



# Court Nonappearance and New Case Filings

## Redefining Pretrial Misconduct



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Spurgeon Kennedy, Justice Management Institute  
Tara Boh Blair, Pretrial Justice Consultants  
Robin Wosje, Justice Management Institute

Edited by Donna Ledbetter, National Institute of Corrections



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Jessica Beach  
Director, Yamhill County Department of  
Community Justice, OR

Kelly Bradford  
New Mexico Senior Statewide Pretrial  
Program Manager

Marianne Clear  
Director, Thurston County Pretrial  
Services, WA

Domingo Corona  
Director, Pima County Pretrial Services, AZ

Tiana Glenna  
Criminal Justice Services Director,  
Eau Claire County, WI

Troy Hatfield  
Deputy Chief Probation Officer, Monroe  
Circuit Court Probation Department, IN

Barbara Hankey  
Director, Public Services Oakland County,  
MI

De'Anna Lawson  
Director, Pretrial Services, Orleans Criminal  
District Court, LA

Natalie Michailides  
Director, Harris County Pretrial Services, TX

Edwin Monteagudo  
Director, Pretrial Services Bureau, Los Angeles  
County Probation Department, CA

Kenneth Rose  
Criminal Justice Program Coordinator, Virginia  
Department of Criminal Justice Services

Nick Sayner  
Executive Director, JusticePoint, Inc.

Elizabeth Simoni  
Executive Director, Maine Pretrial Services

Wendy Venvertloh  
Deputy Director, Illinois Office of Statewide  
Pretrial Services

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## ABSTRACT

The past two decades have enhanced our understanding of pretrial risk. We now know that most individuals with pending criminal cases make scheduled court appearances and remain arrest-free as they await trial. When missed court dates occur, they often are not intentional abscondence but rather the result of unintentional or unavoidable circumstances. Further, most new cases filed against pretrial defendants involve misdemeanors and lower level felony charges, not violent crimes.

However, while we recognize the infrequent and dynamic nature of pretrial misconduct, most justice systems define and measure missed court appearances using the dated and overly broad “failure to appear” descriptor and view new case filings mostly as serious offenses affecting public safety. The result is an overestimation of defendant risk and overly punitive responses to misconduct.

This publication discusses the nature of pretrial risk, missed court dates, and new case filings. It also proposes more accurate and useful definitions for these events and presents strategies used nationwide to help prevent misconduct or to mitigate it when it occurs.

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## INTRODUCTION

Risk is inherent in bail decision-making. Bail grants a “reasonable assurance”<sup>1</sup> of an individual’s return to court and of public safety. The goal is not to eliminate any chance of failure, but to acknowledge the possibility of a missed court appearance or new arrest as “the price for our system of justice”<sup>2</sup> and to manage that risk to promote successful pretrial outcomes.

The desire to better understand and manage pretrial risk helped spur research to identify the factors that predict the likelihood of a missed court date and new pretrial criminal activity.<sup>3</sup> Moreover, since publication of *Measuring What Matters*, a series from the National Institute of Corrections about pretrial performance metrics,<sup>4</sup> many justice systems track how often defendants make all scheduled court dates and remain arrest-free pending adjudication. Based on this body of knowledge, pretrial professionals know more about risk at the pretrial stage now than at any other point during the bail reform era that began in the 1960s. However, this knowledge has not been applied to the most basic questions about pretrial risk and, therefore, has not been an effective tool in policy and legal discussions regarding bail. Specifically, the pretrial field must begin to answer the following questions:

1. What is pretrial risk?
2. How common is risk within most defendant populations?
3. How often are missed court appearances the result of unintended consequences and not abscondence?
4. What is the nature of most new arrests during the pretrial stage?
5. Can a better understanding of pretrial risk translate to more accurate definitions of missed court appearance and new arrests and fairer, more effective responses to these events?

*Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice.*

U.S. Supreme Court  
Associate Justice  
Robert H. Jackson  
*Stack v. Boyle* 342 U.S. 1  
(1951) at p. 8.





Understanding the nature of pretrial risk is essential since the *perception* of risk held by criminal justice stakeholders and the public often impedes the adoption of meaningful bail reform.<sup>5</sup> It is not unusual for individuals to overstate risk, especially in circumstances they cannot fully control, such as another individual's behavior. Criminal justice stakeholders may also gauge risk on a few past bad behaviors rather than the more numerous examples

of positive results. Therefore, any discussion about the nature and frequency of pretrial risk not only must present what the science shows, but also acknowledge the perceptions of risk that stakeholders invariably will have. How we understand and address risk defines our commitment to the principle that bail is the least restrictive means needed to promote an individual's court appearance and public safety.

## PRETRIAL RISK: WHAT IT IS, WHAT IT IS NOT

- ❖ *Pretrial misconduct is not prevalent in most defendant populations.*
- ❖ *Rearrest on violent crimes is rare.*
- ❖ *Missed court appearances often are not willful.*

Pretrial risk is an individual's likelihood of missing a scheduled court appearance or having a new criminal case filed against him or her during the pretrial stage. This definition encompasses the purpose of bail outlined by statute and case law of reasonably assuring court appearance and public safety.<sup>6</sup>

### Pretrial Misconduct Is Not Prevalent in Most Defendant Populations

Data from pretrial risk assessment validation studies and local pretrial services agencies show that most defendants assess at low- to moderate-risk levels. (See figures 1-4).

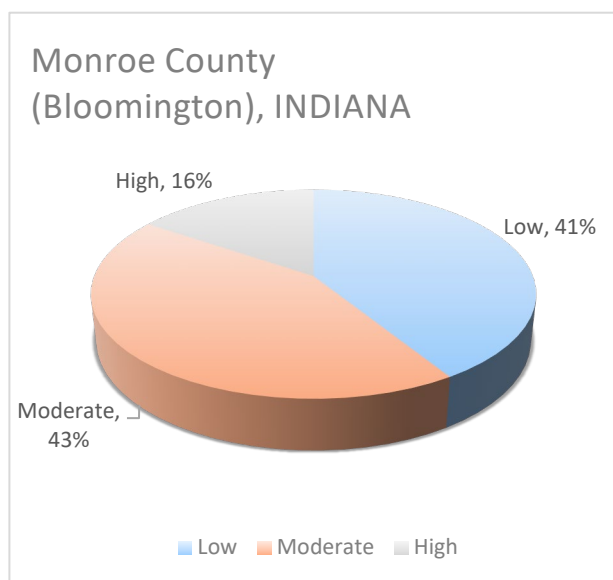


Figure 1: Source: Monroe Circuit Court Pretrial Services Performance and Outcome Measures

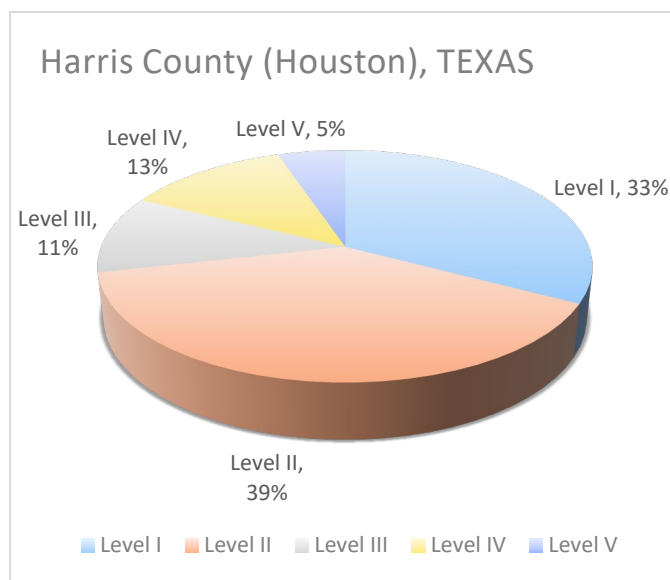


Figure 2: Source: Harris County Pretrial Services 2020 Annual Report.

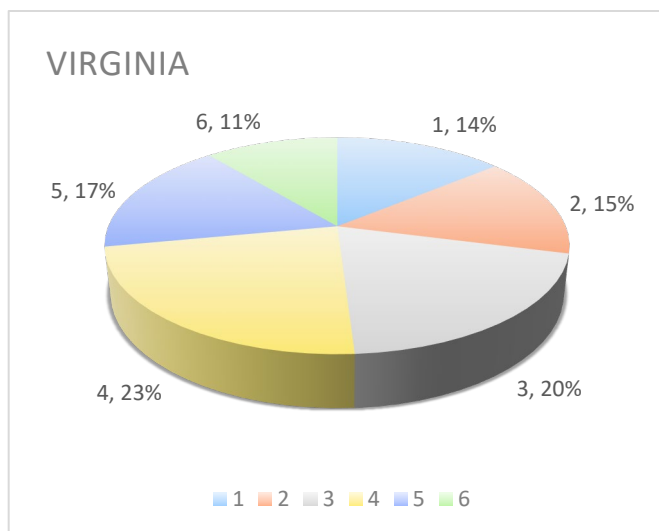


Figure 3: Source: E-mail correspondence with Kenneth Rose Criminal Justice Program Coordinator, Division of Programs and Services/Adult Justice Programs, Virginia Department of Criminal Justice Services, April 18, 2022. Data from July 2020 to June 2021.

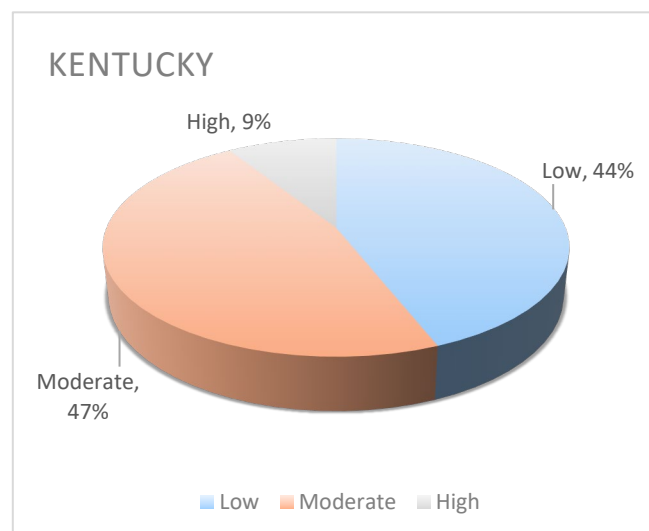


Figure 4: Source: E-mail correspondence with Tara Boh Blair, Executive Officer, Department of Pretrial Services, August 31, 2021. Data from Administrative Office of the Courts, Pretrial Services PRIM database as of August 31, 2021.

Also, as shown in figures 5-9, most defendants make all scheduled court appearances and are not rearrested before trial.

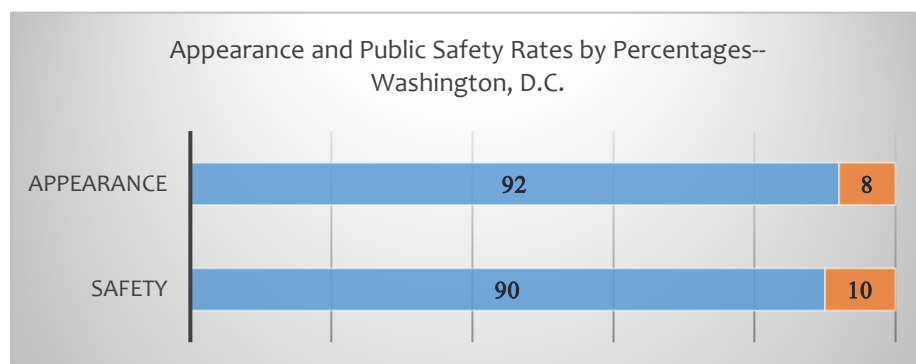


Figure 5: Source: Pretrial Services Agency for the District of Columbia (2022). Congressional Budget Justification and Performance Budget Request: Fiscal Year 2023. (p. 33)

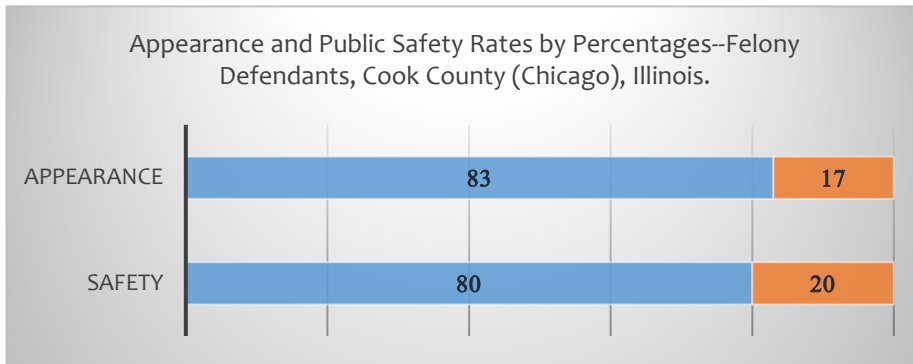


Figure 6: Source: Stemen, D. and Olson, D. (2020). *Dollars and Sense in Cook County: Examining the Impact of General Order 18.8A on Felony Bond Court Decisions, Pretrial Release, and Crime*. Chicago, IL: John D. and Catherine T. MacArthur Foundation.

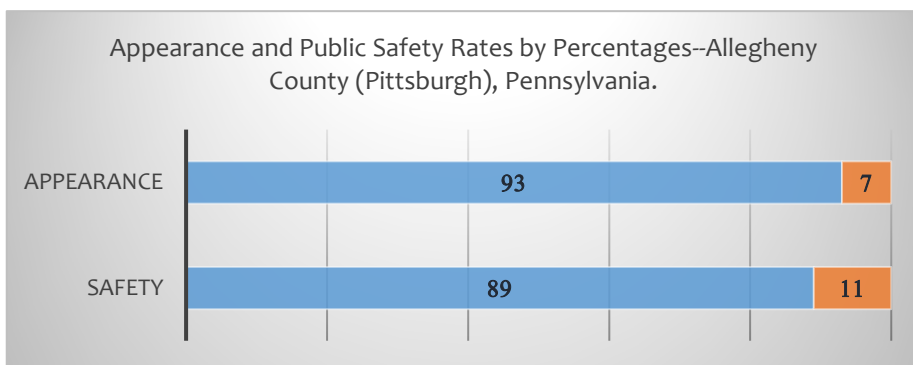


Figure 7: Source: Collins, K. (2018). *Allegheny County Pretrial Services Outcome Reports: 2018*. Pittsburgh, PA: Allegheny County Pretrial Services.

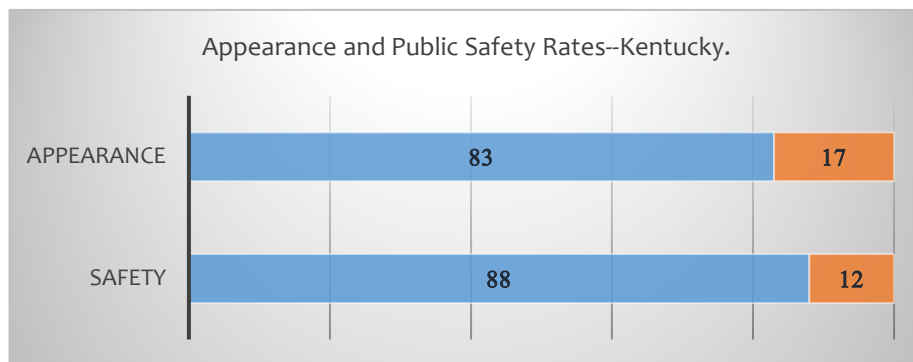


Figure 8: Source: E-mail correspondence with Tara Boh Blair, Executive Officer, Department of Pretrial Services, August 31, 2021. Data from Administrative Office of the Courts, Pretrial Services PRIM database as of August 31, 2021.

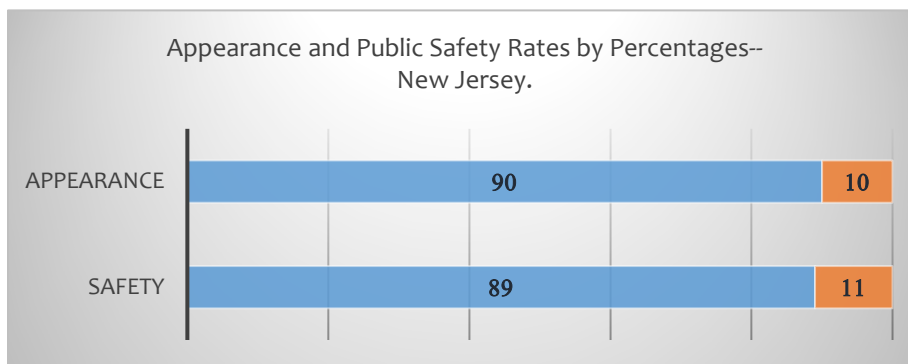


Figure 9: Source: Grant, G.A. (2019). *Criminal Justice Reform: Report to the Governor and the Legislature*. Trenton, NJ: Administrative Office of the Courts. p. 5-6.

Even defendants who assess at higher risk levels typically succeed (i.e., have no missed court dates, new arrests, or case filings) more often than they fail:

- A study of the Federal Pretrial Risk Assessment Instrument found that eighty-four percent (84.5%) of high-risk defendants were successful before trial.<sup>7</sup>
- An internal report by Allegheny County (Pittsburgh), Pennsylvania Pretrial Services found that seventy-six percent (76%) of high-risk defendants made all scheduled court appearances, remained arrest-free before trial, and complied with conditions of pretrial supervision.<sup>8</sup>
- A validation study of the Virginia Pretrial Risk Assessment Instrument in Riverside, California found that a version of the risk assessment noted a sixty-two percent (62%) success rate for defendants at the highest assessed level.<sup>9</sup>
- In New Orleans, from January 2020 to September 2022, eighty-three percent (83%) of high-risk individuals made all scheduled court dates and 73 percent remained arrest-free pending trial.

The authors of one study noted: “Jurisdictions should be mindful that a ‘higher level’ designation only identifies defendants that exhibit a lesser probability of success, not necessarily a likelihood of failure.”<sup>10</sup>

## Rearrest on Violent Crimes Is Rare

Data also discount the idea that pretrial defendants commit an inordinate number of violent crimes—a perception that dominates public discussion regarding bail.<sup>11</sup>

- A report from the Major Cities Chiefs Association found that 63 of the 66 largest police jurisdictions saw an increase in at least one category of violent crimes in 2020. Most of these cities have not passed reforms regarding bail.<sup>12</sup>

- A 2013 study of felony-charged defendants in the nation's largest urban counties found that most rearrests before trial were misdemeanor, drug, and property crimes. Less than two percent (2%) of felony-charged defendants were rearrested on a new violent charge pending trial.<sup>13</sup>
- In Cook County (Chicago), Illinois, less than one percent (1%) of felony defendants whose cases were filed from October 2017 to September 2019 were charged with committing a new violent offense while in the community.<sup>14</sup>
- In fiscal year 2019 (September 2018 to September 2019), only one percent (1%) of defendants in Washington, D.C. were rearrested for a violent offense.<sup>15</sup> Separate studies in 2008 found that nine percent (9%) of rearrests among defendants charged with domestic violence in Washington, D.C.<sup>16</sup> and New York City<sup>17</sup> involved a new domestic violence charge.
- In 2018, less than one percent (1%) of defendants in New Jersey were rearrested for a charge defined as violent under state law.<sup>18</sup>

In December 2021, the New York City Mayor's Office of Criminal Justice (MOCJ) and New York State's Office of Court Administration (OCA) released a report highlighting pretrial outcomes following bail reform amendments enacted in the State of New York in July 2020. The report found that "fewer than 1% of the 45,000 to 50,000 people out pretrial are arrested for nonviolent or violent felonies each month." In addition, OCA's statewide data showed that about fifty percent (50%) of new felony and thirty-seven percent (37%) of new misdemeanor filings resulted in conviction. The MOCJ report also found that pretrial rearrests rates had not changed with bail reform. In January 2019, prior to the implementation of bail reform, ninety-five percent (95%) of people had no new arrest as they were released while awaiting trial. In January 2021, ninety-six percent (96%) of people had no re-arrest following pretrial release, according to MOCJ data.<sup>19</sup>

## Missed Court Appearances Often Are Not Willful

A recent body of literature has grown around the issue of failure to appear. The consensus from this research is that many missed court appearances are unintended or unavoidable, not the result of abscondence. For example:

- Only three percent (3%) of felony defendants in large urban counties who missed a court appearance remained fugitives one year after a warrant was issued.<sup>20</sup>
- Data from New York City's "Safe Surrender" bench warrant resolution program found the most common reasons given by defendants for not surrendering on outstanding warrants were a lack of funds to pay bail or fines (60%) and fear of incarceration on the bench warrant (65%).<sup>21</sup>

- Several studies on the effectiveness of court date reminders cited a number of common reasons for missed appearances, including transportation issues, work or childcare problems, forgotten court dates, lost citations or court notices, not understanding the seriousness of missed appearances, not knowing who to contact about missed dates, and fear of the justice system.<sup>22</sup>
- In another study, defendants ranked scheduling conflicts and forgetfulness highly as reasons for nonappearance.<sup>23</sup>
- Officials in San Mateo County (Redwood City), California identified as common reasons for missed court dates individuals not knowing who to contact to find out where to appear, not understanding the seriousness of the charges, and believing that employment and childcare obligations constituted a valid excuse to miss a court date.<sup>24</sup>

*“[P]eople who miss court dates for reasons beyond their control are counted the same as defendants who intentionally avoid court. While bail theoretically discourages people from joining the latter group, there’s little evidence to suggest that absconding is a problem.”*

Corey, E. and Lo, P. (2019). “The ‘Failure to Appear’ Fallacy.” *The Appeal*.  
<https://theappeal.org/the-failure-to-appear-fallacy/>

In a New York City study on improving appearance rates for individuals released on summons, researchers identified behavioral barriers, including persons forgetting court dates and not seeing court appearance as necessary to resolve minor offenses, that contributed to missed court dates. To minimize these barriers, evaluators redesigned the summons form to highlight the court date, court location, and consequences for failure to appear. The team also implemented follow-up text message reminders for summons court dates. The researchers found that the redesign of the summons form influenced by human behavior reduced failures to appear by thirteen percent (13%).<sup>25</sup>

The literature also suggests that most missed court dates occur in cases involving low-level offenses. For example, eighty-two percent (82%) of missed court appearances in North Carolina between 2015 and 2020 involved misdemeanor traffic offenses. Traffic misdemeanors had the highest nonappearance rates statewide, with about one in five individuals missing at least one court appearance. Missed appearances were less likely in other misdemeanor (about one in ten) and felony cases (one in twenty).<sup>26</sup> A study of case processing in large urban courts found that the rate of missed court dates was lowest in cases involving murder and rape charges and highest in those involving motor vehicle theft.<sup>27</sup>

## Responses to Missed Court Dates Often Are Inconsistent with Defendant Behavior

Though many missed court dates are not deliberate, most criminal justice systems do not distinguish abscondence from unintended court nonappearance. Usually, failure to appear

(FTA) is defined by issuance and recording of bench warrants or capiases. However, this definition lumps together willful and non-willful nonappearance. Automated or manual recording of these events frequently is inconsistent, delayed, or poor. Individual judges also can differ in their responses to nonappearance by issuing a warrant immediately, waiting until the end of court to determine whether a defendant will appear, or providing a grace period for defendants to surrender. Justice data systems also often lack a specific entry for missed court dates, making these difficult to distinguish from other court-issued warrants.

An all-encompassing definition of missed court appearances encourages punitive responses that outweigh the severity of a missed court date. As one author noted: “Under the current [failure-to-appear] regime, courts treat all [people who fail to appear] like criminals. Instead of offering a hand, they brandish a warrant.”<sup>28</sup> For example:

- Data on felony case processing in the nation’s largest courts show steady FTA rates but increasing rates of FTA conviction.<sup>29</sup>
- All states besides Maryland, Mississippi, and Wyoming make missed court dates a new criminal offense.
  - Ohio and Montana limit “criminal FTA” to defendants released non-financially.
  - Minnesota’s penalty for a missed court appearance is one-half the maximum penalty for the underlying felony offense.
  - In Rhode Island, the penalty can be up to 10 years of imprisonment.<sup>30</sup>
  - In Texas, missed court appearances in class A and B misdemeanors can result in up to one year of imprisonment and up to two to ten years for missed court dates in felony cases.<sup>31</sup>
- In the early 2010s, Florida removed the distinction between willful and non-willful missed court dates and prohibited defendants with past excused FTAs from being considered for their own recognizance release.<sup>32</sup>
- North Carolina law requires a loss of driving privileges for individuals that miss court dates on a motor vehicle offense.<sup>33</sup> As a result, one in ten state residents of driving age are prohibited from operating a motor vehicle.<sup>34</sup>

The criminalization of missed court appearance and increases in convictions rates for this behavior have a disparate effect on persons of color. A United States Department of Justice study in Ferguson, Missouri found that 16,000 of the city’s 21,000 residents had outstanding warrants.<sup>35</sup> Ferguson’s population is 67 percent African American.<sup>36</sup> In 2014, Pima County (Tucson), Arizona jailed 10,005 individuals on outstanding FTA warrants for a total of 216,477 jail bed days.<sup>37</sup> African Americans comprised nine percent (9%) of FTA arrests but four percent (4%) of the county’s population. Native Americans comprised eight percent (8%) of FTA arrests, but four percent (4%) of the population.<sup>38</sup> In North Carolina, African Americans made up twenty-two percent (22%) of the state’s population, but accounted for



forty-nine percent (49%) of missed court appearances.<sup>39</sup> The authors noted these differences could suggest “that some racial or ethnic groups face more significant barriers to appearance, hold different assumptions about the consequences of nonappearance, or have different levels of confidence that the court process will be fair.”<sup>40</sup>

## SYSTEM RESPONSES TO COURT NONAPPEARANCE

Fortunately, the evolving viewpoint about the dynamic nature of missed court dates has prompted some jurisdictions to reconsider their responses to—and even their definition of—court nonappearance. For example, a solid body of research shows that simple notification to defendants of upcoming court appearances can reduce the instances of missed court dates.<sup>41</sup> Court notification is such an evidence-based practice in the pretrial field that the state of Colorado made the practice mandatory for courts. State Senate Bill 22-18 allows individuals to opt into text messages that contain the date, location, and time of their court appearances and requires courts to provide three reminders, including one the day before a scheduled court appearance.<sup>42</sup>

Another indicator that dynamic factors often influence court appearance is the success of virtual court appearance systems in reducing missed court appearances. Thirty-eight states, Washington, D.C., and Puerto Rico either mandate or encourage the use of virtual court hearings.<sup>43</sup> Though the research still is developing, several jurisdictions adopting these systems have experienced significant reductions in missed court appearances. For example, in New Jersey, failures to appear dropped from twenty percent (20%) to less than one percent after courts began conducting virtual hearings.<sup>44</sup> Michigan’s failure-to-appear rates dropped from eleven percent (11%) to half of one percent (0.5%) from April 2019 to April 2020.<sup>45</sup>

Judicial officers in Texas reported benefits—including the convenience to defendants of not needing to take time off from work, locate transportation, or find childcare—from the use of remote hearings. For example, data from El Paso, Texas showed a sixty-eight percent (68%) reduction in missed court appearances from January 2019 to April 2021 (13.6 percent to 4.4 percent) following the introduction of remote court hearings. Remote hearings may also expand access to courts for witnesses, victims, experts, and other court stakeholders who live in remote locations or who fear for their safety in court.<sup>46</sup>

### Michigan 2020 Jail Reforms

First-time failures to appear were the number one reason for arrests in Michigan in 2018.<sup>47</sup> Given the body of research showing that many missed court appearances are not true abscondences, in 2020, the Michigan Legislature established a rebuttable presumption against bench warrants issued for certain first-time failures to appear. The law created a 48-hour grace period for defendants to appear voluntarily. If the defendant still fails to show, the court must issue a warrant unless it believes there is good reason to schedule the case for further hearing. This benefit applies to defendants with no previous failures to appear in the pending case and who are not charged with an assaultive or domestic violence offense. Courts may overcome the presumption of a grace period and issue a bench warrant if it has a “specific articulable reason to suspect”<sup>48</sup> that the defendant has committed a crime or that a person or property will be endangered if a bench warrant is not issued. The presumption also can be overcome if the defendant fails to appear for a sentencing, prosecution witnesses have been summoned and are present for the proceeding, or there are other circumstances that

require the immediate issuance of a bench warrant. A court must state its reasons in writing for deviating from the 48-hour presumption and issuing an immediate warrant.

## Harris County Consent Decree

A consent decree issued in a federal court case overseeing bail practices in misdemeanor cases in Harris County (Houston), Texas<sup>49</sup> included procedures to reduce or mitigate missed court dates. First, a misdemeanor court must waive a defendant's required appearance in court upon request by his or her defense counsel before or during that court hearing. A judicial officer also can waive a defendant's appearance at any court appearances over which the judicial officer presides.

The consent decree also created an "Open Hours Court" that is held at least weekly and where a misdemeanor defendant who missed a scheduled court appearance may reschedule that missed appearance. A calendar court cannot issue a bench warrant for a missed court appearance if the defendant appears in the calendar court or Open Hours Court to reschedule the appearance before "close of business on the day of Open Hours Court of the week following the missed setting."<sup>50</sup> A warrant is issued only if a Harris County Criminal Court at Law Judge finds that there was no good cause for failing to appear, "consistent with Texas state law."<sup>51</sup>

## Washington State Rules for Appearance of the Defendant

Responding to the COVID-19 pandemic and a ruling by the State Court of Appeals that revised how and when defendants can appear in court,<sup>52</sup> Washington State revised its court rules. Under the new rules, defendants may appear in court "in person, by video or remote appearance, and through counsel."<sup>53</sup> The rule also defines "necessary hearing,"—or a hearing where the defendant's physical or remote presence is required—as including arraignment, all stages of trial, the return of a verdict, and imposition of a sentence.<sup>54</sup>

## "Safe Surrender" Programs

The Allegheny County (Pittsburgh), Pennsylvania Pretrial Services Department (ACPTS)'s Court Liaison Services Unit offers a "safe surrender" program. This program enables defendants with active bench warrants for failure to appear to report to the pretrial office by 9:00 am, Monday through Friday. Pretrial staff escort these defendants to the Allegheny County Sheriff's Office for surrender on those warrants and to be seen on that day's Motions Court to resolve the warrant.

Similar to the Allegheny County program, Pima County (Tucson), Arizona Pretrial Service's safe surrender program allows defendants with outstanding warrants to "surrender" to the pretrial services agency Monday through Friday from 7:30 am to 9:30 am. Pretrial Services then applies a validated risk assessment, prepares a report with a recommendation regarding appropriate bail, and escorts defendants to a special Motions Court later in the morning.

## New York City Criminal Justice Agency's Outreach Team

New York City's Criminal Justice Agency (CJA) has a dedicated "Outreach Team" that contacts individuals who have missed a court date and encourages them to come back voluntarily. Through CJA's live call center, the outreach staff assist hundreds of people per day in navigating the pretrial system to attend their upcoming court dates.

## REDEFINING PRETRIAL MISCONDUCT

Given what we know about the frequency and causes of pretrial misconduct, it is clear that the pretrial field needs to redefine “failure to appear” and “rearrest” to better align these outcomes with the severity of the conduct and identify appropriate system responses. These definitions also must be practical in real-world settings and allow practitioners to record and track types of behaviors, responses to behaviors, associated defendant characteristics, and interventions that work to reduce future events.

### Court Nonappearance and Abscondence

Alternate definitions for missed court dates come from several sources. In *Defining Flight Risk*, Lauryn Gouldin divided missed events into three subcategories:

- 1) True Flight: Defendants who flee a jurisdiction.
- 2) Local Absconders: Defendants who remain in the jurisdiction but “actively and persistently avoid court.”
- 3) Low-cost Nonappearances: Defendants who remain in the jurisdiction and whose missed court dates are more preventable and less costly.<sup>55</sup>

The Harris County consent decree defined the criteria for failure to appear in misdemeanor cases as:

- 1) The appearance was not waived previously by the court.
- 2) The defendant did not physically or virtually appear for the hearing.
- 3) The court issues a warrant because of the nonappearance and the warrant either:
  - i. was executed via custodial arrest; or
  - ii. remained outstanding 30 days after issuance with no indication that the defendant was prevented from appearing due to circumstances beyond their control, as determined by the court.<sup>56</sup>

The Washington State Court of Appeals in *State v. Gelinas* (15 Wn. App. 2d 484, 478 P.3d 638 (2020)) defined missed court dates as those not attended by the defendant *and* their attorney and through identifying the types of court hearings a defendant is required to attend. Finally, the Michigan Joint Task Force on Jail and Pretrial Incarceration recommended statewide definitions of “nonappearance” as failure to appear without the intent to avoid or delay adjudication and “abscondence” as failure to appear with the intent to avoid or delay adjudication.<sup>57</sup>

*“Pretrial reform efforts must address a fundamental definitional problem: the collapsing of very different types of behavior that result in failures to appear in court into a single, undifferentiated category of nonappearance risk.”*

Gouldin, L.P. (2018). “Defining Flight Risk.” *The University of Chicago Review* 85:677-742.

These examples illustrate potential criteria for a more refined definition of court nonappearance, namely:

- The intent of the behavior, whether the missed appearance was intentional or due to unforeseen or unavoidable circumstances.
- The type of hearing missed and importance of the defendant's appearance at such a hearing; for example, hearings regarding the defendant's liberty interest, trial stages, and guilt and adjudication.
- Attempts by the defendant to resolve the missed appearance within a specified timeframe

Given these criteria, this publication suggests a definition of court nonappearance as:

*A missed required court date after which the defendant attempts resolution through self-surrender or contact with the court, defense counsel, or supervisory agency within an established time period*

Conversely, we suggest a definition of abscondence as:

*A missed required court date with no attempt by the defendant at resolution*

Jurisdictions also should promote individuals' willingness to resolve missed court dates by lessening the penalties for nonappearance and creating mechanisms for resolution. These could include open hours, "warrant" courts, or attempts by a pretrial services agency or other entity to contact defendants and coordinate surrenders to court after missed appearances.

## New Case Filing

A shortcoming of any descriptor of new criminal acts is the lack of information about crimes that do not result in arrest. This limits a redefinition of "rearrest" to (1) a custodial or noncustodial arrest, (2) a newly filed criminal case filing while another criminal case is pending, or (3) a guilty adjudication in the newly filed case. However, the need to define a behavior that occurs between a defendant's pretrial release and case disposition<sup>58</sup> makes guilty adjudication an impractical metric since most would occur after the original case's disposition. Both new arrests and case filings occur within the appropriate timeframe for a "new offense" metric. However, case filing as a metric allows prosecutorial input on the law enforcement action, thus giving more credence to the idea that the arrest involved significant criminal activity. For example, various studies have shown prosecutors deciding not to file charges in a significant percentage of arrests.<sup>59</sup>

NIC defines “new criminal offense pending case disposition” in its description of a public safety pretrial outcome metric.<sup>60</sup> That definition includes:

- An offense that occurs during the defendant’s period of pretrial release and disposition.
- A prosecutorial decision to charge.
- A resulting charge that carries the potential of incarceration or community supervision upon conviction.

This description is a good definition of “new case filing”—it fits within the “window” (pretrial release to adjudication) of measured pretrial outcomes, includes input from multiple stakeholders regarding system response (to adjudicate or to drop), and targets new offenses that are significant regarding public safety. The metric is also within the capacity of most justice systems to measure:

*An offense that occurs between the defendant’s pretrial release and case disposition that results in a prosecutorial charge filing that carries a potential sentence of incarceration or community supervision.*

Jurisdictions should track new cases by type, particularly violent offenses or those that may result from behavioral (drug possession) or economic (unlawful entry with homeless) issues.

## CONCLUSION

What we know about the behavior of individuals awaiting trial differs from the perceptions held by many justice practitioners and the public. Most defendants make scheduled court dates and remain arrest-free before trial. When misconducts occur, they often are not the result of willful (missed court dates) or violent (new case filing) behaviors and can be resolved short of sanctions involving bail revocation or new criminal convictions.

How we define and react to pretrial outcomes should reflect this reality. Definitions should distinguish between willful and unintentional behaviors as well as denote new cases with offenses closely tied to public safety. Responses should match the types of behavior and, when appropriate, allow defendants and justice systems ways to identify resolutions to continue case processing. Definitions and responses must be practical, and systems should track behaviors and interventions to identify those that work to reduce future events.

Risk is inherent in bail decision-making. But a better understanding of the nature and dynamics of these behaviors—and more appropriate and balanced responses—will translate to more informed bail decision-making and fairer and more effective forms of pretrial supervision.



## NOTES

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<sup>1</sup> “Reasonable assurance” is defined here as a substantial likelihood, although not an absolute guarantee, that an event will occur.

<sup>2</sup> *Stack v. Boyle* 342 U.S. 1 (1951) at 8.

<sup>3</sup> Desmarais, S. L. and Lowder, E. M. (2019, February). Pretrial risk assessment tools: A primer for judges, prosecutors, and defense attorneys. Safety and Justice Challenge. <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/02/Pretrial-Risk-Assessment-Primer-February-2019.pdf>. Desmarais, S. L., Zottola, S. A., Duhart Clarke, S., and Lowder, E. M. (2020). Predictive validity of pretrial risk assessments: A systematic review and meta-analysis. *Criminal Justice and Behavior*. Advance online publication.

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<sup>5</sup> See, for example, news articles such as [https://www.wsj.com/articles/bail-reform-killing-new-yorkers-violence-convictions-criminals-judges-court-order-release-murder-stabbing-assault-violent-crime-11645029571?mod=article\\_inline](https://www.wsj.com/articles/bail-reform-killing-new-yorkers-violence-convictions-criminals-judges-court-order-release-murder-stabbing-assault-violent-crime-11645029571?mod=article_inline). <https://www.msn.com/en-us/news/crime/bail-reform-group-bailed-out-repeat-offender-with-recent-elder-and-child-sex-abuse-cases/ar-AAUhoz3>. <https://www.msn.com/en-us/news/crime/violent-crime-on-the-rise-amid-bail-reform-controversy/vi-AAThIrB>.

<sup>6</sup> <https://thelawdictionary.org/bail-v/>. Keilitz, S. and Sapia, S. 2017. “Pretrial Justice Brief 9: Preventive Detention.” Williamsburg, VA: National Center for State Courts’ Pretrial Justice Center for Courts. See *U.S. v. Salerno* 481 U.S. at 754; See also *United States v. Crowell*, 2006 U.S. Dist. LEXIS 88489 (W.D.N.Y. Dec. 7, 2006); *United States v. Torres*, 566 F. Supp. 2d 591 (W.D. Tex. 2008).

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<sup>8</sup> Collins, K. (2018). *Allegheny County Pretrial Services Outcome Reports: 2018*. Pittsburgh, PA: Allegheny County Pretrial Services.

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<sup>12</sup> <https://www.cnn.com/2021/07/07/politics/bail-reform-violent-crime-fact-check/index.html>

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<sup>32</sup> Florida Statutes, Title XLVII, *Criminal Procedure and Corrections* Chapter 903 Bail, Section 903.046 Purpose of and criteria for bail determination.

<sup>33</sup> North Carolina General Statutes, Sec. 20-24.

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- <sup>48</sup> See Michigan Compiled Laws, Section 764.3 - Failure to appear; rebuttable presumption for first failure; revocation of release order or forfeiture of bail; issuance of warrant; conditions and reasons.
- <sup>49</sup> UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION Consent Decree Case 4:16-cv-01414 Document 708 Filed on 11/21/19 in TXSD.
- <sup>50</sup> Id. at p. 12.
- <sup>51</sup> Ibid.
- <sup>52</sup> *State v. Gelinis*, 15 Wn. App. 2d 484, 478 P.3d 638 (2020).
- <sup>53</sup> Washington State Court Rules: Criminal Rules for Courts of Limited Jurisdiction. Rule 3.4, Appearance of the Defendant.
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