June __, 2016

DRAFT

Justice for All

Report and Recommendations of the Task Force on Fair Justice for All:
Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies

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Table of Contents

INTRODUCTION

"Now is the time to do this."[1]

Arizona's human mosaic reflects a relatively high poverty population – over 21percent fall below the federal poverty line. That's 1.2 million people who struggle economically every day. Many of Arizona's poor are not the panhandlers on the highway off-ramps, but the "working poor," people whose household income is less than 150 percent of the federal poverty level, and Arizona's unemployment rates are still higher than the national average. People of all income levels on occasion may commit an infraction of the law. If justice in Arizona is to be administered fairly, the justice system must be conscious of the challenges that sanctions present to those living in poverty and struggling economically.

Recently, national attention exposed Ferguson's criminal justice system deficiencies. Ferguson has sparked a national dialogue causing jurisdictions to examine their practices of imposing and enforcing financial sanctions. The criminal justice system should not be self-defeating. While everyone should face consequences for violating the law, criminal fines and civil penalties should not themselves promote a cycle of poverty by imposing excessive amounts or unduly restricting people's ability to be gainfully employed."

One of the criticisms that has been identified coming out of the situation that developed in Ferguson is that in many states, local, municipal, or justice courts, are not under the supervision of the state supreme court. This is not the case in Arizona, as the State Constitution provides:

> **1. Judicial power; courts**
> Section 1. The judicial power shall be vested in an integrated judicial department consisting of a Supreme Court, such intermediate appellate courts as may be provided by law, a superior court, such courts inferior to the superior court as may be provided by law (municipal courts), and justice courts.[2]
>
> **3. Supreme court; administrative supervision; chief justice**
> Section 3. The Supreme Court shall have administrative supervision over all the courts of the State.[3]

This provides Arizona with an advantage over court systems where such integration and supervision does not exist. All judges and court employees in Arizona participate in required training each year, giving the court system the ability to bring to the attention of those administering justice the latest research possible. The Administrative Office of the Courts conducts periodic operational reviews of courts. In the rare cases when a court is found to severely out of compliance with laws and rules of operation, a court may be removed from the supervision of the local judge and placed under the direct administrative supervision of the presiding judge of

[1] Chief Justice Scott Bales during the opening remarks of the April 7, 2016 task force meeting.
[2] AZ Const. art. 6, Sec. 1
[3] AZ Const. art. 6, Sec. 3

the county. In such cases a plan is developed to "rehabilitate" the court before it is returned to local control.

Arizona already has in place many statutes, rules, and practices that provide flexibility for judges to take into account economic hardship. Unfortunately, it is not true in all types of cases particularly with some of the more common offenses such as driving without insurance. As such, there is still work to do to achieve justice for all in Arizona.

"There shall be no imprisonment for debt…"[4]

Important research regarding evidence-based practices in the legal system is underway throughout the nation. Arizona's Administrative Office of the Courts and its Probation departments have successfully incorporated evidence-based practices into probation services. The results have reduced the number of offenders going to prison and at the same time reduced the number of new felonies probationers commit.

Arizona's courts are now bringing evidence-based practices to the courts pretrial practices. The Arizona Judicial Branch's strategic agenda Advancing Justice Together calls for examining pretrial release policies and procedures; release conditions for eligible defendants; and research-based practices to promote defendant accountability, crime reduction, and community protection.

To promote these goals, practices in Arizona's courts should reflect these principles in practice:[5]

1. People should not be jailed pending the disposition of charges merely because they are poor. Release decisions and conditions should protect public safety and ensure the defendant's appearance at future proceedings.
2. Consistent with the Arizona constitution, people should not be jailed for failing to pay fines or other court-assessed financial sanctions for reasons beyond their control.
3. Court practices should help people comply with their court-imposed obligations.
4. Sanctions such as fees and fines should be imposed in a manner that promotes, rather than impedes, compliance with the law, economic opportunity, and family stability.

To support the work of the Task Force, the Administrative Office of the Courts, built a database of 800,000 cases to use in analyzing what is occurring with misdemeanor, criminal traffic, and civil traffic defendants in Arizona. A summary analysis of that data can be found on the Task Force's website at http://www.azcourts.gov/cscommittees/Task-Force-on-Fair-Justice-for-All/TF-FAIR-Resources.[6]

[4] AZ Const. Art. 2, Sec. 18
[5] Administrative Order No. 2016-16.
[6] Cisneros, Humberto and Huff, Carrin, Administrative Office of the Courts, (April 7, 2016) *Violation Review Data Driven Results* http://www.azcourts.gov/cscommittees/Task-Force-on-Fair-Justice-for-All/TF-FAIR-Resources

Justice for all……..

PART 1

Our ideal of "justice for all" means that people should not be disparately punished because they are poor. While everyone should face consequences for violating the law, criminal fines and civil penalties should not themselves promote a cycle of poverty by imposing excessive amounts or unduly restricting people's ability to be gainfully employed.

Fines (or civil penalties) are the most common sanction imposed by courts for violations of law. However, the impact of fines varies greatly among people of different income levels. A typical speeding fine of $270 has six times the impact on a person making $2,000 per month compared to a person making $10,000 per month. In some cases, such as driving without insurance, the legislature has required a mandatory minimum fine and surcharge amount of $1,040. For low-income individuals a fine that high can be catastrophic. If one assumes that a typical fine for an offense is meant to deter the average income citizen from breaking the law, then judges should be able to adjust the amount for low-income citizens to achieve a similar deterrent value.

Principal One: Provide judges with discretion to set a reasonable penalty.

The legislature is the branch of government that decides public policy regarding what defines unlawful activity, for example, "driving without insurance is against the law." The legislature also determines whether a fine will be mandatory. However, when a fine is mandatory, judges should be authorized to impose a fine but mitigate the amount due based on a person's inability to pay or their financial hardship. Without such authority, mandatory minimum fines impact the poor much more severely than those with higher income.

Recommendations:

1. Request a legislative change to allow judges to mitigate mandatory minimum fines, fees, surcharges, and penalties for those defendants for whom imposing a mandatory fine would cause economic hardship. If it's not possible to amend the statute to provide judicial discretion in all cases, focus the priority on those cases in which just failure to provide proof of insurance is charged. (LJ & GJ)

2. Providing courts with additional tools to determine a defendant's ability or inability to pay fines.

    a. Make use of public database information.
    b. Exclude means-tested benefits (SSI, SNAP) from calculation of the defendant's income.
    c. Waive or reduce fines if defendant qualifies for means assistance programs, much like the fee waiver deferral guidelines.
    d. Provide focused judicial education on ARS 11-584(D) and ARCrP 6.7(D) about how to determine the amount and method of payment, specifically, taking into account the financial resources and the nature of the burden that the payment will

impose on the defendant and make specific findings on the record about the defendant's ability to pay. (GJ)

3. Amend statute to allow judges to mitigate mandatory fines and fees so the fines and fees are proportional to the defendant's income. (GJ)

Principal Two: Provide the ability to pay a fine over a reasonable period of time.

Arizona law already gives judge's discretion to mitigate a fine in many types of cases when the fine amount would impose an economic hardship. Although most (fifty-nine percent) people who are issued a citation pay their fine in full, many are unable to pay the full amount at the time of sentencing and for that reason enter into a time payment plan contract.[7] The higher the fine and surcharge amount, the greater number of people choose to pay over time. It is important for courts to have reasonable time payment plans that realistically allow low-income individuals to make payments. Setting a time payment plan amount that is too high for the low-income person to pay will ultimately result in setting the citizen up to fail. Below are several targeted recommendations that address those situations wherein citizens have not been able to make the money installments on time, and as a result, have had their driver's license suspended.

Recommendations:

4. Implement the City of Phoenix Compliance Assistance Program in regard to the defendant financial obligation enforcement or similar program statewide. (LJ)

5. Conduct an amnesty pilot program that reduces the fines owed along with reinstatement of a driver's license. (LJ)

6. Recommend the court system to explore the following to make it easier for defendants to make time payments:

    a. Test the use of pre-addressed, postage paid envelopes given to defendants for use in making time payments to the court to determine if this method increases the ability for defendants to stay on track with a time payment plan. (LJ)

    b. Discuss with employers the possibility of allowing, at the employee's request, payroll deductions to pay fines to the courts. (LJ)

    c. Discuss with businesses, like grocery stores, the logistics and cost to allow individuals to make court payments within their place of business.

[7] Cisneros, Humberto and Huff, Carrin, Administrative Office of the Courts, (April 7, 2016) *Violation Review Data Driven Results* http://www.azcourts.gov/cscommittees/Task-Force-on-Fair-Justice-for-All/TF-FAIR-Resources

Principal Three: Provide alternatives to paying a fine.

Arizona Revised Statutes (A.R.S.) § 13-824 (*Community restitution in lieu of fines, fees, assessments, or incarceration costs*) was also passed into law in 2015 to enable a judge to convert a fine to community restitution (service) at a rate of $10 per hour. However A.R.S. § 13-824 does not currently allow for the surcharges (often as great as, or greater than the fine) amount to be converted to community restitution.

Court practices should help people comply with their court-imposed obligations. A few examples include effectively alerting people to appearance dates, sending reminders to make a payment or sending notifications when a time payment is missed, and allowing community service as an alternative to financial sanctions.

Citizens also often have the option to attend defensive driving school as a way to divert their case from court. Recent changes in law now allow a person to attend defensive driving online or in-person classes, once per year. Twenty–two percent of those individuals who plead guilty or responsible attended defensive driving school in FY2014.[8] Although the legislature has added additional fees that raise the cost of attending defensive driving school, a benefit remains for those attending a class who desire to keep auto insurance premiums lower.

Recommendations:

7. Courts should implement Interactive Voice Response (IVR), email, or text messaging system to remind defendants of court dates to reduce the amount of defendants who fail to appear for court hearings. (LJ & GJ)

Principal Four: Make payment options clear and convenient.

Courts should modify their online citation information, to clearly indicate that if a person is unable to pay the full amount due at that time that they can come to court to arrange for a time payment or community restitution plan. When a citizen receives a citation and wishes to plead guilty or responsible and pay the fine without coming to court, they access the "fine amount" or bond amount online. Currently, the majority of online systems do not inform the citizenry that a time payment plan is even an option.

Providing payment options makes it convenient for a citizen to pay the fine. All courts should accept payments mailed to the court and provide an alternative option to make a payment online. Some people who receive citations do not have credit cards or bank accounts. Because this population may experience difficulty accessing traditional funding, courts should explore providing individuals with self-addressed, postage-paid envelopes for mailing a money order to the court.

[8] Cisneros, Humberto and Huff, Carrin, Administrative Office of the Courts, (April 7, 2016) *Violation Review Data Driven Results* http://www.azcourts.gov/cscommittees/Task-Force-on-Fair-Justice-for-All/TF-FAIR-Resources

Recommendations:

8. Implement an online payment system. (LJ)

9. Recommend modifying bond cards, reminder letters, and FARE letters to explain that if the defendant plans on pleading guilty or responsible, but cannot afford to pay the full amount of the court sanctions at the time of the hearing, the defendant may request a time payment plan. (LJ)

Principal Five: Appear in Court.

Those that fail to appear in court after promising to do so pose a significant challenge. Eleven percent or 103,000 people failed to appear in court or attend defensive driving school in FY 2014 after receiving a traffic citation.[9] When people willfully fail to appear in court, often times for a civil traffic matter, more serious consequences will follow, including additional cost, issuance of a warrant for failure to appear, and loss of driving privileges. Driving on a suspended license is a criminal offense and what started as a civil traffic matter can quickly become a criminal matter.

In most cases people need to drive to work. If a person is stopped by law enforcement while driving on a suspended license, they may be arrested, detained in jail, and the car impounded. This type of scenario begins a downward spiral into economic devastation as fines and fees, including impounding, booking, and jail costs, are in addition to the civil traffic fines. In fiscal year 2014 for example, eleven percent or 103,000 defendants had their driver's license suspended. Of the 103,000 defendants, twenty-seven percent started as simple speeding violations. Fifty-three percent, or 54,400, were later cited for a criminal offense - driving on a suspended license. Forty-one percent of all criminal traffic offenses are for driving on a suspended license. Fifty-nine percent of these defendants were between the ages of 20 and 34. Notably, twenty-eight percent, or 15,200 of the 54,400 cited for driving on a suspended license failed to appear in court on the criminal citation, too! Regardless of how many options and reminders the court may provide, eventually a citizen must take responsibility to avoid consequences that could escalate and include jail time.[10]

Once arrested, defendants not only have additional cost added, but frequently lose their jobs for not showing up to work while they are in jail. In turn, this can lead to additional consequences such as eviction due to the inability to now make rent or home payments. Interestingly, data shows people who fail to appear in court live in all income zip codes, not just low-income areas.

If a person would show up in court when first cited, they might have their case dismissed (fifteen percent) if they have a defense, have the fine reduced, be allowed to make time payments, or perform community service as an alternative. Failure to appear puts into motion consequences that can be devastating to an individual.

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[9] Cisneros, Humberto and Huff, Carrin, Administrative Office of the Courts, (April 7, 2016) *Violation Review Data Driven Results* http://www.azcourts.gov/cscommittees/Task-Force-on-Fair-Justice-for-All/TF-FAIR-Resources

[10] Cisneros, Humberto and Huff, Carrin, Administrative Office of the Courts, (April 7, 2016) *Violation Review Data Driven Results* http://www.azcourts.gov/cscommittees/Task-Force-on-Fair-Justice-for-All/TF-FAIR-Resources

Some courts in Arizona have instituted an automated phone call system to remind citizens of upcoming court dates. Pima justice courts, achieved a twenty-three percent reduction in citizens failing to appear after installing a phone reminder system. Mesa Municipal court reports similar results.

Recommendations:

10. Modify forms to collect cell phone numbers, a secondary phone number, and email addresses. Forms should include a reminder to the defendant to keep contact information up to date with the court.

11. Train staff to verify and update contact information for the defendant at every opportunity. (LJ & GJ)

12. Provide information to law enforcement agencies regarding the importance of gathering updated contact information.

13. Recommend notifying defendants that a warrant will be issued unless they come to court within five days after a failure to appear. (GJ)

14. Recommend developing a system that communicates in English and Spanish (such as avatars) to provide explanations of options available to a defendant when a ticket of citation is issued. (LJ)

15. Recommend making it clear on the summons and bond card that the defendant can come to court before the designated court date to resolve the case; and tell the defendant how to reschedule the hearing if the defendant can't appear on the scheduled date. (LJ)

16. Implement the ability to email proof of insurance to the court. (LJ)

Principal Six: Make suspension of a driver's license a last resort.

In this day and age it is difficult to work or manage a family without driving a vehicle. Arizona Revised Statutes (A.R.S.) § 28-1601 (*Failure to pay civil penalty; suspension of privilege to drive; collection procedure*) requires courts to issue a complaint and notify the Motor Vehicle Department (MVD) to suspend a person's driver's license if a civil penalty is not paid or an installment payment is not made when due. Some find the requirement for a court to issue a complaint inappropriate, seeing it as a prosecutor's duty, not a court responsibility. Regardless, courts should be encouraged to notify a citizen that their driver's license will be suspended by a certain date, unless they come to court to resolve the matter. Additionally, other enforcement options should be considered, reserving the suspension of a driver's license as a last resort.

The City of Phoenix court has recently begun a Compliance Assistance Program. This program notifies defendants who have had their driver's license suspended that they can come to court, arrange a new and affordable time payment program, and make a down payment on their outstanding fine. In exchange, the court will provide a clearance letter for MVD so the individual

may reinstate their driver's license. In the first four months of this new operation over 5,200 citizens have taken advantage of this program. The program has also resulted in over 4,000 people getting their driver's license reinstated, and has resulted in the payment of $2.3 million to the City of Phoenix for outstanding fines with a remarkably low non-compliance rate.

Recommendations:

17. Recommend utilizing the suspension of a driver's license as a last resort, not a first step. (LJ)

18. Provide limited jurisdiction courts with the ability to provide skip tracing for use prior to issuing a warrant or reminder in cases that have aged. OR require prosecutors to get an updated address. (LJ)

Principal Seven: Provide non-jail enforcement alternatives.

Arizona operates a non-jail-based court order enforcement program called FARE, which utilizes a variety of techniques to locate, send reminder notices, encourages citizens to establish a time payment plan, places "holds" on license plate renewals, and intercepts state income tax refunds and lottery winnings. As a final resort, FARE uses private collections companies to enforce court orders. FARE is a self-sustaining operation and as such, imposes fees for those who continue further into the system. However, FARE fees are much lower than booking and jail fees or car impound costs. Only twenty-nine percent of all defendants whose cases are not dismissed are processed through FARE. A person making time payments is not referred to FARE. Only after failing to appear or failing to make payments and not returning to court to request a modification of a person's time payment plan, is a person referred to FARE. While FARE used to report failure to pay court ordered fines to the credit bureaus, a determination was made to no longer do so and 1.027 million cases have been withdrawn. FARE serves as a better alternative to enforcing court orders than arrest and jail.

Recommendations:

19. Seek legislation to change the following criminal charges to civil charges:

    - Driving on a suspended license
    - Littering
    - Criminal speeding
    - Expired out-of-state registration (LJ)

20. Recommend providing judges with the ability to reduce fines after defendant's successful completion of a program and treatment that helps reduce repetitive criminal activity. (GJ)

21. Recommend notifying defendants about the opportunity to come back to the court to start a payment plan before issuing a warrant for failure to pay. (GJ)

22. Amend A.R.S. § 13-824 (*Community restitution in lieu of fines, fees, assessments or incarceration costs*) to include general jurisdiction fines, or amend A.R.S. § 13-810(E) (*Consequences of nonpayment of fines, fees restitution or incarceration costs*) to allow probation to convert fines to community restitution. (GJ)

23. Recommend that the Conference of Chief Justices and the Conference of State Court Administrators approach congress about federal tax intercept for restitution only with an exception for those who are eligible for the earned income tax credit (EITC). (LJ)

Principal Eight: Handle specialized groups differently.

Statewide estimates show that 272,250 defendants were charged with a criminal traffic or non-criminal traffic misdemeanor complaint as primary charge in FY2014.[11] The largest number of these complaints included offenses such as, liquor violations, failure to comply with a court order, shoplifting and trespassing (related to shoplifting), drug offenses and DUI. In defendants charged with a criminal traffic misdemeanor, sixty-eight percent of these offenders receive a sentence of a fine, community service, or diversion. Nineteen percent receive a sentence to jail, and eighty percent of those sentenced to jail were defendants with a DUI (driving under the influence).

Within that group, those charged with shoplifting, property, or drug offenses, have a high rate (fifty-one to fifty-six percent) of committing a subsequent offense or offenses. For example, a person convicted of shoplifting has a forty-six percent chance of being convicted of additional shop lifting crimes (up to 10 or more) within 12 months. The same is true for drug offenders. These are the repeat offenders that are frequently in and out of jail on a regular basis. Those experienced with dealing with these offenders will point out that *almost all are addicts suffering from substance abuse issues.* Many of these offenders are unlikely to pay a fine and having them perform community restitution is not always practical, beneficial, or safe for vulnerable populations. The ability to order these offenders into a drug treatment program and provide credit-for-time in the program may be far more productive to reduce future crimes.

A second specialized group that are brought to court are the mentally ill. Significate numbers of the individuals appearing in court have been arrested for "quality of life" issues and appear to have mental health issues. Under the current law, Arizona Revised Statutes §§ 13-4501 et seq., the process to determine competency for a person charged with a misdemeanor or felony is the same. The process is cumbersome and expensive. Mesa and Glendale municipal courts have been piloting a streamed line process to handle these cases that shows promise. TO date……..

The handling of cases involving individuals with mental health issues is a challenge for all parts of the criminal justice system. We encourage the presiding judge of each county and of each large municipal court, as well as law enforcement, prosecutors, and defense attorneys to work together and develop protocols that will be used to better handle these cases.

[11] Cisneros, Humberto and Huff, Carrin. Administrative Office of the Courts, (April 7, 2016) *Violation Review Data Driven Results* http://www.azcourts.gov/cscommittees/Task-Force-on-Fair-Justice-for-All/TF-FAIR-Resources

Recommendations:

Money for Freedom.

PART 2

The Task Force was charged with making recommendations for best practices for making release decisions that protect the public, but do not keep people in jail solely for the inability to pay a cash surety (bail).

Courts, the Department of Justice,[12] and many criminal justice stakeholder groups, throughout the United States are joining in the pretrial justice reform efforts with the goal of moving away from a "money for freedom" system, often based on the individual charge - not on the defendant's risk, and moving to a risk-based release decision system. The goal is to keep the high risk people in jail, and release low- and medium-risk individuals, regardless of a person's access to money.

Even short pretrial stays, of 72 hours in jail, have been shown in national and local Arizona studies, to increase the likelihood of recidivism. Pretrial incarceration can cause real harm and can be unproductive on a number of fronts, such as loss of employment, economic hardship, and injury due to neglected medical issues.

Recently, there have been several class action challenges to the money bail system in several jurisdictions across the country. These class action suits have resulted in settlements to end the use of preset bond schedules and secured money bond for arrestees in those jurisdictions who are in jail pretrial.

Principle One: Keep high risk defendants in jail and release low- and moderate-risk defendants.

Current practices in Arizona and in many jurisdictions throughout the United States rely on the use of a secured financial bond to effect the release of defendants arrested for crime. National data indicates that approximately sixty percent of jail inmates are unconvicted, pretrial offenders. Some remain in jail pretrial longer than what a jail sentence would be if convicted.

Many of these defendants remain in custody only because they cannot afford the bond and are held in jail until their case is heard.

> "Many of those incarcerated pretrial do not present a substantial risk of failure to appear or a threat to public safety, but lack the financial means to be released."[13] "Conversely, some with financial means are released despite a risk of flight or threat to public safety, as when a bond schedule permits release upon payment of a pre-set amount without any individual determination by a judge of a defendant's flight risk or danger to the community."[14]

[12] Department of Justice, *"Dear Colleague Letter"* (March 14, 2016)

[13] VanNostrand, M. and Crime and Justice Institute (2007). *Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services*. Washington, DC: US Department of Justice, National Institute of Corrections.

[14] Pepin, Arthur W., *2012-2013 Policy Paper Evidence-Based Pretrial Release.* Conference of State Court Administrators

The American Bar Association Criminal Justice Standards Committee published "ABA Standards for Criminal Justice - Pretrial Release" that defines the purpose of the pretrial release decision as follows:

> **"The purposes of the pretrial release decision include providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses and the community from threat, danger or interference.** The judge or judicial officer decides whether to release a defendant on personal recognizance or unsecured appearance bond, release a defendant on a condition or combination of conditions, temporarily detain a defendant, or detain a defendant according to procedures outlined in these Standards. The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support. These Standards limit the circumstances under which pretrial detention may be authorized and provide procedural safeguards to govern pretrial detention proceedings."[15]

Recommendations:

24. Amend bail statutes to update terminology to align with risk-based decision system.

25. Modify Form 6 - *Release Order* and Form 7 – *Appearance Bond* to conform to risk-based decision system.

26. Recommend prohibiting the use of a bond schedule in non-traffic criminal cases.

27. Expand the use of the public safety assessment to limited jurisdiction courts for use in felony and high level or select misdemeanor cases, i.e., those defendants entitled to counsel with a potential for a jail sentence.

Principle Two: Detaining low-risk defendants in pretrial detention causes harm and correlates to higher rates of new criminal activity.

When defendants cannot afford to pay the costs of a bail bondsman, they remain in custody. Research conducted on the impact of pretrial detention shows that "detaining low-risk and moderate-risk defendants, even for a few days is strongly correlated with higher rates of new criminal activity both during the pretrial period and years after case disposition; as length of pretrial detention increases up to 30 days, recidivism rates for low-risk and moderate-risk defendants also increases significantly."[16] For low-risk and moderate-risk defendants, who are presumed innocent, the collateral consequences of even short periods of incarceration can result in destabilization of positive factors in the defendant's life including job loss, loss of place of residence, inability to care for children and disintegration of other positive social relationships and can lead to increased risk of new criminal activity and risk of failure to appear for court appearances.

[15] American Bar Association (2007). *ABA Standards for Criminal Justice: Pretrial Release, 3d ed.* Standard 10-1.1
[16] Lowenkamp, C. T., VanNostrand, M., and Holsinger, A. (2013). *The Hidden Costs of Pretrial Detention*, Laura and John Arnold Foundation

Recommendations:

28. Recommend amending Rule 7.4(D) of the Rules of Criminal Procedure that currently provides for a 10-day bail review hearing to a.) 24 hours, or b.) 48 hours.

Principle Three: Use of unsecured appearance bonds, electronic monitoring, and pretrial supervision are effective in assuring court appearance.

The use of secured bonds or surety bonds requires that the defendant pay a fee, usually 10 percent, and provide collateral if required, to a commercial bail agent who assumes responsibility for the full bail amount should the defendant fail to appear in court. If the defendant does appear in court, the 10 percent fee is retained by the commercial bail agent, even if the defendant is later found not guilty or the charges are dismissed. Further, the bail agent makes the decision to whom they will extend bail without consideration of the defendants assessed risk level. "The traditional money bail system has little to do with actual risk, and expecting money to effectively mitigate risk, especially risk to public safety, is historically unfounded."[17]

As noted in the ABA Standards for Pretrial Release, the use of "unsecured" bond is recommended or release on a condition or combination of conditions that will help assure court appearance.

In 2007, author John Clark wrote that by following the ABA Standards, and especially Standard 10-5.3, which states in part:

> "(a) Financial conditions other than unsecured bond should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court. The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay. (b) Financial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person. (c) Financial conditions should not be set to punish or frighten the defendant or to placate public opinion." … "Changing judicial decision making to reduce reliance on money bail is essential to effectuating an in-or-out decision that is the essence of good government."[18]
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> "While such cherished concepts as equal justice and due process should always be stressed, the public also needs to understand the implications for society of a system that relies on money bail. When a judicial officer sets a money bail, the outcome of whether the defendant is released or held is out of the hands of that judicial officer. It is then left to the defendant, his or her family, or any of the bail bondsmen working in the community to determine if the defendant stays in jail or goes home. From a public policy perspective, this flies in the face of good government, because the result is that public officials have little control over the use of one of the most expensive and limited resources in any community – a jail bed."[19]

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[17] Schnacke, T.R., (2014*) Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial*. U.S. Department of Justice, National Institute of Corrections

[18] John Clark, *Solving the Riddle of the Indigent Defendant in the Bail System*, Trial Briefs (Oct. 2007) Schnacke, T.R., (2014*) Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial*. U.S. Department of Justice, National Institute of Corrections

[19] John Clark, *Solving the Riddle of the Indigent Defendant in the Bail System*, Trial Briefs (Oct. 2007) at 34. Schnacke, T.R., (2014*) Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial*. U.S. Department of Justice, National Institute of Corrections.)

> "Current pretrial research illustrates that not making an immediately effectuated release decision for low and moderate risk defendants can have both short- and long-term harmful effects for both defendants and society. It is important for judges to make effective bail decisions, but it is especially important that those decisions not frustrate the very purposes underlying the bail process, such as to avoid threats to public safety. Therefore, judges should be guided by recent research demonstrating that a decision to release that is immediately effectuated (and not delayed through the use of secured financial conditions) can increase release rates while not increasing the risk of failure to appear or the danger to the community to intolerable levels. Second, the use of pretrial risk assessment instruments can help judges determine which defendants should be kept in or let out of jail. Those instruments, coupled with research illustrating that using unsecured rather than secured bonds can facilitate the release of bailable defendants without increasing either the risk of failure to appear or the danger to the public, can be crucial in giving judges who still insist on using money at bail the comfort of knowing that their in-or-out decisions will cause the least possible harm." [20]

The judicial officer establishing the terms and conditions is to assign those conditions that are the least restrictive but still able to reasonably assure court appearance and public safety. One condition that is often ordered is pretrial supervision. A study conducted by the Arnold Foundation in 2013 found that moderate- and high-risk defendants who received pretrial supervision were more likely to appear in court, and all defendants who were supervised pretrial for 180 days or more were less likely to be arrested for new criminal activity.[21]

The American Bar Association's (2007:4) Standards for Pretrial Release state that an agency should "…monitor, supervise, and assist defendants released prior to trial, and to review the status and release eligibility of detained defendants for the court on an ongoing basis." The National Association of Pretrial Services Agencies (2004:4) has adopted a similar standard, indicating that "every jurisdiction should have the services of a pretrial services agency or program…" and that the agency or program should "…provide monitoring and supervisory services in cases involving released defendants…"

Pretrial supervision consists of various levels of monitoring based on the defendant's assessed risk level. This may include court date reminders by phone, text messages or email, check-ins with the pretrial office by phone or face-to-face, home visits and electronic monitoring for those defendant's determined to be high risk.

Pretrial service programs are currently in operation or beginning implementation in all superior courts in Arizona, using the Public Safety Assessment (PSA) as the approved pretrial risk assessment tool. Expansion of these services to limited jurisdiction courts (municipal and justice courts) for appropriate defendants is recommended by the Task Force.

Recommendations:

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[20] Schnacke, T.R., (2014*) Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial*. U.S. Department of Justice, National Institute of Corrections.

[21] *Exploring the Impact of Supervision on Pretrial Outcomes* Christopher T. Lowenkamp, Ph.D. Marie VanNostrand, Ph.D. 2013 Laura and John Arnold Foundation)

Principle Four: Judges need the ability to hold high-risk defendants in custody when they are determined to present a risk to the community.

All defendants pose risk – the question is whether that risk is manageable. Some defendants pose such a great risk that they are unmanageable in the community – i.e., no condition or combination of conditions of a bail bond can provide reasonable assurance of public safety or court appearance. However, the great majority of defendants only pose risks that are manageable to reasonable levels outside of the jail.[22]

For those defendants determined to present a high risk to public safety, and there is "clear and convincing evidence that no condition or combination of conditions of release which will ensure the defendant's appearance in court or to protect the safety of the community or any person, the judicial officer should order the detention of the defendant before trial."[23] The use of a pretrial risk assessment at the initial appearance can assist the court in making this determination.

Recommendations:

29. Recommend that a defendant be provided an attorney if they haven't posted the financial release condition within 24 hours.

30. Set chronic offenders to appear in early disposition courts or use specialty courts that target populations i.e., the mentally ill or homeless.

Principle Five: Release decisions need to be individualized and based on an individual defendant's level of risk using evidence-based practices.

The bail process must also be individualized "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"[24] This is supported by the Supreme Court in *Stack v. Boyle*, 342 U.S. 1, 5 (1951), which wrote:

> "Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards, as expressed in the Federal Rules of Criminal Procedure [at the time, the nature and circumstances of the offense, the weight of the evidence against the defendant, and the defendant's financial situation and character] are to be applied in each case to each defendant." … "To the extent that states do not use these factors, such as when over-relying on monetary bail bond schedules that merely assign amounts of money to charges for all or average defendants, the non-individualized bail settings are vulnerable to constitutional challenge."[25]

The federal courts provisions concerning detention on grounds of danger to the community were upheld by the Supreme Court in *United States v. Salerno*, 481 U.S. 739, 755 (1987) a 1987

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[22] Schnacke, T.R., (2014*) Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial*. U.S. Department of Justice, National Institute of Corrections

[23] American Bar Association (2007). *ABA Standards for Criminal Justice: Pretrial Release, 3d ed.* Standard 10-5.8

[24] American Bar Association (2007). *ABA Standards for Criminal Justice: Pretrial Release, 3d ed.* Standard 10-5.3

[25] Schnacke, T.R., (2014*) Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*. U.S. Department of Justice, National Institute of Corrections

decision in which Chief Justice Rehnquist's opinion for the court noted that the government's interest in community safety can in "appropriate circumstances" outweigh an individual's liberty interest.[26]

The Administrative Office of the Courts is in the process of implementing the statewide use of the Public Safety Assessment (PSA), a validated pretrial risk assessment in initial appearance courts for most felony arrests. This risk assessment provides the court with a separate risk score for risk of failure to appear for future pretrial hearings and a risk score for risk of new criminal activity during the pretrial period as well as providing a "violence flag" in those cases where the defendant poses a high risk of new violent criminal activity during the pretrial period. This assessment, combined with additional information can be used by the judicial officer to assist in making release and detention decisions. These assessments are evidence-based and may be used to help the court determine the appropriate release conditions that will help mitigate the defendant's risk of failure to appear or new criminal activity.

Additionally, by using the PSA, judicial officers are able to individually assess which defendants are appropriate for a release on own recognizance and those that a release with certain conditions or combination of conditions may be released and monitored by a pretrial services agency of the court.

Recommendations:

31. Amend A.R.S. § 13-3967 (*Release on bailable offenses before trial; definition*) to include the consideration of the results of a validated risk assessment.

32. Recommend shifting Arizona's current bail structure from a cash bail system to a risk-based decision system.

33. Recommend that the Arnold Foundation conduct further research to determine if the risk assessment tool factors in the predictability of flight risk for those defendants who are in the country illegally.

34. Recommend to clarify by rule or best practices that small bonds ($5-$100) are not needed to ensure that the defendant gets credit for time served when defendant is also being held on a second more serious charge. Recommend amending Rule 7.4(D) of the Rules of Criminal Procedure that currently provides for a 10-day bail review hearing to a.) 24 hours, or b.) 48 hours.

35. Recommend that at the initial appearance, public defenders and prosecutors be present to resolve cases when possible, assist in determining release conditions, facilitate diversion decisions, transition options, or identify other special circumstances, and advocate for defendant's needed services to include collaboration with local RBHAs for early identification of those defendants previously identified as seriously mentally ill, allowing them to participate in necessary mental health services as soon as possible, which will reduce the need to return to court.

[26] American Bar Association (2007). *ABA Standards for Criminal Justice: Pretrial Release, 3d ed.* Standard 10-5.8

The Task Force made additional recommendations that may fall outside of the enumerated principles above; however, they are intended to support these pretrial justice concepts and to provide fair justice for all including better public safety for our communities:

36. Add script or process checklist to judicial bench books to applicable area for all case types. The same information should be created for probation and pretrial services.

37. Promote the use of restitution courts, status conferences, or probation review hearings to ensure due process and consider the wish of the victim. If restitution courts are used, standards must be established for willful contempt.

38. Recommend studying states (i.e., D.C. and New Mexico) that have already moved away from a cash-based system to determine how they modified authorities such as constitution, statute, court rules or by administrative order.

APPENDIX A: Proposed Rule Changes [PLACE HOLDER]

APPENDIX B: Proposed Legislative Changes [PLACE HOLDER]

APPENDIX C: The Task Force on Fair Justice for All

On March 3, 2016, Chief Justice Scott Bales issued Administrative Order No. 2016-16, which established the Task Force on Fair Justice for All: Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies. The task force met a total of ____ times over the span of ___ months. The task force met as a whole group at the beginning of each meeting; however, the members split into limited jurisdiction and general jurisdiction workgroups in order to examine issues and challenges specific to those court jurisdictions. The workgroups would then come back together in order to review all recommendations from differing perspectives. The Chief Justice asked the task force to file a report and make recommendations to the Arizona Judicial Council (AJC) by October 31, 2016.