

Meaningful First Appearance Hearings

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Agenda

- Nature and Importance of First Appearance Hearings
- Elements of a Meaningful First Appearance Hearing: Process
- Elements of a Meaningful First Appearance Hearing: Substance
- Zeroing In: Risk Assessments at First Appearance

Nature and Importance of the First Appearance Hearing

What Is a First Appearance Hearing?

- A first appearance hearing is the first time a person appears before a judge after being arrested
 - May go by other names, including: initial appearance, advisement, arraignment, and bond hearing, among others
- Typically, conditions of release—if any—are set

Why is a First Appearance Hearing Important?



It is often a person's first chance to secure their freedom after being arrested



It may result in restrictions on a person's liberty



It may result in detention

➤ *But should it?*

Key Elements of a Meaningful First Appearance

- **Process**
 - **Timeliness**
 - **Advisement of Rights**
 - ***Meaningful* Representation**
 - **Reasoned Decisions on the Record**
- **Substance**
 - **Least-Restrictive Conditions**
 - **Individualized Conditions**
 - **Presumption of Release**

Elements of a Meaningful First Appearance Hearing:

Process

Timeliness

- **Due process** requires: If someone remains in jail after arrest, they are provided with the opportunity to **secure their freedom** as soon as possible
- Between arrest and first appearance, someone is being held:
 - *without* a finding of probable cause
 - *without* the state carrying its burden to demonstrate that detention is needed
- This time must be as short as possible—no more than 48 hours of arrest and ideally **within 24 hours**



Advisement of Rights

- **Due process** requires meaningful information about legal rights to be provided at *all* stages
- This means providing advice of rights to each person individually in language they understand:
 - ✓ Purpose and function of hearing: to review individual circumstances and determine what release conditions—if any—to impose to assure court appearance and law-abiding behavior
 - ✓ Right to be heard either directly or through counsel
 - ✓ *De novo* determination
 - ✓ State bears burden of demonstrating that any condition is necessary
- Serves as reminder to other hearing participants of guiding legal principles

Meaningful Representation



- The Constitution guarantees that “in all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense”
- Many courts have held that this right includes representation at first appearance hearings—and with good reason: liberty is at stake

Meaningful Representation

- A growing body of research shows that people represented at first appearance:
 - Have higher release rates
 - Spend fewer days in pretrial detention
 - Are less likely to be subject to financial conditions—and when they are, the amounts are lower
- But there is representation, and then there is ***meaningful representation***



How do we ensure that representation is meaningful?

Meaningful Representation

1. Ensure that experienced attorneys are assigned to the hearing
2. Provide opportunity to engage with counsel *before* first appearance (virtual or physical)
 - Research shows that early representation assists counsel to better understand case and client—and to make more effective arguments at first appearance
 - Results in higher release rates and case dismissal rates
3. Allow Pretrial Services and assigned counsel an opportunity to gather information before the hearing and present it to the court at first appearance

Reasoned Decisions on the Record

- Transparency is key, given the stakes of these hearings
- Decisions—and the reasons for them—should be on the record
 - Judges' reasons for their decision are explained clearly to the person appearing before them
 - Record that the judge has considered arguments from both sides and considered any factors required by statute or court rules
 - Ability to appeal/seek review quickly

Elements of a Meaningful First Appearance Hearing:

Substance

Presumption of Release

- Legal principles require that **release** be the presumed outcome at first appearance
- Defaulting to the use of financial conditions across the board should be avoided, as it may result in detention of people who should be released
- Ideally, the decision to detain should be reserved for a subsequent hearing, so the focus of the first appearance is **setting conditions of release**

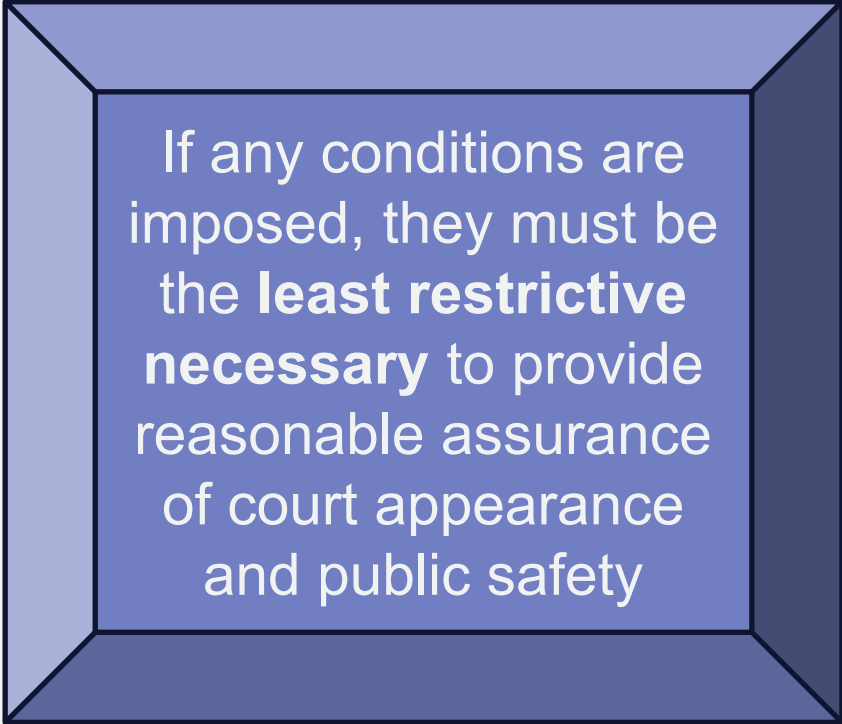
Setting Conditions of Release

For the vast majority of people who are legally entitled to pretrial release, how should a judicial officer set conditions?

Remember: Most people will succeed on pretrial release without any conditions other than a promise to return to court and stay out of legal trouble.

Setting Conditions of Release

Two main legal principles, derived from *Salerno* and *Stack*, govern the setting of conditions of release:



If any conditions are imposed, they must be the **least restrictive necessary** to provide reasonable assurance of court appearance and public safety



Any conditions imposed must be **individualized**

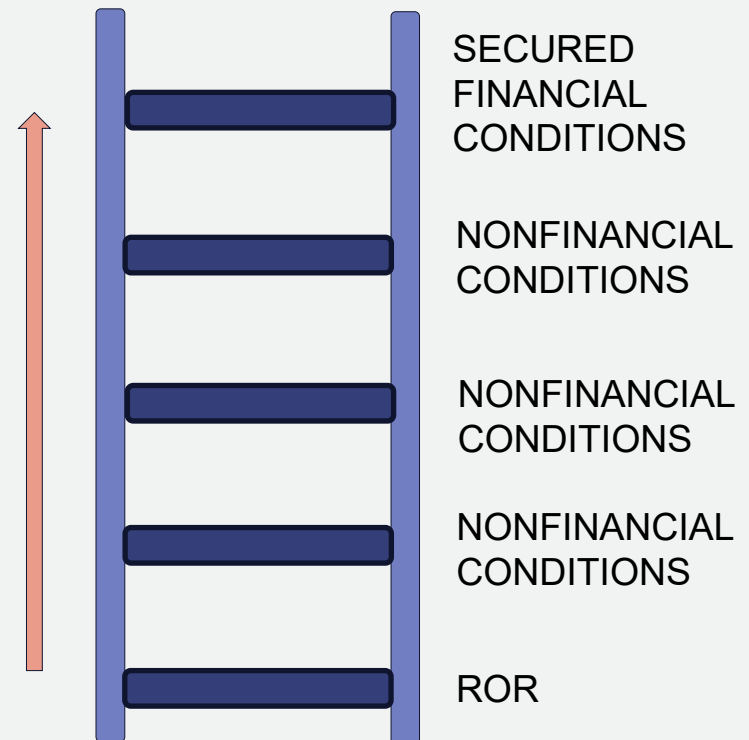
Least-Restrictive Conditions

- Any conditions—beyond a promise to obey the law and return to court—limit someone’s freedom
 - State can rarely do this
- The starting point in many state laws and court rules is **release on recognizance**
- If conditions are necessary, the court should not immediately jump to a condition, such as money bond, that could result in detention
- State laws and rules often reflect these principles

Least-Restrictive Conditions: Example

State Court Rules

- Must release OR or unsec'd
- Unless court finds it will not reasonably ensure appearance, or will present danger to public
- Then, court may consider variety of additional conditions
- Sec'd financial conditions available only if appearance and public safety “cannot otherwise be assured”
 - ✓ Reasons must be on record
 - ✓ Job history and finances considered re. ability to pay



Least-Restrictive Conditions: Financial Release Conditions

- Extremely common across the country—and often a default for nearly everyone arrested
 - Not used as the least restrictive
 - Not individualized (bond schedules)
- Financial conditions of release are meant to be just that—conditions of release
- But current practices result in detention of people likely to succeed on pretrial release simply because they are poor; and the release of those a judge might want detained

Least-Restrictive Conditions: Financial Release Conditions

- Are financial conditions of release effective at promoting court appearance?
- Are financial conditions of release effective at promoting public safety?

“The reliable, credible evidence in the record from other jurisdictions shows that release on secured financial conditions **does not assure better rates of appearance or of law-abiding behavior before trial.”**

O'Donnell v. Harris County, 251 F. Supp. 3d 1052 (S.D. Tex. 2017)

Least-Restrictive Conditions: Financial Release Conditions

- Secured financial conditions contribute to **higher rates of pretrial detention** and exacerbate the **collateral consequences of incarceration**
- Financial release conditions often lead to increased **racial and economic disparities** in the system
 - Wealth extraction from the most impoverished communities



As a result, jurisdictions are working to reduce reliance on financial conditions, or eliminating them altogether

Individualized Conditions

- Conditions should be imposed based on consideration of a person's individual circumstances and **likelihood of pretrial success**
 - State laws and court rules often set forth factors to be considered
- Financial conditions—if used at all—should only be imposed after determining what someone can afford
 - Bond schedules should not be default at first appearance

Risk Assessments at First Appearance

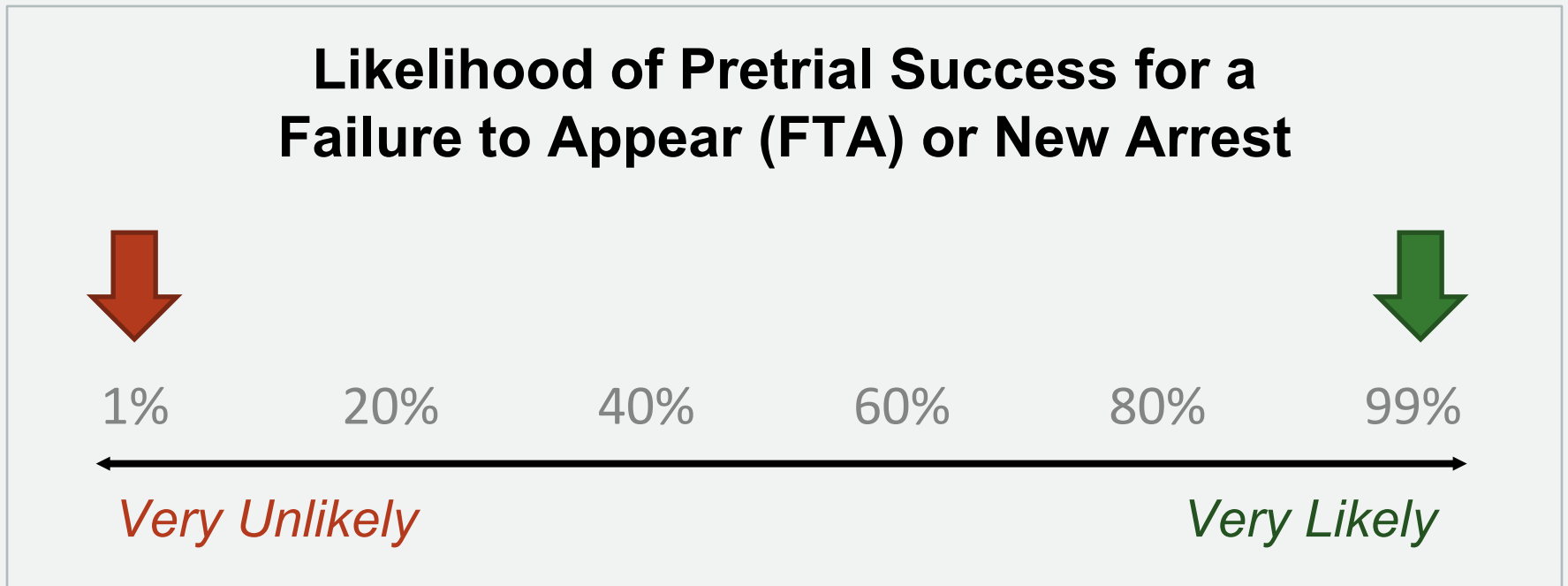
Purpose of Pretrial Assessments

Challenge:

- It is necessary to assess risk when making decisions about pretrial release, detention, and conditions
- That is what a judge is doing—**with or without a tool**—when he/she examines a person and determines what conditions are necessary to provide reasonable assurance of court appearance and public safety
- But it is very difficult to assess risk in advance

Purpose of Pretrial Assessments

- Not an either-or proposition (no 0%, no 100%)
- Exists on a continuum



Purpose of Pretrial Assessments

- Currently decisions are made **subjectively** and **with limited information**
- Pretrial assessment tools are designed to **help predict who is likely to succeed** or fail on pretrial release
- They are **algorithms (statistical models)** that draw on past data to estimate the **probability (risk)** of future events, typically the probability of court appearance and the probability of arrest while on pretrial release

Purpose of Pretrial Assessments

Actuarial pretrial assessment tools have some advantages over unguided decision-making:

- Promote **consistency**
- Increase **transparency**
- Provide data for **evaluation** and **improvement**

Purpose of Pretrial Assessments

But a pretrial assessment **does not make a decision**. It simply **provides information** that decision-makers consider, alongside other information and factors, when deciding how someone's case should proceed.

Role of Pretrial Assessments



An assessment tool alone does not ride to the rescue for a pretrial system that is failing

Role of Pretrial Assessments

But it can play an important role at first appearance:

- How much risk does this person pose of failing to appear for court, being rearrested, and especially rearrested for violence?
- And what, if any, conditions are necessary to mitigate these risks?
 - Recommended release conditions based on assessment score(s)
- Can also be used to inform—**but never determine**—decisions about whether someone is held for a detention hearing, and whether they are eventually detained

Role of Pretrial Assessments

Discussion of bail reform often focuses far too much on assessment tools. But these tools, without **broader change**, cannot bring about desired improvements.

Consider allowing for, rather than legislatively mandating, the use of assessment tools.

- Assessments should be validated (and regularly re-validated) for predictive accuracy and racial neutrality
- In most systems, it is important to allow for different tools to be used, so long as they meet established standards

System and culture change is the goal. Assessment tools are just one possible element in that change.

Questions?

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