

This memo outlines recent changes to pretrial approaches in various jurisdictions through legal challenges and statutory changes and serves as a backup document to Justice Center’s testimony to the Vermont Senate Committee to the Judiciary on November 2, 2017. Last year, lawmakers in 44 states enacted 118 new pretrial laws to change the front end of the criminal justice system. Many of the policy changes center on diversion; however, some states have also focused on who is eligible for release prior to adjudication.

1) *Multiple States’ Court Rulings Find Money Bail Practices Unconstitutional*

Equal Justice Under Law has challenged money bail as unconstitutional across nine states, which have resulted in ending money bail in seven places in Alabama, Missouri, Mississippi, Alabama, and Louisiana.¹ These cases mostly build on the U.S. Supreme Court’s interpretation of the Eight Amendment in Stack v. Boyle 342 U.S. 1 (1951). The decision requires bail must be “reasonably calculated” to fulfill the purpose of assuring the defendant at court and specified “fixing of bail for any individual defendant must be based upon standards relevant to assuring the presence of that defendant,”² (i.e. a determination based on an individual’s characteristics must be made). Suits in California, Georgia, and the aforementioned states are still pending as are suits from other groups and individuals in Chicago and in other places. Suits against money bail have posted wins in 2017 in Harris County (Houston, Texas) and the states of Maryland and Massachusetts, which affect large populations.

In February 2017, the Court of Appeals in Maryland adopted a landmark rule aimed at ending the practice of holding criminal defendants in jail before trial when they cannot afford bail to stave off a lawsuit the Attorney General noted was imminent.³ The previous November, Attorney General Frosh (Maryland) issued an opinion on pretrial detention that noted a failure to assess a person’s ability to pay before setting money bail and the failure to assess one’s inability to pay that would result in pretrial detention would not stand up to constitutional scrutiny.⁴ Sensing a lawsuit, the Court of Appeals adopted the rule change, which retains option for defendants to use money bail, but with judicial release decisions now considering the defendant’s ability to pay and less restrictive options on ensuring appearance. The judiciary also has access to electronic monitoring or pretrial supervision. Some counties in Maryland have successfully used validated risk instruments for years prior to this rule change, which the AG recommends on his webpage.⁵

In April 2017, U.S. District Judge Rosenthal in *ODonnell v Harris Co* ordered the release of almost all misdemeanor defendants from jail within 24 hours of arrest, regardless of their ability to pay the bond amount⁶ and found current practices did not consider the defendants’ ability to pay.⁷ Harris County has used a validated risk assessment for years to determine release through the county’s supervised pretrial release agency and now combines the risk outcome result with an affidavit of indigence related to ability to pay bail coupled with a public defender representing the accused at magistration (probable cause hearing).

¹ Ending the American Money Bail System. Equal Justice Under the Law. <http://equaljusticeunderlaw.org/wp/current-cases/ending-the-american-money-bail-system/>

² Stack, 342 U.S. at 5

³ Dresser, Michael. February 7, 2017. Maryland Court of Appeals: Defendants can't be held in jail because they can't afford bail. Baltimore Sun.

<http://www.baltimoresun.com/news/maryland/bs-md-bail-rule-20170207-story.html>

⁴ Fanno Burdeen ,Cherise and Marc Schindler. November 4, 2016. Reform Maryland’s cash-bail practices. Washington Post. https://www.washingtonpost.com/opinions/reform-marylands-cash-bail-practices/2016/11/04/e7660f0a-a05b-11e6-a44d-cc2898cfab06_story.html?utm_term=.7e979f4dfc62

⁵ Frosh, Brian E. Bail System Reform FAQ. Maryland Attorney General. <http://www.marylandattorneygeneral.gov/Pages/BailReform.aspx>

⁶ McCullough, Jolie. October 2, 2017. How Harris County’s federal bail lawsuit spreads beyond Houston. <https://www.texastribune.org/2017/10/02/how-harris-countys-bail-lawsuit-spreads-beyond-houston/>

⁷ Hardy, Michael. March 9, 2017. In Fight Over Bail’s Fairness, a Sheriff Joins the Critics. New York Times. <https://www.nytimes.com/2017/03/09/us/houston-bail-reform-sheriff-gonzalez.html>

In August 2017, the Supreme Judicial Court of Massachusetts cited similar issues in *Brangan v Commonwealth* and ruled bail costs for poor defendants must be affordable.⁸ Massachusetts's judges can release people with conditions to ensure appearance in lieu of bail by ordering the person to report to probation [or] placing them under electronic monitoring.⁹ The prosecutor, however, may seek to declare the defendant dangerous to keep them incarcerated prior to trial.

Law suits often require jurisdictions to quickly change adopt specific practices and policies to meet court requirements are effective, though blunt, instruments for change. By contrast, state statutory changes provide opportunity to plan more refined and effective reform. This is indeed the lesson from Maryland and other states: reforms are more effective and less costly through the legislative and administrative processes rather than immediate and costly mandates from court rulings.¹⁰ In fact, data from Maryland suggests that remaking the bail system in haste, without careful planning, can actually drive up incarceration rates.¹¹

2) Major State Legislative Reform Efforts

a) Statewide Pretrial Services Reform

Kentucky Pretrial Services was created in 1976 as part of the Bail Bond Reform Act that abolished commercial bail bonding for profit within the state. The Kentucky Pretrial Services program has served as a model for other states and has received national recognition for its ongoing success.¹² A Pretrial Officer conducts a confidential interview, checks the defendant's arrest history and conducts a risk assessment, and presents recommendations to the judge who makes the actual release decision.¹³

Since 1976, other states or local jurisdictions adopted pretrial risk approaches using a pretrial risk instrument with the largest shift occurring over the past decade following increased research on factors predictive of pretrial failure as well as the collateral consequences of pretrial detention. The most notable recent changes at the state level occurred in New Mexico, Alaska, and New Jersey.

New Mexico's voters recently approved a Constitutional amendment to prohibit the detention of defendants who are not deemed dangerous or a flight risk, solely because they are unable to pay money bail. The Supreme Court of New Mexico adopted new rules governing bail decisions, effective July 1, 2017, which includes Rule 401 stating: *judges should consider, although not be controlled in their release and detention decisions by, the results of a Supreme Court-approved risk-assessment-instrument. Although no instrument has yet been fully tested and approved for statewide use, a pilot project using the Arnold PSA [Public Safety Assessment Tool]¹⁴ has been authorized in Bernalillo County.*¹⁵ Bail bondsmen are currently suing the members of the Court.

Alaska passed Senate Bill 91, enacted in July 2016, which created a pretrial services program under corrections and requires an approval of a validated risk assessment to be used by the program. Pretrial services will conduct

⁸ Oakes, Bob. August 29, 2017. Cash Bail Must Be Affordable, Mass. High Court Rules. <http://www.wbur.org/news/2017/08/29/sjc-bail-affordability-ruling>

⁹ *Ibid.*

¹⁰ Fanno Burdeen, Cherise and Marc Schindler. November 4, 2016. Reform Maryland's cash-bail practices. Washington Post.

https://www.washingtonpost.com/opinions/reform-marylands-cash-bail-practices/2016/11/04/e7660f0a-a05b-11e6-a44d-cc2898cfab06_story.html?utm_term=.bfc67f62bc22

¹¹ Olson, Walter. September 22, 2017. Maryland's Bail Reform Is a Warning for Would-Be Moralizers. Wall Street Journal. <https://www.wsj.com/articles/marylands-bail-reform-is-a-warning-for-would-be-moralizers-1506119393?mod=e2two>

¹² Kentucky Court of Justice – Pretrial Services. Pretrial Services. <https://courts.ky.gov/courtprograms/pretrialservices>

¹³ *Ibid.*

¹⁴ The tool predicts risk on three axes (risk of failure to appear, risk of new criminal activity, and risk of new violent criminal activity) without the need for a client interview, by drawing on static data sources. More information about this instrument is available online at: <http://www.arnoldfoundation.org/initiative/criminal-justice/crime-prevention/public-safety-assessment/>

¹⁵ Administrative Office of the Courts of New Mexico. September 28, 2017. Key Facts and Law Regarding Pretrial Release and Detention. https://nmcourts.gov/uploads/files/REVISED-Pretrial%20Release%20and%20Detention%20Key%20Facts%209_28.pdf

the assessment in order to prepare a pretrial release report, including risk score and recommendations, as part of its recommendation to the judges at first appearance.¹⁶

New Jersey passed a bail reform law (P.L. 2014, c. 31) and passed a constitutional amendment replacing their resource-based bail system with a "risk-based" approach, requiring courts to assess the likelihood that a defendant will flee, commit new criminal activity, or obstruct justice by intimidating victims and other witnesses. New Jersey is using aforementioned PSA tool. There is a pending effort to reverse these rules despite early successes with the program.

b) Preventive Detention

Some of the states implementing pretrial reform also narrowed bail eligibility in an attempt to uphold public safety. There is a very limited subset of the pretrial population for whom no condition or combination of conditions will reasonably assure the safety of any other person or the public; therefore, there are some circumstances in which detention without bail is both appropriate and necessary.¹⁷ Effective pretrial justice system provides limited authority for preventive detention accompanied by proper procedural safeguards.¹⁸ New Mexico and New Jersey, after amending their constitutions, eliminated complete access to bail to allow for preventive detention.¹⁹ What is additionally notable about these states is that the preventive detention authorization came at the same time as pretrial reform. The reforms in both states require a risk assessment; therefore, the criminal justice system has additional information on likelihood to appear and/or reoffend during the pre-adjudication period.

In 2014, New Jersey voters approved an amendment to the state constitution that authorized the use of preventive pretrial detention, which started in January 2017. Between January and June, 12% of arrested individuals were detained without the opportunity for release, and courts approved 55% of detention orders requested by prosecutors.²⁰

In November 2016, New Mexico voters approved Constitutional Amendment 1 granting judges the authority to deny bail to defendants whom prosecutors determine to be too dangerous to remain in the community before trial. It also prohibits the detention of defendants who aren't deemed dangerous or a flight risk "solely because of financial inability" to pay bail.²¹ New rules started in July 2017, and by September, the District Attorney's Office in the New Mexico's largest county (Bernalillo – Albuquerque) noted the 2nd Judicial District Court was granting about a third of preventive motions filed by the prosecutor's office.²²

3) Frontend System Reform: Prebooking Diversion, Early State Defense Representation, and Administrative Reforms

Other areas of pretrial reform come from making changes to the criminal justice process through increased alternatives to incarceration such creating pre-booking diversion options. There are also approaches that include early appointment of counsel, so indigent defendants will be represented by an attorney when bail is set. Finally, judicial rules have been updated to expand the right to pretrial release.

¹⁶ UAA Justice Center. (2016). "Senate Bill 91: Summary of Policy Reforms." Alaska Justice Forum 33(1): 2 (Spring 2016). https://www.uaa.alaska.edu/academics/college-of-health/departments/justice-center/alaska-justice-forum/33/1spring2016/b_sb91_summary.cshhtml

¹⁷ U.S. v. Salerno, 481 U.S. 739, (1987).

¹⁸ National Institute of Corrections. 2017. A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency. <https://nicic.gov/library/032831>

¹⁹ Ibid.

²⁰ Pretrial Justice Institute. Detention with Due Process. <http://www.pretrial.org/solutions/detention-with-due-process/>

²¹ Wing, Nick. November 8, 2016. New Mexico Voters to Reform Bail System that Jails People Just Because They're Poor. Huffington Post.

http://www.huffingtonpost.com/entry/new-mexico-amendment-1_us_5817a3cfe4b0990edc32ed05

²² Howerton, Matt. Sept 13, 2017. DA's Office: judges granting only 1/3 of preventative detention motions. KOAT News. <http://www.koat.com/article/das-office-judges-granting-only-13-of-preventative-detention-motions/12240132>

a) Prebooking Diversion

In 2016, about 30 states enacted laws related to diversion policies and 22 states appropriated money or authorized new funding sources to help expand and create diversion alternatives. An additional five states—Connecticut, Delaware, Illinois, Oklahoma, and West Virginia—also expanded access to diversion by authorizing new programs or expanding eligibility.²³ Prebooking diversion options have been implemented in many jurisdictions and are normally focused on specific populations, i.e. CIT (crisis intervention team) for those in mental health crisis will lead to community mental health treatment in lieu of jail bookings in Dallas and Bexar counties; LEAD (Law Enforcement Assisted Diversion) for low level drug possession offenses will lead to community treatment options instead of county jail in Seattle; and Harris and Travis counties (Texas) both run Sobering Centers for those arrested on low level alcohol related offenses (not DUI) to effectively sleep it off and leave with resources on alcohol treatment. The prebooking diversion option is made at the discretion of the law enforcement officer though likely within guidelines discussed between major players in the county criminal justice system, e.g. District Attorney, Sheriff, Police Chief(s), Defense Bar, etc.

b) Representation at First Appearance

Harris County, as part of compliance with *O'Donnell*, now has representation at magistration – the first hearing a defendant attends and when the magistrate sets a bond amount. The Harris County Public Defender Office has access to risk information, criminal history, failure to appear history, and finance information, which they can use to argue for lower bail, personal recognizance bond, or less onerous conditions. Early representation gives defendants the opportunity to present evidence to the magistrate to demonstrate that the defendant is not a threat to public safety and should be released pending trial, or that the defendant has ties to the community such that he will most assuredly appear at all court proceedings, or that the defendant does not have any resources with which to pay bail money.²⁴

Jurisdictions like Florida, Maryland, Colorado, Kentucky, and the federal courts all require defendants to be appointed a lawyer in time to advocate for bail.²⁵ Early representation has had measureable impacts in other jurisdictions. A National Institute of Justice study in the 1980s found defendants with representation were released faster with less onerous conditions during a controlled, random assignment study on early representation.²⁶ Baltimore saw similarly positive outcomes in a random assignment study during a period where about 4,000 non-violent detainees were represented at bail review. Judges granted personal recognizance release to represented defendants at 2.5 the rate of the unrepresented and reduced bond at four times the rate of the unrepresented, which translated to \$4.5 million in savings for a 6,000 jail bed-day reduction.²⁷ Though these studies are not during the period of investigation, they do support the benefit of early representation and note without counsel present to advocate on behalf of the detainee, judicial officers make less informed decisions and set or maintain a pretrial release financial condition beyond an individual's ability to pay, because they do not have access to these details.²⁸

²³ National Conference of State Legislatures. January 2017. Trends in Pretrial Release:

State Legislation Update. http://www.ncsl.org/portals/1/html_largeReports/trends_pretrial_release17.htm

²⁴ 6th Amendment Center and Pretrial Justice Institute. 2014. Early Appointment of Counsel: The Law, Implementation, and Benefits.

http://sixthamendment.org/6ac/6ACPJI_earlyappointmentofcounsel_032014.pdf

²⁵ Bunin, Alexander. Spring 2016. Constitutional Right to Counsel at Bail Hearings. *ABA: Criminal Justice Magazine*. Vol 31, No 1.

https://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/v31/cjspring2016_BUNIN.authcheckdam.pdf

²⁶ Fazio, Ernest J. United States Department of Justice. 1985. "Early Representation by Defense Counsel Field Test: Final Evaluation Report.

²⁷ Constitution Project, National Right to Counsel Committee. March 2015. Don't I Need a Lawyer: Pretrial Justice and the Right to Counsel at First Judicial Bail Hearing.

<https://constitutionproject.org/documents/dont-i-need-a-lawyer-pretrial-justice-and-the-right-to-counsel-at-first-judicial-bail-hearing/>

²⁸ Colbert, Douglas L., Ray Paternoster & Shawn Bushway. 2002. Do Attorneys Really Matter? The Empirical and Legal Case for Representation at Bail, 23 *Cardozo L. Rev.* 1719, 1720 (2002) https://www.researchgate.net/publication/30468195_Do_Attorneys_Really_Matter_The_Empirical_and_Legal_Case_for_the_Right_of_Counsel_at_Bail

c) Judicial Rules Changes

Mississippi did not implement a risk tool, but did create judicial rules that took effect July 1, 2017 to help prevent poor people from being detained in jail without a lawyer or bail.²⁹ The rules incorporated three major elements on setting and granting bail. First, Mississippi created an unsecured appearance bond, which is simply a promissory note than if the defendant does not appear, he will owe a certain sum of money but it is not secured by anyone else or any property. Second, Mississippi developed bond guidelines, which note seven items the judge must keep in mind when setting bail. Finally, the rules indicate secured appearance bonds should be the exception, not the rule.³⁰ During the bail hearing, the judge must also determine if the defendant is indigent and requires appointed counsel and then appoint counsel at the first appearance.

4) Additional Resources

The items reviewed above are all trends from the past two years. Some trends not covered include activities driven from outside both the traditional criminal justice and state policy systems. The MacArthur Foundation began its Public Safety Challenge is an initial five-year, \$100 million investment by the John D. and Catherine T. MacArthur Foundation, in jurisdictions selected through a competitive process receive financial and technical support in their efforts to rethink justice systems and implement data-driven strategies to safely reduce jail populations with one area of focus on keeping people who do not need to be in the jail out.³¹ Many of the projects focus on pretrial detention, including New Haven, Connecticut – another unified jail system, and the rethinking jails mission statement calls attention to the problem on the frontpage of its website: The majority of people in jail are presumed innocent. Most are there for nonviolent offenses. Many are simply too poor to post bail.³²

Justice and Mental Health Collaboration Program (JMHP) created the Stepping Up Initiative, which is led by the Council of State Governments (CSG) Justice Center, the National Association of Counties (NaCo), and the American Psychiatric Foundation (APF) with support from the Bureau of Justice Assistance (BJA). The Stepping Up Initiative assists communities in planning the reduction of the prevalence of people with mental illnesses their jails.³³ Quantifying the use of jail beds by persons with mental health and substance abuse disorders has previously been a barrier to entry in the conversation, which is why Stepping Up released a toolkit to help communities measure prevalence, length of stay, and recidivism for these populations. Once a jurisdiction understands the scope, it can address the issue with policies acceptable to the community.

Although Congress is not an extra-governmental actor, legislation surrounding local bail practices is uncommon. In July 2017, Senators Harris (D-CA) and Paul (R-KY) introduced the Pretrial Integrity and Safety Act, which encourages states to replace or reform current bail practices. Instead of the federal government mandating a one-size-fits-all approach, this bill provides Department of Justice grants directly to the states so each can devise and carry out the most effective policies, tailored for its unique needs.³⁴ Just as importantly, the Act requires states receiving funding for these changes must collect, report, and provide data on progress.³⁵ Therefore, any

²⁹ Amy, Jeff. July 4, 2017. New Mississippi Court Rules Address Bail, Lawyers. US News. <https://www.usnews.com/news/best-states/mississippi/articles/2017-07-04/new-mississippi-criminal-court-rules-address-bail-lawyers>

³⁰ Mississippi Rules of Criminal Procedure <https://courts.ms.gov/rules/msrulesofcourt/2017-Final%20Version%20of%20Rules%20-%20Clean%20Copy%20121316.pdf> and The Mississippi Judicial College presents the new Mississippi Rules of Criminal Procedure. http://cymcdn.com/sites/www.msball.org/resource/resmgr/MISSISSIPPI_RULES_OF_CRIMINA.pdf

³¹ About the Challenge. Safety + Justice Challenge. <http://www.safetvandjusticechallenge.org/about-the-challenge/>

³² Rethinking Jails. Safety + Justice Challenge. <http://www.safetvandjusticechallenge.org/>

³³ Stepping Up Initiative. <https://stepuptogether.org/> and 'Stepping Up' to Reduce the Number of People with Mental Illnesses in U.S. Jails. May 5, 2015. <https://stepuptogether.org/wp-content/uploads/2015/04/Stepping-Up-Press-Release-5-5-2015.pdf>

³⁴ Harris, Kamala D. and Rand Paul. July 20, 2017. "Kamala Harris and Ran Paul: To Shrink Jails, Let's Reform Bail." New York Times.

https://www.nytimes.com/2017/07/20/opinion/kamala-harris-and-rand-paul-lets-reform-bail.html?_r=0

³⁵ Ibid.

program showing promising results can be repurposed for other jurisdictions and those with minimal success need not be unnecessarily duplicated.

Other areas for further research include the Pretrial Justice Institute (PJI),³⁶ which has been working to support fair and effective pretrial justice practices since 1976; National Center for State Courts Pretrial Justice Center for Courts (PJCC),³⁷ which provides information and tools, offers education and technical assistance, facilitates cross-state learning and collaboration, and promotes the use of legal and evidence-based pretrial practices for courts across the country; and, and the DOJ's National Institute of Corrections (NIC), which has a pretrial services resources geared toward the judiciary and the pretrial practitioner.³⁸

5) *Conclusion*

Most states have changed their approach to pretrial release in the past two years. The most common changes come from litigation resulting in affordable bail, implementation of pretrial risk assessments, and front end changes including preventive detention, increased prebooking diversion options, representation at first appearance, and rule changes for the judiciary.

Vermont, which already uses a validated risk assessment, should take the opportunity to assess what front end changes would be possible. For example, increasing prebooking diversion programs either with new populations or eligibility requirements for current programs; create a representation at first appearance pilot in larger places with a Public Defender Office in the jurisdiction; and/or brainstorm on judiciary rule changes, such as eliminating cash bail for non-listed crimes or have presumptive release without cash bail for non-listed crimes (with pretrial conditions, if necessary) that places the onus on the State's Attorneys to contest personal recognizance release instead of the current practice in which the defense argues for it after the fact. The latter ideas would likely have more robust outcomes if the option was coupled with representation at first appearance.

³⁶ <http://www.pretrial.org/>

³⁷ <http://www.ncsc.org/Microsites/PJCC/Home.aspx>

³⁸ <https://nicic.gov/pretrial>