

Pretrial Detention

The two main pretrial outcomes that jurisdictions seek—and the only two outcomes that can legally be considered when deciding whether to detain or release a person pretrial—are to maximize court appearance and maximize community well-being and safety (i.e., minimize the likelihood of a person’s rearrest). This summary examines the current base of knowledge regarding the effectiveness of pretrial detention in achieving these positive outcomes.

On any given day, there are approximately 490,000 people in jail who are not convicted and who are presumed innocent.¹ In fact, pretrial detention has been responsible for virtually all of the net jail growth over the last two decades.²

Pretrial detention is an important option for responding to people who are accused of committing serious and violent crimes or who pose a higher risk of flight. Heavy reliance on pretrial detention, however, can come at a high price not only for the justice system (e.g., budget impacts) but also for those involved in the justice system, for their families, and for the communities in which they live. The societal penalties associated with criminal justice intervention, or the costs of involvement with the criminal justice system that are separate from appearing in court, are commonly referred to as “collateral consequences.” Some commonly experienced collateral consequences of pretrial detention include decreased earnings, loss of employment and public benefits, and increased likelihood of new arrests.³

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This summary reviews key findings from recent research on the collateral consequences of pretrial detention. Since pretrial detention is just one in a complex set of factors that influence whether a person accused of a crime appears in court, remains arrest-free during release, and receives due process and equitable treatment during the pretrial period, the research summarized here focuses on studies that take a rigorous approach to isolating the effects of pretrial detention.⁴

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Key Finding #1: The Influences of Pretrial Detention on Failure to Appear Are Mixed

A study of more than 150,000 people in Kentucky used a series of statistical models to isolate how different lengths of pretrial detention (i.e., 1 day, 2–3 days, 4–7 days, 8–14 days, 15–30 days, 31+ days) impacted court appearance.⁵ After controlling for other important factors, including assessed likelihood of pretrial success (by means of a statistically validated instrument), the study showed that short periods of detention increased the likelihood of failure to appear (FTA) for all people: those who were held for 2–3 days had a 9% greater likelihood of failing to appear in court than statistically similar people who were held for 1 day. This effect was particularly pronounced among people assessed as being statistically most likely to succeed pretrial:⁶ they were 22% more likely to fail to appear after being detained for 2–3 days, and 41% more likely to fail to appear after being detained for 15–30 days, than those detained for 1 day.

However, in another large-scale study controlling for important factors such as demographics, charge, and differences in decision making among magistrates, pretrial *release* was found to *increase* missed court appearances. In particular, people released within 3 days of the pretrial release hearing were 16% more likely to fail to appear than people detained for longer periods. The authors note, however, that the value to the justice system of improved appearance rates may be mitigated by the collateral consequences impacted people experience, such as a higher likelihood of conviction, lower job prospects in the formal labor market, less income over time, and new arrests.⁷

Research demonstrates that people held pretrial for even 2–3 days are significantly less likely to appear for court compared to people held for no more than 1 day, particularly among people assessed as being statistically most likely to succeed pretrial. Longer periods of pretrial detention appear to worsen this effect.⁸

Key Finding #2: Pretrial Detention Impacts Sentencing Decisions

There is growing consensus in the research that after controlling for key case- and individual-level characteristics (e.g., demographics, charge severity, criminal history, etc.), people who are detained pretrial receive

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harsher punishment if convicted.⁹ For example, in the Kentucky study mentioned above, people who were detained and then convicted were significantly more likely to be sentenced to jail or prison and receive longer sentences than those who were released and then convicted.¹⁰ The study further found that people assessed as being statistically most likely to succeed pretrial experienced the most severe consequences: they were more than five times as likely to be sentenced to jail, and four times more likely to be sentenced to prison, when compared to statistically similar people who were released pretrial and later convicted.

Even more recent research from Philadelphia, New York City, and multiple federal jurisdictions drew similar findings. In Philadelphia, an analysis that isolated the effect of pretrial detention in more than 300,000 cases revealed that detention led to a 42% increase in sentence length and a 41% increase in non-bail court fees.¹¹ Similarly, a study of nearly one million cases in New York City found that detention caused an increase of 150 days in the minimum sentence length.¹² Finally, in a study of over 100,000 people across 71 federal district courts, pretrial detention was found to increase both prison sentence length and the probability of receiving a mandatory minimum sentence.¹³

While research examining why pretrial detention leads to harsher punishment in similar cases is relatively rare, researchers have offered some possible reasons, including that people released pretrial are better able to develop a defense by working more closely with their attorneys or collecting relevant evidence. Another possible reason is that people released pretrial have more opportunity to demonstrate positive behavior—such as paying restitution, seeking treatment for substance use or mental illness, or engaging in activities to further their education or employment opportunities—while on release, which might mitigate a judge’s sentencing decision.¹⁴ Finally, multiple studies have demonstrated that the pretrial detention of people who cannot meet financial release conditions creates an incentive for them to plead guilty so they can get out of jail.¹⁵ Indeed, Stevenson’s 2018 study in Philadelphia suggests that many people in this situation would have had their cases dropped or received an acquittal had they been able to afford an earlier release.¹⁶

Research shows that people detained pretrial are more likely to plead guilty and receive harsher punishment than those released pretrial. For example, they are more likely to be sentenced to jail or prison, and their sentence lengths are likely to be longer.

Key Finding #3: Pretrial Detention Has Criminogenic Effects

From an immediate social costs perspective, research suggests that the measured use of pretrial detention¹⁷ may achieve short-term benefits such as lower FTA rates and fewer new arrests while cases are pending.¹⁸ However, these short-term gains—which are largely attributed to the incapacitation effects of detention—are often partially or fully offset by the tendency of pretrial detention to increase criminality and arrest in the longer term. Several large-scale studies have clearly demonstrated these longer-term impacts.

In the Kentucky study, for example, longer periods of detention increased the likelihood that people would be rearrested during the pretrial period as well as within the first two years following case disposition. These negative consequences were most stark for people assessed as being statistically most likely to succeed pretrial: the longer they were detained, the more likely they were to be arrested for a new crime. Compared to statistically similar people who were held for 1 day, those held for 2–3 days were 40% more likely to be arrested for a new crime during the pretrial period, increasing to a 74% higher likelihood when detained for 31+ days.¹⁹ Two years post-adjudication, these people were 17% more likely to recidivate if detained 2–3 days, and 46% more likely to recidivate if detained 15–30 days, than those who were held for 1 day.

Another study combining data from Philadelphia and Miami-Dade showed that while detention had no effect on new arrests during the pretrial period, people who were released pretrial were 12% less likely to be arrested post-disposition.²⁰ The authors attributed this finding to greater participation in the formal labor market and more long-term engagement with government benefits among people released pretrial.²¹

In New York City, researchers found that detention reduced pretrial rearrest; however, this reduction was offset by increases in new arrests post-disposition among people who had been detained pretrial. Specifically, pretrial detention increased the likelihood of being arrested within 2 years of disposition by 7.5% for the felony subsample and by 11.8% for the misdemeanor subsample.²²

Several large-scale studies demonstrate that while pretrial detention may or may not impact rates of new arrest in the short term, it increases recidivism in the long term.

Best Practice Recommendations

Professional practice standards are consistent with the findings of the research literature and, importantly, with the legal principle that courts must impose the “least restrictive conditions” necessary to provide a reasonable assurance of court appearance and community well-being and safety.²³

1. American Bar Association (ABA)

ABA Standards for Criminal Justice: Pretrial Release provides multiple practice standards for pretrial release, including (but not limited to) the following:

- Standard 10-1.1 describes the purposes of the pretrial release decision: “The purposes of the pretrial release decision include providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses and the community from threat, danger or interference...The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support.”
- Standard 10-1.2 recommends release under the least restrictive conditions, suggests diversion and other release options, and states that detention should be considered only under certain circumstances: “In deciding pretrial release, the judicial officer should assign the least restrictive condition(s) of release that will reasonably ensure a defendant’s attendance at court proceedings and protect the community, victims, witnesses or any other person. Such conditions may include participation in drug treatment, diversion programs or other pre-adjudication alternatives. The court should have a wide array of programs or options available to promote pretrial release on conditions that ensure appearance and protect the safety of the community, victims and witnesses pending trial and should have the capacity to develop release options appropriate to the risks and special needs posed by defendants, if released to the community. When no conditions of release are sufficient to accomplish the aims of pretrial release, defendants may be detained through specific procedures.”
- Standard 10-1.3 calls for the use of citations and summonses: “The principle of release under least restrictive conditions favors use of citations by police or summons by judicial officers in lieu of arrest at stages prior to first judicial appearance in cases involving minor offenses.”

- Standard 10-1.6 builds on Standard 10-1.2, considering detention as an exception to policy favoring release: “These Standards limit the circumstances under which pretrial detention may be authorized and provide procedural safeguards to govern pretrial detention proceedings. They establish specific criteria and procedures for effecting the pretrial detention of certain defendants after the court determines that these defendants pose a substantial risk of flight, or threat to the safety of the community, victims or witnesses or to the integrity of the justice process. The status of detained defendants should be monitored and their eligibility for release should be reviewed throughout the adjudication period. The cases of detained defendants should be given priority in scheduling for trial.”²⁴

2. The National Association of Pretrial Services Agencies (NAPSA)

Standards on Pretrial Release provides multiple practice standards for pretrial release, including (but not limited to) the following:

- Standard 1.1: “The goals of bail are to maximize release, court appearance and public safety” (p. 5).
- Standard 1.3: “A presumption in favor of release on one’s own recognizance with the requirements to appear in court at scheduled court appearances and not engage in criminal activity should apply to all defendants” (p. 7).
- Standard 1.6: “Pretrial detention should be authorized but limited only to when the court finds by clear and convincing evidence that a detention-eligible defendant poses an unmanageable risk of committing a dangerous or violent crime during the pretrial period or willfully failing to appear at scheduled court appearances. Detention prior to trial should occur only after a hearing that guarantees a defendant’s due process and equal protection rights and includes explicit consideration of less restrictive options” (p. 13).
- Standard 2.1: “An array of options should be available to law enforcement before the initial court appearance to facilitate release of lower-risk defendants or as choices besides traditional arrest and case processing when appropriate” (p. 18).
- Standard 3.1(a): “Jurisdictions should develop guidelines that authorize criminal justice agencies to review and, where appropriate, release arrestees before the initial court appearance” (p. 37).
- Standard 3.2(a): “Defendants who have not been released pursuant to 3.1(a) should be brought immediately before a judicial officer for an initial bail determination” (p. 39).

- Standard 3.4(a): “Jurisdictions should define and justify the criteria for legal pretrial detention, keeping in mind that ‘liberty is the norm and detention should be the carefully limited exception’” (p. 47).
- Standard 3.4(b): “At the initial pretrial court appearance, the Court may order the temporary detention of the defendant pending a formal pretrial detention hearing if...(iii) the Court finds by a preponderance of the evidence that the defendant poses an unmanageable risk to commit a dangerous or violent offense or to willfully fail to appear for scheduled court appearances” (p. 48).
- Standard 3.4(c): “Unless a continuance is requested by the defense, the formal pretrial detention hearing should be held within five working days of the initial pretrial court appearance” (p. 49).
- Standard 3.4(h): “The Court should state in writing within three working days of the formal pretrial detention hearing the factual basis for its finding that, by clear and convincing evidence, the defendant poses an unmanageable risk to commit a dangerous or violent offense or to willfully fail to appear for scheduled court appearances” (p. 51).
- Standard 3.4(i): “Detained defendants should have their cases placed on an accelerated calendar. Jurisdictions should establish a finite time period from the detention order to the start of trial” (p. 52).²⁵

3. National Institute of Corrections (NIC)

A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency specifies elements of an effective pretrial system and states that pretrial release and detention decisions should be designed to maximize release, court appearance, and community well-being and safety. It also states that jurisdictions should have a legal framework that includes release options that follow or are in lieu of arrest, restrictions on detention for a limited and clearly defined type of defendant, and the consideration of release for defendants eligible by statute for pretrial release, with no locally imposed exclusions not permitted by statute.²⁶

Endnotes

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4. Rigorous research includes randomized controlled trials (experiments), quasi-experimental studies, and statistical models that control for other key factors such as charge, demographics, criminal history, and assessed likelihood of success according to a statistically validated assessment.
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6. According to a statistically validated assessment, these people have a high likelihood of appearing for court and remaining arrest-free.
7. Dobbie et al., 2018.
8. Lowenkamp et al., 2013a.
9. See, e.g.: Heaton, P., Mayson, S., & Stevenson, M. (2017). The downstream consequences of misdemeanor pretrial detention. *Stanford Law Review*, 69, 711–794. https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=2148&context=fac_artchop; Leslie & Pope, 2017.
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11. Stevenson, M. T. (2018). Distortion of justice: How the inability to pay bail affects case outcomes. *The Journal of Law, Economics, & Organization*, 34(4), 511–542. <https://academic.oup.com/jleo/article/34/4/511/5100740>.
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13. Didwania, S. H. (2020). The immediate consequences of federal pretrial detention. *American Law and Economics Review*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2809818.
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16. Stevenson, 2018.
17. One example of a measured use of pretrial detention is to limit pretrial detention to those offenses and criteria set forth in state constitutions and/or statutes.
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