

Connecticut Sentencing Commission

# 2022 Report on Pretrial Justice

*Toward a Fair and Just System*



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CONNECTICUT SENTENCING COMMISSION

## 2022 Report on Pretrial Justice



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The work of several nonprofit partners was also key to the Commission's ongoing bail reform efforts. In 2019, the Urban Institute graciously provided an analysis of Connecticut's pretrial risk assessment, which has identified important areas for further study and validation. That year, the Hartford Foundation and the Tow Foundation have provided the Commission with grants to keep its work on pretrial justice going.

We are also thankful for the continued partnership with the Judicial Branch Court Support Services Division. Its support in monitoring and analyzing data on pretrial justice has brought empirical evidence and objectivity into the discussions. Bryan Sperry has also been instrumental in measuring the utilization of the ten cash percent option and the amount of money that has been returned to communities through this reform.

The authors and the Sentencing Commission more are thankful for the leadership, insight, and passion of the Honorable Robert Devlin, Jr. As chairman of the Sentencing Commission, Judge Devlin oversaw much of the construction of this report. He was steadfast in his recognition of inherent flaws of money bail and was committed to bringing energy and leadership into the Commission's work on pretrial justice. We wish him well as he begins his tenure as the state's first Inspector General.

Lastly, we thank the Honorable Robin Pavia for editing and overseeing final stages of the report. Judge Pavia, who was recently appointed as the chair of the Sentencing Commission, currently serves as Administrative Judge for the Judicial District of Danbury. As an experienced Criminal Presiding Judge, trial judge, and a former State's Attorney, Judge Pavia brings a breadth of knowledge and experience to the Sentencing Commission. The Commission looks forward to working under her leadership.

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## EXECUTIVE SUMMARY

Under our constitutional system, when individuals are accused of a crime, they are presumed innocent unless and until they are proven guilty or agree to a plea agreement. Still, some subset of defendants may be lawfully detained before their trial to prevent flight from justice or unreasonable threats to the community. Depriving someone of their liberty before trial, while occasionally necessary, should be a deliberate and narrow exception. As the U.S. Supreme Court observed in *United States v. Salerno*, “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>1</sup>

Fundamentally, a pretrial justice system should protect public safety and assure defendants’ appearance in court while preserving individuals’ constitutional rights to liberty, equal protection, due process, and a presumption of innocence. Yet cash-based bail systems are unaligned with these goals. When courts impose financial conditions of release, low-risk defendants who cannot afford to pay their bond spend unnecessary time in jail, and high-risk individuals who can purchase their freedom are released. Such an arrangement undermines our system of liberty, inflicts significant harms on indigent individuals, and exposes the public to high-risk individuals.

Recently, a wave of advocacy and litigation efforts have created national momentum for rethinking how pretrial decisions are made. Several jurisdictions have acted to move away from money bail or eliminate it completely. Litigation efforts across the country have forced many jurisdictions to change their practices. Increased media focus on the injustices caused by money bail has heightened scrutiny of the status quo. All this attention builds on the sustained focus of many pretrial experts and advocacy organizations who have long called for fundamental reforms to money bail systems.

The Connecticut Sentencing Commission’s [2017 report](#) on pretrial release and detention examined the significant human and social costs of unnecessary pretrial incarceration on the accused, their families, and their communities. Even short terms of pretrial detention can be devastating. Pretrial incarceration can pressure defendants to plead guilty and may increase the risk of conviction.<sup>2</sup> Detained individuals have more limited access to attorneys, fewer resources to hire an attorney, and more difficulty identifying witnesses to prepare their defense.<sup>3</sup> Additionally, studies have found that defendants who are detained pending trial are much more likely to receive a harsher sentence compared to similarly situated defendants who await the disposition of their case on release in the community. Pretrial detention can threaten a person’s employment, housing stability, child custody arrangements, ability to vote, and access to medical care. Importantly, pretrial detention disproportionately affects people of color, who

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<sup>1</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1987).

<sup>2</sup> Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1136 (2008).

<sup>3</sup> See Margaret A. Costello, *Fulfilling the Unfulfilled Promise of Gideon: Litigation as a Viable Strategic Tool*, 99 IOWA L. REV. 1951, 1964-65 (2014); see also *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (“[The] traditional right to freedom before conviction permits the unhampered preparation of a defense . . .”).

are less likely to be able to afford bonds as a result of generational disparities in wealth.<sup>4</sup> Nationally, pretrial incarceration rates for Black defendants are at least 10% to 25% higher than those for white defendants.<sup>5</sup>

Unnecessary pretrial detention also undermines community safety. Studies have shown that low-risk defendants who are detained pretrial, even for short periods of time, are *more likely* to commit new crimes following release than similarly situated defendants who post bond.<sup>6</sup>

Our constitutional principles, the staggering effects of pretrial detention on low- and moderate-risk defendants; the high fiscal costs of incarceration; and the human costs of pretrial detention to individuals, families, and communities all underscore a clear directive: pretrial justice policies should aim to prevent unnecessary detention by ensuring the timely release of low- and medium-risk defendants. Decisions about which defendants will be released or detained are thus critical to achieving pretrial justice. However, most bail systems in the country, including Connecticut's, do not allow for purposeful detention decisions. Instead, detention hinges on financial ability: many defendants may be detained simply because they cannot afford to post their bond, even if they pose a low risk of reoffending or fleeing.

The successes of other jurisdictions in reducing the role of money in pretrial release and detention provide important lessons for Connecticut. In New Jersey and the District of Columbia, the role of financial conditions has been severely limited; and Illinois will completely eliminate money bail from its pretrial system by 2023.

While no lawful system of pretrial release and detention can guarantee that every defendant will appear for court and remain arrest-free, Connecticut must continue to improve its pretrial justice system and make its communities safer. Change is difficult, but the state will not achieve true pretrial justice if it continues to base pretrial decisions on defendant wealth.

In recent years, Connecticut has experienced a remarkable decline in its prison population. Over 50% fewer people are behind bars today compared to 2008. However, the decline in the pretrial population has not kept pace. Since 2010, the sentenced population declined 62% and the unsentenced population declined 17%. Between 2020 and 2021, the unsentenced population has increased 21%, while the sentenced population decreased 21%. Since July 1, 2021, the unsentenced population has increased 13%.<sup>7</sup>

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<sup>4</sup> David Arnold et al., *Racial Bias in Bail Decisions* 26 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23421, 2018), [https://www.nber.org/system/files/working\\_papers/w23421/w23421.pdf](https://www.nber.org/system/files/working_papers/w23421/w23421.pdf).

<sup>5</sup> Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, PRISON POL'Y INITIATIVE (Oct. 9, 2019), [https://www.prisonpolicy.org/blog/2019/10/09/pretrial\\_race/](https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/).

<sup>6</sup> See Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL REASONING 471, 474, 490 (2016).

<sup>7</sup> Connecticut Department of Correction, monthly data provided to CJIS ([https://cjis-dashboard.ct.gov/CJPPD\\_REPORTS/rdPage.aspx?rdReport=Total\\_Counts](https://cjis-dashboard.ct.gov/CJPPD_REPORTS/rdPage.aspx?rdReport=Total_Counts)).

As of January 1, 2022, 3,590 presumptively innocent defendants were in jail.<sup>8</sup> The pretrial population currently composes 38% of the total incarcerated population. In other words, more than one in three individuals in a Connecticut jail or prison are being held for a crime for which they have not been convicted or sentenced.

Pretrial justice reform presents a historic challenge and tremendous opportunity to reform a system that discriminates against the poor and does not prioritize public safety. In its place, the state could develop a fairer system of pretrial justice in which the decision to release or detain a defendant is based on their risk and not financial resources.

As policymakers seek to move to a fairer, more logical and more transparent system of pretrial release and detention, this report serves as a resource to those interested in learning from the successes and failures of our jurisdiction and others.

Criminal justice stakeholders must be actively engaged in the policymaking process. As with any reform, there will be challenges, disagreement, and a degree of uncertainty. But if stakeholders can come together and collaborate across state and community organizations, meaningful and successful change is possible. The Sentencing Commission looks forward to continuing its work on pretrial justice and collaborating with all participants in the criminal legal system—including the leadership of all three branches of state government—to achieve these goals.

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<sup>8</sup> CRIM. JUST. POL'Y & PLAN. DIV., OFF. POL'Y & MGMT., *Monthly Indicators Report* (Feb. 1, 2022), [https://portal.ct.gov/-/media/OPM/CJPPD/CjResearch/MonthlyIndicators/2021-MONTHLY-INDICATOR-REPORTS/MonthlyIndicatorsReport\\_Feb\\_2021.pdf](https://portal.ct.gov/-/media/OPM/CJPPD/CjResearch/MonthlyIndicators/2021-MONTHLY-INDICATOR-REPORTS/MonthlyIndicatorsReport_Feb_2021.pdf).

## I. INTRODUCTION

### **Governor Malloy's Original Charge**

In 2015, Governor Dannel Malloy asked the Connecticut Sentencing Commission to study Connecticut's pretrial bail system. In his letter, Governor Malloy expressed concern that many indigent defendants, despite presenting little risk of flight or rearrest, were being detained because they could not afford their bond. Accordingly, the Governor asked the Commission to explore alternative bail systems that reduce the role of a defendant's financial means and focus release decisions on whether a defendant poses a flight risk or a danger to the community.

In response to this request, the Commission consulted with national experts on pretrial justice and formed an Advisory Group on Pretrial Release and Detention composed of key stakeholders. This advisory group undertook a two-year study of Connecticut's existing pretrial release and detention system and the alternative approaches used in other jurisdictions. As part of this effort, the group met with high-performing jurisdictions in the country, consulted the leading research on pretrial justice, and reviewed the relevant state and federal caselaw. This initial effort culminated in the Sentencing Commission's 2017 report on the state's pretrial justice system, along with a package of legislative reform proposals.

### **2017 Report**

The Commission's report, *Report to the Governor and the General Assembly on Pretrial Release and Detention in Connecticut* (February 2017), detailed the history and legal background of pretrial detention and money bail. It described the policy and procedures of pretrial justice in Connecticut and explored past and pending bail reform efforts across the United States.

The report noted several key strengths of Connecticut's pretrial justice system, including a relatively low pretrial detention rate and the use of a validated risk assessment in detention decisions. The report also highlighted shortcomings that inhibited pretrial justice in the state. Namely, the Commission recognized that Connecticut's present pretrial justice system is fundamentally wealth based. When financial conditions of release are imposed, a defendant's ability to secure release before trial is conditioned upon the defendant's ability to obtain sufficient funds. Thus, Connecticut's present system inevitably results in (1) the detention of some poor defendants who present low risks of pretrial misconduct and (2) the release of some affluent defendants who present severe risks of misconduct.

Considering these findings, the Commission included several recommendations in its report, which served as the foundation for the Commission's 2017 legislative package. The report also made several recommendations calling for ongoing evaluation, training, and research on Connecticut's bail system and possible reforms.

## 2017 Legislation

In 2017, the Judiciary Committee raised [H.B. 7287](#), *An Act Implementing the Recommendations of the Connecticut Sentencing Commission Concerning Pretrial Release and Detention*. The bill contained multiple provisions, including (1) a requirement that judges make a finding on the record before imposing secured financial release conditions, (2) a shortening of the bail review period for individuals charged with misdemeanors and detained on a secured bond, and (3) a provision for an automatic right to a 10 percent cash option for bonds of \$10,000 or less.

That year, Governor Malloy also introduced his own pretrial justice reform proposals.<sup>9</sup> The Judiciary Committee ultimately consolidated the Governor's and the Commission's proposals. During this consolidation process, some proposed reforms were eliminated from the bill, including the proposal to make the 10 percent option automatic. The final bill, signed into law as [Public Act 17-145](#), *An Act Concerning Pretrial Justice Reform*, included the Commission's proposals regarding misdemeanor detention and bail review periods. The Act also prohibited courts from imposing "cash only" bonds and modified the criteria courts may consider when imposing conditions of release.

### Subsequent Developments

Following the passage of the 2017 legislation, the Commission continued to explore issues related to pretrial justice. Later that year, the Commission hosted a symposium on pretrial release and detention at the University of Connecticut School of Law. The event included presentations from practitioners, advocates, academics, and the former Chief Justice of the New Mexico Supreme Court.

As part of the Commission's ongoing efforts, members continued to pursue avenues to reduce the role of a defendant's financial means in pretrial release and detention decisions. In January 2019, the Commission submitted [a request](#) to the Rules Committee of the Superior Court to create an automatic option for 10 percent cash bail on all bonds of \$20,000 or less. More significantly, the request also sought to make the 10 percent cash bail option available to defendants at the time of booking at a police department. Previously, this option was only available at arraignment. While the Commission recognized this proposal would not solve the fundamental inequity of a money-based bail system, its members noted that the 10 percent option would result in more money flowing back to indigent defendants who appear for court, rather than into the for-profit commercial bail bond industry.

Despite opposition from the bail bond and insurance industries, the proposal was approved unanimously by the judges of the Superior Court in June and went into effect on January 1, 2020. Since then, the Commission has been working with Judicial Branch Court Support Services Division (JB-CSSD) to carefully track the utilization, appearance, and rearrest rates of those who

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<sup>9</sup> See Governor's B. 7044, 2017 Gen. Assemb., Jan. Sess. (Conn. 2017), <https://www.cga.ct.gov/2017/TOB/h/pdf/2017HB-07044-R00-HB.pdf>.

utilize the 10 percent option. An analysis on the first 20 months of data is presented below in section III.

In 2019, the Commission also partnered with the Urban Institute to study Connecticut's Pretrial Risk Assessment tool. That report, [\*Pretrial Risk Assessment in Connecticut: Assessment of Current Instrument and Recommendations Moving Forward\*](#) (October 30, 2019), discussed (1) the benefits and drawbacks of potentially transitioning to a tool that generates separate risk scores for rearrest and failure to appear, (2) the changes that would have to be made to the current risk assessment in a nonmonetary bail system, and (3) potential sources of bias in the current assessment and how future research could measure these potential disparities. The report also provided several recommendations about how Connecticut's Risk Assessment tool could be evaluated in the future to better understand the predictive accuracy of the assessment. For example, the Urban Institute recommended an analysis of the "area under the curve" statistic for the risk assessment and an evaluation of whether different variables in the tool are more strongly correlated with one outcome, such as failure to appear or likelihood of arrest, over another.

That year, the General Assembly also passed Special Act 19-17, which required the Commission to study disparities in pretrial and sentencing outcomes in the state. As part of this effort, the Commission is partnering with two professors from the University of Connecticut who are currently assessing racial, ethnic, gendered, and socioeconomic trends in bail outcomes. The Commission's 2020 symposium centered on this ongoing study and featured a discussion on bail reform from key stakeholders in Connecticut's pretrial justice system.

Lastly, the Commission's efforts were further strengthened in 2019 by the receipt of two grants from the Hartford Foundation for Public Giving and the Tow Foundation. That year, an anonymous donor generously provided the Commission with funding to support its ongoing work to improve the state's pretrial justice system. Both the Hartford Foundation for Public Giving and the Tow Foundation have been instrumental in supporting the Commission's ongoing research on pretrial release and detention.

### **Senator Martin Looney's 2019 Request**

In October 2019, Senator Martin Looney, the President Pro Tempore of the Connecticut Senate, requested that the Sentencing Commission continue to research alternative bail systems for Connecticut. Senator Looney specifically asked the Commission to develop a reform proposal that would (1) reduce Connecticut's pretrial jail population, (2) eliminate the use of financial conditions as a detention mechanism, and (3) maintain public safety. To fulfill this request, the Commission partnered with retired Superior Court Judge Jon Silbert to develop a framework for pretrial justice reform that reduces the detained pretrial population and eliminates the use of money bail in release and detention. The development of this proposal and the resulting framework are the subject of Section VIII below.

## II. BRIEF HISTORY OF MONEY BAIL

The Commission's 2017 report on pretrial release and detention provided a history of bail in the Anglo-American legal system. For centuries, the purpose of bail was to ensure defendants' pretrial court appearance.<sup>10</sup> Although the federal Constitution did not include a right to bail, most state constitutions did. These right to bail provisions mirrored the protections of the 1682 Frame of Government of Pennsylvania, which afforded defendants a presumption of release for noncapital offenses upon the receipt of sufficient surety.<sup>11</sup> Reliance on sureties became an essential feature of pretrial justice and remains so today.<sup>12</sup>

However, the nature of the surety system has changed dramatically since the country's founding. Until the late 1800s, the bonds imposed on defendants were unsecured and processed through personal sureties of friends, family, and community members, who accepted the responsibility for the defendant's court appearance. Bail bonds were essentially promises to appear in court, backed by the pledge of personal surety. Unlike the present system, defendants did not need to deposit any money to be released. Payment was required only if the defendant failed to appear.

As the United States expanded westward, traditional community ties fractured, and defendants could flee to the frontier to escape justice. As a result, traditional bail systems became less effective, as fewer community members were willing to serve as personal sureties.<sup>13</sup>

The late 19<sup>th</sup> century saw the birth of the commercial bail bond industry; and by the early 1900s, commercial bail bonds had replaced the traditional role of personal sureties.<sup>14</sup> The potential for profit turned pretrial justice into a commercial industry. While this development expanded the availability of bonds, it did so at a social cost. Unlike personal sureties, commercial bond agencies initially required an upfront payment of the total bond and kept the deposit regardless of whether the defendant appeared in court—even if the charges were eventually dismissed. While states have since regulated bail bond industries to reduce some of these costs, the financial impact of the industry on the accused and their families and friends remains in jurisdictions that allow commercial bondsmen.<sup>15</sup>

The introduction of profit into the bail system has also created institutional resistance to certain reforms. Today, the commercial bond industry, backed by insurance companies that underwrite their operations, stands as a major obstacle to the elimination of money bail. Notably, the

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<sup>10</sup> Shima Baradaram, *Restoring the Presumption of Innocence*, 72 OHIO STATE L.J. 723, 731-34 (2011).

<sup>11</sup> Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 960 (1956).

<sup>12</sup> SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM* 167 (2018).

<sup>13</sup> William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALA. L. REV. 33 (1977).

<sup>14</sup> Timothy R. Schnacke, *Money as a Criminal Justice Stakeholder: The Judges' Decision to Release or Detain a Defendant Pretrial*, NAT'L INST. CORR. (2014), <https://s3.amazonaws.com/static.nicic.gov/Library/029517.pdf>

<sup>15</sup> Norman L. Reimer, *Limited Resources May Present Unlimited Opportunities for Reform*, CHAMPION 9, 10 (2011).

United States and the Republic of the Philippines are the only two countries in the world that rely on a commercial for-profit money bail system.

In recent decades, some efforts have been made to better adapt money bail systems to predictions about a defendant's risk of rearrest.<sup>16</sup> In *United States v. Salerno* the court upheld the federal Bail Reform Act of 1984, which allowed the detention of high-risk individuals on public safety grounds. During this same time, public safety considerations became part of the pretrial release and detention decision criteria in most jurisdictions. Today, judges routinely consider the impact on public safety in pretrial decisions in all states except New York.

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<sup>16</sup> John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 15-16 (1985).

### III. 2021 UPDATE ON THE UTILIZATION OF THE TEN PERCENT CASH OPTION

In support of the Commission's ongoing work on bail reform, the Court Support Services Division of the Judicial Branch (JB-CSSD) provided data on the utilization of the automatic 10 percent cash bond option in Connecticut. The following discussion summarizes JB-CSSD's analysis, providing early insights into the implementation and impact of the reform. These data show that defendants frequently use the 10 percent option to secure release from police departments. Consequently, the proportion of defendants posting their bonds in full or using professional sureties has decreased significantly.

The analysis relies on bond data from January 1, 2020 to August 31, 2021, using historical 2019 data as a comparison point. Critically, the 2019-2022 coronavirus pandemic began around the same time the automatic 10 percent rule went into effect. The pandemic significantly impacted the state's criminal justice process and affected intake, detention, sentencing, and release at every juncture. As a result, the following findings are provisional, and any identified trends cannot be attributed to changes in the bail policy alone.

Connecticut's pretrial release and detention system allows for releases at three points in the judicial process: upon booking at a police department, after an interview with JB-CSSD bail staff, and after arraignment. Each point of release is analyzed separately below.

#### A. Release from Police Departments

Prior to January 2020, defendants could not utilize the 10 percent option at police departments. Accordingly, utilization was zero for 2019. Since the automatic 10 percent option went into effect, utilization has increased dramatically. By July and August 2021, *one in four defendants* released from custody at a police department was released through the 10 percent option.

Over this period, the utilization of professional sureties (bail bondsmen) at police departments correspondingly dropped. In 2019, professional sureties accounted for roughly 40% of police department releases; over 2020 and 2021, they accounted for roughly 20%.

Similarly, the incidence of releases through full bond payments has also dropped. Prior to the 10 percent reform, 7% to 8% of releases from police departments occurred through full bond payment. Since the 10 percent rule went into effect, only about 1% of defendants secure release through full payment.

A similar trend emerges when only financial releases are considered (e.g., excluding promises to appear and non-surety bonds from the analysis). Of all releases from police departments on financial conditions, over half now utilize the 10 percent option. Professional sureties, which were responsible for over 80% of financial releases in 2019, now constitute just 45% of

releases. Full cash postings have similarly dropped from around 15% to less than 5% of financial releases.

Looking at defendant ethnicity for the first eight months of 2021, white and Hispanic defendants utilized the 10 percent option on bonds \$20,000 or under at rates of 65.3% and 62.9%, respectively. Black defendants utilized the 10 percent option at a lower rate of 55.3%.

Geographically, in certain suburban police departments, such as Greenwich and Old Saybrook, over 85% of eligible releases used the 10 percent option. By contrast, 10 percent utilization was lower in police departments for some of Connecticut's major cities, with Bridgeport at 54%, Hartford at 48%, and New Haven at 46%.

Not surprisingly, utilization of the 10 percent option has been highest for smaller bond amounts. In 2021, for bonds under \$5,000, more individuals were released through the 10 percent option than through professional sureties. For releases on bonds of \$1,000 or less, over 80% of individuals used the 10 percent option. By contrast, professional sureties still constituted most releases on bonds between \$5,000 and \$20,000.

#### **B. Release After an Interview with JB-CSSD Bail Staff**

The number of defendants who secure release after meeting with JB-CSSD bail staff but prior to arraignment is rather small. However, utilization of the 10 percent option at this stage grew from zero in 2019 to roughly 40% in the first eight months of 2021. As was the case with police department releases, the 10 percent option has displaced the number of defendants posting the full bond amount or hiring a professional surety. Similarly, utilization of the 10 percent cash option at this stage is concentrated at bond amounts of \$5,000 or less. Individuals held on bonds over \$5,000 were far more likely to have secured release at this stage through a professional surety.

#### **C. Release After Arraignment**

The 10 percent option has historically been available to defendants at arraignment upon a motion, though the 2020 *Practice Book* change made it automatically available for all bonds of \$20,000 or less. Notably, there has been a *decrease* in the use of the 10 percent option at arraignment since 2019. Whereas 6.0% of all releases on bonds of \$20,000 or less used the 10 percent option at arraignment in 2019, only 4.7% and 3.7% of such releases used the 10 percent option in 2020 and 2021, respectively. More analysis is required to properly understand this trend and determine reasons for such a change.

#### **D. Failure to Appear and Rearrest Rates**

JB-CSSB also compiled data on failure to appear and rearrest rates for those released on 10 percent cash bonds. However, given the impact of the coronavirus pandemic on the state's Judicial Branch operations, the recency of the 10 percent change, and prolonged case

pendency, accurate conclusions cannot be drawn at this time. Many of the cases for individuals released on 10 percent bonds in the past two years are still pending, so uniform analysis is not yet possible. Furthermore, the impact of the pandemic has resulted in highly variable appearance and arrest rates from one year to the next.

Notwithstanding, preliminary data suggest that court appearance rates for defendants on 10 percent bonds are comparable to those for other defendants. Similarly, rearrest rates for 10 percent utilizers appear to be slightly lower than those for defendants using professional sureties. More research will be required to assess the impact of the 10 percent rule on public safety and court appearances, though preliminary results are promising.

### **E. Money Returned to Defendants**

One of the motivating purposes of the 10 percent reform rule was to provide indigent defendants an opportunity to reclaim their deposit after successful court appearance. Outside the 10 percent context, defendants can only reclaim their money if they post their bond in full. Because indigent defendants are often unable to afford a full bond posting, they historically had to resort to bail bondsmen for release, who charge a fee of 7 percent of the full bond amount. Critically, defendants cannot reclaim this fee, even if they show up to court and comply with all conditions of release.

The 10 percent reform sought to give defendants a reduced up-front payment—10 percent of the bond amount—while still allowing defendants to reclaim their money upon successful trial appearance. Unlike bail bondsmen fees, the possibility of reclaiming a 10 percent deposit creates a positive incentive for defendants to appear for court. Furthermore, family and friends may be more willing to loan a defendant money if they know they can reclaim the deposited funds.

To assess reclaimed money under the new 10 percent rule, JB-CSSD analyzed its case management system to identify the cases where the 10 percent option was used. Based on this data, JB-CSSD approximated that, between January 1, 2020 and January 5, 2022, \$1.75 million has been returned to defendants through the 10 percent rule. The methodology for this estimate can be found in Appendix D.

### **F. Concluding Thoughts and Repeal Efforts**

Since its implementation, use of the automatic 10 percent rule has replaced professional sureties and full cash postings for over half of defendants released from police departments. Rearrest and court appearance rates for defendants released on this option appear to be comparable to those for other forms of release, and nearly \$2 million dollars have been returned to defendants. In the future, more research will be required to better understand (1) pretrial outcomes (failure to appear or rearrest) for individuals released on a 10 percent posting and (2) the reduced utilization of the 10 percent option at arraignment.

The Commission also recognizes that an expanded 10 percent option is not a substitute for meaningful pretrial justice reform. In any event, the 10 percent reform reflects movement toward a more just system. Now, many more defendants with low bond amounts are securing release through a mechanism that allows them to reclaim their money upon a successful court appearance. Preliminary indicators do not suggest any heightened risk to public safety.

Despite the success of the 10 percent reform, legislators proposed bills that would have repealed this reform in the 2020 and 2021 regular legislative sessions.<sup>17</sup> Had these bills been enacted, they would have (1) required a court order to use the 10 percent rule and (2) forbidden the use of the 10 percent rule at police departments. These changes would have eliminated the successes documented above and returned the pretrial justice system to where it was in 2019, with many more defendants relying on professional sureties and nonrefundable premium payments to secure release. The Commission urges the General Assembly to continue to reject these repeal efforts, which provide no benefit to Connecticut stakeholders other than the bail bond industry.

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<sup>17</sup> See Proposed H.B. Nos. 5507 (2020) and 5049 (2021).

## IV. UPDATES FROM OTHER JURISDICTIONS

Jurisdictions around the country have implemented various bail reforms over the past decade. These reforms have modified bail statutes, judicial rules, prosecutorial policies, risk assessment tools, and conditions of release. In its 2017 *Report on Pretrial Release and Detention*, the Connecticut Sentencing Commission analyzed major reforms in several jurisdictions, including the District of Columbia, New Jersey, and New Mexico. This section provides updates on the impact of bail reform in these jurisdictions and details subsequent reform attempts in other jurisdictions. These changes provide Connecticut with helpful examples as the state continues to move toward a more equitable and just pretrial system.

### A. Illinois

On February 22, 2021, Illinois Governor J.B. Pritzker signed House Bill 3653, the *Safety, Accountability, Fairness and Equity – Today* (SAFE-T) Act. The omnibus bill implemented numerous criminal justice reforms, including major changes to bail. With the passage of this Act, Illinois is set to become the first state in the country to eliminate money bail for all crimes. While many states have drastically limited the use of bail bonds, and California came close to eliminating money bail before a ballot initiative repealed its law, Illinois is the first state to *completely* end the use of money in all pretrial release and detention decisions. Under the law, Illinois will phase out all uses of money in pretrial detention by January 1, 2023. This marks the most significant development in bail reform in recent decades.

The six-year effort to reform Illinois' pretrial system represents the culmination of a long history of bail reform in the state. In 1963, Illinois made history by outlawing the commercial bail bond industry, eliminating a significant institutional obstacle to future reforms.<sup>18</sup> More recently, Illinois passed the *Bail Reform Act of 2017*, which required courts to allow defense counsel at bond hearings, created a presumption of pretrial release, and gave detained defendants charged with certain crimes a hearing to determine if continued detention is still justified. Shortly after the passage of the *Bail Reform Act*, the Illinois Supreme Court established the Commission on Pretrial Practices to provide recommendations for reform and a task force to help implement their recommendations. That same year, Illinois experienced a significant decline in pretrial detainees after Chief Cook County Judge Timothy Evans required judges to set the lowest possible bond amount that would not jeopardize public safety.<sup>19</sup>

Despite these earlier efforts, Illinois' pretrial justice system—like all systems that use financial conditions of release and detention—continued to encounter inherent inequities. Bail reform efforts in the state accelerated in recent years, driven by concerns about the overuse of

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<sup>18</sup> Cassie M. Chew, *Cash-Register Justice: Fees Collected from Defendants Are Funding the System*, ABA J. (Apr. 1, 2020, 9:16 AM), <https://www.abajournal.com/web/article/cash-register-justice>.

<sup>19</sup> Frank Main, *A Lesson for Illinois on Cash Bail? New York, California Also Got Rid of It, but Reforms Didn't Last*, CHI. SUN-TIMES (Jan. 16, 2021), <https://chicago.suntimes.com/politics/2021/1/16/22231974/cash-bail-reform-illinois-new-york-california-reforms-criminal-justice>.

monetary bail, the disparate impact of wealth-based detention on poor and minority defendants, and the effects of bail on local jail populations. The state’s pretrial justice system faced particular scrutiny, because courts retained 10 percent of all bond payments as an administrative fee.<sup>20</sup> Many critics viewed the practice as an inherent conflict of interest for courts, as it created an incentive to increase administrative funding by imposing higher bond amounts on defendants.<sup>21</sup>

Illinois’ 2021 bail reform efforts ultimately came to fruition through the work of the Coalition to End Money Bond, a group of 14 grassroots advocacy organizations in the state.<sup>22</sup> The Coalition drafted the *Pretrial Fairness Act* and worked to generate support from the community and public officials. In the legislature, the Illinois Legislative Black Caucus spearheaded efforts to support the proposal as part of the *Safety, Accountability, Fairness and Equity – Today* bill.

The bill faced opposition from some legislators and police unions. Groups like the Illinois Sheriffs’ Association and the Illinois Association of Chiefs of Police expressed concerns that the bill was rushed and would create a hazard for public safety.<sup>23</sup> Despite this opposition, a final push for the legislation came during the 2019–2022 coronavirus pandemic following the first COVID-19-related death in Cook County Jail’s pretrial population. The possibility of presumptively innocent defendants dying in jail simply because they could not afford their bond helped generate enough support in the legislature to pass the bill.<sup>24</sup> The state legislature passed the SAFE-T bill on January 13, 2021 as HB 3653, and Governor Pritzker signed it into law shortly after.

The law establishes a two-year implementation period for the bail reforms, which will not come into full effect until January 1, 2023. Until then, anyone charged in Illinois with a felony or certain misdemeanors will go to bond court where a decision regarding pretrial release is made. In bond court, three outcomes are possible: (1) pretrial release on recognizance (ROR), (2) a requirement to post monetary bond to secure pretrial release, or (3) pretrial detention, which is only available for specific offenses under the Illinois Constitution. In some counties, additional pretrial release options are available, including pretrial supervision and electronic monitoring.

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<sup>20</sup> Arthur McGibbons, *Clarification of the Illinois Bail Bond Law Ten Percent Rule: You Don’t Need to Come up with All that Money*, ILLINOISCASELAW (Jan. 2, 2014), <https://illinoiscaselaw.com/illinois-bail-bond-law-ten-percent-rule/>. Defendants paying bonds fees directly to the court has been a common practice throughout state pretrial systems since the Supreme Court decision *Schilb v. Kuebel*, 404 U.S. 357 (1971), which held that court retention fees are constitutional as administrative costs imposed upon both the guilty and the innocent.

<sup>21</sup> Chew, *supra* note 18.

<sup>22</sup> *Summary of Pretrial Fairness Act*, COAL. TO END MONEY BOND (Mar. 5, 2021), <https://endmoneybond.org/pretrialfairness/>.

<sup>23</sup> Emanuella Evans, *Illinois Lawmakers Move to Abolish Cash Bail*, INJUSTICE WATCH (Jan. 14, 2021), <https://www.injusticewatch.org/news/2021/illinois-lawmakers-end-cash-bail/>.

<sup>24</sup> Elizabeth Weill-Greenberg, *Illinois State Lawmakers Vote to Eliminate Cash Bail*, APPEAL (Jan. 14, 2021), <https://theappeal.org/illinois-state-lawmakers-vote-to-eliminate-cash-bail/>.

Aside from these temporary provisions, the SAFE-T Act makes five fundamental changes to Illinois' pretrial justice system. As described below, it: (1) abolishes money bail, (2) prohibits pretrial detention for most defendants, (3) creates a new detention hearing process, (4) limits the conditions that may be imposed on defendants released pretrial, and (5) limits revocation of pretrial release or modification of conditions of pretrial release.

### 1. Abolishes Cash Bail

The Act eliminates secured and unsecured money bonds from Illinois' pretrial justice system. This change eliminates the role of a defendant's wealth in pretrial release and detention decisions. Since Illinois' constitution does not establish the right to bail,<sup>25</sup> the state already had the ability to detain people without imposing money bail by changing the state's statutes, rather than by having to amend its constitution.<sup>26</sup>

### 2. Prohibits Pretrial Detention for Most Defendants

The Act creates a presumption of release for all defendants and limits detention to those who fall within a "detention eligibility net." This change is complemented by a new "cite and release" protocol.<sup>27</sup> Under these two provisions, most defendants will be released upon arrest and issued a court date. Individuals charged with Class B, Class C, Petty, Business, and Ordinance offenses must now be released after the police have identified the defendant and issued them a notice to appear in court within 21 days. The law creates some exceptions to this rule: allowing for a custodial arrest when there is an "obvious risk to public safety" or if the defendant requires mental or medical help. In sum, however, the Act dramatically limits the circumstances in which defendants may be detained pretrial.

### 3. Creates Detention Hearing Processes

Under the new law, pretrial detention may be used only when a person is charged with a qualifying offense *and* either the defendant's release poses a threat to public safety or the defendant is highly likely to willfully flee to avoid prosecution. The qualifying offenses, which constitute the "detention eligibility net," are listed in Section 110-6.1 of the Act. These eligible offenses include all non-probationable, forcible felonies (e.g., murder, armed robbery); all sexual crimes (e.g., criminal sexual assault, criminal sexual abuse, child pornography charges); all domestic violence crimes (e.g., misdemeanor and felony domestic battery); and all non-probationable firearm felonies (e.g., illegal discharge of a firearm, illegal sale of firearms).<sup>28</sup> The "detention eligibility net" is based on the recommendation of the Illinois Supreme Court Commission on Pretrial Practice and national evidence from other jurisdictions.

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<sup>25</sup> For more on the states' constitutional right to bail, see *infra* Appendix D.

<sup>26</sup> H.B. 3653, 101st Gen. Assemb., Reg. Sess. (Ill. 2021), <https://www.ilga.gov/legislation/publicacts/101/PDF/101-0652.pdf>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

To detain an individual, the state must show that a defendant charged with an eligible offense poses a specific and actual threat to another person or a high probability of willful flight.<sup>29</sup> This reflects a narrowing from the previous standard, which only required the state to show an individual would pose a threat to the community in general if released. Now, the state must show there is a threat to a specific person.

The Act continues to incorporate risk assessment tools in pretrial justice decisions while providing new safeguards against potential misuse. These protections include prohibiting risk assessment tools from being the sole factor in a detention decision, requiring the disclosure of scoring criteria to accused persons and defense counsel, and explicitly permitting challenges to the validity of risk assessment tools used by the court.<sup>30</sup>

To detain an individual pretrial, a state's attorney must first submit a written petition detailing the threat the person poses or explaining why the person is likely to flee prosecution. The judge will determine whether it is appropriate to grant a detention hearing. If the judge allows a hearing, the court will grant a 48-hour continuance for both sides to prepare, during which time the arrested person will either be released or detained at the judge's discretion. At the hearing, the state bears the burden of proving by clear and convincing evidence that an individual poses a safety threat or flight risk.

If the court finds that the state has met its burden, the judge can order the arrestee to be detained pretrial. At every subsequent court date, a judge must re-examine the decision to determine whether continued detention is necessary. This ensures defendants will be released if the requirements for detention are not continuously met throughout the pretrial and presentencing periods.

#### 4. Limits the Conditions that may be Imposed Pretrial

The presumption for all defendants is release on recognizance. On release, defendants must attend all required court proceedings, comply with all terms of pretrial release, and not commit any new offenses. The SAFE-T Act also limits the availability of pretrial monitoring. Under the new law, the state bears the burden of proving it is necessary to electronically monitor a released individual. Furthermore, defendants on electronic monitoring must be reevaluated by the court every 60 days to ensure such monitoring is still needed and that there are no other suitable alternatives. In addition, time on electronic monitoring can now be credited toward one's custodial sentence. The Act also removes the requirement of home confinement under electronic monitoring, guaranteeing individuals a degree of movement. Specifically, the law guarantees defendants at least two days a week of "essential" movement to ensure individuals can take care of themselves and their family while awaiting trial.

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

In addition, there will no longer be mandatory pretrial fees charged to people accused of drug crimes. Previously, electronic monitoring and supervision fees were required conditions of release; judges now have discretion in imposing these fees. Finally, under the SAFE-T Act, the state may only charge a monitored individual with felony escape after the defendant has been in violation of pretrial release requirements for at least 48 hours. This provision addresses a previous issue where technical violations of release could constitute felony escape charges.<sup>31</sup>

##### 5. Limits Revocation and Modification of Release

Under prior Illinois law, even minor alleged violations could result in revocation of pretrial release. The SAFE-T Act overhauls this process, and now, a court may only revoke pretrial release under a limited set of circumstances. The new law classifies pretrial violations as either “sanction” or “revocation” violations.<sup>32</sup> “Sanction” violations are low-level or technical violations, for which the state cannot revoke release. Instead, the state may only issue verbal or written warnings, fines, or short jail stays for such “sanction” offenses. These low-level violations are contrasted with “revocation” violations, which occur when someone released pretrial with a pending felony or class A misdemeanor charge is arrested for a subsequent felony or class A misdemeanor. In these cases, an individual’s pretrial release may be revoked. For revocation to occur, the state must first request a hearing with the court. These revocation hearings have a different standard for detention than initial detention hearings. While the state must still demonstrate by clear and convincing evidence that the person is likely to be rearrested, it does not need to prove that the defendant poses a danger to a specific person.

The law also narrows revocation for flight by limiting revocation to cases of “willful flight.” Previously, if an individual failed to appear at hearings for reasons beyond their control, such as medical emergencies or transportation issues, they would be deemed a flight risk and thus have their pretrial release revoked. Now, “willful flight” is defined as “planning or attempting to intentionally evade prosecution by concealing oneself.” Moreover, previous non-appearance in court alone is not evidence of future intent to evade prosecution.<sup>33</sup>

The Act also reforms the arrest warrant process. Previously, courts were required to issue a warrant in a felony case if the defendant missed their court date. Under the SAFE-T Act, judges may now exercise discretion and consider whether an arrest warrant is necessary. Altogether, these changes are intended to ensure that pretrial release is not revoked unnecessarily.

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<sup>31</sup> *Summary of Pretrial Fairness Act*, COAL. TO END MONEY BOND (Mar. 5, 2021), <https://endmoneybond.org/pretrialfairness/>.

<sup>32</sup> H.B. 3653, 101st Gen. Assemb., Reg. Sess. (Ill. 2021), <https://www.ilga.gov/legislation/publicacts/101/PDF/101-0652.pdf>.

<sup>33</sup> *Id.*

## Responses

Members of the Coalition to End Money Bond celebrated the bill's passage. Supporters believe the new law will bring transparency and fairness into the Illinois legal system and constitute a large step forward in reducing racial disparities in pretrial justice. Other constituencies were more reserved in their praise. Jennifer Cacciapaglia, manager of the Mayor's Office of Domestic Violence and Human Trafficking Prevention, believes that over the next two years, all parties involved need to continue to work together "to ensure that any unintended consequences toward survivors of domestic or sexual violence are eliminated."<sup>34</sup>

Other constituencies were more critical. In a letter written to the governor, Tazewell County Sheriff Jeffrey Lower wrote, "[w]ithout bail, many dangerous offenders will walk free within hours of their arrest."<sup>35</sup> With similar sentiments, Senator Dave Syverson (R-Rockford) issued a news release criticizing the governor for signing the bill, in which he expressed concerns that the changes will negatively impact the police community.<sup>36</sup>

Lastly, some groups, while supportive of Illinois' bail reform, wished pretrial reforms could have gone further. For instance, the Bail Project, a progressive coalition committed to preventing incarceration and combating disparities in the bail system, while commending the passage of the SAFE-T Act, stated that "the Act also represents a missed opportunity to stand against the panacea of pretrial algorithms."<sup>37</sup>

As the first state to completely abolish monetary bail, Illinois serves as an important case study for other jurisdictions grappling with potential changes to their pretrial justice systems. Illinois' monumental reform paves the way for a new round of discussion and research for bail reform.

### **B. District of Columbia**

The District of Columbia's (D.C.) pretrial justice system is widely recognized as a national model for high functioning pretrial justice systems. The system effectively promotes community safety and future court appearance while protecting the rights of the accused. D.C.'s pretrial system is unique in that no defendants are detained pretrial because of their inability to post bond. The system has consistently achieved high rates of release and court appearance while simultaneously maintaining a low rate of arrest for individuals on pretrial release.<sup>38</sup>

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<sup>34</sup> Chris Green, *Rockford Area Advocates and Opponents React to New Justice System Reform Law*, ROCKFORD REG. STAR (Feb. 22, 2021), <https://www.rrstar.com/story/news/2021/02/22/rockford-area-officials-support-and-criticize-new-law/4546814001/>.

<sup>35</sup> Brittini Clemons, *Illinois Leaders Explain Impact if Cash Bail Ends*, CENT. ILL. PROUD (Jan. 26, 2021), <https://www.centralillinoisproud.com/news/illinois-leaders-react-to-potential-end-of-cash-bail>.

<sup>36</sup> Green, *supra* note 34.

<sup>37</sup> *The Bail Project Responds to the Passage of the Illinois Pretrial Fairness Act*, BAIL PROJECT (Feb. 22, 2021), <https://bailproject.org/the-bail-project-responds-to-the-passage-of-the-illinois-pretrial-fairness-act>.

<sup>38</sup> Lauren Kelleher, *Out on Bail: What New York Can Learn from D.C. About Solving a Money Bail Problem*, 53 AM. CRIM. L. REV. 799, 825 (2016).

Washington D.C. is one of a few jurisdictions in the United States with an immediate in-or-out pretrial decision. At arraignment, the sitting judge orders either release or detention of the defendant. Under this binary framework, risk serves as the primary factor in release decisions. As such, lower-risk individuals are deliberately released, and higher-risk individuals are deliberately detained. The D.C. municipal code establishes a bail model that (1) severely limits the use of secured financial conditions, (2) permits detention without bail, and (3) includes performance measurement requirements. The pretrial release model also depends on a robust independent pretrial services agency, the Pretrial Services Agency for the District of Columbia (PSA).

The most notable components of the D.C. model include the statutory presumption in favor of nonfinancial release, the prohibition on commercial sureties, the prohibition against the use of financial conditions to assure safety, the prohibition of financial conditions that result in detention, and the ability to preventively detain a carefully limited subset of individuals if procedural safeguards are satisfied.

When an individual is arrested in D.C., the arrestee is either issued a citation and released, or held until arraignment. Law enforcement officials can contact the PSA at the time of arrest for information regarding the arrestee's eligibility for a citation release. The PSA determines whether the arrestee's criminal and court history triggers any of the statutory disqualifying factors and then notifies law enforcement of the individual's eligibility for citation release.<sup>39</sup> An individual who is not issued a citation release must be held over for arraignment in the District's pretrial detention facility for a maximum of 48 hours.

Prior to arraignment, PSA conducts a 15- to 20-minute interview with the arrestee and obtains a urine sample. PSA staff submit urine samples to a forensic lab for urinalysis, retrieve criminal and court history, and record the data obtained during the interview in the pretrial database known as PRAXIS. A specially designed software application pulls the data entered into PRAXIS and runs it through D.C.'s validated risk assessment instrument, returning the results to PSA staff.

Using the criminal history, interview questions, risk score, and toxicological results, PSA staff generate a Pretrial Services Report (PSR) that they present to the arraignment judge. The PSR includes extensive background information on the defendant, the defendant's eligibility for detention, PSA's recommended conditions of release, the recommended level of supervision, and any needed mental health or substance abuse screening. PSA does not include the defendant's risk score in the PSR.

Regarding release, the PSR includes a recommendation to the court as to whether the defendant should be (1) released pending the next court date, (2) released on conditions, or (3) held until a hearing to determine if the defendant should be preventively detained. The

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<sup>39</sup> D.C. CODE § 23-584 (2015).

arraignment judge has four statutory options at the time of the defendant's first appearance. The judge may order that the defendant be (1) released on personal recognizance or the execution of an appearance bond, (2) released on a condition or combination of conditions, (3) temporarily detained to permit revocation of conditional release, or (4) detained pending trial.<sup>40</sup> All of these options are subject to a statutory presumption of release prior to trial.

There are two types of pretrial detention that can occur following a defendant's initial appearance in court. The first is a five-day period of temporary detention permitted by D.C. Code § 23-1322(a) for defendants who have violated the conditions of their probation or parole, or who are likely to flee or pose a danger to the community. The second is a lengthier period of detention under §23-1231(b) designed for individuals for whom no condition or combination of conditions will reasonably assure their appearance in court or the safety of another person or the community.

If a defendant is found eligible for the lengthier detention period, the court must hold a hearing to determine whether any condition or combination of conditions will reasonably assure the defendant's court appearance and public safety. The standard of proof for the hearing is clear and convincing evidence. There is a rebuttable presumption in favor of detention if the court finds probable cause that an individual has met one of the statutory criteria related to dangerousness under § 23-1322(c) of the Code.

If a judge issues a detention order, the court is required to issue written findings of fact with a statement of the reasons for the detention, and the defendant has a right to appeal the order. In addition, the individual subject to a detention order must be placed on an expedited calendar for indictment and trial.

Although detention without bail is an option, most defendants are released and supervised by PSA, which provides a continuum of programs and services for defendants released into the community pending trial. These defendants have a wide variety of risk profiles, from those who pose limited risk and require conditional monitoring, to those who pose considerable risk and need extensive release conditions such as frequent drug testing, stay orders, substance abuse or mental health treatment, or frequent contact requirements with a pretrial service officer.<sup>41</sup> The highest risk defendants may be subject to an electronically monitored curfew, home confinement, GPS tracking, or residence in a halfway house. Throughout the pretrial release period, PSA notifies the court, prosecution, and defense of any noncompliance with release conditions.

The District of Columbia PSA collects robust data on its pretrial release and detention system. In 2019, the agency reported impressive statistics. In 78% of cases, judges concurred with the PSA's recommendation concerning pretrial release, and 94% of D.C. defendants were released

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<sup>40</sup> *Id.* § 23-1321 (2016)

<sup>41</sup> *Defendant Supervision*, PRETRIAL SERVS. AGENCY FOR D.C. (2016), [http://psa.gov/?q=programs/defendent\\_supervision](http://psa.gov/?q=programs/defendent_supervision).

pretrial.<sup>42</sup> Most of these defendants (87%) remained on release in good standing by the end of the pretrial period.<sup>43</sup> The District also maintained an impressive 88% court reappearance rate.<sup>44</sup> Only 13% of defendants were rearrested, and just 1% were rearrested for a violent crime.<sup>45</sup>

In 2020, 92% of defendants were released on their own recognizance or into supervision.<sup>46</sup> This constituted 97% of misdemeanor arrests and 76% of felony arrests.<sup>47</sup> By the end of the period, 85% of defendants remained on release and in good standing. For those released, the 2020 rearrest rate was just 12%, and court reappearance rates rose to 91%.<sup>48</sup>

Although the District of Columbia is a unique jurisdiction in which all pretrial decisions are made in a single courthouse, its successes demonstrate that it is possible to largely eliminate financial release conditions while maintaining high release rates, high court appearance rates, and low rearrest rates.

### C. New Jersey

In 2013, New Jersey's Chief Justice Stuart Rabner assembled a committee to examine issues concerning pretrial justice.<sup>49</sup> Composed of stakeholders including the attorney general, public defenders, private attorneys, judges, court administrators, and representatives from the legislature and the Governor's Office, the group consulted with national experts on bail, reviewed other jurisdiction's practices, and observed pretrial justice practices in the District of Columbia.<sup>50</sup> The collaborative effort produced a report to the legislature containing 27 proposed changes to the state's bail system.<sup>51</sup> These proposals would transform the state's pretrial infrastructure from a money bail system to one focused primarily on defendant risk. The committee adopted many of the recommendations unanimously, though the report included statements from both concurring and dissenting members.<sup>52</sup>

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<sup>42</sup> *PSA Performance Outcomes – FY 2016-2020*, PRETRIAL SERVS. AGENCY FOR D.C. (Nov. 2020) [hereinafter *Performance Outcomes*], <https://www.psa.gov/sites/default/files/Fact%20Sheet-PSA%20Performance%20Outcomes-FY2016-20.pdf>.

<sup>43</sup> *Congressional Budget Justification and Performance Budget Request Fiscal Year 2021*, PRETRIAL SERVS. AGENCY FOR D.C. 12 (Feb. 10, 2020), [https://www.psa.gov/sites/default/files/FY2021%20PSA%20Congressional%20Budget%20Justification\\_0.pdf](https://www.psa.gov/sites/default/files/FY2021%20PSA%20Congressional%20Budget%20Justification_0.pdf).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Performance Outcomes*, *supra* note 42.

<sup>47</sup> *FY 2020 Release Rates for Pretrial Defendants In Washington, DC – FY 2020*, PRETRIAL SERVS. AGENCY FOR D.C., <https://www.psa.gov/sites/default/files/Fact%20Sheet-Release%20Rates%20for%20DC%20Pretrial%20Defendants-FY2020.pdf>.

<sup>48</sup> *Performance Outcomes*, *supra* note 42.

<sup>49</sup> GLENN A. GRANT, JOINT COMM'N CRIM. JUST. REFORM, CRIMINAL JUSTICE REFORM ANNUAL REPORT TO THE GOVERNOR AND LEGISLATURE 1 (2015), <https://www.njcourts.gov/courts/assets/criminal/2015cjrannual.pdf>.

<sup>50</sup> REPORT OF THE JOINT COMMITTEE ON CRIMINAL JUSTICE 12 (2014), <https://www.njcourts.gov/courts/assets/criminal/finalreport3202014.pdf>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

Later the next year, the New Jersey legislature adopted many of the committee’s recommendations. The legislation passed with bipartisan support and strong backing from the Senate president and Assembly speaker. Governor Chris Christie signed the bill into law on August 11, 2014, and the reforms took effect on January 1, 2017.<sup>53</sup> As part of the reform, the state amended its constitution to allow judges to detain the most dangerous defendants without bail. The measure passed with more than 60% of the popular vote at a statewide election.<sup>54</sup>

Under New Jersey’s new system, most defendants receive a “complaint-summons” and face no pretrial detention or supervision.<sup>55</sup> Instead, arresting officers release these defendants without conditions and give them a court date. For certain serious offenses or for certain types of defendants, the state may instead issue a “complaint-warrant,” in which case the defendant is brought to county jail and subject to further pretrial proceedings.<sup>56</sup> In these cases, pretrial services staff make a recommendation within 48 hours based on a public safety assessment, and the defendant appears before a judge at a pretrial hearing.<sup>57</sup>

At the hearing, the defendant is either released on recognizance, conditionally released into pretrial supervision, or detained. Judges may impose only the least restrictive conditions necessary to reasonably ensure court appearance, public safety, and the unobstructed functioning of the justice process.<sup>58</sup> Furthermore, courts may only impose financial conditions as a means of ensuring a defendant’s appearance.<sup>59</sup> Importantly, financial conditions may not be used to detain an individual or as a means of ensuring public safety.<sup>60</sup>

A court may only detain an individual if the state first files a motion for detention.<sup>61</sup> Prosecutors may file a motion to detain defendants charged with certain enumerated offenses. Alternatively, defendants may be detained if they are served a complaint-warrant, which is authorized when the prosecutor believes there is a serious risk that a defendant will fail to appear, pose a danger to the community, or obstruct justice (e.g., through the intimidation of a

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<sup>53</sup> Grant, *supra* note 49 at 2.

<sup>54</sup> *New Jersey Pretrial Detention Amendment, Public Question No. 1*, BALLOTPEDIA, [https://ballotpedia.org/New\\_Jersey\\_Pretrial\\_Detention\\_Amendment,\\_Public\\_Question\\_No.\\_1\\_\(2014\)](https://ballotpedia.org/New_Jersey_Pretrial_Detention_Amendment,_Public_Question_No._1_(2014)).

<sup>55</sup> N.J. CT R. 3:3-1; N.J. REV. STAT. § 2A:162-16 (<insert year>)

<sup>56</sup> N.J. REV. STAT. § 2A:162-16 (<insert year>).

<sup>57</sup> *Id.* § 2A:162-17.

<sup>58</sup> *Id.* § 2A:162-16.

<sup>59</sup> *Id.*

<sup>60</sup> If an individual for whom financial conditions are imposed fails to post bond, he or she may only be detained for 90 days pre-indictment and 180 days post-indictment. *Id.* § 2A:162-22. After the timeframe passes, the defendant must be released unless the court finds 1) that a substantial and unjustifiable risk to public safety or that the obstruction of the criminal justice process would result from the eligible defendant's release, 2) that no appropriate conditions for the eligible defendant's release could reasonably address that risk, and 3) that the failure to indict/commence trial was not due to unreasonable delay by the prosecutor. *Id.*

<sup>61</sup> *Id.* § 2A:162-18.

witness or juror).<sup>62</sup> When making a decision at a pretrial hearing, judges must afford defendants a presumption of release unless they are charged with murder or an offense carrying a life sentence. In such cases, defendants face a rebuttable presumption of detention.<sup>63</sup>

If the state files for pretrial detention, courts must hold a detention hearing within three days.<sup>64</sup> At the hearing, defendants have the right to counsel, to compel and cross-examine witnesses, and to present evidence.<sup>65</sup> The court may order the detention of an individual only if it finds by clear and convincing evidence that no conditions would reasonably assure court appearance, public safety, and an unobstructed functioning of the justice process.<sup>66</sup>

In 2020, roughly two-thirds of the 95,000 individuals charged with a crime in New Jersey were issued a complaint-summons and were not detained.<sup>67</sup> Of the remaining third of defendants (32,000) who received a complaint-warrant, 80% were released pretrial: 3% had their cases remanded or dismissed, 6.5% were released on recognizance, and 70.5% were released into some form of conditional or supervised status.<sup>68</sup> The remaining 20% of complaint-warrant defendants (7% of all individuals charged with a crime) were detained pending trial.<sup>69</sup>

Pretrial misbehavior rates remain low. In 2019, only 13.7% of defendants were rearrested for an indictable offense while on release.<sup>70</sup> Less than 0.5% of released defendants were arrested for serious crimes (e.g., crimes that fall under New Jersey's 85% parole rule).<sup>71</sup> That same year, court appearance rates exceeded 90%, and nearly two-thirds of criminal cases were disposed within a 22-month period.<sup>72</sup>

These trends correlate with a significant reduction in New Jersey's pretrial population. Since the implementation of bail reform in 2017, New Jersey's pretrial jail population has dropped from 7,173 in January 2017 to 5,816 at the end of 2020—a 20% reduction.

Since its bail reform took effect in 2017, New Jersey has received national recognition and has become a model for pretrial justice in the United States. Through a consensus-building process and robust data collection, the state has successfully transitioned from a money bail system like Connecticut's to one that (1) significantly reduced the pretrial population, (2) eliminated the

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<sup>62</sup> *Id.* § 2A:162- 19.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> N.J. JUDICIARY, *Criminal Justice Reform Statistics: Jan. 1 - Dec. 31, 2020* (2020), <https://www.njcourts.gov/courts/assets/criminal/cjrreport2020.pdf?c=HzC>.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Glenn A. Grant, *Annual Report to the Governor and the Legislature*, CRIM. JUST. REFORM 8 (2020), <https://www.njcourts.gov/courts/assets/criminal/2020cjrannual.pdf?c=yr1>.

<sup>71</sup> *Id.* at 9.

<sup>72</sup> *Id.* at 10-11.

use of secured bonds as a detention mechanism, and (3) achieved consistently high levels of public safety and court appearance.

New Jersey's record of reforming its outdated wealth-based detention system is encouraging to other jurisdictions contemplating their versions of bail reform, especially given the robust support the effort received from the state's seemingly disparate stakeholders. Leadership from all three branches of government supported the state's bail reform initiative and both the offices of the attorney general and public defender played key roles in the development and implementation of the reforms.

As New Jersey continues to improve its pretrial justice system, it has identified two ongoing challenges and opportunities for the years ahead. First, the state recognizes that racial disparities continue to pervade the pretrial justice system, as Black defendants in New Jersey are more likely than white defendants to be issued a warrant and be detained.<sup>73</sup> Second, as a result of the decision to suspend jury trials during the coronavirus pandemic, a backlog of cases has produced a larger pretrial jail population, a longer period of case pendency, and thus, a longer period of pretrial detention.<sup>74</sup> Reducing these disparities and eliminating this backlog will remain ongoing efforts for the state in the years to come.

#### **D. New Mexico**

In New Mexico, bail reform was prompted by the state supreme court's decision in *State v. Brown*.<sup>75</sup> In *Brown*, the court held that a judge violated the state constitution by setting a high bond in order to detain a dangerous individual. Further, the court held that a defendant's bond amount could not be based solely on the seriousness of the crime charged, and that courts must consider whether alternative conditions could reasonably assure public safety and court appearance.

In response to *State v. Brown*, in 2016, the New Mexico legislature proposed constitutional amendments to reform the state's bail system.<sup>76</sup> Later that year, voters approved an amendment establishing that a defendant could not be detained solely because of their financial inability to post a money or property bond.<sup>77</sup> The amendment further permitted the denial of bail in felony cases "if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of

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<sup>73</sup> *Id.* at 42. Notably, these disparity measurements do not control for differences in the underlying offense or in defendant characteristics other than race.

<sup>74</sup> *Id.* at 43.

<sup>75</sup> 338 P.3d 1276 (N.M. 2014).

<sup>76</sup> Jenna Dole et al., *Bail Reform: Baseline Measures*, N.M. STAT. ANALYSIS CTR. 1 (2019),

[https://www.nmcourts.gov/wp-content/uploads/2020/12/bail\\_reform\\_baseline\\_measures.pdf](https://www.nmcourts.gov/wp-content/uploads/2020/12/bail_reform_baseline_measures.pdf).

<sup>77</sup> Alex Tsarkov, et al., *Report to the Governor and the General Assembly on Pretrial Release and Detention in Connecticut*, CONN. SENT'G COMM'N 61 (2017), [http://ctsencingcommission.org/wp-content/uploads/2018/04/Pretrial\\_Release\\_and\\_Detention\\_in\\_CT\\_2.14.2017.pdf](http://ctsencingcommission.org/wp-content/uploads/2018/04/Pretrial_Release_and_Detention_in_CT_2.14.2017.pdf).

any other person or the community.”<sup>78</sup> The next year, the Supreme Court of New Mexico adopted judicial rules implementing the new amendment’s provisions for state courts.<sup>79</sup>

Under the implementing rules, New Mexico courts may only impose a secured financial bond upon a showing that nonmonetary conditions cannot reasonably ensure the appearance of the defendant.<sup>80</sup> Courts may not impose financial conditions based on public safety considerations. Furthermore, courts must set monetary bonds at the lowest amount necessary to reasonably ensure the defendant’s appearance and may not set an unaffordable bond for the purpose of detaining an otherwise release-eligible defendant.<sup>81</sup>

For individuals charged with a felony, prosecutors may file a motion for pretrial detention.<sup>82</sup> Within three days of a detention motion, the court must hold a hearing in which the defendant has the right to counsel, testify, present evidence, and compel and cross-examine witnesses.<sup>83</sup> Judicial rules establish factors for a judge to consider when ruling on a pretrial detention motion. These include the offense charged, whether the offense is a crime of violence, the weight of the evidence, the defendant’s history and characteristics, the danger to the community posed by the defendant’s release, whether the defendant had been detained in a past case, and any results of an approved pretrial risk assessment.<sup>84</sup>

If after all these considerations, a court finds by clear and convincing evidence that no release conditions will reasonably protect public safety, it may order the pretrial detention of the defendant.<sup>85</sup> Defendants may appeal this decision.<sup>86</sup>

Robust data on the impact of New Mexico’s bail reform are lacking. While the New Mexico Statistical Analysis Center at the University of New Mexico has recorded baseline statistics for the pre-reform period, a comparison between pre- and post-reform pretrial outcomes is not yet complete.<sup>87</sup> Anecdotal evidence suggests that since the reform, bond amounts appear to be lower, financial conditions of release appear to be imposed less frequently, and defendants appear to be released more often.<sup>88</sup> Still, stakeholders have noted that there is no central definition for “dangerousness” under the constitutional amendment, which has created confusion and inconsistent results in pretrial outcomes.<sup>89</sup> Similarly, different county

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<sup>78</sup> *Id.*

<sup>79</sup> Dole, *supra* note 76.

<sup>80</sup> NMRA, Rule 5-401(E).

<sup>81</sup> *Id.*

<sup>82</sup> NMRA, Rule 5-409.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Dole, *supra* note 76.

<sup>88</sup> Ella J. Siegrist et al., *Implementing Bail Reform in New Mexico*, N.M. STAT. ANALYSIS CTR. 35-41 (2020), <http://isr.unm.edu/reports/2020/implementing-bail-reform-in-new-mexico.pdf>.

<sup>89</sup> *Id.* at 18-25.

prosecutors have utilized different risk assessment tools in deciding whether to file for pretrial detention, and some use none at all.<sup>90</sup>

Generally, researchers noted that New Mexico's system currently struggles from (1) a lack of uniform rules, policies, and guidelines; (2) inadequate stakeholder education; (3) understaffing in the pretrial process; (4) underfunded pretrial services; and (5) limited access to relevant data.<sup>91</sup>

## E. New York

### Summary

In 2019, Governor Andrew Cuomo introduced a bill that would have eliminated money bail and removed discretion from judges to impose detention on most misdemeanors, nonviolent felonies, and even some violent felonies.<sup>92</sup> At the time the governor introduced his original proposal, pretrial detainees constituted as much as two-thirds of the state's daily jail population.<sup>93</sup>

Governor Cuomo also proposed changing the state's standard for pretrial release decisions to include a consideration of the defendant's risk to the physical safety of a reasonably identifiable person or persons when the charged crime was a violent felony, domestic violence offense, or other serious felony. Unlike most states, New York's pretrial justice statutes allow judges to consider only the risk of failure to appear when determining pretrial release, not the defendant's threat to public safety or risk of rearrest.

Governor Cuomo's initial proposals proved controversial among several of the state's advocates and policymakers and were subsequently amended.<sup>94</sup> The resulting proposal, while significantly limiting the role of financial conditions of release, left money bail intact for serious offenses. Additionally, the final proposal did not include public safety as a basis for imposing money bail. That proposal received support from a broad alliance of advocates and criminal justice practitioners and was included in the state's budget bill, which Governor Cuomo signed into law on April 1, 2019.

Prior to this reform, judges in New York could impose financial conditions on all criminal defendants, regardless of charge. All defendants, therefore, could be detained if they could not post their bond. After the 2019 changes went into effect, financial conditions of release were

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<sup>90</sup> *Id.* at 93.

<sup>91</sup> *See generally id.*

<sup>92</sup> FY 2020 NEW YORK STATE EXECUTIVE BUDGET: PUBLIC PROTECTION AND GENERAL GOVERNMENT ARTICLE VII LEGISLATION 182, <https://www.budget.ny.gov/pubs/archive/fy20/exec/artvii/ppgg-artvii.pdf>.

<sup>93</sup> *Legislative Memo: Bail Elimination Act*, NYCLU, <https://www.nyclu.org/en/legislation/legislative-memo-bail-elimination-act>.

<sup>94</sup> Michael McGough, *The Fate of California's Cash Bail Industry Will Now be Decided on the 2020 Ballot*, SACRAMENTO BEE (Jan. 17, 2019), <https://www.sacbee.com/news/state/california/article224682595.html>.

limited to only those defendants charged with violent felony offenses or a small number of other specified charges. All other defendants had to be released based on some nonmonetary grounds. In effect, this meant that some form of pretrial release was mandated in nearly all misdemeanor and non-violent felony cases.

The initial changes became effective on January 1, 2020. However, in response to concerns from key stakeholders and backlash from the public, the legislature amended its bail reform provisions to expand eligibility for money bail and detention. These amendments took effect in July 2020.

### Original Reform

New York's bail reform implemented four major changes. The law (1) limited the use of bail and prohibited pretrial detention for many defendants, (2) required that judges consider defendant's ability to pay before imposing financial conditions, (3) reformed the conditions of pretrial release, and (4) changed the revocation process of pretrial release.<sup>95</sup>

#### 1. Limiting the use of money bail and pretrial detention

As originally passed, New York's bail eliminated the use of financial release conditions and preventative pretrial detention (known as "remand" in New York) for nearly all misdemeanors and nonviolent felonies. For misdemeanors, only arrests for sexual offenses or contempt with an underlying domestic violence allegation were eligible for cash bail. No misdemeanors were eligible for remand.

For felonies, the law limited cash bail or remand to nine categories of charges. These nine categories were (1) violent felony offenses (excluding certain second degree robbery and burglary offenses), (2) felony witness intimidation, (3) felony witness tampering, (4) class A felonies (excluding certain drug crimes), (5) sex offenses, (6) conspiracy to commit murder, (7) terrorism-related offenses, (8) felony contempt with an underlying domestic violence allegation, and (9) select offenses against children.<sup>96</sup> In effect, these categories encompassed most violent felonies while excluding most nonviolent felonies.

For offenses that were not eligible for cash bail or remand, defendants were released upon arrest after being issued a "Desk Appearance Ticket." This ticket lists the defendant's court date, which must be within 20 days of the arrest unless the individual is participating in a diversionary program.<sup>97</sup> In a narrow set of circumstances, law enforcement officials could still

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<sup>95</sup> See generally *L. 2019, ch. 59, Part JJJ, Criminal Procedure Law Amendments* (Jan. 1, 2020), [https://cdn.ymaws.com/www.nysda.org/resource/resmgr/2020reforms/ny\\_bail\\_law\\_2020.pdf](https://cdn.ymaws.com/www.nysda.org/resource/resmgr/2020reforms/ny_bail_law_2020.pdf).

<sup>96</sup> *Id.* § 510.10.4.

<sup>97</sup> *Id.* § 150.10.

take individuals into custody even when the suspected crime was not eligible for cash bail or remand.<sup>98</sup>

## 2. Required ability to pay considerations

To ensure individuals are not held pretrial because of an inability to afford bond, new protocols required judges setting bond to explicitly consider a defendant's "individual financial circumstances," their "ability to post bail without posing undue hardship," and their "ability to obtain a secured, unsecured, or partially secured bond."<sup>99</sup>

In addition to ensuring bond affordability, the new legislation required judges to offer at least three forms of bond payment. One of these options must include an unsecured or partially secured bond, the latter of which is comparable to Connecticut's 10 percent rule.

## 3. Reforms of pretrial release conditions

New York's reforms established a presumption of release on recognizance for crimes that were not eligible for cash bail or detention. Courts could only impose release conditions if they found the defendant posed a flight risk, and judges were required to select the "least restrictive" conditions needed to reasonably assure that the defendant will return on their court date.<sup>100</sup> These conditions could include contact with pretrial services, pretrial supervision, travel restrictions, prohibitions on firearm possession, or electronic monitoring.

The law permits for the use of risk assessment tools (RAT) in helping courts determine a defendant's conditions for release. However, the law requires that any RATs used in court be publicly available, free of racial or gender bias, and validated for predictive accuracy. Importantly, these tools may be only used to determine the likelihood of a defendant reappearing and cannot be used as an assessment of the defendant's future dangerousness or risk to public safety.

The act also created new limits on electronic monitoring. Under the new law, courts may order monitoring for only 60-day periods, and every 60 days there must be a subsequent court hearing to renew the monitoring condition. Furthermore, courts are limited to imposing monitoring only in cases involving a (1) felony, (2) misdemeanor domestic violence offense, (3) misdemeanor sex offense, or (4) misdemeanor in which the defendant has been convicted of a violent felony within the past five years.<sup>101</sup>

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<sup>98</sup> These scenarios include domestic violence cases, sex offenses, Class E felonies involving either escape from custody or bail jumping, cases where it is reasonably expected that protection order will be issued, cases where a driver's license may be suspended or revoked, cases where the defendant has an outstanding warrant or history of failing to appear in court, cases where the defendant cannot establish his or her identity, and if the defendant will face harm without immediate medical or mental health care. *Id.* § 150.20.1.

<sup>99</sup> *Id.* § 150.30.1.

<sup>100</sup> *Id.* § 500.10.

<sup>101</sup> *Id.* § 150.10.21.

Within this restricted set of cases, courts are further limited in ordering electronic monitoring to only those cases in which “no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure a principal’s return to court.”<sup>102</sup> Defendants on electronic monitoring are considered to be “in custody,” which has implications for the timing of a grand jury indictment or the filing of misdemeanor charging documents.

At every subsequent court date, the court must consider reducing or increasing release conditions in response to defendant compliance or noncompliance. Defendants may also apply for a review of pretrial release conditions while their case is pending.

#### 4. Changes to revocation and modification of pretrial release

Under New York’s reforms, courts may still revoke pretrial release or impose new conditions. To impose new conditions, the court must find by clear and convincing evidence after a hearing that a defendant violated a condition of release.

In certain cases, the court may impose a financial bail bond or pretrial monitoring following a violation of release. These cases include when the defendant (1) “persistently and willfully fails to appear,” (2) violates a protection order, (3) is charged with felony witness intimidation or tampering while on release for a misdemeanor, or (4) is charged with any felony while on release for a felony. Courts may revoke release entirely and remand a defendant if, while the defendant is on release for a felony, a judge finds reasonable cause to believe that the defendant committed a class A felony, violent felony, or witness intimidation. To impose a bond or revoke release, courts must first hold a hearing at which the defendant has the right to present evidence or cross-examine witnesses.

Furthermore, if a defendant fails to appear, the court must wait at least 48 hours to issue a bench warrant. This waiting requirement can be waived if the defendant has been charged with a new crime or if there is clear evidence of intentional and willful failure to appear. This waiting period is meant to give the defense attorney time to contact the defendant and arrange a voluntary return to court.

#### Criticism and Amendment

New York’s reforms faced criticism from certain stakeholders in the criminal justice system. On one hand, some advocates did not think the reforms went far enough in eliminating the role of financial bonds in pretrial release decisions.<sup>103</sup> On the other hand, law enforcement groups and district attorneys expressed concerns with the reform’s provisions and felt they were not

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<sup>102</sup> *Id.* § 150.40.4.(a).

<sup>103</sup> Daniele Selby, *Activists Say New York's Cash Bail Reform Doesn't Go Far Enough*, GLOB. CITIZEN (Apr. 9, 2019), <https://www.globalcitizen.org/en/content/new-york-cuomo-passes-cash-bail-reform>.

sufficiently consulted in the development of the policy.<sup>104</sup> In particular, these groups worried the reform’s strict limits on pretrial detention made it too difficult to protect the public from certain high-risk, repeat-offender defendants who posed credible and identifiable threats to public safety.<sup>105</sup> New York City Mayor Bill DiBlasio and the New York City Police Department also blamed an alleged 22% increase in major crime in the city in early 2020 on bail reform.<sup>106</sup> Adding to this opposition, during this time, the media covered several high-profile violent incidents committed by defendants on pretrial release.<sup>107</sup>

In response to this criticism, the New York State Assembly modified its bail statutes in April 2020. These amendments took effect in July 2020. Overall, the reform framework remains largely the same, though the amendments implemented several important changes.

First, the amendments expanded the list of charges and categories of defendants eligible for bond to include four new misdemeanors: bail jumping, escape from custody, criminal obstruction of breathing or blood circulation (when a domestic violence offense), and endangering the welfare of a child (when the defendant is a “level three” sex offender).<sup>108</sup> Still, no misdemeanors are eligible for remand.

The amendments also expanded eligibility for cash bail and remand to include the following felonies: vehicular assault, aggravated assault of a minor under age 11, criminally negligent homicide, manslaughter, leaving the scene of an accident where a death occurred, grand larceny, enterprise corruption, money laundering in support of terrorism, promoting a sexual performance by a child, sex trafficking, possession of a weapon on school grounds, felony bail jumping, felony escape from custody, third degree assault or arson if committed as a hate crime, unlawful imprisonment as a domestic violence crime, and failure to register as a sex offender (if the defendant is a level three sex offender).<sup>109</sup> The amendment also narrowed the

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<sup>104</sup> Erika Leigh, *Lawmakers, Law Enforcement Call for Bail Reform Moratorium*, SPECTRUM NEWS 1 (Nov. 12, 2019), <https://spectrumlocalnews.com/nys/hudson-valley/news/2019/11/12/tedisco-walsh-press-conference-bail-reform>.

<sup>105</sup> Eric Gonzales et al., *Reforms Fraught with Serious Risk: Yes, Reform Discovery and Bail. No, Don’t Endanger the Public in the Process*, N.Y. DAILY NEWS (Mar. 27, 2020), <https://www.nydailynews.com/opinion/ny-oped-reforms-fraught-with-serious-risk-20190327-nmezjrqnacnatlgnopev4wuoc2q-story.html>.

<sup>106</sup> Erin Durkin, *NYPD, de Blasio Blame Bail Reform for Crime Spike as Defenders Question Police Stats*, POLITICO (Mar. 5, 2020), <https://www.politico.com/states/new-york/albany/story/2020/03/05/nypd-reports-spike-in-crime-as-public-defenders-question-the-stats-1265616>. The relationship between bail reform and New York City crime rates in early 2020 is disputed. For an account challenging the narrative that bail reform caused the observed increase in crime, see Laura Bennett & Jamil Hamilton, *Freedom, Then the Press: New York Media and Bail Reform*, FWD (Apr. 2, 2021), [https://www.fwd.us/wp-content/uploads/2021/06/Bail\\_Reform\\_Report\\_052421-1.pdf](https://www.fwd.us/wp-content/uploads/2021/06/Bail_Reform_Report_052421-1.pdf).

<sup>107</sup> Beth Fertig, *“The Hole In The System”: What Tiffany Harris’s Case Really Says About Bail Reform*, GOTHAMIST (Feb. 6, 2020), <https://gothamist.com/news/the-hole-in-the-system-what-tiffany-harriss-case-really-says-about-bail-reform>.

<sup>108</sup> N.Y. STATE DEFS. ASS’N, ELFA ARTICLE VII - NEW PART UU - BAIL AMENDMENTS

(2020), [https://cdn.ymaws.com/www.nysda.org/resource/resmgr/pdfs--other/elfa\\_article\\_vii\\_-\\_new\\_part\\_.pdf](https://cdn.ymaws.com/www.nysda.org/resource/resmgr/pdfs--other/elfa_article_vii_-_new_part_.pdf).

<sup>109</sup> *Id.*

second degree burglary exception from bail-remand eligibility and added certain class A drug felonies to the eligibility net.<sup>110</sup>

Additionally, the amendments added new defendant-based criteria to the bail-remand eligibility net. Now, any individual charged with a felony while on probation or parole is eligible for bail or remand, as are any individuals who, if found guilty of the charged offense, would be considered a “persistent felony offender.” Judges may also impose cash bail or remand a defendant who, while on release for a felony or class A misdemeanor involving harm to a person or property, commits another such felony or class A misdemeanor. Lastly, judges may impose bond on or remand *any* defendant who was convicted pending their sentencing date, regardless of the underlying offense.<sup>111</sup>

Second, judges now have expanded options when it comes to pretrial release conditions. Judges may now order defendants to surrender their passports; participate in pretrial programming; avoid contact with certain individuals; or maintain housing, employment, or education as a condition of release.<sup>112</sup> Judges can also now issue protective orders or order medically recommended hospitalization as a pretrial release condition. The amendments also modified the standard for imposing nonmonetary conditions, so judges may now impose the conditions necessary to assure court appearance *and*, somewhat circularly, compliance with court conditions.<sup>113</sup> Judges still may not consider public safety as a discrete basis for imposing conditions.

Third, the amendments also established that defendants who fail to provide contact information to pretrial service agencies forfeit their right to court date reminders, and that agency failure to provide a reminder does not excuse a failure to appear.<sup>114</sup>

Fourth, the amendments imposed new data collection requirements. This will enable the state to generate empirical data on how bail reforms are affecting incarceration rates, failure to appear, and public safety.<sup>115</sup>

### Impacts

When New York counties began to implement the initial wave of reforms in fall 2019, the state’s pretrial detained population was around 12,500. By March 2020, the pretrial population dropped over 35% to 8,000.<sup>116</sup> Since March 2020, the impacts of New York’s bail reforms have

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* §§ 9-10.

<sup>112</sup> *Id.* § 1.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* § 11.

<sup>115</sup> *Id.* § 6.

<sup>116</sup> *Empire State of Incarceration*, VERA INST. JUST. (Feb. 18, 2021), <https://www.vera.org/empire-state-of-incarceration-2021>.

been confounded by the impacts of the 2019-2022 coronavirus pandemic on the state's justice system, making it difficult to measure longer-term effects of the reforms.<sup>117</sup> For instance, at the beginning of the pandemic, New York police made far fewer arrests, which may inflate the observed impact of bail reform on the pretrial population.<sup>118</sup> These measurement issues are further complicated by the fact that the amendments to New York's reforms went into effect only months after the state began to adjust to virtual criminal justice operations.<sup>119</sup>

In any event, in 2020, monetary bail and pretrial detention rates dropped significantly. In New York City in 2019, 7.8% of misdemeanants had a bond imposed, resulting in an overall detention rate of 6.6%. By contrast, in 2020, the rate of bond for misdemeanors dropped to just 2.5%, resulting in a detention rate of 2.4%.<sup>120</sup>

The reduction was even steeper for nonviolent felonies, where bond and remand were imposed in 35.3% and 1.7% of cases, respectively, in 2019 in New York City. That year, 32.7% of individuals charged with a nonviolent felony spent time in pretrial detention. In 2020, only 13.9% of nonviolent felony cases had bond imposed and only 1.0% were remanded, resulting in an overall detention rate of just 13.4%—less than half the rate in 2019. Correspondingly, the rate of release on recognizance increased from 50.8% to 66.6% from 2019 to 2020, and the rate of supervised release increased from 12.1% to 18.5%.<sup>121</sup>

Even violent felony arrests saw an overall decrease in bond and detention from 2019 to 2020. The rate of bond imposition dropped from 59.5% to 47.7%, and the rate of remands dropped from 4.4% to 3.9%. As a result, the overall detention rate dropped from 53.6% to 44.6%, with a corresponding increase in supervised release.<sup>122</sup>

While any causal inferences are necessarily speculative given the confounding impacts of the pandemic, the 2020 amendments to the state's bail reform likely increased the incidence of bond and remand for violent felonies relative to the original reforms. In the second half of 2020, the rate of bond for violent felonies in New York City returned to over 50%, and remand occurred in over 4% of cases. Some experts estimate that as many as 18% of bonds and remands in the second half of 2020 were the result of the subsequent amendments to bail reform.<sup>123</sup> Again, these estimates are necessarily speculative given the inability to parse out clear chains of causation.

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<sup>117</sup> Michael Rempel & Joanna Weill, *One Year Later: Bail Reform and Judicial Decision-Making in New York City*, CTR. FOR CT. INNOVATION 5 (2021), [https://www.courtinnovation.org/sites/default/files/media/document/2021/One\\_Year\\_Bail\\_Reform\\_NYS.pdf](https://www.courtinnovation.org/sites/default/files/media/document/2021/One_Year_Bail_Reform_NYS.pdf).

<sup>118</sup> *Empire State of Incarceration*, supra note 116.

<sup>119</sup> Rempel & Weill, supra note 117, at 5.

<sup>120</sup> *Id.* at 7.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 9.

<sup>123</sup> *Id.*

In certain counties, the elimination of monetary bail for many low-level offenses meant that when bond *was* set, the average bond amount tended to be higher, though this trend was not consistent across the state.<sup>124</sup> This, in turn, meant in some areas, it took individuals longer to gather the funds to post bond. Consequently, even though the number of individuals detained on bond decreased substantially, the average period of pretrial incarceration increased for certain populations.<sup>125</sup>

Lastly, there continue to be racial disparities in pretrial detention in New York City, and these disparities increased in 2020.<sup>126</sup> However, one study found that these disparities can be explained by differences in bond-remand eligibility across different racial groups, criminal history, and other defendant and charge characteristics.<sup>127</sup>

### Conclusion

New York's experience with bail reform and the subsequent 2020 amendments can inform future reforms. The New York governor's original proposal to eliminate all money bail from the pretrial justice system framed the conversation for comprehensive reform. And while New York eliminated the ability to impose money bail on many defendants charged with most misdemeanors and non-violent crimes, the state's failure to address the concerns of key stakeholders triggered fierce political backlash. Subsequently, the legislature's willingness to amend its reforms in response to implementation challenges can remind policymakers in other jurisdictions that pretrial justice reform is an iterative and ongoing process that requires continued monitoring, evaluation, and modification.

### **F. Alaska**

In 2014, Alaska created an interbranch Criminal Justice Commission consisting of judges, legislators, the state attorney general, the state public defender, the commissioners of Public Safety and Corrections, law enforcement officials, the director of a state mental health authority, and members representing crime victims and Alaska Natives. This group was tasked with reviewing the state's criminal justice system and making recommendations to the legislature. Over the next year, the Commission conducted extensive research and presented 21 recommendations to the legislature. These recommendations included proposed reforms to many aspects of Alaska's justice system, including policies aimed at improving pretrial justice,

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<sup>124</sup> Compare *id.* at 17 (showing increases in the percentage of bonds between \$5,000 and \$25,000 in New York City, but a reduction in the rate of bonds over \$100,000), with *Empire State of Incarceration*, *supra* note 116 (noting an increase in average bond amount for certain counties outside the city).

<sup>125</sup> *Empire State of Incarceration*, *supra* note 116 (noting that, in certain counties outside the city, the percentage of people posting bond within 30 days dropped from 70% in March 2019 to 55% in February 2020). *But see* Rempel & Weill, *supra* note 117, at 16, 23 (showing only single-digit percentage point decreases in 30 day payment rates in New York City).

<sup>126</sup> *Empire State of Incarceration*, *supra* note 116.

<sup>127</sup> Rempel & Weill, *supra* note 117, at 23, 37 n.51.

reducing prison sentences for less serious offenses, strengthening probation and parole, removing barriers to reentry, and improving oversight and data reporting.

In 2016, these recommendations were drafted into Senate Bill 29 and introduced to the legislature. After over 50 public hearings, the legislature passed the bill by wide margins, and Governor Bill Walker signed it into law on July 11, 2016.

### *Initial Pretrial Reforms*

The law enacted several pretrial justice reforms in Alaska. First, the act gave law enforcement officers discretion to issue a citation and summons rather than an arrest for nonviolent C felonies.<sup>128</sup> Prior to the act, officers could only issue nonarrest summonses for nonviolent misdemeanors. The law downgraded most “failure to appear” and “breach of release” condition offenses from misdemeanors or felonies to noncriminal violations.<sup>129</sup> The reforms also shortened the period for mandatory court appearance for arrestees from 48 to 24 hours.<sup>130</sup>

Perhaps most significantly, the reforms sought to transition Alaska’s bail system to focus more on a defendant’s risk rather than on the individual’s financial resources. In particular, the law required the Department of Corrections to develop a pretrial services program that utilizes a validated risk assessment tool to develop pretrial reports and release recommendations for judges.<sup>131</sup>

The act created a three-tiered release system based on the defendant’s assessed risk and pending charge. Based on where a defendant fell in this scheme, released would be (1) required, (2) presumed but not required, or (3) neither presumed nor required. Release on recognizance or on an unsecured bond was required for low- and moderate-risk individuals charged with most nonviolent misdemeanors and for low-risk individuals charged with most nonviolent class C felonies.<sup>132</sup> High-risk individuals charged with nonviolent misdemeanors, moderate- and high-risk individuals charged with nonviolent class C felonies, and low-risk individuals charged with more serious crimes were afforded a rebuttable presumption of release on recognizance or on an unsecured bond. The state could only overcome this presumption upon showing by clear and convincing evidence that no combination of nonmonetary conditions of release could ensure court appearance and public safety.<sup>133</sup> Only upon such a finding could a judge impose a secured bond.

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<sup>128</sup> 2016 Alaska Sess. Laws ch. 36, § 51, <https://www.akleg.gov/basis/Bill/Detail/29?Root=SB%2091>.

<sup>129</sup> *Id.* § 28.

<sup>130</sup> *Id.* § 50.

<sup>131</sup> *Id.* § 117.

<sup>132</sup> *Id.* § 59.

<sup>133</sup> *Id.*

For moderate- and high-risk individuals charged with more serious crimes (violent crimes; class B or higher felonies), defendants were not afforded a presumption of release, and judges were free to order release, nonmonetary conditions, or a secured bond at their discretion.<sup>134</sup>

**Fig. 1 – Alaska’s Release and Detention System Under Initial Reform**

	<b>Nonviolent Misdemeanors</b>	<b>Nonviolent Class C Felonies</b>	<b>Other Crimes</b>
<i>Low-Risk</i>	Release on Recognizance (ROR) or unsecured bond (UB) <b>required</b>	ROR or UB <b>required</b>	ROR or UB <b>presumed</b>
<i>Moderate-Risk</i>	ROR or UB <b>required</b>	ROR or UB <b>presumed</b>	ROR/UB not required nor presumed
<i>High-Risk</i>	ROR or UB <b>presumed</b>	ROR or UB <b>presumed</b>	ROR/UB not required nor presumed

The reforms further required courts, upon defendant application, to revisit and revise any conditions that resulted in the pretrial detention of a defendant for more than 48 hours unless no less restrictive conditions could reasonably ensure court appearance and public safety.<sup>135</sup>

Lastly, the reforms also established more robust forms of pretrial supervision and court date reminders for defendants released pretrial.<sup>136</sup>

*Predicted Impacts and Partial Repeal*

It was estimated that these pretrial justice reforms, combined with other sentencing reforms passed in SB 91, would reduce Alaska’s prison population by 13% by 2024.<sup>137</sup> However, in 2018 and 2019, Alaska’s legislature, fueled by concerns about rising crime rates, passed two bills repealing many of the 2016 reforms.<sup>138</sup>

In the 2018 act, the legislature collapsed the three-tiered release framework into a two-tier framework. Specifically, the act repealed the provisions *requiring* nonfinancial release for low- and moderate-risk individuals charged with nonviolent misdemeanors and for low-risk individuals charged with nonviolent class C felonies. Instead, individuals charged with nonviolent misdemeanors or class C felonies, regardless of risk level, would face a rebuttable

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* § 56.

<sup>136</sup> *Id.* § 178.

<sup>137</sup> *Alaska’s Criminal Justice Reforms*, PEW CHARITABLE TRUSTS (Dec. 2016), [https://www.pewtrusts.org/~media/assets/2016/12/alaskas\\_criminal\\_justice\\_reforms.pdf](https://www.pewtrusts.org/~media/assets/2016/12/alaskas_criminal_justice_reforms.pdf).

<sup>138</sup> Zachary A. Siegel, *Alaska Passed Sweeping Criminal Justice Reforms. Its New Governor Just Unrevealed Them.*, APPEAL (July 11, 2019), <https://theappeal.org/alaska-passed-sweeping-criminal-justice-reforms-its-new-governor-just-unraveled-them/>.

presumption of nonfinancial release unless the state proved by clear and convincing evidence that no nonmonetary conditions can reasonably ensure court appearance and public safety.<sup>139</sup>

**Fig. 2 – Alaska’s Release and Detention System Under 2018 Partial Repeal**

	Nonviolent Misdemeanors	Nonviolent Class C Felonies	Other Crimes
Low-Risk	ROR or UB presumed		ROR or UB presumed
Moderate-Risk			ROR/UB not presumed
High-Risk			ROR/UB not presumed

In 2019, the legislature made additional changes. First, the amendments reinstated failure to appear and violation of release conditions as applicable to misdemeanors or felonies.<sup>140</sup> The amendments also repealed the provisions requiring judges to revise any conditions that resulted in pretrial detention.<sup>141</sup> Significantly, the reforms abandoned the charge and risk scheme for determining whether defendants receive a required or presumed release. Thus, judges may impose the least restrictive conditions necessary, including secured bond, whenever the court determines that release on recognizance or on an unsecured bond will not reasonably ensure court appearance and public safety.<sup>142</sup> No charges trigger a statutory presumption of release. Furthermore, the 2019 law created a rebuttable presumption that individuals charged with certain felonies pose a substantial risk of nonappearance and public danger.<sup>143</sup>

*Recent Developments*

In 2020, in response to the coronavirus pandemic, judges in Alaska implemented a statewide change to the state’s bail schedule. As a result of this order, all individuals charged with a misdemeanor, with the exceptions of stalking in the second degree or crimes of domestic violence, must be released subject to four conditions: that they obey all laws, appear in court, maintain contact with counsel, and avoid contact with any victims.<sup>144</sup> Under state statute and procedural rules, individuals charged with domestic violence or stalking must be detained until arraignment.<sup>145</sup>

<sup>139</sup> 2018 Alaska Sess. Laws ch. 22, §§ 12-13, [http://www.akleg.gov/basis/Bill/Detail/30?Root=hb%20312#tab6\\_4](http://www.akleg.gov/basis/Bill/Detail/30?Root=hb%20312#tab6_4).

<sup>140</sup> 2019 Alaska Sess. Laws ch. 4, §§ 37-38, [http://www.akleg.gov/basis/Bill/Detail/31?Root=hb%2049#tab1\\_4](http://www.akleg.gov/basis/Bill/Detail/31?Root=hb%2049#tab1_4).

<sup>141</sup> *Id.* § 57

<sup>142</sup> *Id.* § 59

<sup>143</sup> *Id.* The presumption applies to those charged with unclassified felonies, class A felonies, sexual felonies, operating a vehicle under the influence, or refusal to submit to a chemical test; those charged with a felony against a person while having a similar conviction within the past five years; those charged with a felony while on release; those charged with a domestic violence offense while having a domestic violence conviction within the past five years; and those arrested as a fugitive from justice or while accused of committing a felony in another jurisdiction.

<sup>144</sup> The Trial Court for the State of Alaska, *Amended Second Temporary Presiding Judges’ Administrative Order Establishing a Statewide Misdemeanor Bail Schedule* (Feb. 21, 2021), <http://www.courts.alaska.gov/covid19/docs/statewide-pjo-bail2.pdf>.

<sup>145</sup> Alaska Criminal Rule 41(d)(3); Alaska Statute § 12.30.027(e).

## G. California

California captured national attention after passing comprehensive bail reform in 2018. Many advocates welcomed the reform as the first legislation in the country to fully eliminate money bail.<sup>146</sup> However, in response to criticism from advocates on both ends of the political spectrum, voters repealed the reforms in 2020 using a “veto referendum” before they took effect.

### 2018 Legislation

In 2018, California passed Senate Bill 10,<sup>147</sup> which would have replaced the state’s money bail system with one based entirely on risk. The bill would have eliminated the use of financial conditions of release in all cases. Instead, release and detention decisions would be based on pretrial investigations and risk assessments conducted by the court system.

Under this system, most defendants arrested for a misdemeanor would be released within 12 hours of booking. Certain misdemeanants would have been exempted, such as those charged with sexual offenses, domestic violence or stalking offenses, protective order violations, or certain DUI offenses; those with pending criminal trials, three or more outstanding failure to appear warrants in the last year, or ongoing community supervision sentences; those with a history of intimidating witnesses or pretrial supervision violations; and those convicted of a “serious or violent” felony in the past five years. These criteria defined the “10 primary exclusions” from automatic pretrial release.

Those arrested for a felony or who fell into one of the 10 misdemeanor exceptions would be subjected to a pretrial investigation and assessment within 24 hours. This investigation would ultimately produce a recommendation for release or detention for each defendant based on the risk of failure to appear and the risk to public safety. By statute, the proposed investigation would have included a review of an arrested person’s instant charges, criminal history, victim input, and past failures to appear. This information would be paired with a validated risk instrument to produce an overall pretrial recommendation.

Low-risk defendants would be released on their own recognizance with the least restrictive conditions that would reasonably assure public safety and court appearance, unless one of the “10 primary exclusions” applied. Low-risk defendants would also be denied immediate release if they were arrested for a felony that was “serious and violent;” involved physical violence to a person, threat of such violence, or the likelihood of great bodily injury; involved the use of a deadly weapon; or inflicted great bodily injury (the “four arrest-based exclusions”). Low-risk defendants who fell into one of these exclusions could be detained until arraignment.

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<sup>146</sup> Alexei Koseff, *Jerry Brown Signs Bill Eliminating Money Bail in California*, SACRAMENTO BEE (Aug. 28, 2018), <https://www.sacbee.com/news/politics-government/capitol-alert/article217461380.html>.

<sup>147</sup> See generally Department of Finance, California Courts, *SB 10 General Overview*, <https://www.courts.ca.gov/documents/sb10-overview.pdf> (last updated Nov. 8, 2018).

Medium-risk defendants faced the same release and detention criteria as low-risk defendants. Both categories receive a presumption of release on least restrictive conditions unless one of the 10 primary exclusions or the four arrest-based exclusions applied. While courts could expand the list of disqualifiers beyond the 14 statutory exclusions, further restricting pre-arraignment release eligibility, courts could not categorically disqualify all medium-risk arrestees from release.

Low- and medium-risk defendants who could not obtain release before arraignment and all high-risk defendants would have an opportunity for release at arraignment.<sup>148</sup> At this point, to continue to detain an individual, the state would have to file a motion to detain. The prosecution would only be able to file such a motion if (1) the crime was committed with violence against a person, threatened violence or the likelihood of serious injury, involved the personal arming or use of a deadly weapon, or personal infliction of great bodily injury; (2) the defendant was on postconviction supervision at the time of arrest; (3) the defendant is awaiting trial or sentencing in a different felony case; (4) the defendant intimidated or threatened retaliation against a witness or victim of the current crime; or (5) there is substantial reason to believe that no conditions will reasonably assure defendant appearance in court and the protection of victims and the public.

After the prosecution filed a detention motion, the judge would have to decide whether any set of conditions could reasonably assure the safe release of the defendant. The court would need to hold a hearing within three days of arraignment, at which the defendant would have a right to counsel. Victims would have the right to submit written comments or testify at this hearing.

To grant a detention motion at the hearing, the court would need to find clear and convincing evidence that no set of conditions could reasonably assure public safety or the appearance of the defendant. For individuals arrested for certain violent felonies or with certain risk factors, the law would establish a rebuttable presumption that no set of conditions of release could reasonably assure public safety.

The state's Judicial Council would have been responsible for implementing many of these provisions. Among the Council's responsibilities included amending the California Rules of Court, identifying validated risk assessments, training stakeholders, contracting with service providers, and collecting and analyzing data on the new system.

### Support and Opposition

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<sup>148</sup> Under the law, courts could also initiate a pre-arraignment release review in which courts could release low- and medium-risk defendants who were not released on the initial pretrial assessment. To continue to detain an individual, the court would need to find that "there is a substantial likelihood that no condition of supervision will reasonably assure public safety or return to court." Individuals arrested for a serious or violent felonies, or who are pending trial or sentencing in a felony matter when arrested, are ineligible for this pre-arraignment release.

Supporters of Senate Bill 10 included many advocates, criminal justice stakeholders, policymakers, grassroots organizations, and the state’s courts and probation officers, who viewed the proposal as a major improvement over a money-based decision system.<sup>149</sup> They endorsed the proposal as a better process than its predecessor, basing release and detention on risk and allowing for the release of a large portion of low- and medium-risk defendants. In particular, these varied stakeholders appreciated a system that would eliminate the injustice of favoring the release of wealthy, high-risk defendants over that of indigent, low-risk defendants.<sup>150</sup>

During the legislative drafting process, the provisions concerning mandatory release and judicial discretion for medium- and high-risk defendants underwent several revisions. As a result of these revisions, some groups that had originally favored the proposal, including the American Civil Liberties Union (ACLU) and California Attorneys for Criminal Justice, withdrew their support. While these groups supported an end to the private bail bond industry, they were concerned that SB 10 would not substantially reduce the pretrial population.<sup>151</sup> These groups were also concerned that the proposed system’s reliance on risk assessments could exacerbate racial and economic disparities in pretrial justice outcomes. The bail bond and insurance industries, which would have lost nearly all bond business in California, also opposed SB 10.

### Passage and Veto Referendum

The California State Legislature ultimately passed Senate Bill 10, which was signed into law by Governor Jerry Brown on August 28, 2018. Shortly after passage, the American Bail Association, a trade group for the bail bond and insurance industries, began a campaign to overturn the law.<sup>152</sup> Using California’s “veto referendum” procedures, opponents of the bill were able to postpone the implementation of the bill until citizens could vote on the reform at the 2020 election.

Consequently, Senate Bill 10 appeared on the 2020 ballot as Proposition 25. Leading up to the referendum, the proposal continued to face opposition from the bail bond industry, law enforcement associations, the state Republican Party, the ACLU, and the NAACP.<sup>153</sup> These

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<sup>149</sup> Michael McGough, *The Fate of California’s Cash Bail Industry Will Now be Decided on the 2020 Ballot*, SACRAMENTO BEE (Jan. 17, 2019), <https://www.sacbee.com/news/state/california/article224682595.html>. In California, Probation Departments administer pretrial supervision.

<sup>150</sup> Off. Senate Floor Analyses, Senate Rules Comm., *SB-10 Senate Floor Analyses* (Aug. 21, 2018), [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201720180SB10#\\_](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB10#_).

<sup>151</sup> E.g., ACLU of Northern California, *ACLU of California Changes Position to Oppose Bail Reform Legislation* (Aug. 20, 2018), <https://www.aclunc.org/news/aclu-california-changes-position-oppose-bail-reform-legislation>.

<sup>152</sup> Reid Wilson, *Bail Bond Industry Mobilizes Against Calif. Law Eliminating Cash Bail*, HILL (Aug. 30, 2018), <https://thehill.com/homenews/campaign/404395-bail-bond-industry-mobilizes-against-calif-law-eliminating-cash-bail>.

<sup>153</sup> CalMatters, *Proposition 25: Abolishing Cash Bail* (2020), <https://calmatters.org/election-2020-guide/proposition-25-cash-bail/>; BallotPedia, *California Proposition 25, Replace Cash Bail with Risk Assessments Referendum* (2020),

groups expressed a variety of concerns. Some argued that the new system would release too many defendants, creating a risk to public safety. Other opponents believed the new system's reliance on algorithm-based risk assessments would exacerbate the racial and economic inequities of the state's pretrial justice system.

While the proposition received support from many state leaders, including Governor Gavin Newsom and the speaker of the State Assembly, the measure lost 44% to 56%. As a result, what would have been one of the country's largest efforts to eliminate money bail failed, and California continues to detain and release defendants partly based on their financial resources.<sup>154</sup>

### Subsequent Developments

While Proposition 25 marked a defeat for major bail reform in California, other avenues of change show potential. In the 2021 case *In re Humphrey*, 11 Cal. 5th 135, the California Supreme Court held that judges must consider a defendant's willingness to pay when imposing financial conditions of release. This case is discussed in greater depth in Section IV on litigation. Furthermore, since the referendum, some legislators have proposed various other measures to reform and reduce the role of bail bonds. At the time of writing, none have been passed.<sup>155</sup>

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[https://ballotpedia.org/California\\_Proposition\\_25,\\_Replace\\_Cash\\_Bail\\_with\\_Risk\\_Assessments\\_Referendum\\_\(2020\)](https://ballotpedia.org/California_Proposition_25,_Replace_Cash_Bail_with_Risk_Assessments_Referendum_(2020)). The ACLU nonetheless reiterated its continued commitment to bail reform that would “dramatically reduc[e] the number of people held in pretrial detention, eliminat[e] racism in pretrial decision-making, ensur[e] a fair and supportive pretrial process, and eliminat[e] the exploitative and abusive commercial bail industry that preys on low-income people and people of color.” ACLU of Northern California, *ACLU of Northern California Statement on Prop. 25* (Oct. 1, 2020), <https://www.aclunc.org/news/aclu-northern-california-statement-prop-25>.

<sup>154</sup> Maria Dinzeo, *Bid to End Cash Bail System Fails in California*, COURTHOUSE NEWS SERV. (Nov. 4, 2020), <https://www.courthousenews.com/bid-to-end-cash-bail-system-fails-in-california/>.

<sup>155</sup> Don Thompson, *Latest California Bail Reform Effort Dies for This Year*, ASSOCIATED PRESS (Sept. 9, 2021), <https://www.usnews.com/news/best-states/california/articles/2021-09-09/latest-california-bail-reform-effort-dies-for-this-year>.

## IV. LITIGATION CHALLENGING THE USE OF CASH BAIL

In recent years, advocates have filed lawsuits in various jurisdictions challenging financial conditions of pretrial release. Some cases have led to injunctions, with courts requiring jurisdictions to reform their practices. Other cases have led to settlement agreements between the parties, which have included mandatory reforms.<sup>156</sup> Many cases are still ongoing. These lawsuits have challenged pretrial detention and the use of money bail on Equal Protection, Due Process, Excessive Bail, and Right to Counsel grounds. The challenges have raised concerns about both the use of cash bail and the procedures used to determine bond amounts. This section discusses these developments and their impacts.

### A. U.S. Supreme Court Caselaw

The Commission's 2017 report described the foundational legal principles of bail, including the presumptions of innocence and pretrial release, the protection against excessive bail, the right against self-incrimination, and the rights to counsel, due process of law, and equal protection. Within the bounds of these rights, the state may detain certain individuals pretrial.

#### *Excessive Bail and Due Process*

The Eighth Amendment to the United States Constitution provides that “[e]xcessive bail shall not be required.”<sup>157</sup> The U.S. Supreme Court has assumed in *dicta* that the Fourteenth Amendment incorporates this protection against state governments.<sup>158</sup>

The use of cash bail also implicates the Due Process Clauses. The Fifth and Fourteenth Amendments provide that no state shall “deprive any person of life, liberty, or property, without due process of law.”<sup>159</sup> The Supreme Court has recognized both “procedural” and “substantive” protections under the Due Process Clauses. “Procedural” due process guarantees fair procedural safeguards, such as individualized consideration, when a person faces a possible deprivation of life, liberty, or property. This includes the deprivation of liberty through pretrial detention. So-called “substantive” due process protections prevent the government from punishing an individual prior to an adjudication of guilt.<sup>160</sup>

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<sup>156</sup> For example, in *ODonnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018), discussed below, the court approved a settlement that required Harris County to implement programs to improve court appearance rates, and led to the passage of a local rule mandating certain procedures prior to requiring money bail as a condition of release. In *Buffin v. City and County of San Francisco*, after determining that the county's use of a bail schedule violated the 14<sup>th</sup> Amendment of the Constitution, the court approved a settlement agreement that would replace the bail schedule with a pre-arraignment assessment program. Final Judgment & Injunction, *Buffin v. City & Cnty. of S.F.*, No. 15-cv-04959-YGR (N.D. Cal. Sept. 3, 2019) ECF No. 372.

<sup>157</sup> U.S. CONST. amend. VIII, § 1.

<sup>158</sup> See *McDonald v. City of Chi.*, 561 U.S. 742, 764 n.12 (2010) (citing *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971)).

<sup>159</sup> U.S. CONST. amend. XIV.

<sup>160</sup> *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

The U.S. Supreme Court has addressed the constitutionality of bail systems in two major cases. First, in *Stack v. Boyle*, the Court held that the constitutional purpose of bail bonds is to assure arrestee appearance in court.<sup>161</sup> Accordingly, the Court determined that “bail set at a number higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’ under the Eighth Amendment.”<sup>162</sup> Furthermore, the Court noted that because bail serves a very specific purpose, the setting of a bail bond for any defendant “must be based upon standards relevant to the purpose of assuring the presence of the defendant.”<sup>163</sup>

The Court expanded its bail jurisprudence in *United States v. Salerno*, which concerned the Bail Reform Act of 1984. Under the Act, courts were required to consider a defendant’s potential dangerousness in bail decisions. In certain situations, the Act authorizes preventative pretrial detention without bail when no release conditions could reasonably assure public safety. In *Salerno* the Court ultimately upheld these provisions against substantive due process, procedural due process, and excessive bail challenges.

First, the *Salerno* Court held that pretrial detention does not constitute “punishment” in violation of substantive due process protections, but rather serves as a regulatory solution to the threat that dangerous individuals may pose to society if released.<sup>164</sup> The Court next held that the government’s interest in preventing crime committed by defendants pending trial can, under narrow circumstances, outweigh the defendant’s liberty interest.<sup>165</sup> In so ruling, however, the Court emphasized that “[i]n our society, liberty is the norm, and detention prior to trial is the carefully limited exception.”<sup>166</sup>

The *Salerno* Court further held that judicial evaluations about a defendant’s potential dangerousness, when paired with safeguards such as the right to counsel and a clear and convincing evidence standard, were adequate to authorize pretrial detention under the Due Process Clause’s procedural protections.<sup>167</sup>

Lastly, the Court upheld the act against an Eighth Amendment challenge. Expanding *Stack’s* jurisprudence, the Court held that the Excessive Bail Clause does not prohibit the government from considering factors other than defendant appearance, such as danger to the community, when making decisions about pretrial release or detention.<sup>168</sup>

### Equal Protection

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<sup>161</sup> *Stack v. Boyle*, 342 U.S. 1 (1951).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *United States v. Salerno*, 481 U.S. 739, 747 (1987).

<sup>165</sup> *Id.* at 750-51.

<sup>166</sup> *Id.* at 755.

<sup>167</sup> *Id.* at 751-52.

<sup>168</sup> *Id.* at 753.

The Equal Protection Clause of the Fourteenth Amendment holds that “no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” This provision generally prohibits states from treating similarly situated individuals differently based on certain suspect characteristics. Under the clause, courts invalidate most state actions that discriminate based on birth-based characteristics, such as race, gender, or place of birth. Discrimination based on other types of characteristics, including wealth,<sup>169</sup> may still trigger the Equal Protection Clause but are subject to a lesser level of judicial scrutiny.

In the criminal justice context, the U.S. Supreme Court has invoked the Equal Protection Clause to hold that individuals may not be imprisoned solely based on their inability to pay fines or fees. The Court has yet to explicitly extend this holding to the context of bail.

In *Williams v. Illinois*, a defendant found guilty of petty theft was sentenced to a one-year maximum sentence, fined \$500, and ordered to pay \$5 in court costs.<sup>170</sup> When the defendant lacked the ability to pay the fine and the fee, the state required him to “work off” his financial obligations and spent an extra 101 days incarcerated beyond the statutory maximum. The Court held that such a scheme violated the Equal Protection Clause, ruling that a state may not subject a class of convicted persons to a period of imprisonment beyond the statutory maximum “solely by reason of their indigency.”<sup>171</sup>

The Court reaffirmed this principle in *Tate v. Short*, where a defendant was imprisoned for a “fine-only” traffic offense.<sup>172</sup> As in *Williams*, Tate was incarcerated at a municipal prison farm to work off a fine he was unable to pay. Echoing its holding in *Williams*, the *Tate* Court held that the Equal Protection Clause prohibits states from limiting a crime’s penalty to a fine for wealthy defendants while allowing incarceration as a penalty for indigent defendants.<sup>173</sup>

In *Bearden v. Georgia*, a defendant challenged the state’s revocation of probation due to his failure to pay court-imposed fines.<sup>174</sup> In its opinion, the Court held that states may not revoke probation for failure to pay fines or restitution without inquiring into the reasons for the failure to pay and examining alternative measures.<sup>175</sup> The Court acknowledged the government has a “fundamental interest in appropriately punishing a person,” but concluded it would be “fundamentally unfair” to imprison a probationer who failed to pay a fine “through no fault of his own” and despite “all reasonable efforts.” Accordingly, the Court remanded the case for a determination of (1) whether the defendant had made a bona fide effort to pay his fine, and

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<sup>169</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973) (holding that wealth-based discrimination does not trigger strict scrutiny).

<sup>170</sup> 399 U.S. 235 (1970).

<sup>171</sup> *Id.* at 242.

<sup>172</sup> 401 U.S. 395 (1971).

<sup>173</sup> *Id.* at 398-99.

<sup>174</sup> 461 U.S. 660 (1983).

<sup>175</sup> *Id.* at 655, 672.

(2) whether alternatives to incarceration could meet the state’s interest in punishing and deterring fine nonpayment.<sup>176</sup>

While the Court has not directly expanded the logic of *Williams, Tate, and Bearden* to the pretrial context, the reasoning in these cases appears even stronger in bail-related decisions. Unlike in *Williams, Tate, and Bearden*, at the pretrial stage, defendants are presumptively innocent. Accordingly, defendants have an even stronger liberty interest, and the government lacks a countervailing interest in punishment. Accordingly, reformers around the country are using these principles to challenge pretrial practices that discriminate based on wealth.

## **B. California**

In one of the most recent cases challenging the use of cash bail, the California Supreme Court in *In Re Humphrey* held that conditioning freedom solely on whether an arrestee can afford bail violates the state constitution’s Equal Protection and Due Process Clauses.<sup>177</sup> In this case, the state set Humphrey’s bond at \$600,000 (later reduced to \$350,000) using a bail schedule.<sup>178</sup> The court in *Humphrey* held that this bail schedule effectively ordered pretrial detention for all but the most affluent.

In reviewing the case, the California Supreme Court held that before setting cash bail, a court must first consider an individual’s ability to pay and whether there are any less restrictive alternatives to the proposed bond.<sup>179</sup> When courts do find cash bail necessary, the bond must be set at an amount the individual can reasonably afford. As a result of this decision, the state can only detain a defendant by *denying* bail outright, which requires a showing of clear and convincing evidence that no conditions of release can reasonably protect the public and assure appearance at court.<sup>180</sup> Further, if the court orders pretrial detention, it must state the reasons for that decision on the record.<sup>181</sup> In essence, this ruling makes it unconstitutional in California to detain a defendant solely because the defendant cannot afford bond.

## **C. Harris County, Texas**

In *O’Donnell v. Harris County*, a class of litigants challenged Harris County’s bail practices under the Due Process and Equal Protection Clauses of the Federal and Texas constitutions. The District Court granted the plaintiffs’ request for a preliminary injunction, finding that the county’s formal requirements and procedures were rarely followed in practice.<sup>182</sup> Instead, detainees were often given extremely brief pretrial hearings in which they had little

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<sup>176</sup> *Id.* at 674.

<sup>177</sup> 276 Cal. Rptr. 3d 232, 237 (2021).

<sup>178</sup> “Bail schedules” are suggested bail amounts based on characteristics about the defendant, the charged offenses, and, in some jurisdictions, the defendant’s score on a risk assessment instrument.

<sup>179</sup> 276 Cal. Rptr. 3d at 248.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 248.

<sup>182</sup> 892 F.3d 147, 153 (5th Cir. 2018).

opportunity to speak or present evidence. Further, state courts imposed bond based on a schedule that gave little consideration to individualized factors. The court also found that the county's bail schedule disproportionately burdened indigent defendants. Lastly, the court held that, considering the limited evidence that secured release conditions increase the odds of court appearance, the county's financial bail policies could only be viewed as a means of imposing pretrial detention on indigent defendants. As a remedy, the Federal Court for the Southern District of Texas imposed an injunction dictating new pretrial safeguards, such as a case-by-case evaluation of an individual's circumstances, including the defendant's ability to pay, and the release of numerous detainees.

The Fifth Circuit upheld the District Court's substantive findings, but remanded the case with an order to narrow the scope of the injunction, finding that the original injunction amounted "to the outright elimination of secured bail for indigent misdemeanor arrestees."<sup>183</sup> Following an amended injunction, another appeal, a political shift following the 2018 county commission elections, and the withdrawal of the second appeal, the parties stayed the litigation and began negotiating a Consent Decree.

In November of 2019, the Court approved the agreement under which Harris County is required to implement multiple reforms. Most significantly, the agreement stipulates most people arrested for misdemeanor offenses must be released as soon as practicable. While monetary (and nonmonetary) conditions may be imposed, cash bail must be unsecured and no greater than \$100.<sup>184</sup> Carveouts exist for certain types of offenses and individuals, and those not immediately released must see a judicial officer within 48 hours of their misdemeanor arrest.<sup>185</sup>

In all cases, courts must follow a specific procedure before setting money bail or imposing any other condition of release. First, the arrestee must be represented by counsel at the bail hearing, and the state court must provide notice to the individual regarding financial affidavits and the rights at stake during the bail hearing. As part of this, the defendant must be asked how much bail they can afford and must be provided an opportunity to be heard, present evidence, and make argument regarding factors relevant to release, detention, and alternative conditions.<sup>186</sup> After these procedures, if the court orders cash bail as a condition of release, the court must present substantive findings on the record by clear and convincing evidence. These findings must show that either 1) the individual can pay the required amount, or 2) the individual does not have the ability to pay, but no less restrictive condition could reasonably assure the safety of the public and the individual's appearance at trial.<sup>187</sup> As a result of these reforms, one group expects 90-95% of misdemeanor arrestees will now be released pretrial.<sup>188</sup>

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<sup>183</sup> *Id.*

<sup>184</sup> Harris Cnty. Crim. Cts. L., Rules of Court, Local Rule 9.2.

<sup>185</sup> Harris Cnty. Crim. Cts. L., Rules of Court, Local Rule 9.4.

<sup>186</sup> Harris Cnty. Crim. Cts. L., Rules of Court, Local Rule 9.12.1-6.

<sup>187</sup> Harris Cnty. Crim. Cts. L., Rules of Court, Local Rule 9.12.7.

<sup>188</sup> Civil Rights Corps, *Harris County, TX: Bail*, <https://civilrightscorps.org/case/harris-county-tx-bail/> (last visited Feb. 17, 2022).

Shortly after the Fifth Circuit upheld the preliminary injunction against Harris County, the Federal Court for the Northern District of Texas issued a similar injunction against Dallas County's bail system mirroring the Fifth Circuit's constitutional analysis.<sup>189</sup> In early 2022, the Fifth Circuit vacated the injunction on standing grounds and remanded the case for consideration on technical matters concerning federal abstention and civil rights law.<sup>190</sup>

#### **D. Hamblen County, Tennessee**

In Tennessee, litigants challenged Hamblen County's bail practices on equal protection, substantive and procedural due process, and right to counsel grounds.<sup>191</sup> Litigants argued that in Hamblen County, courts set bond without any inquiry into the individual's ability to afford bail, resulting in disparate detention of indigent arrestees. Litigants further argued that hearings deny arrestees of their Sixth Amendment right to counsel, are not held in a timely manner, and that individuals are not provided fair notice of the issues to be addressed at the hearing or an opportunity to present evidence.<sup>192</sup>

In November 2020, the federal court for the Eastern District of Tennessee granted the plaintiffs' request for a preliminary injunction to enjoin the sheriff of Hamblen County from detaining individuals who had not been afforded minimum constitutional procedures prior to setting bail.<sup>193</sup> While the court found no equal protection violation, the court held the county's policies likely violate several other constitutional provisions.

First, the court held that for a pretrial detention to comply with substantive due process rights, orders of detention must be narrowly tailored to protecting the government's compelling interests in public safety and court appearance.<sup>194</sup> The court held that to be narrowly tailored, such assessments must be made on a case-by-case basis at a hearing with individualized determinations.<sup>195</sup> The court also held that Hamblen County's procedures failed to meet minimum procedural due process standards, which include an individualized hearing, adequate advance notice, representation by counsel, the ability to present witnesses, and the right to cross-examine the government's witnesses.<sup>196</sup> The court also suggested procedural due process requires an individualized consideration of the defendant's ability to afford bail.<sup>197</sup> Lastly, the

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<sup>189</sup> *Daves v. Dall. Cnty.*, 341 F. Supp. 3d 688 (N.D. Tex. 2018)

<sup>190</sup> *Daves v. Dall. Cnty.*, No. 18-11368 (5th Cir. Jan. 7, 2022). The case also overturned portions of the *ODonnell* opinion that concerned the ability of plaintiffs to sue judges for Texas' bail policy under § 1983 and *Ex Parte Young*, 209 U.S. 123 (1908). While this does not necessarily invalidate the merits of the constitutional holdings in those cases, it does limit the ability of individuals to bring actions against bail systems, as was done in *ODonnell*.

<sup>191</sup> Complaint, *Torres v. Collins*, No. 2:20-cv-00026, (E.D. Tenn. Feb. 16, 2020), ECF No. 1.

<sup>192</sup> *Id.* ¶ 69.

<sup>193</sup> Ord. Granting Motion for Preliminary Injunction at 1, *Torres v. Collins*, No. 2:20-CV-00026 (Nov. 30, 2020), ECF No. 90.

<sup>194</sup> *Id.* at 22-23.

<sup>195</sup> *Id.* at 23.

<sup>196</sup> *Id.* at 24.

<sup>197</sup> *Id.* at 26.

court held that the county's failure to provide counsel at hearings that could result in detention violates the Sixth Amendment.<sup>198</sup>

### E. Nevada

In *Valdez-Jimenez v. 8th Judicial District*, the Nevada Supreme Court held that an arrestee is entitled to a prompt, individualized determination for pretrial detention decisions.<sup>199</sup> The court further held that courts may impose bail only if the state proves by clear and convincing evidence that bond is necessary to ensure the arrestee's appearance in court or to protect the safety of the public.<sup>200</sup> In *Valdez-Jimenez*, the litigants argued their bond was set prohibitively high in violation of their rights to due process and equal protection under the Nevada and Federal constitutions.<sup>201</sup> In deciding the case, the court held that the Nevada Constitution creates a right to reasonable bail before conviction in most circumstances and that excessive bail is prohibited.<sup>202</sup> For bail to be reasonable, it must relate to the state's interests in ensuring appearance at court or protecting the safety of the public.<sup>203</sup> The court stressed that in most instances, bail is not necessary to further these state interests, because many individuals pose neither a flight risk nor a threat to public safety.<sup>204</sup> In addition, an individualized bail hearing must be held within a reasonable time after arrest, in which the individual is entitled to counsel and shall have the right to testify and present evidence.<sup>205</sup> Further, the state must prove by clear and convincing evidence that no less restrictive alternative will satisfy its interests, and the court must make findings of fact and state its reasons for the bail decision on the record.<sup>206</sup> In determining whether bail is necessary, the Supreme Court held that courts must consider the individual circumstances of the arrestee. Essential to this inquiry is a consideration of how much the individual can afford to pay.<sup>207</sup>

### F. Ohio

In *DuBose v. McGuffey*,<sup>208</sup> the Ohio Supreme Court upheld a bond reduction on a defendant's \$1.5 million bond, which a lower court held to be excessive. In the opinion, the Court held that in Ohio, while courts may consider community safety and the risk of harm to others in imposing nonfinancial conditions of release or in preventatively detaining a defendant, courts may not

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<sup>198</sup> *Id.* at 27-28. This case is still ongoing as of November 2021. In May of 2021, the litigants obtained an order for class certification. See Order Granting Motion to Certify Class, *Torres v. Collins*, No. 2:20-CV-00026 (May 5, 2021), ECF No. 116.

<sup>199</sup> 460 P.3d 976, 988 (Nev. 2020).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 983-984.

<sup>202</sup> *Id.* at 984.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 986.

<sup>205</sup> *Id.* at 985-987.

<sup>206</sup> *Id.* at 987.

<sup>207</sup> *Id.* at 985-986.

<sup>208</sup> No. 2022-Ohio-8, slip op. at 1 (Oh. Jan. 4, 2022).

consider public safety in setting a *financial* condition of release.<sup>209</sup> Rather, when setting financial conditions of release, courts may only consider the defendant’s risk of non-appearance, the seriousness of the offense, and the previous criminal record of the defendant. The Court held that setting a bond amount based on considerations about a defendant’s dangerousness would be inappropriate, because a high bond could only meaningfully advance public safety if it resulted in the detention of an individual.<sup>210</sup> The Court rejected this approach, holding that the state could not constitutionally impose a high bond as a means of detaining an allegedly dangerous individual. Instead, if the state wanted to detain the defendant, it would need to meet the high bar for preventative detention.<sup>211</sup> Accordingly, the Court upheld a lower court’s decision that bail was excessive in light of the considerations permitted by statute (i.e., excluding public safety).

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<sup>209</sup> *Id.* at 9.

<sup>210</sup> *Id.* at 13.

<sup>211</sup> In Ohio, this would require the judge to find by clear and convincing evidence that “the proof is evident or the presumption great that the accused committed the [serious offense] with which the accused is charged, . . . that the accused poses a substantial risk of serious physical harm to any person or to the community, and . . . that no release conditions will reasonably assure the safety of that person and the community.” Ohio Rev. Code Ann. § 2937.222 (West 2022).

## V. RECOMMENDATIONS FROM ADVOCACY GROUPS

### A. American Bar Association

The American Bar Association (ABA) has created model standards for pretrial release and detention. These standards assert that no individual should be detained solely because of their inability to afford bail.<sup>212</sup> The standards further state a preference for the release of individuals awaiting adjudication of charges and provide other procedural safeguards and limits on the use of pretrial detention.<sup>213</sup>

The standards establish a presumption of release on personal recognizance.<sup>214</sup> If a judicial officer determines release on personal recognizance is not appropriate, the officer should include a written or oral statement on the record stating the reasons for this determination.<sup>215</sup> Further, judicial officers should assign the least restrictive conditions of release that will ensure attendance at court proceedings and protect the safety of the public.<sup>216</sup>

Financial conditions should be used only when no other conditions will reasonably ensure appearance. When used, financial conditions should be set at the lowest level necessary relative to an individual's financial ability to pay.<sup>217</sup> If the court imposes financial conditions, the conditions should result from a heavily individualized decision-making process, wherein the court weighs the special circumstances of each defendant, the defendant's ability to meet the financial conditions, and the defendant's flight risk.<sup>218</sup> Courts should never set bail by reference to a predetermined schedule of amounts fixed according to the nature of the charge.<sup>219</sup>

A judicial officer should not order pretrial detention unless "the government proves by clear and convincing evidence that no condition or combination of conditions of release will reasonably ensure the defendant's appearance in court or protect the safety of the community or any person . . . ." <sup>220</sup> Courts should only be able to order pretrial detention in certain instances, such as for certain violent or dangerous offenses, for offenses committed while under supervision, or when the individual presents a serious risk of flight or obstruction, danger to the community, or to the safety of any person.<sup>221</sup>

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<sup>212</sup> See AM. BAR ASS'N, CRIM. JUST. STANDARDS: PRETRIAL RELEASE 10-1.4 (2007) (Conditions of release).

<sup>213</sup> *Id.* 10-1.1 (Purposes of Pretrial Detention).

<sup>214</sup> See *id.* 10-5.1 (Release on defendant's own recognizance).

<sup>215</sup> *Id.*

<sup>216</sup> See *id.* 10-1.2 (Release under least restrictive conditions; diversion and other alternative release options).

<sup>217</sup> See *id.* 10-1.4 (Conditions of Release).

<sup>218</sup> *Id.* 10-5.3 (*Release on financial conditions*).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* 10-5.8 (Grounds for pretrial detention).

<sup>221</sup> *Id.*

## B. Uniform Law Commission: Committee on Pretrial Release and Detention

In July 2020, the Uniform Law Commission’s Committee on Pretrial Release and Detention released the *Uniform Pretrial Release and Detention Act*.<sup>222</sup> This model Act created a framework for release and detention determinations. It does not call for the complete elimination of cash bail but sets narrow criteria for when it may be used. The Act also recommends the procedures that should guide a court in setting financial conditions of release or in ordering preventative detention.

Under the Act, individuals not released after arrest are entitled to a hearing within 48 hours to determine release status pending trial.<sup>223</sup> In extraordinary circumstances, the court may continue a release hearing on the motion of the individual, on its own motion, or on the motion of the prosecuting authority. The hearing may be stayed for no more than 48 hours.<sup>224</sup> At the release hearing, the individual has a right to be heard and a right to counsel.<sup>225</sup>

At the hearing, the court shall determine whether the individual poses a clear and convincing risk of absconding, failing to appear, obstructing justice, violating an order of protection, or causing significant harm to another person. The court shall consider information concerning the nature, seriousness, and circumstances of the alleged offense; the weight of evidence against the individual; the individual’s criminal history, history of nonappearance, and community ties; as well as whether the individual has any pending charges in another matter.<sup>226</sup>

In most cases, the court shall order the release of the arrested individual on recognizance.<sup>227</sup> If the court determines that an individual poses a relevant risk, the court shall determine whether practical assistance or voluntary supportive services are available and sufficient to satisfactorily address the risk. If the court determines they are not satisfactory, the court shall impose the least restrictive conditions reasonably necessary to satisfactorily address the relevant risk.<sup>228</sup> Further, the court shall state on the record why the conditions imposed are the least restrictive and reasonably necessary to address the risk identified by the court.<sup>229</sup>

Subject to certain exceptions, the court may not impose a restrictive condition that requires initial payment of a fee greater than what an arrested individual is able to pay from personal resources within 24 hours.<sup>230</sup> As such, before imposing a secured or unsecured bond as a condition of release, the court must consider the individual’s financial resources and

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<sup>222</sup> UNIF. PRETRIAL RELEASE & DET. ACT (UNIF. L. COMM’N 2020).

<sup>223</sup> *Id.* § 301(a).

<sup>224</sup> *Id.* § 301(b).

<sup>225</sup> *Id.* § 302(a)-(b).

<sup>226</sup> *Id.* § 303.

<sup>227</sup> *Id.* § 304(a).

<sup>228</sup> *Id.* §§ 305(a), 306(a).

<sup>229</sup> *Id.* § 306(c).

<sup>230</sup> *Id.* § 307(a).

obligations.<sup>231</sup> Additionally, the court may not impose a secured bond as a condition of release unless the court determines by clear and convincing evidence that the individual is likely to obstruct justice, violate an order of protection, abscond, or not appear.<sup>232</sup>

In certain situations, after the release hearing, the court may issue an order to temporarily detain the arrested individual until a subsequent detention hearing or may impose a financial condition of release in an amount greater than the individual is able to pay within 24 hours from personal financial resources. These options are only available to the court if the individual is charged with a covered offense and the court determines by clear and convincing evidence that (1) the individual is likely to abscond, obstruct justice, violate an order of protection, or cause significant harm to another person *and* no less restrictive condition is sufficient; (2) the individual has violated a condition of pretrial release for a pending criminal charge; or (3) it is extremely likely that the individual will not appear, and a no less restrictive condition is sufficient.<sup>233</sup>

If the court issues an order of temporary pretrial detention and imposes a restrictive condition that results in the individual's continued detention, a hearing shall be held to consider the continued detention of the individual.<sup>234</sup> At the detention hearing, the individual has the rights to counsel, to review evidence before it is introduced at the hearing, to present evidence and witnesses, to testify, and to cross-examine witnesses.<sup>235</sup>

The Act also requires states to enumerate the list of offenses “for which pretrial detention or the imposition of a financial fine that cannot be paid [within 24 hours] is authorized.”<sup>236</sup>

### C. American Civil Liberties Union

As part of its “Smart Justice” Campaign, the ACLU released “A New Vision for Pretrial Justice in the United States,” which sets forth its pretrial policy proposal. The ACLU’s vision is “a system where at least 95 percent of people are released before trial, whether immediately after arrest or within 48 hours, regardless of charge.”<sup>237</sup> The report specifies that those who are not released without booking should have an individualized release hearing within 24 hours of arrest. At this hearing, the individual is entitled to counsel, to discovery, to present and cross-examine witnesses, and to a strong presumption of release without conditions.<sup>238</sup> To impose conditions, the court must find the individual poses a risk of imminent and willful flight or imminent serious physical harm to a reasonably identifiable person.<sup>239</sup> Any conditions imposed

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<sup>231</sup> *Id.* § 307(b).

<sup>232</sup> *Id.* § 307(c).

<sup>233</sup> *Id.* § 308(a).

<sup>234</sup> *Id.* § 401.

<sup>235</sup> *Id.* § 402(a)-(b).

<sup>236</sup> *Id.* § 102(4)

<sup>237</sup> ANDREA WOODS & PORTIA ALLEN-KYLE, ACLU, A NEW VISION FOR PRETRIAL JUSTICE IN THE UNITED STATES 1 (2019).

<sup>238</sup> *Id.* at 4.

<sup>239</sup> *Id.* at 5

must be individualized.<sup>240</sup> Conditions that restrict liberties must be shown by clear and convincing evidence to be the least restrictive necessary to mitigate a specific identified threat.<sup>241</sup> The court may not impose unaffordable bail and must inquire into the individual's ability to pay to ensure any imposed financial condition will not lead to continued incarceration.<sup>242</sup> If the court grants the government's motion for a detention hearing when an individual is charged with a serious offense, such as first degree murder, the hearing shall take place within 48 hours of the motion, and the individual should be afforded the presumption of release.<sup>243</sup> To order detention, the court must find by clear and convincing evidence that no condition or combination of conditions can mitigate a specific, imminent threat of serious physical harm to a reasonably identifiable person or of willful flight.<sup>244</sup>

#### **D. Civil Rights Corps: Pretrial Release and Detention Act**

The Civil Rights Corps is a nonprofit organization dedicated to challenging systemic injustice through litigation, advocacy, and public education. One of the group's current initiatives is to challenge and reform monetary bail in the United States. The Civil Rights Corps has developed policy materials, such as the *Pretrial Release and Detention Act*, to assist in ending wealth-based detention.

The *Pretrial Release and Detention Act* abolishes money bail and requires the least restrictive conditions of pretrial release.<sup>245</sup> Under the act, secured financial condition may not be imposed as a condition to pretrial release.<sup>246</sup> Individuals arrested for misdemeanors shall be given a citation and released on personal recognizance.<sup>247</sup> Those arrested for felony offenses, other than extremely serious felony offenses, shall be released on recognizance or released with one or more temporary conditions.<sup>248</sup> An immediate hearing may be requested if there is probable cause based on individualized facts that further conditions of release are warranted. At the hearing, a magistrate may set temporary conditions of release upon a finding based on individualized facts that unconditional release would not reasonably mitigate a high risk of nonappearance or of serious physical harm to another reasonably identifiable person. Any conditions of release must be the least restrictive necessary to address the specific risk or risks identified.<sup>249</sup> When assigned, conditions shall only last until the pretrial release hearing, which shall occur within seven days.<sup>250</sup>

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 6

<sup>244</sup> *Id.*

<sup>245</sup> Civil Rights Corps, *Pretrial Release and Detention Act*, <https://civilrightscorps.org/wp-content/uploads/2021/10/1ted5lrSx2ynPT8kitB5.pdf> (last accessed Feb. 18, 2022).

<sup>246</sup> *Id.* § 2.

<sup>247</sup> *Id.* § 4(a).

<sup>248</sup> *Id.* § 4(b)(1)-(2).

<sup>249</sup> *Id.* § 4(b)(3).

<sup>250</sup> *Id.* § 4(b)(5).

Upon an arrest for an extremely serious felony offense, an individual may be released on personal recognizance, released with one or more temporary conditions, or temporarily detained if the state proves based on individualized facts that no conditions of release would reasonably mitigate a high risk of imminent, intentional flight, or serious physical harm to another reasonably identifiable person.<sup>251</sup> If an individual is temporarily detained, the defendant must have a pretrial release hearing within 48 hours after entering custody.<sup>252</sup>

At a pretrial release hearing, individuals have the right to counsel, to testify, to present witnesses, to cross-examine witnesses, to present evidence, and to review evidence from the state prior to the hearing.<sup>253</sup> When the offense charged is a felony offense other than an extremely serious felony offense, there is a rebuttable presumption of release on recognizance and that liberty-restricting conditions are not necessary.<sup>254</sup> The state may overcome this presumption by providing clear and convincing evidence that the proposed conditions are the least restrictive necessary to mitigate the risk of flight or harm to reasonably identifiable persons.<sup>255</sup>

In the case of extremely serious felony offenses, the court may order pretrial detention only if the state proves by clear and convincing evidence that no combination of conditions short of complete incapacitation can protect against a high risk of imminent, intentional flight, or a specifically identified risk of serious physical harm to another reasonably identifiable person.<sup>256</sup> If the court orders any conditions of pretrial release, the judge must issue a written statement of reasons explaining why the conditions are the least restrictive.<sup>257</sup>

#### **E. Pretrial Justice Institute**

The Pretrial Justice Institute (PJI) serves as “a bridge between system actors, who historically hold the power in the legal system, and community members, who have a vision for justice and well-being, to co-create places where all people feel safe, respected, and able to thrive.”<sup>258</sup> The Institute “unequivocally” opposes the use of secured financial conditions.<sup>259</sup> According to PJI, pretrial detention should be used only in rare cases and only after individualized due process.<sup>260</sup> The Institute has “consistently opposed the use of pretrial risk assessment tools to make

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<sup>251</sup> *Id.* § 4(c)(2)-(3).

<sup>252</sup> *Id.* § 4(c)(3)

<sup>253</sup> *Id.* § 5(b)-(c).

<sup>254</sup> *Id.* § 5(d)(A).

<sup>255</sup> *Id.* § 5(d)(1).

<sup>256</sup> *Id.* § 5(d)(2).

<sup>257</sup> *Id.* § 5(e).

<sup>258</sup> *What We Do*, PRETRIAL JUSTICE INSTITUTE, <https://www.pretrial.org/> (last accessed Feb. 18, 2022).

<sup>259</sup> *Frequently Asked Questions on Bail Reform*, LEADERSHIP CONFERENCE, <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=187f41cd-6b69-107f-9740-c9c0d8e10511&forceDialog=0> (last accessed Feb. 18, 2022).

<sup>260</sup> *Id.*

detention decisions.”<sup>261</sup> It has now expanded that view to oppose the use of risk assessment tools to determine restrictions on an individual’s pretrial liberty.<sup>262</sup> Their framework supports expanded use of citations as opposed to arrests, adversarial detention hearings for a limited number of serious charges, and addressing people’s needs through community-based support.<sup>263</sup> In addition, the Institute advocates for expanding the use of unsecured bonds or nonfinancial conditions, such as required telephone or in-person contact with caseworkers.<sup>264</sup>

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<sup>261</sup> *Updated Position on Risk Assessment Tools*, PRETRIAL JUSTICE INSTITUTE (Feb. 7, 2020), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=b417a859-9fe9-2a6c-5e12-3f472d0dc997&forceDialog=0>.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *How to Fix Pretrial Justice*, PRETRIAL JUSTICE INSTITUTE, <https://www.pretrial.org/get-involved/learn-more/how-to-fix-pretrial-justice/>

## VI. THE DEVELOPMENT OF A NO-MONEY BAIL SYSTEM IN CONNECTICUT

As the Commission continued to evaluate risk-based alternatives to a financial bail system, the President Pro Tempore of the state Senate asked the Commission to develop a proposal that would “(1) reduce the pretrial detained population and (2) eliminate money bail as a detention mechanism so that release/detention decisions are not impacted by the amount of money defendants may or may not have while (3) ensuring that public safety is not negatively impacted.”<sup>265</sup> To respond to this request, the Commission engaged the services of Jonathan E. Silbert, a retired Superior Court judge who currently works privately as a mediator and arbitrator, to work with key stakeholders in Connecticut’s criminal justice system to develop a comprehensive reform proposal.<sup>266</sup>

Over the course of a year, Judge Silbert met and collaborated with a diverse set of stakeholders, including state’s attorneys, public defenders, judicial branch staff, and other Commission members. Although the Commission members have not yet come to consensus on a proposal, the framework they developed can serve as a blueprint for the key issues to be considered as state lawmakers contemplate transitioning Connecticut away from a money bail system.<sup>267</sup> Such a move will require close collaboration among leadership from all three branches of government. Bail reform and the elimination of financial stakeholders from the pretrial justice system are not simple endeavors, but for those interested in true justice, it is imperative to address these inherent inequities.

In response to the Senate President Pro Tempore’s request for recommendations, this section of the report presents a roadmap to for pretrial reform that eliminates the injustices of money bail. This framework, while maintaining much of Connecticut’s existing predisposition infrastructure, would significantly improve the state’s pretrial justice system by maximizing the release of bailable defendants while still ensuring—and in some cases, improving—public safety.

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<sup>265</sup> See Letter from Sen. Martin M. Looney to J. Robert J. Devlin Jr. (Oct. 15, 2019) (reproduced in Appendix A).

<sup>266</sup> Judge Silbert has asked that we acknowledge his preference for the phrase “pre-disposition release and detention” rather than “pretrial release and detention,” for two reasons. The first and most obvious reason is that given the fact that a nearly infinitesimal percentage of criminal cases end with a trial, whereas all criminal cases result in some sort of disposition . . . plea, nolle, dismissal and even the occasional conviction or acquittal following a trial . . . it is far more factually accurate to recognize that the release or detain decision is a prelude to a disposition, not to a trial. The second and more important reason, in his view, is that calling the process “pre-disposition release or detention” explicitly recognizes the critical impact of that decision on the outcome of the case. Assuming that concerns about flight or danger to the community can be addressed, will a defendant be able to meet regularly with counsel to prepare a defense? Will the defendant have access to a menu of treatment options that can address his or her underlying behavior? Will the defendant be able to retain or obtain employment or pursue an education? In short, will an appropriately counselled defendant be able to undertake activities that will make him or her a better candidate for a disposition that renders recidivism less likely and that eliminates or reduces the need for incarceration?

<sup>267</sup> Appendix B and Appendix C contain the reactions to the framework from the Chief State’s Attorney and the Chief Public Defender.

## A. Basic Policy Design Principles

1. *Liberty is the norm, and detention pending disposition must be a carefully limited exception.* Individuals accused of crime are presumptively innocent, and detention constitutes an infringement on their ability to support themselves and their families and otherwise participate in the benefits of living in a free society. To be warranted, any such infringement must be narrowly tailored to prevent an identifiable risk of flight to avoid prosecution or harm to the community. In addition, conditional release should be understood as a restriction on pretrial liberty and should only be imposed if there is evidence that conditions of release are necessary to prevent flight or protect the public.
2. *The criminal justice system must properly utilize services for release and supervision pending disposition while ensuring any conditions of release are not unnecessarily restrictive.* Connecticut is unique in that it has a well-established statewide pretrial services agency in its Judicial Branch Court Support Services Division (JB-CSSD). JB-CSSD is one of the few jurisdictions in the country to have been accredited by the National Association of Pretrial Services Agencies.  

The Commission recognizes that, in some cases, unconditional release may be insufficient to protect against identifiable risks of flight to avoid prosecution or of harm to the community. In these cases, Connecticut should continue to use and improve minimally intrusive, nonfinancial release conditions. Nevertheless, state courts should also guard against imposing unnecessary conditions.
3. *Stakeholders, including those from impacted communities, should be engaged at every stage of criminal justice reform.* While there is general agreement that the adverse impact of money bail on less affluent individuals is fundamentally unfair, stakeholders in the criminal justice system approach the issue of pretrial release and detention from different perspectives and with different concerns. For the state's movement away from money bail to be successful, reform must enjoy broad support from all the principal actors in the system.

## B. Framework Summary

It shall be the policy of the State of Connecticut that, to the extent possible, persons charged with a crime should be released, with or without conditions, pending the disposition of their cases, consistent with reasonable efforts to prevent flight to avoid prosecution<sup>268</sup> and the risk of physical harm to members of the community. Any imposed conditions should be the least restrictive necessary to reasonably assure that the accused will not flee to avoid prosecution or pose a significant danger to others if released. Only when there are no conditions that will reasonably ameliorate the risk of flight or significant harm to members of the community may

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<sup>268</sup> There is an important distinction between “flight to avoid prosecution,” the phrase traditionally associated with the purpose of bail, and “failure to appear in court.” The former describes willful conduct, a conscious decision to defy the law. By contrast, the latter can involve a multitude of other situations including mental health, substance abuse, negligence, scheduling conflicts, poor planning and simple failure of communication.

the state detain an individual pending disposition. While a history of failures to appear in court may, under some circumstances, be construed as evidence of a flight risk, in most circumstances, it suggests the need for more appropriate release conditions.

### **C. Arrest by Complaint and Summons**

In Connecticut, an individual’s involvement with the justice system begins with an initial police encounter that may occur under any one of three different circumstances.<sup>269</sup> First, an individual may be issued a summons and complaint. By statute, a summons and complaint—referred to as a citation arrest in other jurisdictions—may only be issued for misdemeanor offenses. The decision to issue a written complaint and summons rests with the arresting officer, and once issued, the officer may release the individual on a written promise to appear.<sup>270</sup>

Second, an individual may be subjected to a warrantless arrest. This occurs when an individual is arrested pursuant to a law enforcement officer’s probable cause that the individual committed a criminal offense. In these cases, the document formally describing the charged offense is filed with the court at a later point.

Lastly, an individual may be arrested and brought into police custody pursuant to a bench warrant issued by the court.

As the state continues to explore a transition toward a no-money bail system, lawmakers might consider expanding the ability of law enforcement and courts to release more defendants without arrest. This could include expanding complaint-summons eligibility to cover minor, low-level felonies.

### **D. Custodial Arrest**

There should be a presumption of release for all arrested defendants. After an individual is booked and interviewed by the police, the accused person should be promptly released on a written promise to appear, unless (1) the allegations against the accused are for a “detention-eligible offense” and include physical violence or the credible threat of physical violence to others, or (2) the police are aware of evidence that suggests the likelihood of flight to avoid prosecution. In these scenarios, the accused may be detained until interviewed by bail commission staff. Absent (1) a charge for a “detention-eligible offense” and an accusation of physical violence or a credible threat of physical violence or (2) substantive evidence of a flight risk, police must release individuals on a promise to appear.

### **E. Bail Staff Interview**

Under current law, defendants who remain detained after booking are then subject to an interview with JB-CSSD bail commission staff. The proposed framework would continue this

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<sup>269</sup> These three mechanisms are for criminal offenses. Individuals who commit infractions or violations (noncriminal breaches of law, such as minor traffic violations) are issued citations, which are payable by mail and do not require court appearances.

<sup>270</sup> CONN. GEN. STAT. § 54-1h (2018). Individuals who are eligible include those arrested for a misdemeanor, or an offense for which the penalty is imprisonment for a year or less, or a fine of \$1,000 or less. CONN. JUD. BRANCH, CONN. PRACTICE BOOK § 36-4 (2022) authorizes the judicial authority to direct that a summons and complaint be issued instead of an arrest warrant.

practice for individuals detained at the police department according to the provisions above. Upon a defendant's interview with JB-CSSD bail commission staff, the accused would be released on a promise to appear or upon conditions set by the bail staff and designed to prevent flight or contact with identifiable individuals at risk of physical harm.<sup>271</sup> Such conditions may include, but are not limited to, the following:

- Providing contact information for the accused;
- No contact orders;
- Protective orders;
- Limitations on locations where the accused may visit while charges are pending;
- Curfew restrictions;
- Requirements to notify the court of any change in the accused's circumstances;
- Periodic drug or alcohol testing and, if warranted, treatment if the alleged offense is directly connected to drugs and alcohol; or
- Mental health evaluations.

No statement made by the arrested person in response to any question during the interview related to the terms and conditions of release shall be admissible as evidence against the arrested person in any proceeding arising from the incident for which the conditions of release were set.

#### **F. Detention Eligibility Net at Arraignment**

Defendants who are not released at the police department or after an interview with JB-CSSD would have another opportunity for release at arraignment.

As the state transitions from a money-based pretrial system, policymakers must decide which offenses will constitute its "detention eligibility net." Defendants charged with these offenses would be eligible for detention if the state can meet its burden of proof. Individuals charged with offenses not on the list of detention-eligible offenses will not be subject to detention and would have to be released on a promise to appear or on nonfinancial conditions.

Individuals charged with a detention-eligible offense must be released at arraignment with or without conditions, unless the state requests that the defendant be detained and specifically stating the reasons for which detention is sought. In that case, the court may order temporary detention at arraignment until a subsequent release hearing.

Some potential detention eligibility nets may include the lists of offenses that are not eligible for parole and the "violent offenses" that require serving at least 85% of the sentence to qualify

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<sup>271</sup> Under this framework, there would be some threshold for continued detention of certain defendants after the bail staff interview until arraignment.

for parole. These offenses, as defined in the sections of the Connecticut General Statutes listed below, are:

- 53a-54a Murder
- 53a-54b Capital felony or Murder with special circumstances
- 53a-54c Felony Murder
- 53a-54d Arson Murder
- 53a-70a Aggravated Sexual Assault  
1<sup>st</sup>

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- 53a-55 Manslaughter 1st
- 53a-55a Manslaughter 1st with a Firearm
- 53a-56 Manslaughter 2nd
- 53a-56a Manslaughter 2nd with a Firearm
- 53a-56b Manslaughter 2nd with a Motor Vehicle
- 53a-57 Misconduct with a Motor Vehicle
- 53a-59 Assault 1st
- 53a-59a Assault of a Victim Sixty or Older
- 53a-59b Assault on Dept of Correction Employee
- 53a-60 Assault 2nd
- 53a-60a Assault 2nd with a Firearm
- 53a-60b Assault of a Victim Sixty or Older 2nd
- 53a-60c Assault of a Victim Sixty or Older 2nd
- 53a-64aa Strangulation 1st
- 53a-64bb Strangulation 2nd
- 53a-70 Sexual Assault 1st
- 53a-70b Sexual Assault in a Spousal or cohabiting relationship
- 53a-72b Sexual Assault 3rd with a Firearm
- 53a-92 Kidnapping 1st
- 53a-92a Kidnapping 1st with a Firearm
- 53a-94 Kidnapping 2nd
- 53a-94a Kidnapping 2nd with a Firearm
- 53a-95 Unlawful Restraint 1st
- 53a-100aa Home Invasion
- 53a-101 Burglary 1<sup>st</sup>
- 53a-102 Burglary 2nd
- 53a-102a Burglary 2nd with a Firearm
- 53a-103a Burglary 3rd with a Firearm
- 53a-111 Arson 1st
- 53a-112 Arson 2nd
- 53a-134 Robbery 1st
- 53a-135 Robbery 2nd
- 53a-136 Robbery 3rd
- 53a-167c Assault on a Policeman or Fireman
- 53a-179b Rioting in a Correctional Facility
- 53a-179c Inciting a Riot in a Correctional Facility
- 53a-181c Stalking 1st
- 53a-321 Abuse of Persons 1st, or Conspiracy, Criminal Attempt or Criminal Liability to commit any of these listed offenses

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## **G. Condition of Release**

As jurisdictions around the country have recognized that pretrial systems rooted in money bail are discriminatory, ineffective, and often unconstitutional, increased reliance on conditional release has emerged as an alternative to pretrial incarceration. While conditional release is usually an improvement over detention on bond, it is not without its pitfalls. As the options for pretrial conditions expand, courts might impose more conditions than are necessary, which can be burdensome and ineffective. This over-conditioning could result in defendants' prolonged involvement in the justice system, burdens on defendants' abilities to work and care for family, and technical violations that hinder defendants' ability to develop their defense. Even seemingly minor conditions, such as periodic check-ins, can be burdensome if over-imposed without an assessment of a defendant's particular needs and abilities to comply.

To mitigate these risks, the court and bail staff should impose only the least restrictive conditions reasonably necessary to satisfactorily address the relevant risks. Courts should be required to produce their determinations on the record that the imposed conditions are the least restrictive and why they are reasonably necessary to address the risks identified. Conditions should be evidence-based, related to the charged conduct, and aimed at supporting rather than supervising the accused.<sup>272</sup> Pretrial services should utilize positive, supportive tools and interventions such as phone and text reminders and transportation to court, rather than punitive measures.

## **H. Pre-Disposition Release Hearing**

Any accused individual who remains detained after arraignment should have a hearing at which the individual may challenge the order of detention and propose conditions of release.

### **1. Timeline for Release Hearing**

The hearing should be held within three business days after the arraignment, except where the court has granted an extension.

### **2. Extension of the Release Hearing**

The attorney for the state, the attorney for the accused, or the accused may request an extension of up to 48 hours to prepare for the pretrial release hearing. The judge may grant the state's request for an extension one time, and only if the state represents to the judge that the evidence needed by the state for such a hearing is unavailable through no fault of the state. The judge shall grant an extension beyond 48 hours only upon motion of the arrestee or counsel and for good cause shown.

### **3. Release Plan**

At the release hearing, the defense shall be entitled, but not required, to present a written or oral release plan, specifying the nonfinancial conditions the defense claims will adequately assure that the defendant will neither flee to avoid prosecution nor pose an unreasonable risk

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<sup>272</sup> 40% of pretrial services agencies including Connecticut's are located within probation departments, presenting a challenge to maintaining a supportive rather than supervisory approach. See NAT'L INST. CORRS., A FRAMEWORK FOR PRETRIAL JUSTICE: ESSENTIAL ELEMENTS OF AN EFFECTIVE PRETRIAL SYSTEM AND AGENCY 44 (2017).

of physical harm to an identifiable victim. The defense may, but is not required to, present testimony in support of such a plan.

#### 4. Evidence

Both the state and the defense can produce documentary evidence, including police reports, at the release hearing. However, except at the discretion of the court, no oral testimony shall be required. Upon the state's request, the court may order that names or other identifying information contained in written evidence be redacted. The testimony of an alleged victim of an offense may not be compelled by the defense at the release hearing.

#### 5. Burden of Proof

The burden at the release hearing to detain an individual would be on the state to establish:

- (1) by clear and convincing evidence that there is a substantial risk that the defendant will flee to avoid prosecution or cause physical harm to another individual and
- (2) by clear and convincing evidence that no condition or combination of conditions of release exist that would reasonably prevent the defendant's flight to avoid prosecution and protect the safety of any other person from physical harm.

#### 6. Appellate Review

The framework will retain allowance for review of the predisposition decision provided under current law (Conn. Gen. Stat. § 54-63g):

Any accused person or the state, aggrieved by an order of the Superior Court concerning release, may petition the Appellate Court for review of such order. Any such petition shall have precedence over any other matter before said Appellate Court and any hearing shall be heard expeditiously with reasonable notice.

##### **I. Modification of Release Conditions and Revocation of Release**

On written motion of the state, the court may consider a modification of the defendant's conditions or a revocation of the defendant's release, (1) if the defendant is alleged to have violated a condition of release including rearrest, or (2) to prevent defendant interference with witnesses or the proper administration of justice. Upon hearing the evidence, the court may rule to (1) maintain the defendant's release status; (2) modify the conditions of release to better prevent the defendant's flight to avoid prosecution or better protect the safety of any other person from physical harm; or (3) upon a request for detention from the state specifying the reasons for which detention is sought, detain the defendant. The court shall only order the detention of a defendant if it finds that (1) the criteria described above under 5. *Burden of Proof* are met and (2) at least one of the following is true:

1. The defendant is charged with a crime within the detention eligibility net.
2. While on release pending the disposition of the case, the defendant has been arrested for a felony.
3. The defendant has violated the conditions of a protective order.
4. The defendant has violated a condition of release pertaining to the possession or use of firearms or other deadly weapons/dangerous instruments.

5. The defendant has or has attempted to travel outside of the state or country in violation of the conditions of release.
6. The defendant has physically threatened a witness or otherwise obstructed prosecution.

#### **J. Risk Assessment Tools**

Risk assessment tools have become a common element of efforts to enhance the fairness of pretrial justice systems in jurisdictions across the country. Since 2012, at least 14 different states have either created or standardized the use of pretrial risk assessments.<sup>273</sup>

Pretrial risk assessments are actuarial tools that use historical data to develop a statistical model for estimating the likelihood of failure to appear or rearrest for released. States then use these estimates to inform recommendations to judges and court staff about pretrial release and detention. However, these estimates cannot by themselves determine whether someone *should* be released or detained pretrial, as no risk level is inherently “too low” or “too high.” As such, while release decisions can be informed by quantitative tools, the decision to release or detain an individual is ultimately a values-based decision about how much risk a state is willing to tolerate while a case is pending. In jurisdictions that use risk assessment tools, these values-based decisions are made by policymakers and criminal justice professionals who calibrate how risk assessment scores translate into release recommendations.

Proponents of these tools view them as imperfect but useful means to guide judicial discretion. These assessments can add a degree of objectivity and accuracy to a decision that often hinges on a judge’s reasoned decision-making. Indeed, studies have shown that risk assessment instruments are better at predicting pretrial outcomes than judges on their own.<sup>274</sup> Still, proponents recognize that while risk tools are particularly useful in identifying low-risk defendants for release, a “bad” risk score should never be the sole basis for detaining someone.

Until recently, risk assessments were widely viewed as a progressive tool to help reduce jail populations by better identifying low-risk defendants who could be safely released. The National Association of Counties called on local officials to adopt risk assessment tools, and prominent public defenders and private defense attorneys called for the use of validated risk assessment in all jurisdictions to improve pretrial justice.<sup>275</sup> Additionally, the American Bar Association recommended that judges use actuarial models in making bail determinations.<sup>276</sup>

In recent years, a growing number of skeptics have criticized risk assessments. Some advocates and researchers have raised possible concerns about equity, transparency, and due process with the current tools. First, critics argue that many risk assessments might recreate structural inequities in pretrial justice. For instance, some groups have expressed concerns that these tools often rely on historical arrest and conviction records, which are themselves affected by

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<sup>273</sup> AMBER WIDGERY, NAT’L CONF. STATE LEGISLATURES, TRENDS IN PRETRIAL RELEASE: STATE LEGISLATION 1 (2015).

<sup>274</sup> John Kleinberg et al., *Human Decisions and Machine Predictions* (Nat’l Bureau Econ. Rsch., Working Paper No. 23180, 2017).

<sup>275</sup> GIDEON’S PROMISE ET AL., JOINT STATEMENT IN SUPPORT OF THE USE OF PRETRIAL RISK ASSESSMENT INSTRUMENTS 4 (2017).

<sup>276</sup> AM. BAR ASS’N, CRIM. JUST. STANDARDS: PRETRIAL RELEASE 10-1.10 (2007) (discussing the role of the pretrial services agency in determining release eligibility for defendants).

historical patterns of selective enforcement and discretionary charging.<sup>277</sup> To the extent these historical patterns reflect racial or socioeconomic biases, tools that use these historical data risk perpetuating inequitable justice outcomes.

Others have suggested that certain risk assessment criteria are more directly discriminatory, reducing the likelihood of pretrial release on account of certain demographic characteristics. For example, indigent defendants can be disadvantaged by tools that factor in housing status or employment and will have more difficulty showing community ties, lengthy residence, or a solid job history.<sup>278</sup>

Lastly, some advocates worry that stakeholders overestimate the accuracy of these tools and do not give enough consideration to defendants' individualized circumstances. This could undermine the individualized due process of a criminal trial and allow decisionmakers to delegate too much discretion to imperfect actuarial models, exacerbating the issues highlighted above.

Notably, most of these criticisms are directed at potential issues with risk assessments as they are currently implemented, not with the concept of risk assessments generally. Nonetheless, some groups argue that the very possibility of these disadvantages is enough to outweigh any benefits risk assessments might confer. Accordingly, in 2018, civil rights community, legal, racial justice and digital justice organizations released a national statement of concern, calling for jurisdictions to reform their pretrial justice systems to eliminate both money bail and risk assessment tools.<sup>279</sup> Similarly, Human Rights Watch advises against any form of risk assessment tools in pretrial justice.<sup>280</sup>

In Connecticut, the Judicial Branch Court Support Services Division currently utilizes a pretrial risk assessment when making pretrial recommendations and setting bond amounts.<sup>281</sup> Accordingly, even if no changes in Connecticut's current bail policy procedures are made, the potential problems with risk assessments already apply and would continue to impact our state's system. As the Urban Institute report noted, the Connecticut pretrial risk assessment process need not change in a no-bond context. If retained, however, it would need to be

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<sup>277</sup> See Marie VanNostrand & Gena Keebler, *Pretrial Risk Assessment in the Federal Court*, 73 FED. PROB. 3, 7 (2009). Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014) (raising constitutional and normative arguments against the use of risk prediction assessments based on demographic and socioeconomic factors). See Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

<sup>278</sup> See Samuel Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause*, 36 FORDHAM URB. L.J. 121, 155-56 (2009)

<sup>279</sup> See *More than 100 Civil Rights, Digital Justice, and Community-Based Organizations Raise Concerns About Pretrial Risk Assessment*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (July 30, 2018), <https://civilrights.org/2018/07/30/more-than-100-civil-rights-digital-justice-and-community-based-organizations-raise-concerns-about-pretrial-risk-assessment/>.

<sup>280</sup> John Raphling, *Human Rights Watch Advises Against Using Profile-Based Risk Assessment in Bail Reform* (July 17, 2017), <https://www.hrw.org/news/2017/07/17/human-rights-watch-advises-against-using-profile-based-risk-assessment-bail-reform#>.

<sup>281</sup> See the Commission's 2017 report. Although the tool has been validated to show a relationship to pretrial outcomes, the report noted the bond amounts under the Financial Bond Guidelines have never been validated to show their relationship to failure to appear in court or re-arrests.

revalidated and recalibrated (i.e., replacing bond amounts with release and detention outcomes) to reflect the elimination of financial conditions of release.

Despite broad adoption of pretrial risk assessments around the country, these assessments breed significant cause for caution. Many continue to debate whether pretrial risk assessment tools should continue to have a place in the arsenal of bail reform. Certainly, many prominent reformers and researchers have recently abandoned the position that risk assessment tools are a critical element of a pretrial justice system. In any event, if Connecticut continues to utilize risk assessments, such tools' imperfect actuarial assessment should never constitute the sole basis for detaining an individual. Pretrial assessment tools must be subject to robust analysis and validation to avoid the pitfalls noted above, and institutional stakeholders must not overestimate these tools' predicative accuracy. Lastly, the factors and algorithms used by any risk assessment should be made public and allow for input from those communities impacted by pretrial justice decisions.

### **M. Defining Pretrial "Risk"**

Recent debates on the role of risk assessments are part of a broader conversation about the kinds of risk that should drive pretrial decisions. Of course, pretrial decisions are fundamentally concerned with protecting the public from dangerous individuals awaiting trial. However, most risk assessment tools base their recommendations on the predicted risk of future rearrest using historical data. Critically, an individual's predicted risk of rearrest is not perfectly congruent with their danger to the public. While rearrest for a violent crime might signal danger to an individual or community, rearrest by itself does not necessarily measure "dangerousness." Some individuals may be arrested for conduct that does not pose a clear threat to public safety, such as a technical violation of a release condition.<sup>282</sup>

Similarly, pretrial justice decisions often seek to mitigate the threat of flight from justice. Here again, the pretrial risk assessment tools are not perfectly aligned. Most risk assessment tools measure the risk of failure to appear, which can result from any number of causes such as lack of transportation; competing work, family, and childcare obligations; substance abuse; mental health; and homelessness. Indeed, it appears very few defendants actually flee the jurisdiction to purposefully escape criminal prosecution.

Ultimately, Connecticut must determine which kinds of pretrial risks should drive pretrial release and detention decisions. Should release or detention decisions be based on the risk of a defendant committing any crime or the risk of the defendant committing specific crimes, such as violent offenses? Should prior risk of failure to appear and lack of community ties increase the assessed need for pretrial detention, or should consideration focus primarily on willful flight to avoid justice? The pretrial justice debate continues to address these very important questions. Even if risk assessments continue to play a role in our pretrial justice system, ensuring alignment between an assessment's predicted outcomes and our pretrial priorities will be an important and ongoing endeavor.

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<sup>282</sup> DELBERT S. ELLIOTT, LIES, DAMN LIES AND ARREST STATISTICS 11 (1995).

## N. Constitutional Amendment

Any effort in Connecticut to move away from a money-based pretrial system requires an amendment to the state constitution's bail provisions. While the federal constitution and many state constitutions protect against "excessive" bail, there is no federal right to bail in general. In other words, the U.S. Constitution does not categorically ban pretrial detention without bail. By contrast, in Connecticut and several other states, criminal defendants are often guaranteed a constitutional right to some form of bail.<sup>283</sup>

Traditionally, state constitutions protected defendants' right to bail upon "sufficient sureties, unless for capital offenses, where the proof is evident, or the presumption great." Many states, including Connecticut, have retained this "traditional" right to bail in their state constitutions.<sup>284</sup> By contrast, in nine states, including New York and Massachusetts, there is no constitutional right to bail. Other states, including New Jersey and New Mexico, have amended their right to bail provisions to provide for additional detention eligibility that is usually charge-based. In jurisdictions with no right to bail or an amended right to bail—which include at least 21 states, the District of Columbia, and the federal system—the government may detain a defendant without bail in certain circumstances.

Article I, Section 8(a) of the Connecticut Constitution guarantees the right to be released from jail through "reasonable bail" to virtually all defendants, except in capital cases "where the proof is evident or the presumption great." As a result, under our current constitution, judges are barred from detaining a truly dangerous defendant with the financial resources to post a high bond.<sup>285</sup>

To enable judges to detain truly dangerous individuals and allow the state to eliminate money bail, Article I, Section 8(a) of the Connecticut Constitution could be amended as follows:

In all criminal prosecutions, the accused shall have a right to be heard by themselves and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against them; to have compulsory process to obtain witnesses in behalf; ~~[to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great]~~ and in all prosecutions by information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against themselves, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive

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<sup>283</sup> See Appendix D for a compilation of right to bail provisions in states' constitutions.

<sup>284</sup> The "traditional" formulation of the right to bail has been interpreted differently by courts in various jurisdictions. In states where the right has been interpreted as an absolute right to bail, all defendants (except in capital cases) are eligible for release and defendants are only detained if they are unable to pay their bond. In other states, however, despite similar language, "bail" and sufficient "sureties" have been interpreted to preserve the discretion in extending bail. In these jurisdictions, non-capital defendants are eligible for bail, but the court may always deny bail if it determines that no amount of surety can prevent a defendant's flight or dangerousness to the community. See Ariana Linder Mayer, *What the Right Hand Gives: Prohibitive Interpretation of the State Constitutional Right to Bail*, 78 *FORDHAM L. REV.* 267, 275 (2009).

<sup>285</sup> Since the death penalty has been eliminated in Connecticut, there is a right to bail for all people charged with crimes. Of course, this only results in pretrial release if the defendants meet the conditions of release, which often includes posting bond.

finer imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law, except in the armed forces, or in the militia when in actual service in time of war or public danger. ***In all criminal prosecutions, the accused shall be released; provided, however, that predisposition release may be denied to a person if the court finds that there is clear and convincing evidence of a substantial risk that the defendant will flee to avoid prosecution or cause physical harm to another individual; and clear and convincing evidence that no condition or combination of conditions of release exist that are sufficient to reasonably prevent the defendant's flight to avoid prosecution, or protect the safety of any other person from physical harm.***

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## VII. CONCLUSION

The decision to release a defendant or set a bond can dictate the entire course of a defendant's criminal case. When accused people are released, they can continue to attend school, maintain employment, take care of their families, and prepare their defenses. When defendants cannot afford their freedom, they languish in jail, are much more likely to take a plea arrangement, and are more likely to receive a prison sentence. Thus, bail decisions bear life-altering consequences, not only for a defendant's case outcome, but also for defendants' families and communities.

Connecticut and most jurisdictions in the United States use money bail bonds as a mechanism for releasing and detaining individuals accused of a crime. As the Connecticut Sentencing Commission observed in its 2017 *Report on Pretrial Release and Detention*, relying on money bail for release and detention decision-making raises both constitutional issues about equal protection and due process as well as ethical concerns about fairness and justice. Put simply, under our money bail system, similarly situated individuals are treated differently—released or detained—based on their financial ability to post bond. This practice will *always* result in some low-risk individuals being unnecessarily detained because they cannot afford to post bond, and some high-risk defendants being inadvisably released because they are wealthy enough to purchase their freedom. Furthermore, most jurisdictions in the United States allow for and rely on for-profit bondsmen to provide surety bonds for a nonrefundable fee. This practice funnels indigent defendants' resources into a private pretrial industry. Indeed, only two nations in the world, the United States and the Republic of the Philippines, rely on a commercial bail bond industry in their pretrial justice systems.

The practice of requiring presumptively innocent defendants to pay for their release discriminates on the basis of wealth; exacerbates racial and ethnic disparities; results in over-incarceration; and imposes tremendous costs on affected individuals and their communities, including the increased costs to the state of maintaining its jails and prisons.

The momentum to address the high rates and adverse effects of pretrial detention continues to grow. It is driven by emerging consensus over the harms caused by money bail and by research demonstrating its inability to achieve the goals of pretrial justice. Advocates fighting to end mass incarceration have foregrounded the need to eliminate money bail. In response to this advocacy and litigation, some jurisdictions have transformed their pretrial justice systems to lessen or even eliminate the use of money bail and reduce their pretrial populations. Successful bail reform efforts in New Jersey, the District of Columbia, and Illinois have only increased concerns about the overuse of monetary bail, its disparate impact on poor and minority defendants, and the overincarceration it generates within jails.

Bail reform is happening in jurisdictions across the country. Connecticut could address the inefficiencies and inequities in our pretrial justice system by moving away from money bail and reducing the detained pretrial population. The momentum to move away from wealth-based

detention promises a more just and effective pretrial justice system. Understanding whether and how such reforms can affect court decision making, pretrial release rates, rearrest rates, and court appearance rates is vital to advancing the goals of pretrial justice. The change will require hard work and leadership from all three branches of state government. The Connecticut Sentencing Commission encourages continued reforms in this state's pretrial release and detention practices and procedures.

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## APPENDIX A

### Letter from Senate President Pro Tempore Martin Looney

SENATOR MARTIN M. LOONEY  
PRESIDENT PRO TEMPORE

Eleventh District  
*New Haven, Hamden & North Haven*



State of Connecticut  
SENATE

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October 15, 2019

Hon. Robert J. Devlin, Jr.  
Chair, Connecticut Sentencing Commission  
185 Main Street, Room 212  
New Britain, CT 06051

Re: a study on non- monetary bail

Dear Judge Devlin,

I am writing to respectfully request that the Connecticut Sentencing Commission undertake a study and develop recommendations for a proposal on pretrial justice that would (1) reduce the pretrial detained population and (2) eliminate money bail as a detention mechanism so that release/detention decisions are not impacted by the amount of money defendants may or may not have while (3) ensuring that public safety is not negatively impacted. It appears evident that the current pretrial detention system does not provide for equal justice for all of those who are accused of crimes and that it also perpetuates inequalities based on wealth.

Thank you for your willingness to examine this extraordinarily important issue.

Sincerely,

A handwritten signature in blue ink that reads "Martin Looney".

Martin M. Looney  
State Senator, Eleventh District

CC: Senator Winfield

**APPENDIX B**  
**Office of Chief Public Defender Bail Reform Proposal**  
**August 2021**

Criminal justice reformers in many jurisdictions have advocated for the elimination of money bail as a mechanism to address the disparate impact that financial conditions of release have on poor people and people of color. It is easy to agree that no one accused of a crime should be held in custody solely because they are unable to pay a bond. However, replacing a money bail system is complicated and would require careful attention and analysis to ensure that a new system does not make the problem of unnecessary incarceration worse.

The Office of Chief Public Defender is not convinced that the current proposal for eliminating money bail in Connecticut would result in better outcomes for our clients. OCPD believes that eliminating money bail and replacing it with a system that allows for detention of anyone, regardless of the charge and based on risk assessments, will not decrease the number of people held in custody pretrial. Taking away the constitutional guarantee of reasonable bail, without any indication of what process will be used to assess risk or what process will be due the accused creates an unacceptable level of risk that the new system will negatively impact our clients, who come from poor communities and communities of color.

The current proposal being debated at the Connecticut Sentencing Commission recommends repeal of the bail provision of Article 1, Section 8 of the Connecticut Constitution. Money bail would be replaced with a system that would allow for non-monetary conditions of release based on risk. Under this proposal, bail could be denied to any accused, regardless of the charge. Commonly referred to as *preventative detention*, this system uses algorithmic tools or other assessments to determine risk to public safety and likelihood of flight. The proposal does not specify what criteria or method would be used to assess risk and is silent on what process would be given to an accused when detention without bail was requested.

Proponents of a risk-based system of detention argue that this method would be more transparent and fair than the current money bond system, since detention would be based on the potential hazard the accused posed and not on financial ability to pay. There is no question that money bail results in poor people being held in custody when similarly situated individuals with financial means get released by posting bail. However, using a risk assessment to determine who should be held pretrial will not equalize the system for the poor. Poverty exacerbates negative factors that are used to assess threat to public safety and flight risk, including things like stability of housing, employment, community supports, and educations. People with financial means can use money to reduce these risk factors and minimize that chances that they will be detained.

Connecticut's current system can be modified in a way that increases the opportunity for safe release on nonmonetary conditions. While not perfect, Connecticut law currently provides significant protection against excessive bail. Connecticut General Statutes Section 54-63b already allows for CSSD personnel involved in setting bail to consider risk factors outside of

flight when setting bail.<sup>286</sup> Connecticut General Statutes Section 54-64a limits the circumstances under which the court can impose financial conditions on accused misdemeanor offenders to situations where risk of flight or danger to self or others.<sup>287</sup>

The Judicial Branch's Court Support Services Division (CSSD) already provides a broad menu of services to pretrial accused individuals. CSSD uses a risk assessment tool to make recommendations to the court on who should be released. This includes an assessment of what the conditions should be imposed to reduce the threat of flight and minimize the risk to public safety. These services are well utilized and result in many people being released on a written promise to appear. Relying on data from states like New Jersey and New Mexico, states that substantially eliminated money bail, the proponents believe that eliminating money bail in Connecticut could reduce the overall number of individuals held awaiting trial. Their data is touted as proof that Connecticut could make drastic reductions in the pretrial population. However, a distinction is that New Jersey and New Mexico had very limited or no pretrial services prior to implementing bail reform. It is unlikely that Connecticut would see any significant decrease in pretrial prison population from the proposed bail reform. Connecticut already has a robust menu of pretrial services but, pre pandemic, the number of people held pretrial stayed steady at around 3000.<sup>288</sup> Since bond would be able to be denied for a much larger group of accused, it can be reasonably projected that the number of people held in custody would increase.

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<sup>286</sup> Conn. Gen. Stat. § 54-63b (2021) ("The Court Support Services Division shall establish written uniform weighted release criteria based upon the premise that the least restrictive condition or conditions of release necessary to ensure the appearance in court of the defendant and sufficient to reasonably ensure the safety of any other person will not be endangered is the pretrial release alternative of choice. Such criteria shall be based on, but not be limited to, the following considerations: (1) The nature and circumstances of the offense insofar as they are relevant to the risk of nonappearance; (2) the defendant's record of previous convictions; (3) the defendant's past record of appearance in court after being admitted to bail; (4) the defendant's family ties; (5) the defendant's employment record; (6) the defendant's financial resources, character and mental condition; and (7) the defendant's community ties.").

<sup>287</sup> Conn. Gen. Stat. 54-64a (2021). ("(2) If the arrested person is charged with no offense other than a misdemeanor, the court shall not impose financial conditions of release on the person unless (A) the person is charged with a family violence crime, as defined in section 46b-38a, or (B) the person requests such financial conditions, or (C) the court makes a finding on the record that there is a likely risk that (i) the arrested person will fail to appear in court, as required, or (ii) the arrested person will obstruct or attempt to obstruct justice, or threaten, injure or intimidate or attempt to threaten, injure or intimidate a prospective witness or juror, or (iii) the arrested person will engage in conduct that threatens the safety of himself or herself or another person. In making a finding described in this subsection, the court may consider past criminal history, including any prior record of failing to appear as required in court that resulted in any conviction for a violation of section 53a-172 or any conviction during the previous ten years for a violation of section 53a-173 and any other pending criminal cases of the person charged with a misdemeanor.

(3) The court may, in determining what conditions of release will reasonably ensure the appearance of the arrested person in court, consider the following factors: (A) The nature and circumstances of the offense, (B) such person's record of previous convictions, (C) such person's past record of appearance in court, (D) such person's family ties, (E) such person's employment record, (F) such person's financial resources, character and mental condition, and (G) such person's community ties.").

<sup>288</sup> See CRIM. JUST. DIV., CONN. OFFICE OF POL'Y & MGMT., MONTHLY INDICATORS REPORT (July 2021).

A preventive detention system is likely to result in an increase in certain classes of accused being held at a significantly higher rate, specifically those accused of offenses like domestic violence and animal abuse offenses. These crimes, while not statistically related to an increase in flight or general risk of re-offense are emotionally sensitive and likely to lead a prosecutor to request detention. The court system in general is risk averse and judges are likely to grant detention requests in these cases.

Before the constitutional right to bail is eliminated, Connecticut should do an in-depth study of the pretrial population with bonds under \$25,000 and identify the factors that lead to having a monetary bond set by the court. Outside the current debate over juvenile car thefts, there has been no indication that Connecticut has a crisis of adult accused committing violent crimes while on pretrial release. However, it may also be appropriate to study the reoffending trends of individuals released on bond before engaging in a wholesale elimination of our pretrial release system.

The proposal to eliminate money bail and allow preventative detention for all offenses does not address what process would be due to an accused prior to being detained without bond, leaving that to be worked out after the Constitutional provision is repealed. This is of grave concern to OCPD. The denial of bond results in a person having little means to be released before trial. OCPD believes that this entitles an accused to an evidentiary hearing on both the nature of the offense and the actual risk an accused posed to the community. There is a heightened the liberty interest at stake, since the accused will no longer have any ability to marshal family and community resources to achieve release and will be at the mercy of the court and prosecutor. The Eighth Amendment to the United States Constitution prohibits the imposition of excessive bail. This gives a defendant the right to both challenge and introduce evidence that would contradict a risk assessments recommendation of detention.<sup>289</sup>

#### **OCPD Recommendations:**

Connecticut's current process for pretrial release can be amended and the menu of available programs increased to further reduce the number of individuals held on monetary conditions. OCPD makes the following recommendations:

1. The pretrial population in custody at DOC with bond less than \$25,000 should be studied to determine what factors lead bond to be set and what additional services are needed to increase the number of people who are able to be released safely on non-monetary conditions.
2. Maintain Article 1, Section 8 of the Connecticut Constitution without amendment.
3. Amend Connecticut General Statute Section 54-63c and 54-63d to mandate that a law enforcement and Court Support Services staff to issue a written promise to appear or non-monetary conditions of release in misdemeanor cases unless the criteria set for the for judicial review in C.G.S. 54-64a are met.

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<sup>289</sup> *United States v. Salerno*, 481 U.S. 739 (1987), involved a challenge to the Bail Reform Act of 1964, which allowed the federal courts to detain an accused without bail for certain crimes if the accused presented risk of flight or a danger to public safety. The court in *Salerno* upheld the law, which gave the accused the right to a full hearing, where they could challenge and introduce evidence.

4. Amend Connecticut General Statutes Sections 56-63c, 56-63d and 56-64a to expand the statutory presumption of release by law enforcement, CSSD personnel and the judicial authority for all non-domestic violence misdemeanors to all non-domestic violence felonies not requiring that the accused serve 85% of the sentence before parole pursuant to Connecticut General Statute 54-125a.
5. For felonies and misdemeanors that involve a domestic violence offense,
6. If the offense is a misdemeanor, release is still presumed but law enforcement may issue conditions under C.G.S. Section 54-63c.
7. If the charge is a C, D, E, or U felony, law enforcement or CSSD personnel would release on a written promise to appear or nonmonetary conditions sufficient to ensure appearance in court and public safety. Money bond could only be set by seeking a court order using a process similar to that set out in C.G.S. 46b-133 for admission into a juvenile detention facility. Criteria such as the following could be used to determine if bond should be set.
  - History of convictions or charges with same complainant.
  - Pending cases with DV and same complainant.
  - Protective order not sufficient to keep complainant safe.

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**APPENDIX C**  
**Division of Criminal Justice**  
**Proposal for the Reduction of the Use of Cash Bail**

**Introduction**

The right to be released on reasonable bail is guaranteed by the Constitution of the State of Connecticut. Article First, Section 8, provides that “In all criminal prosecutions, the accused shall have a right... to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; ...nor shall excessive bail be required...” This provision is implemented by Connecticut General Statutes §54-53 *et seq.* and Practice Book § 38-1 *et seq.*

Current Connecticut bail laws favor release without financial conditions in all but the most serious cases. Innovative concepts adopted by the Division of Criminal Justice, such as the Early Screening and Intervention (ESI) program contribute to the over-all low rate of pretrial detention. ESI, which has been implemented in many locations and which the Division proposes expanding to all geographical area court locations, combines the resources of social workers and experienced prosecutors to direct defendants to needed services, while determining the necessity for further prosecution.

As the Connecticut Sentencing Commission noted in a 2017 report on Pretrial Release and Detention in Connecticut, “Connecticut’s pretrial detention rate compares favorably to that of many other US jurisdictions.” *Id.*, pg. 31. Since the time the Sentencing Commission made that statement, our laws have been amended to encourage the pretrial release of even more individuals charged with crimes. For example, in accord with a recommendation from the Sentencing Commission in that same report, General Statutes Section 54-64a was amended to create a presumption of release with no financial conditions for all non-domestic violence misdemeanor offenses. See, Conn. Gen. Stat. § 54-64a(a)(2).

**Current Connecticut Bail Practice**

There presently is a statutory mandate imposed on the trial court to set the least restrictive conditions of release in every case. A recent amendment proposed by the Sentencing Commission and enacted by the General Assembly in Public Act 17-145, added subsection (a)(2) to General Statutes § 54-64a, providing that if the arrested person is charged with no offense other than a misdemeanor, the Court shall not impose financial conditions of release on the person unless the person is charged with a family violence crime, the person requests such financial conditions, or the Court makes a finding on the record that there is a likely risk that the defendant will fail to appear in court, obstruct or attempt to obstruct justice, threaten, injure or intimidate or attempt to threaten, injure or intimidate a prospective witness or juror, or engage in conduct that threatens the safety of himself or herself or another person.

The issue of bail does not occur in a vacuum, but rather in the context of a unified body of law that is applied when a person is charged with a crime. This body of law is the product of two and a half centuries of careful federal and state constitutional, judicial, and legislative development, which balances the liberty interest of the accused with the safety and well-being of the community at large.

As an initial matter, it is important to note that many people charged with crimes are never brought to the police station or detained beyond the time it takes the police to issue them a ticket or summons to appear in court. This is because the police have the discretion to, and often do, charge by way of summons and complaint and release on a promise to appear persons charged with misdemeanor offenses and/or violations punishable by imprisonment for less than a year and/or a one thousand dollar fine. See, Conn. Gen. Stat. § 54-1h. These individuals are simply given a summons and complaint directing them to appear in court at a specified date and time. In Pretrial Release and Detention in Connecticut, which predated the creation of the presumption of release on non-financial conditions for all non-domestic violence offenses, the Sentencing Commission noted that more than fifty percent of misdemeanor offenders are charged by way of a summons and complaint and such individuals are never taken into custody. Pretrial Release and Detention in Connecticut, at 32, Table 6.

Other individuals may be taken into custody but released by the police on a written promise to appear without being further detained. In certain cases, the individual's release may be conditioned upon the person's compliance with certain non-financial conditions. See, Conn. Gen. Stat. § 54-63c(b). A person also may be released by the police after posting a financial bond set by either the Court or the police.

Any person who is subjected to a custodial arrest who is not released must be presented at the next session of the court. See, Conn. Gen. Stat. § 54-1g. Regardless of when the court next is in session, a person may not be detained unless, within forty-eight hours, a neutral and detached judge makes a finding that there is probable cause to believe that a crime has been committed and the person charged committed said crime. *Riverside County v. McLaughlin*, 500 U.S. 44 (1991); *State v. Heredia*, 310 Conn. 742 (2013). The State bears the burden of establishing probable cause.

Even before being presented to court, however, the conditions of the defendant's release are subject to review. Unless the Court has set a bond on a warrant, a person charged with a crime is entitled to have the conditions of release set by the police reviewed by the Bail Commissioner's Office which is required to order the release of the person on the least restrictive condition necessary to assure the person's presence in court. See, Conn. Gen. Stat. § 54-63d(a).

When the arrested person is presented in court, the conditions of his release are reviewed again – this time by the Court with information gathered from the arrested person by the Bail Commissioner's Office. Unless the arrestee elects to appear *pro se*, counsel will advocate on the defendant's behalf. Under our current scheme, the Court has an affirmative obligation to impose the least restrictive set of conditions on an accused that is sufficient to guarantee his presence in

court, protect society (including victims of crime), and protect the integrity of the adjudicative process. This well-developed statutory scheme requires the Court to consider nonfinancial conditions of release as a first option and identifies a number of non-financial conditions from which the judge can tailor the terms of the release to the particular arrestee and case. A recent amendment proposed by the Sentencing Commission and enacted by the General Assembly in Public Act 17-145, added subsection (a)(2) to Conn. Gen. Stat. 54-64a, creating a presumption of release for persons charged with no offense other than a misdemeanor. The statute provides that the Court shall not impose financial conditions of release on the person unless the person is charged with a family violence crime, the person requests such financial conditions, or the Court makes a finding on the record that there is a likely risk that the defendant will fail to appear in court, obstruct or attempt to obstruct justice, threaten, injure or intimidate or attempt to threaten, injure or intimidate a prospective witness or juror, or engage in conduct that threatens the safety of himself or herself or another person.

The present system also provides a mechanism for altering the conditions of release as the situation requires. General Statutes § 54-53a provides that a person charged with a class D or E felony is eligible to have the conditions reviewed every thirty days, and persons detained on non-family violence misdemeanors must have their conditions of release reviewed after fourteen days. They may only be detained further if the Court makes specific findings on the record that without such conditions the person will fail to appear in court, attempt to obstruct justice or threaten a witness, or engage in conduct that threatens the safety of another or him or herself. Persons charged with other offenses, including the most serious ones, are eligible to have their conditions of release reviewed every forty-five days.

Only when there is probable cause to believe that the defendant has violated the terms of his release, the State may request a hearing under General Statutes § 54-64f, at which time it must prove by clear and convincing evidence that the defendant has violated his release. If the State meets this burden, the Court may impose different, or additional, conditions. If the State has proven by clear and convincing evidence that the safety of another person is endangered, the Court may revoke the defendant's release.

Under the present system, defendants in the vast majority of cases are released without financial conditions. Financial conditions are imposed generally where there is a great risk that the person will fail to appear, or a pattern of non-compliance with non-financial conditions of release, or the defendant presents a substantial risk to public safety.

### **Position of the Division of Criminal Justice**

The Division believes that the current statutory scheme properly balances the defendant's liberty interest with the need to ensure the defendant's presence in court and safety to the public or themselves. In this regard, the Division notes that the rate at which the State of Connecticut detained individuals compared favorably to other states, even before the adoption of the presumption of release for all non-domestic misdemeanor offenders in 2017. Accordingly,

changes should not be made lightly. With that in mind, the Division will address two options for modifying the current system.

### Release/Detention Model

The most drastic proposal calls for the elimination of financial conditions of release in favor of a release/detention model. Under such a model, the Court would not set financial conditions of release but would have the authority to order a person held without bond if the Court believes the person is a risk to public safety or himself or of failing to appear in court. If the person is not detained, the person is released with only non-financial conditions. Several states and the federal courts use this model.

A release/detention model provides some benefits. It ensures that a person who is deemed a risk to the community or not likely to appear in court is not released because he or she has the resources to post bond. It also ensures that people who are neither a risk to the community nor a risk of flight are not detained simply because they cannot post bond.

As a practical matter, however, the release/detention model cannot be readily adopted in Connecticut without substantial change. Specifically, it would require an amendment to Article First Section 8, which guarantees persons charged with crimes the right to reasonable bail. That provision would have to be amended to allow a person to be detained without bail if the person presents a danger to society or is unlikely to appear in court.

The Division would support such an amendment but only if the system adopted by the General Assembly provides the Court with effective tools to guarantee the integrity of the judicial process and the safety of victims and the public at large by insuring the Court's power to detain someone, regardless of the charge, who the Court believes is not going to appear in court, is going to obstruct justice, tamper with witnesses, or threatens the safety of another or him or herself.

In this regard, the Division notes that some proposals have called for the elimination of a detention option in whole categories of criminal activity, while others discount or wholly exclude a defendant's history of recidivism, failure to appear, and non-compliance with judicially imposed conditions, such as probation. Such proposals would impede judges from effectively addressing the safety of victims and witnesses, the integrity of the judicial process including timely adjudication, and the mental, physical, and substance abuse needs of a person accused of crimes.

For example, a person suffering from a mental illness who is accused of one or more offenses for which detention is wholly excluded would be unlikely to appear in court, could not be effectively assessed for competency to stand trial, and would present a potential danger to both himself or others, yet remain beyond the ability of the Court to address any of these conditions.

The Division views as extremely problematic, and would oppose, a system that precludes the detention of a person for certain categories of crimes under any circumstance. Such a system would produce the absurd situation of a Court being unable to detain a person even if the person

stood in front of the Court and announced that he or she was not going to appear again. In this regard, the Division suggests that having a presumption of release for misdemeanors, similar to the presumption of release on non-financial conditions we have under the current system, would be appropriate, as long as the Court has the ability to detain the person if the person presents a risk to public safety or to him or herself or is unlikely to appear in court.

Further, it would be unwise, and potentially fatal, to preclude a Court from detaining a person charged with an offense such as a nondomestic threatening, if the Court believes the person will follow through with the threat.

Any system that denies a trial court the flexibility to react to the panoply of varying circumstances presented by criminal activity and the persons charged with it presents a danger to public safety and the effective administration of justice.

There are numerous other questions that must be answered before the Division would feel comfortable fully supporting a release/detention model. Three questions readily come to mind: 1) what type of hearing is required; 2) what evidence can be used to establish the defendant is a risk to public safety or of failing to appear; and 3) what standard will the Court use in evaluating whether the defendant should be detained. The Division believes that an evidentiary hearing is not required and that the State be allowed to demonstrate the defendant's risk to the community and of failing to appear by proffer, as it does in the current system and as is done in federal court. The Division also believes that the State should have to establish the defendant's risk to the community and of failing to appear by a preponderance of the evidence.

In determining whether to adopt a release/detention model, policymakers should note that use of such a model will not necessarily ensure a decrease in the number of people being detained. Substantively, the release/detain model also poses problems in application. In situations where a defendant might be a risk of flight, the Court would have only two options available to address the issue: release and detention. This model fails to recognize the fact that the risk of financial forfeiture often is sufficient to guarantee an accused's presence in court while sparing him detention while his case is determined on the merits.

#### Improvements to the Current System

Unless all of the elements outlined above were incorporated into a release/detention model, the Division of Criminal Justice would recommend maintaining the existing comprehensive statutory scheme which provides for non-financial conditions of release in the vast majority of cases. The Division further recommends expansion and modification of the existing statutory scheme to allow for tailoring the conditions of release to the particular circumstances of the accused offender, the victim, and the community at large.

It is well established that many criminal offenses are committed as a consequence of substance abuse, mental illness, or a combination of the two. In these cases, especially in low-level offenses, the goals of the Court, the State, and the defense counsel often overlap.

Frequently, the focus of both parties and the Court is not on conviction, but on redirection of the accused to avoid future contact with the criminal justice system. Pretrial release is frequently used to effectuate this goal, either through established diversionary programs or through the exercise of prosecutorial discretion and creative alternatives devised by, and agreed to, by counsel. The Early Screening and Intervention (ESI) Program operating in many courthouses has formalized the latter method and provided resources to enhance success.

The Division of Criminal Justice makes the following recommendations:

- Retention of the non-cash bail release presumption in the first instance for all misdemeanor cases other than those constituting a family violence offense as defined by section 46b-38a or a violation of section 53a-173 or an offense involving the use, attempted use, or threatened use of physical force against another person;
- Institution of a non-cash bail release presumption in the first instance for Class E felonies other than those constituting a family violence offense as defined by section 46b-38a or an offense involving the use, attempted use, or threatened use of physical force against another person;
- Direct referral and entry into a mental health or substance abuse treatment program as a condition of release on the motion of the State, the defense, or the Court, and entry into such program following the defendant's initial appearance in court, whenever the circumstances of the case or information presented to the Court supports a finding by a preponderance of evidence that a person is in need of treatment and is otherwise not likely to fail to appear;
- Direct referral and entry into a mental health or substance abuse treatment program as a condition of release on the motion of the State, the defense, or the Court, and entry into such program following the defendant's initial appearance in court in all cases of violation of probation when the sole basis of the violation is failure to comply with mental health or substance abuse treatment;
- Expansion of the Early Screening and Intervention (ESI) program;
- Fully funding treatment and community-based programs to which defendants may be referred as conditions of released.

**APPENDIX D**  
**Right to Bail Provisions in State Constitutions**

<b>No Constitutional Right to Bail</b>	<b>Traditional Right to Bail</b>	<b>Amended Right to Bail</b>																																										
Georgia Hawaii Maryland Massachusetts New Hampshire New York North Carolina Virginia West Virginia	<table border="0"> <tr> <td>Alabama</td> <td>Maine</td> </tr> <tr> <td>Alaska</td> <td>Montana</td> </tr> <tr> <td>Arkansas</td> <td>Minnesota</td> </tr> <tr> <td>Connecticut</td> <td>Nebraska</td> </tr> <tr> <td>Delaware</td> <td>Nevada</td> </tr> <tr> <td>Idaho</td> <td>North Dakota</td> </tr> <tr> <td>Indiana</td> <td>Oregon</td> </tr> <tr> <td>Iowa</td> <td>South Dakota</td> </tr> <tr> <td>Kansas</td> <td>Tennessee</td> </tr> <tr> <td>Kentucky</td> <td>Wyoming</td> </tr> </table>	Alabama	Maine	Alaska	Montana	Arkansas	Minnesota	Connecticut	Nebraska	Delaware	Nevada	Idaho	North Dakota	Indiana	Oregon	Iowa	South Dakota	Kansas	Tennessee	Kentucky	Wyoming	<table border="0"> <tr> <td>Arizona</td> <td>Ohio</td> </tr> <tr> <td>California</td> <td>Oklahoma</td> </tr> <tr> <td>Colorado</td> <td>Pennsylvania</td> </tr> <tr> <td>Florida</td> <td>Rhode Island</td> </tr> <tr> <td>Illinois</td> <td>South Carolina</td> </tr> <tr> <td>Louisiana</td> <td>Texas</td> </tr> <tr> <td>Michigan</td> <td>Utah</td> </tr> <tr> <td>Mississippi</td> <td>Vermont</td> </tr> <tr> <td>Missouri</td> <td>Washington</td> </tr> <tr> <td>New Jersey</td> <td>New Mexico</td> </tr> <tr> <td></td> <td>Wisconsin</td> </tr> </table>	Arizona	Ohio	California	Oklahoma	Colorado	Pennsylvania	Florida	Rhode Island	Illinois	South Carolina	Louisiana	Texas	Michigan	Utah	Mississippi	Vermont	Missouri	Washington	New Jersey	New Mexico		Wisconsin
Alabama	Maine																																											
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On the following pages, Table A provides the constitutional text for each state's bail provisions.

**Table A – Bail Provisions in State Constitutions**

State	Constitutional Provision	Text of Provision
Alabama	ALA. CONST. art. I, § 16	That all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great; and that excessive bail shall not in any case be required.
Alaska	ALASKA CONST. art. 1, § 11	“...The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great...”
Arizona	ARIZ. CONST. art. 2, § 22	<p>A. All persons charged with crime shall be bailable by sufficient sureties, except:</p> <ol style="list-style-type: none"> <li>1. For capital offenses, sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age when the proof is evident or the presumption great.</li> <li>2. For felony offenses committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge.</li> <li>3. For felony offenses if the person charged poses a substantial danger to any other person or the community, if no conditions of release which may be imposed will reasonably assure the safety of the other person or the community and if the proof is evident or the presumption great as to the present charge.</li> <li>4. For serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge.</li> </ol> <p>B. The purposes of bail and any conditions of release that are set by a judicial officer include:</p> <ol style="list-style-type: none"> <li>1. Assuring the appearance of the accused.</li> <li>2. Protecting against the intimidation of witnesses.</li> <li>3. Protecting the safety of the victim, any other person or the community.</li> </ol>
Arkansas	ARK. CONST. art. 2, § 9	Excessive bail shall not be required; nor shall excessive fines be imposed; nor shall cruel or unusual punishment be inflicted; nor witnesses be unreasonably detained.
California	CAL. CONST. art. 1, § 12	Sec. 12. A person shall be released on bail by sufficient sureties, except for: (a) Capital crimes when the facts are evident or the presumption great; (b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption

**Table A – Bail Provisions in State Constitutions**

State	Constitutional Provision	Text of Provision
	<p>CAL. CONST. art. 1, § 28</p>	<p>great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or (c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released. Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. A person may be released on his or her own recognizance in the court's discretion.</p> <p>(b) In order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled to the following rights: (3) To have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant.</p> <p>(f) (3) A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary considerations. A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail. Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney and the victim shall be given notice and reasonable opportunity to be heard on the matter.</p>

**Table A – Bail Provisions in State Constitutions**

State	Constitutional Provision	Text of Provision
		<p>When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes.</p>
Colorado	COLO. CONST. art. 2, § 19	<p>(1) All persons shall be bailable by sufficient sureties pending disposition of charges except:</p> <ul style="list-style-type: none"> <li>(a) For capital offenses when proof is evident or presumption is great; or</li> <li>(b) When, after a hearing held within ninety-six hours of arrest and upon reasonable notice, the court finds that proof is evident or presumption is great as to the crime alleged to have been committed and finds that the public would be placed in significant peril if the accused were released on bail and such person is accused in any of the following cases: <ul style="list-style-type: none"> <li>(I) A crime of violence, as may be defined by the general assembly, alleged to have been committed while on probation or parole resulting from the conviction of a crime of violence;</li> <li>(II) A crime of violence, as may be defined by the general assembly, alleged to have been committed while on bail pending the disposition of a previous crime of violence charge for which probable cause has been found;</li> <li>(III) A crime of violence, as may be defined by the general assembly, alleged to have been committed after two previous felony convictions, or one such previous felony conviction if such conviction was for a crime of violence, upon charges separately brought and tried under the laws of this state or under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States which, if committed in this state, would be a felony; or</li> </ul> </li> <li>(c) Deleted by 1994, H.C.R.94-1003, § 1, eff. Jan. 1, 1995.</li> </ul> <p>(2) Except in the case of a capital offense, if a person is denied bail under this section, the trial of the person shall be commenced not more than ninety days after the date on which bail is denied. If the trial is not commenced within ninety days and the delay is not attributable to the defense, the court shall immediately schedule a bail hearing and shall set the amount of the bail for the person.</p>

**Table A – Bail Provisions in State Constitutions**

State	Constitutional Provision	Text of Provision
		<p>(2.5)(a) The court may grant bail after a person is convicted, pending sentencing or appeal, only as provided by statute as enacted by the general assembly; except that no bail is allowed for persons convicted of:</p> <ul style="list-style-type: none"> <li>(I) Murder;</li> <li>(II) Any felony sexual assault involving the use of a deadly weapon;</li> <li>(III) Any felony sexual assault committed against a child who is under fifteen years of age;</li> <li>(IV) A crime of violence, as defined by statute enacted by the general assembly; or</li> <li>(V) Any felony during the commission of which the person used a firearm.</li> </ul> <p>(b) The court shall not set bail that is otherwise allowed pursuant to this subsection (2.5) unless the court finds that:</p> <ul style="list-style-type: none"> <li>(I) The person is unlikely to flee and does not pose a danger to the safety of any person or the community; and</li> <li>(II) The appeal is not frivolous or is not pursued for the purpose of delay.</li> </ul> <p>(3) This section shall take effect January 1, 1995, and shall apply to offenses committed on or after said date.</p>
Connecticut	CONN. CONST. art. 1, § 8	<p>Sec. 8. [As amended] a. In all Criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law, except in the armed forces, or in the militia when in actual service in time of war or public danger.</p> <p>b. In all criminal prosecutions, a victim, as the general assembly may define by law, shall have the following rights: (1) the right to be treated with fairness and respect throughout the criminal justice process; (2) the right to timely disposition of the case following arrest of the accused, provided no right of the accused is abridged; (3) the</p>

**Table A – Bail Provisions in State Constitutions**

State	Constitutional Provision	Text of Provision
		<p>right to be reasonably protected from the accused throughout the criminal justice process; (4) the right to notification of court proceedings; (5) the right to attend the trial and all other court proceedings the accused has the right to attend, unless such person is to testify and the court determines that such person's testimony would be materially affected if such person hears other testimony; (6) the right to communicate with the prosecution; (7) the right to object to or support any plea agreement entered into by the accused and the prosecution and to make a statement to the court prior to the acceptance by the court of the plea of guilty or nolo contendere by the accused; (8) the right to make a statement to the court at sentencing; (9) the right to restitution which shall be enforceable in the same manner as any other cause of action or as otherwise provided by law; and (10) the right to information about the arrest, conviction, sentence, imprisonment and release of the accused. The general assembly shall provide by law for the enforcement of this subsection. Nothing in this subsection or in any law enacted pursuant to this subsection shall be construed as creating a basis for vacating a conviction or ground for appellate relief in any criminal case.</p>
Delaware	DEL. CONST. art. 1, § 12	<p>Section 12. All prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is positive or the presumption great; and when persons are confined on accusation for such offenses their friends and counsel may at proper seasons have access to them.</p>
Florida	FLA. CONST. art. 1 § 14	<p>Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.</p>
Georgia	GA. CONST. art. 1, § 1, ¶ XVII	<p>Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; nor shall any person be abused in being arrested, while under arrest, or in prison.</p>
Hawaii	HAW. CONST. art. 1, § 12	<p>Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. The court may dispense with bail if reasonably satisfied that the defendant or witness will appear when directed, except for a defendant charged with an offense punishable by life imprisonment.</p>

**Table A – Bail Provisions in State Constitutions**

State	Constitutional Provision	Text of Provision
Idaho	IDAHO CONST. art. I, § 6	All persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excess fines imposed, nor cruel and unusual punishments inflicted.
Illinois	ILL. CONST. art. 1, § 9	All persons shall be bailable by sufficient sureties, except for the following offenses where the proof is evident or the presumption great: capital offenses; offenses for which a sentence of life imprisonment may be imposed as a consequence of conviction; and felony offenses for which a sentence of imprisonment, without conditional and revocable release, shall be imposed by law as a consequence of conviction, when the court, after a hearing, determines that release of the offender would pose a real and present threat to the physical safety of any person. The privilege of the writ of habeas corpus shall not be suspended except in cases of rebellion or invasion when the public safety may require it.
Indiana	IND. CONST. art. 1, § 17	Section 17. Offenses, other than murder or treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong.
Iowa	IOWA CONST. art. 1, § 17	Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted.
Kansas	KAN. CONST. Bill of Rights § 9	All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.
Kentucky	KY. CONST. § 16	All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it.
Louisiana	LA. CONST. art. 1, § 18	Section 18. (A) Excessive bail shall not be required. Before and during a trial, a person shall be bailable by sufficient surety, except when he is charged with a capital offense and the proof is evident and the presumption of guilt is great. After conviction and before sentencing, a person shall be bailable if the maximum sentence which may be imposed is imprisonment for five years or less; and the judge may grant bail if the maximum sentence which may be imposed is imprisonment exceeding five years. After sentencing and until final judgment, a person shall be bailable if the sentence actually

**Table A – Bail Provisions in State Constitutions**

State	Constitutional Provision	Text of Provision
		<p>imposed is five years or less; and the judge may grant bail if the sentence actually imposed exceeds imprisonment for five years.</p> <p>(B) However, a person charged with a crime of violence as defined by law or with production, manufacture, distribution, or dispensing or possession with intent to produce, manufacture, distribute, or dispense a controlled dangerous substance as defined by the Louisiana Controlled Dangerous Substances Law, and the proof is evident and the presumption of guilt is great, shall not be bailable if, after a contradictory hearing, the judge or magistrate finds by clear and convincing evidence that there is a substantial risk that the person may flee or poses an imminent danger to any other person or the community.</p>
Maine	ME. CONST. art. 1, § 10	<p>Section 10. No person before conviction shall be bailable for any of the crimes which now are, or have been denominated capital offenses since the adoption of the Constitution, when the proof is evident or the presumption great, whatever the punishment of the crimes may be. And the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.</p>
Maryland	MD. CONST. art. 25 (Declaration of Rights)	<p>That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law.</p>
Massachusetts	MASS. CONST. pt. 1, art. 26	<p>ART. XXVI. No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments. No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.</p>
Michigan	MICH. CONST. art. 1, § 16	<p>Sec. 16. Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained.</p>
Minnesota	MINN. CONST. art. 1, § 5	<p>Sec. 5. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.</p>
Mississippi	MISS. CONST. art. 3, § 29	<p>(1) Excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses (a) when the proof is evident or presumption great; or (b) when the person has previously been convicted of a capital</p>

**Table A – Bail Provisions in State Constitutions**

State	Constitutional Provision	Text of Provision
		<p>offense or any other offense punishable by imprisonment for a maximum of twenty (20) years or more.</p> <p>(2) If a person charged with committing any offense that is punishable by death, life imprisonment or imprisonment for one (1) year or more in the penitentiary or any other state correctional facility is granted bail and (a) if that person is indicted for a felony committed while on bail; or (b) if the court, upon hearing, finds probable cause that the person has committed a felony while on bail, then the court shall revoke bail and shall order that the person be detained, without further bail, pending trial of the charge for which bail was revoked. For the purposes of this subsection (2) only, the term “felony” means any offense punishable by death, life imprisonment or imprisonment for more than five (5) years under the laws of the jurisdiction in which the crime is committed. In addition, grand larceny shall be considered a felony for the purposes of this subsection.</p> <p>(3) In the case of offenses punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment, a county or circuit court judge may deny bail for such offenses when the proof is evident or the presumption great upon making a determination that the release of the person or persons arrested for such offense would constitute a special danger to any other person or to the community or that no condition or combination of conditions will reasonably assure the appearance of the person as required.</p> <p>(4) In any case where bail is denied before conviction, the judge shall place in the record his reasons for denying bail. Any person who is charged with an offense punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment and who is denied bail prior to conviction shall be entitled to an emergency hearing before a justice of the Mississippi Supreme Court. The provisions of this subsection (4) do not apply to bail revocation orders.</p>
Missouri	<p>MO. CONST. art. 1, § 20</p> <p><u>MO.</u> CONST. art. 1, § 32</p>	<p>That all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.</p> <p>1. Crime victims, as defined by law, shall have the following rights, as defined by law:</p>

**Table A – Bail Provisions in State Constitutions**

State	Constitutional Provision	Text of Provision
		<p>(2) Upon request of the victim, the right to be informed of and heard at guilty pleas, bail hearings, sentencing, probation revocation hearings, and parole hearings, unless in the determination of the court the interests of justice require otherwise;</p> <p>2. Notwithstanding section 20 of article I of this Constitution, upon a showing that the defendant poses a danger to a crime victim, the community, or any other person, the court may deny bail or may impose special conditions which the defendant and surety must guarantee.</p>
Montana	MONT. CONST. art. 2, § 21	All persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.
Nebraska	NEB. CONST. art. I, § 9	All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.
Nevada	NEV. CONST. art. 1, § 7	All persons shall be bailable by sufficient sureties; unless for Capital Offenses or murders punishable by life imprisonment without possibility of parole when the proof is evident or the presumption great.
New Hampshire	N.H. CONST. pt. 1, art. 33	No magistrate, or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.
New Jersey	<p>N.J. CONST. art. 1, ¶ 11</p> <p>N.J. CONST. art. 1, ¶ 12</p>	<p>No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be eligible for pretrial release. Pretrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person’s appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process. It shall be lawful for the Legislature to establish by law procedures, terms, and conditions applicable to pretrial release and the denial thereof authorized under this provision.</p> <p>Excessive bail shall not be required, excessive fines shall not be imposed, and cruel and unusual punishments shall not be inflicted. It shall not be cruel and unusual punishment to impose the death penalty on a person convicted of purposely or knowingly causing</p>

**Table A – Bail Provisions in State Constitutions**

State	Constitutional Provision	Text of Provision
		death or purposely or knowingly causing serious bodily injury resulting in death who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value.
New Mexico	N.M. CONST. art. 2, § 13	<p>All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in which bail is specifically prohibited by this section. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.</p> <p>Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. An appeal from an order denying bail shall be given preference over all other matters.</p> <p>A person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond may file a motion with the court requesting relief from the requirement to post bond. The court shall rule on the motion in an expedited manner.</p>
New York	N.Y. CONST. art. 1, § 5	Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.
North Carolina	N.C. CONST. art. I, § 27	Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.
North Dakota	N.D. CONST. art. 1, § 11	All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted. Witnesses shall not be unreasonably detained, nor be confined in any room where criminals are actually imprisoned.
Ohio	OHIO CONST. art. I, § 9	All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical

**Table A – Bail Provisions in State Constitutions**

State	Constitutional Provision	Text of Provision
		<p>harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.</p> <p>The general assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community. Procedures for establishing the amount and conditions of bail shall be established pursuant to Article IV, Section 5(B) of the Constitution of the state of Ohio.</p>
Oklahoma	OKLA. CONST. art. 2, § 8	<p>A. All persons shall beailable by sufficient sureties, except that bail may be denied for:</p> <ol style="list-style-type: none"> <li>1. capital offenses when the proof of guilt is evident, or the presumption thereof is great;</li> <li>2. violent offenses;</li> <li>3. offenses where the maximum sentence may be life imprisonment or life imprisonment without parole;</li> <li>4. felony offenses where the person charged with the offense has been convicted of two or more felony offenses arising out of different transactions; and</li> <li>5. controlled dangerous substances offenses where the maximum sentence may be at least ten (10) years imprisonment.</li> </ol> <p>On all offenses specified in paragraphs 2 through 5 of this section, the proof of guilt must be evident, or the presumption must be great, and it must be on the grounds that no condition of release would assure the safety of the community or any person.</p>
Oregon	OR. CONST. art. I, § 16	<p>Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense. -- In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law, and the right of new trial, as in civil cases.</p>
Pennsylvania	PA. CONST. art. 1, § 14	<p>All prisoners shall beailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great; and</p>

**Table A – Bail Provisions in State Constitutions**

State	Constitutional Provision	Text of Provision
		the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.
Rhode Island	R.I. CONST. art. 1, § 9	All persons imprisoned ought to be bailed by sufficient surety, unless for offenses punishable by imprisonment for life, or for offenses involving the use or threat of use of a dangerous weapon by one already convicted of such offense or already convicted of an offense punishable by imprisonment for life, or for offenses involving the unlawful sale, distribution, manufacture, delivery, or possession with intent to manufacture, sell, distribute or deliver any controlled substance or by possession of a controlled substance punishable by imprisonment for ten (10) years or more, when the proof of guilt is evident or the presumption great. Nothing in this section shall be construed to confer a right to bail, pending appeal of a conviction. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety shall require it; nor ever without the authority of the general assembly.
South Carolina	S.C. CONST. art. I, § 15	All persons shall be, before conviction, bailable by sufficient sureties, but bail may be denied to persons charged with capital offenses or offenses punishable by life imprisonment, or with violent offenses defined by the General Assembly, giving due weight to the evidence and to the nature and circumstances of the event. Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained.
South Dakota	S.D. CONST. art. 6, § 8	All persons shall be bailable by sufficient sureties, except for capital offenses when proof is evident or presumption great. The privilege of the writ of habeas corpus shall not be suspended unless, when in case of rebellion or invasion, the public safety may require it.
Tennessee	TENN. CONST. art. 1, § 15	That all prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or the presumption great. And the privilege of the writ of Habeas Corpus shall not be suspended, unless when in case of rebellion or invasion, the General Assembly shall declare the public safety requires it.
Texas	TEX. CONST. art. 1, § 11	Sec. 11. All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident; but this provision shall not be so construed as to prevent bail after indictment found upon examination of the evidence, in such manner as may be prescribed by law.
Utah	UTAH CONST. art. 1, § 8	§ 8

**Table A – Bail Provisions in State Constitutions**

State	Constitutional Provision	Text of Provision
	UTAH CONST. art. 1, § 9	<p>(1) All persons charged with a crime shall be bailable except:</p> <p>(a) persons charged with a capital offense when there is substantial evidence to support the charge; or</p> <p>(b) persons charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, when there is substantial evidence to support the new felony charge; or</p> <p>(c) persons charged with any other crime, designated by statute as one for which bail may be denied, if there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community or is likely to flee the jurisdiction of the court if released on bail.</p> <p>(2) Persons convicted of a crime are bailable pending appeal only as prescribed by law.</p> <p>§ 9 Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.</p>
Vermont	VT. CONST. ch. II, § 40	<p>Excessive bail shall not be exacted for bailable offenses. All persons shall be bailable by sufficient sureties, except as follows:</p> <p>(1) A person accused of an offense punishable by death or life imprisonment may be held without bail when the evidence of guilt is great.</p> <p>(2) A person accused of a felony, an element of which involves an act of violence against another person, may be held without bail when the evidence of guilt is great and the court finds, based upon clear and convincing evidence, that the person's release poses a substantial threat of physical violence to any person and that no condition or combination of conditions of release will reasonably prevent the physical violence. A person held without bail prior to trial under this paragraph shall be entitled to review de novo by a single justice of the Supreme Court forthwith.</p> <p>(3) A person awaiting sentence, or sentenced pending appeal, may be held without bail for any offense.</p>

**Table A – Bail Provisions in State Constitutions**

State	Constitutional Provision	Text of Provision
		<p>A person held without bail prior to trial shall be entitled to review of that determination by a panel of three Supreme Court Justices within seven days after bail is denied.</p> <p>Except in the case of an offense punishable by death or life imprisonment, if a person is held without bail prior to trial, the trial of the person shall be commenced not more than 60 days after bail is denied. If the trial is not commenced within 60 days and the delay is not attributable to the defense, the court shall immediately schedule a bail hearing and shall set bail for the person.</p> <p>No person shall be imprisoned for debt.</p>
Virginia	VA. CONST. art. 1, § 9	That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; that the privilege of the writ of habeas corpus shall not be suspended unless when, in cases of invasion or rebellion, the public safety may require; and that the General Assembly shall not pass any bill of attainder, or any ex post facto law.
Washington	WASH. CONST. art. 1, § 20	All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great. Bail may be denied for offenses punishable by the possibility of life in prison upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons, subject to such limitations as shall be determined by the legislature.
West Virginia	W. VA. CONST. art. 3, § 5	Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offence. No person shall be transported out of, or forced to leave the state for any offence committed within the same; nor shall any person, in any criminal case, be compelled to be a witness against himself, or be twice put in jeopardy of life or liberty for the same offence.
Wisconsin	WIS. CONST. art. 1, § 8	“...(2) All persons, before conviction, shall be eligible for release under reasonable conditions designed to assure their appearance in court, protect members of the community from serious bodily harm or prevent the intimidation of witnesses. Monetary conditions of release may be imposed at or after the initial appearance only upon a finding that there is a reasonable basis to believe that the conditions are

**Table A – Bail Provisions in State Constitutions**

State	Constitutional Provision	Text of Provision
		<p>necessary to assure appearance in court. The legislature may authorize, by law, courts to revoke a person's release for a violation of a condition of release.</p> <p>(3) The legislature may by law authorize, but may not require, circuit courts to deny release for a period not to exceed 10 days prior to the hearing required under this subsection to a person who is accused of committing a murder punishable by life imprisonment or a sexual assault punishable by a maximum imprisonment of 20 years, or who is accused of committing or attempting to commit a felony involving serious bodily harm to another or the threat of serious bodily harm to another and who has a previous conviction for committing or attempting to commit a felony involving serious bodily harm to another or the threat of serious bodily harm to another. The legislature may authorize by law, but may not require, circuit courts to continue to deny release to those accused persons for an additional period not to exceed 60 days following the hearing required under this subsection, if there is a requirement that there be a finding by the court based on clear and convincing evidence presented at a hearing that the accused committed the felony and a requirement that there be a finding by the court that available conditions of release will not adequately protect members of the community from serious bodily harm or prevent intimidation of witnesses. Any law enacted under this subsection shall be specific, limited and reasonable. In determining the 10-day and 60-day periods, the court shall omit any period of time found by the court to result from a delay caused by the defendant or a continuance granted which was initiated by the defendant.</p> <p>(4) The privilege of the writ of habeas corpus shall not be suspended unless, in cases of rebellion or invasion, the public safety requires it.”</p>
Wyoming	WYO. CONST. art. 1, § 14	All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishment be inflicted.



## APPENDIX E

# State of Connecticut

JUDICIAL BRANCH

COURT SUPPORT SERVICES DIVISION

455 Winding Brook Drive, Glastonbury, CT 06033

## Ad-Hoc Request: Ten-Percent Bonds Collected and Returned

1/5/2022

**Question Posed:** Approximately how much money has been collected using the Ten Percent Bond option, and how much money has been returned to defendants?

**Methodology:** Ten Percent Bond option's primary impact involves defendants who post bond at police departments prior to interview or arraignment. JBCSSD maintains a snapshot of bond information (bond type and amount) for court cases that are released at police departments. While this snapshot is generally accurate there are some instances where bond type/amount can change prior to the snapshot. Thus, these figures should be considered approximate.

To estimate the amount returned to defendants, JBCSSD identifies whether cases have been disposed, and uses the presence of a Failure to Appear as a proxy measure. It is assumed for the purposes of this effort that all cases re-arrested for FTA would have bond forfeited, and all cases that disposed without FTA would have bonds returned. JBCSSD asserts that this is an estimate and that this may not be the actual practice in the courts.

**Answer:** Since Ten Percent bond was expanded on January 1 of 2020, the Judicial Branch has collected over \$4.25 million worth of bond posted at police departments:

	# Bonds	\$ Collected	\$ Forfeited	\$ Held	\$ Returned
Cases w/ Ten Percent Bonds Posted at PD since 1/1/2020	14,090	\$ 4,264,812			
Bonds with FTA	1,611		\$ 365,620		
Pending Cases, no FTA	6,412			\$ 2,145,346	
Disposed without FTA	6,067				\$ 1,753,845

Based on the methodology, it is assumed that \$365,620 has been forfeited, and that \$1.75 million has been returned to defendants. Another \$2.15 million is held in anticipation of case disposition.