections is to illustrate that a proper and lengthy period of bail education would likely lead the Washington legislature to question even the limited bail provisions still found in the statutes.

Diversion and Pre-Pretrial Issues

Jurisdictions embarking on pretrial improvements quickly become aware of the various methods being implemented across America (including traditional pretrial diversion paths as well as numerous specialty treatment courts and even things such as criminal mediation) to divert criminal defendants away from the traditional adversarial criminal justice system or to move them through an alternative system.[55] These diversion methods are becoming far too numerous to examine and report in an analysis such as this, but the people in Yakima County, Washington, should understand three things about them. First, there is often a body of literature describing best practices in both the substantive treatments or in the implementation of these programs, and to the extent that a particular state has created any sort of diversion or specialty treatment program not based on best practices, it should review that program and possibly change it. Second, traditional diversion is considered to be a second prong of the pretrial field, and so at the very least, jurisdictions should consult the research on this type of alternative and implement it when possible.[56]

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[53] Wash. Rev. Code § 10.21.015(1).
[54] *See id.* § 10.21.055.
[55] The author notes the existence in the Washington Statutes of deferred prosecution in certain cases as well as drug courts, "therapeutic courts" for dependency cases, and provisions dealing with the arrest of persons with mental disorders and arrest of persons with chemical dependencies through a pilot program located in Snohomish County.
[56] The National Association of Pretrial Services Agencies intends to amend its national pretrial standards by including the diversion standards into a standalone document. The current set of diversion standards are found at http://www.napsa.org/publications/diversion_intervention_standards_2008.pdf. Recently, the National Institute of Corrections published a document explaining outcome and performance measures for the pretrial diversion field. *See Measuring for Results: Outcome and Performance Measures for the*

Third, once a jurisdiction begins seeing the benefits of pretrial diversion, it should quickly recognize the similar benefits of moving back even further in time to achieve better overall outcomes for its community. While not required of jurisdictions participating in the Smart Pretrial Initiative, I recommend enlisting a group of people to study so-called crime or criminal prevention strategies, which include programs and treatments often given to children (or even expectant mothers) and shown by the research to reduce entrance into the criminal justice system, albeit with measurable outcomes presenting sometimes only decades later.

Recommendation: Yakima County should take advantage of lawful diversion methods, but with an understanding that they must be evaluated as any other pretrial practice for their tendency to follow legal and evidence-based practices. To the extent that Yakima County can also begin a discussion of research-based crime or criminal prevention programs, it should be done.

Statements of Purpose

The best pretrial laws in America have explicit purposes to guide system participants when implementing pretrial policies and practices. Articulating a purpose follows the ABA Standards, which include a number of statements indicating an overall philosophy of the administration of bail and the pretrial process. Among other things, the ABA Standards were created, at a minimum, "to minimize unnecessary pretrial detention in a variety of ways including encouraging the use of citations and summonses in cases involving minor offenses, articulating a presumption in favor of release on personal recognizance, and – in cases where personal recognizance is inappropriate – providing for the use of the least restrictive conditions necessary to assure the defendant's appearance for scheduled court proceedings and minimize the risk of danger to public safety."[57]

The Standards articulate additional principles that shape a fundamental philosophy concerning pretrial decisions, including: (1) the need for the release or detention decision to be made in an open, informed, and accountable fashion, (2) the need to use non-financial conditions of release, to minimize financial conditions, and to eliminate commercial sureties, (3)

Pretrial Diversion Field (NIC 2015), found at https://s3.amazonaws.com/static.nicic.gov/Library/029722.pdf.

[57] *ABA Standards*, *supra* note 33, at 30.

the need to create pretrial services agencies, (4) the need to develop reliable risk assessment instruments and evidence-based risk mitigation procedures, (5) the need to use preventive detention, or "no bail" procedures in ways that are lawful and effective, and (6) the need to reallocate resources to effectively monitor and supervise a large population of defendants released into the community. The ABA Standards' overall philosophy is one that is tied to a number of legal principles,[58] but particularly to the presumption of innocence ("[t]he strong presumption in favor of pretrial release is tied, in a philosophical if not a technical sense, to the presumption of innocence.")[59] It also recognizes the need for research to illuminate the societal costs of maintaining fundamentally flawed practices, such as the traditional money bail bond system, as well as to develop alternatives to inefficient, outdated, or unfair bail bond-setting practices. More than anything, however, its philosophy mirrors Chief Justice Rehnquist's statement in *United States v. Salerno* that, "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[60]

The Washington bail statutes do not appear to have an expressly articulated purpose, other than Wash. Rev. Code Section 10.01.050, which declares that no person shall be punished unless and until he or she is convicted of a crime, and Wash. Rev. Code Section 10.21.010, which articulates a general intent to enact laws made necessary by the 2010 amendment to the Washington Constitution. The court rules are only slightly better, in that they state that they "are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay."[61] None of the local court rules relevant to Yakima County appear to have any such statement of purpose, either, but a purpose clearly articulating the pretrial philosophy of the criminal justice system would be beneficial to everyone in that system.

Recommendation: Yakima County should create its own statement of purpose for use in its pretrial justice system.

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[58] For a discussion of how many of these key legal principles are tied to the pretrial release decision, *see* VanNostrand, *supra* note 8, at 3-8; *Fundamentals*, supra note 5.
[59] *ABA Standards*, *supra* note 33, at 36.
[60] 481 U.S. at 755 (1987).
[61] CrR 1.2.

Definitions of Terms and Phrases

The statutes and rules also appear not to have explicit definitions of key terms and phrases for the pretrial phase of the criminal case. Moreover, the apparent definitions adopted by the courts, legislators, and practitioners appear to conflict with definitions gleaned from the history, law, pretrial research, and national best-practice standards. Most importantly, it appears that Washington defines the word "bail" as money, thus confusing the process of release with one of many conditions of release. In this sense, the definition is like that found in many states that have, over time, blurred the process of bail with only one of its conditions.

Definitions concerning bail change over time. Because of this, we are seeing that even state supreme court definitions of certain key terms and phrases can become outdated or inaccurate. The Bail Practices Work Group recommended finding agreement on the definition of bail, and this should be done as a prerequisite to other pretrial improvements locally and statewide. For all of the reasons articulated in the NIC's document titled, *Fundamentals of Bail,* including even logic, bail should never be defined as one of bail's conditions – i.e., money – and a proper definition should reflect universal truth over custom, habit, or even inaccurate laws.[62]

Recommendation: Yakima County should agree on its own definitions of key terms and phrases that reflect the fundamentals of bail, noting, especially, when current definitions stand in the way of legal and evidence-based practices.

Citations v. Arrest and Summonses v. Warrants

Police officers and sheriff's deputies make more decisions concerning pretrial release and detention than any other actors in the criminal justice system. Accordingly, how law enforcement treats these contacts has a significant effect on the rest of the system. The better state laws (as reflected by the national pretrial standards) put few limitations on police officer discretion to issue citations, in some cases guide those officers toward

[62] *See Fundamentals, supra* note 5. For several decades, Colorado's statutes and court opinions defined "bail" as money. However, after over one year of study of the fundamentals of bail, Colorado made numerous changes to its statute, including the definition of bail, which was deemed to be erroneous and confusing.

presumptively issuing citations whenever possible, and sometimes forbid the use of arrest in certain cases.

Judges, too, have an opportunity to significantly impact their jurisdictions' pretrial release and detention policies simply by acting more purposefully at the decision to send a summons versus issuing an arrest warrant. Like state laws concerning citations and arrests without warrants, the better state laws dealing with summonses similarly encourage judges to use them liberally in lieu of warrants for arrests. More enlightened states also understand some of the inherent flaws with decisions involving both citations and summonses when those decisions are made without the benefit of validated risk assessment instruments and instead are based on notions surrounding the criminal charge and money. The trend in America today appears to be toward infusing notions of pretrial risk into even these early decisions.

Chapter 10.31 of the Washington statutes deals with warrants and arrests, and appears to be set up to reflect a system that is based on traditional but archaic notions of risk and money. Police officers are given general authority to arrest persons committing certain crimes without a warrant, but the exceptions to the rule – exceptions sometimes requiring the arrest of persons under certain circumstances – appear to be getting quite numerous. Like most states based on traditional pretrial notions, these exceptions are based primarily on charge apparently as a proxy for risk for failure to appear or, more likely, risk to public safety.

Of course, the police must follow the law, but there is a growing body of research illustrating the benefits of citation release and its effects on public safety and court appearance. Moreover, the decision to issue a citation versus arresting a defendant can be helped considerably by allowing police to use risk instruments or risk "proxies," which would give the officer some indication of the person's risk of flight or to public safety at first contact.

Summonses, too, can be made more prevalent simply by making a conscious decision to favor their use, and can be made more effective through taking advantage of the current research on risk in making that decision. CrR 2.2 is better than the statute dealing with arrests in that the rule requires judges to presumptively issue summonses, except under certain circumstances, for non- felony cases (the rules state that judges "may" issue summonses for felonies unless the court has reason to believe the defendant may not appear or might otherwise harm the public.) These provisions could be better, but,

in the main, they do not appear to significantly hinder Yakima County in pursuing legal and evidence-based pretrial practices, which would increase the use of both citations and summonses.

When jurisdictions embark on improving the pretrial system, they typically appropriately focus on the use of money in that system. Often, however, those jurisdictions neglect to discuss the issue of using money as financial conditions attached to warrants. Some jurisdictions take money at bail so much for granted that their statutes or rules mandate amounts of money on warrants or require forms of warrants that include blanks for amounts of money. Fortunately, Washington does not appear to be one of those states, although Rule 2.2(c) requires a judge to "set forth in the order for the warrant, bail and/or other conditions of release."[63] Legal and evidence-based practices require jurisdictions not to take a single condition of release for granted, but instead to individually assess *all* conditions for their effectiveness and lawfulness, with the recognition that ineffectiveness may affect legality. This assessment should be done for conditions no matter where those jurisdictions see their use, including on warrants, and financial conditions on warrants that are set primarily out of habit or custom should be avoided.

One important caution should be noted, which is that when statutes and rules do not require citations or summonses, and when jurisdictions implement a risk assessment system that can only happen after persons are brought to the jail, it may become tempting to actually arrest and issue warrants in more cases due only to the desire to bring defendants to a place where they can be properly assessed for their pretrial risk. This would be exceedingly unfortunate, but hopefully knowledge of the fundamentals of bail, and especially fundamental legal principles of due process, excessive bail, equal protection, and the presumption of innocence will keep it from happening in Yakima County.

Recommendation: Even though both the statute and rules regarding citations and summonses might benefit from revision in the future, none of the provisions appear to significantly hinder issuing a great many citations and summonses based on legal and evidence-based practices. To the extent that police and judges can incorporate validated risk assessment instruments into these decisions, they should, but the criminal justice system should also

[63] Moreover, Ferguson's treatise on Washington Criminal Practice and Procedure includes several forms, many of which have fill-in-the blank lines for financial conditions.

recognize that the use of both citations and summonses – even without incorporating the latest risk research – follows basic notions of American law favoring least restrictive treatments and conditions pretrial. All conditions of release, including conditions set on warrants, should be assessed for legality and effectiveness as well as individually tailored to the particular defendant based upon risk of flight and to public safety. To the extent that Yakima County routinely uses secured financial conditions on warrants, it should question that use. Best practices suggest using arrests and warrants sparingly, basing the decision to arrest and to issue a warrant on risk whenever possible, and to recognize and resist any temptation to increase the number of warrants and arrests simply to obtain objective risk assessments.

Money Bail Schedules

Often when defendants are not released by officers at the scene, they are transported to some facility that includes the use of money bail schedules, which, in their traditional form, assigns amounts of secured financial conditions to various charges. Money bail bond schedules are common throughout the country, the result of a "long history of courts setting money bail on the basis of the charge alone."[64] Although they are almost always created benevolently as a way to help defendants obtain early release, they typically grow (often through committees using indexes such as the consumer price index or other, more arbitrary means to raise amounts) and permeate the process to the point where they tend to cause the detention of bailable defendants. There are many problems with bail schedules, including: (1) they tend to violate the principles of *Stack v. Boyle*[65] (as well as state laws created in the wake of *Stack,* such as are found in both the Washington statutes and rules) that require individualization in setting conditions of release; (2) they can be seen to violate state law concerning the unlawful delegation of the judicial responsibility to set conditions of release; (3) the money on the schedule is often never changed from the scheduled amount, even after a judge has individually assessed a defendant; (4) they are arbitrary, with few jurisdictions capable of articulating why one amount has been chosen over others, and with jurisdictions occasionally doubling or halving all amounts for various reasons having little to do with court appearance; (5) they are often non-uniform across jurisdictions; (6) they are based on a faulty assumption that secured money amounts protect the

[64] *ABA Standards*, *supra* note 33, Std. 10-1.7 (commentary), at 51.
[65] *Stack v. Boyle,* 342 U.S. 1, 4 (1951).

community and motivate persons to return to court; (7) they are lately under attack for violating civil rights laws and principles of equal protection in the federal courts; and (8) they violate principles as articulated in the ABA best-practice standards on pretrial release and detention. The ABA Standards state: "Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the defendant's flight risk, and should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge."[66] Commentary to that Standard explains the ABA's position:

> This Standard emphasizes the importance of setting financial conditions through a process that takes account of the circumstances of the individual defendant and the risk that the individual may not appear for scheduled court proceedings. It flatly rejects the practice of setting bail amounts according to a fixed bail schedule based on charge. Bail schedules are arbitrary and inflexible; they exclude consideration of factors other than the charge that may be far more relevant to the likelihood that the defendant will appear for court dates. The practice of using bail schedules leads inevitably to the detention of some persons who would be good risks but are simply too poor to post the amount of bail required by the bail schedule. They also enable the unsupervised release of more affluent defendants who may present real risks of flight or dangerousness, who may be able to post the required amount easily and for whom the posting of bail may be simply a cost of doing 'business as usual.'[67]

This quote illustrates the fundamental problem with money bail schedules being used in jurisdictions attempting to implement a risk-informed pretrial justice system based on legal and evidence-based practices, and it bears repeating: money bail schedules hinder the release of low and medium risk defendants due solely to their lack or money, while permitting the unwise release of extremely high risk defendants who have money.

The better state laws discourage or attempt to eliminate the practice of using money bail schedules. The worst laws require their use. In Washington State, schedules are permitted but not required, and are specifically

[66] *ABA Standards, supra* note 33, Std. 10-5.3 (e), at 110.
[67] *Id.* Std. 10-5.3 (e) (commentary), at 113.

mentioned in the criminal rules of limited jurisdiction as well as the local district court and municipal court rules. The Washington Supreme Court has indicated that their benevolent purpose is that of early release. Nevertheless, jurisdictions wanting to follow the law as well as the best research on risk assessment and mitigation simply should not use bail schedules.

Recommendation: Yakima County should cease using monetary bail bond schedules, or, at least, use them only for the least serious offenses for defendants posing no risk to public safety, only after an individualized determination of defendant risk for failure to appear for court, and with application of "unsecured" financial conditions of release, that is, financial conditions that do not require the advance payment of money to obtain release from jail. There is a trend in America toward using "bail matrices" or "bail guidelines," which, although resembling bail schedules, are much more detailed documents based on a collaborative but intricate process of determining risk and risk mitigation interwoven with criminal charges. The people assigned to help Yakima County during the Smart Pretrial Initiative are aware of these documents and know how to create them.

Pretrial Services Functions

The better state laws in America have created special provisions for operating pretrial services programs. The very best laws either mandate their use or, at the least, treat these programs as desirable, and some even require judges to elect between setting surety bonds or allowing supervision through pretrial services programs so as to further their use. The reason for this desirability is simple; as the law and research surrounding bail developed through the 20th Century, with new options for release, with better tools to assess risk, with the creation of public safety as a constitutionally valid purpose for limiting pretrial freedom, and with a variety of supervision techniques that far surpass the traditional model of relying on commercial sureties (who do not supervise for public safety), jurisdictions have recognized that a new group of persons is required to perform the essential functions now done routinely by pretrial services programs. Thus, it is easy to see why the ABA's national best-practice standards on pretrial release and detention recommend that every jurisdiction establish a pretrial services agency or program.

Quite broadly, to make appropriate decisions about the "type" of bail bond and conditions of release, judges, magistrates, or their designees must have

"specific, relevant, timely, and accurate information," as well as "a range of relevant options from which to choose when making a decision."[68] Without this information or range of options (as well as the ability to monitor defendants placed on those options), courts are hampered in their ability to safely release defendants into the community pretrial, frustrating several basic and foundational principles of American criminal jurisprudence, including due process, equal protection, and the presumption of innocence.[69] In countless United States jurisdictions, pretrial services agencies are the only entities that ensure that adherence to these important principles is maintained.

The importance of a professional pretrial services program, no matter where it is housed, and no matter how large or small it may be, cannot be overstated. "Pretrial programs are a vitally important part of [criminal justice systems] because they perform functions that, in their absence, are often performed inadequately or not at all."[70] When these functions are performed well, however, the benefits are significant: "jurisdictions can minimize unnecessary pretrial detention, reduce jail crowding, increase public safety, ensure that released defendants appear for scheduled court events, and lessen the invidious discrimination between rich and poor in the pretrial process."[71]

Through RCW Section 10.21.015, the Washington laws contemplate the existence of pretrial services programs, and the rules include permissible conditions of the type typically used by courts in assigning defendants to those programs. As in many states, however, the Washington statutes appear to somewhat mistakenly separate out a "pretrial release program" as some sort of new and separate function operating within the bail system.[72] In reality, all of the bail (release) process operates as a pretrial release program. The only question is whether that pretrial release process/program includes the types of things that allow it to best follow legal and evidence-based practices. Many state and local criminal justice systems operate their pretrial release "programs" simply by setting secured money amounts and hoping bail bondsmen will offer to help provide a means for release. The better

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[68] John Clark and D. Alan Henry, *The Pretrial Release Decision Making Process: Goals, Current Practices, and Challenges* (Nov. 1996), at 7.
[69] *See generally, Fundamentals, supra* note 5; VanNostrand, *supra* note 8.
[70] *ABA Standards, supra* note 33, Std. 1.3 (commentary), at 15.
[71] Barry Mahoney, Bruce D. Beaudin, John A. Carver III, Daniel B. Ryan, and Richard B. Hoffman, *Pretrial Services Programs: Responsibilities and Potential,* Nat'l Inst. of Just. (Wash. D.C. 2001), at 1.
[72] Additionally, and as noted previously, the Washington statute denies pretrial services supervision to persons charged with violent or sex offenses unless accompanied by a secured financial condition, indicating a fundamental misunderstanding of the role of these programs.

practice is to look at the decision to release or detain criminal defendants as requiring certain imperative functions, which may be run in a variety of ways.

None of those imperative functions, however, are currently being done by commercial sureties. There are now an overwhelming number of historical, legal, research-based, and practical reasons not to use commercial sureties,[73] but I will limit a discussion only to a comparison of commercial sureties and pretrial services when it comes to core pretrial functions. A professional pretrial services program performs (and if it does not, it should) four important functions for the court: (1) collect and analyze information relevant to each defendant's individualized pretrial risk; (2) make recommendations to the court on the type of bond and conditions of release that would most likely minimize the risk posed by each individual defendant; (3) supervise defendants while they are in the community by monitoring and encouraging each defendant's compliance with all conditions of bond set by the court, and respond accordingly to a defendant's compliance, as well as to every instance of non-compliance with any bail bond condition; and (4) report to the sentencing judge the defendant's performance while out of custody and in the community – the specific bond conditions with which the defendant complied, all instances of non-compliance with specific bond conditions, and the defendant's response to the pretrial agency's attempts to bring the defendant back into compliance.

In contrast, commercial bail bondsmen only perform a very limited version of the third function (i.e., supervision) listed above. Commercial bail bondsmen neither assess for the court a defendant's risk to public safety or failure to appear, nor do they recommend to the court the type and conditions of bond that would most likely lessen that risk. They simply await the court's decision concerning a single condition – money – and then make their own assessment of whether they would like to serve as the defendant's for-hire surety, which can be based on any reason or no reason at all. In virtually every state in America, a commercial bail bondsmen's role in supervising defendants is necessarily limited only to assuring the defendant's appearance in court. Bondsmen may statutorily ignore defendant's non-compliance with all other bond conditions, especially those

[73] *See Proposal, supra* note 13, at 76-86; *see generally Fundamentals, supra* note 5; *Money, supra* note 6; Melissa Neal, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail;* Spike Bradford, *For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice;* Jean Chung, *Bailing on Baltimore: Voices from the Front Lines of the Justice System* (JPI 2012) found at http://www.justicepolicy.org/research/4459.

that were ordered by the court to minimize defendants' risk of harm to victims, witnesses, or the general public.

Furthermore, commercial bail bondsmen do not report to the sentencing judge information about the defendant's performance on the various court-ordered conditions of bond while the defendant was out of custody and in the community. Such information is vital to the judge's decision to continue the defendant's release until the sentencing hearing, and to the sentencing decision itself. Finally, most commercial bail bondsmen are currently limited in their (a) training and experience to render effective community-based supervision, such as that provided by a professional staff from pretrial services, diversion, probation, parole, or community corrections agencies, and (b) ability or desire to track their own pretrial outcomes that are appropriately measured and are meaningful to the court. In light of these key differences, it is easy to understand why the statement, made singularly by bail insurance company lobbyists, that, "Commercial bail bondsmen provide the same service as a government-funded professional pretrial services agency, at no cost to taxpayers," is plainly false.

Recommendation: If not already in existence, Yakima County should create a pretrial services agency or program, or find ways to incorporate the core functions of such programs into an existing entity such as probation.[74] Defendants who are intended to be released but are required to post secured bonds prior to their acceptance into a pretrial release program pursuant to Wash. Rev. Code Section 10.21.015 should be given either nominal (for example, as low as a single dollar) or attainable secured financial conditions that do not hinder release, and preferably, that also do not require commercial surety assistance to meet.

Delegated Release Authority

The issue of delegated release authority arises in a variety of ways in jurisdictions across the United States, including the use of citations and money bail schedules, which have already been discussed. An additional method of implementing delegated release authority is to allow pretrial services agencies or programs to have certain control over the decision to

[74] Roughly 50% of pretrial services functions in America are now performed within probation entities. Issues concerning placing pretrial services within probation departments are easily addressed, and, if necessary, the author of this summary will provide Yakima County unpublished documents covering these issues.

release that is typically performed by judges. For example, in some jurisdictions, judges give pretrial services agencies the authority to release persons on personal recognizance (or on other delineated non-financial conditions) when those persons are charged with certain low level offenses, or when they are assessed to be extremely low risk. This somewhat cursory review of Washington law did not reveal any specific statutes or rules dealing with delegation to pretrial services programs. Nevertheless, Yakima County should be aware that sometimes courts of appeals have found that judges who have implemented delegated release authority have, in fact, over-delegated their authority to set bail, which is typically described (and as is currently described by the Washington Supreme Court) as being a sole or primary function of the judiciary.

Recommendation: It is likely that if Yakima County increases the use of citations and summonses, decreases or eliminates the use of money bail schedules, and implements other legal and evidence-based practices, such as quicker individualized bail hearings, early prosecutor and defense attorney participation, and use of empirical risk assessment to make the release and detention decision, it will see little need to delegate release authority to any pretrial services entity. If it does so, however (perhaps by using bail "matrices" or "guidelines," mentioned above), it should use caution and understand that all delegation tends to diminish the judge's crucial and unique role in the bail setting process.

First Appearance – Promptness

As noted previously, Washington law is better than most states simply by requiring a release or detention hearing as soon as possible and no later than 48 hours after arrest. Nevertheless, recent research suggests that these hearings should be done with even more frequency, perhaps following the national standards of every 24 hours and every six hours for larger jurisdictions.

Recommendation: Yakima County should attempt to hold release or detention hearings every 24 hours, seven days a week, recognizing that the unnecessary detention of low and medium risk defendants leads to higher risk for failure to appear for court and to public safety both short and long-term. The same negative outcomes do not occur with high risk persons, however, and so risk assessment should be seen as crucial for determining which people must be released quickly and which can wait for slightly

longer periods of time. This need for quick hearings may lead Yakima County to consider delegated release authority, discussed above, albeit done carefully so as to follow the law and the pretrial research.

First Appearance – Defense Counsel Present

A document published by the Constitution Project National Right to Counsel Committee entitled, *Don't I Need A Lawyer? Pretrial Justice and the Right to Counsel at the Frist Judicial Bail Hearing*,[75] provides the most recent and comprehensive review of the issue of defense counsel at bail, including the need for representation, the history, the law, and policies and practices. In 2008, the United States Supreme Court issued its decision in *Rothgery v. Gillespie County*, in which the Court "reaffirm[ed]" what it has held and what "an overwhelming majority of American jurisdictions" have understood in practice: "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." [76] The ruling dramatically reduced the number of states denying representation at bail, and, concomitantly, has led to an increase in the number of states that have extended the right to counsel both to more local jurisdictions and statewide.[77] Unfortunately, however, even though the Court wrote that the right to counsel "attached" at this first appearance, the Court did not address whether the hearing to determine release or detention was a "critical stage," thus requiring the government to then provide representation to indigent defendants.

Some state laws – virtually all adopted pre-*Rothgery* – place limitations on providing defense counsel at bail and are in the process of being revised. In other states, the right to counsel is acknowledged, but counsel is not actually present when the right attaches, leading many defendants to waive counsel or risk delaying the hearing and staying in jail. The legal trend on this issue (through laws either encouraging or mandating defense counsel

[75] *Don't I Need A Lawyer? Pretrial Justice and the Right to Counsel at the Frist Judicial Bail Hearing* [hereinafter *Right to Counsel*] (2015) found at http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf. *See also Early Appointment of Counsel, The Law, Implementation, and Benefits* (6th Amend. Ctr./PJI 2014), found at http://sixthamendment.org/6ac/6ACPJI_earlyappointmentofcounsel_032014.pdf.
[76] 128 S.Ct. 2578, 2592 (2008).
[77] *Right to Counsel, supra* note 76, at 16.

representation) appears to be one that is dramatically increasing the number of defense attorneys present at the release or detention hearing.

Washington CrR 3.1 requires a lawyer to be provided "at every stage of the proceedings," CrRLJ 3.1 requires defense counsel at "critical stages" of the criminal proceedings, and both CrR 3.2.1 and CrRLJ 3.2.1 provide that at the preliminary appearance "the judge shall provide for a lawyer pursuant to rule 3.1 and for pretrial release pursuant to rule 3.2." While the Washington courts have defined the term "critical stage" in a way that would clearly encompass the release or detention hearing,[78] there does not appear to be any case specifically articulating the bail hearing to be a "critical stage."

Because first advisements can occur quickly, because defense counsel are crucial to a fair and transparent release or detention hearing, and because the ancillary effects of the decisions made at those hearings are so great, the best practice is for defense counsel to be present at all first advisement/bail hearings to provide at least provisional representation for all defendants, whether indigent or not.

Recommendation: There do not appear to be any laws hindering defense counsel from being present at first advisements/bail hearings in Yakima County. Indeed, Washington law appears to favor early representation, and so defense counsel in Yakima County should endeavor to be present and should be allowed the time to review information necessary to present effective advocacy for all criminal defendants.

First Advisement – Prosecutor Function

According to the Pretrial Justice Institute:

> Jurisdictions should ensure that an experienced prosecutor conduct screening of criminal cases before the initial court appearance.
>
> Early screening of cases will allow for appropriate charging or timely dismissal, as well as early diversion or problem-solving court eligibility determinations. Prosecutors engaged early in

[78] Critical stages are those "in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected." *State v. Agtuca*, 12 Wash. App. 402, 404 (1974) (as quoted in *The Right to Effective Assistance of Counsel in Washington* (WSBA) found at http://www.wsba.org/~/media/Files/Resources_Services/Legal%20Help/RightToCounselBrochureR3.ashx.

> the case can use the pretrial risk assessment instrument to aid in their bail arguments at the initial appearance, to include details needed to request preventive detention if available.[79]

This recommendation is shared by other national organizations. For example, noting that screening decisions arguably are "the most important made by prosecutors in the exercise of their discretion in the search for justice," the National District Attorneys Association National Prosecution Standards currently state that prosecutors screen cases "at the earliest practical time."[80] Likewise, the American Bar Association Criminal Justice Standards on the Prosecution Function recommend that prosecutors be present at the first appearance, and that prior to the first appearance should, among other things, (1) determine whether the accused should be released or detained pending further proceedings and, if released, whether supervisory conditions should be imposed, and (2) ensure that the charges are consistent with law enforcement reports or other information.[81] Moreover, the American Prosecutors Association has publicly echoed the recommendation from the National Symposium on Pretrial Justice calling for the "screening of criminal cases by an experienced prosecutor before the initial court appearance to make sure that the charge(s) that go before the court at that hearing are the charge(s) on which the prosecutor is moving forward."[82] Finally, there is a body of literature going back to the 1980s showing that early screening by experienced prosecutors can, among other things, increase criminal case efficiencies and reduce jail crowding.[83]

Recommendation: For a number of reasons, there are rarely any state laws covering this topic in detail, and so it was likely inevitable that in the time permitted I was only able to find a single provision addressing the duty of the prosecutor "to inquire into and make full examination of all the facts and circumstances connected with any case of preliminary examination, as

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[79] PJI Website, found at http://www.pretrial.org/solutions/early-screening/.
[80] National District Attorney Association, National Prosecution Standards, Std. 4-1.1 (and commentary) (3rd ed. 2009), found at http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html.
[81] American Bar Association Criminal Justice Standards for the Prosecution Function, Std. 3-5.1, found at http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html.
[82] *21st Century Prosecution and Pretrial Justice*, found at http://www.pretrial.org/21st-century-prosecution-pretrial-justice/ (citing *National Symposium on Pretrial Justice: Summary Report*, at 39 (BJA/PJI 2011)).
[83] *See. e.g.,* Hall, *Systemwide Strategies to Alleviate Jail Crowding* (NIJ 1987), found at https://www.ncjrs.gov/pdffiles1/Digitization/103202NCJRS.pdf.

provided by law, touching the commission of any offense wherein the offender shall be committed to jail, or become recognized or held to bail."[84]

Nevertheless, jurisdictions using best pretrial practices have recognized the need for early prosecutor screening for both charging and bail-setting functions. The best bail hearings are based on input from the pretrial risk assessment, the pretrial services program staff, the defense attorney, and the prosecutor, and taking just a small amount of time to make sure this hearing is done right can save an enormous amount of time and significant harm later. Thus, to the extent that experienced Yakima County prosecutors do not already screen and have input on cases prior to bail-settings, they should do so.

First Advisement – Nature of the Hearing

The consequences of the decisions made during a defendant's first appearance have been described as "enormous."[85] Nevertheless, those decisions are routinely made under less than ideal circumstances. As noted in the ABA Standards,

> Proceedings to determine pretrial release often are conducted under circumstances that would not be tolerated at trial. Courtrooms may be noisy and overcrowded, and cases may be treated hurriedly in order to dispose of a large volume of cases in a short period of time. . . . [F]irst appearances should not be conducted in a perfunctory manner. Rather, reflecting the importance of the decisions made at this stage, the proceedings should be held in physical facilities that are appropriate for the administration of justice and conducted with the dignity and decorum to be expected of a court proceeding. Each case should be treated individually, with attention to the information about the case that has been developed by the prosecutor, defense counsel, and pretrial services.[86]

Jurisdictions must remember that the decisions they make in release or detention hearings after a period of only one or two minutes (and sometimes a period of mere seconds) might lead to unnecessary pretrial detention

[84] Wash. Rev. Code § 10.16.110.
[85] VanNostrand, *supra* note 8, at 1.
[86] *ABA Standards*, *supra* note 33, Std. 10-4.3 (a) (commentary), at 94-95 (footnote omitted).

without due process or through the unwise release of extremely high risk defendants without supervision. Those two things, in turn, can lead to far worse consequences in the future. Often assessing the "nature" of the bail hearing – looking for such things as balance or hurriedness – can only be done first-hand and by comparing the hearing to similar hearings found in other states or jurisdictions within the same state. Many jurisdictions have come to see the bail hearing as an annoyance, and have created streamlined processes, including video advisements, simply to save time and effort. When undergoing improvements at bail, all of these processes must be questioned.

It is likely that if Yakima County changes from its current system of release and detention to one that is based more on legal and evidence-based practices, the nature of its first appearances will also change dramatically. Simply adding defense attorneys will lead to a more balanced process, and, rather than either arguing about or simply taking for granted a single condition of release – money – attorneys will likely find themselves speaking about risk, the purposes of limitations of release, and the facts and evidence to support various techniques to mitigate risk for released defendants. Understanding the overall cultural change and how the resulting processes will function as a result of that change are often the most challenging parts of system improvement.

Recommendation: The best bail hearings are those at which defense counsel is at least provisionally appointed and has time to meet with the defendant, at which the recommendations from a pretrial services entity concerning defendant risk and mitigation of that risk are discussed, at which both the prosecutor and defender may engage in the release or detention decision process, and at which judges carefully assess the risk and individually tailor conditions designed to mitigate that risk based on the law and the best pretrial research available. To the extent that the current process lacks these components, Yakima County justice leaders should examine ways to improve it.

The Decision to Release or Detain a Defendant Pretrial

The release/detention decision itself is the focal point of a defendant's first appearance. Judges must understand the seriousness of the decision, and recognize the necessity of taking the time to do it right: "[T]wo kinds of mistakes can easily be made at this stage: a defendant who could safely be

released may be detained or a defendant who requires confinement may be released. Thus, the stakes for both the defendant and the community are high."[87] Over the years, statutes and professional standards have been instrumental in shaping the release/detention decision so that these mistakes can be avoided.

The ABA Standards, in particular, emphasize the importance of the release/detention decision by articulating foundational principles upon which the Standards are based:

> These Standards view the decision to release or detain as one that should be made in an open, informed, and accountable fashion, beginning with a presumption (which can be rebutted) that the defendant should be released on personal recognizance pending trial. The decision-making process should have defined goals, clear criteria, adequate and reliable information, and fair procedures. When conditional release is appropriate, the conditions should be tailored to the types of risks that a defendant poses, as ascertained through the best feasible risk assessment methods. A decision to detain should be made only upon a clear showing of evidence that the defendant poses a danger to public safety or a risk of non-appearance that requires secure detention. Pretrial incarceration should not be brought about indirectly though the covert device of monetary bail.
>
> The strong presumption in favor of pretrial release is tied, in a philosophical if not a technical sense, to the presumption of innocence. It also reflects a view that any unnecessary detention is costly to both the individual and the community, and should be minimized. However, the Standards make it clear that under certain circumstances the presumption of release can be overcome by showing that no conditions of release can appropriately and reasonably assure attendance in court or protect the safety of victims, witnesses, or the general public.[88]

This emphasis on release is appropriate, as American law contemplates the release of virtually all bailable defendants. Nevertheless, in this generation

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[87] *Id.* (introduction), at 35.
[88] *Id.* at 35-36; *see also Standards on Pretrial Release (3rd Ed),* Nat'l Assoc. of Pretrial Servs. Agencies (Oct. 2004), Std. 1.1 (commentary), at 8-10 [hereinafter *NAPSA Standards*].

of bail reform, we are giving equal consideration to detention – or "no bail" – and thus a typical state legal analysis looks for relevant provisions concerning both release and detention. By looking at the history of bail in both England and America as well as the law intertwined with that history, we see that both "bail" and "no bail" are lawful, but only if done correctly. Indeed, if they are not done correctly, we have seen great periods of bail reform practically forcing themselves on criminal justice systems. Historically and legally, the "bail" or "no bail" process has always been an in-or-out proposition, and jurisdictions improving the process must first recognize that they likely need to change their initial bail/no bail dichotomy before they can make lasting and meaningful local improvements.

Detention Eligibility and Process

This appears especially to be the case in Washington State, where the bail/no bail dichotomy (as amended in 2010) is primarily set up to assess risk through the proxy of charge. The current relevant constitutional language allows for the detention ("no bail") of persons charged with capital offenses when proof is evident or the presumption great, or offenses punishable by life in prison "upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons, subject to such limitations as shall be determined by the legislature."[89] To its credit, the legislature has enacted certain "no bail" processes that are virtually identical to the federal statute, including the initial decision options, the due process hearing requirements (albeit modified slightly to reflect Washington practice), the factors for consideration, and the contents of release or detention orders. Because the due process elements included in this basic scheme were crucial to surviving the constitutional attack in *United States v. Salerno* in 1987*,* and because they are also designed to narrow the numbers of defendants detained through that process, its inclusion into the law is commendable.

Unfortunately, however, because detention eligibility is still triggered by charge (capital crimes or those punishable by life in prison), the scheme is likely to miss extremely high risk defendants as determined by an empirical risk assessment instrument – the same issue faced by Washington prior to 2010. Essentially, the law was changed to account for the facts surrounding

[89] Wash. Const. Art I, § 20.

the Maurice Clemmons case, but not the current generation of pretrial reform based on, or informed by, empirical risk.

This is not unusual, however, and in 2010 very few, if any, states had fully realized that the current generation of reform might lead to the need to change constitutional right to bail provisions to account for risk. Since then, only one state (New Jersey, albeit imperfectly) has done so – and only two or three others are moving in that direction.

Whether or not Washington would rather base release and detention decisions on risk versus charge,[90] the current constitutional language poses the biggest hindrance to local jurisdictions seeking to fully implement legal and evidence-based practices at bail. There is seemingly no decent option for dealing with extremely high risk defendants who fall outside of the constitutional net. In the past, judges may have used cash-only bonds to achieve detention, but this option was (and still is) likely unlawful under a variety of legal theories. Moreover, because the Washington Supreme Court in *State v. Barton* has said that anytime "bail" is set, the court must include third-party sureties as an option, judges who seek to detain extremely high risk defendants using money will now be forced to set perhaps extraordinarily high amounts to account also for the commercial surety business, which often allows high-risk defendants out of jail on no money down and on payment plans.

Accordingly, and as mentioned previously, until the constitution is once again amended, the best and most transparent practice for Washington jurisdictions to follow is to provide the due process-laden hearing outlined in the statute for any defendant deemed unmanageable in the community, even when that defendant is not technically eligible for detention. If the hearing demonstrates the requisite showing for detention, the court would then set "bail" at an amount deemed reasonable to assure either public safety or court appearance. When this amount results in the detention of a "bailable" defendant, the court can at least point to a rational and fair process leading to detention. Nevertheless, while this process might avoid challenges based on procedural due process, it would still be vulnerable to challenges based on other legal theories such as excessive bail (which requires a proper

[90] Of course, states do not have to change, but leaving a charged-based constitutional provision alone while still detaining bailable defendants either intentionally or unintentionally will likely lead to court challenges and possibly forced change in the future.

government purpose for setting conditions) and equal protection (which is currently being tested through the federal courts).

Release Eligibility and Process

Jurisdictions that do not fully understand the history of bail in England and America do not realize that, throughout that history, virtually all bailable defendants were required to be released. Throughout history, this was done through the use of personal sureties and what we call today "unsecured bonds," which do not require any payment up front prior to release from jail. Seeing bailable defendants ordered to release on conditions either designed to detain or causing detention unintentionally is an historical aberration and has only happened since the mid-1800s. America switched to the commercial surety system right about 1900 in order to effectuate the release of bailable defendants, and when the commercial surety system failed to do so, we underwent a period of reform starting in 1920 and continuing today that seeks to make sure bailable defendants actually obtain release.[91]

Accordingly, the best "bail" or release provisions make sure that bailable defendants actually get out of jail. Current research suggests that low and medium risk defendants should be released as quickly as possible, as bad outcomes, such as increased risk to public safety and for failure to appear for court, are caused by even short periods of detention.

Overall, the Washington laws dealing with release go far toward effectuating the actual release of bailable defendants. Nevertheless, they stop short of making sure all bailable defendants are released, likely due to the shortcomings of its bail/no bail dichotomy, discussed above. As noted previously, the statutes are sparse, somewhat antiquated, and often misapprehend fundamental concepts of pretrial release and detention, but the court rules are quite good.

Like the national best-practice standards on pretrial release as well as statutes modeled after those standards, those rules create a presumption for release on personal recognizance unless there is no reasonable assurance of court appearance or public safety.

[91] This is why it is crucial for jurisdictions to define their bail/no bail dichotomies correctly. Because history demands correction to any system that results in the detention of bailable defendants, jurisdictions must make sure that the class of bailable defendants is one that everyone is comfortable releasing or at least is understanding of the legal parameters.

Most admirably (and unlike most state laws), the rules also reflect an understanding that there are legal and empirical differences between assessing the risk to public safety and the risk of flight, and so they separate out the two considerations. Thus, the rules list factors to guide judges in assessing each,[92] but, of course, these lists have not necessarily been tested for their weighted predictability of either FTA or new crimes. This is similar to the situation found in virtually all other states, which are learning that the factors mandated by their statutes or rules are not necessarily the best factors for predicting pretrial misbehavior. As those states begin using more research-based assessments, they are learning about the need to balance the new with the old; accordingly, if Yakima County begins using a research-based pretrial risk instrument, it will have to balance the findings from that instrument with the possibly un-predictive and un-weighted factors found in existing law.

For risk of flight, the provision requires the use of "least restrictive conditions," a term of art associated with excessive bail. Simply following the concept of least restrictive conditions will go far in effectuating the release of bailable defendants, most often through the use of unsecured bonds, which are less restrictive than secured bonds, and yet are indistinguishable from secured bonds in terms of getting higher court appearance rates. Indeed, as Yakima County progresses by using traditional pretrial services functions, such as general pretrial supervision that can range from minimal to intense, it will likely use financial conditions less than before. Instead, it is likely that the County will rely more on condition number one, which is to "place the accused in the custody of a designated person or organization agreeing to supervise the accused."[93] Finally, as to conditions, Yakima County should note a national trend (and possibly a trend in Washington) of courts more thoroughly scrutinizing non-financial conditions of release to make sure they are related to the fundamental

[92] The legislature, too, has enacted "factors" that judges must consider when determining whether there are conditions that will reasonably assure public safety. *See* Wash. Rev. Code 10.21.050. When these factors were enacted, it appears that they were intended to apply to both ""bail" and "no bail," for example, through a broader statement of intent (that was later deleted) and a suspension of the use of felony bail schedules until 2011. Now it appears that the section is seen primarily only as part of the judicial determination of "no bail" specifically addressing the 2010 amendment to the Washington Constitution.

[93] CrR 3.2(b)(1). A similar condition is found for use to protect the public. Unlike commercial sureties, pretrial services programs supervise for both court appearance and public safety, and so it is likely that the best use of this condition is in reference to pretrial services supervision.

purposes underlying the bail process – court appearance and public safety,[94] especially when those conditions impinge on constitutional rights.

It should be noted that the list of possible conditions found in the rules dealing with flight has apparently been supplemented by a list of similar, but in some cases substantively different, possible conditions found in Wash. Rev. Code. Section 10.21.030.[95] Moreover, and as noted previously, the legislature has enacted Wash. Rev. Code Section 10.21.015, which forbids pretrial release programs from agreeing to supervise certain defendants charged with violent or sex offenses "unless the offender's release before trial was secured with a payment of bail."[96] This latter provision is unfortunate, as it is based on a fundamental misunderstanding of bail in general and research-based supervision in particular, but language like it is found in some other states' statutes. Following legal and evidence-based practices means that Yakima County, like other jurisdictions facing similar provisions, may have to set nominal "bail" in these situations to take advantage of effective pretrial supervision.

Finally, the legislature has also enacted Wash. Rev. Code. Section 10.21.055, which mandates a blanket bail condition (interlock device or 24/7 sobriety program monitoring, or both) for all defendants arrested on certain alcohol related offenses. Whether financial or non-financial, mandatory, blanket conditions of release violate the fundamental legal principle of individuality at bail, erode judicial discretion, and preclude judges from using perhaps more evidence-based supervision methods designed to mitigate known pretrial risk. Jurisdictions facing similar mandatory, blanket conditions have come to rely upon their pretrial services programs to tailor whatever supervision is ordered to the actual risk of the defendant. This may be made slightly more difficult depending on the details of "24/7 sobriety programs," as defined by Washington law.

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[94] *See, e.g., Butler v. Kato,* 154 P.3d 259 (Wash. Ct. App. 2007); *State v. Rose,* 191 P.3d 83 (Wash Ct. App. 2008).

[95] Similar to the court rules, § 10.21.030 states that the conditions can be used to address risk of failure to appear "or to prevent interference with the administration of justice." Sometimes states articulate interfering with the administration of justice to be a third constitutionally valid purpose for limiting pretrial freedom, but nearly all instances of "interfering with the administration of justice" can be tied to public safety as measured through the commission of new crimes. It is not necessary to parse the factors found in this section and to compare them to those in the rule, as each list of factors shares the same fundamental flaw of using elements that have not been tested for their aggregate and weighted ability to predict pretrial misbehavior.

[96] Wash. Rev. Code § 10.21.015 (2).

As noted previously, the Washington Supreme Court has said in *State v. Barton* that the so-called 10% option condition found in Rule 3.2 (b)(4) must provide for the use of a third-party surety based on the Washington Constitution. Interestingly, that opinion also addressed the interplay between that section and section 3.2(b)(5), which permits courts to "require the execution of a bond with sufficient solvent sureties, or the deposit of cash in lieu thereof." In *Barton,* the Court wrote that section (b)(5) "safeguards a defendant's right to a surety bond as an alternative to putting up cash or collateral, thus providing an option that will often be less restrictive than the scenario contemplated in Rule 3.2(b)(4)." According to the Court, "a court setting bail is obligated to allow the option listed under [(b)(5)] unless it finds such a surety arrangement will not adequately secure the defendants appearance."[97]

Based on this somewhat puzzling statement, if a court were to find that the defendant's risk for flight was extremely high – and thus that condition (b)(5) would not provide reasonable assurance of court appearance – the bail-setting court could theoretically use the more restrictive option found in (b)(4), eliminating the need for an extraordinarily high amount to cover the surety arrangement. However, the crux of the *Barton* decision is that while section (b)(4) of the rule does not necessarily contemplate a surety arrangement, the Washington Constitution requires the option of a surety arrangement whenever bail (defined as money) is set. This perplexing aspect of the decision is explained somewhat by the Court noting that the section was borrowed from the federal scheme, which "may not have appreciated Washington's unique constitutional framework," but ultimately gives credence to that part of Justice McCloud's concurrence indicating that the *Barton* decision likely nullified subsection (b)(4).

These distinctions are made mostly unnecessary, though, as Yakima County begins to use legal and evidence-based pretrial practices. The law and the research point to using either release on recognizance or unsecured bonds for all defendants except for those defendants believed to be an extremely high risk for pretrial misbehavior – such that no condition or any combination of conditions will suffice to provide reasonable assurance of public safety and court appearance (and courts should probably recognize that a failure to appear, though unfortunate and time consuming, is likely much less unfortunate than serious breaches of public safety). To the extent that

[97] *State v. Barton,* 331 P.2d 50, 59 (2014).

extremely high risk defendants fit within the "no bail" provisions of the Washington Constitution, they should already be within that process, having a possibility of either pretrial detention or release, depending on the outcome of the hearing. If they fall outside of that process, these extremely high risk defendants should be given at least the same due process as those who are detained through the formal detention process articulated by the Washington Constitution and statutes. This would lessen the chances of an appellate court finding that the detention of any particular bailable defendant violated due process and possibly the right to bail. However, once again, even when these due process precautions are taken, bail setting judges should recognize that state and federal appellate courts are still likely to find the intentional detention of bailable defendants (as well as detention through extremely high money amounts set without any record of intent) to be unlawful.[98]

Because money is at least legally tied to court appearance, the inclusion in the Rules for Courts of Limited Jurisdiction of a provision allowing courts to adopt a money bail schedule is not obviously irrational. However, Yakima County should refer to the discussion on bail schedules, above, and remember that (1) they are intended to facilitate release, and (2) there exist far more legal and evidence-based reasons to eliminate them than to keep them.

Both the Superior and Limited Jurisdiction Court Rules mandate bail setting courts to consider the defendant's financial resources before setting an unsecured or secured financial condition both for risk of flight and to public safety. While admirable, provisions like these do not necessarily lead to attainable bond amounts. Instead, jurisdictions that seek to ensure that money does not hinder a decision to release have adopted language, such as that found in the federal statute, that "the judicial officer may not impose a financial condition that results in the pretrial detention of the person."[99] Despite Washington's obvious use of the federal statute in creating its overall release and detention scheme, this particular provision was left off. This, too, is likely tied to Washington's bail/no bail dichotomy, and the resulting necessity to leave money in place to allow for judges to detain extremely high risk but otherwise bailable defendants.

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[98] The court in *Yakima v. Mollett* 63 P.3d 177, 180-81 (Wash. App. Ct. 2003), gave some indication of its stance on the intentional detention of bailable defendants when it stated that, "It would be inconsistent with the rule [formerly CrRLJ(a)(7) now CrRL 3.2(b)(7)] for the trial court to impose "cash only" bail knowing the defendant probably lacked the means to pay it" (citing cases).

[99] 18 U.S.C. §3142 (c)(2).

Unlike the section dealing with conditions designed to mitigate risk of flight, the section dealing with conditions designed to mitigate the risk of public safety does not include the mandate to use "least restrictive conditions."[100] Instead, that phrase is only included in a subsection to the rule allowing judges to require a defendant to post a secured or unsecured bond, providing as follows: "This condition [requiring a secured or unsecured bond] may be imposed only if no less restrictive condition or combination of conditions would reasonably assure the safety of the community."[101] Despite the "less restrictive" language, the express allowance of the use of money to protect public safety is unfortunate for several reasons: (1) while the law is not as clear as in other states, Washington appears to be like virtually every other state in that it only allows the forfeiture of a financial condition backed by a commercial surety for failure to appear; [102] because it cannot be forfeited for new crimes, setting a financial condition to help provide assurance of public safety would be unnecessary, irrational, and thus likely unlawful; (2) there is no research that has ever shown money affects public safety; secured money has only ever been tied empirically to detention, but using money with a purpose to detain is likely unlawful; (3) the research has shown that when money detains low and moderate risk defendants for longer than just 24 hours, their risk of not returning to court and of committing new crimes actually goes up; (4) the ABA Standards on Pretrial Release recommend never setting financial conditions to protect the public; instead, jurisdictions are advised to use non-financial conditions, or, if necessary, a transparent detention process to address risk to the public;[103] and (5) relying on money to protect the public can result in catastrophic outcomes, such as the incident involving Maurice Clemmons in 2009.

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[100] *See* CrR 3.2(d).
[101] *Id.* 3.2(d)(6).
[102] Washington court rules apparently allow for the forfeiture of a bail bond for violations of any conditions (such as meetings, having no weapons, and periodic urinalysis tests) besides court appearance. *See* CrR 3.2(k)(2); CrRLJ 3.2(j)(2). However, when reversing a trial court's forfeiture of the money bond for the defendant's failure to comply with these other conditions, the Washington Court of Appeals stated: "A bonding company, by undertaking to guarantee the presence of the defendant, may accept certain conditions of release [and by] doing so, the surety is guaranteeing the accused's presence in court, should any of the conditions be violated and the court call for the presence of the accused. It defies logic to suggest that by accepting those conditions, the surety is guaranteeing that the accused will not violate any of those conditions. The surety has no means of guaranteeing the accused's behavior, short of locking him up. We have found no cases where the surety contracted to guarantee the behavior of the defendants, at the risk of forfeiting bond." *State v. Darwin,* 856 P.2d 401, 403 (Wash. Ct. App. 1993). This follows from other Washington court opinions going back 100 years articulating the purpose of bail and that courts not use financial conditions to raise revenue or to punish sureties. I could find no cases dealing with the forfeiture of a money amount paid *without* the help of a commercial surety for breaches of conditions other than court appearance.
[103] *See ABA Standards*, *supra* note 33, Std. 10-5.3(b) (and commentary) at 110-112.

Overall, Washington law dealing with conditions of release provides much leeway for courts to implement evidence-based supervision strategies. The main issue for Yakima County will be deciding on which strategies to use (based upon the strength of the evidence for them and as compared to existing practices), and making sure that they have the resources necessary to use them. As most jurisdictions are beginning to realize, in addition to making sure that their laws are not a hindrance, there other prerequisites to changing from the current charge and money-based system to one based on legal and evidence-based processes, such as implementing risk assessment and some sort of pretrial services entity or function. Once these things are in place, and with exceptions discussed previously, current Washington law should not significantly hinder implementing risk-based supervision for low, medium, and some high risk defendants.

There are two issues raised by the local rules that apply to pretrial release eligibility and processes. First, both the Yakima District Court and Municipal Court Rules require persons arrested on domestic violence charges to be held without bail until the first appearance on the next judicial day. These rules seem acceptable so long as the hold does not exceed the 48 hour rule articulated by the Court in *Westerman,* and, in fact, such a hold to allow for objective pretrial risk assessment would help to better protect the public in any event. However, both sets of rules then mention a "standard bail" for domestic violence cases. Standard bail amounts violate many principles associated with following legal and evidence-based practices. Accordingly, as Yakima County learns more about those practices, it might wish to consider changing these particular local rules.

Second, both the Yakima District Court and Yakima Municipal Court Rules allow for courts to apply cash posted as bail to fines, penalties, costs, or other obligations or assessments. Although these provisions are better than state provisions mandating cash financial conditions to be used to pay for fines, costs, etc., the better practice is not to do it. The only constitutionally valid purposes for limiting pretrial freedom are to provide reasonable assurance of public safety or court appearance. Accordingly, in virtually every state, courts have said that financial conditions set to enrich the treasury (i.e., to pay for things) is not a proper purpose of bail, and are therefore unlawful. Allowing courts to use financial conditions to pay for things is only one step away from expressly intending those financial conditions to pay for things, which would be clearly unconstitutional. If

money is to be used at all, it is proper only to rely on it only for its lawful purpose.[104]

Recommendation: For the vast majority of defendants, Washington law should not hinder Yakima County judges' decisions to release or detain defendants using legal and evidence-based practices. Yakima County Judges should follow the concepts outlined in the NIC's paper, *Money as a Criminal Justice Stakeholder*, cited at the beginning of this analysis, when making the decision. The law will hinder, however, a detain decision made for an extremely high risk defendant who is nonetheless "bailable" under the Washington Constitution. Accordingly, and as noted previously, extremely high risk defendants falling outside of the formal constitutional process, and whom are likely to be detained – whether on purpose or by accident – should be given at least the same due process protections as those who are detained through the formal detention process. Once again, this practice might lessen the chances of an appellate court finding that the detention of any particular bailable defendant violated due process and possibly the right to bail, but might not lessen the chances of being found unlawful for other reasons.

Monitoring Pretrial Detainee Status

Monitoring the status of defendants after the release or detention decision is crucial to determining that the decision was effectuated. In Standard 10-1.10 (b), the ABA recommends that pretrial services agencies should "review the status of detained defendants on an ongoing basis for any changes in eligibility for release options and facilitate their release as soon as feasible or appropriate."[105] Moreover, in Standard 10-5.12, the ABA recommends additional procedures for alerting the court to circumstances warranting a change in the pretrial release decision. Notably, the standards recommend that pretrial services or other appropriate justice agencies be required to "report to the court as to each defendant, other than one detained under Standards 5.8, 5.9, and 5.10 [concerning preventive detention after a hearing], who has failed to obtain the release within [24 hours] after entry of a release order . . . and to advise the court of the status of the case and the reasons why a defendant has not been released."[106] The ABA also

[104] Some states have come to rely on "bail" paying for things to the extent that they cannot possibly envision a pretrial release or detention system without money. In these states, achieving pretrial justice is made harder, if not impossible without forcing them to change.
[105] *ABA Standards*, *supra* note 33, Std. 10-1.10 (b) (viii), at 55.
[106] *Id.* Std. 10-5.12 (b), at 141.

recommends that reports on inmate status be filed for any inmate held more than 90 days without a court order.[107]

Standards articulated by the National Association of Pretrial Services Agencies contain similar provisions in their Standard 3.6.[108] Commentary to that Standard addresses the fairly common issue of pretrial detainees who are given a conditional release order, but who are somehow unable to meet those conditions, especially financial conditions. It states as follows:

> When a judicial officer sets financial conditions for a defendant's release or orders that a defendant be released subject to conditions such as participation in an appropriate treatment program, the pretrial services agency has a continuing responsibility to make sure that the defendant is in fact released. In particular, as emphasized in Standards 1.4 (c) and 2.5, if financial conditions are set by the court, they should be achievable. If the defendant cannot meet them, the pretrial services program should inform the court and should seek to craft recommendations for conditions that would meet concerns about nonappearance.
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> The continued detention of defendants who remain in custody after a financial bond has been set should be a particular focus of attention for pretrial services programs, since – under these Standards – the sole purpose of financial conditions is to assure the defendant's appearance at scheduled court proceedings, and financial conditions are supposed to be set at an amount that is within the financial reach of the defendant.[109]

Both the Superior and Limited Jurisdiction Court Rules in Washington provide for review of conditions, but Rule CrR 3.2(j) is superior in that it allows a defendant to move for reconsideration at any time due to his or her failure to post bail, requires a hearing, and requires a record. CrRLJ 3.2(j), on the other hand, does not contain this broad language, and only recites that part of CrR 3.2 that allows a court to amend its order for "change of

[107] *Id.* Std. 10-5.12 (c), at 141.
[108] *NAPSA Standards, supra* note 89, Std. 3.6, at 69.
[109] *Id.* (commentary), at 70 and n. 48 (internal citation omitted).

circumstances, new information or showing of good cause." Many courts do not consider the mere fact of detention due to a condition of release to be a "change of circumstances," "new information," or cause good enough to allow for a hearing. The better state statutes allow for quick consideration of unattainable conditions, do not necessarily require "changes in circumstances," etc., to get the hearing, and place time limits on the process. The better practice is to require the pretrial services program to monitor and report such things as unattainable conditions, or other changes warranting either an increase or decrease in restrictiveness, and to keep an open dialog with the judge to best effectuate the purposes of both release and detention. The best practice is to set bail correctly in the first instance, so that defendants needn't rely on post-bail processes to avoid unnecessary detention.

Recommendation: Yakima County should require its pretrial services officers to monitor all defendants and report to judges on any changed circumstances affecting the two primary pretrial outcomes. Pretrial services officers should report the unnecessary detention of pretrial defendants due to unattainable bond conditions at the earliest time possible, but no later than 48 hours after the conditions were set.

Appeal

Many states, like Washington through Wash. Rev. Code Section 10.21.040, have provisions allowing for expedited review of a detention order, but these provisions typically assume that pretrial detention will occur only after the sort of due process hearing found in the federal statute; often there is no decent language allowing for the appeal of de-facto detention – that is, detention that is obtained through the release process by using unattainable conditions of bail. The better state statutes provide for the immediate appeal of both release and detention orders (which would allow for the review of a release order not actually leading to release) with language requiring quick disposition of the appeal.

Recommendation: The best recommendation concerning appeals is for judges to do everything within their power to avoid them, including endeavoring to use legal and evidence-based practices to begin with. Nevertheless, as Washington State moves forward in this generation of pretrial reform, it will likely need changes to its statute, including provisions allowing for speedy and meaningful appeals.

Transfer of Data to Sentencing Court

A key element of the Smart Pretrial Initiative concerns the ability for jurisdictions to transfer information to a sentencing court, prosecutor, defense counsel, and others supervising entities post-conviction. Typical issues dealing with information gleaned through the criminal pretrial phase involve allowing defendant statements to be used against them in violation of the Fifth Amendment to the U.S Constitution. Jurisdictions that have implemented pretrial services functions have faced these issues and successfully overcome them, albeit sometimes through interagency agreements of MOUs. Occasionally, states have enacted provisions dealing specifically with these issues into their main bail statutes, typically in sections discussing the powers, duties, and roles of the pretrial services agencies or programs. Moreover, jurisdictions often have numerous provisions generally governing the transfer of information from one public entity to another scattered throughout the entirety of its law. Once again, time restrictions hindered my ability to look through the entire legal statutory scheme for those sorts of laws. Moreover, my review of the pretrial specific statutes and rules did not uncover any particular law dealing precisely with transferring or giving information gleaned during the pretrial stage. Any perceived legal problems with transferring data to the sentencing court or other entities have likely been solved by other jurisdictions. Any perceived practical problems will have to be addressed as they arise.

Note: The following information was added to this analysis after visiting Yakima County.

The Law and Justice Panel Review Committee Report, written by James Hutton, David Thorner, and David Connell, while not initially a part of this written analysis or presentation to Yakima County, is relevant and appears to confirm the need for criminal justice leaders to explore improvements to the administration of pretrial release and detention. That report presents a number of recommendations, including pretrial recommendations, "in order to achieve the greatest cost savings and efficiencies possible in what all concede are challenging economic times."[110] *Beyond mere cost savings and*

[110] James Hutton, David Thorner, & David Connell, *Yakima County Law & Justice Panel Review Committee Report* (2012) at 2, found in the *History of Pretrial in Yakima County* produced by the Yakima County Pretrial Policy Team, and provided to the author of this analysis on May 14, 2015.

efficiencies, however, many of those pretrial-related recommendations – which include (1) instituting an "aggressive program" to reduce the number and duration of local prisoner pretrial confinements; (2) creating booking standards to facilitate release or diversion; (3) increasing the use of release on recognizance; (4) reinstituting the Pre-trial Unit; and (5) accomplishing the somewhat ambitious recommendation to "modify the current process for setting bail"[111] *– seem to promote legal and evidence-based practices that transcend notions of efficiency and cost benefits. Other recommendations, such as to increase the use of electronic home monitoring, should be implemented only after consulting the relevant research literature concerning how that particular treatment works to achieve the purposes underlying the bail decision. And still others, such as to revitalize the "work ethic detention program," which would presumably allow pretrial detainees to stay out of custody during the work week, should lead criminal justice leaders toward a more vigorous discussion of why these apparently low to medium risk defendants should be detained at all.*

Conclusion

I am hopeful that this document will serve as a starting point for discussions about Washington's legal scheme for pretrial release and detention, and how that scheme either helps or hinders legal and evidence-based administration of bail. Only in the last few years have jurisdictions understood that improvements to the pretrial process can often be helped or hindered by less than ideal bail laws. Because Yakima County seeks to improve its bail and no bail procedures to better reflect legal and evidence-based principles, it will focus primarily on attempting to do so under the current legal scheme. Nevertheless, through the bail education process, Yakima County will be in the best position to understand and reflect on that scheme – including its tendency to help or hinder the pretrial process – and to engage those who are able the change the laws when those changes become necessary.

The entire legal scheme in Washington State is quite good, due primarily to its ability to create optimal rules for bail and no bail that are uninfluenced by

[111] This recommendation appears to define a bail hearing as something that only happens later, after an initial bail-setting is done at a first appearance. Thus, the report recommends, in part, that a bail hearing be combined with an arraignment, which apparently can happen as "long as 10-12 days after the criminal information is filed." *Id.* at 4. A major theme of this legal analysis is for judges to set bail promptly and correctly at the first appearance, so as to avoid altogether the need to re-assess conditions of release or detention at some later date. To do this, Yakima justice leaders should begin to think of the bail setting at first appearance as a bail hearing, and any hearing held later to re-assess conditions of release as a rare occurrence made mostly unnecessary through the new process.

either politics or special interests. Looking at the entire legal scheme as compared to other states, Washington law is likely in the top half of all American bail laws. Nevertheless, the Washington Constitution likely needs revision, and due to this fundamental flaw – along with its continuing use of money in the "bail" and "no bail" process – its laws are still likely at the lower part of that top half of state laws.

Overall, Washington is poised to become one of the first states to move completely from a charge and money-based system to one that is risk informed and uses little, if no money, becoming a model for all American States in this generation of bail reform. Yakima County, in turn, can provide the knowledge and practical experience needed to facilitate statewide change. Moreover, with few legal barriers to implementing legal and evidence-based practices, Yakima County can also become a model for countless American counties that wish to move from the traditional money bail system to one that better follows the law and research.