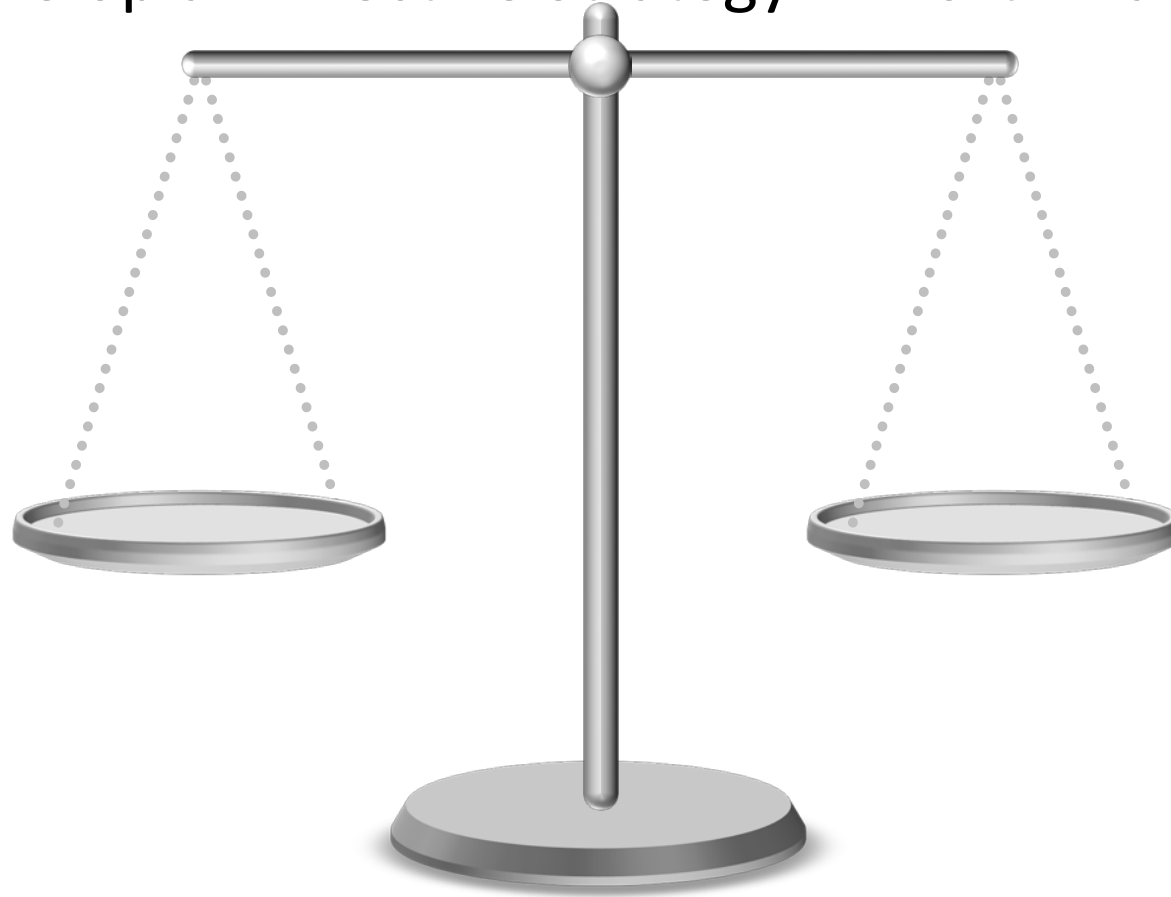


# Pre-Trial Services: Overview of Pre-Trial Services and How to Develop an Effective Strategy in North Dakota



# Some of the Numbers:

- A 2016 Federal Reserve Board study found that 47 percent of Americans would have to sell property or go into debt to come up with \$400 for an emergency expense like a bail fee. <sup>1</sup>
- In 1990, the percentage of pretrial detainees was about 50%, but in 2007, the pretrial detainee population increased to 62% of the jail population<sup>2</sup>
- The United States of America has approximately 615,000 serving time in County [Jail](#)
- Approximately 465,000 of the those serving time in County Jail have not been [convicted](#)

## COST OF PRETRIAL DETENTION

### Financial:

- Often times, an individual detained pre-trial will lose their job
  - If they lose their job, some research suggests serving time reduces hourly wages for men by 11%, annual employment by nine weeks, and annual earnings by 40%<sup>3</sup>
  - Increased cost of time spent by indigent defense contractors
  - The Cost of a day in jail varies widely, but ranges anywhere from approximately \$65 dollars per day to as much as \$200 per day, depending on the facility
    - In FY 2015, the average cost of incarceration of federal inmates was \$87.61

### Social:

- Cost to Detainee
  - Low Risk offenders can and will often learn anti-social behaviors from higher risk inmates
  - A Recent Study on Harris County Texas found similarly situated Defendant's were 25% more likely to plead guilty if incarcerated than those out of custody, 43% more likely to be sentenced to jail, and receive Jail sentences that are more than twice as long on average<sup>4</sup>
  - detention imposes significant yet difficult-to-quantify costs on individuals, including the loss of liberty, dignity, damaged reputation, standing in the community, and disruptions to family life and other relationships<sup>5</sup>

→Example

## CASE LAW

O'Donnell v. Harris County Texas, 882 F.3d 528, 545( 5<sup>th</sup> Cir. 2018)

- Maranda Lynn O'Donnell was arrested for driving without a license, a misdemeanor
- She had to pay \$2500 in order to be released, which she was unable to come up with
- Ms. O'Donnell sued Harris County for their bond practices
- U.S. District Court Judge Lee Rosenthal of the U.S. District Court for the Southern District of Texas issued a 193 page Opinion
  - Judge Rosenthal found as a matter of fact that secured money bail does not improve court appearance or public safety relative to simple alternatives
  - “magistrates may not impose a secured bail solely for the purpose of detaining the accused. And, when the accused is indigent, setting a secured bail will, in most cases, have the same effect as a detention order.”
  - It boils down to this: when a poor defendant and one who has money is arrested on a the a similar charge with similar facts, but the poor defendant has to sit in jail solely due to his financial situation, due process is violated!

In sum, the essence of the district court's equal protection analysis can be boiled down to the following: take two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this violates the equal protection clause, and we agree.”

In Re Humphrey, 19 Cal. App. 5<sup>th</sup> 1006 (Ct.App. 2018)

- 64 year old San Francisco resident was detained because he could not come up with secured money bail
- Faced allegation he had followed a 79 year fellow resident of a senior home, and threatened him, stole \$7 and a bottle of cologne
- Because Mr. Humphrey had a history of substance abuse, bond was set at \$600,000
  - It was later reduced to \$350,000
- Held a financial condition of release, set at an unattainable level, is the equivalent of de facto pre trial detention.
  - Citing Santosky v. Kramer, 455 U.S. 74 (1982), the Court further held: “an arrestee's pretrial liberty interest, protected under the due process clause, is "a fundamental interest second only to life itself in terms of constitutional importance”. In Re Humphrey, 19 Cal.App. 5<sup>th</sup> at 1037.

## Now is the Time for reforming bail in North Dakota

- There is national support for reform of the bail system in our country. In 2013 the Conference of State Court Administrators (COSCA) issued a policy paper, *Evidence-Based Pretrial Release*, which urges that “Court leaders promote, collaborate toward and accomplish the adoption of evidence-based assessment of risk in setting pretrial release conditions.” Later in 2013, the Conference of Chief Justices issued a resolution endorsing the COSCA policy Conference of State Court Administrators.
- Many states including New Jersey, New Mexico to name a few have taken on this reform. Montana, has just recently instituted their own version of pre-trial release
- Where are we currently in North Dakota:

# What do pre-trial systems look like?

- An effective pre-trial service system involves coordination of all three branches of government: (and must include county involvement)
  - Executive: There must be buy in and participation with law enforcement, parole and probation services, and executive level decision makers
  - Judicial:
    - The Court needs to develop and/or adopt a pretrial objective screening tool to provide more information to judicial decision makers when determining bond
    - The Court may need to review some of its rules in relation to bond/bail practices
      - N.D. R. Crim. P. 46
      - Potential rules of professional conduct as they relate to counsel at initial appearances
  - Legislative: There may necessary changes to laws and potentially the State Constitution
    - N.D. Const. Art. I, Sec. 11
    - N.D. Const. Art. I, Sec. 25
    - N.D. Cent. Code 29-08
    - N.D. Cent. Code 26.1-26.6
    - Funding of services necessary for an effective program

# Screening Tools:

- The Ohio Risk Assessment System
- The Arnold Foundation's PSA
- Regardless of which tool is used, they provide the Court with objective information:
- Uses Risk Factors to identify the Risk of Failure to appear and new criminal activity
  - These factor are then scored and assigned a risk level
  - The Court then makes a determination as to whether bond should be imposed and what if any pre-trial release conditions should be set

# Level of Supervision:

- Intensive Intervention for Low Risk Offenders will often increase likelihood of new offense or failure to appear
- Increased reporting requirements can lead to failure
- Some studies have found that lower risk defendants release to conditions that included alternatives to detention, were more likely to experience pretrial failure<sup>6</sup>
- There are few studies on the use of electronic monitoring, but no conclusive evidence that it is effective in reducing FTA's or new arrests
- Simple systems such as notifications by phone or email can significantly reduce non appearance at court
  - given the information on level of supervision for low risk offender, it is important that pre-trial reform not be swallowed in by the dearth of services
  - Likewise, cost should not deter a fundamental constitutional right

# Other Issues that Need to Be Evaluated for a Successful Pre-Trial System:

- Data, Data, Data
  - There is no one size fits all assessment tool, there are unique aspects to consider
- There should be room for overrides of a screening tool result, but an objective screening tool will almost always beat an override
- Judicial Discretion must remain a key component
- Issues associated with Bench Warrants
- Differences between Misdemeanor and Felony pre-trial population
- Notification systems to reduce Failure to Appear
  - Like Dr. Office Reminders

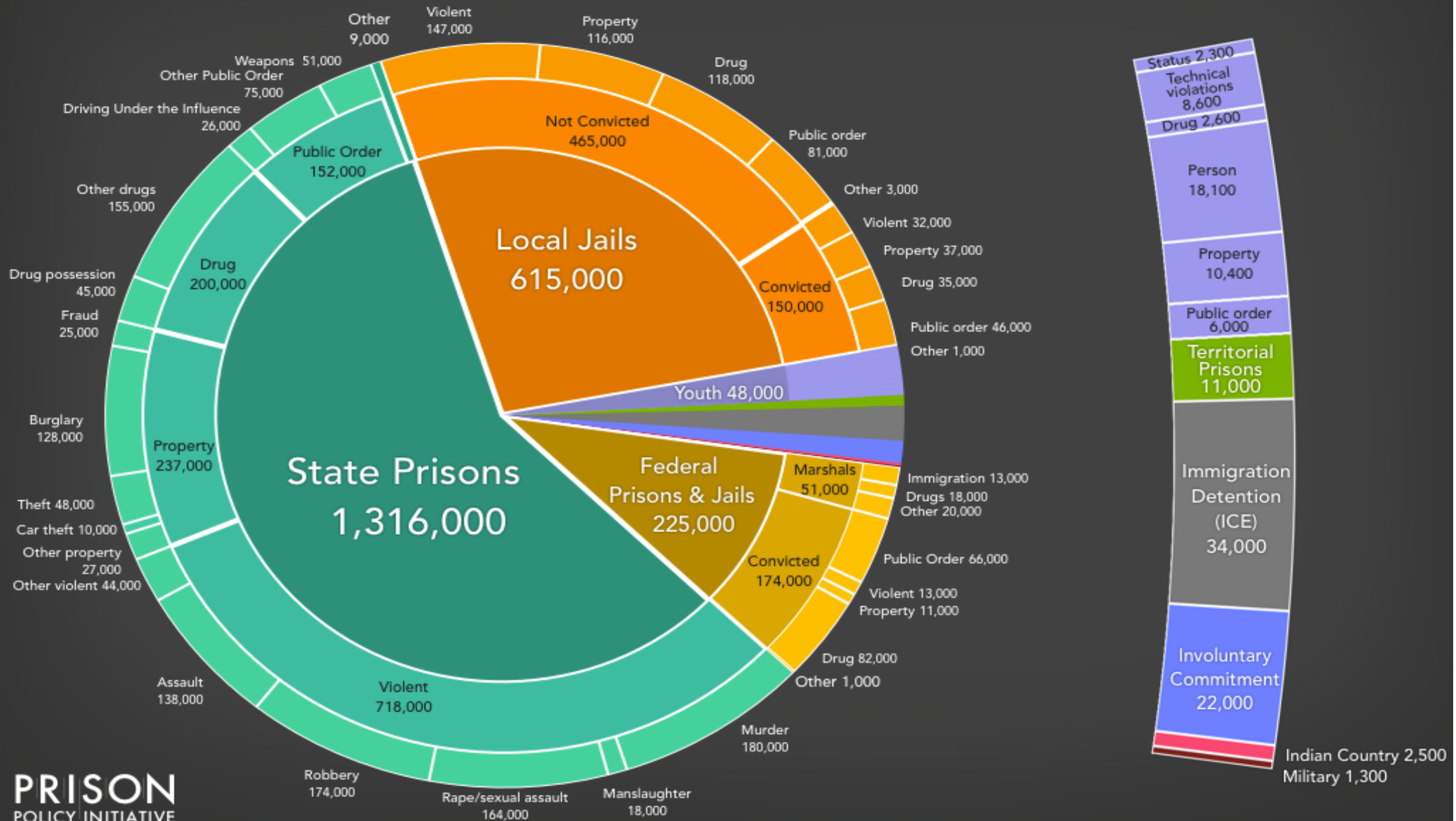


## REFERENCES

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- 2: Shima Baradaran Baughman & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV, 497, 551 note 2 (2012)
- 3: Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 Boston Univ. L. REV. 1, 5 (citing PEW CHARITABLE TRS., COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY (2010))
- 4: Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Pre-Trial Detention*, 69 STAN. L. REV. 711 711 (2017)
- 5: Shima Baughman, *Costs of Pretrial Detention*, 97 Boston Univ. L. REV. 1, 5
- 6: VanNostrand, M., and G. Keebler (2009), Pretrial Risk Assessment in Federal Court. *Federal Probation* Vo. 72(2).

# How many people are locked up in the United States?

The United States locks up more people, per capita, than any other nation. But grappling with why requires us to first consider the many types of correctional facilities and the reasons that 2.3 million people are confined there.



# Pre-trial Detention

The United States has more people — 536,000 — detained before trial than most countries have in their prisons and jails combined.

