

Smarter Pretrial Solutions: Responding to Technical Violations

Introduction

Many jurisdictions aim to address mass incarceration by minimizing how many people come through the “front door” of the criminal justice system. However, technical violations of pretrial release conditions are also a significant source of incarceration. Technical violations are not by themselves criminal offenses, but instead are failures to comply with court-ordered conditions of pretrial release such as drug testing or curfews. What qualifies as a technical violation is the subject of much discretion, and the limited data available show significant racial disproportionality in terms of revocation of release.

Three broad options exist for decreasing the likelihood that technical violations will result in pretrial incarceration:

- Reducing the number of conditions placed on a person, and thereby reducing the opportunity for violations;
- Providing community-based support to increase pretrial success; and
- Changing responses to people who do not comply with all conditions and offering incentives to those who do.

This brief describes the process undertaken by two jurisdictions, Mecklenburg County, North Carolina, and Lucas County, Ohio, to address technical violations, with the goal of increasing success in the community and reducing jail

revocations. In some instances, this required modifying how the jurisdiction addressed instances of non-compliance. For example, pretrial services in Mecklenburg County switched from routinely giving judges a notice of revocation along with an order of arrest, to a notice of non-compliance, which gave judges more options on how to respond. In order to heighten focus on compliance with release conditions, Lucas County adapted its data-collection system to capture compliance data and established multi-pronged communications for educating clients on incentives for compliance. The two sites also developed strategies to track outcomes and ensure fidelity to the process.

In addition to this brief, representatives from the two jurisdictions described their experiences in a First Friday Forum webcast, [which is available on the University of Pretrial](#).

How Do Technical Violations Fit Into Pretrial Reform?

Pretrial justice reform has become a major focal point in discussions around criminal justice policy and practice. In the last few years, nearly every state has addressed pretrial justice in some way, whether it is through legislation, judicial leadership, or community activism. The majority of these reforms focus on the front end of the pretrial justice system—trying to divert people away from the criminal justice system or limit the depth of their contact with the

system—with the goal of ending the habitual mass incarceration of people at the pretrial stage.

This focus, however, has diverted attention away from another critical pathway to pretrial detention. When a person is released, that person may be subject to certain conditions, such as meeting with pretrial services, drug testing or alcohol monitoring, or abiding by a curfew. Failing to meet such a condition (other than the condition to appear in court and have no new arrests) is known as a technical violation. Technical violations are not by themselves criminal offenses, but can result in modification of release conditions or even revocation of release. As a result, even jurisdictions with high initial pretrial release rates can still end up incarcerating a large number of people, and these practices are often going unnoticed.

Over 6.6 million adults in the United States are under some form of supervision, whether in the pretrial, probation, or parole contexts, and as a result, technical violations are a considerable driver of incarceration.¹ The Council of State Governments estimates that one in four incarcerated people are locked up due to supervision violations.² Pretrial technical violations raise concerns over more people becoming more deeply involved in the criminal justice system even as they are still entitled to a presumption of innocence regarding the principal charge.

- Pretrial services in Sonoma County, California noted that in 2018, 45 percent of cases had at least one technical violation filed with the court, leading to the conclusion that

the “more terms associated with release, the greater the likelihood that an individual will violate those terms, potentially leading to subsequent detention.”³

- In Virginia, 14 percent of people placed on pretrial supervision had their bail revoked due to a violation of condition of pretrial release in FY 2018.⁴ Notably, the number of people placed on pretrial supervision in the state has risen significantly in recent years; increasing 17 percent from FY 2015 to FY 2018.⁵
- Technical violations make up 29 percent of cases where bond is revoked in Illinois.⁶

In the [2019 Scan of Pretrial Practices](#), 43 percent of responding counties said they did not track data on technical violations; 41 percent said they did track them; and 16 percent did not know.⁷ Of the 37 counties who did track technical violation data, 70 percent tracked their readmission rate (i.e., the percentage of people who were booked into jail, released, but taken back to jail for a technical violation); 16 percent did not track it; and 14 percent did not know whether their county tracked this data.⁸

PRETRIAL TECHNICAL VIOLATIONS RAISE CONCERNS OVER MORE PEOPLE BECOMING MORE DEEPLY INVOLVED IN THE CRIMINAL JUSTICE SYSTEM EVEN AS THEY ARE STILL ENTITLED TO A PRESUMPTION OF INNOCENCE REGARDING THE PRINCIPAL CHARGE.

In many jurisdictions, while the growing body of pretrial law and research are in the forefront of release decisions and condition setting, subsequent decisions relating to technical violations lack the same vigor or nuance relating to likelihood of success. As noted by Jessica Ireland, Pretrial Services Program Manager for Mecklenburg County, in PJI’s [First Friday Forum on technical violations](#), “Once you were on supervision, we essentially handled all violations the same.”

Moreover, many frequently used pretrial release conditions have not been proven to support the goals of pretrial release, which are returning to court with no new arrests. Studies have shown that less intensive forms of supervision are equally as successful in terms of court appearance rates and arrest rates when compared to more intensive forms of supervision.⁹ The principle of least restrictive conditions for people in pretrial status, who are still entitled to the presumption of innocence, requires that pretrial release conditions should be the minimum conditions necessary to meet the goals of pretrial release. Excessive conditions, including conditions that do not promote returning to court arrest-free, should be avoided.

Racial Bias and Pretrial Technical Violations

Given the inconsistency of data gathering around pretrial technical violations, there is not much data on how technical violations and racial disparity intersect in state and local courts. However, looking at studies of probation revocations, as well as technical violation data from the federal courts, may provide some indications.

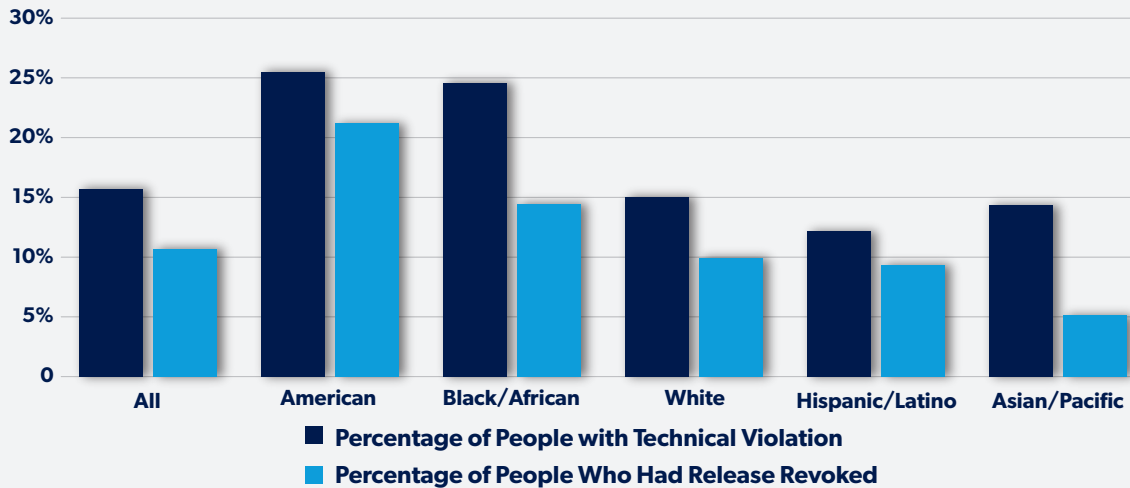
For example, a 2014 study from the Urban Institute looked at probation revocation in Dallas County, Texas; Iowa’s Sixth Judicial District (SJD); Multnomah County, Oregon; and New York City, and found that Black people on probation in each of these jurisdictions were consistently revoked more frequently than White or Hispanic people on probation.¹⁰ While differences in assessment and criminal history accounted for a large portion of the differences—and such differences themselves likely reflect embedded biases in the system—the researchers noted that the size of the remaining unexplained disparity was a cause of concern.

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“Given the consistent research finding that [B]lacks are disadvantaged by bias in a broad variety of contexts in the United States, it seems prudent to assume that some level of bias may be occurring and to seek options to remediate it. However, responsibility for revocation decision making is diffuse, involving probation officers, supervisors, court liaison staff, and judges. Thus, even if bias appears to be operating, it is still necessary to determine where in the process it may reside.”¹¹

The decision of whether a person has committed a technical violation is subjective to

Technical Violations and Revocation of Release in Federal Court



a degree that permits the influence of conscious or unconscious bias. In a report from the Ohio Ad Hoc Committee on Bail and Pretrial Services, the committee noted, “Pretrial service agencies and departments should be given the opportunity to bring a defendant who has a technical pretrial violation into compliance. The agency or department personnel must be able to use their best professional judgment within the parameters of a specific, articulated court policy to say that “this violation” is the tipping point where it is no longer technical.”¹² While professional discretion can be beneficial—for example, considering the circumstances of a curfew violation before determining a response—the added potential for bias requires careful consideration of how individual decisions are made, and appropriate policy guidance and oversight must be in place.

Another source for understanding racial bias is the federal district courts, where such data have

been collected. Out of over 100,000 cases from 2008-2010, 19 percent had at least one instance of pretrial misconduct—a term that includes technical violations, failure to appear in court and arrests for new offenses—and in 11 percent of cases, a person’s release was revoked.¹³ The federal system has traditionally had extremely low rates of failure to appear (1 percent) and arrests for new offenses (4 percent), so revocations due to technical violations are significant.¹⁴

The data from the federal courts show that American Indian/Alaska Native and Black people are significantly more likely to have a technical violation and to have their release revoked. Twenty-seven percent of American Indian/Alaska Native people and 24 percent of Black people had a technical violation, compared to 16 percent of White, 14 percent of Hispanic and 13 percent of Asian/Pacific Islander people.¹⁵ Twenty-two percent of American

Indian/Alaska Native and 15 percent of Black people had their release revoked, compared to 10 percent of White, 9 percent of Hispanic and 6 percent of Asian/Pacific Island people.¹⁶

Racial disparities in technical violations require particular attention, since determinations of violations are made with a great deal of discretion, and as noted earlier, data on technical violations is limited.

Improving Responses to Pretrial Misconduct

In 2017, the Pretrial Justice Institute, working with the Bureau of Justice Assistance, [issued a call for applications](#) from localities seeking to improve specific areas of practice, including minimizing technical violations and readmissions to jail, and improving responses to failure to appear and new arrests. Mecklenburg County (NC) and Lucas County (OH) were selected to receive technical assistance.

About Mecklenburg County: One of the most populous counties in North Carolina (1.1 million), Mecklenburg County’s pretrial services operate within the Criminal Justice Services Department. The program has 19 full-time employees, three grant-funded positions, and an annual operating budget of \$1.6 million. Mecklenburg County is 46 percent White, 33 percent Black and 14 percent Hispanic/Latino. According to a 2017 report, the

A Vigorous Process for Determining Revocation of Release in New Jersey

In New Jersey’s historic pretrial justice reforms, the virtual elimination of money bond was its much-discussed centerpiece. Less discussed but just as vital, however, were changes to how technical violations and revocations are handled.

Under the new policy, a person who is released when issued a complaint-warrant may have his or her release revoked under a motion by the prosecutor and a finding by the court that:

- By preponderance of the evidence, the person while on release violated a restraining order or condition of release; or
- There was probable cause to believe the person committed a new crime while on release; and
- “After considering all relevant circumstances including but not limited to the nature and seriousness of the violation or criminal act committed, finds clear and convincing evidence that no monetary bail, non-monetary conditions of release or combination of monetary bail and conditions would reasonably assure the defendant’s appearance in court when required, the protection of the safety of any other person or the community, or that the defendant will not obstruct or attempt to obstruct the criminal justice process.”¹⁷

The new rules also provide for a revocation hearing with full due process protections available, including a right to counsel, right to testify, right to present and cross-examine witnesses, and right to present information.

According to its 2018 report to the governor and legislature, under this new structure, prosecutors in New Jersey filed a total of 3,052 motions to revoke release in 2018.¹⁸ The prosecution withdrew or the court dismissed 1,109 of those motions. Out of the remaining 1,943 requiring a judicial decision, the court granted 56 percent of motions, and denied 44 percent. In other words, out of a possible universe of 35,714 people who could be supervised by pretrial services—representing the majority of people who were issued a complaint-warrant, released and ordered to monitoring by pretrial services—less than 5 percent had their release revoked due to any pretrial misconduct.

Mecklenburg County jail is 67 percent Black, 20 percent White, 11 percent Hispanic/Latino and 1 percent other. Mecklenburg County has undertaken a number of strategies to reduce the number of people detained during the pretrial phase, including reducing the use of financial bonds and arrests.¹⁹ Mecklenburg County approached this initiative with the intention of, “more fully implement[ing] a response to violation structure that incorporated the identified risk of the defendant when responding to compliance and non-compliance.”²⁰

About Lucas County: Lucas County has a population of over 433,000. Its Court of Common Pleas, the trial court of the county, operates a pretrial services program as part of the Regional Court Services Department. Pretrial assessment services are provided to all courts within the county, and pretrial supervision services are available mostly to people charged with felony offenses. Pretrial services has been in existence in Lucas County since the 1980s. Lucas County is 68 percent White, 20 percent Black, and 7 percent Hispanic/Latino. African-Americans make up 58 percent of the arrested jail population. The Lucas County Correctional Center (LCCC) has been under federal court oversight since the 1970s, and has required mandatory releases within certain timeframes.²¹ Under a court order, the maximum jail population has been set at 403, and the order further requires plans to lower the population to 369.²² Since 2016, a multi-pronged strategy has resulted in a 26 percent decline in the average daily population.²³ More than half (54 percent) of people who are released on pretrial supervision score “high” on the county’s pretrial assessment tool, and Lucas County sought a graduated approach to

technical violations to avoid readmission to jail and achieve better outcomes.

Both sites have implemented the Arnold Public Safety Assessment (PSA) and are members of the MacArthur Foundation’s Safety and Justice Challenge network, which seeks to reduce the overuse of jails. Both sites have implemented differentiated supervision levels.

Process of Change

The process for change in both counties took place in four major stages: convening key stakeholders; gathering data; identifying areas for focus and response; and implementation and follow-up.

Bringing Together Stakeholders

Mecklenburg County has a standing Criminal Justice Advisory Group (CJAG) of key justice system leaders that examines local policy. CJAG appointed a committee to work on the technical violations issue, comprised of the lead criminal court judge, appointed public defender, representative from the district attorney’s office, and representatives from pretrial services. Some committee members, such as the defender and judge, had authority to make decisions for their respective agencies.

Lucas County formed a Pretrial Policy Team, which included two of the ten judges from the Court of Common Pleas, a representative from the prosecutor’s office, the chief public defender, a member of court security, the management team from regional court services, and a pretrial services staff member. Ultimately, any policies and procedures adopted by pretrial services had to be approved by a majority vote of the ten Court of Common Pleas judges.

Data Analysis

At the beginning of the initiative, the sites had to hand-pull data to understand the nature of misconduct while on pretrial release, since it was not possible to gather data from multiple systems. Mecklenburg County found that, based on available data, pretrial services was issuing technical violations and ultimately revoking 32 percent of people originally released on supervision.

Lucas County, which included failure to appear in its scope of examination, looked at all technical violation data and found that 7.9 percent of the supervised population had received a technical violation. A deeper look into sub-samples of data revealed that failure to appear was the most common type of misconduct; that technical violations and failures to appear occurred early in the life of the case; and that the most common judicial response to a violation notice was no documented response (33 percent), followed by revocation of bond for failure to appear (26 percent).²⁴

Identifying Areas of Focus

The data provided areas for focus, and helped initiate conversations on next steps, all against a backdrop of understanding pretrial law and research. In this context, the principle of least restrictive conditions, an understanding of risk principles, and an acknowledgement that there is a lack of a sound body of research around supervision, helped guide how participants reached their decisions.

Areas of Focus: Mecklenburg County

For Mecklenburg County, the CJAG committee easily reached consensus around the issue of meeting with pretrial services. Their data showed that two major sources of non-compliant behavior were failing to make initial contact with pretrial services (19 percent) and people who kept their initial appointment but did not sustain contact (38 percent). Members felt it was important for people to keep their initial appointment with their case manager and establish rapport, and for this reason, the

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group agreed that there would not be much leniency for those who did not initially report as instructed. People are offered bus passes at the time of release so they have a means to make their initial appointment. In addition, clients meet face-to-face with members of the court team, and are given clear instructions regarding when and where to report. For those who did not report to subsequent meetings, there was consensus that pretrial services should continue to work with the person and take increasing steps to re-establish contact,

and bring the person back into compliance. The CJAG committee allowed consensus-building to develop over time, providing resources as necessary, whether that meant independent meetings with individual members of the group to allow more candid conversations, or a commitment to look at the data and revisit the issue after a certain amount of time.

ADDITIONAL AREAS OF EXAMINATION, DISCUSSION, AND REFORMS INCLUDED:

Handling Responses to New Arrests

The Mecklenburg CJAG sought to reach consensus over how to handle new alleged criminal activity. The group discussed whether how a person is arrested—physical arrest, warrant, or other means of arrest—and on what charges should trigger a response to non-compliance. The group eventually agreed that except for the lowest level misdemeanors, any manner of arrest for a charge would have some type of response.

The group also re-examined how non-compliant behavior was presented to the court. In the past, it had become routine for pretrial services staff to present a Notice of Revocation to the Court along with an Order for Arrest (OFA) for the judge to sign. While reviewing the procedures, the judges indicated that they felt they had no

choice but to sign the order. The group discussed and decided upon a new process which involves the pretrial services staff submitting a Notice of Non-Compliance as opposed to Notice of Revocation, and asking the judge to identify if they want to take action or not. The result of this new procedure has been an 18 percent decrease in action taken due to non-compliance.

Drug Testing Compliance

In the pretrial context, drug testing conditions are not associated with higher rates of court appearance or lower rates of arrest.²⁵ In spite of this, drug testing remains a widespread condition of pretrial release, even when the charge is not related to drug use. According to the most recent [Scan of Pretrial Practices](#), 77 percent of counties with pretrial services reported that they administered drug tests.²⁶ Among all counties surveyed, only 35 percent had data on how many people were placed on drug or alcohol monitoring or testing.²⁷

Data from Mecklenburg County revealed that compliance with drug testing conditions is not correlated with success on pretrial release. In looking at cases closed as successful, Mecklenburg County found that among cases that tested positive one or more times, 71 percent of cases were successful, compared to 67 percent of cases that never tested positive. As a result, Mecklenburg County decided to avoid the use of drug testing as a blanket condition.

Instead, drug testing must be ordered by the judge, and only when it is considered necessary to mitigate a known risk. The program will not take a punitive response

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to drug use, but will continue to work with the person and make appropriate service referrals.

Incentives for Compliance

While Mecklenburg County had an existing directive that allowed for reductions in supervision after 90 days when a person had achieved full compliance, the policy was not implemented consistently. Under the new policy, incentives such as converting one in-person visit to a phone call or reducing the frequency of drug testing are available after certain periods of compliance.

Areas of Focus: Lucas County

In Lucas County, the Pretrial Policy Team initiated their work around the same time that policies for graduated responses to post-conviction programs had been formalized and presented to the judges. The group took this opportunity to educate all its members on how violations progressed to the point of a notice being sent to the court. This exercise

helped guide the development of a graduated responses policy for people with pretrial status. Looking at graduated responses policies made apparent that existing policy and procedure did not take supervision level into account. Responses to noncompliance were the same across supervision levels, and incentive responses did not exist. The team came to the consensus that the responses to compliance and noncompliance would not be the same across supervision levels. In turn, they developed more specific responses to failure to appear based on the reason given, and to new arrests, based on the type and severity of the charged activity. A table was created with behaviors and potential responses classified by type and ranked by severity.

ADDITIONAL AREAS OF EXAMINATION, DISCUSSION, AND REFORMS INCLUDED:

Drug Testing Compliance

As noted earlier, drug testing conditions are not associated with higher rates of court appearance or lower rates of arrest, and data from both counties revealed that compliance with drug testing conditions is not correlated with successful pretrial release. Lucas County found that people who only incurred a technical violation related to drug testing (i.e., positive drug test, failure to take a drug test, or delinquent reporting for a drug test) had much higher rates of success on pretrial release (76 percent) than those who had a violation for any other condition (34 percent). Lucas County has opted to take a deeper look at pretrial release orders and other data analyses with regard to drug testing before changing their approach.

Incentives for Compliance

Lucas County did not have a formal policy regarding incentives to motivate people to remain in compliance, except for verbal praise. Under the new policy, Lucas County has created an incentives matrix, trained its staff on how to use the compliance review table, and track supervision to provide incentives at the recommended intervals. Pretrial services staff has also been trained on how to educate clients on the compliance policies, and notices to clients have been revised to include reminders of incentives.

Implementation and Follow Up

Arriving at consensus around responses to technical violations is only part of the process; ensuring that the new policies and practices are implemented with fidelity in a sustainable way is the other part of the equation, including gathering data to allow for monitoring and adjustments. Each site used multiple strategies to ensure high-quality implementation, including training, case reviews, formalization of policies, and data collection.

Mecklenburg County implemented its changes in phases. The case management supervisor, who is responsible for maintaining contact with front-line staff, completed eight hours of training prior to a “soft launch” of procedures regarding agreed-upon items, such as handling initial and subsequent contacts, as well as implementation of positive responses to compliance. Pretrial services also committed to additional training for staff and codifying internal directives. The case management supervisor also committed to reviewing cases to ensure that changes are

being implemented consistently. In addition to training for pretrial services staff, the group recognized the need for training for system actors.

In Lucas County, the Common Pleas Court Judges approved the Pretrial Graduated Responses Policy in January 2019. All facets of the policy will not be fully implemented until January 2020, but graduated responses to pretrial compliance and misconduct have slowly been applied to the pretrial supervision population. Lucas County noted in its report, “While the training did slow progress, it was felt that taking a guided and deliberate approach and allowing feedback during the development process would lead to less concerns post-implementation and also lead to long-term sustainability of the policy and resulting procedures.”²⁸

Data Collection as a Component of Implementation

A key element of implementation is data collection and analysis to ensure that actual changes are occurring, examine how reforms may or may not have an impact on racial disparities, and identify areas for improvement. In many cases, the barrier to collecting and accessing data is significant, and creating or modifying systems to handle data collection is an enormous undertaking. As noted earlier, staff from both sites had to hand-pull data because the information was not available in a coordinated way from all involved agencies.

Mecklenburg County’s case management system currently does not permit an indicator of high, medium or low responses, except in the qualitative notes section. To track progress on

responding appropriately to technical violations according to the alleged behavior, the group acknowledged that the system should have that capacity, and also track how frequently judges move to revocation after receiving a Notice of Non-Compliance.

Lucas County modified its case management system to document all of their incentive and misconduct responses in one place. The documentation of incentive responses is an important part of a cultural shift in pretrial services to emphasize compliance with conditions. Changes to the case management system have also been made to allow auditing for timeliness and consistency; capture concurrence rates; and examine the effectiveness of imposed responses by looking at:

- Bond violation data;
- Data on violations sent to court;
- Nature of violations;
- Risk level at time of violation;
- Recommendations to court; and
- Judicial responses.

In the future, Lucas County plans to look at multi-pronged strategies to educate clients on

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incentives, as well as examining lengths of stay of revocation following a technical violation.

Conclusion

Appropriate responses to technical violations are an essential part of pretrial justice. While many jurisdictions are identifying ways to maximize pretrial release at booking or first appearance, the subsequent detention of people due to technical violations can contribute significantly to pretrial incarceration. Technical violations also appear to be a driver of racial inequalities in the pretrial justice system. The data are still limited, but strongly indicate that this issue requires examination and oversight to identify and address potential sources of bias. Jurisdictions should also examine the extent and number of conditions set on people who are given pretrial release, and question whether the conditions are related to meeting the goals of returning to court with no new arrests.

The process of re-examining the handling of technical violations presented significant opportunities for Mecklenburg and Lucas Counties. Recognizing the legal principles in pretrial justice allowed stakeholders to reach a common understanding of how technical violations should be addressed. It was a “get back to basics” moment for many system actors, which eventually produced a more sophisticated level of engagement, improved communications, and greater efficiencies in the systems. As a result of this work, these jurisdictions have been able to reduce readmissions to jail while creating incentives for success that ultimately lead to better outcomes for both impacted people and their communities.

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