



Pretrial Release Decision Making

What Victims and Advocates Should Know

December 6, 2011

Webinar Purpose – To Help Understand:

- ▶ What are the legal bases for pretrial release decisions?
- ▶ What is the timing of the decision?
- ▶ Who is the decision maker?
- ▶ Where is the decision made?
- ▶ Who is present when the decision is made?
- ▶ What information is available for the decision?
- ▶ What options are available for the decision?
- ▶ How are victims involved in the decision?
- ▶ What are the standards for the decision?



The Pretrial Period: A “Dubious Interval?”

- ▶ The defendant is accused, but not convicted.
- ▶ The defendant is presumed innocent, but most are ultimately convicted.
- ▶ The defendant has a constitutional right to a bail that is not excessive, but release may endanger the victim specifically or the public at large.
- ▶ As a result, a difficult balance must be struck between the risks and costs of release and the risks and costs of detention.



What are the legal bases for the decisions?

- ▶ Constitutions – state that excessive bail shall not be required; identify who has a constitutional right to bail that is not excessive
- ▶ Statute – list the factors the court must consider in making the decision and the options that are available; establish a presumption of release on least restrictive conditions reasonably calculated to assure safety and court appearance



What is the timing of the decision?

- ▶ Hearings are held the same time every day, during business hours
- ▶ Hearings are held the same time every day, but around the clock
- ▶ A judicial officer is available during business hours to hear cases that come in
- ▶ A judicial officer is available around the clock to hear cases that come in
- ▶ A defendant can be released by a bail schedule at any time after arrest and before seeing a judge



Who (or what) is the decision maker?

- ▶ A trial judge
- ▶ A law trained magistrate, justice of the peace, commissioner
- ▶ A non law trained magistrate, justice of the peace, or commissioner
- ▶ Jail or pretrial services staff
- ▶ A bail schedule
- ▶ A bail bonding company/the defendant's family or friends



64% Use a Bail Schedule

- ▶ Before initial appearance only 7%
- ▶ At initial appearance only 41%
- ▶ Both before and at initial court appearance 51%

Source: 2010 PJI Scan of Practices



Where are the decisions made?

- ▶ In a courtroom in the downtown courthouse
 - ▶ (The defendant may appear via video link with the jail)
- ▶ In a courtroom in the jail
- ▶ In a workstation in the jail or police station
- ▶ Over the telephone



Who is present when the decision is made?

- ▶ The judicial officer
- ▶ The judicial officer and the defendant
- ▶ The judicial officer, defendant, and arresting officer
- ▶ The judicial officer, defendant, and the prosecutor
- ▶ The judicial officer, defendant, prosecutor, and public defender
- ▶ The judicial officer, defendant, prosecutor, public defender, and pretrial services
- ▶ (Families of defendant, victims, media, general public)



What information is available for the decision?

- ▶ The name of the charge (all that is available for a bail schedule)
- ▶ An oral report from the arresting officer about the incident leading to the arrest
- ▶ A written police report
- ▶ A written police report and the defendant's criminal history
- ▶ A written police report, the defendant's criminal history, and any representations by the prosecutor and defense
- ▶ A written police report, the defendant's criminal history, a report from pretrial services that incorporates an assessment of risk, and any representations by prosecution, defense and victim



What options are used for the decision?

- ▶ Financial bail (with or without bail schedule)
- ▶ Financial bail, ROR
- ▶ Financial bail, ROR, conditions of release supervised by pretrial services programs
- ▶ Financial bail, ROR, conditions of release supervised by pretrial services programs, detention without bail for those who pose unmanageable risks
- ▶ ROR, conditions of release supervised by pretrial services programs, detention without bail for those who pose unmanageable risks



Use of those options in felony cases

- ▶ Financial bail set 70%
Range = 28% to 96%
- ▶ Non-financial release 25%
Range = 0 to 68%
- ▶ Held without bond 5%
Range = 0 to 27%

Source: 2006 State Court
Processing Statistics Project



Considerations when financial bail is used

- ▶ **Uncertainty about release since no in/out decision is made**
 - ▶ 47% of felony defendants who have money bail set are released, 53% stay in jail
 - ▶ Percent of felony defendants who have money bail set and who are released ranges from 16% to 85%
- ▶ **Defendants with access to the money can purchase their release, those without cannot**

Source: 2006 State Court Processing Statistics



Considerations when non-financial release used

- ▶ An “out” decision is made – no uncertainty about release.
- ▶ Release is not dependent upon the defendant’s access to money.
- ▶ Release can be conditioned and supervised.

Considerations regarding holding defendants without bond

- ▶ No uncertainty – the defendant is held without the possibility of release, regardless of his access to money, unless the judge changes the order.
- ▶ Not invoked often in many jurisdictions because of procedural hurdles.

What notice is given to victims regarding the decision?

- ▶ Notice to victim of date and time of initial appearance
- ▶ Notice to victim of pretrial release of the defendant

Notice to victim of date and time of initial appearance

- ▶ Notice given in all cases 31%
- ▶ Notice given, but only in certain circumstances 51%
- ▶ No notice given 18%

Source: 2010 PJI Scan of Practice



Notice to victim of pretrial release of the defendant

- ▶ Notice always given 14%
- ▶ Notice given, but only in certain circumstances 78%
- ▶ No notice given 8%


Source: 2010 PJI Scan of Practice



What are the standards of the legal profession for the decision?

- ▶ Elimination of bail schedules, both before and at initial appearance. (ABA recommended)
- ▶ Pretrial release decision making based upon complete, objective and validated information about risks posed by each defendant – provided by a pretrial services program. (ABA recommended)



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- ▶ Pretrial release options that address the range of risks presented by defendants and that emphasize the in/out decision, with conditions of release supervised by a pretrial services program. (ABA recommended)
 - ▶ Use of detention without bail for defendants with unmanageable risks to victim or public safety where such provisions exist, and enactment of such provisions where they do not. (ABA recommended)
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ROLES VICTIM ADVOCATES CAN PLAY TO ASSURE VICTIM SAFETY

- ▶ Educating victims about how the pretrial release decision making process works in your jurisdiction.
- ▶ Advocating for pretrial release policies and practices that will enhance victim safety.



ROLES VICTIMS CAN PLAY TO HELP ASSURE THEIR SAFETY

- ▶ Providing input into conditions of release or detention.
- ▶ Working as a partner with pretrial services, prosecutors and law enforcement to make sure those conditions are being adhered to.



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