U.S. Department of Justice
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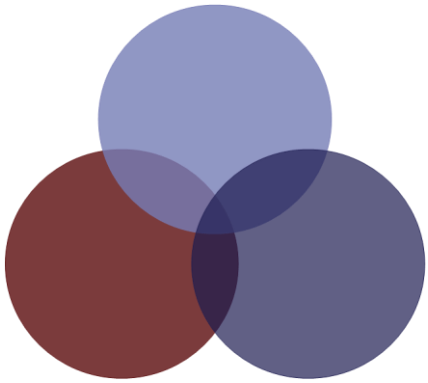
LEGAL AND EVIDENCE-BASED PRACTICES:

Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services

April 2007

Authored by Marie VanNostrand, Ph.D.
Luminosity, Inc.

for the Crime and Justice Institute and
the National Institute of Corrections



This paper was developed as part of a set of papers focused on the role of system stakeholders in reducing offender recidivism through the use of evidence-based practices in corrections.

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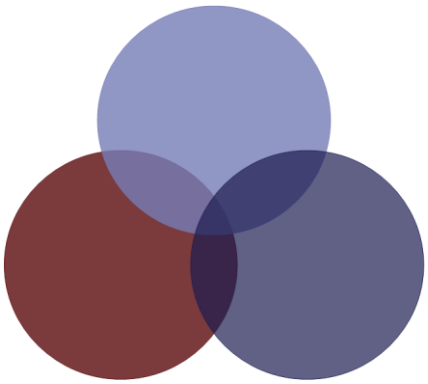

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The Crime and Justice Institute (CJI) and the National Institute of Corrections (NIC) are proud to present a series of seven whitepapers known as the Box Set. The papers are designed to share information with criminal justice system stakeholders about how the implementation of evidence-based practices (EBP) and a focus on recidivism reduction affect their areas of expertise in pretrial services, judiciary, prosecution, defense, jail, prison, and treatment. This initiative stems from a cooperative agreement established in 2002 between CJI and NIC entitled *Implementing Effective Correctional Management of Offenders in the Community*. The goal of this project is reduced recidivism through systemic integration of EBP in adult community corrections. The project's integrated model of implementation focuses equally on EBP, organizational development, and collaboration. It was previously piloted in Maine and Illinois, and is currently being implemented in Maricopa County, Arizona and Orange County, California. More information about the project, as well as the Box Set papers, are available on the web sites of CJI (www.cjinstitute.org) and NIC (www.nicic.org).

CJI is a nonpartisan nonprofit agency that aims to make criminal justice systems more efficient and cost effective to promote accountability for achieving better outcomes. Located in Boston, Massachusetts, CJI provides consulting, research, and policy analysis services to improve public safety throughout the country. In particular, CJI is a national leader in developing results-oriented strategies and in empowering agencies and communities to implement successful systemic change.

The completion of the Box Set papers is due to the contribution of several individuals. It was the original vision of NIC Correctional Program Specialist Dot Faust and myself to create a set of papers for each of the seven criminal justice stakeholders most affected by the implementation of EBP that got the ball rolling. The hard work and dedication of each of the authors to reach this goal deserves great appreciation and recognition. In addition, a special acknowledgment is extended to the formal reviewers, all of whom contributed a great amount of time and energy to ensure the success of this product. I would also like to express my appreciation to NIC for funding this project and to George Keiser, Director of the Community Corrections Division of NIC, for his support. It is our sincere belief and hope that the Box Set will be an important tool for agencies making a transition to EBP for many years to come.

Sincerely,

Elyse Clawson
Executive Director, CJI

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INTRODUCTION AND BACKGROUND

Approximately 14 million arrests for criminal offenses (excluding traffic offenses) are made each year in the United States.[1] Each time a person is arrested and accused of a crime a decision must be made as to whether the accused person, known as the defendant, will be released back into the community or detained in jail pending trial. Although the percentage of defendants detained pending trial is unknown, a study of felony defendants processed through the court systems in 75 of the largest urban counties in the U.S. revealed that 38% of all defendants charged with a felony were detained (held in confinement) until the disposition of their court case.[2] In addition, there are nearly 750,000 persons incarcerated in local jails on an average day in this country and of those 62% are defendants being detained pending trial.[3]

The bail decision, to release or detain a defendant pending trial and the setting of terms and conditions of bail, is a monumental task which carries enormous consequences not only for the pretrial defendant but also for the safety of the community, the integrity of the judicial process, and the utilization of our often overtaxed criminal justice resources. The bail decision is the responsibility of the Court and is usually made by a judicial officer - either a Judge or designee such as a Magistrate or Bail Commissioner. In most states the risk of failure to appear in court and danger to the community are the two considerations when a judicial officer is faced with a pretrial release/detention decision.

The bail decision…is a monumental task which carries enormous consequences not only for the pretrial defendant but also for the safety of the community, the integrity of the judicial process, and the utilization of our often overtaxed criminal justice resources.

Consideration of danger to the community during the bail decision was not widespread until the passage of the Comprehensive Crime Control Act in 1984 which amended the Bail Reform Act of 1966 by expanding the consideration to include danger to the community. Although these Acts only apply to the federal courts, most states have followed suit and currently there are at least 44 states and the District of Columbia that have statutes listing both community safety and the risk of failure to appear as appropriate considerations in the bail decision.[4] A few states, like New York, only allow for the consideration of court appearance.

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[1] Federal Bureau of Investigation, *Crime in the United States 2005* (Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, 2006) Table 29

[2] Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2002* (Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, 2006) p. 16

[3] Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2005* (Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, 2006) pp. 1 & 8

[4] Pretrial Services Resource Center, *The Pretrial Services Reference Book* (Washington, D.C.: Pretrial Services Resource Center, 1999) p. 12

Until the 1960s, the Courts relied almost exclusively on the traditional money bail system. The basic principle of the money bail system is that a defendant can secure his/her release if he or she can arrange to have bail posted in the amount of money set by the judicial officer.[5] The inequities of the money bail system were exposed in two landmark studies – Arthur Beeley's study of bail in Chicago in 1927[6] and Caleb Foote's study of the bail system in Philadelphia in 1954.[7] These studies revealed, as others have since confirmed, that release pending trial was secured by those with financial resources while those without financial resources, mostly the poor, remained incarcerated. Research has shown that the poor were more likely to be held pending trial regardless of the actual risk posed by the defendant and that being incarcerated pending trial led to a greater likelihood of a harsher sentence if convicted.[8]

The field of pretrial services emerged in response to the inequities of the money bail system as well as judicial officers' needs for reliable information to make bail decisions.[9] Pretrial services programs perform critical functions related to the bail decision. They serve as providers of the information necessary for judicial officers to make the most appropriate bail decision. They also provide monitoring and supervision of defendants released with conditions pending trial. The Manhattan Bail Project, a project initiated by the Vera Institute of Justice in 1961, was one of the first and potentially best known pretrial services programs in the United States. Since that time pretrial services programs have been developed across the country and there are now programs operating in more than 300 counties and all 94 districts in the federal court system.[10]

The field of pretrial services contains two primary sub-fields; pretrial release and pretrial diversion. Pretrial release generally involves the provision of information to judicial officers to assist them in making the pretrial release/detention decision, as well as the monitoring and supervision of

[5] National Institute of Justice, *Pretrial Services Programs: Responsibilities and Potential* (Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, 2001) p. 7
[6] Arthur Beeley, *The Bail System in Chicago* (Chicago, IL: University of Chicago Press, original 1927; reprint 1966)
[7] Caleb Foote, "Compelling appearance in Court: Administration of bail in Philadelphia" *University of Pennsylvania Law Review*, 1031 (1954)
[8] Patricia Wald, "The right to bail revisted: A decade of promise without fulfillment" in *The Rights of the Accused, Sage Criminal Justice System Annuals*, Vol. 1 (1972), p. 178
[9] See Supra note 5, pp. 7-13 and Appendix A for a thorough review of the history of bail and pretrial services.
[10] Supra note 5, p.8

persons released from custody while awaiting disposition of criminal charges. Pretrial diversion is a dispositional alternative for pretrial defendants. Defendants voluntarily enter into a diversion program in lieu of standard prosecution and court proceedings. When a defendant successfully completes the diversion program the result is a dismissal of charges, or its equivalent.

The primary distinction between pretrial release and diversion is the nature of participation on the defendant's part. Participation in pretrial diversion is voluntary whereas the pretrial release decision and the setting of terms and conditions of release are a result of a judicial decision regarding the defendant. Pretrial release allows for the defendant to be monitored in the community while following the standard court process pending trial, whereas pretrial diversion allows the defendant to voluntarily enter into a diversion program and avoid standard prosecution. Should a defendant fail diversion, however, he will be returned to the court process for prosecution. The distinctions between the two sub-fields are important and the unique challenges for diversion programs will be explored in a separate publication.[11] For the purposes of this paper, pretrial services refer to the area of pretrial release and may not be applicable to pretrial diversion.

There are numerous critical points and stages along the criminal case process continuum. The law governs the application of distinct legal principles at varying stages along this continuum. The period of time between arrest and case adjudication is known as the pretrial stage. During this stage defendants enjoy certain inalienable rights as found in the law. As a result, there are critical legal principles applicable to defendants during the pretrial stage. These principles, as applied to specific pretrial practices, serve as the legal foundation on which pretrial services programs must operate. A clear grasp of these legal tenets is necessary to build a framework for appropriate delivery of pretrial services.

[11] The National Association of Pretrial Services Agencies has secured a cooperative agreement (No. 2006-LD-BX-K070) with the Bureau of Justice Assistance (BJA), Office of Justice Programs, U.S. Department of Justice to publish a Pretrial Diversion Best Practices Monograph to Support Community-Based Problem-Solving Criminal Justice Initiatives.

PRETRIAL LEGAL FOUNDATION

The legal foundation for case processing during the pretrial stage can be found in the Constitution of the United States, case law, and state and federal statutes. There are six critical principles found in the law that serve as the framework for the operation of pretrial services programs:

1. Presumption of Innocence
2. Right to Counsel
3. Right Against Self-incrimination
4. Right to Due Process of Law
5. Right to Equal Protection Under the Law
6. Right to Bail that is Not Excessive

The six legal principles are not fully inclusive of all of the rights afforded to a defendant during the pretrial stage. There are many other legal protections provided to defendants during this stage, including but not limited to, the requirement of a probable cause hearing within 48 hours,[12] the right to confront witnesses,[13] and the right to a fair and speedy trial.[14] For the purposes of this paper the scope of legal principles has been narrowed to include the principles that have the greatest impact on the operation of pretrial services programs. Any person working in the field of pretrial services or any part of the criminal justice system that manages pretrial defendants must have a complete understanding of these guiding principles. A discussion of each principle and its basis in law is provided below.

Presumption of Innocence

The presumption of innocence dictates that a formal charge against a person is not evidence of guilt; in fact, a person is presumed innocent and the government has the burden of proving the person guilty beyond a reasonable doubt. This fundamental principle can be found in case law dating back to 1895 when Justice White wrote in his opinion for the Supreme Court in *Coffin v. United States* "The principle that there is a presumption of innocence in

[12] See *Gerstein v. Pugh*, 420 U.S. 103 (1975) at 114 where the Court found "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." The timeliness requirement of the *Gerstein* opinion was subsequently refined by the Court in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) to place a maximum limit of 48 hours on the time that a person can be held in custody before a probable cause determination is made by a judicial officer.

[13] This right is found in the Sixth Amendment to the United States Constitution as applied to the States in the Fourteenth Amendment.

[14] Ibid., footnote 13

favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[15] Although the presumption of innocence is the only principle without a foundation in the Bill of Rights of the United States Constitution, it is considered an undisputed and fundamental principle of American jurisprudence.

Right to Counsel

The right to counsel in criminal proceedings is found in the Sixth Amendment to the U.S. Constitution which states that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial … and to have the assistance of counsel for his defense." The Sixth Amendment right to counsel was extended to the states in 1963 by the U.S. Supreme Court in *Gideon* v. *Wainwright*.[16] In this case the Court held that the Sixth Amendment's guarantee of the right to state-appointed counsel, firmly established in federal-court proceedings in *Johnson* v. *Zerbst* (1938),[17] applies to state criminal prosecutions through the Fourteenth Amendment. The Supreme Court clarified the scope of that right in 1972 in *Argersinger v. Hamlin*,[18] holding that an indigent defendant must be offered counsel in any misdemeanor case "that actually leads to imprisonment." In essence, a pretrial defendant has the right to counsel if there is a threat of any length of incarceration.

Right Against Self-Incrimination

The Fifth Amendment of the U.S. Constitution states that "No person … shall be compelled in any criminal case to be a witness against himself…" This amendment gives individuals the right to decline to answer any questions or make any statements, when doing so would help establish that the person committed a crime or is connected to any criminal activity. This right is also known as the Fifth Amendment right against self-incrimination. The U.S. Supreme Court clarified this right in 1966 in *Miranda v. Arizona* finding that "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege."[19] The procedural safeguards detailed by the Court are well known in the United States as "Miranda Warnings." It should be noted that *Miranda v. Arizona* also reinforced the right to counsel, finding that "The police also prevented

[15] *Coffin v. United States*, 156 U.S. 432 (1895) at 545
[16] *Gideon v. Wainwright*, 372 U.S. 335, 344 - 345 (1963)
[17] *Johnson v. Zerbst*, 304 U.S. 458 (1938)
[18] *Argersinger v. Hamlin*, 407 U.S. 25 (1972)
[19] *Miranda v. Arizona*, 384 U.S. 436 (1966)

the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel."[20]

Right to Due Process of Law

The Fifth Amendment of the U.S. Constitution states that "No person shall be…deprived of life, liberty, or property, without due process of law …." while section one of the Fourteenth Amendment states that "No State shall … deprive any person of life, liberty, or property, without due process of law…" The Due Process Clause of the Fifth Amendment applies to the Federal Government and the Fourteenth Amendment applies to the States. Both amendments provide that the government shall not take a person's life, liberty, or property without due process of law.

A clear definition of due process is lacking; however, Justice Frankfurter paints a picture of due process in his 1950 dissenting opinion for the Supreme Court in *Solesbee v. Balkcom* which states "It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just."[21]
As it relates to restricting a pretrial defendant's liberty, due process requires, at a minimum, an opportunity for a fair hearing before an impartial judicial officer, that the decision to restrict liberty is supported by evidence, and that the presumption of innocence is honored.

Right to Equal Protection Under the Law

The right to equal protection under the law is found in section one of the Fourteenth Amendment which states that "No State shall … deny to any person within its jurisdiction the equal protection of the laws." Although the equal protection clause does not list specific forms of discrimination, it has been applied consistently on the basis of race, ethnicity, gender and religious beliefs.

As it applies to pretrial defendants equal justice has been extended to include a person's financial status. The courts have ruled that release pending trial (pretrial freedom) should not be based solely on a person's ability to pay and

[20] Ibid., footnote 19
[21] *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950)

to do so is a violation of equal protection.[22] This protection further applies to criminal trials. Justice Black makes this clear in the 1956 U.S. Supreme Court opinion in *Griffin v. Illinois* in which he writes "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial."[23]

Right to Bail That Is Not Excessive

The right to bail that is not excessive was established in the Judiciary Act of 1789 and the Eighth Amendment of the U.S. Constitution which states "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The scope and intent of 'excessive bail' has been clarified over time with a few critical changes in law and U.S. Supreme Court case decisions. A brief review of the history of bail reform is necessary to understand today's interpretation of 'excessive bail' as well as the current state of bail.

You may recall that for the majority of our history the sole consideration when deciding bail was the risk of failing to appear in court. This was reiterated in the U.S. Supreme Court case of *Stack v. Boyle* decided in 1951, likely the most notable court case that addresses the Eighth Amendment right to bail that is not excessive. Chief Justice Vinson writes in his opinion for the Court that "From the passage of the Judiciary Act of 1789 to the present Federal Rules of Criminal Procedures, Rule 46(a) (1), federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction … The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty ... Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment."[24]

The first major federal bail reform since the Judiciary Act of 1789 occurred approximately 15 years after *Stack v. Boyle* in the form of the Bail Reform Act of 1966. The key provisions of the Act that relate directly to understanding bail today include:

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[22] See generally *Bandy v. United States* 82 S.Ct. 11 (1961), *Pugh v. Rainwater*, 557 F.2d 1189 (5th Cir. 1977), *Ackies v. Purdy*, 322 F. Supp. 38, 42 (S.D. Fla. 1970)
[23] *Griffin v. Illinois*, 351 U.S. 12 (1956)
[24] *Stack v. Boyle*, 342 U.S. 1 (1951)

1. The presumption of release on recognizance for defendants charged with non-capital crimes unless the Court determined that such release would not assure court appearance.

2. Conditional pretrial release, supervision of released defendants, with conditions imposed to address the risk of flight.

3. Restrictions on money bail, which the Court could impose only if non-financial release options were not enough to assure appearance.[25]

The Bail Reform Act of 1966 reinforced that the sole purpose of bail was to assure court appearance and that the law favors release pending trial. In addition, the Act established a presumption of release by the least restrictive conditions with an emphasis on non-monetary terms of bail.

In the early 1970s, the District of Columbia became the first jurisdiction to experiment with detaining defendants due to their potential danger to the community if released pending trial. Under D.C. Code 1973, 23-1322, a defendant charged with a dangerous or violent crime could be held before trial without bail for up to sixty days; this practice became known as preventive detention. This detention scheme was upheld by the District of Columbia Court of Appeals in *United States v. Edwards.*[26] The change in law in the District of Columbia followed by *United States v. Edwards* paved the way for the next major bail reform.

The Bail Reform Act of 1984 was, in part, created in response to the growing concern over the potential danger to the community posed by certain defendants released pending trial. Following the lead of the District of Columbia as upheld in *United States v. Edwards*, the 1984 Act retained the presumption of release on the least restrictive conditions found in the 1966 Act while allowing for detention of pretrial arrestees based on both court appearance and danger to the community. Preventive detention as detailed in the Act allows for pretrial detention in cases when a judicial officer finds that no conditions or combination of conditions will reasonably assure the appearance of the person in court and the safety of any other person and the community.

The preventive detention aspect of the Bail Reform Act of 1984 was challenged in the U.S. Supreme Court case *United States v. Salerno* in 1987. The United States Court of Appeals for the Second Circuit initially struck

[25] Supra note 4, p. 10
[26] *United States v. Edwards*, 430 A.2d 1321, (1981), cert. denied, 455 U.S. 1022 (1982)

down the preventive detention provision of the Act as facially unconstitutional, because, in that Court's words, this type of pretrial detention violates "substantive due process." As a result, the Supreme Court granted certiorari because of a conflict among the Court of Appeals regarding the validity of the Act. The Supreme Court then reversed the Court of Appeals and held that the Act fully comported with constitutional requirements. The Court decided that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. What is just as important as upholding preventive detention is the context in which the decision was made. The Court noted that "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[27] In addition, the opinion for the Court provided by Chief Justice Rehnquist emphasized that the federal statute limits the cases in which detention may be sought to the most serious crimes; provides for a prompt detention hearing; provides for specific procedures and criteria by which a judicial officer is to evaluate the risk of "dangerousness"; and (via the provisions of the Federal Speedy Trial Act) imposes stringent time limits on the duration of the detention.[28]

The Bail Reform Acts of 1966 and 1984 only apply to the federal system but as stated previously, most states have followed suit and emulated the essence of these two Acts. Bail, as it stands today in most states and in the federal government, serves to provide assurance that the defendant will appear for court and not be a danger to the community pending trial. Bail set at an amount higher, or conditions more restrictive than necessary to serve those purposes, is considered excessive. There remains a legal presumption of release on the least restrictive terms and conditions, with an emphasis on non-financial terms, unless the Court determines that no conditions or combination of conditions will reasonably assure the appearance of the person in court and the safety of any other person and the community.

Summary of Legal Principles

The six legal principles of the presumption of innocence, the right to counsel, the right against self-incrimination, the right to due process of law, the right to equal protection under the law, and the right to bail that is not excessive serve as the pretrial legal foundation. Pretrial services programs are guided by this set of principles that are unique to defendants at the pretrial stage and programs must ensure that these principles and all of the rights provided for a pretrial defendant are respected and honored in every aspect of program operation.

[27] *United States v. Salerno*, 481 U.S. 739 at 755 (1987)
[28] Ibid. at 747

EVIDENCE-BASED PRACTICES

The term evidence-based practice (EBP) is widely used in numerous fields including medicine, social services, education, mental health, and others – including criminal justice. EBP is used to describe the adoption of interventions and practices that are informed by research. The history of the term can be traced back to the early 1970's in the healthcare field. EBP has become a common term in the criminal justice system over the past decade and has recently experienced widespread use in community corrections (the post-conviction field also referred to as post-trial).

The Crime and Justice Institute, in partnership with the National Institute of Corrections, provides guidance for evidence-based practice for the community corrections field in the 2004 publication "Implementing Evidence-Based Practice in Community Corrections: The Principles of Effective Intervention".[29] There are many similarities between the pretrial and post-conviction fields; however, there are three primary distinctions between these fields that require evidence-based practices for pretrial services programs to vary in some instances from those identified for community corrections. First, pretrial services programs deal with defendants who are pending trial (during the pretrial stage) and are therefore presumed innocent while community corrections programs deal with post-trial convicted offenders (during the post-trial stage).[30] In essence, the pretrial and post-conviction fields differ by the very nature of the status of the people whom they serve; defendants presumed innocent versus convicted offenders. One primary difference between these two fields is that the rationales of rehabilitation and punishment often applied to convicted persons are inappropriate and inapplicable to pretrial defendants.[31]

The post-conviction field seeks to impact long-term criminal behavior while the pretrial field is limited to impacting criminal behavior and court appearance solely during the pretrial stage.

Second, pretrial and post-conviction programs differ in their intended outcomes. Evidence-based practices are considered effective for the post-conviction (community corrections) field when they reduce offender risk and subsequent recidivism and as such make a positive long-term contribution to public safety.[32] The intended outcome of pretrial services programs is to reduce pretrial failure (failure to appear and danger to the community)

[29] See "Implementing Evidence-Based Practice in Community Corrections: The Principles of Effective Intervention" (Crime and Justice Institute, 2004)
[30] For the purpose of this paper convicted offender refers to any person who has had a sentenced imposed, received community supervision or deferred adjudication, or the court deferred final disposition of the case.
[31] *United States v. Cramer*, 451 F.2d 1198 (5th Cir. 1971)
[32] Supra note 29, p. 1

pending trial. The post-conviction field seeks to impact long-term criminal behavior while the pretrial field is limited to impacting criminal behavior and court appearance solely during the pretrial stage. The intended outcomes for the pretrial and post-conviction fields are distinct and these distinctions must be taken into consideration when applying evidence-based practices to the pretrial services field.

Finally, evidence-based practices for pretrial services must be consistent with the pretrial legal foundation and related principles discussed previously in order to maintain certain inalienable rights afforded to each defendant during the pretrial stage. Due to the three primary distinctions of the pretrial services field EBP for pretrial services may be more accurately referred to as legal and evidence-based practices (LEBP). LEBP is defined as interventions and practices that are consistent with the pretrial legal foundation, applicable laws, and methods research has proven to be effective in decreasing failures to appear in court and danger to the community during the pretrial stage. The term is intended to reinforce the uniqueness of the field of pretrial services and ensure that criminal justice professionals remain mindful that program practices are often driven by law and when driven by research, they must be consistent with the pretrial legal foundation and the underlying legal principles.

We will begin our discussion of LEBP by examining the legal and evidence-based practices identified for pretrial services. Admittedly, research related to pretrial services specific practices is significantly limited. Available pretrial specific research focuses on risk assessment, bail recommendations, and a few aspects of supervision. The existing pretrial research has made a significant contribution to the field, however, substantially more research is needed in all areas – even those mentioned above. Due to the limited pretrial specific research as well as the similarities between the pretrial services and post-conviction fields the LEBP discussion is followed by a review and consideration of the applicability of community corrections EBP. Although there are general EBP identified through research, the 8 principles of effective intervention mentioned previously are used for this discussion.

Pretrial Services Legal and Evidence-Based Practices

Policies and practices for programs must be guided by the pretrial legal foundation, applicable laws, and methods that research has proven to be effective. Standards related to pretrial release and pretrial services which are based on pretrial legal principles have been issued by the American Bar

Association,[33] the National District Attorney's Association,[34] and the National Association of Pretrial Services Agencies.[35] A discussion of the standards is beyond the scope of this paper; however, a review of these standards is highly recommended.

Pretrial investigation and pretrial supervision are the primary mechanisms for providing information to judicial officers to assist with the bail decision and monitoring and supervision of pretrial defendants released pending trial. In recent years the National Institute of Justice,[36] the Bureau of Justice Assistance,[37] and the National Association of Pretrial Services Agencies[38] have released comprehensive publications which provide detailed guidance related to pretrial investigations and pretrial supervision. It would be duplicative and beyond the scope of this paper to review in great detail the related suggested best practices. General overviews of the components of pretrial investigation and supervision are presented below followed by detailed discussions of the pretrial services specific legal and evidence-based practices.

Pretrial Investigation

The pretrial investigation is the mechanism for relaying the necessary information to judicial officers so that they can make the most appropriate pretrial release/detention decision. Components of a pretrial investigation should include an interview with the defendant, verification of specified information, a local, state and national criminal history record, an objective assessment of risk of failure to appear and danger to the community, and a recommendation for terms and conditions of bail. The two primary components of a pretrial investigation that are supported by LEBP are the risk assessment and bail recommendation.

[33] American Bar Association Standards for Criminal Justice *Standards on Pretrial Release, Third Edition* (2002)
[34] National District Attorney's Association *National Prosecution Standards, Second Edition* (1991) pp: 138-150
[35] National Association of Pretrial Services Agencies *Standards on Pretrial Release, Third Edition* (2004)
[36] Supra note 5
[37] Bureau of Justice Assistance, *Pretrial Services Programming at the Start of the 21st Century: A Survey of Pretrial Services Programs* (Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, 2003)
[38] Supra note 35

Risk Assessment

The purpose of a pretrial risk assessment instrument is to identify the likelihood of failure to appear and the danger to the community posed by a defendant during the pretrial stage. A pretrial risk assessment instrument should use research-based objective criteria to identify the likelihood of failure to appear in court and danger to the community pending trial.[39]

The use of an objective and research-based risk assessment instrument by pretrial services programs to assist the judicial officer in making the bail decision is strongly recommended by both ABA and NAPSA Standards and has proven effective through research. Pretrial risk assessment research conducted over the past 30 years has identified common factors that are good predictors of court appearance and/or danger to the community as follows:

- Current Charge(s)
- Outstanding Warrants at Time of Arrest
- Pending Charges at Time of Arrest
- Active Community Supervision at Time of Arrest (e.g. Pretrial, Probation, Parole)
- History of Criminal Convictions
- History of Failure to Appear
- History of Violence
- Residence Stability
- Employment Stability
- Community Ties
- History of Substance Abuse

1. *A pretrial risk assessment instrument should be proven through research to predict risk of failure to appear and danger to the community pending trial* – An appropriate risk assessment instrument for pretrial services is one that is developed using generally accepted research methods to predict the likelihood of failure to appear and danger to the community pending trial. A pretrial risk assessment instrument should be validated to ensure it is an accurate predictor of pretrial risk in the community or communities in which it is being applied. Pretrial risk assessment instruments developed using generally accepted research methods that are specific to the field of

[39] Supra Note 5, pg.46 "Programs that assess risks of pretrial misconduct in an exclusively subjective manner are more than twice as likely to have a jail population that exceeds its capacity than those programs that assess risk exclusively through an objective risk assessment instrument—56 percent, compared to 27 percent. Forty-seven percent of programs that add subjective input to an objective instrument are in jurisdictions with overcrowded jails."

pretrial services include: Harris County, Texas;[40] New York City, New York;[41] Commonwealth of Virginia;[42] Hennepin County, Minnesota;[43] and Philadelphia, Pennsylvania.[44]

2. *The instrument should equitably classify defendants regardless of their race, ethnicity, gender, or financial status* – An instrument that is proven through research to effectively predict the likelihood of failure to appear and danger to the community for an entire population may also be found to result in disparate classification and treatment of certain defendants. For an example, an instrument may accurately categorize defendants generally, but may also over-classify defendants of a particular race or socioeconomic status. Over-classification involves the classification of a group of defendants into higher risk levels than the actual risk level of the group. The result of such over-classification is the unequal and unfair treatment of certain defendants; frequently minorities and the poor. A risk assessment instrument should be proven through research methods to equitably classify defendants regardless of their race, ethnicity, gender or financial status.[45]

3. *Factors utilized in the instrument should be consistent with applicable state statutes* – Bail statutes and pretrial services acts, if applicable, should be consulted to ensure that factors included in a pretrial risk

[40] See Steven Jay Cuvelier and Dennis W. Potts, *Bail Classification Profile Project: Harris County, Texas* (Alexandria, VA: State Justice Institute, 1993) and Steven Jay Cuvelier and Dennis W. Potts, *A Reassessment of the Bail Classification Instrument and Pretrial Practices in Harris County, Texas* (Huntsville, TX: Sam Houston State University, 1997)

[41] See Qudsia Siddiqi, *Assessing Risk of Pretrial Failure to Appear in New York City* (New York City, NY: New York City Criminal Justice Agency, 1999) and Qudsia Siddiqi, *Prediction of Pretrial Failure to Appear and an Alternative Pretrial Release Risk-Classification Scheme in New York City: A Reassessment Study* (New York City, NY: New York City Criminal Justice Agency, 2002)

[42] See Marie VanNostrand, *Assessing Risk Among Pretrial Defendants in Virginia: The Virginia Pretrial Risk Assessment Instrument* (Richmond, VA: Virginia Department of Criminal Justice Services, 2003)

[43] See Rebecca Goodman, *Hennepin County Bureau of Community Corrections Pretrial Release Study* (Minneapolis, MN: Planning and Evaluation Unit, 1992)

[44] See John Goldkamp and Michael White, *Charge Seriousness, Risk Classification, and Resource Implications: Three Outstanding Issues in Implementing Pretrial Release Guidelines* (Philadelphia, PA: Crime and Justice Research Institute, 1994) and John Goldkamp and Michael White, *Pretrial Release and Detention During the First Year of Pretrial Release Guidelines in Philadelphia: Review and Recommendations* (Philadelphia, PA: Crime and Justice Research Institute, 1997)

[45] See Supra note 42, pp. 11-14 for a research methods model of ensuring equitable classification of groups

assessment instrument are allowable for the purposes of bail consideration.

4. *Factors utilized in the instrument should be limited to those that are related either to risk of failure to appear or danger to the community pending trial* – Remembering the purpose of a pretrial risk assessment instrument, factors utilized in an instrument should relate to either the likelihood of failure to appear or danger to the community during the pretrial stage. Factors that are often considered for post-conviction offenders, such as those related solely to recidivism or criminogenic needs, which do not demonstrate a relationship to predicting pretrial risk (court appearance or danger to the community) should not be included in pretrial risk assessment instruments.

Bail Recommendation

A recommendation regarding bail is the final component of a pretrial investigation and is founded upon information collected during the investigation process which includes the criminal history record, defendant interview, verification of information, and the risk assessment. Pretrial services programs are tasked with identifying the least restrictive terms and conditions of bail that will reasonably assure a defendant will appear for court and not present a danger to the community during the pretrial stage. Terms and conditions of bail are intended to mitigate the risk of failure to appear and potential danger to the community posed by the defendant.

There are three primary terms of bail utilized by defendants to secure release pending trial:

1. Release on Own Recognizance (OR) – A defendant can be required to provide a promise to appear in court, signed or unsigned, to secure his/her release pending trial. A defendant is said to be released on his or her own recognizance, also known as Personal Recognizance (PR).

2. Unsecured Bail – A defendant can be required to sign a bond stating that they promise to appear in court and agree that if they fail to appear, they will pay the Court an agreed upon bail bond amount. An unsecured bail does not require money be offered up front; payment is required only if the defendant fails to appear in court.

3. Secured Bail – A defendant can be required to pay the Court a designated amount of money or post security in the amount of the bail in order to secure release pending trial. Security can be in the form of

cash or property and may be posted by the defendant or by someone on his/her behalf, e.g., a relative or a private surety (not all states allow private sureties to post security on behalf of defendants).

In addition to the terms of bail, conditions of bail may be required to further assure court appearance and safety to the community. State bail statutes usually provide guidance regarding appropriate conditions of release pending trial. The U.S. Criminal Code offers an example of release conditions that can be required to mitigate the risk posed by a defendant as follows:

If the judicial officer determines that the release on promise to appear or unsecured bond will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person—

(A) subject to the condition that the person not commit a Federal, State, or local crime during the period of release; and

(B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—

(i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the Court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii) maintain employment, or, if unemployed, actively seek employment;
(iii) maintain or commence an educational program;

(iv) abide by specified restrictions on personal associations, place of abode, or travel;

(v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(vii) comply with a specified curfew;

(viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance … without a prescription by a licensed medical practitioner;

(x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(xi) execute an agreement to forfeit upon failing to appear as required, property …;

(xii) execute a bail bond with solvent sureties…;

(xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community. [46]

It is also important to distinguish between the bail decision and the bail outcome. The decision to release or detain a person pending trial and the identification of the terms and conditions a defendant must meet to secure release is the bail decision. Whether the person secures his/her release or is detained pending trial is the bail outcome. The bail decision and bail outcome can be different. When a judicial officer sets a financial term of bail the bail decision is release; however, if the defendant remains detained due to his/her inability to meet the term the bail outcome is detention.

Research has identified financial terms of bail as resulting in disparate outcomes due to a person's financial status and may be a form of de facto

[46] U.S. Code Title 18, Part II, Chapter 207, § 3142.C Release or detention of a defendant pending trial: Release on Conditions

racial and ethnic discrimination.[47] One such study examined the effects of race and ethnicity on both bail decisions and bail outcomes and found that Hispanic and black defendants are more likely than white defendants to be held on bail because of an inability to post bail. The defendant's financial status and ability to post bail accounted for the majority of black and Hispanic defendants' overall greater likelihood of pretrial detention.[48] For these reasons, pretrial services programs must be mindful of not only the potential resulting bail decision but also the potential bail outcome based on the bail recommendation.

Additionally, the implications of detention pending trial deserve consideration by pretrial services programs when making a bail recommendation. Detention pending trial can reduce a defendant's ability to prepare an adequate defense and be disruptive to family, employment, and community ties and negatively stigmatize the defendant.[49] Research has shown that defendants who are detained pending trial are more likely to plead guilty and receive more severe sentences if convicted (including being sentenced to prison) when compared to defendants who are released pending trial. These facts remain true even when other relevant factors are controlled for including the current charge, prior criminal history, family ties, and type of counsel.[50]

The bail recommendation, including the terms and conditions of bail, must be guided by the pretrial legal foundation and principles with an emphasis on the right to bail that is not excessive and the right to equal protection under the law. Pretrial detention is allowable only in cases when a judicial officer finds that no term or conditions of bail will reasonably assure the appearance of the person in court and the safety of the community. The Supreme Court in *United States v. Salerno* reminds us that liberty is the norm and detention prior to trial the carefully limited exception.

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[47] Stephen Demuth, "Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A comparison of Hispanic, Black, and White Felony Arrestees," *Criminology*, 41 (2003), pp.873-907

[48] Ibid., p. 899

[49] Ibid., p. 876

[50] See Stephen Demuth, "Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A comparison of Hispanic, Black, and White Felony Arrestees," *Criminology*, 41 (2003), pp.873-907; E. Britt Patterson and Michael J. Lynch, "Bias in formalized bail procedures," *Race and Criminal Justice* (1991); S.H. Clark and S.T. Kurtz "The Importance of Interim Decisions to Felony Trial Court Dispositions" *Journal of Criminal Law and Criminology*, 74 (1983), pp. 476-518; A. Rankin, "The Effects of Pretrial Detention," *New York University Law Review*, 39 (1964); Caleb Foote, "Compelling Appearance in Court – Administration of Bail in Philadelphia," *University of Pennsylvania Law Review* 102 (1954), pp. 1031-1079

Some research has concluded that providing drug testing randomly to pretrial defendants as a condition of bail, regardless of any individually identified risk, does not have an impact on reducing pretrial crime or failure to appear.[56] Similarly, providing services to defendants that are not based on an individually identified risk does not have an impact on reducing pretrial crime or failure to appear.[57]

1. *Bail recommendations should be based on an explicit, objective, and consistent policy for identifying appropriate release conditions*[51] – The identification of the bail recommendation, including release options and conditions, should be based on detailed policies and be supported by objective and consistently applied criteria. The use of an explicit and objective policy to develop the bail recommendation is intended to remove subjectivity and reduce the potential for disparity in bail recommendations.

2. *Conditions of bail should be the least restrictive reasonably calculated to assure court appearance and community safety*[52] –Release on personal recognizance or promise to appear should first be considered for all defendants. Additional conditions may be recommended only if the information contained in the pretrial investigation, primarily the results of the risk assessment, indicate that this type of release is not sufficient to assure court appearance and community safety.

3. *Financial terms of bail should only be recommended when no other term will reasonably assure court appearance*[53] – If a financial term of bail is to be recommended, it should be based on the minimum amount reasonably calculated to assure court appearance and upon consideration of the defendant's ability to post the bail. Under no circumstances should a financial term be used to address risk to the community or to detain a person, and should not result in pretrial detention solely due to the defendant's inability to pay.

4. *Conditions of bail should be restricted to those that are related to the risk of failure to appear or danger to the community posed by the defendant*[54] – Since the purpose of bail is to assure court appearance and community safety during the pretrial stage, bail conditions should be related to the risk posed by an individual defendant and intended to mitigate pretrial risk. Bail conditions that are not related to mitigating pretrial risk, including those that are punitive or solely rehabilitative in nature, should not be recommended. It should be noted that research related to drug testing as a condition of bail has produced inconsistent results.[55] Some research has concluded that providing drug testing

[51] Supra note 35, pp. 60-61
[52] This practice is consistent with the legal principle of the right to bail that is not excessive
[53] Ibid., footnote 52
[54] Ibid., footnote 52
[55] See supra note 5, p. 43; National Institute of Justice, *Research in Brief: Predicting Pretrial Misconduct with Drug Tests of Arrestees* (Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, 1996); National Institute of Justice, *The Impact of*

randomly to pretrial defendants as a condition of bail, regardless of any individually identified risk, does not have an impact on reducing pretrial crime or failure to appear.[56] Similarly, providing services to defendants that are not based on an individually identified risk does not have an impact on reducing pretrial crime or failure to appear.[57]

Pretrial Supervision

Pretrial supervision can be ordered by a judicial officer as a condition of bail. Remembering that the purpose of bail is to provide reasonable assurance of court appearance and community safety during the pretrial stage, pretrial supervision serves as a mechanism to monitor bail conditions for released defendants.

1. *Defendant contacts should be required at a frequency that is reasonably necessary to monitor the conditions of release*[58] – Contacts with the defendant, usually face-to-face or by phone, should be required as often as is deemed necessary to effectively monitor the conditions of bail. Contact with the defendant that is required more frequently than necessary to serve this purpose may be considered excessive. There is a dearth of research on the most effective frequency and types of contacts to monitor bail conditions. One research study concluded that pretrial supervision generally made a positive contribution in minimizing pretrial failure; however, variations in the frequency of contacts with the defendant produced no statistically significant difference in pretrial failure.[59] More research is needed in the area of effective pretrial supervision related to the types and frequencies of defendant contacts.

Systemwide Drug Testing in Multnomah County, Oregon (Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, 1995)

[56] Chester Britt, III, Michael R. Gottfredson, and John S. Goldkamp, " Drug Testing and Pretrial Misconduct: An Experiment on the Specific Deterrent Effects of Drug Monitoring Defendants on Pretrial Release," *Journal of Research in Crime and Delinquency*, 29 (1992), pp. 62-78

[57] James Austin, Barry Krisberg, and Paul Litsky, "The Effectiveness of Supervised Pretrial Release," *Crime & Delinquency*, 31 (1985), pp. 519-537

[58] Supra note 52

[59] John S. Goldkamp and Michael D. White, *Restoring Accountability in Pretrial Release: The Philadelphia Pretrial Release Supervision Experiments*, (Philadelphia, PA: Crime and Justice Research Institute, 1998)

2. *Defendants should be reminded of their court date(s)* – Reminding defendants of their court dates either by phone, mail, e-mail, or during face-to-face contacts has been proven through research to reduce the incidence of failure to appear.[60]

Summary and Discussion of Pretrial Services Legal and Evidence-Based Practices

Pretrial services programs conduct pretrial investigations, including risk assessments and bail recommendations, for the purpose of providing information to judicial officers so that they can make appropriate pretrial release/detention decisions. Pretrial supervision serves as a mechanism to monitor conditions of bail for defendants released pending trial. When providing pretrial investigations and supervision it is critical for programs to remember that these services are not intended to be punitive or solely rehabilitative in nature, instead, the purpose is to meet the intended outcomes - provide reasonable assurance of court appearance and community safety pending trial.

The research supporting pretrial services LEBP should be expanded significantly and much work is needed in the area of risk assessment and supervision. There are two areas relating to risk assessment that are critical yet to date have been relatively unexplored; the nature and severity of the danger to the community being assessed and the potential portability of an instrument from one jurisdiction to another.
Although pretrial risk assessment instruments in most instances do well in predicting the likelihood of danger to the community (often measured by a new arrest pending trial) there is no known research that explores the nature and severity of the new arrest. For example, a person might be a high risk for being arrested for a new offense pending trial; however, what is not known is whether the new arrest is likely to be for a low level traffic offense or a high level violent offense. This is a critical area to be explored in future pretrial risk assessment research.

[60] Supra note 4, pp. 25 – 26

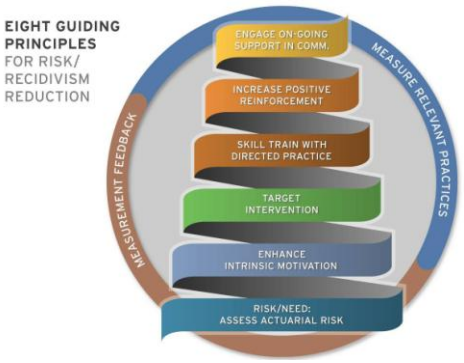
The potential portability of an instrument from one jurisdiction to another has only recently been tested. Until the late 1990's it was generally accepted that a pretrial risk assessment instrument developed in one jurisdiction would not be valid in another. The Virginia Pretrial Risk Assessment Instrument was the first research-based multi-jurisdictional instrument that was proven to be valid in multiple and varying jurisdictions.[61] The argument for the potential portability of a pretrial risk assessment instrument was strengthened when the Virginia Pretrial Risk Assessment Instrument, known as the "Virginia Model", was implemented in Summit County, Ohio and recently validated for that population.[62] More research in this area is also needed.

Effective supervision practices for pretrial services are relatively unknown with the exception of those documented above. Until additional research can be conducted on the most effective LEBP for pretrial services we will look to another stage in the criminal justice system, the post-trial stage, to examine the potential applicability of their evidence-based practices.

[61] Supra note 42
[62] Christopher T. Lowenkamp and Kristin Bechtel, *A Validation of the Summit County Pretrial Risk Assessment Instrument* (Cincinnati, OH: University of Cincinnati, 2007)

PRINCIPLES FOR EBP IN COMMUNITY CORRECTIONS

Research in the field of community corrections has identified eight evidence-based principles for effective intervention.[63] This research indicates that certain programs and intervention strategies, when applied to a variety of offender populations, reliably produce sustained reductions in recidivism. Although the field of pretrial services has some unique legal and evidence-based practices as described previously, it may be possible to benefit from the research conducted for community corrections to supplement pretrial services specific LEBP. The following section contains brief descriptions of the principles for EBP in community corrections along with considerations for the application of these principles based on the pretrial legal foundation and distinctions of the pretrial services field discussed previously.[64] It should be noted that research is needed to determine the effectiveness of these principles in producing the intended outcomes for pretrial services.



Principle One: Assess Actuarial Risk/Needs

Community Corrections programs are encouraged to develop and maintain a complete system of ongoing offender risk screening/triage and needs assessments. Screening and assessment tools that focus on dynamic and static risk factors, profile criminogenic needs, and have been validated on similar populations are preferred.

Similar to community corrections, pretrial services programs are encouraged to use actuarial risk assessment instruments which have been validated on similar populations. The significant distinction between the two types of assessments is the intended outcome. A pretrial risk assessment instrument is intended to identify the likelihood of pretrial failure (failure to appear and

[63] Supra note 29

[64] See "Implementing Evidence-Based Practice in Community Corrections: The Principles of Effective Intervention" (Crime and Justice Institute, 2004) and "Implementing Evidence-Based Practice in Community Corrections: Quality Assurance Manual" (Crime and Justice Institute, 2005) for comprehensive discussions on EBP in community corrections.

danger to the community) posed by a defendant during the pretrial stage. A pretrial risk assessment instrument should meet the following criteria:

1. be proven through research to predict risk of failure to appear and danger to the community pending trial;

2. equitably classify defendants regardless of their race, ethnicity, gender, or financial status;

3. only utilize factors which are consistent with applicable state statutes; and

4. only utilize factors that relate either to risk of failure to appear or danger to the community pending trial.

Both the community corrections and pretrial services fields are encouraged to use actuarial risk assessment instruments which have been validated on similar populations; however, the pretrial risk assessment instrument will likely vary due to the intended outcome and in order to ensure compliance with the pretrial legal foundation and underlying legal principles.

Principle Two: Enhance Intrinsic Motivation
Community corrections staff should relate to offenders in interpersonally sensitive and constructive ways to enhance intrinsic motivation in offenders. Feelings of ambivalence that usually accompany change can be explored through motivational interviewing, a style and method of communication used to help people overcome their ambivalence regarding behavior changes. Research strongly suggests that motivational interviewing techniques, rather than persuasion tactics, effectively enhance motivation for initiating and maintaining behavior changes.

Motivational interviewing has been proven effective in producing intended outcomes in community corrections and many other non-criminal justice related fields. Motivational interviewing in pretrial services may be a beneficial technique for staff during supervision when attempting to enhance motivation for compliance with conditions, court appearance, and a reduction in danger to the community. Care should be taken by staff to ensure motivational interviewing techniques are used in such a way that the pretrial legal principles, specifically the presumption of innocence and the right against self-incrimination, are honored. A motivational interviewing training curriculum may need to be modified to ensure compliance with the pretrial legal foundation.

Principle Three: Target Interventions

The third principle for evidence-based practices in community corrections has several underlying principles as follows:

- *Risk Principle: Prioritize supervision and treatment resources for higher risk offenders.*
- *Need Principle: Target interventions to criminogenic needs.*
- *Responsivity Principle: Be responsive to temperament, learning style, motivation, culture, and gender when assigning programs.*
- *Dosage: Structure 40-70% of high-risk offenders' time for 3-9 months.*
- *Treatment: Integrate treatment into the full sentence/sanction requirements.*

The application of this principle should be modified due to the pretrial legal foundation. Remember that conditions of bail should be related to the risk of failure to appear or danger to the community posed by the defendant during the pretrial stage, be the least restrictive reasonably calculated to assure court appearance and community safety, and be related to the risk posed by an individual defendant and intended to mitigate pretrial risk.

The application of the *risk principle* to pretrial services, prioritizing supervision and treatment resources for higher risk defendants, is consistent with the intended outcome. Modifications to the application of the *need principle* are recommended for pretrial services to ensure the principle does not violate the pretrial legal foundation. Conditions of bail, including supervision and treatment, must relate to the risk of pretrial failure. Criminogenic needs should be targeted only when they are related to a risk of pretrial failure. This qualification is necessary because of the distinctions between the intended outcomes of pretrial services and community corrections. It appears that the *responsivity principle* is generally applicable to pretrial services. The *dosage and treatment principles* must be modified due to the general length of the pretrial stage, the purpose of pretrial supervision and the legal rights of the defendant. Treatment should be required and a defendant's time structured based on the specific risk posed and be the least restrictive reasonably calculated to assure court appearance and community safety pending trial.

Principle Four: Skill Train with Directed Practice (use Cognitive Behavioral treatment methods)

Community corrections programs are encouraged to provide evidence-based programming that emphasizes cognitive behavioral strategies. To successfully deliver treatment to offenders, staff must understand antisocial thinking, social learning, and appropriate communication techniques. Skills are not just taught to the offender, but are practiced or role-played and the resulting pro-social attitudes and behaviors are positively reinforced by staff.

Programs that utilize cognitive behavioral strategies should be recommended by pretrial services and/or ordered by the Court with one caveat - participation in some programs may be seen as an admission that the defendant has committed the behavior of which he or she has been accused.[65] When applying this principle to pretrial services modifications to the cognitive behavioral strategies used in programs may be necessary to ensure they honor the defendant's rights to the presumption of innocence and against self-incrimination. It is common for a cognitive behavioral based anger management program, for example, to require a participant to admit guilt related to the crime for which they have been convicted. Failure to admit guilt results in the unsuccessful completion of the program. Consistent with the legal principles of pretrial services, behavioral modification programming should not require an admission of guilt as a program component nor should a defendant have his/her bond revoked for failing to admit guilt related to the current charge.

Principle Five: Increase Positive Reinforcement

Behaviorists recommend applying a much higher ratio of positive reinforcements to negative reinforcements in order to better achieve sustained behavioral change. Research indicates that a ratio of four positive to every one negative reinforcement is optimal for promoting behavior changes. With exposure to clear rules that are consistently (and swiftly) enforced with appropriate graduated consequences, offenders and people in general, will tend to comply in the direction of the most rewards and least punishments.

This principle has been applied to many fields outside of community corrections and it is reasonable to believe that it could also be effectively

[65] Supra note 5, p. 46

applied to pretrial services supervision. Pretrial services programs need to be cautious, however, with the application of "appropriate graduated consequences". The modification of bail conditions should only be made by, or with the approval of, a judicial officer. Certain sanctions/consequences may require the approval of the Court before they can be applied to a defendant.

Principle Six: Engage Ongoing Support in Natural Communities
Community corrections staff are encouraged to realign and actively engage pro-social supports for offenders in their communities. Research indicates that many successful interventions with extreme populations (e.g., inner city substance abusers, homeless, dual diagnosed) actively recruit and use family members, spouses, and supportive others in the offender's immediate environment to positively reinforce desired new behaviors.

The application of this principle to defendants during pretrial supervision should be done so with caution. Notification of the arrest to family members or other people in the community may cause harm to a defendant who is presumed innocent. It is recommended that the use of family members, spouses, and supportive others in the defendant's immediate environment to positively reinforce desired new behaviors be done so with the permission of the defendant. To do otherwise would arguably be beyond that which is reasonably necessary to monitor the conditions of bail and may impinge on the rights afforded to defendants during the pretrial stage.

Principle Seven: Measure Relevant Processes/Practices
Community corrections programs should maintain accurate and detailed documentation of case information, along with a formal and valid mechanism for measuring outcomes. Programs must routinely assess offender change in cognitive and skill development, and evaluate offender recidivism, if services are to remain effective. In addition to routinely measuring and documenting offender change, staff performance should also be regularly assessed.

Measuring relevant processes, practices, and outcomes is advisable for programs of all kinds and pretrial services programs are no exception. The measures, including the desired outcomes, vary for pretrial services. Pretrial services programs should measure the results of bail recommendations, defendant compliance with bail conditions, and the impact of interventions,

programs, and services in relation to the intended outcomes (court appearance and community safety during the pretrial stage). Staff performance should also be regularly assessed.

Principle Eight: Provide Measurement Feedback

Once a method for measuring relevant processes and practices is in place (principle seven) the information must be used to monitor process and change. Providing feedback to offenders regarding their progress builds accountability and is associated with enhanced motivation for change, lower treatment attrition, and improved outcomes. The same is true within an organization. Monitoring delivery of services and fidelity to procedures helps build accountability and maintain integrity to the agency's mission.

There are no special considerations when applying this principle to pretrial services.

Summary and Discussion of Evidence-based Practices in Community Corrections

It appears that many of the principles of effective intervention developed for community corrections could be applied to pretrial services if the appropriate modifications are made and cautions adhered to. The recommended modifications to the application of these principles are consistent with the pretrial legal foundation and in recognition of the distinctions between the pretrial and post-conviction fields. The uniqueness of the pretrial services field should not inhibited the modification of these principles to pretrial services, in fact, research as to the effectiveness of these principles in producing the intended pretrial outcomes is strongly encouraged.

SUMMARY AND CONCLUSIONS

Bail decisions, to release or detain defendants pending trial, carry enormous consequences for accused persons, the safety of the community, and the integrity of the judicial process. Pretrial services programs perform two critical functions related to bail. They provide information to judicial officers to assist with bail decisions and monitor and supervise defendants released with bail conditions pending trial when Court ordered.

It is critical to recognize that pretrial services programs deal with defendants during the pretrial stage. Pretrial defendants enjoy many legal protections during this stage and programs must respect these protections and operate within the framework provided by the pretrial legal foundation. The six legal principles that constitute the pretrial legal foundation include the presumption of innocence, right to counsel, right against self-incrimination, right to due process of law, right to equal protection under the law, and the right to bail that is not excessive. These rights, as well other legal protections provided to pretrial defendants, must be honored during all aspects of pretrial services program operations.

Pretrial services legal and evidence-based practices are interventions and practices that are consistent with the pretrial legal foundation, applicable laws, and methods that research has proven effective in decreasing failures to appear in court and danger to the community during the pretrial stage. Pretrial services related research has identified a number of risk assessment, bail recommendation, and supervision related practices and interventions that are consistent with the pretrial legal foundation and have been proven effective in producing reductions in pretrial failure. There is a dire need to add to the existing body of research and to expand the research into relatively unexplored areas including, but not limited to, refining risk prediction to include the potential severity of the danger to the community posed by pretrial defendants as well as the potential portability and universal application of a pretrial risk assessment instrument.

Evidence-based practices have been identified for community corrections as detailed in the eight principles of effective intervention. Although there are significant distinctions between the pretrial services and post-convictions fields, it is reasonable to believe that pretrial services could potentially benefit from this body of research. Modifications to the application of some of these principles are needed in light of the distinctions between these fields including the legal status of the defendant, the intended outcomes of pretrial services, and the pretrial legal foundation. Additional research is needed to determine

the effectiveness of the eight principles of effective intervention as modified for pretrial services in producing reductions in failures to appear in court and danger to the community during the pretrial stage.

The pretrial services field is challenged with striking a balance between honoring the rights of the accused and protecting the safety of our communities. Chief Justice Rehnquist reminds us in U.S. v. Salerno that, as it relates to pretrial defendants, "in our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." Yet we also know from this Supreme Court case decision that we must detain pretrial defendants "charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community to which no condition of release can dispel."

Pretrial services programs strive to identify those defendants who can safely be released into the community pending trial with the least restrictive conditions necessary to assure court appearance and the safety of the community while simultaneously identifying the "carefully limited exception" – defendants who must be detained pending trial for the safety of individuals and our community. The pretrial services legal and evidence-based practices discussed here provide much needed direction to programs attempting to strike this delicate balance. Additional research is necessary to clarify existing practices and to identify new practices and interventions that are consistent with the pretrial legal foundation and are proven effective in decreasing failures to appear in court and danger to the community during the pretrial stage. It is this vital research that will guide pretrial services future practices and further illuminate the path to pretrial justice.

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