

Bail Reform: A Practical Guide Based on Research and Experience

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I. Introduction

In 1963 Attorney General Robert F. Kennedy called for a national conference on bail and delivered a comprehensive report on *Poverty and the Administration of Criminal Justice*. This report reached three conclusions: (1) the conditions of pretrial release for criminal defendants should be carefully tailored to each individual situation; (2) there should be a preference for nonfinancial conditions of release; and (3) a large role for commercial bail bondsmen endangered the fair administration of the criminal justice system.¹ This report led to Senate hearings in 1964 and 1965, which resulted in the passage of the Federal Bail Reform Act of 1966.² The new federal system relied extensively on a pretrial release agency investigation and supervision and guaranteed legal representation to indigent defendants.

In the several years following the federal reform of the pretrial and bail system, many states made sweeping reforms of their own system. However, still today, reform efforts continue in many states. And on any given day, jails in the United States hold more than 450,000 pretrial detainees. More than 40 states have assembled task forces or commissions considering changes to bail and pretrial detention, and bail reform efforts have gathered serious momentum in the last few years as many jurisdictions have moved to significantly reform their bail practices. Bail reform efforts have received tremendous funding support from public and private entities.

The National Task Force on Fines, Fees, and Bail Practices developed a set of general principles to guide state policy makers undertaking reform efforts, and several address bail reform.³ Those principles were approved by the Conference of Chief Justices and Conference of State Court Administrators in 2018.

The purpose of this *Guide* is to provide state court leaders with detailed information on state bail reform efforts. This *Guide* presents case studies of six states' recent experiences with bail and pretrial reform efforts: Arizona, California, Connecticut, Maryland, New Jersey, and Texas. These six states were selected to present a geographic and politically diverse sample, as well as a variety of approaches to reform. Key members involved in the reform efforts in each state were interviewed, including chief justices, appellate court justices, trial court judges, state court administrators, administrative offices of the courts staff, state legislators, state attorneys general, and executive-branch criminal-justice experts, among others.

¹ REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE (1963).

² P.L. 89-465, amending 18 U.S.C. section 3145, et seq.

³ Principles on Fines Fees, and Bail Practices. National Task Force on Fines, Fees, and Bail Practices (2018). <https://www.ncsc.org/~media/Files/PDF/Topics/Fines%20and%20Fees/Principles-Fines-Fees.ashx>

II. Background

A. Three Generations of Bail Reform in the United States

By most accounts, we are well into the third generation of bail reform efforts in the United States, and they are characterized as follows:

The First Generation: 1920s–1960s. The first generation began in the 1920s, with significant research by Roscoe Pound and Felix Frankfurter (*Criminal Justice in Cleveland*), Arthur Beeley (*The Bail System in Chicago*), and Caleb Foote (*Compelling Appearance in Court: Administration of Bail in Philadelphia*). This period of research culminated with the work conducted by the Vera Institute and New York University Law School’s Manhattan Bail Project in 1961.⁴ Following this was the U.S. Supreme Court ruling in *Stack v. Boyle* that bail determinations must be individualized.⁵ The federal Bail Reform Act of 1966 was passed, focusing bail on appearance in court and alternatives to the traditional money bail system by encouraging pretrial release on least restrictive, nonfinancial conditions, as well as presumptions favoring release on recognizance. Also during the first generation of bail reform, the first National Pretrial Symposium was held. And, in 1968, the American Bar Association released its *Criminal Justice Standards on Pretrial Release*, making legal and evidence-based recommendations for release and detention decisions.

The Second Generation: Late 1960s–1980s. The second generation of bail reform introduced the permissibility of public safety considerations as a “constitutionally valid purpose to limit pretrial freedom.”⁶ Up until 1970, court appearance was the only constitutionally valid purpose for limiting pretrial freedom.⁷ Then Congress passed the District of Columbia Court Reform and Criminal Procedure Act of 1970, which allowed public safety to be considered equally to court appearance in release determinations. Many states followed with similar legislation. Then in 1987 in *United States v. Salerno*, the U.S. Supreme Court upheld the legitimacy of considering dangerousness in pretrial release decisions.⁸ Most states and the District of Columbia use both public safety and failure to appear as criteria for determining pretrial release decisions.⁹ These criteria are also included in the professional standards of the American Bar Association, the National District Attorneys Association, and the National Association of Pretrial Services Agencies, which added dangerousness as a factor to consider when addressing release determinations. Almost every state adopted similar language to the Bail Reform Act of 1984 to include both flight and danger.¹⁰ During this generation, pretrial services agencies began to gain traction, and research was collected on legal and evidence-based practices.

⁴ See generally, TIMOTHY SCHNACKE, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR PRETRIAL REFORMS (National Institute of Corrections 2014).

⁵ *Stack v. Boyle*, 342 U.S. 1 (1951)

⁶ SCHANKE, *supra* note 3 at 37.

⁷ Congress first allowed public safety to be considered equally to court appearance in the District of Columbia Court Reform and Criminal Procedure Act of 1970, and many states followed.

⁸ *U.S. v. Salerno*, 481 U.S. 739 (1987)

⁹ Legal Framework, Pretrial Justice Center for Courts. National Center for State Courts, available at <http://www.ncsc.org/Microsites/PJCC/Home/Topics/Legal-Framework.aspx>.

¹⁰ *Id.*

The Third Generation: 1990-Present. This generation has been described as devoted to “fixing the holes left by states not fully implementing improvements from the first two generations of bail reform [and] using legal and evidence-based practices to create a more risk-based system of release and detention.”¹¹ There has been significant research during this period, sponsored by agencies and organizations including the U.S. Department of Justice, the Pretrial Justice Institute, the Administrative Office of the U.S. Courts, the District of Columbia Pretrial Services Agency, numerous universities, and a significant number of other public, private, and philanthropic organizations. Additionally, numerous national organizations have issued policy statements in support of bail reform efforts. Some of this research has focused on the use of empirical risk assessment instruments. It has been during this current generation of reform that the National Symposium on Pretrial Justice was as held in 2011, sponsored by the Department of Justice and the Pretrial Justice Institute.

¹¹ SCHANKE, *supra*, note 4 at 38.

III. Case Studies

Arizona

Bail Reform Timeline

2009-2014	Chief Justice Berch’s strategic agenda for the Arizona Supreme Court includes pretrial reforms
2012-2013	COSCA released its Policy Paper on Evidence-Based Pretrial Release
2014-2019	Chief Justice Bales’s strategic agenda for the Arizona Supreme Court includes improving and expanding “the use of evidence-based practices to determine pre-trial release conditions for low-risk offenders”
Jan. 2014	Arizona Supreme Court modified its Code of Judicial Administration to include a new section on evidence-based pretrial services
Feb 2014	The Laura and John Arnold Foundation announced that four counties and one city in Arizona would be among the latest jurisdictions to pilot the Public Safety Assessment (PSA) pretrial risk assessment tool
June 2015	By Supreme Court Administrative Order, the PSA was approved as a validated pretrial risk assessment tool for all Arizona courts, including courts hearing misdemeanor and traffic cases
Mar. 2016	By Supreme Court Administrative Order, the Task Force on Fair Justice for All (TF-FAIR) was established to study court-ordered fines, penalties, fees, and pretrial release policies
Aug. 2016	TF-FAIR releases its Report and Recommendations of the Task Force on Fair Justice for All: Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies
Aug. 2016	The Supreme Court amends the Rules of Court to establish procedures needed to implement the legislation. The rules go into effect on January 1, 2017
Fall 2016	Members of the task force meet with approximately 40 organizations to present the recommendations and garner support
Jan. 2017	Legislative Summit held by TF-FAIR to educate and garner support from legislators
June 2017	Judicial Conference plenary focuses on TF-FAIR’s recommendations with live broadcast for court staff

The Origins of Bail Reform in Arizona

Arizona courts have a history of innovation. Local courts began experimenting with pretrial release initiatives around the same time COSCA released its 2012-2013 Policy Paper on Evidence-Based Pretrial Release. This Policy Paper had a huge impact in Arizona. Outgoing Chief Justice Berch (2009-2014) and current Chief Justice Bales (2014-present) were both very interested in pursuing pretrial reforms. In the strategic process of transitioning chief justices, Chief Justice Berch adopted pretrial reform as her five-year plan, and Chief Justice Bales included improving and expanding “the use of evidence-based practices to determine pre-trial release conditions for low-risk offenders” as part of the Arizona Supreme Court’s 2014-2019 strategic agenda. Having that kind of support from both the outgoing and incoming chiefs was essential in carrying the momentum of change through the transition of chief justices. Arizona’s annual statewide court leadership conference in 2013 focused on Evidence-Based Pretrial Release and included a panel that presented on bail reform. At that time, about half of Arizona’s 15 counties provided some form of pretrial services.

In January 2014, the Arizona Supreme Court modified its Code of Judicial Administration to include a new section on evidence-based pretrial services. The new section provided requirements for establishing and operating pretrial services for all courts statewide.

Arnold Foundation Pilot Program Risk Assessment Tool

In February 2014, the Laura and John Arnold Foundation announced that four counties and one city in Arizona would be among the latest jurisdictions to pilot the Public Safety Assessment (PSA) pretrial risk assessment tool. This was a critical component of advancing pretrial services in Arizona because the PSA did not require an interview with each defendant, making risk assessment easier to adopt for courts (particularly limited-jurisdiction courts) with few staff resources. The PSA was piloted in Arizona’s felony courts (superior courts). But court leaders were not interested in limiting their pretrial reform to felony cases. Court leaders in Arizona wanted to make sure their reforms included misdemeanor cases as well. This makes Arizona’s experience unique.

Based on the success of the five pilot sites, in June of 2015, by Supreme Court Administrative Order, the PSA was approved as a validated pretrial risk assessment tool for all Arizona courts, including courts hearing misdemeanor cases. To implement the PSA, the Administrative Office of Courts (AOC) staff worked closely with the Arnold Foundation and representatives from each county to provide stakeholder training and education and to help monitor implementation. The AOC convened a statewide training event with faculty from Kentucky’s pretrial services program for pretrial staff in all 15 Arizona counties. The meeting discussed evidence-based supervision practices and the differences between pretrial supervision and post-conviction probation supervision.

Task Force Creation (March 2016)

As national attention was drawn to the issues surrounding legal financial obligations, court leaders began to discuss the formation of a task force that would address all of the issues surrounding fines, fees, and bail reform. In March of 2016, by Supreme Court Administrative Order, the Task Force on Fair Justice for All (TF-FAIR) was established to study court-ordered fines, penalties, fees, and pretrial release policies. TF-FAIR had 20-25 members involved and was asked to study and make recommendations as follows:

- Recommend statutory changes, if needed, court rules, written policies, and processes and procedures for setting, collecting, and reducing or waiving court-imposed payments.
- Develop suggested best practices for allowing citizens unable to pay the full amount of a sanction at the time of sentencing options for reasonable time payment plans or by the performance of community service.
- Recommend best practices for making release decisions that protect the public, but do not keep people in jail solely for the inability to pay bail.
- Review the practice of suspending driver's licenses and consider alternatives to license suspension.
- Recommend educational programs for judicial officers, including pro tem judges and court staff who are part of the pretrial decision-making process.
- Identify technological solutions and other best practices that provide defendant notifications of court dates and other court-ordered deadlines using mobile applications to reduce the number of defendants who fail to appear for court and to encourage citizens who receive a citation to come to court.

The TF-FAIR was instructed to file its final report with the Arizona Judicial Council by October 31, 2016. For such a holistic view of reform, this was a very tight timeline for the task force. But the six-month timeline was a calculated decision to maintain the momentum for reform. Incredibly, the task force released its final report two months early.

TF-FAIR was chaired by Dave Byers, administrative director of the courts. The members were carefully chosen to balance geographic groups, ethnic groups, and various jobs in the justice system. One regret was not including a highly visible victim's representative in the membership. The members were a committed group and credited Mr. Byers and his staff with the success of meeting the report deadline. AOC staff provided immediate follow-up minutes and drafts after meetings. The quality and timeliness of their work motivated members to contribute to the overall success of TF-FAIR.

To provide resources to the members and the public at-large, Mr. Byers created a resource webpage that included links to reports, articles and press releases, lawsuits, authorities, and guides and other materials. These resources were critical in educating task force members, maintaining the national and statewide momentum for reform, and providing transparency to the public at-large.

Task Force Meetings and Data

TF-FAIR met four times before issuing their final report. At the kick-off meeting in April, Chief Justice Bales gave opening remarks. Mr. Byers scheduled Tim Schnacke to make the first presentation about the history of bail reform. Mr. Schnacke, a criminal justice system analyst and one of the nation's leading experts in the pretrial justice field, discussed case law; the purpose of the bail process, to maximize court appearance and public safety; and the use of validated risk assessment tools. The AOC followed him by presenting Arizona data tracking of every case in the limited-jurisdiction courts in 2014 (one million cases). This presentation educated the members on important state-specific data regarding demographics, disposition and sentencing, defaults, failures to appear and license suspensions, assessments, time payment fees, and the impact of the Fines, Fees and Restitution Enforcement (FARE) program and subsequent violations.¹² The task force went on to hear presentations about preexisting local efforts at reform, such as the City of Phoenix's Compliance Assistance Program and Pima County's notification system. The task force then separated into limited-jurisdiction (misdemeanor and traffic cases) and general-jurisdiction (felony cases) workgroups to discuss and develop recommendations to be brought back to the entire membership for consideration. Breaking out into limited-jurisdiction and general-jurisdiction workgroups was done at the first two meetings to facilitate and encourage discussion.

TF-FAIR allowed the membership to receive opinions and feedback from other community groups that were not included in the task force membership. This was an important calculated method to protect the membership from becoming too large and to allow for diverse groups to feel included in the process. The following community groups presented to the membership: Puente Human Rights Movement, Justice that Works, Center for Neighborhood Leadership, Guadalupe Municipal Court, Mesa Municipal Court, and the Maricopa County Probation Office. The bail industry was also asked to present testimony. The bail industry was intentionally not included in the membership of the TF-FAIR. Lucky for Arizona, their bail industry was in disarray at the time and did not present an organized attack, though they did testify before the membership.

At the third and fourth task force meetings, the membership voted on the proposed recommendations. The county attorney representative was often the sole no vote. Again, the success of the task force was often credited to Mr. Byers and the way he ran the meetings. He created subcommittees to hash out difficult recommendations, and the looming deadline was a powerful incentive.

¹² The Fines/Fees and Restitution Enforcement (FARE) Program was developed in 2003 by the Administrative Office of the Courts as a non-jail-based court-order-enforcement program, which uses a variety of techniques to locate offenders, send reminder notices, encourage people to establish time payment plans, place "holds" on license plate renewals, and intercept state income tax refunds and lottery winnings. As a final resort, FARE uses private collection companies to enforce court orders.

The Final Report (August 2016)

The 65 recommendations that came out of TF-FAIR had rule changes and legislative changes. All the rule changes were implemented or are in the process of being implemented. The abbreviated recommendations are as follows:

1. Authorize judges to mitigate mandatory minimum fines, fees, surcharges, and penalties if the amount otherwise imposes an unfair economic hardship.
2. Use automated tools to determine a defendant's ability to pay.
3. Create a Simplified Payment Ability Form when evaluating a defendant's ability to pay.
4. Use means-tested assistance program qualification as evidence of a defendant's limited ability to pay.
5. Seek legislation to reclassify certain criminal charges to civil violations for first-time offenses.
6. Implement the Phoenix Municipal Court's Compliance Assistance Program statewide.
7. Conduct a pilot program that combines the Phoenix Municipal Court's Compliance Assistance Program with a fine reduction program and reinstatement of defendants' driver's licenses.
8. Test techniques to make it easier for defendants to make time payments on court-imposed financial sanctions.
9. Seek legislation that would grant courts discretion to close cases and write off fines and fees for traffic and misdemeanor violations after a 20-year period if reasonable collection efforts have not been effective.
10. Allow probationers to receive earned time credit without consideration of financial assessments, other than restitution to victims.
11. Eliminate or reduce the imposition of the 10 percent annual interest rate on any Criminal Restitution Order.
12. Modify court website information, bond cards, reminder letters, FARE (Fines/Fees and Restitution Enforcement) letters, and instructions for online citation payment to explain that if the defendant intends to plead guilty or responsible but cannot afford to pay the full amount of the court sanctions at the time of the hearing, the defendant may request a time payment plan.
13. Authorize judges to impose a direct sentence that may include community restitution (service) and education and treatment programs as available sentencing options for misdemeanor offenses.
14. Expand community restitution (service) to be applied to surcharges, as well as fines and fees, and expand this option to sentences imposed by superior courts.
15. Implement English and Spanish Interactive Voice Response (IVR), email, or a text-messaging system to remind defendants of court dates, missed payments, and other actions to reduce failures to appear.
16. Modify forms to collect cell phone numbers, secondary phone numbers, and email addresses.
17. Train staff to verify and update contact information for defendants at every opportunity.
18. Provide information to law-enforcement agencies regarding the importance of gathering current contact information on the citation form.
19. After a defendant fails to appear, notify the defendant that a warrant will be issued unless the defendant comes to court within five days.

20. For courts operating pretrial service programs, allow pretrial services five days to reengage defendants who have missed scheduled court dates and delay the issuance of a failure-to-appear warrant for those defendants who appear on the rescheduled dates.
21. Authorize the court to quash a warrant for failure to appear and reschedule a new court date for a defendant who voluntarily appears in court after a warrant has been issued.
22. Consider increasing access to the court (e.g., offering hours at night, on weekends, or extending regular hours, taking the court to people in remote areas, and allowing remote video and telephonic appearances).
23. Develop and pilot a system that communicates in English and Spanish (such as video avatars) to provide explanations of options available to defendants who receive tickets or citations.
24. Clarify on court informational websites and bond cards that defendants may come to court before the designated court date to resolve a civil traffic case and explain how to reschedule the hearing for those defendants who cannot appear on the scheduled dates.
25. Implement the ability to email proof of compliance with a law—such as proof of insurance—to the court to avoid having to appear in person.
26. Suspend a driver’s license as a last resort, not a first step.
27. Make a first offense of driving on a suspended license a civil violation, rather than a criminal offense.
28. Provide courts with the ability to collect and use updated contact information, such as a database service, before issuing a warrant or a reminder in aging cases.
29. Authorize courts to impose restrictions on driving—such as “to and from work only”—as an alternative to suspending a driver’s license altogether.
30. Before or in lieu of issuing a warrant to bring a person to court for failure to pay, courts should employ proactive practices that promote voluntary compliance and appearance.
31. Support renewing efforts to encourage the Conference of Chief Justices and the Conference of State Court Administrators to approach Congress about extending the federal tax intercept program to include intercepting federal tax refunds to pay victim restitution awards, with an exception for those who are eligible for the earned income tax credit.
32. Promote the use of restitution courts, status conferences, and probation review hearings that ensure due process and consider the wishes of the victim. Provide judicial training on the appropriate use of orders to show cause in lieu of warrants and appointment of counsel at hearings involving a defendant’s loss of liberty.
33. Coordinate where possible with the local regional behavioral health authority to assist the court or pretrial services in identifying defendants who have previously been diagnosed as mentally ill.
34. Revise mental health competency statutes for expediting mental competency proceedings for misdemeanor cases.
35. Bring together criminal justice and mental health stakeholders in larger jurisdictions to adopt protocols for addressing people with mental health issues who have been brought to court.
36. Consider the use of specialty courts and other available resources to address a defendant’s treatment and service needs, as well as risk to the community, when processing cases involving persons with mental health needs or other specialized groups.
37. Modify Form 6–Release Order and Form 7–Appearance Bond to simplify language and

- clarify defendants' rights in an easy-to-understand format.
38. Eliminate the use of non-traffic criminal bond schedules.
 39. Amend Rule 7.4, Rules of Criminal Procedure, to require the appointment of counsel if a person remains in jail after the initial appearance.
 40. Clarify by rule that small bonds (\$5-100) are not required to ensure that the defendant gets credit for time served when defendant is also being held in another case.
 41. Authorize the court to temporarily release a "hold" from a limited-jurisdiction court and order placement directly into a substance abuse treatment program upon recommendation of the probation department.
 42. Expedite the bond process to facilitate timely release to treatment programs.
 43. Request amendment of A.R.S. § 13-3961(D) and (E) (Offenses not bailable; purpose; pre-conviction; exceptions) to authorize the court, on its own motion, to set a hearing to determine whether a defendant should be held without bail.
 44. Encourage the presence of court-appointed counsel and prosecutors at initial appearance hearings to assist the court in determining appropriate release conditions and to resolve misdemeanor cases.
 45. Request the legislature to refer to the people an amendment to the Arizona Constitution to expand preventive detention to allow courts to detain defendants when the court determines that the release will not reasonably ensure the appearance of the person as required, in addition to when the defendant's release will not reasonably ensure the safety of other persons or the community.
 46. Eliminate the requirement for cash surety to the greatest extent possible and instead impose reasonable conditions based on the individual's risk.
 47. Eliminate the use of a cash bond to secure a defendant's appearance.
 48. Expand the use of the public safety risk assessment to limited-jurisdiction courts.
 49. Encourage collaboration between limited-jurisdiction courts and pretrial service agencies in superior courts in preparing or providing pretrial risk assessments for limited-jurisdiction cases.
 50. Establish information sharing between a superior court that has conducted a pretrial risk assessment and a limited-jurisdiction court when the defendant is arrested for charges in multiple courts and a release decision must be made in multiple jurisdictions.
 51. Request the Arnold Foundation to conduct research on the impact of immigration status on the likelihood of not returning to court if released to ascertain whether it is good public policy to hold these defendants on cash bond.
 52. Encourage the Arnold Foundation to conduct periodic reviews to revalidate the Public Safety Assessment (PSA) tool as to its effect on minority populations.
 53. Provide data to judicial officers to show the effectiveness of the risk assessment tool in actual operation.
 54. Develop an educational plan and conduct mandatory training for all judicial officers.
 55. Create multilayered training (court personnel and judicial staff) to include a practical operational curriculum.
 56. Develop online training modules for future judicial officers.
 57. Host a one-day kick-off summit inviting all stakeholders (law enforcement, prosecutors, county attorneys, public defenders, city council and county board members, the League of Towns and Cities, criminal justice commissions, legislature, and presiding judges) to educate and inform about recommendations of the task force and provide direction for

leadership to initiate the shift to a risk-based system, rather than a cash-based release system.

58. Train judicial officers on the risk principle and the methodology behind the risk assessment tool.
59. Educate judges about the continuum of sentencing options.
60. Educate judges about available community restitution (service) programs and the types of services each offers so that courts may order services that “fit the crime.”
61. Launch a public education campaign to support the adopted recommendations of the task force.
62. Provide a comprehensive and targeted educational program for all stakeholders (funding authorities, legislators, criminal justice agencies, media, and members of the public) that addresses the shift to a risk-based system, rather than a cash-based release system.
63. Request that the chief justice issue an administrative order directing the education of all full- and part-time judicial officers about alternatives to financial release conditions. Training and educational components should: (a) Inform judges that cash bonds are not favored. Judges should consider the least onerous terms of release of pretrial detainees that will ensure public safety and the defendant’s return to court for hearings. (b) Train limited-jurisdiction court judges to more aggressively allow payment of fines through community service, as permitted by A.R.S. § 13-810.
64. Provide focused judicial education on A.R.S. § 11-584(D) and Arizona Rules of Criminal Procedure 6.7(D) about how to determine the amount and method of payment, specifically taking into account the financial resources and the nature of the burden that the payment will impose on the defendant and making specific findings on the record about the defendant’s ability to pay.
65. Update bench books and other judicial aides to be consistent with court-adopted recommendations.

Legislation

The TF-FAIR included Jerry Landau, Government Affairs Director for the Arizona Supreme Court, in their meetings and process. As the liaison to the Arizona legislature, he presented draft proposed amendments to the task force members based on the statutory changes they recommended. His advice on what would work and not work in the legislature was critical to drafting language that gained widespread bipartisan support. The American Legislative Exchange Council’s (ALEC) Criminal Justice Committee drafted a model Resolution on Criminal Justice Fines and Fees that was influential on Arizona legislators as well.

Members of the task force began meeting with organizations in the fall of 2016 to present the recommendations and garner support. The following organizations were briefed:

- Department of Justice
- National Association of Presiding Judges
- Arizona Criminal Justice Commission
- Arizona Prosecuting Attorneys’ Advisory Council
- Chief of Police Association

- Probation Chief’s Association
- NAACP chapters in Tucson, Maricopa County, and Pinal County
- Maricopa County Bar
- Lorna Lockwood Inn of Court at the University Club
- Arizona Judicial Council
- County Presiding Judges
- Arizona Court Leadership Conference
- Arizona Commission on Access to Justice
- Commission on Minorities in the Judiciary
- Commission on Victims in the Court
- Committee on Limited Jurisdiction Courts
- Committee on Superior Court
- Court Interpreter Advisory Committee
- Adult Management Meeting (AMM)
- Committee on Probation
- Humanist Society of Greater Phoenix
- State Bar of Arizona Military Legal Affairs Committee and Board of Governors
- Governor’s Office of Highway Safety
- Inn of Courts
- Sandra Day O’Connor Law School
- Conference of State Court Administrators
- Arizona Attorneys for Criminal Justice
- Harvard School of Law
- Morrison Institute at ASU, Public Forum
- Coconino County limited-jurisdiction judges meeting
- Training Coordinators Annual Conference
- Pima County Annual Conference
- Arizona Courts Association
- Problem-Solving Court Conference
- American Probation and Parole Association
- Mid-Atlantic States
- Arizona Magistrates Conference

Members of the TF-FAIR invited every member of the Arizona legislature to attend a legislative summit on January 10, 2017. The meeting garnered legislative support and built momentum for the task force’s recommendations. Presentations were made by Tim Schnacke, Tim Murray of Pretrial Justice, and Ronald Lampard with ALEC. TF-FAIR created legislative packets to inform legislators of the various proposed statutory changes.

Unfortunately, the House Judiciary Chairman blocked the proposed legislation from reaching the floor of the House. TF-FAIR members are hopeful all legislation will pass in 2018. The task force learned an important lesson about the ability of one person to block passage of almost unanimously supported legislation.

The Media

The media was generally supportive of the task force's reforms. The Morrison Institute commissioned a poll, and 67 percent of 800 registered voters said a person who is not a risk to the community should not be held in jail if the only reason they are there is that they cannot afford bail.

Education

The TF-FAIR began discussing education and training as early as the second meeting of the task force. Jeff Schrade, education services division director for the AOC, outlined an education and training plan at that second meeting. He suggested establishing an explicit training requirement in the Arizona Code of Judicial Administration allowing the Committee on Judicial Education and Training to set the specific requirement. The training plan included a multibranch stakeholder summit, plenary at the 2017 Judicial Conference with live broadcast for court staff, bench book updates, and ongoing integration into other training sessions. Mr. Schrade developed special training for all judges in the state, including pro tem, part-time, and non-attorney judges who conduct initial appearance hearings. Staff are currently developing training to help court staff understand the new sentencing guidelines. TF-FAIR's commitment to education and training is a critical factor in successfully changing the court culture to align with the successful reforms.

How Arizona Succeeded at TF-FAIR Reforms

TF-FAIR reforms were successful in Arizona because of strong leadership by the chief justices and the AOC. Factors that led to success included:

- Former Chief Justice Berch and current Chief Justice Bales were both committed to pretrial reform. Having that kind of support from both the outgoing and incoming Chiefs was essential in carrying the momentum of change through the transition of chief justices.
- A strong administrative director of the courts, Dave Byers, who understood the importance of using data to drive the decision-making process, who gathered excellent stakeholders, and who expertly and efficiently managed the work of the task force.
- A supreme court that promulgated rules governing the administration, practice, and procedure in all courts in the state.
- It was also critical that the legislative branch was educated and included from the outset, due in part to the inclusion of Jerry Landau, Government Affairs Director for the Arizona Supreme Court, on the TF-FAIR.
- Local innovations that were already underway before the task force was formed: Phoenix Municipal Court's Compliance Assistance Program; Pima County Consolidated Justice Courts and the Glendale and Mesa municipal courts' Interactive Voice Response notification system; Mesa and Glendale municipal courts' mental

competency proceedings pilot program; Maricopa County's Justice Court Video Appearance Center; and Pima County's MacArthur Safety and Justice Challenge.

- Support from organizations on both sides of the aisle such as the American Civil Liberties Union and the American Legislative Exchange Council.
- The decision to not include the bail industry on TF-FAIR. It was clear that the bail industry would oppose any meaningful reform.
- The TF-FAIR's commitment to education and training, including requiring every judge in the state, including pro tem, part-time, and non-attorney judges who handle initial appearances to attend training, remains a critical factor in successfully changing the court culture to align with the successful reforms.
- Possibly the only irreplicable factor was the timing. The TF-FAIR benefited from the national momentum, momentum within the state, and the six-month deadline given to the task force by Chief Justice Bales ensured that the momentum for reform was not wasted.

The Future

While many reforms in Arizona seemingly occurred overnight, the implementation of those reforms down to each judge and clerk is a challenging and time-consuming process. A longtime court administrator, Donald Jacobson, was hired as a fulltime senior special projects consultant to implement all the TF-FAIR recommendations. His task is to train and educate judges and court staff on how to abide by the new rules. But the daily changes necessitated by the reforms are slow to occur. As Mr. Byers noted, the devil is in the details, and details surrounding this massive cultural change are seemingly unending.

Subcommittees were formed that continue to meet. The Mental Health and Criminal Justice Subcommittee was formed to address a reoccurring concern for mental health reform, and the Post-Conviction Action Subcommittee was formed to address issues that were set-aside by the task force. The task force is optimistic that the legislature will pass the proposed statutory changes in the 2018 session.

California

California Bail Reform Timeline

- May 2011 U.S. Supreme Court’s opinion in *Brown v. Plata* is released
- Oct. 2014 Martin Hoshino became the administrative director of the Judicial Council of California
- Mar. 2015 Civil Rights Division, U.S. Department of Justice, *Investigation of the Ferguson Police Department* report released
- May 2015 Lawyers’ Committee for Civil Rights issues a report: *Not Just a Ferguson Problem – How Traffic Courts Drive Inequality in California*
- June 2015 Rule 4.105 of the California Rules of Court becomes effective.
- Oct. 2015 *Buffin et al. v. City and County of San Francisco*, No. 4:15-cv-04959 (N.D. Ca. 2015)(bail practices)
- Jan. 2016 *Welchen et al. v. County of Sacramento et al.*, No. 2:16-cv-00185 (E.D. Ca. 2016)(bail practices)
- June 2016 *Rubicon Programs et al. v. Solano County Superior Court et al.*, No. FCS047212 (Sup. Ct. Co. of San Francisco 2016)(fines and fees)
- Aug. 2016 *Mata Alvarado et al. v. Superior Court of Los Angeles*, No. BC 628849 (Super. Ct. Ca., Cty. Of L.A. 2016)(driver's licenses)
- Oct. 2016 *Hernandez et al. v. California DMV*, No. RG16836460 (Super. Ct. Ca., Alameda Co. 2016)(driver’s licenses)
- Mar. 2016 Chief Justice Cantil-Sakauye’s State of the Judiciary Address to the California legislature
- May 2016 Chief Justice Cantil-Sakauye and Mr. Hoshino attended the Western Regional Committee of CCJ and COSCA
- Oct. 2016 Pretrial Detention Reform Workgroup established
- Jan. 2017 Criminal Law Advisory Committee and the Traffic Advisory Committee make recommendations to the Judicial Council, which were adopted and made effective
- Aug 2017 Chief Justice Cantil-Sakauye, Governor Jerry Brown, Senator Bob Hertzberg and Assembly member Rob Bonta issue a joint statement committing to work together on reforms to the state’s bail system “that prioritize public safety and cost-

efficiency.”

- Oct 2017 Workgroup releases its final report, Pretrial Detention Reform: Recommendations to the chief justice
- Aug 2018 SB 10 (Pretrial release or detention: pretrial services) passes in both houses of the California Legislature – the Assembly and the Senate
- Aug 2018 Governor Jerry Brown signs SB 10 into law, to become effective on October 1, 2019

Background of Criminal Justice and Bail Reform in California

In 2011 the U.S. Supreme Court, in *Brown v. Plata*, upheld a federal court order requiring the state of California to reduce its state prison population because of shortfalls in medical and mental health care for the state's prison population. California then undertook a public safety realignment that shifted many correctional responsibilities for lower-level felons from the state to counties. This, in turn, increased California's jail population and caused overcrowding at the county level. This public safety realignment forced policy makers to rethink all elements of the criminal justice system, including bail. Meanwhile, Chief Justice Cantil-Sakauye had been serving as California's Chief since she was sworn into office on January 3, 2011.

In the fall of 2014, Martin Hoshino became the Administrative Director of the Judicial Council of California. This was also around the same time the U.S. Department of Justice (DOJ) began investigating Ferguson, Missouri for routine violations of constitutional rights by the courts and law enforcement. In March of 2015, the DOJ released its report on the *Investigation of the Ferguson Police Department*, which showed that the town of Ferguson set revenue targets for criminal justice fines and fees to help fund their operating budget. The report found a systematic and purposeful system designed to maximize fines and fees payments disproportionately from African-Americans and poor people.

Not Just a Ferguson Problem

In May of 2015, the Lawyers' Committee for Civil Rights issued its report: *Not Just a Ferguson Problem—How Traffic Courts Drive Inequality in California*. In it, the Lawyers' Committee explained how citations routinely become poverty sentences: the revenue incentives of fine collection lead to increased citation enforcement; add-on fees for minor offenses double or quadruple the original fine; and people who fail to pay because they do not have the money lose their driver's licenses. The Lawyers' Committee found that once an initial deadline is missed, California courts routinely deny people the right to a hearing unless they can afford the total amount owed up-front, and payments in full become the sole means for having a license reinstated. The report explained how the growing trend of driver's license suspensions impacts workers, employers, families, communities of color, and the local economy. Ultimately, the report concluded, legal financial obligations and license suspensions impose a hidden tax on government, public safety, and the economy.

In part as a response to this report, on June 8, 2015, Rule 4.105 of the California Rules of Court became effective. The rule was adopted on an urgency basis (within 19 days) on the request of Chief Justice Cantil-Sakauye to address concerns that courts were requiring defendants to post bail before challenging traffic infractions. When adopting Rule 4.105, the Judicial Council directed the appropriate advisory committees to consider changes to rules, forms, or any other recommendations necessary to promote access to justice in all infraction cases, including recommendations related to postconviction proceedings or after the defendant has previously failed to appear or pay fines or fees.

Lawsuits

Momentum for reform was not limited to the chief justice and the Judicial Council. Momentum for successful litigation was also building in the state of California during this time. At least four or five of the 58 trial courts received letters of concern, threatening potential litigation regarding their traffic-fines-and-fees practices. Three more lawsuits were filed against Solano County Superior Court, the Superior Court of Los Angeles, and the California DMV. In October of 2015 the City and County of San Francisco were sued for their criminal-court bail practices. In January of 2016 the County of Sacramento was also sued for its criminal-court bail practices.

Workgroup Creation

In March of 2016 Chief Justice Cantil-Sakauye delivered the State of the Judiciary Address to the California legislature, stating: “We must examine our bail system. In its current form, is it fair to all? Does it penalize poverty? Does it adequately serve its purpose?”

In May of 2016 the chief justice, Mr. Hoshino, and lead judicial staff attended the Western Regional Committee of CCJ and COSCA, which addressed the legal and empirical research related to effective pretrial justice practices. The conference provided important background to the chief justice as she considered the potential role of California's judiciary in bail reforms.

In October of 2016 the Pretrial Detention Reform Workgroup was established to study current pretrial detention practices and provide recommendations for potential reforms. The chief justice and Mr. Hoshino recognized that judicial decision making is integral to pretrial release and detention. The workgroup was composed of 12 members (11 judges from counties across the state and 1 court executive officer). The members committed to approaching the issues with open minds, and they held each other accountable to that commitment. The members represented a vast array of experience (former public defenders, former prosecutors, former police officer) and diversity in community (from rural and urban, northern, southern, and central California). They were guided by the following principles:

- Pretrial custody should not occur solely because a defendant cannot afford bail.
- Public safety is a fundamental consideration in pretrial detention decisions.
- Defendants should be released from pretrial custody as early as possible based on an assessment of the risk to public safety and the risk for failing to appear in court.
- Mitigating the impacts of implicit bias on pretrial release decision making should be considered.
- Reform recommendations should consider court and justice system partner resources.
- Nonfinancial release alternatives should be available.
- Establish consistent and feasible practices for making pretrial release, detention, and supervision decisions.

Workgroup Meetings and Data

In November of 2016 the workgroup began its work. The group met nine times in person, held eight conferences and webinars, and engaged in numerous email and phone communications. The group initially educated themselves on the current bail system and reviewed materials and resources, including:

- National pretrial resources from COSCA, NCSC, etc.
- California Constitution and cases addressing pretrial release and detention
- Research and evaluation reports
- Risk assessments
- Bail materials and resources
- California pretrial resources
- Victims' rights perspective
- Reports addressing mental health and substance abuse issues
- Other state pretrial resources (from Arizona, Illinois, Kentucky, New Jersey, New Mexico, Ohio, Utah, and the District of Columbia)

The workgroup received in-person presentations from more than 40 speakers, including state and national experts, justice system partners, the commercial bail industry, state and local regulators, victim and civil-rights advocates, California counties that have had experience with pretrial services programs, and jurisdictions outside California that have undertaken pretrial reform efforts. To provide transparency on the workgroup process, every group that presented was given a four-page list of questions from the workgroup.

The workgroup greatly benefited from its co-chairs, Judge Brian J. Back of Ventura and Judge Lisa R. Rodriguez of San Diego. Judge Back has sat on the bench for over 25 years and brought an incredible amount of institutional knowledge with him, whereas Judge Rodriguez, a former prosecutor, was appointed to the bench in 2015 and brought a fresh perspective with her. They both contributed an immense amount of work to the process and worked well together, with mutual respect. Their leadership was instrumental to the success of the workgroup.

Advisory Committees

Meanwhile, the Criminal Law Advisory Committee and the Traffic Advisory Committee, in consultation with the Advisory Committee on Providing Access and Fairness, made a joint recommendation to the Judicial Council that was adopted and made effective January 1, 2017. The proposals were adopted to:

1. Amend rule 4.105 of the California Rules of Court to require that trial court websites include a link to the statewide traffic self-help information posted on the California courts website.
2. Adopt rule 4.106 of the California Rules of Court to establish uniform procedures in

infraction offenses for which the defendant has received a written notice to appear and has failed to appear or failed to pay.

3. Adopt rule 4.107 of the California Rules of Court to require that trial courts send reminder notices to traffic defendants before their initial appearance and specify what information must be provided in those notices.
4. Adopt rule 4.335 of the California Rules of Court to standardize and improve court procedures and notice to infraction defendants related to ability-to-pay determinations.
5. Repeal standard 4.41 of the California Standards of Judicial Administration, which currently provides recommendations regarding courtesy notices.

Courts were required to implement these provisions as soon as reasonably possible but no later than May 1, 2017.

Three-Branch Solution

On August 25, 2017, Chief Justice Cantil-Sakauye joined Governor Jerry Brown, Senator Bob Hertzberg, and Assembly member Rob Bonta in a joint statement committing to work together on reforms to the state's bail system "that prioritize public safety and cost-efficiency." SB 10, the California Money Bail Reform Act of 2017, is authored by Hertzberg and Bonta. SB 10 proposed a revised pretrial release procedure where a pretrial services agency conducts a pretrial risk assessment. The bill also required the Judicial Council to adopt rules of court regarding pretrial risk assessment information and the imposition of pretrial release terms and conditions.

The Final Report (October 2017)

In October 2017, three months earlier than expected, the workgroup submitted its final report, *Pretrial Detention Reform: Recommendations to the Chief Justice*. The workgroup submitted the following recommendations to be considered and implemented as a whole:

1. Implement a robust, risk-based pretrial assessment and supervision system to replace the current monetary bail system.

Implement a risk-based pretrial assessment and supervision system that (1) gathers individualized information so that courts can make release determinations based on whether a defendant poses a threat to public safety and is likely to return to court—without regard for the defendant's financial situation, and (2) provides judges with release options that are effective, varied, and fair alternatives to monetary bail.

2. Expand the use of risk-based preventive detention.

Expand the use of preventive detention to ensure that defendants will be detained pending trial in appropriate cases when public safety cannot be addressed through release conditions.

3. Establish pretrial services in every county.

Pretrial services maximize the safety of the community and minimize the risk of nonappearance at court proceedings. Pretrial services must be established in every county and must include the comprehensive use of a validated risk assessment instrument, as

well as monitoring and supervision.

4. Use validated pretrial risk assessment tools.

Use of validated risk assessment tools will provide valuable information to judges to help inform pretrial determinations regarding the defendant's likelihood of reoffending and returning to court and assist the court in fashioning conditions or terms of pretrial release. Judicial officers must remain the final authority in making release or detention decisions and can override the assessment's recommendation when necessary to protect the public or in the interest of justice.

5. Make early release and detention decisions.

Release and detention decisions should be made early in the pretrial process. A pretrial system that gathers information about a defendant before arraignment will allow for prompt release and detention decision making, facilitating the early release of low-risk defendants and detaining, until arraignment, defendants who are unlikely to return to court or who pose a risk to public safety.

6. Integrate victim rights into the system.

The perspective of victims must be fully integrated into the pretrial process and the risks to their well-being addressed in pretrial decision-making. All crime victims have constitutional rights in California, including the right to be heard regarding any pretrial release decision, and their input is essential to a well-functioning system.

7. Apply pretrial procedures to violations of community supervision.

A significant portion of the jail population includes individuals accused of violating the terms and conditions of probation, mandatory supervision, postrelease community supervision, or parole. Legislation and rules of court must be adopted that consider the pretrial-release and detention-screening procedures for those defendants charged with a violation of supervision conditions.

8. Provide adequate funding and resources.

California's courts and local justice system partners must be fully funded to effectively implement a system of pretrial-release and detention decision making and supervision, with resources for new judges and court staff, local justice partner infrastructure, assessment tools, and training. Both significant initial investment of resources and ongoing funding are essential.

9. Deliver consistent and comprehensive education.

To achieve the goals of public safety and return to court, judges, court staff, local justice system partners, and the community must be educated on the development and implementation of a pretrial release and supervision system and provided with continuing education regarding both implicit and explicit bias to ensure that neither the pretrial system nor any type of assessment perpetuates bias. This education requires time, funding, and most importantly investment in and collaboration among all justice system partners.

10. Adopt a new framework of legislation and rules of court to implement these recommendations.

A structure will be sustainable only if it is built on a solid foundation. To undertake such comprehensive reform, this system must not be grafted onto the current complex statutory framework of monetary bail. Provisions currently in the California Constitution that presume release, permit preventive detention, and protect victims' rights will serve as the bedrock of a reformed pretrial system that balances public safety, release, and return

to court. Comprehensive legislation and rules of court should be adopted to create a system of release and detention that is efficient and does not impose excessive layers of procedural requirements.

The Media

The media were very supportive of the report and understood the balancing act between public safety and due process/civil rights. The bail industry did not appear to have a prepared response. The workgroup co-chairs and members were very disciplined about not speaking to the media during the 11-month process. The workgroup did not release the report until the chief justice reviewed and accepted the recommendations. The vast majority of stakeholders supported the final report, once it was released. The workgroup only received three letters raising concerns from: (1) the bail industry, (2) Human Rights Watch, and (3) San Francisco's public defender.

Education

The workgroup members began their process by educating themselves about the current commercial bail system, the bail bond industry, and its regulation, and the process of pretrial release and detention. The workgroup determined that few judges understand how the current commercial bail system actually works. One of the goals of the workgroup members is to continue educating the media, the public, and their fellow judges about how California's current bail system fails to ensure public safety and about alternatives for more effective pretrial release and detention decisions.

How California Succeeded

The Pretrial Detention Reform Workgroup was successful in California because of strong leadership by the chief justice. Factors that led to success included:

- Chief Justice Cantil-Sakauye's commitment to pretrial reform. Having that kind of support from the beginning, when the Chief expedited a rule change to stop courts from requiring defendants to post bail before challenging traffic infractions, was essential to building the momentum for reform.
- A strong Administrative Director of the Judicial Council, Martin Hoshino, who understood the significance of the *Not Just a Ferguson Problem* report and worked with the Chief to direct the appropriate advisory committees within the Judicial Council to consider changes to rules, forms, or any other recommendations necessary to promote access to justice in all infraction cases.
- Lawsuits played an important role in maintaining the momentum surrounding the specific issue of bail reform.
- Informed by their attendance at the Western Regional Committee of COSCA and CCJ,

the Chief and Mr. Hoshino determined what kind of task force they wanted to create: a workgroup of a dozen diverse judicial members who would work from a blank slate and have an entire year to make recommendations. This was a very successful strategy.

- Workgroup members committed to approaching the issues with open minds. A handful of members openly confessed that they changed their opinions about bail and pretrial procedures because of the education they received while serving on the workgroup. The recommendations of the workgroup were unanimous.
- Dynamic co-chairs who contributed an immense amount of work to the process and worked well together, with mutual respect and affection. Their leadership was instrumental to the success of the workgroup.
- Local innovations that were already under way before the workgroup was formed: Humboldt County's pretrial justice technical-assistance success; Imperial County Day Reporting Center; Riverside County's pretrial justice technical-assistance success; and the Santa Clara County Office of Pretrial Services.

The Future

Unfortunately, there were many big initiatives in the 2017 California legislative session and the California Money Bail Reform Act, SB 10, had to compete with other bills addressing issues like climate change, affordable housing, the minimum wage, a gas-tax increase for improving roads, drug pricing, etc. Proponents of the bail reform did not want to lose their momentum and converted SB 10 to a two-year bill.

Leadership of all three branches continued to work together toward reform. Twelve months later, on August 28, 2018, Governor Jerry Brown signed SB 10, which preserves the rights of the accused, while prioritizing public safety. The new law – which will take effect on October 1, 2019 – establishes a new system for determining a defendant's custody status while they await trial based on an assessment of risk to public safety and probability of missing a court date rather than their ability to pay cash bail.

SB 10 Referendum Effort

Bail industry groups are currently circulating a petition to place a referendum on the November 2020 ballot to repeal SB 10. (Referendum to Overturn a 2018 Law that Replaced Money Bail System with a System Based on Public Safety Risk.)

If the effort is successful in collecting 365,880 valid signatures of registered voters by Nov. 26, 2018, the law will be put on hold until the voters decide whether to repeal it. If not repealed, SB 10 would take effect in November 2020.

Connecticut

Bail Reform Timeline

- 1965 The Connecticut General Assembly authorized circuit court judges to release defendants on their own recognizance at arraignment.
- 1967 The Connecticut General Assembly established a statewide Bail Commission that helped to achieve an overall non-surety release rate of 61 percent and a 2.8 percent rate of non-appearance. The Commission's authority was limited by the legislature in 1969, and its staff was reduced.
- 1978 The Connecticut General Assembly formed a Pretrial Commission to study the effectiveness of pretrial programs and techniques with a view to implementing a statewide criminal pretrial program.
- 1980 Bail commissioners began using a ten-component risk assessment point scale that formed the basis for a recommendation of either release on nonfinancial conditions or release on a surety bond or 10 percent bond.
- 1981 The Pretrial Commission raised concerns about the continued detention of individuals unable to afford money bail, alternatives to commercial sureties, and the need for a more robust pretrial services agency.
- 1989 The legislature enacted reform legislation that allowed superior court judges to consider public safety concerns when setting conditions of release for certain crimes and to revoke bail when a defendant violated conditions of release.
- 2003 The Connecticut Judicial Branch contracted with the Central Connecticut State University (CJCC) for an examination of the validity of Connecticut's existing risk assessment and to evaluate the point system. The study recommended an alternative 11-point scale, which would have resulted in more persons being released.
- 2004 Connecticut developed a Decision Aid or Pretrial Conditional Release to help match the arrestee's needs with conditions. In 2007 a study looked at how the use of the Decision Aid affected pretrial recommendations.
- 2009 CJCC submitted a report containing recommendations for financial bond guidelines.
- 2011 The General Assembly created a Sentencing Commission as an independent body to propose changes to existing criminal justice legislation and sentencing policies. It contracted with CJCC in 2015 to reevaluate the weighted release criteria established in 2003.

- 2012 The legislature enacted reform legislation that allowed bail commissioners to consider what would be sufficient to reasonably ensure that the safety of any other person will not be endangered.
- 2015 Governor Daniel Malloy asked the Sentencing Commission to examine the current bail system and the possibility for reform.
- 2016 The Sentencing Commission requested the National Institute of Corrections (NIC) to conduct data analysis. The NIC contracted with Flint Springs Associates who produced a report that described the numbers of court-ordered bonds and the detention population.
- 2017 The Sentencing Commission issued a report with eight recommendations for legislation, support, and training.
- 2017 The General Assembly passed legislation that enacted the Sentencing Commission's recommendations designed to reduce the amount of monetary bail and time in detention for persons charged with misdemeanors.

The Origins of Bail Reform in Connecticut

Fifty years ago, bail in Connecticut was primarily based on the current charge against the accused and not on prior behavior or characteristics of the accused. An extremely high percentage of accused offenders were given financial bail, which greatly discriminated against indigent offenders.

Connecticut embarked on its bail reform efforts in 1965 when the Connecticut General Assembly passed a measure authorizing circuit court judges to release defendants on their own recognizance at arraignment. In 1967 the legislature established a statewide Bail Commission as an independent state agency for the determination of bail. The Commission was given authority to make the initial bail determination, and a staff of 61 employees were assigned to interview arrestees and determine the appropriate conditions of release at police stations across the state. After nine months of operation at the circuit court level, the commission had achieved an overall non-surety release rate of 61 percent and a 2.8 percent rate of non-appearance.

In 1969 the Commission's authority was limited by the legislature. The staff of the Commission was cut from 61 to 28. Initial bail determination was returned to the police, and the role of the bail commissioner was reduced to interviewing only those defendants who had been unable to post the bail bond set by the police.

The Pretrial Commission

In 1978 the Connecticut General Assembly formed a pretrial commission to "study the effectiveness of pretrial programs and techniques with a view to implementing a state-wide criminal pretrial program." The Connecticut Pretrial Commission drew heavily from the first generation of bail reform measures and issued two reports that focused on the continued detention of individuals unable to afford money bail, alternatives to commercial sureties, and the need for a more robust pretrial services agency.

In 1980 bail commissioners began using a ten-component risk-assessment point scale that formed the basis for a recommendation of either release on nonfinancial conditions or release on a surety or 10 percent bond.

In 1981 the Connecticut Pretrial Commission raised concerns about the continued detention of individuals unable to afford money bail, alternatives to commercial sureties, and the need for a more robust pretrial services agency and recommended the use of uniform and weighted criteria and the creation of data collections and verification for the purpose of improving accountability.

In 1989 in response to perceived abuses in the pretrial justice system and public outcry over the rape and murder of a Hartford woman by a man out on bond for a rape charge, the legislature reexamined Connecticut's bail system and enacted reform legislation. For the first time in Connecticut history, the legislation allowed superior court judges to consider public safety concerns when setting conditions of release for certain crimes and to revoke bail when a defendant violated conditions set by the court.

In 2003 the risk assessment criteria that bail commissioners considered were:

- the nature and circumstances of the offense;
- prior convictions;
- prior failure to appear;
- family ties;
- employment record;
- financial resources, character, and mental condition; and
- community ties.

That year, the Connecticut Judicial Branch contracted with the Department of Criminology and Criminal Justice at Central Connecticut State University (CJCC) to examine the validity of the existing risk assessment, to evaluate the point system to determine which factors are predictive and to identify additional factors.¹³ The 2003 CJCC study found:

- Bail decisions were influenced most by offense characteristics and criminal history. The more charges a client had, and the more severe the primary charge was, the more restrictive the bail and the higher the bond amount received.
 - Charges—Clients charged with sex offenses and weapons violations received the most restrictive bail, followed by violations of court orders and drug offenders.
 - Criminal history—being on probation or parole, being arrested on a warrant, and having an outstanding warrant were all associated with more restrictive bail types.
- Of the 480 bail commissioner recommendations, 61 percent received a surety bond, 19 percent received conditions, 13 percent received a promise to appear, 6 percent received a surety with conditions or cash bond, and 1 percent received a non-surety with conditions or a percent surety bond. Bond amounts ranged from \$0 to \$1,000,000, with an average amount of \$18,386, and a median bond amount of \$1,500; half of the bond amounts were less than \$1,500 and the remaining half were greater than \$1,500.
- Twenty-nine percent were held in detention, 30 percent were out on a promise to appear or conditional release, 39 percent were out on bond, and 3 percent of the cases were disposed by the court.
- Of those clients who were out on bond or release, 21 percent failed to appear in court.
- Prior criminal behavior (prior convictions), not being able to financially support him- or herself, and being unmarried raise the likelihood that a client will fail to appear for court.

The 2003 study recommended an 11-point alternative point scale,¹⁴ which would have resulted in more persons being released on conditions and fewer failures to appear.

Since 2003, several changes were introduced to pretrial decision making in Connecticut, including the use of questions to better target conditional release recommendations to client

¹³ Jennifer Hedlund, Stephen M. Cox & Susan Wichrowski, Validation of Connecticut's Risk Assessment for Pretrial Decision Making (report for the Court Support Services Division, Judicial Branch, State of Connecticut, July 2003).

¹⁴ The 11 factors that emerged from that study included charge severity, marital status, living companion, verifiable reference, means of support, education, time on job, mental health/substance abuse issues, and criminal history (prior criminal record, prior failure to appear, number of prior convictions).

needs, the implementation of guidelines for recommending bond amounts when financial bail is deemed appropriate, and the addition of new weighted release criteria aimed at assessing a client's safety risk.

The Decision Aid for Pretrial Release

In 2004 a Decision Aid for Pretrial Conditional Release was developed to guide pretrial personnel in determining if a condition is needed and in matching the client's needs with conditions. The Decision Aid classifies clients' needs into three primary areas: personal needs (e.g., substance abuse, unemployment), compliance needs (e.g., prior FTA, living alone), and safety risks (e.g., violent offender). The menu of available conditions (e.g., drug treatment, call ins, electronic monitoring) is similarly organized according to these areas of needs. The Decision Aid helps the interviewer to narrow down the set of conditions that might best address a client's needs.

In 2007, Central Connecticut University (CJCC) looked at how the use of the Decision Aid affected pretrial recommendations and outcomes. CJCC found:

- the likelihood of recommending a nonfinancial form of release was more than double in the Decision Aid group compared to the pretest group;
- there were three times more cases receiving a conditional release recommendation in the Decision Aid group compared to the pretest groups;
- there was a 16 percent increase in the number of cases where the bail-recommended condition matched the court-ordered condition in the Decision Aid Group, which suggests that judges were more likely to follow the bail recommendation when the Decision Aid was used;
- Eighteen percent fewer clients were held in pretrial detention when the Decision Aid was used;
- for those clients out on release, fewer clients failed to appear when the Decision Aid was used (12 percent) than when it was not (17 percent);
- the failure-to-appear (FTA) rearrest rate was 50 percent lower (8 percent vs. 19 percent);
- the likelihood of being convicted of an FTA was 66 percent lower in the Decision Aid than the pretest group (3 percent vs. 9 percent); and
- clients who were held in pretrial detention were more likely to be convicted and received longer sentences than clients in the pretest group.

In 2009 the CJCC submitted a report containing recommendations for financial bond guidelines. This report analyzed patterns in bond recommendations using 2006 and 2007 data. Guidelines were developed based on this report consisting of two rating scales (offense characteristics and

client risks) with a corresponding table of bond amounts. The offense characteristics incorporate mitigating and aggravating factors that increase or decrease with the severity of a charge.

In 2012 the legislature enacted reform legislation that allowed bail commissioners to consider what would be sufficient to reasonably ensure that the safety of any other person would not be endangered.

In 2015 CJCC conducted a new study to reevaluate the weighted release criteria from 2003 to determine if they were still valid and if any modifications could be made to improve their validity. The study examined the 14 factors then in effect—three of which were added in October 2012—to determine if they still explain significant variation in pretrial outcomes and whether the weights assigned to them are still appropriate. CCSU considered two pretrial outcomes for those clients who are released: failure to appear and acquisition of a new arrest. The 2015 study found:

- Nine of the original 11 release criteria exhibited significant relationships with the likelihood of both failure to appear and a new arrest. CJCC developed recommendations to modify the weights and two criteria to further enhance the validity of the point scale.
- There was less disparity across racial/ethnic groups in the distribution of points when looking at the new points relative to the current points.
- Clients with lower point scores (between 0 and +5) might benefit from a conditional release recommendation. Clients with higher point scores (-10 to -6) might benefit from more intensive supervision while on release
- The use of conditions can reduce FTA and new arrest rates by as much as 4 to 5 percent for those who have points below zero.

The Current Arrest/Detention Process

The Initial Encounter with the Police

An individual's involvement with the justice system begins with an initial police encounter. Following a custodial arrest, the officer transports the individual to the police station for booking. Police can keep the arrestee overnight. A police officer interviews the arrestee to obtain information relevant to the terms and conditions of that person's release from custody. After the interview, the officer makes the decision on whether to release the arrestee with a written promise to appear, with an unsecured (non-surety) bond, or with a secured bond and (typically) a 10 percent cash deposit. In family violence cases, the police officer may also impose nonfinancial conditions of release. Police officers set bail without any statewide guidelines for conducting these interviews. Police officers do not utilize an actuarial risk assessment to determine the financial amount of bail or the conditions they will impose.

Bail bondsmen typically are present at the police stations and work with the defendants and their families to post bond after the defendant pays a 10 percent cash deposit. If the arrestee is unable or unwilling to post bond, the police must notify the judicial branch bail staff—the Court Support

Services Division (CSSD). In practice, CSSD often initiates contact with police departments to determine whether any defendants in custody were unable to post bond. Statistics are not kept on how many bonds are posted by bail bondsmen.

In 2014, of 310,726 police encounters, the police made 165,093 citation releases; 67,964 non-custodial arrests (summons); and 77,669 custodial arrests.

The Role of Judicial Branch Bail Staff (CSSD)

During non-court hours, once the CSSD determines that a defendant is unable to post bond at a police department, staff travel to the police department, review those conditions, conduct an interview, modify the bond, or release on a promise to appear, if necessary. The new determination is based on a validated risk tool and statutory release criteria that include the nature and circumstances of the offense and the person's (1) record of previous convictions; (2) past record of appearance in court after being admitted to bail; (3) family ties; (4) employment record; (5) financial resources, character, and mental condition; and (6) community ties.

Following the interview and investigation at the police station, the bail staff must promptly order the release of arrestee on the least restrictive condition sufficient to ensure that person's appearance in court. The bail staff may release the individual upon the execution of (1) a written promise to appear without special conditions; (2) a written promise to appear with nonfinancial conditions; (3) a bond without surety in no greater amount than necessary; or (4) a bond with surety in no greater amount than necessary. When bail staff order financial conditions of release, they utilize financial bond guidelines. If the individual is unable to meet the conditions of release as modified by bail staff, a report is submitted to inform the court and provide recommendations to the judge. If the non-court bail staff are unable to conduct an interview at the police station, bail staff who work during court hours conduct an interview in the court's holding facility on the morning of arraignment.

The interviews and investigations conducted by the bail staff at both the police department and the courthouse are designed to accurately obtain the information necessary to assess risk and determine an individual's needs. The interview information is entered into a standardized form containing Connecticut's actuarial risk assessment instrument and recommendation guidelines. Once the interview, investigation, and analysis are complete, bail staff formulate a recommendation based on the interview information, the individual's assessment score, and the recommendation guidelines. The report and recommendation are submitted in writing to the judge presiding over the day's arraignment docket, and the bail staff inform the judge of a recommendation in open court. Judges exercise their discretion and make the final decision on defendants' condition of release.

After the arraignment, CSSD staff provide pretrial supervision and referrals for treatment and services. Bail staff monitor all conditions of release ordered by the court, and supervise individuals referred to services. CSSD staff provide the court with a progress report at each court appearance. CSSD contracts with private nonprofits to provide treatment and services for defendants based on need.

Bail Forfeiture

If a defendant fails to appear, bail forfeiture is not immediate. By statute, if a defendant fails to appear for a court hearing, there is a mandatory six-month stay on execution of the bond. If the defendant reappears during those six months, possibly on a new arrest and warrant, the bondsmen do not have to pay the state. They pay only if the chief prosecutor initiates a collection action. In practice, if the bondsmen pay within seven days, they only pay half of the bond amount. In 2016 \$2 million was collected from bail bondsmen.

The Sentencing Commission

In 2011 the legislature created a Sentencing Commission as an independent body to review the existing criminal sentencing structure in the state and to propose changes to existing criminal justice legislation and existing and proposed sentencing policies and practices to the governor, the General Assembly, and appropriate criminal justice agencies. Its membership includes representatives of the judiciary, the executive branch, prosecutors, the chief public defender, corrections, law enforcement, victim advocates, community organizations, law professors, the business community.

In November 2015, Governor Daniel Malloy asked the Sentencing Commission to examine Connecticut's current bail system and the possibility for its reform. The Governor referred to the 600 people in jail whose bond is less than \$2,000, people who are mostly nonviolent, low-level offenders who are in jail only because they are poor—they do not have the \$200 cash to secure a bond. He also referred to the people under similar circumstances who are walking free because they have the financial means to do so. The governor cited jurisdictions across the country such as New Jersey, who changed their constitution and laws to enable judges to deny pretrial release. Connecticut's constitution now guarantees the right to be released on bail upon sufficient security in all criminal proceedings except capital offenses and also prohibits excessive bail. The Governor also asked the Sentencing Commission to consider the state of Connecticut's jail diversionary programs.

The Sentencing Commission investigated Connecticut's current system of pretrial detention and release, with a view to making recommendations as to how to justly and fairly maximize (1) public safety, (2) appearance in court, and (3) the release ofailable defendants.

To inform its analysis, the Commission sought, and was granted, technical assistance from the National Institute of Corrections (NIC), an agency within the United States Department of Justice (USDOJ). As part of NIC's orientation for jurisdictions conducting such analyses, Commission staff traveled to Aurora, Colorado for a week of intensive training covering the fundamental principles of pretrial research and law, the essential elements of a high functioning pretrial justice system and agency, and national developments in the field of pretrial justice.

In March 2016, Attorney Timothy Schnacke, a criminal justice system analyst and one of the nation's leading experts in the pretrial justice field, presented on the fundamental principles of pretrial release and detention at the Commission's regular meeting. Shortly afterward,

Commission staff finalized the study scope and helped facilitate the formation of a research advisory group.

A Pretrial Release and Detention Advisory Group, which included criminal justice professionals with experience in the state's pretrial justice system, was established to involve key criminal justice system stakeholders in the commission's evaluation of pretrial release and detention.

The advisory group worked with commission staff to evaluate Connecticut's pretrial justice system and solicited input from local and national experts on pretrial justice issues. These included presentations from Lori Eville of NIC, Judge Truman Morrison of the District of Columbia Superior Court, Doctor Jennifer Hedlund of the Central Connecticut State University Department of Criminology and Criminal Justice, Professor Sarah French Russell of the Quinnipiac University School of Law, Professor Kim Buchanan, Bryan Sperry and other members of Judicial Branch Court Support Services Division, Jeffrey Clayton from the American Bail Coalition, and Andrew Marocchini of the Bail Association of Connecticut.

As part of the evaluation process, Commission staff and advisory group members conducted a two-day site visit to the District of Columbia to observe the operations of what is considered to be one of the model high-functioning pretrial justice systems in the United States. Group members and staff spent most of their time there as guests of the Pretrial Services Agency (PSA) for the District of Columbia. The group met with a variety of stakeholders, including senior PSA staff, judges, prosecutors, and defense attorneys; observed the pretrial process; and engaged in substantive discussions concerning the merits, distinguishing features, and limitations of the D.C. pretrial justice system.

During the evaluation, the Commission also held a public hearing on the ability of Connecticut's current pretrial justice system to justly and fairly maximize public safety, appearance in court, and the release of bailable defendants. Members of the Commission and its advisory group on pretrial release and detention heard testimony from the advocates, representatives of the bail bond and insurance industries, and other interested parties.

The Flint Springs Report

In 2016, the Sentencing Commission requested the National Institute of Corrections (NIC) to contract with Flint Springs Associates (FSA) to conduct data analysis. Among its findings:

- FSA examined cases of custodial arrests from 2013 to 2015 that involved a CSSD interview. FSA did not examine the custodial arrest cases in which the defendants were released by the police on a promise to appear or on a bond—decisions made without a risk assessment.
- Half of the 100,000 court-ordered bonds that FSA examined were financial and, of those, 92 percent were surety bonds. (The nonfinancial court orders included 20,000 persons released with a written promise to appear and 23,000 persons released with conditions.)

- Felony defendants primarily received financial bonds; half of misdemeanor defendants received financial bonds.
- 40,000 defendants remained detained 1 day after arraignment; 32,000 remained detained 14 days after arraignment.
- The median 7 percent bond was \$2,500; the median conditions with security bond was \$15,000.
- Detention rates for Misdemeanor A defendants could not be explained by charge, risk score, type, and amount of bond. Detention rates do increase as the amount of bond increases.
- There is not a consistent detention rate for Felony Class C or D felonies.
- The State of Connecticut detains a small proportion of defendants who are assessed as low risk to public safety.
- For defendants who were detained, bond amounts were consistently higher than those who were released, regardless of assessed level of risk.
- Comparisons of similarly situated defendants showed different detention rates, indicating that detention was impacted by defendant's ability to pay.

In February 2017, the Sentencing Commission issued a *Report to the Governor and General Assembly on Pretrial Release and Detention in Connecticut* that included eight recommendations for improvement. The commission recommended:

- That legislation be enacted requiring the court to make a finding on the record before imposing secured financial conditions in misdemeanor cases.
- That the bail review period should be shortened and modified for certain individuals who remain detained after the imposition of secured financial conditions. The commission recommends that if a defendant is charged with a misdemeanor offense, then the defendant must return to court if still detained 14 days after the first appearance.
- That legislation be enacted permitting a defendant to deposit 10 percent of the bond amount with the court whenever a surety bond of \$10,000 or less is imposed.
- That judicial-branch bail staff be given adequate opportunity to review and make release decisions following every warrantless custodial arrest. The commission recommends that the legislature increase access to bail commissioners during booking to allow for pretrial screening and risk-based release decision making shortly after each warrantless arrest.
- That lawyers, judges, and other stakeholders receive regular training on current best practices in pretrial release and detention decision making.

- That the Division of Criminal Justice receive adequate support and opportunity to establish screening and intake units.
- That the commission continue to investigate the feasibility of a carefully limited preventive detention system to keep the most dangerous defendants in jail and whether the constitution should be amended to substitute preventive detention for the current practice of imposing high-dollar bonds on defendants.

The commission did not agree on a recommendation whether to amend the constitution to eliminate the right to be released with sufficient financial surety.

In 2017 the legislature enacted compromise legislation¹⁵ with bipartisan support that enacted some of the first two of the commission's recommendations. Data supplied by the judicial branch from its robust information management system and by the corrections department's data on the pretrial population was helpful to convince legislators to reduce the use of monetary bail in most misdemeanor cases.

- The legislature mandated that detained persons charged with a misdemeanor must be presented to the court within 14 days after arraignment.
- The legislature mandated that the court must then release the defendant without financial conditions unless:
 - The charge involves domestic violence; or
 - The court makes a finding on the record that there is a likely risk of failure to appear, the person will obstruct justice, the person is a risk to the safety of a juror or witness, or the person is a risk to public safety.

The Detainee Population in 2016

- 20 percent of defendants were released on their own recognizance.
- 23 percent of defendants were released with conditions.
- 3,260 inmates were detained on May 25, 2016. Of the 2,041 detainees interviewed:
 - 585 detainees had a bond for \$20,000 or less. These detainees would need to post a down payment of 7 percent or less to be released.
 - The median bond was \$90,000.
 - 442 inmates were detained on a misdemeanor charge.
 - 248 of these inmates had a bond of \$20,000 or less.
 - 77 percent of the 442 inmates had three or more convictions.
 - 60 percent of the 442 inmates had a prior felony conviction.

¹⁵ Public Act No. 17-145, An Act Concerning Pretrial Justice Reform.

- 7 percent of the 442 inmates were detained on a domestic violence charge and had a history of domestic violence.

The Future

Many members of the Sentencing Commission and the three branches of government are interested in further bail reform. There is interest in:

- amending the constitution to enable judges to detain defendants if no amount of monetary bail could reasonably ensure the person's appearance in court or protect the safety of the person or the community;
- reducing the use of monetary bail in felony cases so that fewer people are detained solely because they are too poor to pay their bond;
- revising the practices and statutes that enable police to set bail without risk assessments; and
- making it easier for the state to forfeit the bond and collect greater amounts from bail bondsmen when a defendant fails to appear.

The commission continues its study on pretrial release and detention. A delegation of 12 members and their designees recently traveled to New Jersey to observe their no-money bail system in action. The commission has also recently hosted a one-day symposium on bail. National and state experts presented on pretrial issues, including risk assessment, pretrial release and detention, consequences of pretrial incarceration, legal challenges to pretrial practices across the nation, risk management, and the use of preventive detention.

Change will be difficult. However, if bail reform is to advance in Connecticut, it will likely come from the Sentencing Commission. The commission's membership, structure, and commitment to pretrial justice can continue to bring together the interested stakeholders to evaluate Connecticut's pretrial justice system, identify any deficiencies, and develop any necessary and appropriate solutions.

Maryland

- Oct. 1987 Report of the Special Committee on District Court Jury Trial Prayers is released. One of the recommendations is for a rule change providing that, in determining whether a defendant sentenced to incarceration in the district court should be released pending his or her de novo trial in the circuit court, the state should have the burden of establishing that the defendant will flee or pose a danger to any other person, or to the community.
- Dec. 15, 1996 The Commission on the Future of the Maryland Courts issues its final report. Some of their recommendations include that experienced prosecutors should realistically and aggressively screen criminal cases as soon as practicable after arrest to ensure proper charging; explore alternatives to detention; determine the availability and appropriateness of alternative dispute resolution mechanisms; and evaluate dispositional and treatment alternatives.
- Feb. 13, 1998 A bill is introduced, and fails, requiring representation by the public defender of indigent defendants at bail review.
- Feb. 5, 1999 A bill is introduced, and fails, requiring representation by the public defender to indigent defendants at bail review.
- Feb. 10, 2000 A bill is introduced to require a property bondsmen to register and remain in good standing with the district court. This bill is withdrawn. Another bill, which failed, would require representation by the public defender to indigent defendants at bail review.
- June 19, 2000 The chief judge of the Maryland Court of Appeals forms the Pretrial Release Project Advisory Committee to study pretrial release procedures in Maryland.
- Feb. 8, 2001 A bill is introduced to require persons acting as property bondsmen to provide documentation of ownership, tax status, and liens against the property posted. This bill passed and was signed into law. A bill is also introduced to provide representation of indigent defendants at bail review hearings by the public defender. This bill receives an unfavorable vote from the House Judiciary Committee.
- Sept. 12, 2001 The Pretrial Release Project (Abell Foundation) releases its final report. Some of the recommendations include that Maryland should expand its pretrial release investigation statewide and invest greater resources in supervising pretrial detainees; monetary bail should be used sparingly, limited to situations when no other condition of release will reasonably ensure the defendant's appearance and the complainant's safety; judicial officers should consider an unsecured bond in lieu of collateral bond; Maryland should further study the viability of eliminating the bail bondsman commercial surety as recommended by the ABA Standard Relating to Pretrial Release 10.1-3; judicial officers should receive training and education regarding pretrial release determinations; and a community-based

revolving bail fund should be established to post 10 percent cash bonds for individuals who are employed, are caretakers, or otherwise have reliable community ties.

- Oct. 11, 2001 The Pretrial Release Project Advisory Committee (C. Carey Deeley, Jr.) releases its final report, which includes recommendations to establish a statewide pretrial release agency and alternatives to prolonged pretrial detention. Other recommendations include that monetary bail should be used sparingly; that the feasibility of dedicating resources to other modes of pretrial release, such as supervision funded through decreased detention costs, should be studied; and that weekly reports be made to the appropriate administrative judge regarding information necessary to monitor and assess prolonged pretrial incarceration. This last provision was implemented.
- Jan. 8, 2002 Judiciary/Lieutenant Governor's Office Joint Workgroup on Bail studied different county pretrial programs to assess whether counties want a statewide program; how to get pretrial release information to commissioners; and whether a public defender should provide representation at bail review hearings.
- Jan. 9, 2002 A bill is introduced to require the public defender to provide legal representation to indigent defendants during bail review hearings. This bill is withdrawn.
- Feb. 2002 Warnken Report on Pretrial Release is issued. This report indicates that corporate surety bail is the most effective, the most cost-efficient, and the most conducive to public safety. It also provided that district court judges and commissioners are making reasoned and able pretrial release decisions.
- Feb. 2, 2002 University of Maryland Center for Applied Policy Studies issues its report on Pretrial Processing in Baltimore City. They find that a new approach to bail is desperately needed, and there needs to be less reliance on cash bail as a means for ensuring appearance. They recommended that bail amounts be tied closer to the defendant's financial situation to ensure appearance while simultaneously ensuring that the defendant is capable of posting bail. They also recommend other alternatives to arrest.
- Oct. 23, 2003 The chief judge of the Maryland Court of Appeals creates a Bail System Task Force in response to internal auditors who expressed concern that the current laws, practices, and procedures governing the bail system may not be effective.
- Nov. 2003 Ad Hoc Committee on Jury Trial Prayers issues its final report and recommendations. They recommend that a defendant's existing bond should remain in full force and effect unless a judge determines that the defendant represents a clear and present threat of danger to the community.
- Jan. 1, 2004 Maryland Court of Appeals adopt the 152nd report, which amends Rule 4-216(e) to provide that if a judicial officer sets bail at \$2,500 or less, the judicial officer shall advise the defendant that the defendant may post a bail bond secured by either a corporate surety or a cash deposit of 10 percent of the full penalty

amount.

- Dec. 13, 2007 Bail System Task Force created by the chief judge of the Maryland Court of Appeals (referenced above) to analyze the bail system issues its final report. This task force recommends licensing property bondsmen.
- Feb. 14, 2008 A bill is introduced to license property bondsmen. This bill receives an unfavorable vote from the House Judiciary Committee.
- Mar. 2, 2010 Two bills are introduced to license surety bondsmen by the Maryland Insurance Administration. These bills receive an unfavorable vote from House Judiciary and are withdrawn in the Senate.
- Feb. 11, 2011 A bill is introduced regarding installment contracts for bail bonds. This bill is never voted in House Judiciary.
- Jan. 27, 2012 A comprehensive bill is introduced regarding representation at an initial appearance and increasing the eligible offenses that can be charged by citation. This bill also creates the Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender.
- July 11, 2012 Report of the Post-Arrest Practices Committee is issued. They have several recommendations with regard to failure to appear, homeless and transient defendants, length of pretrial incarceration and bail. With regard to bail, they recommend studying the federal system of bail, especially the system where certain enumerated crimes carry presumptions that alleged offenders pose risks of flights or are dangers to the community and continuing education on pretrial release.
- Sept. 2012 Justice Policy Institute issues its Bailing on Baltimore report. Their recommendations include using evidence-based risk assessments to ensure court appearance and public safety; releasing more people on their own recognizance with supervision and monitoring conditions; and seeing that all people have legal counsel at their first bail hearing.
- Nov. 2012 Task Force on Indigent Criminal Defendants referenced above issues its interim report requesting an extension to finish its work.
- Jan. 31, 2013 A bill passes that specifies that an order setting cash bail or cash bond that specifies that the bail or bond may be posted by the defendant only may be posted by the defendant, by an individual, or by a private surety acting for the defendant that holds a certificate of authority in the state.
- Feb. 8, 2013 A bill is introduced to require a pretrial services unit to immediately perform a comprehensive risk assessment to determine a defendant's flight risk or danger to another person or the community if the defendant is held on a no-bail status in a case that does not involve a crime of violence. This bill is never voted on in

House Judiciary.

- Oct. 2013 The judiciary creates the Task Force on Pretrial Confinement and Release in response to the court decision in *DeWolfe v. Richmond*.
- Dec. 2013 Task Force regarding Indigent Criminal Defendants created in 2012 issues its final report. One of the recommendations is that the use of secured, financial conditions of pretrial release (cash, property, or surety bond) be eliminated. The task force also recommends that a statewide system that utilizes a standard, validated pretrial risk-screening tool and utilizes risk-and-need-based supervision, referral, and treatment options in Maryland be implemented. It also recommends that a statewide pretrial services agency be created and that an objective, validated risk assessment tool for use by pretrial services agents be adopted.
- Jan. 2014 Several bills are introduced regarding pretrial confinement and release, none passing. These include a bill to require an arrested person be presented to a district court judge within 24 hours of arrest; requiring district court commissioners to release defendants charged with certain offenses; requiring the district court to operate six days a week for release determinations; establishing the Task Force on Pretrial Risk Assessment, which will recommend a validated pretrial risk assessment tool and authorize pretrial release of specified persons; prohibiting a commissioner from conducting an initial appearance for an arrested person during normal business hours; changing the duties and powers of the district court commissioners; and establishing a Pretrial Release Services Program within the Department of Public Safety and Correctional Services to include the adoption of a validated risk assessment tool.
- Apr. 2014 The judiciary-created Task Force on Pretrial Confinement and Release issues its final report to the chief judge of the court of appeals. The report settled on a comprehensive proposal, which called for judges to conduct initial appearances five days per week with commissioners conducting initial appearances during the weekends and holidays. It also called for an examination of a pretrial risk assessment tool, an expansion of the use of citations or summons in lieu of arrest, and other enhancements to aid in the reduction of Maryland's pretrial population.
- May 2014 The governor created a Commission to Reform Maryland's Pretrial System.
- Dec. 19, 2014 The Commission to Reform Maryland's Pretrial System issued its final report. Some of the recommendations consist of creating a uniform pretrial services agency; implementing a validated risk assessment tool; eliminating secured, financial conditions of pretrial release; having cash bail monitored by the Maryland Insurance Administration; and expanding the use of the criminal citation.
- Feb. 11, 2015 A bill is introduced in the House requiring a district court commissioner to release certain defendants if their most serious offense is one of the offenses listed in the legislation. This bill gets out of the House but receives an unfavorable vote in

Senate Judicial Proceedings.

- Feb. 11, 2016 A bill is introduced in the House to order the pretrial release of a person on personal recognizance, on nonfinancial conditions, or unsecured bond or subject to least restrictive conditions that will reasonably ensure the appearance of the person and public safety. This bill never receives a vote in House Judiciary.
- Aug. 3, 2016 A few Maryland delegates write a letter to Attorney General Frosh requesting a formal opinion on whether the current rule and practice in Maryland regarding money bail or other financial conditions of pretrial release are constitutional.
- Oct. 11, 2016 Maryland Attorney General Frosh submits letter to delegates in response to their request for an opinion on Maryland's system of pretrial detention.
- Oct. 25, 2016 Maryland Attorney General Frosh submits letter to the Standing Committee on Rules of Practice and Procedure, requesting it consider changes to Maryland Rule 4-216 to ensure that defendants are not held in pretrial detention solely because they lack the financial resources to post monetary bail and indicating that the current practice could be unconstitutional.
- Oct. 25, 2016 Chief judge of the Maryland District Court sends letter of advice to Maryland judges and commissioners, offering cautionary advice for the proper determination of bail "in light of the recent AG's opinion"; chair of the Conference of Circuit Judges provides similar information to the judges of Maryland's circuit courts.
- Nov. 16, 2016 Maryland's Office of the Public Defender issued a report, *The High Cost of Money Bail: How Maryland's Reliance on Money Bail Jails the Poor and Costs the Community Millions*.
- Nov. 22, 2016 Rules Committee issues its 192nd report providing guidance to judicial officers regarding the manner in which certain core principles intended to govern decisions regarding the pretrial release of arrested individuals should be applied.
- Jan. 5, 2017 The Maryland Court of Appeals holds its open meeting to consider the 192nd report of the Rules Committee.
- Jan. 11, 2017 Maryland General Assembly 2017 session begins. Several bills regarding bail and pretrial release are introduced, none of them passing. These include bills establishing pretrial release pilots; requiring counties to establish pretrial services agencies; establishing standards, criteria, and requirements for the pretrial release of defendants contrary to the proposed rule; providing that a judge may not include a financial condition as a condition of pretrial release; and providing that in Baltimore City only, a judicial officer shall authorize the release of a defendant who is not charged with a crime of violence on any condition to reasonably ensure appearance and public safety.

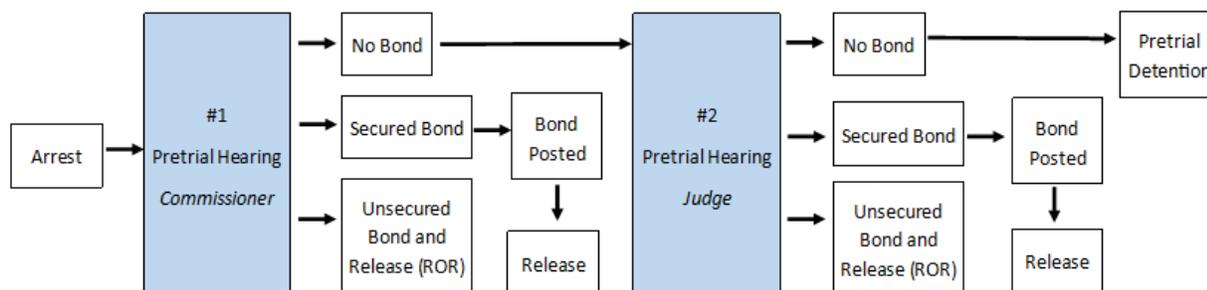
- Jan. 20, 2017 Rules Committee submits first supplement to its 192nd report to the Maryland Court of Appeals with amendments to the proposed rules addressing concerns raised at the first meeting.
- Feb. 7, 2017 The Maryland Court of Appeals holds an open meeting to consider the first supplement to the 192nd report of the Rules Committee.
- Feb. 11, 2017 Rules Committee submits second supplement to its 192nd report to the Maryland Court of Appeals with amendments to the proposed rules addressing concerns raised at the second meeting.
- Feb. 16, 2017 The Maryland Court of Appeals held an open meeting to consider the second supplement to the 192nd report of the Rules Committee.
- Feb. 16, 2017 The Maryland Court of Appeals issues Rules Order.
- Apr. 10, 2017 Maryland General Assembly 2017 session ends with no successful efforts to prevent the new bail reform rules, as promulgated by the Maryland Court of Appeals, from moving ahead.
- July 1, 2017 Revised rules go into effect.
- Nov. 3, 2017 Maryland Judiciary, as required by FY2018 budget legislation, releases report on impact of new bail rule.
- Jan. 5, 2018 Indicted Baltimore State Senator Nathaniel Oaks confessed to taking cash bribe to talk to legislators about a bill favorable to the bail bond industry.
- Jan. 10, 2018 Criminal justice advocates hold news conference calling on lawmakers to return any political contributions received from bail industry and to refuse sponsorship of industry's bills.
- Jan., 16, 2018 House Judiciary Committee holds a pretrial briefing early in session on the impact of the new pretrial release rules.
- Jan. 25, 2018 Two bills are introduced establishing the Pretrial Services Program Grant Fund to provide grants to counties to establish or improve pretrial services programs.
- Mar. 23, 2018 One million dollars is allocated in the Governor's Office of Crime Control and Prevention for pretrial start-up services.
- May 14, 2018 A pretrial summit, funded with support from the State Justice Institute (SJI) and the National Center for State Courts (NCSC) and presented by the Maryland Judiciary, took place with teams of key criminal justice stakeholders representing each county and Baltimore City to engage in planning and identification of resources for pretrial services and risk assessment tools.

The Origins of Bail Reform in Maryland

Since the late-1990s, every branch of state government in Maryland has examined the issues of pretrial and bail reform in Maryland, as have independent agencies and scholars. Numerous reports and recommendations have been issued.¹⁶ These studies have demonstrated that the conclusive factor in pretrial detention for the majority of Maryland defendants is not the risk that they will fail to appear for trial, nor the danger they pose to society, but rather it is their inability to post a bond amount set by the court. The majority of these recommendations aligned with reform efforts in other states. However, these efforts fell short when it came to identifying a successful path toward implementation for Maryland.

The Maryland Court of Appeals, through its rulemaking authority, has established court rules regarding bail and pretrial release.¹⁷ Figure 1 below shows the two phases of Maryland’s pretrial process. Arrestees first appear before a district court commissioner for an initial appearance within 24 hours of arrest, and if they are not released, they then appear before a district court judge for a bail review hearing at the next sitting of the court. Indigent defendants now have a right to state-furnished counsel at both their initial appearance and bail review hearing.¹⁸

Figure 1. Two Phases of Maryland’s Pretrial Process



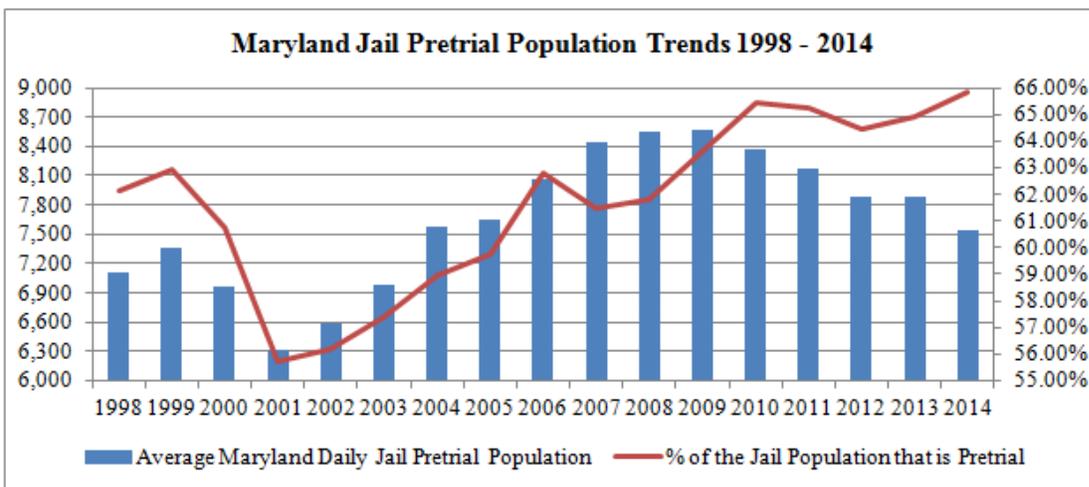
¹⁶ See THE PRETRIAL RELEASE PROJECT: A STUDY OF MARYLAND’S PRETRIAL RELEASE AND BAIL SYSTEM (Abell Foundation 2001), http://www.abell.org/sites/default/files/publications/hhs_pretrial_9.01%281%29.pdf; BALTIMORE BEHIND BARS: HOW TO REDUCE THE BAIL POPULATION, SAVE MONEY AND IMPROVE PUBLIC SAFETY (Justice Policy Institute 2010), http://www.justicepolicy.org/images/upload/10-06_rep_baltbehindbars_md-ps-acrd.pdf; Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender. Maryland Department of Legislative Services, Office of Policy Analysis (Dec. 13, 2013), <http://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/018000/018924/unrestricted/20140000e.pdf> and the Report to the Pretrial Release Subcommittee of this Task Force, available at <http://www.pretrial.org/download/pjireports/Report%20to%20the%20MD%20Pretrial%20Release%20Subcommitte%20-%20PJ%202013.pdf>; Maryland Governor’s Commission to Reform Maryland’s Pretrial System: Final Report (Dec. 19, 2014), <http://goccp.maryland.gov/pretrial/documents/2014-pretrial-commission-final-report.pdf>; THE HIGH COST OF MONEY BAIL: HOW MARYLAND’S RELIANCE ON MONEY BAIL JAILS THE POOR AND COSTS THE COMMUNITY MILLIONS (Maryland Office of Public Defender 2016), <http://www.opd.state.md.us/Portals/0/Downloads/High%20Cost%20of%20Bail.pdf>.

¹⁷ See MD. CONST. art. IV, § 18(a) (providing that “[t]he Court of Appeals from time to time shall adopt rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law.”).

¹⁸ Commission to Reform Maryland’s Pretrial System: Final Report (Dec. 19, 2014), at 8, <http://goccp.maryland.gov/pretrial/documents/2014-pretrial-commission-final-report.pdf>

In Maryland, the state’s pretrial jail population climbed from approximately 56 percent of all detained in 2001 to 65.8 percent in 2014.¹⁹ See Figure 2 below. Maryland’s FY 2014 pretrial jail population is the highest recorded in the state since the county jails began collecting this data in 1998. On any given day in Maryland in 2014, there were roughly 7,000-7,500 defendants detained in jail awaiting trial with an average length of stay of 39 days.²⁰ This cost the state approximately \$22.65-\$44.75 million each year (\$83-\$153 a day in jail) in detention costs.²¹

Figure 2. Maryland Jail Pretrial Population from 1998-2014



Sources: Department of Public Safety & Correctional Services
Maryland Correctional Administrators Association

The Fall of 2016: The Watershed Period for Bail Reform Efforts in Maryland

On August 3, 2016, Maryland delegates Erek L. Barron, Kathleen Dumais, Shelly Hettleman, Marc Korman, and Brooke Lierman wrote to Attorney General Brian Frosh requesting a formal opinion on whether the current rule and practice in Maryland regarding money bail or other financial conditions of pretrial release were constitutional. Specifically, the delegates asked whether the U.S. Constitution, the Maryland Declaration of Rights, and other applicable federal and state law and regulations require (1) a judicial officer to conduct an individualized inquiry regarding a criminal defendant’s financial resources before ordering money bail or other financial condition of pretrial release or (2) a judicial officer to avoid ordering money bail, or other financial condition of pretrial release that clearly exceeds a criminal defendant’s ability to pay.²²

The Attorney General’s Office of Counsel to the General Assembly, in a letter dated October 11,

¹⁹ *Id.*

²⁰ James F. Austin, MARYLAND PRETRIAL RISK ASSESSMENT DATA COLLECTION STUDY (JFA Institute 2014).

²¹ *Id.*

²² Letter from Delegates Barron, Dumais, Hettleman, Korman, and Lierman to Maryland Attorney General Brian E. Frosh (Aug. 3, 2016).

2016, concluded that Maryland “law and court rules should be applied to require a judicial officer to conduct an individualized inquiry into a criminal defendant’s ability to pay a financial condition of pretrial release.” The 11-page opinion further advised that “setting the bail in an amount not affordable to the defendant, thus effectively denying release, raises a significant risk that the Maryland Court of Appeals would find it violates due process. If pretrial detention is not justified yet bail is set out of reach financially for the defendant, it is also likely the court would declare that the bail is excessive under the Eighth Amendment of the U.S. Constitution and Article 25 of the Maryland Declaration of Rights.”

On October 25, 2016, Attorney General Frosh submitted a letter to Judge Alan M. Wilner, chair of the Standing Committee on Rules of Practice and Procedure, urging the Committee to make amendments to Maryland Rule 4-216.²³ Attorney General Frosh presented the following arguments:

- (1) Current law requires judicial officers to conduct an individualized inquiry into a defendant’s financial circumstances and the imposition of bail that a defendant cannot afford raises significant Constitutional concerns.
- (2) Current pretrial release rules are not consistently followed across the state.
- (3) Maryland’s pretrial system does not effectively advance the state’s compelling interests in the protection of public safety and in ensuring the appearance of criminal defendants at trial.
- (4) Increasing reliance on pretrial services, as opposed to pretrial detention, will lead to better outcomes.
- (5) Maryland’s pretrial system disproportionately affects racial minorities.
- (6) Pretrial detention unnecessarily harms defendants and their families.²⁴

Also during this watershed period was the November 16, 2016 release of a report by the Maryland Office of the Public Defender, *The High Cost of Bail: How Maryland’s Reliance on Money Bail Jails the Poor and Costs the Community Millions*. The Office of Public Defender analyzed more than 700,000 criminal (non-traffic) cases filed in the District Court of Maryland in 18 Maryland jurisdictions between 2011 and 2015. The study found:

- (1) Maryland’s reliance on money bail caused the routine, illegal incarceration of poor people: over a five-year period, no fewer than 46,597 defendants were detained on bail for more than five days at the start of their criminal case. Of these, more than 17,434 defendants were detained on bail amounts of less than \$5,000.
- (2) For those who used the services of a bondsman, the price was steep. Maryland communities were charged more than \$256 million in non-refundable corporate bail bond premiums from 2011 to 2015.
- (3) Defendants who used a bail bondsman were obligated to pay a corporate bail

²³ Letter from Brian E. Frosh, Md. Attorney General., to the Hon. Alan M. Wilner, Chair, Standing Comm. on Rules of Prac. and Proc. 1–2 (Oct. 25, 2016), [http://www.marylandattorneygeneral.gov/News%20Documents/Rules Committee Letter on Pretrial Release.pdf](http://www.marylandattorneygeneral.gov/News%20Documents/Rules%20Committee%20Letter%20on%20Pretrial%20Release.pdf).

²⁴ *Id.*

- bond premium regardless of the outcome of the case. More than \$75 million in bail bond premiums were charged in cases that were resolved without any finding of wrongdoing.
- (4) Corporate bonds extracted tens of millions of dollars from Maryland's poorest zip codes, contributing to the perpetuation of poverty.
 - (5) The money bail system has a disproportionate impact on racial minorities: over five years, black defendants were charged premiums of at least \$181 million, while defendants of all other races combined were charged \$75 million.
 - (6) Despite all these costs, secured money bail that requires a payment for release is no more effective than unsecured bonds, for which defendants pay nothing unless they fail to appear for court.²⁵

Rules Committee Issues its Report to the Maryland Court of Appeals

After the Criminal Rules Subcommittee met and forwarded proposed amendments, the full Rules Committee considered and voted to approve them at a meeting on November 18, 2016. Among the materials submitted to the Rules Committee included a memorandum from former United States Attorney General Eric Holder and colleagues at the law firm of Covington & Burling, as well as letters from the American Bar Association and the Office for Access to Justice at the U.S. Department of Justice, among others.²⁶

The Rules Committee, in its report, summarized the issues and concerns as follows:

There have been several independent, highly credible studies of the pre-trial release system in Maryland. Each of them has found, from documented evidence, that the reliance on money bail set at levels that the defendant cannot afford is (1) not uncommon, (2) irrational, unfair, unnecessary to ensure either the defendant's appearance or public safety, (3) racially and ethnically discriminatory, and (4) fiscally unsound. These studies stress not only the fiscal cost to the State and the counties from incarcerating people who do not need to be incarcerated but also the human cost of incarceration—the loss of employment; the loss of housing, automobiles, and utilities and other services because of the loss of income; the loss of governmental benefits, such as Medicaid and Social Security SSI payments; the disruption of families—all of which can have a lasting and devastating impact on the defendant and his or her

²⁵ HIGH COST OF BAIL, *supra* note 16, at 4.

²⁶ See Memorandum from Eric H. Holder Jr., Former U.S. Attorney General., to Brian E. Frosh, Maryland Attorney General. (Oct. 3, 2016),

<http://www.opd.state.md.us/Portals/0/Downloads/Covington%20white%20paper%20Maryland%20Wealth-Based%20Pretrial%20Detention%20Scheme.pdf>; Letter from Linda Klein, President, American Bar Association to Hon. Alan Wilner, Chair, Standing Committee on Rules of Practice and Procedure (Nov. 16, 2016),

https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_letter_md_money_bail_11_15_16.authcheckdam.pdf; Letter from Lisa Foster, Director of the Office for Access to Justice, U.S. Department of Justice (Nov. 17, 2016),

http://www.opd.state.md.us/Portals/0/Downloads/lisa%20foster3_111716_160501.pdf.

family.²⁷

What Was the Nature of the Proposed Changes to the Rules (new Rule 4-216.1)?

Among the most significant changes to the pretrial rules, Rule 4-216.1 (1) prohibits courts from imposing financial conditions that result in the pretrial detention of the defendant, and (2) expressly requires courts to give priority to nonfinancial conditions of release (there is no emphasis on the use of unsecured bonds in the Rules).²⁸ Other changes include (1) a prohibition on using money bail to ameliorate dangerousness²⁹ and (2) the requirement that the court consider “the recommendation of any pretrial release services program that has made a risk assessment of the defendant in accordance with a validated risk assessment tool and is willing to provide an acceptable level of supervision over the defendant during the period of release if so directed by the judicial officer”³⁰

What Was the Opposition to the Reform Efforts?

The bail bond industry, including bond surety company Lexington National Insurance Corporation, was the primary voice of opposition against the reform efforts. Opposition to the reform efforts argued: (1) the existing bail system in Maryland is plainly constitutional; (2) to the extent there are concerns that the existing rules are not being followed, the solution is not new rules but enforcement of the existing rules and education about what those rules provide; (3) the proposed rule changes raise serious constitutional problems by appearing to take bail off the table as a way for certain defendants to avoid pretrial deprivation of their liberties; (4) the proposed reforms were dangerous to public safety by releasing dangerous defendants without significant surety they will reappear; and (5) there is neither a statewide pretrial release program in Maryland nor a validated Maryland risk assessment tool.³¹ Additionally, others argued that although reform was needed, it was a matter for the Maryland General Assembly to take on, not the courts through its rulemaking authority.

At the Maryland Court of Appeals open hearing on proposed changes to the rules governing pretrial release, Paul Clement spoke in strong opposition to the proposed rule changes. Clement is a partner in the Washington D.C. Office of Kirkland & Ellis LLP, which represents the American Bail Coalition. Clement argued:

I don't think I'm going out on a limb by saying even at the time of the framing, not everybody had the same amount of money, and there were some

²⁷ Standing Committee on Rules of Practice and Procedure, 192nd Report to the Court of Appeals (2016), at 3-4.

²⁸ MD. R. 4-216.1(e)(1)(A).

²⁹ MD. R. 4-216.1(e)(1)(B).

³⁰ MD. R. 4-216.1(f)(1).

³¹ See, e.g., Paul Clement et al, Constitutionality of Maryland Bail Procedures 6 (Kirkland & Ellis LLP memorandum October 26, 2016), and see also Court of Appeals Open Meeting of the Court of Appeals to Consider the One Hundred Ninety-Second Report of the Standing Committee on Rules of Practice and Procedure, Jan 5, 2017, available at <https://www.courts.state.md.us/coappeals/webcasts/specialevents>.

people who were going to face a bail that they couldn't afford, but yet the Constitution doesn't protect against that. What it protects against is excessive bail that prevents somebody from having the option of at least posting a bail. It doesn't guarantee everyone the means of being able to post the bail, but it does guarantee the option.³²

Open Meeting on Proposed Rule Changes

Typically, open meetings for proposed court rule changes are held in a conference room and typically not attended by more than 15 to 25 interested individuals. The open meeting for proposed changes to Rule 4-216, held on January 5, 2017, was held in the Maryland Court of Appeals courtroom, was streamed live, and received national viewership. Testimony from approximately 50 individuals lasted over six hours. Among the presenting witnesses were former U.S. Attorney General Eric Holder; former U.S. Solicitor Paul Clement; Maryland Attorney General Brian Frosh; Hon. Lynn Leibovitz, presiding judge, Criminal Division of the Superior Court of the District of Columbia; Hon. John W. Debelius III, chair, Conference of Circuit Judges; Hon. Kathleen Gallogly Cox, vice-vhair, Conference of Circuit Judges; and Hon. John Morrissey, chief judge of the District Court of Maryland.³³

Maryland Court of Appeals Issues Rules Order

After the Rules Committee issued a first supplement to its report on January 20 and a second supplement on February 1, 2017,³⁴ the seven members of the Maryland Court of Appeals unanimously voted to recommend the adoption of the new Rule 4-216.1 in February 2017, with an effective date of July 1, 2017. Before the effective date of the new rule, court leadership sent a Letter of Advice to all judges and commissioners to provide guidance regarding the factors to be considered in determining conditions of release.

How Was the Reform Effort Covered by the Media?

The reform effort surrounding amendments to the rules on pretrial release was covered extensively by the press across the state, but also in national media outlets. Maryland media outlets were generally supportive of the reform efforts.

³² Open Meeting of the Court of Appeals to Consider the One Hundred Ninety-Second Report of the Standing Committee on Rules of Practice and Procedure, Jan 5, 2017, testimony of Paul Clement, timestamp 3:03-5:07.

³³ Justin Fenton, *Maryland's Highest Court Hears Arguments from Holder and Opponents on Bail Reform*, BALTIMORE SUN, Jan. 6, 2017, <http://www.baltimoresun.com/news/maryland/crime/bs-md-bail-reform-court-of-appeals-20170105-story.html>.

³⁴ Standing Committee on Rules of Practice and Procedure, 192nd Report to the Court of Appeals, Supplement 1 (Feb. 1, 2017), 3, <https://mdcourts.gov/sites/default/files/rules/reports/192ndsupplement2.pdf>.

Response by the Maryland Legislature

In March 2017, the Maryland Senate passed Senate Bill 983 by a vote of 26-19, which pared back key provisions in the amended Rule 4-216.³⁵ Specifically, SB 983 (1) requires that a judicial officer make an individualized determination regarding the release or detention of a defendant before trial; (2) requires that a judicial officer impose the least restrictive pretrial release conditions on a defendant that are reasonably necessary to ensure the defendant's appearance as required and the safety of each alleged victim, other person, or the community; (3) prohibits a judicial officer from giving preference to a particular condition of pretrial release; (4) requires that a judicial officer take into consideration all available information in determining conditions of pretrial release, as specified; and (5) prohibits a judicial officer from setting financial conditions of release for specified reasons. The bill also established the Pretrial Services Workgroup, to be staffed by the Governor's Office of Crime Control and Prevention.³⁶ However, Del. Anderson, sponsor of House Bill 1215 (the cross-file to SB 983), withdrew the bill after the new Rule 4-216 was adopted. From there, it was up to the Speaker of the House, Michael Busch, to determine whether this bill advanced out of the Rules Committee and into the House Judiciary Committee. Ultimately, Busch elected not to send the bill to the House floor. Busch said his leadership team polled the Democratic party caucus and found "there were not enough votes to pass the measure even if it squeaked out of a strongly divided House Judiciary Committee on the strength of the support of Republicans and a handful of Democrats."³⁷ This decision came the week after the very powerful Legislative Black Caucus voted 31-5 to oppose the Senate bill.

According to the National Institute on Money in State Politics (NIMSP), Maryland politicians received more from the bail bonds industry between 2011 and 2014 than their counterparts across the country. NIMSP reported that Maryland took in \$168,166, ahead of second-place California (\$114,875) and third-place Texas (\$78,005).³⁸

What Has Been the Impact of the New Rules to Date?

When the Maryland General Assembly adjourned in April 2017, the chairmen of the Senate Budget and Taxation Committee and the House Appropriations Committee in their *Joint Chairmen's Report* requested that by November 1, 2017 the judiciary provide it with an update on the impact of the revised rules, specifically:

The committees are interested in the impact of recent changes to the Maryland Rules regarding pretrial release and the use of cash bail across the State. As the General Assembly continues to consider statutory changes to the pretrial system, it

³⁵ Md. S.B. 983, <http://mgaleg.maryland.gov/2017RS/bills/sb/sb0983t.pdf>.

³⁶ Md. S.B. 983, Fiscal and Policy Note, Department of Legislative Services, Maryland General Assembly, 2017 Session. http://mgaleg.maryland.gov/2017rs/fnotes/bil_0003/sb0983.pdf.

³⁷ Michael Dresser, *Busch: Maryland House Will Not Vote on Divided House Bill*, BALTIMORE SUN, April 6, 2017, <http://www.baltimoresun.com/news/maryland/politics/bs-md-bail-bill-imperiled-20170406-story.html>.

³⁸ Ovetta Wiggins, *Campaign Cash from Bail Industry Surged as State Considers Reforms*, WASH. POST, Jan. 25, 2017, https://www.washingtonpost.com/local/md-politics/report-campaign-cash-from-bail-industry-surged-as-state-considered-reforms/2017/01/25/8ef77f5c-e28c-11e6-a547-5fb9411d332c_story.html?utm_term=.dcddbde573fd

will be especially important to understand the impact of the decreased utilization of cash bail likely to occur under the new rule. Therefore, the committees request a report on the implementation of the new rule from its effective date, July 1, 2017, to September 30, 2017. The report should provide:

- (1) An update on pretrial release practices, including any guidance on the new rule issued by the Judiciary;
- (2) A preliminary evaluation of the rule's impact on reducing the number of individuals held because they cannot afford to pay their set bail;
- (3) An explanation of how affordable bail amounts are determined for individual defendants; and
- (4) Recommendations for General Assembly action that would be beneficial to the implementation of the new rule.³⁹

In November 2017, the Maryland Judiciary released a report, *Impact of Changes to Pretrial Release Rules*.⁴⁰ The report concluded that the analysis of the data since the Letter of Advice was sent to judges on October 2016 showed that significantly more individuals are being released on their own recognizance from pretrial detention, and the use of unsecured personal bonds has also increased. Further, the number of individuals being held on a cash bail has decreased significantly. The number of individuals being held without bail also has increased.⁴¹ At least two factors are likely to be in play: The shift away from the use of high monetary bail to ensure that a defendant perceived to be dangerous does not secure release pretrial and courts finding that the defendant poses a danger and that no condition of release will ameliorate the risk.

Why Were Reform Efforts Successful?

A number of factors led to the successful reform efforts in Maryland in the last two years. These factors include the following:

- (1) Numerous independent and highly credible studies of the pretrial release system in Maryland were available and demonstrated that the reliance on money bail set at levels that the defendant cannot afford is (1) not uncommon; (2) irrational, unfair, and unnecessary to ensure either the defendant's appearance or public safety; (3) racially and ethnically discriminatory; and (4) fiscally unsound.⁴²
- (2) The Maryland General Assembly has "consistently, for decades, been unwilling to enact any substantial reform measures."⁴³ Accordingly, because Maryland already had existing court rules that governed the pretrial and bail process, achieving reform through the amendment of an existing court rule was both feasible and achievable.

³⁹ CHAIRMEN OF THE SENATE BUDGET AND TAXATION COMMITTEE AND THE HOUSE APPROPRIATIONS COMMITTEE, JOINT CHAIRMEN'S REPORT, Annapolis (April 2017), 12, <http://mgaleg.maryland.gov/pubs/budgetfiscal/2017rs-budget-docs-jcr.pdf>.

⁴⁰ MARYLAND JUDICIARY, THE IMPACT OF CHANGES TO PRETRIAL RELEASE RULES (Nov. 3, 2017), <https://www.courts.state.md.us/sites/default/files/import/media/newsitem/reference/pdfs/impactofbailreviewreport.pdf>.

⁴¹ *Id.*

⁴² Austin, *supra* note 20.

⁴³ *Id.*, at 7.

- (3) The most vocal opposition to the reform efforts was the bail industry and its insurance-bond-surety companies. The historically powerful bail industry, a monied interest, put forth several public safety argument arguments that were not generally supported by data and research and considered by some to be transparently self-interested.
- (4) Several jurisdictions within the state had already moved away from money bail and had successfully reduced recidivism and failures to appear, through effective pretrial services and monitoring. One of these jurisdictions, St. Mary's County, has data that demonstrated that pretrial monitoring can be achieved with a modest scale and budget, drawing attention from jurisdictions outside the state and praise from pretrial experts. The pretrial program in St. Mary's—a jurisdiction of 113,000—was launched in 2015 by assistant sheriff Maj. Michael Merican while he was warden at the detention center.⁴⁴ In its very first year of operation, the program provided community supervision through existing resources to over 200 individuals awaiting trial who would have otherwise been in jail, and the county saw a savings of almost \$400,000.⁴⁵ Those 200 participants showed up for their court dates at a rate of 99 percent.⁴⁶

What Does the Future Hold?

In January 2018, at a House Judiciary Committee hearing on the impact of the bail rule change, Baltimore County State's Attorney Scott Shellenberger, who initially opposed the rule change, suggesting it represented a threat to public safety, acknowledged to the committee that he had been wrong to oppose the reforms. "The sky has not fallen. We are starting to hold the right people, and we are starting to release the right people," said Shellenberger.⁴⁷ However, to support the changes, justice system experts agree that the next step in the bail reform efforts in Maryland is the development of a well-designed and well-funded system of pretrial services units in every county. The Maryland Judiciary, in its report on the impact of changes to the pretrial release rules, suggested that "to complement the effects of the new Rule, enhanced pretrial services must be implemented in each county that does not yet have a pretrial services unit."⁴⁸

As of November 2017, 13 of Maryland's 24 counties, plus Baltimore City, can order defendants to pretrial services of some kind. Ten of those counties use a risk assessment tool, and one of the ten (Montgomery) uses a validated tool.⁴⁹ Thirteen counties offer telephonic reminders of court dates; the same 13 counties offer drug and alcohol testing. Eleven counties offer GPS monitoring. The Administrative Office of the Courts is developing text notification services to

⁴⁴ Michael Dresser, *St. Mary's Pretrial Supervision Program Earns Praise as It Cuts Incarceration*, BALTIMORE SUN, May 27, 2017.

⁴⁵ Steps in the Right Direction: Maryland Counties Leading the Way in Pretrial Services (report, Open Society Institute—Baltimore 2016), 4. https://www.osibaltimore.org/wp-content/uploads/Steps_Formatted-V3.pdf.

⁴⁶ *Id.*

⁴⁷ Michael Walter, *Bail Reform Requires Pretrial Release Services*, BALTIMORE SUN, Jan. 21, 2018, <http://www.baltimoresun.com/news/opinion/oped/bs-ed-op-0122-pretrial-release-20180119-story.html>

⁴⁸ *Supra* note 39, at 5.

⁴⁹ The Maryland Correctional Administrators Association (MCAA) and Maryland Alliance for Justice Reform (MAJR) cooperated to survey local detention centers in November 2017 for an up-to-date report as to what pretrial, screening, mental health, and reentry services are currently available at the centers. See Pretrial, Screening, Mental Health and Reentry Services Available at Maryland's Local Detention Centers—Survey of November 2017 (Maryland Alliance for Justice Reform), <http://www.ma4jr.org/wp-content/uploads/2018/03/MCAA-11-17-Survey-Summary-revised.pdf>

remind defendants, litigants, and witnesses about court dates statewide. Maryland counties have found it is up to 11 times less expensive to serve defendants in the community than it is to hold them in jail pending trial.⁵⁰

It is anticipated that counties across Maryland will continue to develop and expand pretrial services programs. A pretrial summit, funded with support from the State Justice Institute (SJI) and presented by the Maryland Judiciary in conjunction with the National Center for State Courts (NCSC) took place on May 14, 2018, with teams of key criminal justice stakeholders representing each county and Baltimore City to engage in planning and identification of resources for pretrial services and risk assessment tools.

⁵⁰ *Supra*, note 44.

Maryland Resources

The Impact of Changes to Pretrial Release Rules. Maryland Judiciary (Nov. 3, 2017).
<https://www.courts.state.md.us/sites/default/files/import/media/newsitem/reference/pdfs/impactofbailreviewreport.pdf>

The High Cost of Bail: How Maryland's Reliance on Money Bail Jails the Poor and Costs the Community Millions. Maryland Office of the Public Defender (Nov. 16, 2016).
<http://www.opd.state.md.us/Portals/0/Downloads/High%20Cost%20of%20Bail.pdf>

Commission to Reform Maryland's Pretrial System: Final Report. Governor's Commission to Reform Maryland's Pretrial System (Dec. 19, 2014).
<http://goccp.maryland.gov/pretrial/documents/2014-pretrial-commission-final-report.pdf>

Memorandum from Eric H. Holder Jr., Former U.S. Attorney Gen., to Brian E. Frosh, Maryland Attorney Gen. (Oct. 3, 2016).
<http://www.opd.state.md.us/Portals/0/Downloads/Covington%20white%20paper%20Maryland%20Wealth-Based%20Pretrial%20Detention%20Scheme.pdf>

Court of Appeals, Rules Order to Adopt Proposed New Rule 4-216.1 and Amendments to Current Rules (Feb. 16, 2017). <http://www.courts.state.md.us/rules/rodocs/ro192.pdf>

Standing Committee on Rules of Practice and Procedure, 192nd Report to the Court of Appeals (2016). <https://mdcourts.gov/sites/default/files/rules/reports/192nd.pdf>

Standing Committee on Rules of Practice and Procedure, 192nd Report to the Court of Appeals, Supplement 1 (Jan. 20, 2017).
<https://mdcourts.gov/sites/default/files/rules/reports/192ndsupplement.pdf>

Standing Committee on Rules of Practice and Procedure, 192nd Report to the Court of Appeals, Supplement 2 (Feb. 1, 2017).
<https://mdcourts.gov/sites/default/files/rules/reports/192ndsupplement2.pdf>

Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by the Office of the Public Defender. Maryland Department of Legislative Services, Office of Policy Analysis (Dec. 13, 2013)
<http://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/018000/018924/unrestricted/20140000e.pdf>

New Jersey

New Jersey's Criminal Justice Reform Act (CJRA)⁵¹, enacted on August 11, 2014 and effective January 1, 2017, changed the landscape of the State's criminal justice system relating to pretrial release. Now, a judge may detain a defendant before trial if the state files a pretrial detention motion, and the judge finds that the defendant presents a serious risk of danger, flight, or obstruction. A defendant who poses a lesser risk can be released on his or her own recognizance or on conditions that would be monitored by the judiciary's Pretrial Services Program (PSP). The CJRA also sets forth speedy trial rules that apply to defendants that are detained.

Before 2017, New Jersey's system of pretrial release relied heavily on monetary bail. Under the old system, defendants, even those who posed a substantial risk of flight or danger to the community, could be released if they or friends/family had the financial resources to post bail. Meanwhile, defendants accused of less serious crimes, even those who presented minimal risk of flight or danger, were held in custody because they and their friends/family did not have the financial resources to post even modest amounts of bail.

The Origins of Bail Reform

Since 1844, the New Jersey Constitution had guaranteed defendants the right to bail. Some defendants who could afford to pay bail were being released into the community even though they posed a substantial risk to community safety. Other defendants who posed minimal risk to community safety were being detained in county jails because they could not afford to pay even modest amounts of bail. Meanwhile, in the federal courts in New Jersey (and across the nation), defendants were being released on their own recognizance or on conditions, unless a judge found that the defendant was a risk of flight. In 2012 Governor Chris Christie, a former federal prosecutor familiar with the Federal Constitution and a system that allowed for the pretrial detention of defendants that posed a risk to the community, called for a constitutional amendment to allow for pretrial detention in these serious cases.

Jail Population Study. In March 2013, Marie VanNostrand, Ph.D., from Luminosity, authored a jail population study commissioned by the Drug Policy Alliance (Jail Population Study) that analyzed New Jersey's jail population.⁵² Among other findings, the study revealed that more than half of all inmates had been charged with nonviolent offenses. Five thousand inmates, 38.5 percent of the total jail population, were pretrial detainees who had the option of posting bail but were held in custody solely due to their inability to meet the terms of bail. These inmates were not serving a sentence, had no holds or detainers, and could have been released if they were able to post bail in the form of cash, cash/bond, 10 percent option, or support arrears. The Jail

⁵¹ N.J.S.A. 2A:162-15 to 26 codifies L. 2014.c. 31. Effective January 1, 2017.

⁵² MARIE VAN NOSTRAND, NEW JERSEY JAIL POPULATION ANALYSIS: IDENTIFYING OPPORTUNITIES TO SAFELY AND RESPONSIBLY REDUCE THE JAIL POPULATION (Luminosity 2013), https://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf

Population Study revealed the primary findings shown below.

1. *Many of the inmates' cases were in backlog status*
 - a. Forty-one percent of the total active pending cases in the municipal court were in backlog status;
 - b. More than half (53 percent) of the superior court criminal cases pre-indictment were in backlog status; and
 - c. Forty-five percent of the criminal cases post-indictment were in backlog status.
2. *Many detainees waited long times for their day in court*
 - a. The length of time that detained inmates awaited trial—inmates who had been indicted but had not yet had a trial—was on average 314 days.
3. *Many inmates were detained because they were too poor to post modest amounts of monetary bail.*
 - a. Twelve percent of the entire jail population was held in custody solely due to their inability to pay \$2,500 or less to secure their release pending case disposition.

The Jail Population Study prompted the leaders of the three branches of government to take action. The State's Public Defender, Joseph Krakora, notified Chief Justice Stuart Rabner of the findings of the Jail Population Study. The chief justice responded in June 2013 by establishing a Joint Committee on Criminal Justice. The committee comprised members of the three branches of state government, including judges, prosecutors, public defenders, private counsel, court administrators, and staff from the legislature and governor's office, and was charged with examining the bail, pre-indictment, and post-indictment processes. The committee did not include any representatives of the bail bond industry.

In March 2014, the committee issued a report, finding that the current system presented problems at both ends of the spectrum: defendants charged with less serious offenses, who posed little risk of flight or danger to the community, too often remained in jail before trial because they could not post modest amounts of bail, while other defendants who faced more serious charges and had access to funds were released even when they posed a substantial risk to public safety or flight. The report recommended a series of changes to the criminal justice system, focusing on bail reform and the need for specific speedy trial time frames:

- A system that employs an objective, "risk-based" method of analysis to assess a defendant's risk of failure to appear and danger to the community;
- A system of supervised pretrial release with pretrial services officers who monitor defendants and track their compliance with nonmonetary conditions of release;
- A system that expressly permits judges to consider danger to the community and to order a defendant detained without bail if no conditions of release will protect the community; and
- A system that sets forth time frames in which defendants must be indicted and brought to trial.

Legislation. On August 11, 2014, the legislature passed the Criminal Justice Reform Act (CJRA)

with bipartisan support. The Act's effective date was January 1, 2017. The CJRA has four principal components.

1. *It allows for the pretrial detention of defendants who present a serious risk of danger, flight, or obstruction.*
 2. *It calls for an objective evaluation of each defendant's risk and consideration of conditions of release that pretrial officers would monitor.*
 3. *It establishes speedy trial deadlines for defendants who were detained pretrial.*
 4. *It calls for the administrative director of the courts to create a statewide Pretrial Services Program.*
- **The Act's Purpose:** The CJRA specifically states that the legislation should be liberally construed to effectuate the purpose of relying primarily on pretrial release by nonmonetary means to reasonably ensure appearance and to provide safety to the community and to prevent obstruction of justice.
 - **The Post-Complaint-Warrant Process:** The CJRA permits the defendant to be temporarily detained to allow the Pretrial Services Program to prepare a risk assessment and recommend conditions of release. Within 48 hours, unless the prosecutor files a motion seeking the defendant's pretrial detention, the court must make a pretrial release decision and provide notice to the defendant of any conditions of release. The CJRA establishes a hierarchy of the permissible types of pretrial release. It should be noted that monetary bail remains a permissible form of pretrial release if the court determines that other means, such as release on one's own recognizance (ROR) or under nonmonetary conditions, is insufficient for a particular defendant.
 - **Pretrial Detention:** The court may order pretrial detention only if the prosecutor first files a detention motion. If the court then finds by clear and convincing evidence at a detention hearing that no conditions of release would reasonably ensure a defendant's appearance in court, the safety of the community, or the integrity of the criminal justice process, the court may order that the defendant be detained pretrial. The CJRA clarifies which offenses carry a presumption of detention, lists the information that a court should consider at a pretrial detention hearing, and makes clear that a court order of detention must direct that the defendant be able to meet with counsel.
 - **Speedy Trial:** Except for "excludable time for reasonable delays," defendants cannot remain in jail for more than 90 days before the return of an indictment, or once indicted, more than 180 days before the start of trial. The statute lists 13 periods of excludable time. The outer limit is two years, aside from delays attributable to the defendant. If these time frames are not met, the defendant must be released.
 - **Pretrial Services Program:** The Pretrial Services Program is responsible for preparing risk assessments and for monitoring defendants who are released on conditions. The program is currently funded by enhanced filing fees in civil cases.⁵³

The Constitutional Amendment. It was clear that the recommendations required a constitutional amendment and legislation and could not be done by court rule alone. In 2014 the legislature proposed a constitutional amendment to permit detention if the court found that no amount of monetary bail and nonmonetary conditions could reasonably ensure the person's

⁵³ The chief justice believes that future funding should be included in the judiciary's budget through the normal legislative budget allocation process.

appearance or protect the safety of any person or the community, or prevent the person from obstructing the criminal justice process. In November 2014, the constitutional amendment was approved by New Jersey voters, 61.8 percent to 38.2 percent.

Supreme Court Rule. In August 2016, the supreme court amended its Rules of Court to establish procedures needed to implement the legislation. These rules went into effect on January 1, 2017.

The judiciary took steps to make sure that the courts would be ready to implement the legislation:

- With the assistance of the Laura and John Arnold Foundation (LJAF), the judiciary adopted the use of a risk assessment tool called the Public Safety Assessment (PSA).⁵⁴ After reviewing thousands of cases in New Jersey, the PSA was validated for use in this state. The PSA contains nine factors that were identified as predictive of risk of flight and danger to the community. Those risk factors are:
 1. Age at current arrest;
 2. Current violent offense;
 - 2a. current violent offense and 20 years old or younger;
 3. Pending charge at the time of the offense;
 4. Prior disorderly persons conviction (misdemeanor);
 5. Prior indictable conviction (felony)
 - 5a. prior conviction (disorderly persons or indictable);
 6. Prior violent conviction;
 7. Prior failure to appear pretrial in the past two years;
 8. Prior failure to appear pretrial older than two years ago; and
 9. Prior sentence to incarceration.
- The judiciary transformed its technology to effectively use and populate the risk assessment tool by utilizing LiveScan fingerprinting technology to identify the arrestee and compile his or her adult criminal and court-appearance history from various state and federal law enforcement and judiciary databases.

⁵⁴ The Arnold Foundation Public Safety Assessment has been adopted by approximately 38 jurisdictions, including the states of Arizona, Kentucky, and New Jersey—as well as three of the largest cities and two of the largest jail systems.

- The judiciary created a Pretrial Services Program to run the PSA, make release recommendations to the court, and monitor whether released defendants are complying with their conditions of release;
- The judiciary conducted extensive outreach efforts with criminal justice stakeholders and community groups to educate them on the requirements of the new law and to address concerns on how the changes would impact the communities of New Jersey.

The Current Arrest/Detention Process

Upon the arrest of a person, law enforcement uses LiveScan fingerprinting to identify the arrestee and to learn of the arrestee's criminal history using the FBI Integrated Automated Fingerprint Identification System (IAFIS), the state police database, and the judiciary's automated case management system. The state police and judiciary's database information is automatically fed into New Jersey's electronic risk assessment tool and provides preliminary risk assessment results for the arrestee. Law enforcement uses the results and corresponding recommendation when entering information into the judiciary's case management system complaint form and deciding whether to release the arrestee on a complaint-summons or to seek a complaint-warrant from a municipal judge. Prosecutors review the law enforcement recommendations, and both prosecutors and judges are on-call, even on the weekends, for warrant applications. Judges also have access to the risk assessment results when determining whether there is sufficient probable cause to charge the arrestee on a complaint-warrant.

If the arrestee is charged with an indictable crime or a disorderly persons offense on a complaint-warrant, he or she is an eligible defendant under the CJRA, and unless the prosecutor files a motion for pretrial detention, the court must make a release decision in his or her case within 48 hours. If the arrestee is released, the CJRA requires that any conditions imposed by the court be the least restrictive possible to ensure his or her appearance in court and protect the community. The judiciary's Pretrial Services staff will monitor any release conditions, including requiring the arrestee to check in in-person or by telephone periodically, depending on his or her risk results as identified by the PSA. Staff can also decide whether to issue violations and recommend more stringent monitoring conditions if the court determines that the defendant should be re-released after a violation hearing.

If the prosecutor files a detention motion, a detention hearing must be held within three days, unless the court grants a continuance. Arrestees who are detained must be indicted within 90 days, and tried within 180 days after indictment, not counting any excludable time authorized under the CJRA.

The Attorney General's Law Enforcement Directive

In 2016 the attorney general promulgated a law enforcement directive that provided uniform guidance to prosecutors and police on implementation of the CJRA. The attorney general directive contains direction to law enforcement regarding when a defendant may be charged by complaint-summons and released on personal recognizance. The attorney general also instructs law enforcement as to when a defendant may be charged by complaint-warrant—when some

release condition or conditions are appropriate to manage the risk of flight, the risk to the safety of the community, witnesses, and victims, and/or the risk that defendant will obstruct the criminal justice process. The attorney general directive also lists crimes that must be charged by complaint-warrant.

The directive tracks the CJRA and makes it clear that a prosecutor may not seek imposition of monetary bail in an amount that the defendant cannot afford to satisfy.

- Monetary bail may not be imposed to prevent the defendant’s release; it can be used only to discourage flight.
- Monetary bail may not be used to ensure the safety of any other person or the community or to ensure that the defendant will not obstruct or attempt to obstruct the criminal justice process.

The prosecutor must seek pretrial detention—and not excessive monetary bail—if the prosecutor determines that no conditions of release will reasonably ensure the safety of any other person or the community in general.

Social Benefits and Cost Savings

New Jersey has identified benefits and cost savings created by criminal justice reform.

- Defendants are now properly identified through LiveScan.
- Prosecutorial oversight of the charging process and early case screening lead to more efficient criminal justice case processing.
- Use of the risk assessment and nonmonetary conditions of release has led to the release of defendants whose risk can be managed through monitoring by Pretrial Services and has reduced the number of defendants who are detained as a result of their financial status. This promotes:
 - public safety, by detaining the highest-risk defendants that pose an unreasonable risk on pretrial release;
 - the potential for defendants who present a manageable risk to maintain their community ties and employment status, rather than destabilizing in the county jail; and
 - effective utilization of limited resources for the public good.

How New Jersey Succeeded at Criminal Justice Reform

Criminal justice reform was successful in New Jersey because of strong leadership by persons committed to reform and a governmental framework that makes reform possible. New Jersey’s governmental system includes:

- A strong chief justice who serves as the administrative head of all the courts in the state. Chief Justice Rabner provided leadership by convening the Joint Committee on Criminal Justice and supporting their findings and recommendations. The chief justice and the committee then assisted the legislature by providing the information needed to justify revisions to the constitution and bail statutes.
- A supreme court that promulgated rules governing the administration, practice and procedure in all courts in the state, and judges who are appointed to office.⁵⁵
- A strong administrative director of the New Jersey courts, Judge Glenn Grant, who understood the importance of using data to drive the decision-making process and who enhanced the courts' technology not only to enable the analysis of data to measure the impact of reform, but also to enable law enforcement to use LiveScan fingerprinting to access a defendant's criminal history and populate the risk assessment tool.
- Attorneys general, first John J. Hoffman and then Christopher Porrino, and their director of the Division of Criminal Justice, Elie Honig, who exercised their authority over the appointed county prosecutors and issued directives on when motions for pretrial detention should be filed throughout the state.
- A strong public defender, Joseph Krakora, who helped to secure support from indigent-defense counsel.
- It was also critical that the three branches of government cooperated and replicated their history of collaboration.

Other factors that led to success included:

- Technical support from the Arnold Foundation to implement the Public Safety Assessment and to advise the judiciary of best practices in bail reform across the country.
- Support from organizations such as the American Civil Liberties Union, the Drug Policy Alliance, the NAACP, and the Latino Coalition.
- The decision to not include the bail industry on the Joint Committee on Criminal Justice. It was clear that the bail industry would oppose any meaningful reform as evidenced by the subsequent filing of a complaint in the U.S. District Court to enjoin implementation of the law.
- The attorney general's role in addressing the public safety concerns of county prosecutors and law enforcement by successfully lobbying for weapons charges to receive a more restrictive recommendation from Pretrial Services.
- The judiciary's commitment to technology has led to the creation of a fully automated statewide criminal case management process. New Jersey has a truly paperless system, as everything from case initiation through final disposition, including the defendant's fingerprinting, the filing of the complaint, the calculation of the defendant's PSA risk results, the processing of motions, pretrial monitoring, and case tracking to final disposition, is done electronically.

⁵⁵ New Jersey Constitution, Article VI.

The Impact

To date, the impact of criminal justice reform appears to be positive and accomplishing its purpose. According to statistics released by the Administrative Office of the Courts, from January 1, to September 30, 2017, 33,499 defendants fell under the provisions of the CJRA. Of those defendants, 2,670, or 8.0 percent, were released on their own recognizance, and 23,654, or 70.6 percent, were released with conditions and monitored by Pretrial Services staff. In addition, 5,870 defendants, or 17.5 percent, were detained by the courts because they posed a risk of flight, a risk to community safety, or a risk of obstructing justice.⁵⁶

The Future

The judiciary's administrative office is working to improve its data collection and analysis to provide the public and stakeholders with information regarding the impact of the CJRA on community safety. The judiciary is also working to enhance data from prior years to compare failures to appear and the impact on community safety under the CRJA with their pre-2017 rates.

⁵⁶ Of the remaining defendants, 1,084, or 3.2 percent, had their cases dismissed or remanded to municipal court, and the cases for 221 defendants, or 0.7 percent, were still pending resolution.

Texas

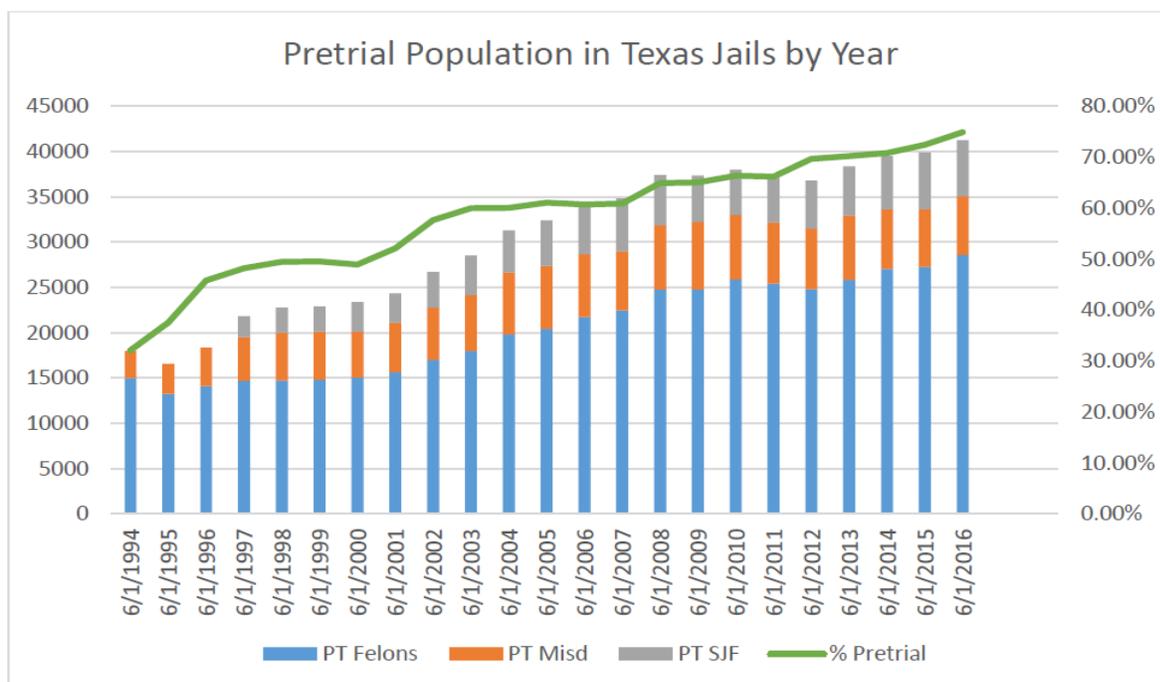
- June 2015 Texas Judicial Council's (TJC) Criminal Justice Committee was established with a charge by the chief justice to "assess the impact of pretrial criminal justice statutes and policies in Texas to determine if there are ways in which Texas courts can enhance public safety and social outcomes when making pretrial confinement decisions, and identify judicial policies or initiatives that could be enacted to further those goals."
- Nov. 2015 The Texas Office of Court Administration and the Texas Indigent Defense Commission partnered with the Public Policy Research Institute at Texas A&M University to conduct a study on pretrial practices in Texas.
- May 2016 A class action was filed in the U.S. District Court for the Southern District of Texas under 42 U.S.C. §1983 against Harris County, the Harris County Sheriff's Office, and hearing officers, claiming that jailing a person because of an inability to pay was a violation of the Equal Protection and Due Process clauses of the Constitution.
- Oct. 2016 The TJC accepted the report and recommendations of the Criminal Justice Committee, and a resolution to the legislature addressing the need for pretrial reform was passed.
- Dec. 2016 The Senate Committee on Criminal Justice issued its Interim Report to the 85th Legislature, tasking the Office of Court Administration (OCA) with gathering data on pretrial intervention programs, including a description of the program, a list of eligible offenses, the number of successful participants, and the number of unsuccessful participants each state fiscal year.
- Mar. 2017 The Public Policy Research Institute at Texas A&M released its report, *Liberty and Justice: Pretrial Practices in Texas*.
- Mar. 2017 Bail reform bills, HB 3011 by Rep. Andrew Murr (R-District 53) and SB 1338 by Sen. John Whitmire (D-Houston) filed.
- Apr. 2017 U.S. District Court for the Southern District of Texas Houston Division releases opinion in *O'Donnell v. Harris County*.
- May 2017 Texas legislature's 85th regular session concluded without having passed bail reform. HB 3011 was filed but did not advance to committee. Key provisions were incorporated into SB 1338. The Senate bill passed the Senate with a vote of 26-5 on May 4, but died in House committee.

- Jan. 2018 A class action was filed in the U.S. District Court for the Northern District of Texas against Dallas County, the sheriff, county magistrates, and district and county judges alleging that the county’s practice of setting money bail amounts without an inquiry into a defendant’s ability to pay results in the detention of people solely on the basis of their poverty, and as such, these practices violate the Fourteenth Amendment’s Equal protection and Due Process clauses. The complaint alleged that bail amounts are not individualized but set according to predetermined money bail schedules, that these schedules are interpreted to require secured money bail in every case, and further that they are the only means used to determine release conditions. The lawsuit applies to practices relating to individuals arrested for misdemeanor or felony charges.
- Feb. 2018 5th Circuit Court of Appeals releases opinion in *O’Donnell v. Harris County*.
- Apr. 2018 A class-action lawsuit was filed in the U.S. District Court for the Southern District of Texas against Galveston County, the district and county court judges, county magistrates, and the district attorney. The complaint alleges that the use of a fixed bail schedule and the absence of opportunities for arrestees to raise issues relating to their ability to pay results in situations in which “wealthier people can purchase their release, while similarly situated, but less wealthy people accused of the same crimes are locked in jail.” The complaint also alleges that because hearings are not individualized and do not take into account a person’s risk of flight or danger, the county lacks justification for refusing to release people who cannot pay. And as such, the complaint alleges that these practices violate the Fourteenth Amendment’s Equal Protection and Due Process clauses. The lawsuit applies to practices relating to individuals arrested for misdemeanor or felony charges.

Background and Extent of the Issue

Twenty years ago in Texas, one in three jail inmates was awaiting trial. By 2017, that number had grown to three out of four. The pretrial population in Texas jails rose from approximately 16,000 in 1994 to over 40,000 in 2016.⁵⁷ The average cost to Texas taxpayers in 2016 for jailing people pretrial, many of whom pose no risk of violence or flight, was approximately \$60.12 per day. With a population of 41,243 pretrial individuals being held in Texas jails on June 1, 2016, the cost per day to local government was \$2,479,529.⁵⁸ Annualized, that figure is approximately \$905,028,085.

Table 1. Pretrial Population in Texas Jails by Year⁵⁹



The Current Pretrial Process in Texas

After a person is arrested in Texas, they are brought before a magistrate and given bail, defined as “the security given by the accused that he/she will appear and answer before the proper court the accusation brought against him/her, and includes a bail bond or a personal bond.”⁶⁰ The amount of bail is required to be set by the court, judge, or magistrate or officer taking the bail

⁵⁷ TEXAS JUDICIAL COUNCIL, CRIMINAL JUSTICE COMMISSION REPORT AND RECOMMENDATIONS: PRETRIAL DECISION-MAKING PRACTICES (October 2016), citing data from the Texas Commission on Jail Standards (excludes federal contract and state parole violator inmates). See <http://www.txcourts.gov/media/1436204/criminal-justice-committee-pretrial-recommendations-final.pdf>, at 2.

⁵⁸ *Id.*, at 3.

⁵⁹ *Id.*, at 2.

⁶⁰ Tex. Crim. Proc. Code Ann. Art. 17.01.

pursuant to the exercise of discretion and the following rules:

1. The bail is to be sufficiently high to give reasonable assurance that the undertaking will be complied with;
2. The power to require bail is not to be so used to make it an instrument of oppression;
3. The nature of the offense and the circumstances under which it was committed are to be considered;
4. The ability to make bail is to be regarded, and proof may be taken upon this point; and
5. The future safety of a victim of the alleged offense and the community shall be considered.⁶¹

Depending on the jurisdiction, magistrates might have additional information, such as criminal history of the defendant, risk assessment information, employment information, and previous failure to appear information.⁶² Some jurisdictions also utilize bond schedules.⁶³

Texas appellate courts have held that courts should weigh the following factors in determining the amount of bail, in addition to the statutory factors:

1. The possible punishment for the offense;
2. The accused's work record;
3. The accused's family ties;
4. The accused's length of residency;
5. The accused's prior criminal record, if any;
6. The accused's conformity with the conditions of any previous bond;
7. The existence of outstanding bonds, if any; and
8. Aggravating circumstances alleged to have been involved in the charged offense.⁶⁴

Bail Reform Efforts in Texas

Formed in June 2015, the Texas Judicial Council's (TJC) Criminal Justice Committee was established with a charge by the chief justice to "assess the impact of pretrial criminal justice statutes and policies in Texas to determine if there are ways in which Texas courts can enhance public safety and social outcomes when making pretrial confinement decisions, and identify judicial policies or initiatives that could be enacted to further those goals."⁶⁵ The committee studied the pretrial and bail issues and made recommendations for bail reform in October 2016.

⁶¹ Tex. Crim. Proc. Code Ann. Art. 17.15.

⁶² Interim Report to the 85th Texas Legislature (House Committee on County Affairs, January 2017), at 49.

<http://www.house.state.tx.us/media/pdf/committees/reports/84interim/County-Affairs-Committee-Interim-Report-2016.pdf>

⁶³ *Id.*

⁶⁴ Tex. Crim. Proc. Code, *supra*, note 60, at 5-6, citing *Ex Parte Scott* (App. 2 Dist. 2003) 122 S.W.3d 866; *Ex Parte Ragston* (App. 14 Dist. 2014) 422 S.W.3d 904; *Ex Parte Castellanos* (App. 14 Dist. 2014) 420 S.W.3d 878; *Brown v. State* (App. 14 Dist. 2000) 11 S.W.3d 501; *Jobe v. State* (App. 11 Dist. 2016) 482 S.W.3d 300; *Cooley v. State* (App. 1 Dist. 2007) 232 S.W.3d 228; *Ex Parte Hunt* (App. 2 Dist. 2004) 138 S.W.3d 503; *Ex Parte Ruiz* (App. 1 Dist. 2004) 129 S.W.3d 751; *In re Hulin* (App. 1. Dist. 2000) 31 S.W.3d 754; *Nguyen v. State* (App. 1 Dist 1994) 881 S.W.2d 141; *Ex Parte Goosby* (App. 1 Dist. 1985) 685 S.W.2d 440; and *Ex Parte Rubac* (Crim.App. 1981).

⁶⁵ Tex. Crim. Proc. Code, *supra* note 60, at 1.

The committee's recommendations were informed by research conducted by Texas A&M's Public Policy Research Institute on bail practices in Texas.⁶⁶

The Criminal Justice Committee found that Texas's current system of pretrial bail decision making by magistrates:

1. Is primarily void of evidence-based pretrial risk assessment with which to determine the defendant's flight risk or risk to public safety.
2. Addresses ensuring that the defendant will appear and answer the accusation brought against him/her most often through a monetary condition of release.
3. Prohibits managing the risks of pretrial misconduct through the denial of bail. For all defendants charged with a crime, with certain few exceptions, the Texas Constitution requires a bail to be set or the defendant released.
4. Is primarily dependent upon a defendant's ability to post money bail, which, in turn, is dependent upon his/her financial resources.
5. Results in detention of poor defendants who present low risks of flight or danger to the community.
6. Results in release of more affluent defendants who present severe risks of flight or danger to the community.
7. Attempts to mitigate risk of flight or danger to the community through nonmonetary conditions of release, such as interlock devices on vehicles and "no contact" conditions, or through the setting of a high amount of monetary bail.
8. Is dependent upon the defendant's compliance with nonmonetary conditions to protect the public.
9. Is ineffective in ensuring the defendant's compliance with nonmonetary conditions due to a lack of supervision in place to monitor the defendant's compliance with nonmonetary conditions.⁶⁷

The committee recommended the following:

Recommendation 1: The Legislature should require defendants arrested for jailable misdemeanors and felonies to be assessed using a validated pretrial risk assessment prior to appearance before a magistrate under Article 15.17, Code of Criminal Procedure.

Recommendation 2: The Legislature should amend the Texas Constitution bail provision and related bail statutes to provide for a presumption of pretrial release through personal bond, leaving discretion with judges to utilize all existing forms of bail.

Recommendation 3: The Legislature should amend the Texas Constitution and enact related statutes to provide that defendants posing a high flight risk and/or high risk to community safety may be held in jail without bail pending trial after certain findings are made by a magistrate and a detention hearing is held.

⁶⁶ DOTTIE CARMICHAEL ET AL., LIBERTY AND JUSTICE: PRETRIAL PRACTICES IN TEXAS (Public Policy Research Institute 2017), http://www.txcourts.gov/media/1437499/170308_bond-study-report.pdf.

⁶⁷ TEXAS JUDICIAL COUNCIL, *supra*, note 56, at 7.

Recommendation 4: The Legislature should provide funding to ensure that pretrial supervision is available to defendants released on a pretrial release bond so that those defendants are adequately supervised.

Recommendation 5: The Legislature should provide funding to ensure that magistrates making pretrial release decisions are adequately trained on evidence-based pretrial decision-making and appropriate supervision levels.

Recommendation 6: The Legislature should ensure that data on pretrial release decisions is collected and maintained for further review.

Recommendation 7: The Legislature should expressly authorize the Court of Criminal Appeals to adopt any necessary rules to implement the provisions enacted by the Legislature pursuant to these recommendations.

Recommendation 8: The Legislature should provide for a sufficient transition period to implement the provisions of these recommendations.⁶⁸

In October 2016 the committee's report and recommendations were accepted by the TJC. This report was the basis for TJC's legislative resolutions on pretrial reform, which were adopted at the same time.⁶⁹

Texas A&M's Public Policy Research Institute's Study on Pretrial Practices in Texas

In October 2016, the TJC asked the Public Policy Research Institute at Texas A&M University to conduct a study on pretrial practices in Texas to inform the TJC's Criminal Justice Committee's recommendations and test the potential impacts of its policy guidance. The study aimed to compare financial and risk-based pretrial systems, and 3.5 years of criminal case data from two Texas jurisdictions were compared—Tarrant (Fort Worth) and Travis (Austin) counties. Tarrant County determines pretrial release almost exclusively using financial bond; a pretrial services department screens and monitors personal bond for 6 percent of defendants. Travis County uses a validated risk assessment tool to identify low-risk defendants for release without financial requirements.⁷⁰ The study yielded five major findings:

- (1) Validated pretrial risk assessment successfully predicts defendants' chance of bond failure.
- (2) Decisions to release or detain defendants can be obtained using a lower-cost statistical algorithm instead of an interview-based risk assessment.
- (3) Validated risk assessment results in better pretrial classification: fewer high-risk defendants are released, and fewer low-risk individuals are detained.
- (4) The costs of a risk-informed pretrial release system are more than offset by savings that occur when defendants are properly detained.

⁶⁸ *Id.*, at 8.

⁶⁹ See Tex. Jud. Council Res., <http://www.txcourts.gov/media/1436331/criminal-justice-committee-recommendations.pdf>.

⁷⁰ CARMICHAEL ET AL., *supra* note 66.

(5) A risk-informed pretrial release system is fairer for defendants.⁷¹

Federal Class Actions Filed: Harris, Dallas, and Galveston Counties

Harris County: In May 2016 a class action was filed under 42 U.S.C. §1983 against Harris County, the Harris County Sheriff’s Office, and hearing officers claiming that the plaintiff’s pretrial detention because they could not afford cash bail was a violation of the Equal Protection and Due Process clauses of the Constitution. Specifically, the plaintiff claimed that after being arrested for driving with an invalid license, she was detained in the Harris County Jail because she couldn’t afford the \$2,500 bail. Her bail amount was set according to a bail schedule that did not consider the plaintiff’s individualized circumstances. The plaintiff alleged that she was told by Harris County Sheriff’s deputies not to speak at her 60-second hearing, and pursuant to Harris County’s policies and practices, no inquiry was made into her ability to pay when the hearing officer found probable cause for her arrest.⁷²

After an eight-day hearing on the plaintiff’s motion for a preliminary injunction, Chief District Court Judge Lee H. Rosenthal, in a 193-page opinion, enjoined Harris County from “detaining indigent misdemeanor defendants who are otherwise eligible for release but are unable because of their poverty to pay a secured money bail.”⁷³ The court also ordered that Harris County Pretrial Services must verify a misdemeanor arrestee’s inability to pay bail on a secured basis by affidavit. Further, the court ordered that the Harris County Sheriff must release on unsecured bail those misdemeanor defendants whose inability to pay is shown by affidavit, who would be released on secured bail if they could pay, and who have not been released after a probable cause hearing held within 24 hours after arrest.⁷⁴

Harris County appealed the injunction to the U.S. 5th Circuit Court of Appeals, and the Conference of Chief Justices, along with several state’s attorneys generals, the American Bar Association, the U.S. Department of Justice, and a number of other organizations filed amicus curiae briefs.⁷⁵ In April 2017 the 5th Circuit affirmed the district court’s findings of fact and conclusions of law except as to §1983 claims against the county sheriff and the procedural protections guaranteed by due process. However, the court found the injunction was not narrowly tailored to address the issue. Rather, the court suggested, “Thus, the equitable remedy necessary to cure the constitutional infirmities arising under both clauses is the same: the County must implement the constitutionally-necessary procedures to engage in a case-by-case evaluation of a given arrestee’s circumstances, taking into account the various factors required by Texas state law (only one of which is ability to pay). These procedures are: notice, an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision by an impartial

⁷¹ *Id.*

⁷² O’Donnell v. Harris, S.D. Tex. 2016 (No. 4:16-cv-1414), Complaint at 4.

⁷³ Slip opinion at 181, https://www.gpo.gov/fdsys/pkg/USCOURTS-txsd-4_16-cv-01414/pdf/USCOURTS-txsd-4_16-cv-01414-5.pdf.

⁷⁴ *Id.*, at 181-182.

⁷⁵ Brief of Conference of Chief Justices as *Amicus Curiae* in Support of Neither Party.

<https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=5af5f763-e0cd-62ac-e9ae-c8feb822eb41&forceDialog=0>

decisionmaker.”⁷⁶

Dallas County: In Dallas County, a class-action lawsuit against the county, the sheriff, county magistrates, and district and county judges was filed in January 2018 alleging that the county’s practice of setting money bail amounts without an inquiry into a defendant’s ability to pay results in the detention of people solely on the basis of their poverty. The complaint alleges that bail amounts are not individualized but set according to predetermined money bail schedules, that these schedules are interpreted to require secured money bail in every case, and further that they are the only means used to determine release conditions. Unlike in Harris County, the Dallas County lawsuit applies to practices relating to individuals arrested for misdemeanor or felony charges.

The complaint alleges that arrestees who cannot afford to pay the amount provided for on the schedule are detained without the opportunity to raise the issue of ability to pay until their first appearance in court—a period plaintiffs argue can last from between four to ten days, or longer. The complaint notes that nearly 70 percent of inmates in the Dallas County Jail are in pretrial status.

The complaint further alleges that the first court appearance is not a real opportunity for a defendant to raise ability-to-pay issues or challenge their conditions of release, because arrestees are brought into the courtroom to speak to a judge only if they are pleading guilty. As a result, arrestees who are poor are kept in jail solely because they cannot afford to make a monetary payment, while arrestees with access to money are released.

Galveston County: In Galveston County, a class-action lawsuit against the county, the district and county court judges, county magistrates, and the District Attorney was filed in April 2018. The complaint alleges that the use of a fixed bail schedule and the absence of opportunities for arrestees to raise issues relating to their ability to pay results in situations in which “wealthier people can purchase their release, while similarly situated, but less wealthy people accused of the same crimes are locked in jail.” The complaint alleges that because hearings are not individualized and do not take into account a person’s risk of flight or danger, the county lacks justification for refusing to release people who cannot pay. Like in Dallas County, the lawsuit in Galveston County applies to practices relating to individuals arrested for misdemeanor or felony charges.

The complaint also alleges that arrestees can remain in jail for more than a week, often longer, before a bail hearing is held. The complaint notes that 71 percent of people awaiting trial in the Galveston County Jail are in pretrial status and that the average length of stay in the jail is trending upward.

Legislative Reform Attempted

Bail reform legislation was proposed in the 85th Legislature. Two bills were filed, one in the House and one in the Senate: HB 3011, filed by Rep. Andrew Murr (R-District 53), and SB

⁷⁶ 5th Circuit opinion, 21-22

1338, filed by Sen. John Whitmire (D-Houston). Generally, the bills required the use of pretrial risk assessment, the imposition of the least restrictive release conditions to ensure court appearance, and detention without bond upon a court's finding that no conditions could ensure a defendant's court appearance or public safety. Key bill provisions were based on findings and recommendations of the TJC's Criminal Justice Committee report. HB 3011 was filed but did not advance to committee. Key provisions were incorporated into SB 1338. The Senate bill passed the Senate with a vote of 26-5 on May 4, but died in House committee.

Moving Beyond Partisan Politics

Partisan politics has had almost no bearing on bail reform efforts in Texas. SB 1338 was sponsored by Sen. John Whitmire (D-Houston) and HB 3011 by Rep. Andrew Murr (R-District 53). The legislative reform effort was also supported by social justice groups, including Texas Appleseed, ACLU, and the Texas Fair Defense Project—but it was also supported by the Texas Public Policy Foundation, a conservative think tank. The media were also solidly in favor of the proposed legislation.

What Was the Opposition to Bail Reform Efforts?

The only real opposition to bail reform efforts in Texas was the bail industry—both local Texas bail bond businesses, as well as the national bail insurance industry.

Why Legislation Instead of Court Rule Change?

In the area of court fines and fees reform, the Texas Judicial Council could make changes to the rules in the Collections Improvement Program, a program created by the legislature to be administered by the Texas Office of Court Administration. In August 2016, the Texas Judicial Council approved amendments to the rules that govern the implementation and operation of programs operated by counties and municipalities to improve the collection of court costs, fees, and fines.⁷⁷ However, criminal procedure has always been the legislature's exclusive province in Texas. Texas's high criminal court has no rule-making authority for trial court procedure, and the supreme court cannot write rules of criminal procedure. Further, with a nonunified court system in Texas, legislation was the best way to achieve statewide, uniform change with more certain implementation.

⁷⁷ Texas Administrative Code, Title 1, Chapter 175.

Looking to the Future: A Local Approach

After the failure of the bail reform legislation, several localities opted to take on bail reform themselves. Chief Justice Hecht noted, “When there is this kind of failure of state policy, local government can just come right in. There’s nothing to prevent judges from doing it themselves.”⁷⁸ Litigation, or the threat of it, may be prompting jurisdictions to examine their practices, though direction and support for reform is coming from a variety of local and state sources. For example:

- Judges in Nueces County have developed and are piloting the use of an objective risk assessment instrument. The Public Policy Research Institute at Texas A&M University is studying the impact of the tool.
- Judges and pretrial program staff from counties around the state are involved in training, information sharing, and advocacy to raise awareness of the need for pretrial reform and the local strategies needed to be successful. Pretrial reform has been featured on conference and training agendas regularly over the last several years.
- The Texas Association of Pretrial Services (TAPS) continues to be an important pretrial-focused forum for the exchange of ideas, sharing of research findings, and training on pretrial-related best practice strategies. TAPS held its fifth annual conference in April 2018. The agenda featured local, state, and national speakers on a range of reform-oriented topics, including using evidence-based practices in pretrial, planning and implementing strategies to address the mental health needs of pretrial detainees, and managing change in pretrial environments.
- OCA is developing a web-based risk assessment instrument to assist judges in making pretrial release decisions. The tool is called the Pretrial Risk Assessment Information System for Texas (PRAISTX). PRAISTX will provide judges with information about the risk that a defendant released pretrial will fail to appear or that the defendant will commit a new crime, including a violent crime. Risk scores generated by the tool will be based on nine factors. No defendant interview is required with PRAISTX.
 - Risk scores generated by the tool will be based on the following factors:
 - Current offense
 - Pending charges at time of current offense
 - Age at current arrest
 - Prior misdemeanor convictions
 - Prior felony convictions

⁷⁸ John Buntin, *The Fight to Fix America’s Broken Bail System*, GOVERNING MAG., Oct. 2017, <http://www.governing.com/topics/public-justice-safety/gov-bail-reform-texas-new-jersey.html>.

- Number of violent convictions
- Number of pretrial FTAs (failure to appear) in last two years
- Pretrial FTAs in case older than two years
- Previous sentences to jail or prison greater than 14 days

The tool is currently being prepared for piloting and will be available for use later this year.

PRAISTX is not designed to be a substitute for the application of judicial discretion, and the risk scores it generates are not intended to be used to automatically detain or release a defendant. PRAISTX will not generate recommendations about conditions of pretrial release a judge may want to impose.

- In June 2017, the TJC's Criminal Justice Committee was continued by the chief justice and charged to, among other things, evaluate and monitor implementation of the recommended pretrial bail reforms. The committee has met several times during the year and will issue a report with recommendations to the TJC in late June. The committee's report will be used to support the drafting of legislative resolutions focused on the need for pretrial reform.
- OCA planned a pretrial summit held in October 2018. The summit brought teams together in Austin from counties from around the state to hear from national and state leaders on pretrial reform and will include facilitated sessions for counties to develop pretrial improvement strategies.

IV. Lessons Learned from the *Practical Guide's* Six Bail Reform Case Studies

Executive Summary

The two most common ingredients for successful reforms were the following:

- Task Force/Committee/Commission leadership: Arizona, California, Connecticut, Maryland, New Jersey, and Texas.
- The judiciary's ability to promulgate rules governing pretrial practices in all courts in the state: Arizona, California, Maryland, and New Jersey.

Opposition to reform came from two main sources:

- The bail industry: California, Connecticut, Maryland, and Texas.
- Unwilling legislatures: California, Connecticut, Maryland, and Texas.

Other shared ingredients for success included:

- Local innovations within the state had already begun and shown success: Arizona, California, and Maryland.
- Strong leadership by chief justices and state court administrators: Arizona, California, and New Jersey.
- Legislatures willing to pass reforms: Arizona, Connecticut, and New Jersey.
- Independent and highly credible studies of existing pretrial release systems: California, Maryland, and Texas.
- Support from organizations on both sides of the aisle (e.g., from the ACLU to ALEC): Arizona, New Jersey, and Texas.
- Lawsuits filed against local jurisdictions: California and Texas.

Extended Summary

While the chosen paths to reform may appear unique at first glance, each of the six states took some similar key steps on their individual paths. While all six states experienced varying degrees of success, Arizona and New Jersey were arguably the most successful in achieving the majority of their recommended pretrial reforms. Arizona and New Jersey share one very important element: both states had strong support from their respective legislative and executive branches. Successful pretrial reform demonstrably requires three-branch support.

Reforms in all six states began with appointed groups of people tasked with reviewing pretrial practices:

- Arizona Chief Justice Bales created the Task Force on Fair Justice for All in 2016.
- California Chief Justice Cantil-Sakauye created the Pretrial Detention Reform Workgroup in 2016.

- Since 1967, Connecticut’s legislature has convened various commissions to reform pretrial practices, with the latest independent body, the Sentencing Commission, established in 2011.
- Maryland also has a history of creating various commissions to address pretrial reforms, including the 2014 judiciary-created Task Force on Pretrial Confinement and Release, and ultimately the constitutionally created Standing Committee on Rules of Practice and Procedure of the Maryland Court of Appeals.
- New Jersey Chief Justice Rabner created a three-branch Joint Committee on Criminal Justice in 2013.
- The Texas Judicial Council created a Criminal Justice Committee to assess pretrial criminal justice in 2015.

Four of these states had the ability to promulgate court rules governing pretrial practices in all the courts in their state:

- In January 2014, the Arizona Supreme Court modified its Code of Judicial Administration to include a new section on evidence-based pretrial services. The new section provided requirements for establishing and operating pretrial services for all courts statewide, and in June of 2015, by Supreme Court Administrative Order, the PSA was approved as a validated pretrial risk assessment tool for all Arizona courts, including courts hearing misdemeanor cases.
- In 2015 Rule 4.105 of the California Rules of Court became effective. The rule was adopted on an urgency basis (within 19 days) on the request of Chief Justice Cantil-Sakauye to address concerns that courts were requiring defendants to post bail before challenging traffic infractions. In 2017 multiple rule changes recommended by the Criminal Law Advisory Committee and the Traffic Advisory Committee, in consultation with the Advisory Committee on Providing Access and Fairness, were adopted by the California Judicial Council.
- In 2017 Maryland’s Court of Appeals unanimously voted to recommend the adoption of Rule 4-216.1, prohibiting courts from imposing financial conditions that result in the pretrial detention of the defendant and expressly requiring courts to give priority to nonfinancial conditions of release.
- In 2016 the New Jersey Supreme Court amended its Rules of Court, to establish procedures needed to implement the 2014 legislation and constitutional amendment permitting detention only if the court found that no amount of monetary bail and nonmonetary conditions could reasonably ensure the person’s appearance or protect the safety of any person or the community, or prevent the person from obstructing the criminal justice process.

Three of these states also greatly benefited from having local innovations within the state that had already begun and shown success:

- Arizona: Phoenix Municipal Court’s Compliance Assistance Program; Pima County Consolidated Justice Courts and the Glendale and Mesa municipal courts’ Interactive Voice Response notification system; Mesa and Glendale municipal courts’ mental

competency proceedings pilot program; Maricopa County's Justice Court Video Appearance Center; and Pima County's MacArthur Safety and Justice Challenge.

- California: Humboldt County's pretrial justice technical assistance success; Imperial County Day Reporting Center; Riverside County's pretrial justice technical assistance success; Santa Clara County Office of Pretrial Services.
- Maryland: Baltimore County's, Montgomery County's, and St. Mary's County's pretrial programs.
- Texas: Judges in Nueces County have developed and are piloting the use of an objective risk assessment instrument. The Public Policy Research Institute at Texas A&M University is studying the impact of the tool.

V. Other Statewide Reform Efforts

In July 2017, again in April 2018, and again in January 2019⁷⁹, the National Task Force on Fines, Fees, and Bail Practices emailed Conference of State Court Administrators (COSCA) members asking them to share if their state or jurisdictions within their state had revised practices regarding pretrial/bail reform. The survey responses were combined with information from the [Task Force’s State Resource Guide Map](#). The most common responses were grouped into categories by “activity.” A majority of states created or assigned a judiciary commission or work group to study the issue of pretrial/bail reform. Jurisdictions participating in pilot programs utilizing risk assessment tools was the next most common response. See the chart below:

Activity	States
Judiciary Commission/Work Group <i>27 states</i>	Alabama, Arizona, Arkansas, California, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, Texas, Utah, Washington, Wisconsin
Pilot Projects with Risk Assessment Tools <i>25 states</i>	Alabama, Arizona, California, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Louisiana, Missouri, Nevada, New Hampshire, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin
Litigation <i>23 states</i>	Alabama, Arkansas, California, Colorado, Florida, Georgia, Illinois, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Washington
Curtailment of Use of Monetary Bail <i>14 states</i>	Alabama, Alaska, Arizona, California, Connecticut, Indiana, Maryland, Massachusetts, Minnesota, Nebraska, Ohio, Pennsylvania, Vermont, Wisconsin
Creation of Pretrial Release Rules/Guidelines <i>12 states</i>	Arizona, California, Indiana, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, Nevada, Pennsylvania, Vermont, Wisconsin
Training/Educating Judges/Quasi-Judicial Officers <i>12 states</i>	Alabama, Arizona, California, Kansas, Maryland, Nevada, New York, Oregon, Pennsylvania, Texas, Virginia, Wisconsin

⁷⁹ Responses from Pennsylvania, and Texas are forthcoming.

Creation/Use of Statewide Pretrial Risk Assessment Tool <i>10 states</i>	Alaska, Arizona, Indiana, Kentucky, Montana, Nevada ⁸⁰ , New Jersey, Oregon, Texas, Utah
Local Pretrial Risk Assessment Tools <i>10 states</i>	Alabama, California, Maryland, Michigan, Missouri, New Mexico, Texas, Virginia, Washington, Wisconsin
Creation/Use of Pretrial Services Programs <i>8 states</i>	Alaska, Arizona, California, Kentucky, Massachusetts, Nebraska, New Jersey, Ohio ⁸¹
Considering Use of Pretrial Risk Assessment Tool <i>8 states</i>	Alabama, California, Delaware, Massachusetts, Missouri, Oklahoma, Wisconsin
Legislation Reclassifying Certain Offenses <i>5 states</i>	Alaska, Arizona, California, Oklahoma, Wisconsin
Executive Branch Commission/Work Group <i>3 states</i>	Oklahoma, Oregon, New York
Elimination of Bail Schedules <i>3 states</i>	Arizona, California, Minnesota, Ohio ⁸²
Constitutional Amendment <i>2 states</i>	New Jersey, New Mexico
Bail by Credit Card <i>1 state</i>	New York
Bail Review Hearings <i>1 state</i>	Connecticut
Charitable Bail Organizations <i>1 state</i>	New York
Elimination of “Cash Only” Bail <i>1 state</i>	Connecticut
Local Use of “I-Bonds” <i>1 state</i>	Illinois
Pilot Project with Personal Recognizance <i>1 state</i>	Oklahoma
Implemented rule changes to allow courts to use preventative detention <i>1 state</i>	Arizona

⁸⁰ The Nevada Supreme Court is currently considering statewide implementation. A public hearing was held on February 5, 2019.

⁸¹ In some jurisdictions in Ohio.

⁸² In some jurisdictions in Ohio.

Implementing text/email/voice notification system <i>1 state</i>	Arizona
Adopted Standardized DV Assessment Tool <i>1 state</i>	Arizona
Passage of legislation to allow judges to mitigate a fine both at sentencing and post-sentencing on ability to pay <i>1 state</i>	Arizona
Passage of legislation to allow for the restriction of a drivers license instead of suspension <i>1 state</i>	Arizona