AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges federal, state, local, and territorial governments to promote public safety and assure that defendants appear in court by adopting policies and procedures that:

1. favor release of defendants upon their own recognizance or unsecured bond;
2. require that a court determine that release on cash bail or secured bond is necessary to assure the defendant's appearance and no other conditions will suffice for that purpose before requiring such bail or bond;
3. prohibit a judicial officer from imposing a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay;
4. permit a court to order a defendant to be held without bail where public safety warrants pretrial detention and no conditions of pretrial release suffice, and require that the court state on the record the reasons for detention; and
5. bar the use of "bail schedules" that consider only the nature of the charged offense, and require instead that courts make bail and release determinations based upon individualized, evidence-based assessments that use objective verifiable release criteria that do not have a discriminatory or disparate impact based on race, ethnicity, religion, socio-economic status, or sexual or gender identification.

REPORT

I. Curtailing Financial Conditions of Pretrial Release

A. The Escalating Use of Financial Release Conditions

Standard 10-5.1(a) of the *ABA Standards for Criminal Justice: Pretrial Release* (3d ed., 2007) [hereinafter ABA Standards] establishes a presumption that arrested people will be released on their personal recognizance, effectively a promise to appear in court. If release on personal recognizance would pose a "substantial risk" that a person will not show up for a court proceeding, endanger others' safety, or imperil the judicial system's "integrity" (through, for example intimidation of a witness), the person must still usually, but as mentioned below not always, be released, though subject to the "least restrictive" condition or conditions that "reasonably ensure" he or she will attend court proceedings and not imperil others or the judicial process's integrity. ABA Standards 10-5.1(a)-(b), 10-5.2(a).

The American Bar Association's longstanding call for the limitation of pretrial detention has manifested itself in myriad other ways. For example, upon a finding of probable cause to believe a person committed a charged crime, the ABA allows for pretrial detention only in very narrow circumstances. At a hearing with the procedural safeguards outlined in ABA Standard 10-5.10, the government must prove, by the heavy standard of clear and convincing evidence, that *no* release condition or conditions would "reasonably ensure" the defendant will appear in court or protect individual or public safety. ABA Standard 10-5.8(a). And when people are detained pretrial, they must be afforded "accelerated trials" to diminish the period of time they are subject to pretrial incarceration. ABA Standard 10-5.11.

Despite the ABA's insistence that pretrial detention should occur only in exceptional situations, large-scale pretrial confinement has continued unabated in this country since adoption of the ABA Standards in 2002. (The commentary to the Standards was completed in 2007.) In 2015, almost eleven million people were admitted into a jail. Todd D. Minton & Zhen Zeng, U.S. Dep't of Justice, *Jail Inmates in 2015* at 2 (2016). Most of the people incarcerated in jails have not been convicted of the alleged crime that led to their confinement. They are simply awaiting a decision whether they will be charged with a crime or, if charged, their trial. These unconvicted individuals comprised over 62% of the people incarcerated in jails in 2015, up from 40% in 1983. Todd D. Minton & Zhen Zeng, U.S. Dep't of Justice, *Jail Inmates in 2015* at 5, Table 4 (2016); Allen J. Beck, U.S. Dep't of Justice, *Profile of Jail Inmates, 1989*, at 2 tbl. 1 (1991).

One of the chief reasons for the extensive incarceration of presumptively innocent people is the conditioning of release from jail (or not being booked into jail) on the meeting of financial requirements, whether in the form of a cash payment, the posting of property as collateral, or a surety bond from a commercial bail bondsman. Even in 2002, before the publication of many new research findings about financial release conditions

and alternatives to them, the ABA was largely opposed to financial release conditions. The ABA Standards, for example, bar financial conditions of release imposed to protect the public's safety. ABA Standard 10-5.3(b). The Standards only allow the imposition of financial conditions of release (other than unsecured bond) when no other release condition would "reasonably ensure" a person's appearance in court. *Id.* at 10-5.3(a). The ABA Standards furthermore call on judges to refrain from imposing a financial release condition that "results in the pretrial detention of the defendant solely due to an inability to pay." *Id.*

As the Vera Institute of Justice recently reported, "Money, or the lack thereof, is now the most important factor in determining whether someone is held in jail pretrial." Ram Subramanian et al., Vera Inst. Of Justice, *Incarceration's Front Door: The Misuse of Jails in America* 29 (2015) [hereinafter Vera Report]. And therein lies the problem. Most of the people detained in jails are poor. Some manage to eventually procure the funds needed to post bail or pay a nonrefundable fee to a bail bonding company, though they have to endure days or weeks of incarceration in the meantime. Many others are unable to ever muster the financial resources needed to gain their freedom.[1] In fact, statistics collected since the adoption of the ABA Standards have revealed that 90% of the individuals who never secure their release from jail while their criminal cases are being processed are not confined because they were denied bail due to being a flight risk or danger to the public. They are incarcerated simply because they could not muster the financial resources needed to secure their liberty. Brian A. Reaves, U.S. Dep't of Justice, *Felony Defendants in Large Urban Counties*, 2009, at 15 (2013).

Recent statistics from New York City highlight how cash bail continues to erect an insurmountable barrier to freedom for so many people. In 2013, more than half (54%) of the people who had to remain in the city's jails while their cases were being processed did not have enough money to pay bail set at $2500 or less. Vera Report 32. In fact, 31% of the non-felony defendants who were never able to secure their pretrial release were so poor that they could not even pay a bail sum as little as $500 or less. *Id.*

B. <u>New Research Findings on the Harm Caused by Unneeded Pretrial Confinement</u>

An abundance of research conducted and knowledge amassed since the adoption of the ABA Standards in 2002 have now made it clear that financial conditions of release fail to protect individual or public safety. At best, in rare cases, financial conditions may be used in conjunction with an individualized assessment of risk and ability to pay.

1. **<u>Financial Release Conditions' Promotion of Uninformed and Arbitrary Pretrial-Release Decisions and Jeopardizing of Public Safety</u>**. The amount of money or property a person has is not an accurate predictor of the risk of danger that person

[1] About half of felony defendants subject to financial release conditions cannot meet them and remain in custody until the disposition of their cases. *Felony Defendants, 2009*, at 17.

poses to others or of the risk that he or she will not show up for a scheduled court proceeding. The inability to explain or demonstrate why one particular financial sum is a more appropriate release condition than a higher or lower sum is a further indicator of the arbitrary treatment that ensues from financial release conditions. But researchers have now developed, and jurisdictions are increasingly employing, validated risk-assessment instruments to guide pretrial-release and detention decisions. These empirically-tested tools are much more accurate predictors of risk than financial bail, intuition, or professional judgments unguided by such risk-assessment instruments. Conference of State Court Administrators, *2012-2013 Policy Paper: Evidence-Based Pretrial Release* 6-7 (2012).

The state of the science of risk assessment has advanced dramatically since the drafting of the ABA Standards. Before 2002, only a couple jurisdictions had conducted empirical studies of their risk-assessment tools, and those studies were limited. In 2003, a comprehensive pretrial risk-assessment validation study was published, the first validating a tool for use throughout an entire state – Virginia. Marie VanNostrand, Virginia Dep't of Criminal Justice Services, *Assessing Risk Among Pretrial Defendants in Virginia: The Virginia Pretrial Risk Assessment Instrument* (2003). Since then, other states have conducted pretrial risk-assessment studies to develop tools that can be used in all communities within those states. *See, e.g.*, Pretrial Justice Inst., *The Colorado Pretrial Assessment Tool (CPAT)* (2012) [hereinafter *Colorado Pretrial Assessment Tool*]. And the Laura and John Arnold Foundation has developed and tested a tool normed for all jurisdictions across the country. Laura and John Arnold Foundation, *Developing a National Model for Pretrial Risk Assessment* (2013). These studies have demonstrated that it is possible to sort defendants into categories showing their probabilities of success on pretrial release.[2]

When pretrial detention decisions are informed by these risk-assessment instruments, individuals identified as low and moderate risk can remain in the community during the processing of their criminal cases, though moderate-risk individuals may be subject to certain release conditions, such as supervision requirements. Pretrial detention decisions regarding people classified as high risk also change. When a court determines, by clear and convincing evidence, that no conditions could provide a reasonable assurance of safety or court appearance if a high-risk individual were released, he or she will be detained in jail pending trial. The person will not be able, as now happens in jurisdictions with financial release conditions, to evade confinement when able to post cash bail or meet some other financial release condition. *See, e.g.*, Michael E. Miller, *An Ohio man allegedly tried to kill his ex-wife. When he got out on bail, police say he*

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[2] Another thing these studies have made clear is that most people confined in jail pretrial fall into low and moderate-risk categories, meaning that they are appropriate candidates for release on recognizance (low risk) or non-financial conditions (moderate risk). For example, the study of the Colorado statewide pretrial risk-assessment tool, which has four risk levels, found that 69% of the detainees were in the two lowest risk categories, with only 8% of them falling in the highest risk category. *Colorado Pretrial Assessment Tool* 19.

finished his crime., THE WASHINGTON POST, Dec. 10, 2015, *available at* https://www.washingtonpost.com/news/morning-mix/wp/2015/12/10/an-ohio-man-allegedly-tried-to-kill-his-ex-wife-when-he-got-out-on-bail-police-say-he-finished-his-crime.

2. **Increased Recidivism Due to Pretrial Jail Confinement**. New research has unveiled that when low- and moderate-risk people are detained in jail for more than a day, they are significantly more likely to engage in a future crime. For example, low-risk people detained for just 2-3 days after their arrest were found to have a 39% higher odds of being arrested for a new crime while on pretrial release, while those held 4-7 days were 50% more likely to be arrested during this pretrial period. Christopher T. Lowenkamp et al., *The Hidden Costs of Pretrial Detention* 11, 17-18 (2013). The same patterns held true for moderate-risk defendants. *Id.* And this linkage between pretrial confinement and increased recidivism persisted even after the disposition of a criminal case. For example, low-risk individuals who were incarcerated pretrial for 2-3 days were 1.17 times more likely to recidivate during a 24-month post-disposition period. *Id.* at 28.

3. The Harm Unnecessary Pretrial Incarceration Inflicts on Confined People. The trauma and stigma that people endure from being incarcerated pretrial cannot be overstated, as recently reported data illustrate. The Bureau of Justice Statistics reported in 2015 that suicide has been the leading cause of death in jails since 2000, Margaret Noonan et al., U.S. Dep't of Justice, *Mortality in Local Jails and State Prisons, 2000-2013 – Statistical Tables* 1, 3 (2015), with people confined in jail taking their own lives about three times more frequently than the general population. Lindsay M. Hayes, U.S. Dep't of Justice, *National Study of Jail Suicide: 20 Years Later* 45 (2010). Pretrial detainees committed four-fifths of these suicides, a tragic indicator of the devastating effects of jail incarceration. Noonan, *supra*, at 12. The suicide risk is highest during the first seven days of confinement, *id.* at 3, 10, when people are experiencing what one corrections expert and court-appointed monitor for the Rikers Island Jail in New York City has termed the "shock of confinement." *The "Shock of Confinement": The Grim Reality of Suicide in Jail* (NPR radio broadcast, July 27, 2015).

Recent research has shed light on the numerous other ways in which people incarcerated before trial are gravely harmed due to their confinement. One stark example of this harm is the sexual victimization of people confined in jail. In 2011-12, 3.2% of the people confined in a jail reported having been sexually victimized since their confinement, a figure that translates into thousands of victims. Allen J. Beck et al., U.S. Dep't of Justice, *Sexual Victimization in Prisons and Jails Reported by Inmates*, 2011-12, at 9 (2013).

4. Financial Bail's Skewing of Criminal Case Outcomes. New research has revealed that pretrial detention due to an inability to post bond has a pervasive and negative impact on the outcomes of criminal cases. People who are incarcerated pretrial are more likely to be convicted than their unconfined counterparts. Mary T. Phillips, N.Y. City Criminal Justice Agency, *A Decade of Bail Research in New York City* 115-17 (2012) [hereinafter *New York City Bail Research*]. They are more likely to receive a jail

or prison sentence. *Id.* at 115, 118-19. And they are more likely to receive longer prison or jail sentences than those who were not incarcerated pretrial. *Id.* at 115, 120-21.

The multivariate analyses of the effects of pretrial detention on case outcomes controlled for the effect of other variables that impact case outcomes, such as a person's offense type, criminal history, or risk level. The most recent such study confirmed the particularly stark impact of pretrial detention on the sentences imposed. *See* Christopher T. Lowenkamp et al., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (2013). The research found that people who were detained throughout the pretrial period were substantially more likely than those who were released to receive a sentence that involved either jail or prison. For example, detained individuals who had been scored by a validated pretrial risk-assessment tool as low risk were approximately five times more likely to receive a jail sentence and four times more likely to receive a prison sentence than people released during the pretrial period. *Id.* at 13, 17. Likewise, moderate-risk individuals who were detained during the pretrial period were approximately four times more likely to get a jail sentence and three times more likely to get a prison sentence, controlling for other factors, than their counterparts who were released during the pretrial period. *Id.*

That same study also looked at the length of sentences that were imposed on those who were in custody throughout the pretrial period compared to those who had been released pending trial. Looking at those who had scored as low risk on the pretrial risk assessment, the study found that jail sentences were three and a half times longer for those who had been detained pretrial than for those who had been released. *Id.* at 15. For those who had been scored as moderate risk, jail sentences were twice as long. *Id.* Likewise, controlling for other factors, prison sentences were much longer for those who had been detained pretrial than for those who had been released. *Id.*

These research findings are not a surprise. When people are unable to post bond and return to their families and community, they will likely be more prone, even when innocent, to agree during plea negotiations to enter a guilty plea in return for their earlier release from confinement. When people are confined during plea negotiations, they also have less leverage to induce an agreement from the prosecutor to reduce a charge in return for a guilty plea. The ensuing elevated convictions for people not wealthy enough to post bail yield more severe sentences than those imposed on like individuals who are not incarcerated during the processing of their cases. *Id.* at 115.

Another potential reason why those incarcerated pretrial are both more likely to be sent to jail or prison and to receive longer confinement sentences is that people released pretrial have the chance to show a sentencing judge how they are complying with the law, including court-ordered release requirements, and are working to change for the better – meeting family responsibilities, going to school, getting a job, obtaining treatment, and the like. *Id.* at 118. Those in jail without the financial means to secure their release have no such chance.

II. Key Requirements for Effective Pretrial-Release and Detention Decision Making

To realize the objectives of equal justice and public safety, this resolution outlines ten particularly key steps that jurisdictions need to take as they curtail or completely jettison the "antiquated and sometimes dangerous pretrial practices" in which pretrial release and detention are linked to a person's wealth. Assistant Attorney General Laurie Robinson, U.S. Dep't of Justice, Remarks at the National Symposium on Pretrial Justice (May 31, 2011). Most of these requirements are self-explanatory, but four points bear highlighting.

First, the value of validated risk-assessment instruments, for which Requirements 1 and 3 call, in informing and guiding pretrial release decisions has already been mentioned. An additional benefit of empirically-based risk-assessment instruments is that they are also tailored to guide decisions regarding what conditions, if any, someone released pretrial should be subject to. This guidance can help avert the imposition of unnecessary release conditions on low-risk people. Research has made it clear that the best way to address low-risk people is through the option of personal recognizance. These individuals typically need no supervision or financial incentive to return to court, and researchers have in fact determined that release conditions can actually increase the risk of these individuals' pretrial failure (a missed court appearance or arrest on another charge). Marie VanNostrand & Gena Keebler, U.S. Dep't of Justice, *Pretrial Risk Assessment in the Federal Court* 32-33 (2009).

Empirically-grounded risk assessments can also facilitate the identification of the release conditions that will make it more likely that moderate-risk people will complete the pretrial period successfully while remaining in the community. A recent study found, for example, that, after controlling for numerous variables, pretrial monitoring of non-financial conditions significantly reduces the likelihood of failure to appear for both moderate-risk and certain higher-risk individuals. Christopher T. Lowenkamp & Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes* 13-14 (2013).

Second, it is vital that jurisdictions undertake and augment efforts to completely avoid unnecessary pretrial incarceration rather than simply take steps to shorten the length of such unneeded confinement. This is true not only because these individuals have not been convicted of a crime but because of the many onerous consequences of even short-term confinement, such as the increased recidivism and what can be suicide-generating despair, humiliation, and fear mentioned earlier.

Researchers have developed streamlined risk-assessment instruments that can accurately identify low-risk arrestees. *See* Marie VanNostrand & Christopher T. Lowenkamp, *Assessing Pretrial Risk without a Defendant Interview* (2013). Requirement 1 urges jail officials and others to employ such instruments to avoid the booking into jail and unnecessary incarceration of these low-risk people for whom a citation to appear in court will suffice. Judges can then, with the aid of a validated risk-assessment instrument, determine the conditions of release, if any, for other individuals booked into the jail.

Third, one of the primary goals of this resolution is to bring a halt to the prevailing practice in this country of incarcerating presumptively innocent people without the financial resources that would enable them to remain within their communities while decisions are being made regarding the pursuit or disposition of a criminal charge. At the same time, the resolution provides the means to assure that those with unmanageable risks are detained without bond. As Requirement 8 and the ABA Standards provide, after a hearing that comports with due process, judges can order the continued detention of people whom the government has proven, by clear and convincing evidence, pose such a high risk of danger to the public or the judicial system's integrity or high risk of failure to appear for a court date that they cannot be released pretrial, even with conditions. *See* ABA Standard 10-5.8 (authorizing pretrial detention when "no condition or combination of conditions of release will reasonably ensure the defendant's appearance in court or protect the safety of the community or any person"); Standard 10-5.9(a)(ii)(B) (also authorizing pretrial detention when there is a "substantial risk" that a charged defendant will "obstruct or attempt to obstruct justice, or threaten, injure, or intimidate a prospective witness or juror"); and Standard 10-5.10 (outlining the rights that must attend a pretrial detention hearing, including the right to be represented by counsel, to have counsel appointed if unable to pay for one, to be present and testify, to present witnesses, to confront and cross-examine the prosecution's witnesses, to present other information to the court by proffer, and to have the judge describe on the record or in writing within three days the reasons for ordering a person's detention pretrial).

Fourth, while the ABA recognizes that pretrial detention is, in very limited instances, necessary, the elimination of financial release conditions as the default mode of release will eradicate their potential to undermine the procedural and substantive requirements that must be met under Requirement 8 and the ABA Standards in order for a person to be subjected to pretrial detention. No longer will it be possible to skirt the need for a detention hearing by simply setting a financial release condition that, as a practical matter, the person in question has no ability to meet.

III. Elimination of Bail Schedules[3]

In the seminal case of Stack v. Boyle, the United States Supreme Court ultimately held that such blanket bail setting was improper, given the individualized criteria contained in the Federal Rules of Criminal Procedure for setting bail. 342 U.S. 1 (1951) The Court stated, "[b]ail set at a figure higher than an amount reasonably calculated to fulfill [the purpose of assuring the presence of the accused] is 'excessive' under the Eighth Amendment." Id. at 5. The Court further held that to "reasonably calculate" the appropriate bail for individual defendants, courts must conduct bail determinations "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, are to be applied in each case to each defendant . . . To infer from the fact of indictment alone a

[3] Adapted from Lindsay Carlson, Pretrial Justice Institute, Bond Schedules: A Violation of Judicial Discretion? (2010). With permission from the Pretrial Justice Institute.

need for bail in an unusually high amount is an arbitrary act." (Emphasis added.) Id. at 5, 6.

Since Stack, the Supreme Court has recognized an additional legitimate purpose for bail – community safety. See United States v. Salerno, 481 U.S. 739 (1987). Subsequently, nearly every state has incorporated the two valid purposes for bail – court appearance and community safety - into its laws or rules, along with standards relevant to furthering those purposes. These standards typically provide for individualized bail determinations, requiring judicial officials to weigh a variety of factors, including, among other things, the nature and circumstances of the offense charged, the weight of the evidence, family ties, employment, financial resources, and character and mental condition of the defendant. Despite the clear legal emphasis on the importance of individualized bail determinations, many American jurisdictions have nevertheless adopted a particular device that represents the antithesis of bail fixed according to the personal characteristics and circumstances of each defendant: the bail schedule.

A. The Purpose and Use of Bail Schedules

Broadly speaking, bail schedules are procedural schemes that provide judges with standardized money bail amounts based upon the offense charged, regardless of the characteristics of an individual defendant. These schedules might formally be promulgated through state law, or informally employed by local officials. They may be mandatory or merely advisory, and may provide minimum sums, maximum sums, or a range of sums to be imposed for each crime.

The practical effect of these schedules is to detain large numbers of arrestees on relatively low bonds. Misdemeanor and traffic violation bail schedules impose comparatively low bail, which ostensibly is to afford defendants charged with low-level offenses greater opportunity to obtain release. And yet, a study recently conducted in New York City reveals that in 2008, among defendants arrested on nonfelony charges (misdemeanors and traffic violations) and given bail of $1,000 or less, only 13% were able to post bail at arraignment. Human Rights Watch, The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City, December 2010 at 21. Even more significantly, nearly half of these defendants never made their bail – judges are reluctant to reduce bail unless circumstances have changed significantly - so they were held until the disposition of their case. Id. at 21. But even where judges may be willing to reduce bail, public defenders with limited resources and staff typically have to seek such a reduction. In the meantime, the arrestees sit in jail because they can't afford their bail.

Finally, where these types of schedules represent a judicial determination that defendants charged with low-risk offenses ought to be released, the appropriate mechanisms are release on recognizance or unsecured appearance bonds. Otherwise, these low bail amounts simply serve as an arrest fine or tax on those defendants who can make bail, while detaining those who can't. The reality is that even though most jurisdictions can use release on personal recognizance or unsecured bonds to facilitate swift release on low-level offenses, money bail schedules are so prevalent because most

courts have come to embrace money as their primary and singular condition of pretrial release.

KEY REQUIREMENTS FOR EFFECTIVE PRETRIAL RELEASE AND DETENTION DECISION MAKING

1. Validated risk-assessment instruments are utilized by trained individuals in conformance with best practices to avoid the unnecessary confinement of individuals in jail before their first appearance in court.

2. Individuals charged with a crime and confined in jail are provided prompt, meaningful access to an attorney who works to secure their immediate release and to ensure that any release condition is the least restrictive means of achieving its objective.

3. Validated risk-assessment instruments are utilized by trained individuals in conformance with best practices to assist the court in making appropriate decisions about the pretrial release or detention of those individuals who are booked into the jail.

4. Pretrial risk assessments exclude risk factors that have little predictive value but contribute to the disproportionate confinement of minorities and the poor.

5. The factors considered during pretrial risk assessments and the weight assigned to each factor are disclosed to the public and are readily accessible on the Internet.

6. Effective mechanisms are employed, including the use of technology, to alert and remind individuals of court dates.

7. The jurisdiction has the capacity to provide the appropriate level of supervision to individuals on pretrial release, when supervision is needed, and to implement other conditions of their pretrial release.

8. The court is authorized to enter an order of detention before trial when: (a) it finds by clear and convincing evidence, after a due-process hearing, that the person poses such a high level of risk that no condition or combination of conditions could provide a reasonable assurance that the public's safety will be protected, that the defendant will appear in court if released pretrial, or that the judicial system's integrity will not be imperiled; and (b) all other requirements for pretrial detention set forth in the *ABA's Standards for Criminal Justice: Pretrial Release* (3d ed., 2007) and the law have been met.

9. Training is provided to judges, prosecutors, defense attorneys, law-enforcement officials, jail officials, and pretrial-services officers about the adverse effects of unnecessary pretrial detention, the performance of their pretrial-release-related

functions, and the benefits and proper use of risk-assessment instruments.

III. Conclusion

Government leaders have begun to publicly decry prevailing pretrial-release practices that, in the face of over a decade of research, one would be hard-pressed to describe as sound policy or "pretrial justice." For example, Delaware Governor Jack Markell noted in a speech in 2015: "It's not working when a single mom gets stuck in detention because she can't come up with a hundred bucks and has little to no family support, but a dangerous drug dealer can get his minions to bail him out. . . . Our bail process needs to change, and it can be done, but only if we're cognizant of the full extent to which everyone involved in our criminal justice system must adjust their thinking." Jessica Masulli Reyes, *Will Delaware end cash bail?* THE NEWS JOURNAL, Nov. 8, 2015, *available at* http://www.delawareonline.com/story/news/crime/2015/11/07/doing-away-cash-bail/74619298.

In New Jersey, Governor Chris Christie signed in sweeping reforms that took effect on January 1, 2017. These reforms allowed the pretrial release of individuals who could not afford bail and also permitted judges to deny bail to cases deemed to be flight risks or threats to the community. In New Mexico, voters similarly approved a Constitutional amendment which prohibited the detention of defendants based solely on the inability to pay, and allowed the denial of bail to defendants whose cases could not be managed in the community.

The use of financial release conditions is also being called into question on another front, through suits filed in a number of jurisdictions challenging, on constitutional grounds, various aspects of the use of these conditions. In one such case, *Walker v. City of Calhoun, Georgia*, No. 4:15-cv-0170-HLM (N.D. Ga. Jan. 28, 2016), the United States District Court for the Northern District of Georgia Rome Division entered a declaratory judgment stating that "*[a]ttempting to incarcerate or to continue incarceration of an individual because of the individual's inability to pay a fine or fee is impermissible....This is especially true where the individual being detained is a pretrial detainee who has not yet been found guilty of a crime."* In another case, *Rodriguez v. Providence Community Corrections, Inc.*, No. 3:15-cv-01048 (M.D. Tenn. Dec. 17, 2015), in which bail schedules were challenged, the court wrote: "The use of secured money bonds has the undeniable effect of imprisoning indigent individuals where those with financial means who have committed the same or worse probation violations can purchase their freedom…. The Fourteenth Amendment precludes imprisoning someone because he or she does not have enough money..." [4]

[4] For a synopses of other litigation challenging the constitutionality of certain financial pretrial-release conditions, see http://equaljusticeunderlaw.org/wp/current-cases/ending-the-american-money-bail-system/.

As mentioned earlier, the ABA Standards currently permit the imposition of financial conditions of release "only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court." ABA Standard 10-5.3(a). But while there is no research indicating that financial release conditions are effective in promoting court appearances, recent research, as discussed previously, demonstrates that the use of validated risk-assessment instruments and properly calibrated non-financial release conditions are effective in improving appearance rates. In other words, in light of what we now know about release conditions, there will always be a "less restrictive condition of release" that "will reasonably ensure the defendant's appearance in court." Research has furthermore brought to light, not only that financial release conditions are rarely needed, but that they have adverse, and sometimes profoundly harmful, effects of which there was no knowledge fourteen years ago.

The American Bar Association reiterates its call to federal, state, local, and territorial governments to adopt policies and procedures that establish the presumption that arrested people will be released on their personal recognizance. Furthermore, research has given us the tools to make rational, research-informed, and transparent decisions, and the time has now come for all government officials – prosecutors, defense attorneys, judges, jail officials, legislators, and others – to "adjust their thinking" and join in practices that rationally and effectively promote individual liberty, public safety and the efficient administration of justice.

Respectfully submitted,

Matt Redle
Chair, Criminal Justice Section

August 2017

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Matt Redle, Chair

1. Summary of Resolution(s).

This resolution calls for the adoption of policies and procedures that: favor release on personal recognizance bonds or unsecured bonds; that permit cash bonds or secured bonds only upon a determination by the court that such financial conditions and no other conditions will assure appearance; and that pretrial detention should never occur due solely to an inability to pay. The resolution also calls for detention without bail under certain conditions, requires the use of individualized, evidence-based assessments that have been shown to have no discriminatory impact in detention decisions, and rejects the use of 'bail schedules' based on the pending charge.

2. Approval by Submitting Entity. This resolution was passed by the Criminal Justice Council at the Spring meeting in Jackson Hole, Wyoming, in May 2017.

3. Has this or a similar resolution been submitted to the House or Board previously?
No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The ABA Criminal Justice Standards address many of these issues and are concordant with the resolution. Standard 10-5.1(a) establishes a presumption for release on personal recognizance, and Standards 10-5.3(d)(1) and Standard 10-1.4(c) establish a preference for unsecured bonds over other financial conditions of release. Standards 10-5.8, 5.9, and 5.10 provide for pretrial detention without bail, although the Standards require courts to follow certain procedural safeguards in order for a defendant to be subject to detention without bail. Standards 10-5.3(a) and 10-1.4(e) prohibit financial conditions that cause pretrial detention due to an inability to pay them. Standard 10-5.3(a) prohibits cash bail and secured bond when a "less restrictive condition of release" would reasonably ensure appearance in court. Standard 10-5.3(e) requires that the imposition of financial release conditions be "individualized" and "never" set based on a "predetermined schedule of amounts."

5. If this is a late report, what urgency exists which requires action at this meeting of the House?
No.

6. Status of Legislation. (If applicable)

States across the country are re-examining their detention and release policies and practices. This includes SB 10 in California, which would eliminate county bail schedules and introduce pretrial risk assessments; a bill in Illinois that would require courts to order

arrestees charged with a non-violent offense released on own recognizance; a bill in Nebraska that would require any bailable defendants to be released on his or her own recognizance unless the judge makes a determination that such release would not reasonably assure appearance or jeopardize public safety. Other states such as Florida, North Carolina and Idaho have commissions that are examining bail issues or have recently released reports. Some municipalities are taking the lead by re-examining their court rules or practices.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

This resolution allows the ABA to speak out and bring attention to one of the most pressing criminal justice issues of the day. The detention of individuals before a determination of guilt~~y~~ or innocence due to an inability to pay has reached crisis proportions, with unconvicted persons making up two-thirds of the current jail population. As states and localities seek to change their detention and release practices, the ABA resolution provides guidance and support in this important matter.

8. Cost to the Association. (Both direct and indirect costs)
No costs known.

9. Disclosure of Interest. (If applicable)
N/A

10. Referrals. Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:

Public Service and Diversity
Commission on Veteran's Legal Services
Legal Aid & Indigent Defense
Commission on Disability Rights
Special Committee on Hispanic Legal Rights & Responsibilities
Commission on Homelessness and Poverty
Center for Human Rights
Commission on Immigration
Racial & Ethnic Diversity
Racial & Ethnic Justice
Youth at Risk
Young Lawyer's Division
Civil Rights and Social Justice
Government and Public Sector Lawyers
International Law
Federal Trial Judges
State Trial Judges
Law Practice Division

Science & Technology
Health Law
Litigation
TIPS

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution calls for the adoption of policies and procedures that: favor release on personal recognizance bonds or unsecured bonds; that permit cash bonds or secured bonds only upon a determination by the court that such financial conditions and no other conditions will assure appearance; and that pretrial detention should never occur due solely to an inability to pay. The resolution also calls for detention without bail under certain conditions, requires the use of individualized, evidence-based assessments that have been shown to have no discriminatory impact in detention decisions, and rejects the use of 'bail schedules' based on the pending charge.

2. Summary of the Issue that the Resolution Addresses

The detention of individuals before trial due solely to an inability to pay has reached unmanageable proportions. According to the latest statistics available, approximately two-thirds of people in jail are awaiting trial, and research has shown that many of these people are low-risk individuals who could be returned safely to their jobs, families and communities, either on personal recognizance bond or unsecured bond, with the expectation that they will return to court. Meanwhile, for the individuals whose profiles suggest that they cannot be reasonably managed in the community, money bail still allows the possibility that they can be released.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The resolution affirms and highlights the ABA's position on many critical issues regarding pretrial release and detention. As states and localities seek to revise their bail policies and practices, this resolution will help guide their decisions and provide evidence that these positions are widely accepted and recognized in the legal community.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified.

N/A