Sentencing Guidelines Commission
Review of Uniform Pretrial Release and Detention Act
SB 5307 (2021)

Comment from the Committee:

We appreciate the consideration of uniformity. Uniformity should not be prioritized over what works best for Washington, however. Currently there are substantive changes being made to the SRA, legal changes being made in response to the Blake decision, and we are, on a local and statewide level, looking at how to best make our laws better and fairer for everyone. The SGC is concerned that all this ongoing work makes this a difficult time to craft a Pretrial Release and Detention Act that would work for Washington and be seriously considered by other states.

Additionally, there is an open WA State Supreme Court case looking at pretrial as a procedural right (State v. Smith, 84 Wash.2d 498, 501, 527 P.2d 674 (1974)). As cited in the case, "[T]he fixing of bail and the release from custody traditionally has been, and we think is, a function of the judicial branch of government, unless otherwise directed and mandated by unequivocal constitutional provisions to the contrary." Any legislation now regarding pretrial release runs the risk of being overturned by the state Supreme Court.

Furthermore, there may already be a solution in the works. Pierce and Thurston Counties are working with the Arnold Venture Group's Advancing Pretrial Policy and Research project on pretrial release reform. The APPR project is "aimed at reducing wealth- and race-based discrimination and ensuring pretrial incarceration is used only when absolutely necessary to protect public safety." This will result in a pretrial process built from the ground up, one that can be used by and normed to each county in the state, as pretrial release is a localized issue.

In the tables below are the SGC's concerns and comments regarding Senate Bill 5307 (2021) – Uniform Pretrial Release and Detention Act.

ARTICLE I – GENERAL PROVISIONS

Statutory Provision	Comment	Suggestion
Sec. 102 DETENTION. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise. (4) "Covered offense" means an offense for which the penalty may be life in prison, for which pretrial detention is authorized under Article I, section 20 of the state Constitution. Covered offense also includes a class A or class	This implies that class C felonies are excluded as covered offenses and that automatic release is available. (Senator Pedersen suggested that this is the intent.) There are some class C felonies that would be appropriate for financial condition, for example, Assault 4 with Domestic Violence.	Monetary bail would likely be set for Class C felonies if they are not included. What about misdemeanors? What is the intent – need to know to offer suggestion. Example: class B property offense shouldn't be treated the same as a class B violent offense. Many Class B offenses are unranked. May be premature based on work of the Criminal

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B felony, for which a judicial officer must determine the financial conditions for release.	This language is problematically simplistic. The result is that is both overbroad and underinclusive. For instance, during our discussions, Judge Rumbaugh has expressed concern that it is too narrow, such that it will not cover categories of offenses, such as domestic violence, that present unique considerations aside from their class or authorized statutory penalty. But this language also covers a lot of conduct that is inherently nonviolent in nature, such as MM1, Theft 1, and burglary.	Sentencing Task Force as offenses may change SL and/or classification. Get more information to determine if alternative language is appropriate.
(6) "Not appear" or "nonappearance" means to fail to appear in court as required without intent to avoid or delay adjudication.	The determination of intent or the lack of it, would be difficult to establish. Few defendants would profess that they failed to appear with the intent to thwart proceedings.	CrR 3.2 - willful and non-willful appearance behavior (ex: transportation unavailable) should not be put into same category. Important so as not to penalize persons experiencing based on poverty, class, geography, race or other marginalizations beyond their control.

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(14) "Unsecured appearance bond" means a person's promise other than through a secured appearance bond to forfeit a specified sum if the individual whose appearance is the subject of the bond absconds or does not appear.	Senator Pedersen clarified that this is a process whereby a sum of cash (like 10% of the amount set as bail) is posted with the court and would be refunded after the defendant complied with all pretrial conditions. While the intent is to allow for an "unsecured appearance bond", but some members of the SGC subcommittee read this language as not achieving this intent. Concern is that this language describes a "partially secured bond." Because we support the use of an unsecured appearance bond, we propose adding language to clarify the intent.	Definition does not equate to UNsecured appearance bond. Money bail has disproportionate impact based on class/race. Change (14): "An unsecured appearance bond does not require payment of any money unless the individual absconds or does not appear for a hearing." NOTE: See research article(s).

ARTICLE 2 – CITATION AND ARREST

Statutory Provision	Comment	Suggestion
Sec. 201. A new section is added to chapter 10.31 RCW to read as follows: (1) A police officer who arrests an individual without a warrant shall detain the individual in a detention or custodial facility until the individual's first post-arrest appearance only upon probable cause to believe that the individual: (a) Committed a crime against another individual;	Changing from "shall" to "may" is consistent with the overall intent of the language which seems to be trying to limit the circumstances in which someone can be arrested rather than compelling arrests in situations where even law enforcement would prefer that it not happen. It is also inconsistent with Sec. 201 (2), which does not require booking.	Change (1): "warrant shall" to "warrant may". Change (a): "crime" to "violent crime". Create a narrower definition than 'covered offense' in Sec. 102(4). Jail populations could significantly inflate if applied to all crimes. Many nonviolent crimes result in 'cite and release".

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Statutory Provision	Comment	Suggestion
(c) Will commit a violent crime, including misdemeanors and gross misdemeanors that are not defined as violent offenses in RCW 9.94A.030; or will seek to intimidate witnesses, or otherwise interfere with administration of justice; or	This language is unclear. We do not understand what is included or excluded.	Very complex. Concern about inequity. This is asking law enforcement officers to make determination of whether person would commit future offense and what that offense might be. Commit a violent offense but also include misdemeanor and gross misdemeanor that aren't violent offenses? Which is it?
(d) Is unlikely to respond to legal process based upon the totality of circumstances, including but not limited to the individual's mental condition or impairment, length of residence in the community, criminal history including the existence of pending charges, the existence of arrest warrants for the individual, any pending criminal charges, the willingness of responsible members of the community to assist the individual in appearing for required hearing, and any other factors indicating the individual's ties to the community.	There is no way a busy line officer in the field has access to this information in any reliable way. During our meetings, the judiciary has expressed strong concerns about this language. The defense agrees that it is problematic to the extreme. It is ripe for inequitable application and subjective guesses by law enforcement. It is also difficult to understand how such a determination could be made by law enforcement in the field.	This provision should be stricken.
(2) (b) For purposes of this subsection, "administratively booking" means transporting the individual to a police station or other designated location for the purpose of photographing and fingerprinting as required by RCW 43.43.735 or other statute authorizing the	Does this amend- 43.43.735? "(1) It shall be the duty of the sheriff or director of public safety of every county, and the chief of police of every city or town, and of every chief officer of other law enforcement agencies duly operating within this state, to cause the photographing and fingerprinting of	

Statutory Provision	Comment	Suggestion
collection of identification data. Once identification data is collected, the individual shall be released upon the individual's promise to appear in court pursuant to a summons or upon the date provided by the arresting officer pursuant to local court rule.	all adults and juveniles lawfully arrested for the commission of any criminal offense constituting a felony or gross misdemeanor. (a) When such juveniles are brought directly to a juvenile detention facility, the juvenile court administrator is also authorized, but not required, to cause the photographing, fingerprinting, and record transmittal to the appropriate law enforcement agency; and (b) a further exception may be made when the arrest is for a violation punishable as a gross misdemeanor and the arrested person is not taken into custody. (2) It shall be the right, but not the duty, of the sheriff or director of public safety of every county, and the chief of police of every city or town, and every chief officer of other law enforcement agencies operating within this state to photograph and record the fingerprints of all adults lawfully arrested."	
(3) An individual who is arrested upon probable cause to believe the individual has committed a crime and who is not detained or administratively booked at the time of arrest shall be photographed and fingerprinted following the individual's first appearance in court for proceedings arising from such arrest for any criminal offense constituting a felony.	Does this amend- 43.43.735? See above. See prior comments. Use of "felony" appears to be narrower than current law.	Change (3): from "arrest shall be" to "arrest may be".

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ARTICLE 3 – RELEASE HEARING

Statutory Provision	Comment	Suggestion
Sec. 301. TIMING. (2) The court may continue a release hearing: (a) On motion of the arrested individual; or (b) In extraordinary circumstances, for not more than 48 hours, on its own or on motion of the prosecuting attorney.	The defense has multiple objections to this language.	Provision (2)(b) should be stricken.
(3) At the conclusion of a release hearing, the court shall issue an order of pretrial release or temporary pretrial detention.	This language conflicts with the requirement that a bond be given unless the case falls within the narrow category of those that are eligible for "pretrial detention."	
Sec 303. JUDICIAL DETERMINATION OF RISK. At a release hearing, the court shall determine whether the arrested individual poses a risk that is relevant to pretrial release. The individual poses a relevant risk only if the court determines by clear and convincing evidence that the individual is likely to abscond, not appear, obstruct justice, violate an order of protection, or there is substantial risk the arrested individual will commit a violent crime. The court shall consider:	CrR 3.2 (k)(2) references a clear and convincing standard in the context of a hearing revoking conditions of release or forfeiting bail. This clear and convincing standard does not appear anywhere else. While in practical terms most judicial officers will have to be 'convinced' that the pretrial conditions imposed (or revoked) are done so property, this standard is too inexact to allow for uniform application. Most judicial officers would come within a relatively close range when deciding a more probable that not issue, and a beyond a reasonable doubt issue. There is a great range of opinion about what is clear and convincing, and therefore difficult to uniformly apply. Is 60% clear and convincing? 70%? 80%? Can the qualitative circumstances even be quantified in this way. This clear and convincing standard finds its way into this bill in multiple places and this concern applies to all such references.	

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Statutory Provision	Comment	Suggestion
(1) Available information concerning: (a)The nature, seriousness, and circumstances of the alleged offense; (b) The weight of the evidence against the individual;	This sets an impossible standard for bail hearings. The prosecution will not have sufficient time to provide notice of the allegations and alleged evidence to the defense. The defense will have had no opportunity to review the allegations, meaningfully discuss with the client, investigate, identify weaknesses in the evidence, and provide information that may be relevant to assessing the "weight." Certainly, there are times when defense counsel has argued that cases are weak, and that the weakness should be considered as a part of the pretrial detention/release decision. But for both large and small jurisdictions, it is difficult to see how this would reliably function as intended. It is hard to see how this adds any meaningful substantive or value.	
(c) The individual's criminal history, history of absconding or nonappearance, and community ties; and	This language is inadequate to address the complexities of the analysis. It is overinclusive and under specific. In determining appropriate language, consideration should be made about violent offenses, offenses against persons, DUIs, etc.	
(d) Whether the individual has a pending charge in another matter or is under criminal justice supervision;	This is overly broad. Many individuals are on a form of "criminal justice supervision" that is in name only. What is the relevance? Also, inclusion of this will deepen racial disproportionality and inequity faced by poor and marginalized people.	

Statutory Provision	Comment	Suggestion
(3) Other relevant information, including information provided by the individual, the prosecuting attorney, or an alleged victim.	Why is the prosecutor added here again? Does this contemplate that the prosecutor would have information beyond what is already listed above. This should be removed and/or it should be reworded to be a catch-all that is applicable to both prosecution and defense.	Change (3): "by the individual, those in the individual's community or support system, the prosecuting attorney…" These are often the people with information most relevant to a person's success if released, and to the harms that will be caused by detention.
Sec. 304. PRETRIAL RELEASE. (1) Except as otherwise provided in subsection (2) of this section and section 308 of this act, at a release hearing the court shall issue an order of pretrial release on recognizance. The order must state: (a) When and where the individual must appear; and (b) The possible consequences of violating the order or committing an offense while the charge is pending.		Change (b): "committing a violent/person offense while…":
(2) If the court determines under section 303 of this act that an arrested individual poses a relevant risk, the court shall determine under sections 305 through 307 of this act whether pretrial release of the individual is appropriate.	This should be reworded to make it clear that the court is determining whether to release an individual with or without a bond, instead of whether to release or detain an individual.	
Sec. 305. PRACTICAL ASSISTANCE—VOLUNTARY SUPPORT SERVICES. (1) If the court determines under section 303 of this act that an arrested individual poses a relevant risk, the court shall determine whether practical assistance or a voluntary support service, or both, are available and sufficient to satisfactorily address the risk. Practical assistance	Case law prohibits detention in a treatment facility pretrial, except for competency restoration. The defense would object to the Court ordering treatment as a condition of release. This is contrary to applicable law. See Butler v. Kato, "imposing affirmative requirements, as	

Statutory Provision	Comment	Suggestion
may include delayed release for up to 24 hours for an intoxicated individual when release would be unsafe or for transfer to a treatment facility for custody and care as permitted by court rule. Voluntary support services may include pretrial services programs, housing support programs, pretrial release programs provided in RCW 10.21.015, and other available state or community programs for which an arrested individual qualifies.	the court has on Butler, could involve serious restrictions on his constitutional rights." https://caselaw.findlaw.com/wa-court-of-appeals/1297932.html	
Sec. 306. RESTRICTIVE CONDITION OF RELEASE. (2) A restrictive condition under subsection (1) of this section includes: (a) Mandatory therapeutic treatment or social services when authorized pursuant to chapter 71.05 RCW or other applicable laws;	Case law prohibits detention in a treatment facility pretrial, except for competency restoration. The defense would object to the Court ordering treatment as a condition of release. This is contrary to applicable law. See Butler v. Kato, "imposing affirmative requirements, as the court has on Butler, could involve serious restrictions on his constitutional rights." https://caselaw.findlaw.com/wa-court-of-appeals/1297932.html	
(b) A requirement to seek to obtain or maintain employment or maintain an education commitment;	This is problematic for multiple reasons. What is the nexus between this factor and the alleged crime? What evidence will be needed to demonstrate compliance? Who will compliance be demonstrated to? When? What if the person is laid off? What if the arrest, or the conditions of release, cause the individual to lose employment? What if the individual is unemployable due to disability?	

Statutory Provision	Comment	Suggestion
	What if the individual is a full-time mother or father?	
(k) A condition proposed by the arrested individual, the prosecuting attorney, or an alleged victim;	This seems problematic and we are unsure what appropriate and constitutional conditions could be imposed that are not already covered by other factors.	
(l) Any other nonfinancial condition required by law of this state other than this act; or	What is this to include? Where is the limit?	
(3) The court shall state in a record the reasons the restrictive condition or conditions imposed under subsection (1) of this section are the least restrictive reasonably necessary means to satisfactorily address the relevant risk the court identifies under section 303 of this act.	The specific language that achieves this purpose could be determined.	Change (3): "of this act and, in the case of a secured bond, will indicate what information or evidence supports the proposition that a certain bond amount will mitigate the risk."
Sec. 307. FINANCIAL CONDITION OF RELEASE. (1) Subject to sections 308 and 403 of this act, the court may not impose a restrictive condition under section 306 of this act that requires initial payment of a fee in a sum greater than the arrested individual is able to pay from personal financial resources within 24 hours after the condition is imposed. If the individual is unable to pay the fee, the court shall waive or modify the fee, or waive or modify the restrictive condition that requires payment of the fee, to the extent necessary to release the individual. If the individual is unable to pay a recurring fee, the court shall waive or modify the recurring fee or the restrictive condition that requires payment of the fee.	It is not possible to reliably know this financial information at an arraignment that normally follows a day or two after detention. Generally speaking, this would result in 90% or so of individuals arrested being released without bail regardless of the severity of the offense. Cash bail has its place in some severe crimes and is also a constitutional mandate (Art. 1 Sec. 20) How do judges (or prosecution or defense) have the time and resources to reliably determine this? The better approach is that taken by New York. Individuals cannot be ordered to pay fees in connection with restrictive conditions. There is no "means test".	

Statutory Provision	Comment	Suggestion
	Is this referring to house arrest fees?	
(3) Subject to sections 308 and 403 of this act, the court may not impose a secured appearance bond as a restrictive condition under section 306 of this act unless the court determines by clear and convincing evidence that the arrested individual is likely to abscond, not appear, obstruct justice, or violate an order of protection.	Don't like the standard.	
4) Subject to sections 308 and 403 of this act, the court may not impose a secured appearance bond as a restrictive condition under section 306 of this act: (a) To keep an arrested individual detained; (b) For a charge that is not a felony, unless the individual (i) has absconded; or (ii) did not appear in a criminal case or combination of criminal cases three or more times; or	Over what time period?	
(c) The cost of which is an amount greater than the individual is able to pay from personal financial resources within 24 hours after the condition is imposed.	As with paragraph 306(4)(c) and paragraph 308 (1) and (2) which follow, there is no reliable or efficient way of making this determination.	
Sec. 308. TEMPORARY PRETRIAL DETENTION. (1) At the conclusion of a release hearing, the court may issue an order to detain the arrested individual temporarily until a detention hearing, or may impose a financial condition of release in an amount greater than the individual is able to pay from personal financial resources within 24 hours after the condition is imposed, only if the individual is charged with a covered offense and the court determines by clear and convincing evidence that:	Defense opposes any temporary pretrial detention What does "covered offense" include? A and B felonies? Defense agrees with the judiciary that this is a problematic standard that would be difficult to apply and lead to inequities.	

Statutory Provision	Comment	Suggestion
(b) The individual has violated a condition of an order of pretrial release for a pending criminal charge; or	This is far too broad.	Provision (b) should be stricken.
(c) In a case in which the individual is charged with a felony, it is likely the individual will not appear, and no less restrictive condition is sufficient to satisfactorily address the relevant risk the court identifies under section 303 of this act.	Too broad. Also unclear. Is this for Class C felony offenses since As and Bs re "covered offenses?"	
(2) If under subsection (1) of this section the court issues an order to detain the arrested individual temporarily or imposes a financial condition of release in an amount greater than the individual is able to pay from personal financial resources within 24 hours after the condition is imposed, the court shall state its reasons in a record, including why no less restrictive condition or combination of conditions is sufficient.	Not clear just how detailed these findings should be. Will a simple "based on the totality of the circumstances" statement be satisfactory, or does each of the CrR 3.2 criteria, in combination with the (unreliable) financial resources information have to be detailed in the court's rationale? Seems overly cumbersome and unnecessary. This needs to allow for a 3.2j hearing to reconsider.	

ARTICLE 4 – DETENTION HEARING

Statutory Provision	Comment	Suggestion
Sec. 401. TIMING. (1) If the court issues an order of temporary pretrial detention of an arrested individual under section 308 of this act, or pretrial release of an arrested individual under section 304 of this act subject to a restrictive condition that results in continued detention of the individual, the court shall hold a hearing to consider	The judiciary has expressed concern about being able to do this within 48 hours. It is clear (and Senator Pederson was so advised) the courts do not have close to the necessary resources to hold an evidentiary conditions of release hearing within 3 days, or 3 weeks for that matter, of every case where	

Statutory Provision	Comment	Suggestion
continued detention of the individual pending trial. The hearing must be held within three days not including any intermediate Saturday, Sunday, or legal holiday after issuance of the order.	restrictive conditions, including detention, are imposed. This is simply unworkable in its present form. What does this contemplate? Is it a 3.2j hearing but more robust?	
(4) At the conclusion of a detention hearing, the court shall issue an order of pretrial release or detention .	Unconstitutional for the vast majority of charges.	
Sec. 402. RIGHTS OF THE DETAINED INDIVIDUAL. (1) At a detention hearing, the detained individual has a right to counsel. If the individual is indigent, a public defense services agency or provider shall provide counsel.	It is clear (and Senator Pederson was so advised) the courts do not have close to the necessary resources to hold an evidentiary conditions of release hearing within 3 days, or 3 weeks for that matter, of every case where restrictive conditions, including detention, are imposed. This is simply unworkable in its present form.	
(2) At a detention hearing, the detained individual has a right to: (a) Review evidence to be introduced by the prosecuting attorney before it is introduced at the hearing;	There should be a right to introduce witnesses separate from that done as a part of later case preparation.	Change (2): "At a detention hearing, the rules of evidence apply and the detained…"
Sec. 403. PRETRIAL DETENTION. (1) At a detention hearing, the court shall consider the criteria in sections 303 through 307 of this act to determine whether to issue an order of pretrial detention or continue, amend, or eliminate a restrictive condition that has resulted in continued detention of the detained individual. If failure to satisfy a secured appearance bond or pay a fee is the only reason	Regarding "an order of pretrial detention," this is unconstitutional. While often true, failure to post a bond should not be considered prima facia evidence of anything, even indigency.	

Statutory Provision	Comment	Suggestion
the individual continues to be detained, the fact of detention is prima facie evidence that the individual is unable to satisfy the bond or pay the fee.		
(2) The court at a detention hearing may issue an order of pretrial detention or continue a restrictive condition of release that results in detention only if the detained individual is charged with a covered offense and the court determines by clear and convincing evidence that:	Regarding "an order of pretrial detention," this is unconstitutional. Once again we see the clear and convincing standard as unworkable. "Clear and convicting evidence is a problematic standard.	
(a) It is likely that the individual will abscond, obstruct justice, violate an order of protection, or there is substantial risk the arrested individual will commit a violent crime and no less restrictive condition is sufficient to satisfactorily address the relevant risk the court identifies under section 303 of this act; or	A problematic standard.	
(3) If under subsection (2) of this section the court issues an order of pretrial detention or continues a restrictive condition of release that results in detention, the court shall state its reasons in a record, including why no less restrictive condition or combination of conditions is sufficient.	Not clear just how detailed these findings should be. Will a simple "based on the totality of the circumstances" statement be satisfactory, or does each of the CrR 3.2 criteria, in combination with the (unreliable) financial resources information have to be detailed in the court's rationale? Seems overly cumbersome and unnecessary.	

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ARTICLE 5 – MODIFYING OR VACATING ORDER

Statutory Provision	Comment	Suggestion
Sec. 502. MOTION TO MODIFY. On its own or on motion of a party, the court may modify an order of pretrial release or detention using the procedures and standards in Articles 3 and 4 of this chapter. The court may consider new information relevant to the order, including information that the individual subject to the order has violated a condition of release. The court may deny the motion summarily if it is not supported by new information.	With this section the proposed legislation has now created a post arraignment, evidentiary hearing process, followed (in this section) by an appeal process where, unlike most other appeals, new information can be submitted that was not in the evidentiary hearing record. This entire process creates a quagmire of delay and imposes an extraordinarily large unfunded mandate upon the courts. This information should include evidence that the individual has been detained longer than the minimum sentence in the case. There should be a presumption of release at that time.	

ARTICLE 6 – MISCELLANEOUS PROVISIONS

Statutory Provision	Comment	Suggestion
Sec. 602. UNIFORMITY OF APPLICATION AND CONSTRUCTION RCW 10.19.170 and 1996 c 181 s 1 are each amended to read as follows: ((~~Notwithstanding CrR 3.2, a~~)) A court ((~~who~~)) that releases a defendant arrested or charged with a violent offense as defined in RCW 9.94A.030 on the offender's personal recognizance or personal recognizance with conditions must state ((~~on the~~)) its reasons in a record ((~~the reasons why the court did not~~	This makes no sense to me. If you release a person charged with a violent offense on Personal Recognizance or with less restrictive conditions than detention, why would you need to make a record why release with no less restrictive conditions is sufficient? That release has already occurred. This disincentivizes release and that is the opposite of what should be doing.	

Statutory Provision	Comment	Suggestion
~~require the defendant to post bail~~)) including why no less restrictive condition or combination of conditions is sufficient, consistent with section 308(2) of this act.		
(3) At the hearing, such defendant has the right to be represented by counsel, and, if financially unable to obtain representation, to have counsel appointed. The defendant must be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding that no condition or combination of conditions will reasonably assure the safety of any other person and the community must be supported by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons.	We agree with the judiciary that the rules of evidence should apply.	