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POLICY DIRECTIVE 2021-02: POLICY ELIMINATING THE USE OF CASH BAIL AND SETTING STANDARDS FOR PRETRIAL DETENTION

I. Introduction and Background

A. Cash Bail Is Unjust and Inequitable

America's system of cash bail is unfair, inequitable, and imposes severe harm on communities. Cash bail is a system under which a defendant who has been accused of a crime is required to post money in order to secure release from jail pending trial. Importantly, cash bail forces defendants to pay for their release before they have been convicted. In function, then, cash bail imposes pre-conviction punishment on criminal defendants who cannot afford to pay.

Cash bail is inconsistent with several foundational principles of American criminal law.[1] Debtors' prisons—that is, prisons that housed people for inability to pay a debt—were abolished by Congress in 1833.[2] Today, debtors' prisons are illegal in all fifty states.[3] The United States Supreme Court, moreover, has held that states may not constitutionally imprison indigent defendants, as punishment for a crime, simply because they cannot afford to pay.[4] Yet each day, hundreds of thousands of Americans sit in jail, pre-trial, because they lack the funds to "make bail."[5]

Cash bail is also at odds with the "presumption of innocence" that has long been a bedrock of American law.[6] Few would argue that being forced to sit in jail is not punishment. Indeed, jail sentences are routinely handed down *as punishment*.[7] Again, though: cash bail forces

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[1] This Policy is an exercise of discretion by the Washtenaw County Prosecuting Attorney, and does not purport to argue that that cash bail, in and of itself, violates the United States Constitution. *See* U.S. Const. Amend. 8 ("*Excessive* bail shall not be required") (emphasis added). The purpose of this discussion is only to note the tension between cash bail and foundational American values.

[2] Alicia Bannon, Mitali Nagrecha, & Rebekah Diller, *The Hidden Costs of Criminal Justice Debt* (2010), at 19, *available at* https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf.

[3] *Id.* at 2.

[4] *Bearden v. Georgia*, 461 U.S. 660, 672 (1983).

[5] Lea Hunter, *What You Need to Know About Ending Cash Bail,* Center for American Progress (Mar. 16, 2020), *available at* https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/16/481543/ending-cash-bail/.

[6] *Coffin v. United States*, 156 U.S. 432, 453 (1895).

[7] *See* Michigan Joint Task Force on Jail & Pretrial Incarceration, Report & Recommendations (Jan. 10, 2020) ("Joint Task Force Report") at 7 (noting that over half of the people in Michigan's jails are "convicted detainees"), *available at* https://courts.michigan.gov/News-

people to remain in jail *before they have been convicted of a crime*.

By its very terms, cash bail is socioeconomically inequitable. Under a cash bail system, poorer people—even those who are accused of relatively minor crimes—are forced to sit in jail for days, weeks, or years. At the same time, cash bail allows wealthier people who are accused of serious crimes to go free pending trial.

Examples are myriad, but two prove the point. In Wayne County, Michigan, a court required a man to sit in jail for two weeks because he could not afford a $200 cash bond stemming from a misdemeanor ticket for staying in a park after dark.[8] But in Connecticut, a wealthy financier accused of kidnapping and murdering his ex-wife was able to post a $6 million cash bond, and be freed from jail pending trial.[9] Functionally speaking, cash bail thus provides one set of laws for the wealthy—and another set entirely for the poor and working class.

The harms imposed by cash bail are long-lasting. One prominent example is the tragic case of Kalief Browder. Browder, a 16-year-old boy from New York City, was arrested in 2010 on suspicion of stealing a backpack.[10] His family was unable to afford his initial $3,000 cash bond, which led to years of court involvement.[11] For *three years*, Browder sat in jail, maintaining his innocence all the while.[12] Eventually, prosecutors dropped the charges against him.[13] But in 2015, traumatized by his time in jail, Browder hung himself at his parents' home.[14]

Though cash bail does not always impose such draconian harms, its adverse effects routinely radiate outwards. When defendants are unable to post bail themselves, they often pay a fee to a commercial bond company that posts bail on their behalf. (The United States and the Philippines are the only countries on the planet with a commercial bail-bond industry.)[15] That fee can trap poorer people in a cycle of debt and poverty. What is more, defendants who are held on bail for even "one to three days" are at serious risk of losing their jobs.[16] Those employment-related consequences can last for years. According to the Internal Revenue Service, those who are detained on cash bail are significantly less likely be employed *three to four years later* than

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Events/Documents/final/Jails%20Task%20Force%20Final%20Report%20and%20Recommendations.pdf

[8] Complaint, *Ross v. Blount,* No. 2:19-cv-11076-LJM-EAS (E.D. MI) (April 14, 2019), at 8.

[9] Sarah Wallace & Marc Santia, *Fotis Dulos Posts $6M Bond, Placed Under House Arrest,* NBC News (Jan. 9, 2011), *available at* https://www.nbcnewyork.com/investigations/otis-dulos-ex-girlfriend-expected-to-post-bail-in-missing-mom-murder-case/2257335/.

[10] Alysia Santo, *No Bail, Less Hope: The Death of Kalief Browder,* The Marshall Project (June 6, 2015), *available at* https://www.themarshallproject.org/2015/06/09/no-bail-less-hope-the-death-of-kalief-browder.

[11] *Id.*

[12] Benjamin Weiser, *Kalief Browder's Suicide Brought Change to Riker's. Now it has Led to a $3 Million Settlement,* The New York Times (Jan. 24, 2019).

[13] *Id.*

[14] *Id.*

[15] Jamiles Lartey, *New York Rolled Back Bail Reform. What Will The Rest Of The Country Do?,* The Marshall Project (Apr. 23, 2020), *available at* https://www.themarshallproject.org/2020/04/23/in-new-york-s-bail-reform-backlash-a-cautionary-tale-for-other-states.

[16] Luke Darby, *How The For-Profit Prison Industry Keeps 460,000 Innocent People in Jail Each Day,* GQ (May 24, 2019), *available at* https://www.gq.com/story/abolish-cash-bail.

those who were not detained.[17]

All of this exacerbates the poverty that rendered a defendant unable to afford bail in the first place. And the mutually enforcing poverty-bail-poverty cycle is intergenerational. When people lose their jobs, they are more likely to lose their homes. Their children may become homeless, be forced to live with relatives, or to enroll in a new school. And even in the best of circumstances (which is clearly not the case when a parent is justice-involved) switching schools unexpectedly is linked to significant declines in reading and math achievement.[18]

What is more, like so many aspects of our criminal justice system, the costs of cash bail are not borne equally. In general, "Black and brown defendants receive bail amounts that are twice as high as bail set for white defendants."[19] And "Black and brown defendants . . . are less likely to be able to afford it."[20] That is so, in part, because of the enduring racial wealth gap in the United States. "White Americans have seven times the wealth of [B]lack Americans on average."[21] The reasons for the wealth gap are multifaceted. It has its origins in "the glaring legacy of American slavery and the violent economic dispossession that followed."[22] And it has been exacerbated by more than 100 years of governmental policies that prevented Black Americans from accumulating generational wealth—including federal policies that prohibited Black people from owning homes or pursuing higher education.[23]

But while the origins of the wealth gap are multifactored, its intersection with cash bail is straightforwardly discriminatory. Cash bail forces people to pay money, *upfront,* to secure their release from jail. It thus systematically disadvantages families who lack accumulated wealth. People who lack wealth in the United States are disproportionately likely to be Black. In this way, cash bail perpetuates "the glaring legacy of American slavery," and the cascading consequences that have accrued from centuries of discrimination.[24]

Neither Washtenaw County nor the State of Michigan is immune from these trends. For "the past few decades," approximately 50% of the people held in Michigan's jails have been pretrial detainees—typically people who were held because they could not afford their cash bond.[25] According to a preliminary analysis by the ACLU of Michigan, over half of the bookings into Washtenaw County's jail "had a cash bail amount attached to at least one charge."[26] That

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[17] Seema Jayachandran, *Unable to Post Bail? You Will Pay for That for Many Years,* The New York Times, (Mar. 1, 2019), *available at* https://www.nytimes.com/2019/03/01/business/cash-bail-system-reform.html.

[18] Russell Rumberger, Student Mobility: Causes, Consequences, and Solutions, National Education Policy Center (June 2015).

[19] Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial,* The Prison Policy Initiative (Oct. 9, 2019), *available at* https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.

[20] *Id.*

[21] Trymaine Lee, *The 1619 Project: A Vast Wealth Gap, Driven by Segregation, Redlining, Evictions, and Exclusion, Separates Black and White America,* The New York Times (Aug. 14, 2019), *available at* https://www.nytimes.com/interactive/2019/08/14/magazine/racial-wealth-gap.html.

[22] *Id.*

[23] *Id.*

[24] *See id.*

[25] Joint Task Force Report at 7.

[26] ACLU Smart Justice Michigan, *Washtenaw County Statistics: Preliminary Findings* at 1 (July 10, 2019).

same analysis found that "Black people in Washtenaw County are 8.55 times more likely to be incarcerated because they are unable to pay bail than white people."[27] That is in many ways unsurprising. As discussed above, the adverse effects of cash bail are exacerbated by the racial wealth gap. And lamentably, Washtenaw County "ranks 80 out of 83 counties in Michigan for [racial] income inequality."[28]

B. Cash Bail And Public Safety

All of this would be disturbing even if cash bail promoted public safety. But it does not. Studies have repeatedly demonstrated that cash bail does little to ensure the safety and well-being of the public.[29] And these studies are not merely academic. Communities across the United States have shown that cash bail can be eliminated without undermining public safety.

As an initial matter, several jurisdictions across the country have eliminated (or all but eliminated) cash bail. Perhaps the most instructive experience comes from the District of Columbia, which effectively eliminated cash bail in 1992. In the nearly 30 years that have followed, Washington D.C. has not seen any resulting increase in crime or the number of people skipping trial.[30]

Similarly, New Jersey eliminated cash bail in 2017—and its crime rates "plummet[ed]."[31] Of course, the reasons crime rates might rise or fall at any given time are complex, and multi-factorial. But there is good reason to believe that cash bail actually *increases* crime. The observed empirical research is most "consistent with the claim that monetary bail . . . lead[s] to a slight *increase* in misconduct" among people who are released pretrial, "which could be due to the destabilizing effects of monetary involvement."[32] Studies, moreover, have repeatedly demonstrated that those who are held pretrial are "more likely to commit crimes after release."[33] "One reason may be new personal connections made while locked up: Jail and prison are prime networking opportunities."[34]

What has worked in other communities—the elimination of cash bail—can work here. In response to the COVID-19 pandemic, Washtenaw County's judges and the Sheriff's Office moved quickly to reduce the jail population, and prevent the threat of spread. On the eve of

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[27] *Id.*

[28] Ann Arbor City Government, *New "One Community Equity Initiative" Launches* (Jan. 24, 2018), *available at* https://www.a2gov.org/news/pages/article.aspx?i=447.

[29] Joint Task Force Report at 16; *see also, e.g.,* Ouss, Aurelie and Stevenson, Megan, Bail, Jail, and Pretrial Misconduct: The Influence of Prosecutors (June 20, 2020), *available at* SSRN: https://ssrn.com/abstract=3335138 ("no evidence that cash bail and pretrial supervision served to deter [failure to appear] or pretrial crime among released defendants in our sample").

[30] Weekend Edition, *What Changed After D.C. Ended Cash Bail* (Sept. 2, 2018), *available at* https://www.npr.org/2018/09/02/644085158/what-changed-after-d-c-ended-cash-bail.

[31] Reuben Francis, *New Jersey is Proving that Bail Reform Works*, Talk Poverty (Apr. 26, 2019), *available at* https://talkpoverty.org/2019/04/26/new-jersey-bail-reform-works/.

[32] Ouss & Stevenson, *supra* n. 29, at 23.

[33] Seema Jayachandran, *Unable to Post Bail? You Will Pay for That for Many Years,* The New York Times, (Mar. 1, 2019), *available at* https://www.nytimes.com/2019/03/01/business/cash-bail-system-reform.html.

[34] *Id.*

COVID-19's arrival in Michigan in March 2020, Washtenaw County's jail housed 332 people.[35] By April 28, the population stood at 147.[36] The persons released were those who did not pose a "threat to the public," including those that were previously being held on less than $1,000 cash bond.[37] Crucially, Washtenaw County did not see a resulting crime wave as a result of its moves to thin the jail population. Our COVID-19 experience demonstrates that, as in Washington D.C. and New Jersey, bail reforms can be implemented locally without threatening public safety.

To be sure, some have suggested that bail reform is at odds with public safety. After New York passed sweeping changes to its bail laws in 2020, "wall-to-wall coverage in New York [City]'s tabloids" blamed the bail-reform law for an uptick in crime.[38] The data, however, told a different story. It is true that New York City experienced more crime in early 2020 than in years prior—with approximately 1,222 more serious crimes reported in January 2020 than in January 2019.[39] But of those crimes, just 84 (in a city of nearly 8.5 million) were committed by people who had been released for a different crime without bail.[40]

Others have noted that, even if cash bail does not meaningfully prevent new crimes, allowing more people to go free pending trial means there will be "a larger pool of released defendants, which necessarily means that the public suffers additional crimes."[41] In other words, even if people who are released on bail are no more likely to commit additional crimes than people who are released without bail, bail inevitably keeps some defendants in jail. Without bail, more defendants will go free. That means that there will be more people walking free in the community, and some percentage of them will inevitably commit some additional crime.

That argument, however, ultimately proves too much. Of course, it is true that people cannot commit crimes in the community if they are in jail. The corollary, of course, is that when people are *not* in jail, some percentage of them will commit crimes. But the need for crime prevention must be balanced against liberty, equity, and the cascading consequences of incarceration. In that regard, few would argue that it would be appropriate to incarcerate people for parking tickets—even though incarcerating such people would necessarily prevent them from committing crimes in the community.

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[35] Tracy Samilton, *Aggressive COVID-19 Plan at Washtenaw County Jail Reduces Population By More Than Half,* Michigan Radio (Apr. 28, 2020), *available at* https://www.michiganradio.org/post/aggressive-covid-19-plan-washtenaw-county-jail-reduces-population-more-half

[36] *Id*.

[37] *Id.*

[38] Jamiles Lartey, *New York Rolled Back Bail Reform. What Will The Rest Of The Country Do?,* The Marshall Project (Apr. 23, 2020), *available at* https://www.themarshallproject.org/2020/04/23/in-new-york-s-bail-reform-backlash-a-cautionary-tale-for-other-states.

[39] Mary Frost, *Crime Spike Can't Be Pinned on Bail Reform, Electeds and Advocates Say,* The Brooklyn Eagle (Feb. 6, 2020), *available at* https://brooklyneagle.com/articles/2020/02/06/crime-spike-cant-be-pinned-on-bail-reform-electeds-and-advocates-say/

[40] *Id.*

[41] Paul G. Cassell & Richard Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County, Illinois* (2020) at 3, University of Utah College of Law Research Paper No. 349, Wake Forest Law Review, Forthcoming, *available at*: https://ssrn.com/abstract=3541091 or http://dx.doi.org/10.2139/ssrn.3541091

In any event, public-safety arguments in favor of cash bail tend to conflate *bail* with *pretrial release*. The existence of cash bail does not mean that dangerous people are held pending trial. It means that people (dangerous and non-dangerous) are held pending trial *unless they have monetary resources*. Again: a cash bail system allows a poor person to be held on $200 bail for being in a park after dark. A wealthy person accused of kidnapping and murder, however, can go free on $6 million bond. That is not just, and does not promote public safety.

The Washtenaw County Prosecutor's Office is well aware that there are factual circumstances in which public safety requires a defendant to be held pending trial—or for conditions to be imposed as a condition of their release. Such conditions may be warranted when, for example, an individual is involved in escalating gang violence. They may also be warranted in cases involving domestic violence, an offense for which recidivism rates are particularly high.[42] At the very least, in such cases, release conditions must include removing access to firearms. In domestic violence cases, for example, "[a]n abuser's access to a firearm increases the risk of femicide by at least 400%."[43]

At the same time, the Washtenaw County Prosecutor's Office is committed to dispensing justice evenhandedly, irrespective of a person's socioeconomic status. Cash bail, by its very terms, is socioeconomically inequitable. Accordingly, the Washtenaw Prosecutor's Office will no longer seek to impose upfront monetary conditions as a term of pretrial release.

C. Michigan's Legal Landscape

In announcing this "no cash bail" policy, the Washtenaw County Prosecutor's Office joins other prosecutor's offices across the nation. San Francisco's District Attorney's Office no longer requests cash bail.[44] Nor does the State's Attorney in Chittenden County, Vermont, or the Commonwealth's Attorney in Fairfax County, Virginia.[45] In jurisdictions that have eliminated cash bail, prosecutors still seek to hold people pretrial if they pose an imminent risk to public safety. Wealth, however, is not part of the equation.

In general, that is the broad thrust of this Policy. Several particular aspects of Michigan law, however, are important to consider.

First, Michigan's Constitution permits dangerous defendants to be held pretrial without

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[42] *See* Viet Nguyen & Mia Bird, *Tailoring Domestic Violence Programs to Reduce Recidivism,* Public Policy Institute of California (June 12, 2018), *available at* https://www.ppic.org/blog/tailoring-domestic-violence-programs-to-reduce-recidivism/ ("Three-fifths of individuals convicted for domestic violence are rearrested within two years—and 67% of this group are rearrested for another domestic violence offense").

[43] National Coalition Against Domestic Violence, *Guns and Domestic Violence, available at* https://assets.speakcdn.com/assets/2497/guns_and_dv0.pdf.

[44] San Francisco District Attorney, *No Cash Bail, available at* https://www.sfdistrictattorney.org/policy/no-cash-bail/.

[45] Paul Heintz, *State's Attorney Sarah George to End Cash Bail in Chittenden County,* Seven Days Vermont (Sept. 16, 2020), *available at* https://www.sevendaysvt.com/OffMessage/archives/2020/09/16/states-attorney-sarah-george-to-end-cash-bail-in-chittenden-county (Chittenden County); Commonwealth's Attorney Procedure Memorandum: Bond Policy (Dec. 7, 2020), *available at* https://www.fairfaxcounty.gov/commonwealthattorney/sites/commonwealthattorney/files/assets/documents/fairfax%20cwa%20-%20bond%20policy.pdf (Fairfax County).

bail in several circumstances. Specifically, people can be held without bail if they are charged with (a) murder, (b) treason, (c) first-degree criminal sexual conduct, (d) kidnapping with the intent to extort money or another valuable thing, or (d) armed robbery.[46] A person can also be held without bail if they have committed two or more violent felonies in the past 15 years, or if they are charged with a violent felony while on probation, parole, or pretrial release for another violent felony.[47]

Second, and correlatedly, Michigan's Constitution prevents the categorical detention of a person if they were *not* charged with the above-referenced offenses. Michigan court rules, however, grant judges broad latitude to impose non-monetary conditions on release—including conditions that may be difficult to meet. By way of example, Michigan's court rules allow a defendant to be released only to "the custody of a responsible member of the community who agrees to monitor the defendant."[48] The court rules also allow a defendant to be released only on satisfaction of "any injunctive order made a condition of release."[49] And they allow a court to apply "any other condition . . . reasonably necessary to ensure . . . the safety of the public."[50]

Third, Michigan law allows for bonds that do not require upfront payment. The Court Rules specifically allow a person to be "released . . . on an unsecured appearance bond."[51] An "unsecured appearance bond" eliminates the need for a defendant to pay money upfront to secure release—but does require defendants to pay money if they violate the terms of release. A defendant may also be released on a "surety bond," which means that a third party promises to pay the amount of the bond if the defendant absconds or commits a new crime while they are on pretrial release.[52]

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As detailed below, it is the policy of the Washtenaw County Prosecutor's Office not to request cash bond in any case. The Prosecutor's Office can and will, however, seek unsecured and surety bonds in appropriate cases, particularly when deemed necessary to ensure public safety or to secure a defendant's appearance at trial.

For the avoidance of doubt, a surety bond under this Policy should not be used to funnel a person to a for-profit bail bondsman. A surety can be *any* third party. Given that the gravamen of this Policy is to eliminate wealth-based detention, it is not appropriate to require a defendant to secure a surety from a for-profit commercial actor. Assistant Prosecuting Attorneys should not advocate for such an outcome. Use of a surety bond is most likely to be appropriate if (1) there is reason to believe that an unsecured appearance bond would not adequately protect public safety or ensure the defendant's presence at trial, and/or (2) in situations where state law requires imposition *either* of a cash bond or a surety bond. *See* MCL 765.6a, as well as discussion

[46] Mich. Const. Art. I § 15.
[47] *Id.*
[48] MCR 6.106(D)(2)(j)
[49] *Id.* 6.106(D)(2)(n)
[50] *Id.* 6106(D)(2)(o)
[51] *Id.* 6.106(A)(2)
[52] *Id.* 6.106(A)(3).

regarding that statutory section below.

In addition, the Prosecutor's Office can and will seek to impose *nonmonetary* conditions in appropriate cases. The default presumption is that a defendant should be released pretrial. But cases in which the risk of public harm is pronounced may be cause to impose stringent nonmonetary conditions. Such cases include, but are not limited to, domestic violence cases and cases involving repeated (or escalating) crimes against persons or property. A defendant's wealth, however, should not play a role in their release.

II. Policy Directive

1. No Cash Bail Policy: As part of authorizing a warrant and filing a complaint, Assistant Prosecuting Attorneys (APAs) *will be required* to fill out the Bond Information Form *in all cases.* APAs may not seek cash bond in any case. In appropriate cases, however, APAs may seek unsecured appearance bonds, surety bonds, and—where lawful—categorical denial of pretrial release. APAs may also seek appropriate nonmonetary conditions of release, as discussed in further detail below.

2. Denial of Pretrial Release Policy: APAs may recommend denial of pretrial release where the defendant is charged with:

A. Murder
B. Treason
C. Criminal sexual conduct in the first degree
D. Armed robbery; or
E. Kidnapping with the extent to extort money or other valuable thing.

APAs may also recommend denial of pretrial release where the defendant is charged with a "violent felony"—defined as a felony in which an element involves a violent act or threat of a violent act against any other person—and:

A. The defendant, during the 15 years preceding the commission of violent felony, has been convicted of 2 or more violent felonies arising out of separate incidents; or
B. At the time of the commission of a violent felony, the defendant was on probation, parole, or released pending trial for another violent felony.

3. Release Conditions: In all cases, APAs should seek the least restrictive release conditions *that will ensure public safety*. For most offenses, that will mean release on a personal recognizance bond. Without more (i.e., repeated violations, or a pattern of escalating conduct), a defendant should generally be released without additional conditions if charged with an offense such as larceny, retail fraud, simple assault, uttering and publishing, a driving offense[53], a possession of contraband offense,[54] fraudulent use of a financial transaction device, or breaking

[53] Driving offenses causing injury, or OWI offenses, may be subject to additional conditions, as discussed in this Policy.

[54] This includes, for example, possession of stolen, embezzled, or converted property, MCL 750.535, carrying a concealed weapon, MCL 750.227, possession of a "blackjack, slungshot, billy, metallic knuckles, sand club, sand bag, or bludgeon," MCL 750.224(1)(d), possession or transportation of a firearm or pneumatic gun in a vehicle,

and entering into a motor vehicle.

This list is non-exhaustive. Again, the default position is to seek the least restrictive conditions that ensure public safety.

In some cases, however, additional conditions will be required to ensure public safety or to avoid flight. All cases are different, and there is no set of standard conditions that will apply across the board. The following are, however, a set of guidelines that should be followed by APAs when recommending conditions of release:

> A. Drug and Alcohol Testing or Tethers—When Recommended: Drug and alcohol testing or tethers should not be recommended as a default position, particularly when a crime did not involve drugs or alcohol. Drug and alcohol testing or tethers may, however, be recommended where:
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> i. The charged crime is a crime against persons or property, and is (a) alleged to have been committed under the influence of drugs or alcohol, or (b) the factual circumstances indicate that the crime was committed in order to obtain drugs or alcohol; and
> ii. The crime is alleged to have been committed in a manner that highly suggests that recurrence is likely if drug or alcohol testing is not imposed.
>
> Drug or alcohol testing or tethers may also be recommended where the instant crime does not meet the foregoing criteria, but the defendant's criminal history, or the substance itself, indicates a future offense against persons or property is likely if drug or alcohol testing or tethers are not imposed.
>
> Thus, for example, drug and alcohol testing or tethers should not generally be recommended if a defendant is charged, for the first time, with simple possession of a controlled substance. Such a charge is *not a crime against persons or property*. Nor should drug or alcohol testing or tethers be required if a person is arrested for participation in a bar fight while drunk. Although that charge is a crime against persons, a bar fight is not (typically) a crime that suggests likely recurrence if drug or alcohol testing or tethers not imposed.
>
> Again, though: drug and alcohol testing or tethers may be recommended if the defendant's *criminal history* indicates that a future offense against persons or property is likely. Thus, for example, an APA *may* recommend drug and alcohol testing for a person who is charged for participation in a bar fight, if that person previously was charged with malicious destruction of property when drunk, or has several OWI offenses. An APA may also recommend drug testing if a defendant has had repeated involvement with the criminal justice system as a result of drug use (e.g., several charges that occurred when

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MCL 750.227c-d, possession of a boat or aircraft signaling device, MCL 750.231c, possession of a portable device directing electrical current, MCL 750.224a, and possession by minors of firearms in public, MCL 750.234f. Drug-related offenses should also generally be considered for pretrial release without conditions, except as further delineated in the "Drug and Alcohol Testing and Tethers" portion of this Policy.

the defendant was under the influence of a particular drug).

Drug testing may also be recommended if the substance itself is pharmacologically linked to violent behavior. Given the observed linkage between methamphetamine and violent behavior[55], for example, drug testing for methamphetamine may be appropriate even for a first methamphetamine-related offense.

Where substance abuse testing is recommended, an APA should seek to ensure that the conditions imposed are narrowly tailored to (a) the risk identified, and (b) the particular drug that is at issue. For example, if an APA deems it appropriate to test a defendant for methamphetamine use, that defendant should not also be precluded from drinking alcohol or using marijuana. Correlatively, that defendant should not be deemed to have failed to comply with pretrial release requirements if s/he tests positive for alcohol or marijuana.

B. Drug and Alcohol Testing—Availability: Whenever drug and alcohol testing is recommended, the Prosecutor's Office should generally recommend that testing be made available in a manner that comports with a defendant's work schedule. The Prosecutor's Office *will not oppose* any reasonable accommodation requested by a defendant to have testing take place outside of work hours. Nor will the Prosecutor's Office oppose reasonable requests for alternative testing arrangements (e.g., testing at a location close to a defendant's place of residence) to be made.

In general, the Prosecutor's Office should recommend that testing take place no more frequently than once per week, unless circumstances otherwise require (e.g., where a defendant needs to be tested for alcohol or for another drug that is quickly flushed from the body).

C. Drug and Alcohol Testing or Tethers—Reconsideration: Wherever the Prosecutor's Office recommends drug or alcohol testing, it shall recommend that such conditions be reconsidered after 60 days. Absent exceptional circumstances, the Prosecutor's Office shall support lifting a drug and alcohol testing requirement if the defendant has complied with both testing and sobriety requirements for 60 days.

D. Driving Restrictions: Driving restrictions are generally disfavored, as they can interfere with a person's ability to transport themselves to work, or to engage in basic family care. If a person is charged with OWIs (particularly repeat OWIs), breathalyzer locks are a preferred alternative to categorial driving restrictions. Driving restrictions may, however, be recommended in cases where the circumstances indicate that public safety requires such restrictions.

E. GPS Tethers: GPS tethers are highly restrictive liberty conditions, and should be recommended primarily where there is a factual basis to believe that a specific person faces a realistic threat from a defendant if a GPS tether is not imposed. When recommending a GPS tether for public safety purposes, the Prosecutor's Office should

[55] *See* Mary-Lynn Brecht and Diane Herbeck, *Methamphetamine Use and Violent Behavior: User Perceptions and Predictors,* Drug Issues, 2013 Oct, 43(4); 468-482.

state the factual basis supporting that recommendation.

GPS tethers may also be used where there is a factual basis to believe that a defendant is a flight risk. When recommending a GPS tether for flight-risk purposes, the Prosecutor's Office should state the factual basis supporting that recommendation.

To the greatest extent possible, GPS tether conditions should be tailored to avoid any accidental violations, or harm to public safety. If, for example, the purpose of a GPS tether is to ensure that a defendant remains at home with the exception of transporting him/herself to and from a place of employment, "go zones" rather than "no go zones" should be recommended. Similarly, if a GPS tether is meant to protect a victim or witness, the Prosecutor's Office should recommend a "proximity tether"—where the victim/witness is alerted by an alarm if the defendant is close by.

Wherever the Prosecutor's Office recommends a GPS tether, it shall recommend that such conditions be reconsidered after 60 days. The Prosecutor's Office should generally support lifting a GPS tether requirement if the defendant has complied with conditions for 60 days. If, however, a tether was imposed to protect an identifiable person from harm, the Prosecutor's Office shall consult with that person before supporting the lifting of a GPS tether. That person's wishes may be an acceptable reason to support the continuation of GPS tether requirements.

F. No Contact Orders: When recommending no-contact orders, the scope of the order should be tailored to the specifics of the case. No-contact orders are a critical tool in providing victim safety in domestic violence cases, so we begin with the presumption that a no-contact order should be requested in any case in which domestic violence is alleged. If the APA decides to deviate from this policy, the specific factual basis for the deviation should be stated.

For other crimes, a no-contact order should be requested only if (1) the complaining witness wishes to have a no-contact order imposed, or (2) there is reasonable factual basis to conclude that a no-contact order is needed to ensure the safety of an identified person or persons. When recommending a no-contact order, the Prosecutor's Office should state the factual basis supporting that recommendation. It is considered a sufficient "factual basis" that domestic violence was alleged.

Categorical no-contact orders—i.e., no-contact orders that prevent a defendant from speaking with a family member or co-parent—should be recommended only where there is a factual basis to conclude that such communications would result in threats or witness tampering. When recommending a categorical no-contact order, the Prosecutor's Office should state the factual basis supporting that recommendation.

G. Travel Restrictions: Absent compelling circumstances that raise a specific and individualized danger of flight, prosecutors should not recommend travel restrictions, particularly for defendants who live outside the jurisdiction. When recommending travel restrictions, the Prosecutor's Office should state the factual bases supporting that

recommendation.

H. House Arrest: House arrest (i.e., home confinement via tether) may be recommended in cases involving a particularly serious, violent offense, where necessary to ensure public safety. When recommending house arrest, the Prosecutor's Office should state the factual bases supporting that recommendation.

I. Firearm and Weapons Restrictions: A recommendation that a defendant, as a condition of pretrial release, be prohibited from possessing a firearm should be made *in all cases* where (1) domestic violence is alleged, (2) a firearm was used in the commission of the instantly charged offense, or (3) there is a factual basis to conclude that a firearm may be used in the commission of a crime by the defendant in the future. In addition, if such a defendant is released into the custody of another community member, that community member should similarly be precluded from having firearms that are accessible to the defendant.

J. Release to a Responsible Member of the Community: There may be some cases in which public safety considerations require the Prosecutor's Office to seek stringent *non-monetary* conditions as a condition of release. Such cases may include domestic violence cases, sexual assault cases, or cases involving escalating cycles of violence.

In such circumstances involving a threat to public safety, the Prosecutor's Office may seek to have the defendant released only to "the custody of a responsible member of the community" who can (1) monitor the defendant during their release period, and (2) ensure the safety of the public. *See* MCR 6.106(d)(2)(j).

In making such a recommendation on the Bond Information Form, the Prosecutor's Office may request that the court require the *defendant* to identify a "responsible member of the community" who can ensure public safety. The Prosecutor's Office should also request the opportunity to participate in a hearing as to whether the "responsible member of the community" can adequately ensure public safety. Sample language (included on the Bond Information Form) is below:

> Defendant should be released only into the custody of a "responsible member of the community" who can "ensure the safety of the public." MCR 6.106(d)(2)(j), (o). Defendant should identify the "responsible member of the community" as a precondition of any release. *See* MCR 6.106(d)(2)(n). The Prosecutor's Office requests the opportunity to participate in a pre-release hearing to determine whether the identified "responsible member of the community" can adequately ensure public safety.

In the foregoing circumstances, the Prosecutor's Office should contest release if it does not believe that the defendant has identified a "responsible member of the community" that can ensure public safety. The Prosecutor's Office should seek continued detention of the defendant until such a "responsible member of the community" has been identified.

This is necessarily a fact-specific inquiry. In some circumstances, a spouse or relative

may qualify as a "responsible member of the community." But in domestic violence cases, a "responsible member of the community" will almost never be an intimate partner or spouse who is a potential victim of a future crime. Similarly, if a defendant lives with a relative and is accused of a violent incident, it may not be appropriate to deem that same relative a "responsible member of the community." Further, in litigating the appropriateness of a "responsible member of the community" in a case involving domestic violence, APAs should be cognizant of the fact that people who commit domestic violence are often able to manipulate others in order to continue the cycle of abuse.

The Prosecutor's Office should seek advance notice from defense counsel (i.e., prior to a hearing) if the defendant has identified a purportedly "responsible member of the community," so that the Prosecutor's Office can conduct appropriate diligence and take a position as to whether the person can adequately ensure community safety.

It should be emphasized that this condition should not be requested in the typical case. It is appropriate only for serious cases which involve a threat to public safety, or repeated crimes against persons or property. When recommending release only to a "responsible member of the community," the Prosecutor's Office should state the factual bases supporting that recommendation, and explain why public safety requires such a recommendation. An illustrative list of examples related to the "responsible member of the community" analysis is included as an appendix to this Policy.

K. Additional Non-Monetary Conditions of Release: In addition to the foregoing, the Prosecutor's Office may recommend, in appropriate cases, additional non-monetary conditions on release. **In no circumstances, however, may the Prosecutor's Office advocate for cash bond.**

J. Consideration Of "Collateral" Facts: In determining what conditions of pretrial release to impose, APAs may appropriately consider "collateral" facts (e.g., facts that are not an element of the charge). For example, when weighing public safety needs, it may be appropriate for an APA to consider an allegation that a defendant's alleged crime was a result of their participation in gang activity. In considering such allegations, however, APAs should consider the strength of their underlying factual bases.

4. MCL 765.6a: MCL 765.6a requires that a court "require a cash bond or a surety other than the applicant if the applicant (1) is charged with a crime alleged to have occurred while on bail pursuant to a bond personally executed by him; or (2) has been twice convicted of a felony within the preceding 5 years."

In cases where MCL 765.6a applies, the Prosecutor's Office may inform the court that the defendant is subject to that statute. Even in such circumstances, however, the Prosecutor's Office will not advocate for a cash bond. Instead, the Prosecutor's Office will recommend that a surety bond be issued as a condition of release, in addition to any non-monetary conditions deemed necessary for public safety.

5. Felony Child Support: Although the Attorney General's Office generally handles felony child-support cases, those cases have a particular wrinkle of which APAs should be aware in the event the Prosecutor's Office is ever called upon to handle felony child-support cases.

MCL 750.165 provides that a person who is charged with felony non-payment of child support must be held, prior to arraignment, on "a cash bond of not less than $500.00 or 25% of the arrearage." At that time, "except for good cause to be shown on the record," the court "shall order the bond to be continued at not less than $500.00 or 25% of the arrearage."

It is the position of the Washtenaw County Prosecutor's Office that MCL 750.165 is constitutional only if interpreted to mean that a person can be released on "good cause" *without* bond, if they lack the ability to pay. The United States Supreme Court has held that pre-trial detention can be justified only if a defendant poses (1) a risk to public safety, or (2) a flight risk.[56] The Court has further held that it is unconstitutional to detain someone merely because of their wealth.[57] Jailing a person, pretrial, without meaningful inquiry into their ability to pay runs contrary to these holdings. What is more, there are obvious policy reasons that detaining a poorer person—potentially risking their livelihood—is counterproductive to the goal of ensuring that child-support payments are made.

Accordingly, as with all cases, the Prosecutor's Office will not advocate for continuation of a cash bond in felony child-support cases. Where the evidence indicates that a defendant lacks the financial ability to pay a cash bond, APAs will advocate for the elimination or reduction of the bond. In all other circumstances, the Prosecutor's Office will decline to take a position on bond.

6. Bond Hearings: This Policy applies to all stages of a criminal case in which bond is considered. At no point in a criminal case will the Prosecutor's Office advocate for cash bond.

7. Defense Motion to Reduce/Eliminate Cash Bond: The Prosecutor's Office will not contest any defense motion to eliminate the imposition of a cash bond. Upon request by defense counsel, the Prosecutor's Office will join any such defense motion that seeks the elimination of a cash bond.[58] The Prosecutor's Office will not, however, join any such motion to the extent it advocates against the Prosecutor's Office's position with respect to nonmonetary conditions of release. The Prosecutor's Office will oppose such motions to the extent they advocate against the Prosecutor's Office's position with respect to nonmonetary conditions of release.

8. Appeals: In appropriate circumstances, the Prosecutor's Office may appeal the imposition of a cash bond when such bond was imposed notwithstanding the Prosecutor's Office's recommendation. *See* MCR 6.106(H). The Prosecutor's Office will appeal such determinations on case-by-case basis, and will do so only when the appeal does not threaten public safety.

9. Data Collection and Reporting: This Policy is being adopted in light of (a) the inherent

[56] *United States v. Salerno*, 481 U.S. 739, 748-50 (1987)
[57] *Bearden,* 461 U.S. at 672.
[58] As outlined in Paragraph 5 of this Policy, however, the Prosecutor's Office may decline to take a position on bond in a felony non-payment of child support case where the evidence indicates a defendant has the ability to pay.

socioeconomic inequity associated with cash bail; (b) the observed racial inequities associated with cash bail; and (c) data and experience which shows that cash bail can be eliminated without meaningfully undermining public safety.

The Prosecutor's Office will collect and analyze data, on an ongoing basis, to ensure that this policy is being implemented in a way that reduces racial and socioeconomic inequities in pretrial detention, and keeps our community safe. The Prosecutor's Office, moreover, expects that this policy will result in a net increase in the number of people being released pretrial. The Prosecutor's Office may choose to reevaluate and modify its policies related to pretrial release if data indicates a need to do so

10. No Substantive Rights Created: This Policy is an exercise of discretion by the Washtenaw County Prosecuting Attorney's Office. Nothing in this Policy purports to affect the legality or propriety of any prosecutor's, judge's, or law enforcement official's actions. Nothing in this Policy shall be interpreted to create substantive or enforceable rights.

11. Exceptions: Requests for deviations from this Policy shall be made in writing, and require the approval of the Chief Assistant Prosecuting Attorney or the Prosecuting Attorney. A deviation from this Policy will be granted only in exceptional circumstances, and where public safety requires that deviation.

Eli Savit
Prosecuting Attorney, Washtenaw County

January 4, 2021

Appendix: Examples of "Responsible Member of the Community"

This appendix provides a list of illustrative examples of factors APAs should consider when seeking release only to a "responsible member of the community." *See* MCR 6.106(d)(2)(n). Notably, "responsible member of the community" is undefined in the Michigan Court Rules. The Court Rules, however, specifically directs the court to set pretrial conditions that ensure "the safety of the public." MCR 6106(D)(2)(o).

The Prosecutor's Office should therefore take the position that a "responsible member of the community" is one who can reasonably ensure "the safety of the public," given the factual circumstances surrounding each case. All cases are different, and are fact-specific. Therefore, what qualifies as a "responsible member of the community" will be different in each case.

With that being said, this appendix gives several *illustrative* examples of how this analysis might be conducted. It will be observed that all of the offenses outlined in this appendix are serious offenses. That is no accident. The "responsible member of the community" condition is a significant liberty restriction, and it may result in a defendant being held, pretrial, until and unless a "responsible member of the community" can be identified. Accordingly, the Prosecutor's Office should seek release to a "responsible member of the community" only where the underlying facts of the case suggest that the defendant would otherwise pose a threat to community.

As outlined in the Policy, the Prosecutor's Office should, where appropriate, seek to place the burden on the *defendant* to identify a "responsible member of the community." The Prosecutor's Office should then take a position, at a subsequent hearing, as to whether release to a particular community member should be granted.

Example 1: Domestic Violence

Abel, a wealthy 48-year-old attorney, is charged with domestic assault after he punched his wife following an argument. Abel has two previous convictions for domestic assault—one of which involved him slapping his wife following an argument, and one of which involved him throwing a dinner plate at her. Neither of those assaults resulted in serious or aggravated injury, but the Prosecutor's Office is concerned that the cycle of violence is escalating. The Prosecutor's Office thus seeks to have Abel released only to a "responsible member of the community," in addition to the imposition of a GPS tether and a no-contact order.

a. <u>No Responsible Member of the Community Identified</u>

Abel is unable to identify a "responsible member of the community," and instead seeks to be released on cash bond (which he could easily afford). The Prosecutor's Office should not consent to cash bond in lieu of release to a responsible community member. Instead, it should take the position that release is inappropriate until and unless a "responsible member of the community" is identified.

b. <u>Responsible Member of the Community Is Potential Victim</u>

Abel identifies his wife as a "responsible member of the community" into whose custody he can be released. The Prosecutor's Office should oppose release. The facts of the case indicate that Abel poses an escalating risk to his wife, and releasing him into her custody would not ensure "the safety of the public." MCR 6106(D)(2)(o).

c. "Responsible Member of the Community" May Be Manipulated

Abel identifies his mother as a "responsible member of the community." Given that domestic abusers are often able to manipulate loved ones, the Prosecutor's Office may take the position that Abel's mother is not a "responsible member of the community" that would ensure he does not have contact with his wife. *See* MCR 6106(D)(2)(o).

d. **"**Responsible Member of the Community" is Unlikely to be Manipulated and is not Potential Victim

Abel identifies a local well-regarded non-profit leader, who is known to the court, as a "responsible member of the community." That non-profit leader pledges that Abel will stay with him, and that he will personally ensure that Abel abides by release conditions.

The Prosecutor's Office may consent to release in such a circumstance, though it may also seek additional non-monetary conditions of release, such as a GPS tether or (if alcohol was involved in the previous assaults) alcohol testing. What is more, the Prosecutor's Office should seek to ensure that the non-profit leader into whose custody Abel is released does not have any firearms on his property.

Example 2: Repeated Non-Violent Offenses

Blake is a 28-year-old who lives with two roommates. Blake is charged with home invasion after officers responded to a call that a neighbor—who was on vacation—had her home broken into late at night. Police officers caught Blake on the scene, and he was arrested. The home invasion took place just 5 minutes away from where Blake currently resides.

Blake had previously been charged with two other non-violent nighttime home invasions in the same neighborhood. He was on pretrial release, facing charges for those two incidents, when the third home invasion occurred. To ensure that similar incidents do not continue to occur, the Prosecutor's Office seeks release only to a "responsible member of the community."

a. Release to Similar Living Situation

Blake identifies one of his roommates as a "responsible member of the community" into whose custody he should be released. Blake's roommate has no criminal record, and is a part-time student who also works night shifts as a bartender.

The Prosecutor's Office should oppose release. Blake is proposing release into a similar living situation that had failed to deter him from committing repeated crimes. Moreover, despite the roommate's apparent good character, it does not appear that his roommate (who is rarely home in the evenings) will adequately be able to ensure additional nighttime break-ins. MCR 6106(D)(2)(o).

b. Release to a Community Member That Cannot Adequately Ensure Public Safety

Blake identifies his grandfather as a "responsible member of the community" into whose custody he should be released. Blake's grandfather, however, is elderly, hard of hearing, and lives just five minutes away from Blake's current residence. The Prosecutor's Office may oppose release, given that it would not have adequate assurance that Blake's grandfather would be able to stop Blake from engaging in additional nighttime break-ins. *See* MCR 6106(D)(2)(o).

c. Release to a Community Member That Can Adequately Ensure Public Safety

Blake identifies his aunt as a "responsible member of the community" into whose custody he should be released. Blake's aunt lives 50 minutes away from Blake's current residence, and works from 7 AM-3:30 PM as a paraprofessional at a local elementary school. The Prosecutor's Office may consent to release, given that it will have some reasonable assurance that Blake's aunt may be able to prevent additional nighttime break-ins in the community. The Prosecutor's Office, however, may wish to seek additional restrictions, such as a GPS tether with "go zones."

Example 3: Serious Violent Offenses

Chris is a 19-year-old who lives with his mother and his father. He known to local law enforcement as a member of a street gang. That gang is in the midst of an escalating, violent feud with another street gang. Chris is accused of shooting a gun at a rival gang member. Fortunately, the bullets missed, and Chris is charged with (among other things) attempted murder. Because *attempted* murder is not a charge for which Chris can be categorically held pending trial, *see* Mich. Const. Art. I § 15, Chris must have release conditions imposed. Among other restrictions (house arrest, tether), the Prosecutor's Office seeks release only to a "responsible member of the community."

a. Release to Similar Living Situation

Chris identifies his parents as "responsible members of the community." Neither of Chris's parents have criminal history, and they pledge that at least one will be in the home at all times. Nevertheless, the Prosecutor's Office should oppose release. In this circumstance, lives are on the line, and the threat to the community is grave. Releasing Chris to a similar living situation as he was previously in will not adequately ensure public safety.

b. Release to a Community Member that Cannot Adequately Ensure Public Safety

Chris identifies his aunt as a "responsible member of the community" into whose custody he should be released. Chris's aunt lives 50 minutes away and works from home. In many cases, this may be adequate to ensure public safety. Given, however, that Chris is involved in escalating gang violence, it is quite possible that even his aunt will be unable to ensure that Chris does not engage in further violence. What is more, Chris's release into his aunt's custody may result in retaliation (i.e., an attempt on *Chris's* life) by the rival gang. In a situation of this magnitude, the Prosecutor's Office should oppose release, as Chris's aunt will likely be unable to ensure public safety.

c. Narrow Circumstances of Release

It may be observed that, in a situation of this magnitude, it will be exceedingly difficult to identify a "responsible member of the community" that can ensure public safety. The imposition of this condition may thus functionally result in Chris being held in jail pending trial. That is no accident. Again, it is the policy of this Prosecutor's Office to support pretrial release only to the extent it is consistent with public safety. In virtually every circumstance, it would pose a serious risk to public safety to release a gang member, accused of shooting at another gang member, in the midst of an escalating cycle of gang violence in the community.

Moreover, at least for a situation of this magnitude, the imposition of stringent nonmonetary conditions would result in little difference from the status quo. Prior to the imposition of this Policy, the Prosecutor's Office would likely seek an astronomically high cash bond for a person in Chris's situation—rendering it nearly impossible for him to be released. "Nearly impossible," but not entirely impossible. If Chris, for example, has a wealthy parent, it is possible that even an astronomical cash bond could be posted, placing the community in further danger.

Similarly, the fact that there are *nearly no* circumstances in which it would be appropriate to release Chris into the custody of a "responsible member of the community" does not mean that there are *no* such circumstances. Perhaps, for example, Chris could be released into the custody of a married pair of sworn law enforcement officers, who live far away from the community, and who will agree to keep Chris under their custody and watch 24 hours a day. It is theoretically possible that such a circumstance—combined with a GPS tether and an order of house arrest—could adequately ensure public safety. But the appropriate set of circumstances in a situation of this magnitude will be necessarily (and appropriately) narrow. And unlike a cash bond-based approach, it will be tailored to the actual public safety needs of the community, not to the wealth of the defendant.

* * *

The foregoing examples are not in any way meant to be exhaustive. Again, each circumstance is different, and the Prosecutor's Office should strive to impose the least restrictive conditions that will ensure public safety. In some factual circumstances (e.g., a more serious domestic violence case than the one outlined above), that will result in more stringent conditions than provided in these examples. In others (e.g., a less serious string of non-violent offenses than the home-invasion example outlined above), it will result in less stringent conditions. This Appendix is meant to be illustrative only, and to provide APAs with concrete examples of the factors they should be considering when seeking release to a "responsible member of the community."

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