


Commonwealth of Virginia

COUNTY OF FAIRFAX

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COMMONWEALTH'S ATTORNEY PROCEDURE MEMORANDUM	
	Date: 12/7/2020
Policy Title: Bond Policy	
Summary: This policy outlines and codifies procedures in place since January 1, 2020, regarding how prosecutors analyze and formulate positions with respect to bond determinations and affirms the opposition of the Commonwealth's Attorney to any form of cash bond.	
Authorizing Signature:	

This bond policy memorializes guidance provided to the office in January 2020 and the interim bond policy guidance adopted in March 2020.

The number of people detained awaiting trial has increased by a factor of five times since 1970.¹ This growth has continued to occur even while both violent and property crime has decreased.² The growth, in large part, is due to the increased use of cash bail.

Cash bail does not mitigate flight risk, deter failures to appear, or ensure community safety.³ Empirical, academic, and statistical evidence demonstrates that cash bail is not an effective means of promoting these objectives.⁴ In fact, it has been proven that pre-

¹ See Jacob Kang-Brown and Ram Subramanian, *Out of Sight: The Growth of Jails in Rural America* (New York: Vera Institute of Justice, 2017), 9-10, <https://perma.cc/J9DW-4WK5>.

² See Federal Bureau of Investigation, Uniform Crime Reporting (UCR) Program, UCR Data Online, <https://perma.cc/95KR-QD6L>.

³ Compared to alternative release conditions, cash bail compares unfavorably in terms of encouraging court attendance and lawful behavior, and evidence has existed of this fact for decades. See, e.g., Clarke, Stevens et al., *The Effectiveness of Bail Systems: An Analysis of Failure to Appear in Court and Rearrest While on Bail*, UNC Institute of Government (January 1976), <https://www.ncjrs.gov/pdffiles1/Digitization/32349NCJRS.pdf> (stating that "forms of bail that rely solely on the threat of financial loss to ensure appearance in court proved to be the worst in terms of rates of nonappearance and rearrest.").

⁴ See Aurelie Ouss & Megan Stevenson, *Bail, Jail, and Pretrial Misconduct: The Influence of Prosecutors* (June 20, 2020), <https://ssrn.com/abstract=3335138>; Aurelie Ouss & Megan Stevenson, *Evaluating the Impacts of Eliminating Prosecutorial Requests for Cash Bail 1* (Feb. 17, 2019); Megan Stevenson & Sandra G. Mayson, *Bail Reform: New Directions for Pretrial Detention and Release*, Faculty Scholarship

trial detention due to the inability to pay cash bail actually increases recidivism rates.⁵ Moreover, cash bail, and pretrial detention in general, both have a history of being applied in a racially discriminatory manner.⁶ The evidence demonstrates that alternatives to cash bail are both more fair and more effective.⁷ Cash bail is discriminatory, undermines public safety, and has no place in our criminal justice system.

Furthermore, pretrial detention in general has a detrimental impact on housing stability and employment status, and in the long-term results in increased rates of recidivism and rearrest, decreased employment opportunities, lower income, and a host of other adverse consequences. Therefore, pretrial detention should be used only as a last resort to ensure community safety and appearance at trial.

In order to facilitate a more fair, just, and uniform response with respect to bond decisions, the following policy, in practice since January 1, 2020, is memorialized herein.

NO CASH BAIL. On January 1, 2020, the Fairfax County Commonwealth's Attorney's Office ended its past practice of requesting cash bail. Cash bail undercuts one of the most critical pillars of the criminal justice system - the idea that rich and poor should get the same access to justice. Under a cash bail system, whether a person sleeps at home or in a cell can be determined solely by how much money they have. Even a small cash bail amount has the potential to wreak havoc.⁸ Those awaiting trial often lose their jobs and by extension, their means of providing housing to themselves and their children. The consequences of being poor and in the criminal justice system are dire and the

1745, at 7 (Mar. 13, 2017) (noting the findings in jurisdictions with pre-trial services organizations of the type found in Fairfax County).

⁵ Arpit Gupta, et. al., *The Heavy Costs of High Bail: Evidence from Judge Randomization 1* (Aug. 18, 2016); Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 786–87 (2017) (estimating that the release on personal bond of the lowest-risk detainees would have resulted in 1,600 fewer felonies and 2,400 fewer misdemeanors within the following eighteen months).

⁶ See, e.g., David Arnold, Will Dobbie, Crystal S. Yang, *Racial Bias in Bail Decisions* (May 2018) https://scholar.harvard.edu/files/cyang/files/adv_racialbias.pdf (finding that “black defendants are 11.2 percentage points more likely to be assigned monetary bail than white defendants and, conditional on being assigned monetary bail, have bail amounts that are \$14,376 greater”); United States Department of Justice, Bureau of Justice Statistics, *Profile of Jail Inmates*, July 2004, <https://www.bjs.gov/content/pub/pdf/pji02.pdf> (reporting that nearly 7 in 10 people detained pretrial are people of color).

⁷ See, e.g., Pretrial Justice Institute, *The Pretrial Services Agency For the District of Columbia: Lessons From Five Decades of Innovation and Growth*, 2 Case Studies 1, 2 (Aug. 2018), <https://perma.cc/8KAD-TY5H> (“Agency data show that 90 percent of released people make all court appearances and that 91 percent complete the pretrial release period without any new arrests.”). In Virginia in 2019, defendants on pretrial release had a 93 percent appearance rate, a 93 percent “public safety” rate referring to no new arrests, and an 85 percent supervision compliance rate. See Report on Pretrial Services Agencies FY 2019, Virginia Department of Criminal Justice Services, December 2019, <https://rga.lis.virginia.gov/Published/2019/RD709/PDF>.

⁸ In Virginia, 92% of the people who are in jail because they cannot afford cash bail have bail amounts of less than \$5,000. Virginia Department of Criminal Justice Services, *A “New Norm” for Pretrial Justice in the Commonwealth of Virginia—Pretrial Risk-based Decision Making 10* (2013).

pressure associated with those consequences is immense. Ending cash bail not only ends an injustice, but promotes a social good. Communities are better when people are working and supporting their families. Keeping families together helps avoid situations where increased poverty and familial instability leads to decreased opportunity and more crime.

Accordingly:

- a. ACAs must never request a cash bond - under any circumstances.
- b. ACAs must never request that the court maintain a cash bond set by the magistrate or a prior judge.
- c. ACA must affirmatively request that a judge remove, or join in a defendant's motion to remove, a cash bond set by the magistrate or a prior judge. Silence, or deferring to the court's discretion, is not an option.
- d. If defense counsel requests a cash bond, the ACA must restate the position against cash bond and separately state a position on bond based on the analysis below.
- e. ACAs shall agree to waive the statutory requirement of a cash bond under Code 19.2-123 and ask that bond be determined based upon the factors in Code 19.2-120(A).⁹

NON-VIOLENT CRIMES. People arrested for non-violent offenses, whether misdemeanors or felonies, who are deemed not to be a danger to the community, should be released, subject to the flight risk analysis below, with appropriate conditions.

In determining whether a defendant represents a danger to the community, ACAs must review the available police report and supplemental reports, prior record of the accused, available notes from the magistrate and/or court services, the Virginia Pretrial Risk Assessment Instrument (VPRAI)¹⁰, and any other available information.

For non-violent offenses, the ACA shall begin the analysis applying a strong presumption in favor of finding that the person is not a danger to the community. However, the presumption can be rebutted by the available evidence. Scenarios where

⁹ 19.2-123 applies when a person is arrested for a felony and the person: (i) has previously been convicted of a felony, (ii) is presently on bond for an unrelated arrest in any jurisdiction, or (iii) is on probation or parole. The requirement of a secure/cash bond under 19.2-123 may be waived with the "approval of the judicial officer and with the concurrence of the attorney for the Commonwealth." Code 19.2-123 authorizes the judicial officer to impose any "condition deemed reasonably necessary to assure appearance as required, and to assure his good behavior pending trial."

¹⁰ The VPRAI recommendation is instructive, but not dispositive. It is a tool and source of information to be considered in the context of all other available information. In reviewing the VPRAI recommendation, if the recommendation is "detain," it is important to discount the VPRAI risk factor considering whether someone is employed at the time of arrest. While this factor only accounts for 1 point out of a total of 14 possible points in the VPRAI risk analysis, studies have shown that this question, and the underlying data, potentially injects a racial structural inequity into the tool and analysis. Moreover, subsequent studies have found that this question is a poor indicator of risk of pretrial failure.

the presumption is more likely to be rebutted, **include, but are not limited to**, those where:

- a. The defendant has a recent history of convictions for violent crimes (as defined below).
- b. There is a pattern or history of repeated targeting of the current victim or similarly situated victims.
- c. There is evidence of explicit threats of physical violence to victim or witness during or after arrest.
- d. The case involves the illegal sale or illegal purchase/transfer of a firearm, the removal of a serial number from a firearm, or the possession of a stolen firearm or a firearm where the serial number has been removed.
- e. The case involves a felon in possession of a prohibited weapon.
- f. The unlawful possession of a gun in violation of a protective order or substantial risk order.

Where an ACA determines that the above presumption is not rebutted, and there is no flight risk or any flight risk that exists can be mitigated by appropriate conditions, the ACA should agree to the release of the defendant on a personal recognizance (PR) bond.

An ACA may request that the court require participation in the supervised released program (SRP) as a condition of release. ACAs may also ask the court to impose other special conditions as part of the release. However, ACAs should only ask for SRP or special conditions if those special conditions address concerns specific to the particular defendant or case. The Commonwealth should not reflexively advocate for SRP or a blanket set of conditions in every case regardless of the facts.

CRIMES INVOLVING VIOLENCE OR THE POTENTIAL FOR VIOLENCE, SEXUAL ASSAULT, & CHILD VICTIMS. Crimes, whether misdemeanors or felonies, that: (i) are violent in nature¹¹, (ii) involve a child victim or someone the defendant believed to be a child, (iii) are of a sexual nature, (iv) constitute a violation of a protective order or substantial risk order, or (v) are an attempt to commit any of the foregoing, require a higher evidentiary threshold to determine that a person does not pose a potential

¹¹ The term "violent" as used herein is defined to include offenses: (i) where intentional force is used, or attempted, to effectuate a crime or to injure another person, (ii) involving an affirmative act that puts someone, or is intended to put someone, in reasonable fear of injury, or (iii) involving the use of a weapon to accomplish a crime.

danger to the community and is not a flight risk. These cases must be closely scrutinized.

ACAs must review, at a minimum, the available police report and supplemental reports, other information available through iLeads, such as related involvements, the prior record of the accused, any notes provided by the magistrate and/or court services, the VPRAI analysis¹², and any other available information.

After reviewing such information, ACAs shall make an independent determination of dangerousness. Subject to the flight risk analysis below, if the ACA has a reasonable belief that the person does not present a danger to the community, the ACA should support the release of the defendant on a PR bond with appropriate, case-specific conditions, including SRP.

FLIGHT RISK. Flight risk should be analyzed separately from potential danger to the community. ACAs should only proceed to a flight risk determination after assessing potential danger and determining that someone does not pose a danger to the community or that any risk can be mitigated with the imposition of special bond conditions.

The factors most relevant to flight risk **include, but are not limited to**:

- A history of two or more convictions or charges for failure to appear (FTA). However, if a prior FTA can be explained adequately in a manner that indicates there was not an attempt to evade prosecution, the ACA should discount the existence of the FTA in assessing flight risk.
- Attempts or evidence of intent to conceal identity from, or evade, law enforcement.
- Existence of an active warrant from another jurisdiction.
- Residence outside of the DC metro area and participation with an organized group to commit criminal offenses in NOVA or throughout several states.

While these factors are the most relevant factors to a determination of flight risk, they should not automatically result in an objection to the release of a defendant. Even if a defendant is deemed a flight risk without conditions, ACAs should look for the least restrictive conditions that will allay the risk of flight.

If the ACA believes that no condition or set of conditions can mitigate the risk of flight, the ACA should move to an assessment of the nature of the alleged criminal offense. ACAs should temper decisions to object to bond based solely on risk of flight by applying a sliding scale of offense seriousness. As the seriousness of the alleged

¹² See footnote 10.

criminal offense increases, the more weight an ACA should place on any evidence of flight risk in the analysis.¹³ At the less serious end of the scale, the evidence of risk of flight must be substantial before an ACA should consider objecting to release.

ALWAYS TAKE A POSITION. It is the responsibility of each ACA to use the authority of this office to affirmatively advocate for positions that reflect the values of the community. When prosecutors defer to the court, they surrender the authority the community has vested in this office to speak on their behalf. Accordingly, ACAs must take a position with respect to bond for any case this office is involved in.

NO GRANT OF ADDITIONAL RIGHTS. This policy, like all policies of the Fairfax County Commonwealth's Attorney's Office, provides only internal guidance, which may be modified, rescinded, or superseded at any time without notice. This policy is not intended to, and may not, be relied upon to create any rights, expectations, privileges, or benefit to any individual enforceable at law in any administrative, civil, or criminal matter. This policy is not inviolable and may be deviated from as is deemed necessary by the Fairfax County Commonwealth's Attorney.

¹³ Offense seriousness presents a different issue than the question of whether one poses a potential danger to the community. An offense may be non-violent, and the defendant may not pose a danger to the community, but the offense may nonetheless be a serious offense.