

Pretrial Preventive Detention

White Paper

Introduction

As states move away from monetary bail as the primary condition for pretrial release and toward risk-based pretrial release decision-making systems, the use of preventive detention on a limited basis for those who pose a risk of flight or to public safety has become a key element of pretrial systems in a growing number of states. As of 2019, at least 22 states and the District of Columbia had authorized preventive detention of at least some persons arrested for specified serious criminal offenses.¹ The District of Columbia was the first jurisdiction outside the federal system to institute preventive detention in 1970.² In recent years, New Jersey initiated its preventive detention program through amendments to its state constitution in 2014 and New Mexico amended its state constitution to authorize preventive detention in 2016.³ Arizona is the latest state to implement preventive detention through changes to its Rules of Court effective in January 2018.⁴ In 2018, California enacted legislation authorizing preventive detention, but the qualification of a voter referendum in opposition to the legislation in January 2019 has stayed its implementation.⁵

This trend continues as proposals to institute preventive detention through constitutional amendments, state statutes, and court rules are more frequently introduced or discussed. In efforts to moderate the expanding interest in implementing preventive detention processes, some scholars and civil rights advocates are urging caution and greater consideration of the potential consequences of expanding the authority of prosecutors and judges to detain defendants pretrial. They cite concerns that statutory language setting more expansive parameters on the persons and classes of crimes subject to preventive detention coupled with lack of rigorous due process safeguards may lead to even greater numbers of people being detained under the guise of pretrial justice reform.⁶

Court leaders are aware of these concerns and have their own questions about whether and how to engage in efforts to institute preventive detention in their states. In response to this need, the leadership of the Conference of Chief Justices and Conference of State Court Administrators established the CCJ/COSCA Work Group on Preventive Detention to inform and guide the development of this White Paper by the National Center for State Courts.⁷ The White Paper examines issues raised by scholars, civil rights and pretrial justice advocates, and court leaders through an analysis of statutory or judicial authority for preventive detention in Arizona, California, the District of Columbia, New Jersey, and New Mexico.⁸ It also discusses implementation challenges and lessons learned in the four of these jurisdictions that are in various stages of implementation. Our purpose is to provide guidance to state court leaders in leading and responding effectively to legislative actions to authorize or expand the use of preventive detention in their states, as well as in developing court rules on preventive detention that both protect the community and maximize individual liberty during the pretrial process.

The Rationale for Preventive Detention

The use of formal preventive detention processes to manage the risk of danger that a person accused of crime may present to the community pending criminal adjudication is of relatively recent origin. In 1951, the Supreme Court said that “a defendant's bail cannot be set higher than an amount that is reasonably likely to ensure the defendant's presence at the trial”.⁹ Until the adoption of the DC Court Reform and Criminal Procedure Act in 1970, and the federal Bail Reform Act of 1984, the law only recognized the use of bail to promote the defendant’s appearance in court.¹⁰ It did not recognize the use of money bail or any other measures to intentionally detain defendants based on dangerousness or to protect public safety.¹¹ Although the 1984 Act authorized use of preventive detention under narrow circumstances, it specifically prohibited and still prohibits, imposition in the federal courts of any financial condition (e.g. bail) that results in the pretrial detention of any person.¹²

In its 1987 Salerno decision the US Supreme Court upheld the constitutionality of the federal Bail Reform Act of 1984 and for the first time expressly authorized the judicial use of explicit preventive detention criteria to achieve the detention of arrested persons determined to constitute an undue risk to public safety if released from physical custody pending trial.¹³ In the absence of any explicit state statutory or constitutional authority or criteria to detain based on public safety, most states have continued to rely on the use of money bail to reduce risk to public safety as well as risk of flight.

The most obvious challenge to a pretrial detention process based on the posting of money bail is that it favors those who can afford bail and disadvantages those who cannot—persons who are disproportionately people of color.¹⁴ There is no direct or rational relationship between the thing being determined (degree of pretrial risk) and the criteria used to measure it (financial wealth). In recognition of this fact, many states are now following the lead of the District of Columbia and federal courts and reforming their pretrial policies to move away from an irrational system where pretrial release depends on the wealth of the accused and towards a more rational one where the issue of pretrial release is determined squarely on the basis of individual risk, the degree of risk that a specific person charged with a specific crime will inflict injury on another, flee, or otherwise obstruct justice pending adjudication of the crime(s) charged.

Persons Subject to Detention

In upholding the constitutionality of the federal Bail Reform Act of 1984, the Supreme Court in its *Salerno* decision said that the act “carefully limits the circumstances under which detention may be sought to the most serious of crimes,” referencing crimes of violence, offenses punishable by life imprisonment or death, serious drug cases, and certain repeat offenders.¹⁵ Based on *Salerno* and subsequent cases commentators have suggested that a preventive detention scheme that permits detention without regard to the seriousness of the charge would be unconstitutional.¹⁶ Some scholars advocate that the use of detention be limited primarily to those charged with violent offenses and, secondarily, to include those found to have willfully failed to appear for court or to have committed a jailable offense while on pretrial release.¹⁷ While some scholars oppose consideration of risk assessment scores in determining the persons subject to detention,¹⁸ others have proposed use of risk assessment tools geared specifically to risk of arrest for violent or serious crime as a “limited entry point” to preventive detention, as a necessary but not sufficient basis of preventive detention.¹⁹

Due Process Safeguards for Preventive Detention Processes

In its *Salerno* decision upholding the constitutionality of the 1984 Act, the US Supreme Court did not broadly define the essential requirements of a constitutional preventive detention process. However, the Supreme Court did cite specific core components of the 1984 Act as factors in its decision.²⁰ Those components include:

- (1) an adversarial hearing within a reasonably short period of time after arrest at which the defendant has the right to counsel, to testify, and to present and cross-examine witnesses;
- (2) a judicial finding based on clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person;
- (3) pretrial detention orders based on written findings of fact and statement of reasons for decision;
- (4) strict adherence to the jurisdiction's speedy trial requirements; and
- (5) an opportunity for appeal or review of the detention order.²¹

Risk Assessment

Pretrial decision-making is fundamentally a risk assessment process.²² As we transition from money bail to risk-based pretrial decision-making systems, the question of how best to measure or assess risk, especially the risk of pretrial offending, becomes critical. Traditionally, courts have relied on judges' subjective assessment of criminal risk based on the information most commonly available, including reports of the nature and circumstances of the charged offense and the defendant's prior criminal history, age, and community ties. Today, we have the benefit of actuarial risk assessment tools that consider some of the same factors²³ and have been consistently demonstrated to be more accurate and fair than the exercise of professional judgment alone.²⁴ Risk assessment tools are not intended to make pretrial release decisions, but merely to provide accurate, relevant, and reliable information to better inform the exercise of discretion by judges and other pretrial decision makers.

In an exhaustive analysis of a nationally representative sample of over 70,000 felony defendants on pretrial release from the seventy-five largest counties in the US between 1990 and 2006, researchers found that historically judges have often released and detained the wrong people. Half of those detained had less than 20% chance of re-arrest while an equivalent number of those released had a greater likelihood of committing a crime.²⁵

It is important to recognize, however, that actuarial risk assessment tools are based on group data. They do not predict whether the specific defendant will or will not reoffend. They tell us only that the defendant is in a group that presents a specified risk of reoffending. Depending on the tool, they also do not necessarily tell us what kind of offense the defendant is at risk of committing. Actuarial pretrial risk assessment tools, largely based on historical criminal justice data, can reflect and reinforce the racial and ethnic biases that have historically affected our criminal justice system, the so-called "base rate" problem.²⁶ Although, for example, most actuarial risk assessment tools have been shown to have "predictive parity" (e.g., African-American defendants assessed as high risk reoffend at the same rate as white defendants assessed as high risk), they often tend to classify higher percentages of minority defendants than white defendants as high risk.²⁷

Some recent research suggests that preventive detention provisions that restrict detention to persons who fall into moderate-high or high-risk categories and who are charged with a violent felony or domestic violence offense may significantly reduce pretrial detention and at the same time almost eliminate racial and ethnic disparities in detention.²⁸

Although actuarial risk assessment is now an important feature of effective pretrial decision-making, practitioners are advised not to assume that its use will always support reform goals. In addition to the concerns noted above, the assessment's accuracy and fairness depend on proper and on-going validation, calibration of risk scores and implementation based on current or recent data, as well as transparency, and effective community oversight and governance.²⁹ It is important that both those responsible for conducting the assessment and those who use the assessment receive appropriate training to understand its strengths and limitations (including that the assessment is based on group data) and its proper use in making critical individualized decisions.

Although the primary use of pretrial risk assessment information is in setting appropriate conditions of release,³⁰ risk assessment information is also increasingly used in preventive detention decision-making. Risk assessment information may be helpful in identifying low risk and moderate risk persons for release with appropriate conditions designed to promote their appearance and remaining arrest-free pending criminal adjudication.³¹ High risk scores may trigger more intensive pretrial supervision for the same purposes, or a detention hearing if the charges against the defendant satisfy the jurisdiction's detention criteria.³² Experts caution against the use of high risk scores as the primary or sole basis of a detention determination.³³ Preventive detention hearings often focus on risk to commit serious or violent offenses, not risk of flight to avoid prosecution or failure to appear.³⁴

The popular Arnold Ventures Public Safety Assessment (PSA) tool includes a “flag” assessing the risk of commission of a future violent offense. The items included in the PSA violence risk assessment flag include whether the currently charged offense is violent, the existence of prior felony and violent convictions, and whether the defendant is age 20 or younger.³⁵

Similar violence prediction factors were identified in the exhaustive national pretrial release study discussed earlier. The researchers found that only 1.9% of felony defendants were re-arrested for a violent crime. The most dangerous cohort were persons under 20, charged with murder, with an active criminal justice status, four or more prior arrests, and a prior violent felony conviction. Those charged with drug felonies were among the least likely to be rearrested for a violent crime.³⁶

Summary of Preventive Detention Provisions in Five Jurisdictions

Although nearly half the states have authorized preventive detention, many simply deny the right to pretrial release to a limited set of cases, typically capital crimes and other serious offenses that could result in life imprisonment. Most also do not have constitutional provisions, legislation, or court rules that articulate sufficient due process safeguards or procedural guidance for implementation.³⁷ The five jurisdictions profiled here (the District of Columbia, New Jersey, New Mexico, Arizona, and California) define a wider range of persons subject to detention, promote movement away from money bail to risk-based release decision-making, and provide important procedural safeguards, including an adversarial hearing within a short time after initial detention, the right to appointed counsel and other rights of defendants, a “clear and convincing evidence” standard for ordering preventive detention, written findings and reasons for detention, an opportunity for appeal or review of the detention order, and expedited trial for

defendants who are detained pending trial.

This summary highlights the key features of the preventive detention provisions in these jurisdictions, including persons subject to detention, the detention process, the use of risk assessment, the role of monetary bail, and any data available on the impact of preventive detention processes on pretrial release.³⁸ The summaries are presented in the order in which the jurisdictions authorized and implemented preventive detention. A table that accompanies this White Paper ([see Appendix](#)) summarizes the specific elements of each jurisdiction's preventive detention system and provides citations to the respective constitutional, statutory, or rules provisions.

District of Columbia³⁹

Persons Subject to Detention:

Persons subject to detention include those: (A) charged with a crime of violence, or a dangerous crime, as these terms are defined in § 23-1331; (B) charged with an offense under section 502 of the District of Columbia Theft and White Collar Crimes Act of 1982;⁴⁰ (C) presenting a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate a prospective witness or juror; or (D) presenting a serious risk that the person will flee.

The Process:

- The detention hearing shall be held upon oral motion of the attorney for the government.
- After a hearing, the person shall be detained upon a finding by clear and convincing evidence that no condition or combination of conditions will reasonably assure the appearance of the person as required, and the safety of any other person and the community.
- There shall be a rebuttable presumption that no condition or combination of conditions will reasonably assure the appearance of the person as required, and the safety of any other person and the community if the judicial officer finds by probable cause that the person committed certain dangerous crimes or crimes of violence while armed with a deadly or dangerous weapon, or while on pretrial release, or has been previously convicted of such a crime while on release, or committed two or more such offenses in separate incidents that are joined in the current case, or committed a robbery in which the victim sustained physical injury, or violated certain firearms laws, or has threatened a law enforcement officer, officer of the court, or prospective witness or juror in any criminal investigation or proceeding.
- At the hearing, the person has the right to counsel, to present and cross-examine witnesses, and to testify. Testimony by the person shall not be admissible on the issue of guilt but is admissible for the purpose of impeachment. Rules of evidence do not apply.
- In determining whether the person shall be detained the judge shall consider the nature and circumstances of the offense, the weight of the evidence, the history and characteristics of the person including the person's criminal justice status at the time of the current offense, and the seriousness of the danger to any person or the community that would be posed by the person's release.
- Any detention order shall include written findings of fact and statement of the reasons for decision. If detained, the person shall be entitled to a trial on an expedited calendar.

Risk Assessment:

The Pretrial Services Agency (PSA) for the District of Columbia makes recommendations regarding release and identifies persons subject to preventive detention based on risk assessment

determinations and statutory guidelines. PSA developed its own pretrial risk assessment tool in 2014 and revalidated the tool in FY 2018.⁴¹ In FY 2019 judges concurred with PSA recommendations in 78% of cases.⁴² According to PSA, released defendants remained arrest free in 87% of the cases⁴³ and free from arrest for a violent crime in 99% of cases.⁴⁴

Bail:

Secured money bail is rarely used in the District of Columbia and used typically to assure appearance. It is not used to assure public safety. According to the PSA, judges set financial bonds in only about 4% of the cases; and when a bond is set, it is nearly always a cash bond that is almost wholly refundable.⁴⁵

Results:

Of the 15,516 cases filed in FY 2019, about 18% were felonies and 82% were misdemeanors. 85% of all arrestees (felony and misdemeanor) were released at their first court appearance. The remaining 15 % (67% charged with felonies and 33% charged with misdemeanors) proceeded to detention hearings. Of the remaining 15%, 59% were released at the detention hearing (67% of the misdemeanor defendants and 55 % of the felony defendants) with the result that 25% of the felony defendants, 2 percent of the misdemeanor defendants, and 6% of all defendants remained detained.⁴⁶

New Jersey⁴⁷

Persons Subject to Detention:

New Jersey uses the term “pretrial detention” rather than the term “preventive detention.” Persons subject to pretrial detention include persons charged with any crime for which the penalty is life imprisonment or certain enumerated serious felony crimes including murder, aggravated manslaughter or manslaughter, vehicular homicide, aggravated assault, disarming a law enforcement officer, kidnapping, aggravated sexual assault, sexual assault, robbery, carjacking, aggravated arson, burglary, extortion, terrorism, firearms trafficking, and causing or permitting a child to engage in a prohibited sexual act. Persons previously convicted of two or more specified offenses are also eligible for detention, as well as any persons charged with a felony offense where the prosecutor believes there is a serious risk that the defendant poses a danger, will not appear, or will obstruct justice. The New Jersey pretrial detention statute also extends to domestic violence-related disorderly persons offenses, analogous to misdemeanors. Unless domestic violence is involved, defendants charged solely with disorderly persons offenses are not eligible for pretrial detention.

The Process:

- The defendant must have been arrested on or after January 1, 2017, for an offense described above, and on a warrant rather than a summons to appear. Defendants arrested prior to January 1, 2017, are subject to bail, and are not subject to detention.
- The prosecutor must file a pretrial detention motion, at which the defendant has the right to counsel, discovery, to present and cross-examine witnesses, and to testify. Subject to certain exceptions, testimony by the defendant at the hearing is not admissible on the issue of guilt in other proceedings. The normal rules of evidence do not apply.
- In most cases, there is a rebuttable presumption in favor of release unless the court finds probable cause that the defendant committed murder or a crime punishable by life imprisonment.

To detain in most cases, the court must find by clear and convincing evidence that no amount of bail, non-monetary conditions, or both will reasonably assure the defendant's appearance in court, the protection and safety of any other person or the community, and that the defendant will not obstruct or attempt to obstruct the criminal justice process.

- Where the defendant is charged with murder or a crime subject to life imprisonment, there is a rebuttable presumption in favor of detention. In those cases, the burden shifts to the defendant to prove by a preponderance of the evidence that the court can be reasonably assured that the defendant can be released on conditions. If found, the burden then shifts to the prosecutor to prove by clear and convincing evidence that the court cannot be reasonably assured.
- The state can proceed by proffer and consistent with principles of due process is not required to call live witnesses.⁴⁸
- Before being allowed to call an adverse witness on the issue of detention, a defendant must proffer how the witness's testimony would tend to undermine the State's evidence in support of detention in a material way.⁴⁹
- A pretrial detention order must contain written findings of fact and statement of reasons for decision.

Risk Assessment:

- New Jersey uses the Public Safety Assessment (PSA), which has been validated in that state. The PSA provides a scaled score from 1-6 to indicate a defendant's relative risk of failing to appear for court events (FTA score), and separately, the risk of being arrested for a new offense (NCA score) while on pretrial release. Additionally, the PSA provides the presence or absence of a "New Violent Criminal Activity Flag" (NVCA flag), signifying whether the defendant may be at increased risk of committing a new violent offense while on pretrial release. The presence of the flag is also based on a scaled score of 1-6; it is present when the score reaches 4 or higher.
- New Jersey also uses a Pretrial Release Recommendation Decision Making Framework (DMF) that utilizes the PSA scores, in conjunction with other objective factors, such as the current charge, to produce a recommendation for or against release.

Bail:

The New Jersey statute authorizes the use of money bail only when the trial court finds that release on the defendant's own recognizance, or release using only non-monetary conditions, will not suffice to achieve the goals of assuring court appearance, the safety of the public, and non-obstruction. The 2018 Report to the Governor and Legislature provided statistical data confirming that monetary bail is now rarely used in the Superior Court.⁵⁰ Of the 44,383 detention-eligible defendants in 2018, only 102 were ordered to post monetary bail, typically only after a defendant had failed to appear in court as required. New Jersey has effectively eliminated bail without formally doing so because the vast majority of defendants arrested after January 1, 2017, are either released with non-monetary conditions without the need to post bail or detained without the ability to post bail pursuant to the pretrial detention provisions.

Results:

Court appearance rates and rates of commission of new offenses after release are about the same as prior to the reforms. In addition, defendants are being released much more quickly. Overall, the pretrial population has been reduced significantly.

- Prosecutors filed requests to detain defendants in 43.7% of cases in 2017 and 49% in 2018.
- The rate of alleged commission of a new felony after release increased marginally from 12.7% in 2014 to 13.7% in 2017.

- The court appearance rate decreased marginally from 92.7% in 2014 to 89.4% in 2017.
- Average custody time prior to release decreased substantially from 62.4 days in 2014 to 37.2 days in 2017. The average number of days defendants were in custody while awaiting trial decreased by 40% between 2014 and 2017 and decreased more significantly for black defendants than for whites.
- In 2018, 19.5% of detention-eligible defendants were detained. When considering all complaints filed in 2018, 6.4% were detained.
- The overall county jail population dropped from over 15,000 in October 2012 to about 9,000 in October 2018, a reduction of over 40%.

New Mexico⁵¹

Persons Subject to Detention:

The prosecutor may file a motion at any time for pretrial detention in any felony case where a court has made a probable cause determination, including cases in which the defendant is not in custody. The motion must be based on public safety and not risk of flight.

The Process:

- The preventive detention process begins when the prosecutor files an “Expedited Motion for Pretrial Detention.”
- Defendants have the right to appointed counsel, to testify, to compel and cross-examine witnesses, and to present information.
- The prosecutor has the burden to prove by clear and convincing evidence that no release conditions will reasonably protect the safety of any person or the community.
- New Mexico Rules of evidence do not apply to the preventive detention hearing.
- The court shall consider facts relevant to the nature and seriousness of danger to any person or the community and whether any conditions of release will reasonably protect their safety, including but not limited to the nature and circumstances of the offense charged, weight of the evidence against the defendant, history and characteristics of the defendant, nature and seriousness of danger to any person or the community that the defendant’s release might pose, any facts that might indicate whether the defendant would commit new crime if released, whether the defendant has been ordered detained under Article II, Section 13 of the New Mexico Constitution based on a finding of dangerousness in any pending or prior case, and any available results of a pretrial risk assessment instrument, provided that the court makes an independent determination of dangerousness and community safety based on all information available at the hearing.
- Credible proffers and other summaries of evidence, law enforcement and court records, or other nontestimonial information may provide sufficient support for a decision that the state either has or has not met its constitutional burden to prove that no available release conditions would reasonably protect the community.⁵²
- The court may consider factually undisputed information from court and law enforcement files.⁵³
- The court shall issue a written order for pretrial detention at the conclusion of the hearing if it finds by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. The court must file findings of the facts justifying the detention no later than three days after the hearing.
- If the court determines that the prosecutor has failed to prove the grounds for pretrial deten-

tion by clear and convincing evidence, the court shall deny the motion for pretrial detention and issue an order setting the conditions of release under Rule 5-401 NMRA. The court must file findings of the facts justifying the denial of the detention motion no later than three days after the hearing.

- If the defendant is detained pending trial the court shall provide expedited scheduling for the trial.
- On written motion of either the prosecutor or the defendant the court may reopen the detention hearing if the court finds that new information exists or circumstances have changed subsequent to the hearing, and the information has a material bearing on whether the previous ruling should be reconsidered.
- Either the prosecutor or the defendant may appeal the district court order disposing of the motion for pretrial detention. The constitutional requirement that an appeal from a detention order “shall be given preference over all other matters” results in a disposition within a few weeks in the Court of Appeals subject to an expedited petition for Supreme Court review.⁵⁴

Risk Assessment:

Rule 5-401 NMRA governs pretrial release in New Mexico. Among the factors to be considered in determining conditions of release, the results of a pretrial risk assessment instrument approved by the New Mexico Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant are the primary factors specified. New Mexico’s largest county, Bernalillo County (Albuquerque) in the Second Judicial District, has used the Public Safety Assessment (PSA) since June 2017. Sandoval County in the Thirteenth Judicial District and San Juan County in the Eleventh Judicial District are now implementing the PSA along with robust pretrial services programs. The Administrative Office of the Courts (AOC) has requested additional funding to implement full-service pretrial programs, including the use of the PSA, throughout the state over the next several years. Some counties use a remote early release program (ERP), under which pretrial services officers in Albuquerque are authorized by court rule (Rule 5-408 NMRA) to release defendants arrested for specified non-violent crimes after administering the PSA and interviewing the defendant by remote video. Following a pilot run from the Bernalillo County Metropolitan Court in Albuquerque to six county detention facilities, hiring is now underway to transition the ERP to be a stand-alone program run by the AOC from the Metropolitan Court using the PSA to release low-risk defendants within hours of arrest.

Bail:

Since the amendment to Article II, Section 13 of New Mexico’s Constitution in 2016, the use of monetary bail has declined, and the use of secured money bonds has become very rare. Under Rule 5-401, the court must make written findings of particularized reasons why a defendant cannot be released on personal recognizance or execution of an unsecured appearance bond, which is 100% refundable.

Results:

A study by the Institute for Social Research at the University of New Mexico examined preventive detention data in Bernalillo County for all cases in which the PSA was administered and a preventive detention motion was filed between July 2017 and August 2018. Of the approximately 7,844 cases, preventive detention motions were filed in 1,533 (19.5%).⁵⁵ Approximately 46% of the preventive detention motions were granted and 54% were denied. The study compared rates of Failure to Appear (FTA) and new criminal activity (NCA) during the pretrial period in cases

where a preventive detention motion was denied with FTA and NCA rates in cases in which no motion was filed. The overall difference in FTA rates was small, 15.2% in cases where a preventive detention motion was denied vs. 12.3% in cases in which no motion was filed. The difference in outcomes for NCAs was about the same, 17% NCA in cases where the motion was denied vs. 15% in cases in which no motion was filed. One purpose of this study was to consider whether proposed legislation to allow preventive detention based on risk of flight and obstruction of the criminal process and to provide certain rebuttable presumptions for detention would significantly reduce FTAs or improve public safety. The researchers determined that the proposed legislation would do neither.

Arizona⁵⁶

Persons Subject to Detention:

Persons subject to pretrial detention include those charged with a capital offense or felony offense committed while the person is admitted to bail on a separate felony charge. Persons subject to detention also include persons charged with felony offenses who pose a substantial danger to any other person or the community, if no conditions of release which may be imposed will reasonably assure the safety of the other person or the community and if the proof is evident or the presumption great as to the present charge.⁵⁷

The Process:

- Arizona has two methods to secure preventive detention. The first is statutory. It requires the State to make an oral motion, and the court must hold a preventive detention hearing within 24 hours of the initial appearance, subject to continuances as provided. Because the requirement of a hearing within 24 hours is impractical, this method is almost never used. The second method was established by court rule effective January 1, 2018.⁵⁸ The process provisions described in this summary are those specified by the court rule. At the initial appearance, if the judicial officer finds that the person is likely subject to preventive detention the court detains the person and sets a hearing to be held within 7 days, unless the defendant moves for a continuance.
- The prosecutor shall provide reasonable notice and an opportunity for victims and witnesses to be present and heard at the hearing.
- The person is entitled to representation by counsel and is entitled to present information by proffer or otherwise, to testify and to present witnesses on the person's own behalf. Testimony of the person charged that is given during the hearing is not admissible on the issue of guilt in any subsequent judicial proceeding.
- The court must find that the proof is evident or the presumption great that the defendant committed one or more of the specified felony offenses; clear and convincing evidence that the defendant poses a substantial danger to the victim, any other person, or the community, or that the defendant engaged in conduct constituting a dangerous crime against children or terrorism; and that no condition or combination of conditions of release will reasonably assure the safety of the victim, any other person, or the community.
- The court shall consider several factors in making its determination, including the nature and circumstances of the offense charged; weight of evidence against the person; history and characteristics of the person; nature and seriousness of the danger to the victim, any other person, or the community; the recommendation of the pretrial services program based on an appropriate risk assessment instrument; and any victim statement about the offense and the person's pretrial release.

- The court's findings must be on the record.
- If the person is detained, the case shall be placed on an expedited calendar and, consistent with the sound administration of justice, the person's trial shall be given priority.
- Upon the filing of a timely notice of appeal, the court, on motion or on its own, may amend the conditions of release if it finds a substantial risk exists that the defendant presents a danger to the victim, another person or the community, or that the defendant is unlikely to return to court when required to do so.

Risk Assessment:

- The pretrial services program provides information to the court at the initial appearance, including the person's criminal history and a validated risk assessment, the Public Safety Assessment (PSA). The PSA risk scores and violence flag are used to identify the person's risk to reoffend and the likelihood to attend future court hearings if released. It also is used to inform the recommendations by the pretrial services program presented in pretrial detention hearings, but the pretrial services program does not make a recommendation whether to detain or release.

Bail:

- Any person who is charged with an offense that is bailable as a matter of right must be released pending and during trial on his own recognizance with specified mandatory conditions of release. The court may impose additional non-monetary and monetary conditions if the court finds they are reasonable and necessary to secure the person's appearance or to protect an individual or the community from risk of harm. To impose monetary conditions, the court must make an individualized determination of the person's risk and financial circumstances. The court may not impose a monetary condition if that condition alone would result in pretrial incarceration because the person is unable to pay. If the person is unable to secure release through the payment of a monetary condition, an attorney must be appointed and a petition for reconsideration of release conditions may be filed.

Results:

Because Arizona has only recently implemented preventive detention, results on the impact are not yet available.

California⁵⁹

Persons Subject to Detention:

The prosecutor can file a motion for preventive detention based on any of the following five circumstances:

- (1) The crime for which the person was arrested was committed with violence against a person, threatened violence, or the likelihood of serious bodily injury, or was one in which the person was personally armed with or personally used a deadly weapon or firearm in the commission of the crime, or was one in which he or she personally inflicted great bodily injury in the commission of the crime;
- (2) At the time of arrest, the defendant was on any form of postconviction supervision other than informal probation or court supervision;
- (3) At the time of arrest, the defendant was subject to a pending trial or sentencing on a felony matter;
- (4) The defendant intimidated or threatened retaliation against a witness or victim of the

current crime; or

(5) There is substantial reason to believe that no nonmonetary condition or combination of conditions of pretrial supervision will reasonably assure the protection of the public or a victim, or the appearance of the defendant in court as required.⁶⁰

The Process:

At the defendant's arraignment or any time thereafter, the prosecutor may file a motion seeking preventive detention.

- At the hearing the defendant has the right to counsel, and the right to testify.
- The court may consider reliable hearsay evidence.
- Upon request of the victim, the victim has the right to notice of the hearing and a reasonable opportunity to be heard, or to submit written comments on the defendant's custody status.
- There shall be a rebuttable presumption that no condition or combination of conditions of pretrial supervision will reasonably assure public safety if the court finds probable cause to believe either:
 - (1) that the current crime is a violent felony as defined, or is a felony offense committed with violence against a person, threatened violence, or with a likelihood of serious bodily injury or one in which the defendant was personally armed with or personally used a deadly weapon or firearm in the commission of the crime, or was one in which he or she personally inflicted great bodily injury or
 - (2) that the defendant has been assessed as "high risk" to the safety of the public or a victim and any of the following:
 - (A) the defendant was previously convicted of a serious felony or a violent felony as defined within the past 5 years;
 - (B) the defendant committed the current crime while pending sentencing for a crime described in (1) above;
 - (C) the defendant has intimidated, dissuaded, or threatened retaliation against a witness or victim of the current crime; or
 - (D) at the time of arrest, the defendant was on any form of postconviction supervision other than informal probation or court supervision.
- In determining whether the person should be detained the court may take into consideration any relevant information, as set forth in a newly required California Rule of Court including but not limited to the nature and circumstances of the crime charged, the weight and admissibility of the evidence against the defendant, the defendant's past conduct, family and community ties, and criminal history, whether at the time of the current arrest the defendant was on probation, parole, or supervised release, the nature and seriousness of the risk to the safety of any other person or the community, the recommendation of the pretrial services agency based on its risk assessment, the impact of detention on the defendant's family responsibilities and community ties, employment, and participation in education, and any proposed plan of supervision.
- The court may order preventive detention only if the detention is permitted under the United States and California Constitutions and the court determines by clear and convincing evidence that no nonmonetary condition or combination of conditions of pretrial supervision will reasonably assure public safety or the appearance of the defendant in court as required. The court must state its reasons for ordering preventive detention on the record.

Risk Assessment:

Risk of failure to appear or to public safety due to the commission of a new criminal offense is to be determined through use of validated pretrial risk assessment tools to be approved by the Judicial Council, demonstrated to be accurate and reliable and to minimize bias, and employed by newly established Pretrial Assessment Services programs that operate as officers of the court and do not supervise persons released from custody pursuant to the legislation.⁶¹

Bail:

The California legislation repeals all pre-existing laws regarding bail and requires that any remaining references to bail refer to the newly established procedures. The legislation authorizes use only of nonmonetary conditions of pretrial release and supervision. The legislation also provides that no released person shall be required to pay for any nonmonetary conditions of release.⁶²

Results:

Since California has yet to implement preventive detention, results are not available.

Implementation Challenges and Lessons Learned

This section draws upon interviews with experts involved in implementing or managing preventive detention processes in the District of Columbia, New Jersey, New Mexico, and Arizona to describe some of the challenges they have experienced and lessons they have learned that may assist other jurisdictions in their efforts to implement preventive detention. California experts were not interviewed on implementation because preventive detention is not yet in effect in the state. These challenges and lessons learned include those arising from the manner of enactment of the reforms, level and breadth of state-wide leadership, the respective roles of the various criminal justice stakeholders in the reform process, the specific nature of the adjudicatory processes in each jurisdiction, the use of risk assessment information, the continued role of money bail, and the use of data and technology. As noted in the introduction to this White Paper, these jurisdictions are in different stages of implementation and use of preventive detention. For example, the District of Columbia initiated its program in 1970, while Arizona launched its current program in 2018. The variation in challenges and lessons learned from state to state stem not only from the states' respective stages of implementation but also from the specific nature of the reforms undertaken, the reform processes involved, and the states' differing political and judicial governance structures. The descriptions of challenges and lessons learned are presented in the order in which the jurisdictions authorized and implemented preventive detention.

District of Columbia

In the District of Columbia, a single judge conducts all arraignments (averages 67 per day and can be as high as 125 on high volume days) and another single judge conducts most of the preventive detention hearings which may take 20-30 minutes.

Money bail is not formally eliminated in DC, but it is only used to assure appearance, and generally in fugitive cases or for potential obstruction of justice.

At the request of judges of the superior court and based on concerns about publicly labeling individuals based on risk assessment information, the Pretrial Services Agency (PSA) does not provide risk level in-

formation to the court. PSA also does not expressly recommend detention. In such instances, the agency will simply report that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. Even in these instances, PSA provides recommendations to the court in the event that the person is released to the community.

In addition to the very few misdemeanor defendants who may be subject to preventive detention because they are currently under supervision on another case, other DC statutes authorize holding misdemeanor defendants charged with domestic violence for short periods of time (“cooling off statute”) and substance-addicted persons for short periods of time to coordinate out of custody care.

The DC PSA, one of the oldest and most highly regarded pretrial services agencies in the country, emphasizes that any jurisdiction using risk assessment should have its instrument normed and validated on the population with which it is used. The DC PSA revalidates its instrument every three years. As a result of such analyses, the PSA has been able to drop and collapse 30 of its criminal history factors, focusing instead on recent history over the past 10 years, without affecting the validity of the tool. The PSA also advises that pretrial risk assessment tools be regularly analyzed for the influence of race, ethnicity, and gender and that stakeholders be educated on and understand the tool’s design and use. The PSA emphasizes that it has created a culture of continuous evaluation and improvement that has allowed it to sustain outcomes with which it is satisfied. The agency advises that judges consistently concur with about 70% of its recommendations at first appearance.

In creating and operating a preventive detention system the PSA advises against “legislation by anecdote” and that a jurisdiction analyze its own data to determine what kinds of situations present high levels of pretrial risk to public safety and then create a system that narrowly addresses the issues to which the data points and provides good options for those released: “preventive detention should not be so broad that everyone is eligible for it.”

The PSA also emphasizes the importance of regular and frequent collaboration, communication, and training with the judiciary and defense bar. The PSA conducts regular training sessions with the judiciary, defense bar and prosecutors. A council of criminal justice stakeholders also meets monthly to discuss operational issues. The PSA also cautions against implementing too quickly: “You don’t have to go from cash bail to no cash bail overnight. Understand that change takes time. Use data to sell the expansion of that concept.... Make sure you have everyone on board as you move forward and evaluate and discuss throughout the process.”

The PSA also cautions against getting side-tracked by a fight with the bail bond industry seeking to formally end cash bail. Instead, the PSA officials advise creating a system of pretrial release that is just less dependent on the use of cash bail.

New Jersey

The transition to pretrial detention in New Jersey began in 2012-2013 with an important Jail Population Study issued in March of 2013.⁶³ A non-profit organization, the Drug Policy Alliance, commissioned the study by Luminosity Inc., which showed that 12% of the pretrial population was incarcerated for an inability to afford bail amounts of \$2,500 or less. As a result, New Jersey’s Chief Justice established and chaired a Joint Committee on Criminal Justice that included stakeholders from all three branches of government. The committee issued numerous recommendations to reform the monetary pretrial release system, including the establishment of law and policy to release most defendants on non-monetary conditions, and to order defendants who could not be safely released, based on relevant risk factors, to

pretrial detention without bail.

The question on whether to adopt the new pretrial release and detention system was posed as part of a state ballot initiative in 2014 to amend the New Jersey Constitution, which was followed by new statutes that passed consistent with that amendment. Voters passed the ballot initiative overwhelmingly. Although New Jersey's pretrial detention system has in practice minimized the use of monetary bail, neither the state constitutional amendment nor statute directly prohibit the use of bail as a condition of release, which may have blunted arguments that the reform deprived defendants of a right against excessive bail.

New Jersey attributes its success to widespread stakeholder engagement and cooperation. Successful implementation would have been impossible without the continued engagement of the Attorney General, Public Defender, private bar, county jails, and advocacy groups. The Legislature established the Pretrial Services Program Review Commission by statute as part of the 2014 reform. It includes all key stakeholders as well as advocacy groups, and reports on the implementation and maintenance of the Pretrial Services Program annually. Further, a Criminal Sentencing and Disposition Commission was convened by the governor in 2018 and includes key stakeholders and advocacy groups working together to recommend reforms for the sentencing phase. In addition to the commissions, New Jersey's stakeholders continue to work collaboratively on a variety of criminal justice-related issues.

New Jersey officials also attribute much of their success to the development of an automated risk assessment tool, and their electronic filing and criminal case management systems (collectively called eCourts). E-filing in the criminal division was implemented about three years before the adoption of the pretrial detention reforms. A Preliminary Law Enforcement Investigation Report and an Affidavit of Probable Cause are now transmitted electronically along with the criminal complaint. This information is shared with both the judge and defense attorney as soon as the complaint is filed.

Risk assessment information contained in the Public Safety Assessment (PSA) is based on public information and transmitted electronically to the parties and judge before the pretrial detention hearing. In addition to the PSA score and recommendation on release conditions, pretrial services staff provide relevant supplemental court information not contained in the PSA risk factors, such as domestic violence history or juvenile history.

Pretrial detention motions must be filed before the first court appearance which occurs typically within 24 hours of arrest and are also filed electronically. Nearly one-quarter of preventive detention motions are withdrawn before the hearing. In some counties, specific judges are designated to conduct detention hearings. In addition, some county prosecutors and public defenders have designated attorneys to specialize in the first appearance (arraignment) and/or detention hearing. The new detention hearings replaced the time allotted for bail review hearings, resulting in a limited impact on overall case flow. Detention hearings typically take 15-20 minutes.

In 2019, approximately 21% of pretrial detention motions were withdrawn or dismissed before the hearing. Many cases are resolved prior to the hearing, making the motion moot. Additionally, New Jersey's Supreme Court has issued decisions that address the concern that detention motions would become "mini-trials." The Supreme Court has upheld the statutory authorization to permit evidence by proffer at the detention hearing. Indeed, proffers in lieu of testimony are common.

Although County Prosecutors have wide discretion in filing pretrial detention motions by law, on October 11, 2016, the New Jersey Attorney General, as part of its oversight authority over criminal matters,

published a detailed statewide “Directive Establishing Interim Policies, Practices, and Procedures to Implement Criminal Justice Reform.” This Directive was updated on May 24, 2017, and again on September 28, 2017. The Directive was modified to provide statewide guidance and direction on pretrial detention, including that the exception (not the norm) is for a prosecutor to seek pretrial detention, and no motion for pretrial detention should be filed except as authorized in the Directive.⁶⁴

New Jersey court officials advise that gathering relevant data on important issues such as jail population, criminal activity, and court appearance rates from before the reform to compare to the reformed system is essential. Empirical information is useful to both explain the need for reform prior to making changes and to demonstrate the success of reform thereafter.

New Mexico

New Mexico’s pretrial justice reforms have benefited from the strong leadership and commitment of the Supreme Court and the Administrative Office of the Courts (AOC). These reforms initially focused on reducing the jail population in Bernalillo County, which led to several criminal justice reforms, including the adoption of a pretrial risk assessment tool. Following a New Mexico Supreme Court ruling disallowing the imposition of monetary bail based solely on the nature and seriousness of the offense charged (*State v. Brown*, 2014 NMSC 038 (November 6, 2014)), a study committee recommended a constitutional amendment on pretrial detention to authorize preventive detention for violent felons and prohibit pretrial detention based solely on the defendant’s inability to pay for a bail bond. The recommendation was endorsed by the New Mexico Supreme Court, Association of District Attorneys, Law Office of the Public Defender, and Criminal Defense Lawyers Association. Robust advocacy for the proposed amendment persuaded lawmakers that setting a high bond does not always ensure dangerous defendants will stay in jail, while arbitrary bond schedules keep poor but low-risk defendants in jail with negative results for public safety. Legislation to submit the proposed amendment to the public led to its adoption in 2016 by an overwhelming majority (87%) of the voters.

The Supreme Court maintained the momentum of this success by immediately developing clear and detailed court rules on pretrial detention and release for the District, Metropolitan, and Magistrate Courts. It was important for the Supreme Court to build in the appropriate due process provisions from the beginning, such as the right to a hearing, right to counsel, the appropriate burden of proof, and expedited appeal from grant or denial of a preventive detention motion. The new rules became effective on July 1, 2017.

In implementing the new rules, the Supreme Court and the AOC considered it to be critical to provide training for judges, court staff, prosecutors and defense counsel. They understood that the use of preventive detention and reduced reliance on money bond would require a significant cultural change in criminal practice. The trial judges who are implementing these changes have been a key to success and most of them have been strong advocates for reform.

The Supreme Court Rules have not raised significant or long-lasting challenges except in Bernalillo County (Albuquerque), where the District Attorney has frequently criticized them. The District Attorney alleges that the courts deny too many motions for detention and has advocated for changes in the law to allow preventive detention based on flight risk and obstruction of justice and to adopt a presumption favoring detention for certain crimes. Although a recent study by the Institute for Social Research at the University of New Mexico (UNM) does not support these proposals (see discussion above in the summary of New Mexico’s preventive detention rules), the challenges to New Mexico’s preventive detention rules

have continued. Further, despite attempts to educate the press on the public safety benefits that result from both preventive detention and diminished use of money bond, these challenges have been playing out in media coverage of high violent crime rates in Albuquerque.

In its ongoing efforts to ensure the fairness and effectiveness of New Mexico's preventive detention processes, the Supreme Court issued an order on January 6, 2020, establishing the Ad Hoc Committee to Review Pretrial Release and Detention Procedures. The Committee's charge is to review the current rules and make any recommendations it "deems advisable for improving the pretrial detention procedure based on data-driven input, such as the recent study by UNM researchers that analyzed 6,400 cases in Bernalillo County between July 2017 and March 2019 in which defendants charged with felonies were released from custody pending trial." The Committee is composed of a multidisciplinary group of stakeholders from Albuquerque and smaller jurisdictions, including two District Court judges, a Bernalillo County Metropolitan Court judge, two District Attorneys (including Albuquerque's), the state's Chief Public Defender, the Albuquerque Chief of Police, the Office of the Governor, the Department of Public Safety, four legislators, and a professor at UNM School of Law. The Committee's report and any recommendations are to be submitted by March 31, 2020.

Arizona

Arizona is the most recent of the states profiled in this paper to implement preventive detention reforms. As a result, there is to date little data available on the effect of the reforms undertaken. Although the principal purpose of the reforms was to reduce the use of high bail to detain defendants, the cultural shift involved in pretrial practices is still evolving. The principal challenges faced by the Arizona judiciary in implementing its preventive detention reforms appear to result from the fact that its early efforts have focused on adoption and use of Rules of Court, which establish new preventive detention rules but which also, because the use of money bail is still authorized in the Arizona constitution, leave in place several pre-existing rules permitting the use of money bail as an alternative to the new rules to promote the defendant's appearance and public safety. To a significant extent, prosecutors have continued to request high bail to accomplish preventive detention.

New Rule of Court 7.2, effective in January 2018, provides generally for a preventive detention hearing (described as a "bail eligibility hearing"), to be conducted within 7 days of the initial appearance if the defendant is determined ineligible for bail at the initial appearance. In Maricopa County (Phoenix) and other jurisdictions where prosecutors tend to appear at the initial court appearance, prosecutors continue to request setting of bail at the initial appearance including high bail even in cases that are likely eligible for preventive detention. Such motions are regularly granted. Although new Rule 7.3 (c)(2)(A) prohibits the use of monetary conditions of release that result in unnecessary pretrial incarceration solely because the defendant is unable to pay the imposed conditions, the rule does not prevent the setting of high bail at the initial court appearance at which the court typically does not have sufficient defendant financial information to set bail at an appropriate amount. If the defendant remains in custody, counsel is appointed and can then file a motion to reduce bail to an appropriate amount.

Court staff has now put in place electronic systems to track preventive detention hearings in order to obtain more reliable data on the effect of its recent reforms and are considering further rule changes to improve the effectiveness of the new preventive detention rules.

Conclusion

As states consider the adoption of preventive detention provisions, this analysis of statutory and judicial authority for preventive detention in the District of Columbia, New Jersey, New Mexico, Arizona, and California, and discussion of implementation challenges and lessons learned in those jurisdictions, can provide guidance to court leaders in other states. This guidance may be helpful in leading and responding effectively to legislative actions to authorize or expand the use of preventive detention in their states, as well as in developing court rules on preventive detention that protect the community while maximizing individual liberty during the pretrial process.

Experts express the need for caution and careful consideration of the potential consequences of expanding the authority to detain defendants pretrial. Their concerns arise from potential use of overly expansive categories of persons and classes of crimes subject to preventive detention, as well as the potential absence of rigorous due process safeguards. They fear these changes may lead to even greater numbers of people being detained under the guise of pretrial justice reform.

These concerns can be mitigated through carefully considered and implemented pretrial reform measures. Many jurisdictions are moving away from an irrational and unfair system in which pretrial release depends on the wealth of the accused and towards a more rational and fair one where the issue of pretrial release is determined squarely on the basis of individual risk—the level of risk that a person charged with a specific crime will inflict injury on another, flee, or otherwise obstruct justice pending adjudication of the crime charged. These reform efforts can aid in reducing the number of people who are detained pretrial, as well as the disproportionate impact of many existing systems of pretrial release on vulnerable populations, including those who are financially disadvantaged and people of color.

About this White Paper

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Endnotes

- ¹ Ahee, W., Alvarez, M., Rivers, J., & Signorelli, G. (2016). Moving beyond money: A primer on bail reform. Criminal Justice Policy Program at Harvard Law School. Retrieved from <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>, p. 25
- ² Pub. L. No. 91-358, District of Columbia court reform and criminal procedure act of 1970. (1970). Retrieved from <https://www.govinfo.gov/content/pkg/STATUTE-84/pdf/STATUTE-84-Pg473.pdf>
- ³ N.J.P.L. c.31 C.2A:162-15 et seq. (2014). Retrieved from https://www.njleg.state.nj.us/2014/Bills/PL14/31_.HTM; NM Const., Art. II, Sec. 13; NMRA 5-409 J. Retrieved from <https://www.nmlegis.gov/handouts/CJRS%20102717%20Item%204%20Rule%205-409.pdf>
- ⁴ AZ. Ct. R., amending rules 4.2, 5.1, 5.4, 7.2, and 7.4. (2017). Retrieved from <https://www.azcourts.gov/Portals/20/2017%20Rules/R170015.pdf> Statutory changes authorizing preventive detention had been enacted earlier in Arizona, but according to Arizona court officials, preventive detention had rarely been sought because the statute required that the detention hearing be conducted within 24 hours of the initial appearance, which had proven impractical.
- ⁵ The California statute authorizing use of preventive detention was to go into effect on October 1, 2019. On January 16, 2019 the California Secretary of State certified that Referendum 1856 (Referendum to Overturn a 2018 Law That Replaced Money Bail System with a System Based on Public Safety Risk), sponsored by the American Bail Coalition, qualified for the November 2020 ballot. Qualification of the referendum has the effect of staying SB 10. At this time, the Judicial Council of California has suspended implementation of the legislation.
- ⁶ Robinson, D. G., Sassaman, H. J., & Stevenson, M. (2018). Pretrial risk assessments: A practical guide for judges. Judges Journal 57(3), 8-11. Retrieved from https://www.americanbar.org/groups/judicial/publications/judges_journal/2018/summer/pretrial-risk-assessments-practical-guide-judges/
- ⁷ The Work Group members are Maryland's Chief Judge Mary Ellen Barbera, Chair, Kentucky's Chief Justice John D. Minton, New Jersey's Chief Justice Stuart Rabner, Administrative Director of the Arizona Courts David K. Byers, Administrative Director of the Judicial Council of California Martin Hoshino, Director of New Mexico Administrative Office of the Courts Arthur W. Pepin, and Administrative Director of Texas Office of Court Administration David W. Slayton.
- ⁸ These jurisdictions were selected to profile because they define a wider set of offenses subject to denial of pretrial release, promote risk-based release decision-making in place of money bail, and have more specific and elaborated constitutional, legislative, and/or ruled-based schemes for the use of preventive detention than do most of the other jurisdictions that have authorized preventive detention. Although implementation of its preventive detention statute has been stayed pending a forthcoming referendum (see endnote 5, supra), we include California because the legislation is comprehensive and eliminates commercial surety bonds.
- ⁹ Stack v. Boyle. 342 U.S. 1 (1951). Retrieved from <https://supreme.justia.com/cases/federal/us/342/1/>, p. 342
- ¹⁰ Schnacke, T. (2017). Model bail laws: Re-drawing the line between pretrial release and detention. Center for Legal Evidence-Based Practices. Retrieved from <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e0ff560c-6de6-db75-02ea-2af46f94e875&forceDialog=0>
- ¹¹ Id.
- ¹² 18 U.S. Code § 3142, Release or detention of a defendant pending trial. Retrieved from <https://www.law.cornell.edu/uscode/text/18/3142>
- ¹³ United States v. Salerno. 481 U.S. 739 (1987). Retrieved from <https://www.law.cornell.edu/supremecourt/text/481/739>
- ¹⁴ Arnold Ventures. (2019). Statement of principles on pretrial justice and use of pretrial risk assessment. Retrieved from <https://craftmediabucket.s3.amazonaws.com/uploads/AV-Statement-of-Principles-on-Pretrial-Justice.pdf>
- ¹⁵ United States v. Salerno. 481 U.S. 739 (1987). Retrieved from <https://www.law.cornell.edu/supremecourt/text/481/739> The federal Act also authorizes detention where the defendant poses a serious risk of obstructing justice or flight. Some scholars have criticized the rebuttable presumption for detention applicable to persons subject to federal detention on the basis that the enumerated crimes that trigger detention hearings are not tied to the individual circumstances of the defendant, and have advocated that when rebuttable presumptions trigger detention hearings they not prevent individualized determinations of risk based on the defendant's individual circumstances. Ahee, W., Alvarez, M., Rivers, J., & Signorelli, G. (2016). Moving beyond money: A primer on bail reform. Criminal Justice Policy Program at Harvard Law School. Retrieved from <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>
- ¹⁶ Smith, J. (2019). Pretrial preventative detention in North Carolina. UNC School of Government. Retrieved from <http://cijil.web.unc.edu/files/2019/03/Preventative-Detention-3.21.2019.pdf>

¹⁷ Schnacke, T. (2017). Model bail laws: Re-drawing the line between pretrial release and detention. Center for Legal Evidence-Based Practices. Retrieved from <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e0ff560c-6de6-db75-02ea-2af46f94e875&forceDialog=0>. Some cases have upheld application of preventive detention against federal due process challenges in “potentially lethal” domestic violence cases even if the charge is a misdemeanor; Smith, J. (2019). Pretrial preventative detention in North Carolina. UNC School of Government. Retrieved from <http://cijil.web.unc.edu/files/2019/03/Preventative-Detention-3.21.2019.pdf>, p. 9. However, many state constitutions extend the right to bail to misdemeanor cases thus prohibiting use of preventive detention to detain persons charged with misdemeanor domestic violence offenses in those states. See, e.g., Arizona Const. Art. 2, Sec. 22A. Recent initiatives to divert persons with serious mental illnesses and substance use disorders to crisis response programs and other treatment services and away from involvement in the justice system suggest that jails are not ideal institutions for addressing behavioral health conditions. Jaeckel, T. & Economy, C. (2019). Promising solutions to our nation’s behavioral health crisis. Harvard Kennedy School Government Performance Lab. Retrieved from https://hwpi.harvard.edu/files/govlabs/files/promising_solutions_to_nations_behavioral_health_crisis.pdf. For information on more effective efforts to address these needs, see National Center for State Courts. (2019). Leading Change: Improving the court and community’s response to mental health and co-occurring disorders. Retrieved from <https://www.ncsc.org/~media/Files/PDF/Topics/Court%20Management/Leading-Change-Guide.pdf>

¹⁸ Schnacke, T. (2017). Model bail laws: Re-drawing the line between pretrial release and detention. Center for Legal Evidence-Based Practices. Retrieved from <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e0ff560c-6de6-db75-02ea-2af46f94e875&forceDialog=0>

¹⁹ Ahee, W., Alvarez, M., Rivers, J., & Signorelli, G. (2016). Moving beyond money: A primer on bail reform. Criminal Justice Policy Program at Harvard Law School. Retrieved from <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>, p. 27. For those detainees with potential substance use and/or mental disorders, it is important that validated risk/needs and clinical assessments be conducted, and that agreements with community mental health and substance abuse providers be established to serve those persons. See, Osher, F., D’Amora, D. A., Plotkin, M., Jarrett, N., & Eggleston, A. (2012). Adults with behavioral health needs under correctional supervision. New York, NY: Council of State Governments Justice Center. Retrieved from https://csgjusticecenter.org/wp-content/uploads/2013/05/9-24-12_Behavioral-Health-Framework-final.pdf; Tennessee Criminal Justice Task Force Report. (2019). Retrieved from <https://www.tn.gov/content/dam/tn/governorsoffice-documents/governorlee-documents/CJInvestmentTaskForceReport.pdf>.

²⁰ United States v. Salerno. 481 U.S. 739 (1987). Retrieved from <https://www.law.cornell.edu/supremecourt/text/481/739>; Smith, J. (2019). Pretrial preventative detention in North Carolina. UNC School of Government. Retrieved from <http://cijil.web.unc.edu/files/2019/03/Preventative-Detention-3.21.2019.pdf>

²¹ Ahee, W., Alvarez, M., Rivers, J., & Signorelli, G. (2016). Moving beyond money: A primer on bail reform. Criminal Justice Policy Program at Harvard Law School. Retrieved from <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>; Schnacke, T. (2017). Model bail laws: Re-drawing the line between pretrial release and detention. Center for Legal Evidence-Based Practices. Retrieved from <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e0ff560c-6de6-db75-02ea-2af46f94e875&forceDialog=0>; American Bar Association (ABA). (2007). ABA standards for criminal justice: Pretrial release (3rd ed.). Washington, D.C.: American Bar Association. Retrieved from https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.pdf

²² Ahee, W., Alvarez, M., Rivers, J., & Signorelli, G. (2016). Moving beyond money: A primer on bail reform. Criminal Justice Policy Program at Harvard Law School. Retrieved from <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>

²³ The Arnold Foundation’s pre-trial risk assessment tool, the PSA, for example, is based on the existence of any prior misdemeanor, felony, or violent convictions, prior incarceration sentence or failure to appear, pending charge, and the defendant’s age at current arrest. <https://www.psapretrial.org/about/factors>

²⁴ See, e.g., Meehl, P. E. (1954). Clinical versus statistical prediction: A theoretical analysis and a review of the evidence. *University of Minnesota Press*; Grove, W. M., Zald, D. H., Lebow, B. S. Snitz, B.E., & Nelson, C. (2000). Clinical versus mechanical prediction: a meta-analysis. *Psychological Assessment*, 12(1):19.; Lin, J., Jung, J., Goel, S., & Skeem, J. (2016). The limits of human predictions of recidivism. *Sci. Adv.* 6.; Ahee, W., Alvarez, M., Rivers, J., & Signorelli, G. (2016). Moving beyond money: A primer on bail reform. Criminal Justice Policy Program at Harvard Law School. Retrieved from <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>; Arnold Ventures. (2019). Statement of principles on pretrial justice and use of pretrial risk assessment. Retrieved from <https://craftmediabucket.s3.amazonaws.com/uploads/AV-Statement-of-Principles-on-Pretrial-Justice.pdf>; Mayson, S. (2019). Bias in, bias out. *Yale Law Journal*, 128(8), 2218–2300. Retrieved from <https://www.yalelawjournal.org/article/bias-in-bias-out>. (Although actuarial and subjective assessments may consider the same risk factors, actuarial tools remove the personal biases that may influence subjective assessment: “...there is every reason to expect that subjective risk assessment produces greater racial disparity than algorithmic risk assessment – and that it does so with less transparency and less potential for accountability or intervention....Rejecting the precise mirror of algorithmic prediction in favor of subjective risk assessment

does not solve the problem. It merely turns a blind eye.” (p. 2281) Some recent research shows that use of actuarial risk assessment actually increases release rates of minorities. Brooker, C. M. B. (2017). Yakima County, Washington pretrial justice system improvements: Pre- and post- implementation analysis. Smart Pretrial Justice Initiative. Retrieved from <https://justicesystem-partners.org/wp-content/uploads/2015/04/2017-Yakima-Pretrial-Pre-Post-Implementation-Study-FINAL-111517.pdf>; see also “Results” from use of preventive detention in New Jersey, p. 7 infra.) A recent revalidation study of the Pretrial Risk Assessment (PTRA), used in the federal courts since November 2009 to inform pretrial release decisions, found that the tool performs well at predicting pretrial rearrests, failure to appear, revocations of release, or a combination of these pretrial violations, regardless of the defendant’s race, ethnicity, or gender. The study did not examine whether pretrial release decisions based on the PTRA might result in racial, ethnic, or gender-based disparities, and the researchers suggest that future research “...might contemplate moving beyond the issue of risk prediction and focus on how decision makers actually use information generated from actuarial risk instruments to inform their decisions, policies, and practices.” Cohen, T.H. & Lowenkamp, C.T. (2019). Revalidation of the Federal PTRA: Testing the PTRA for Predictive Biases. *Criminal Justice and Behavior*, 46(2), 234–260.

²⁵ The researchers also found that in states where judges weigh both dangerousness and flight risk, “judges consider dangerousness at a much higher rate than flight risk, almost to the exclusion of flight risk” (p. 558). Their evidence-based model is based on the arrest charge and defendant’s age, arrest record, prior incarcerations and FTAs, and criminal justice status. One of the study’s conclusions was that using their evidence-based model jurisdictions could release about 25% more defendants while decreasing pretrial crime levels. Baradaran, S. & McIntyre, F. L. (2012). Predicting violence. *Texas Law Review*, 90, 497-570. Retrieved from <http://texaslawreview.org/wp-content/uploads/2015/08/Baradaran-McIntyre-90-TLR-497.pdf>.

²⁶ Picard, S., Watkins, M. Rempel, M., & Kerodal, A. (2019). Beyond the algorithm: Pretrial reform, risk assessment, and racial fairness. Center for Court Innovation. Retrieved from <https://www.courtinnovation.org/publications/beyond-algorithm>, p. 9; Ahee, W., Alvarez, M., Rivers, J., & Signorelli, G. (2016). Moving beyond money: A primer on bail reform. Criminal Justice Policy Program at Harvard Law School. Retrieved from <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>; Mayson, S. (2019). Bias in, bias out. *Yale Law Journal*, 128(8), 2218–2300. Retrieved from <https://www.yalelawjournal.org/article/bias-in-bias-out>. (Actuarial assessment has exposed pre-existing disparities, not created them; given the racial disparities in the underlying data, totally race-neutral risk prediction is impossible.)

²⁷ Picard, S., Watkins, M. Rempel, M., & Kerodal, A. (2019). Beyond the algorithm: Pretrial reform, risk assessment, and racial fairness. Center for Court Innovation. Retrieved from <https://www.courtinnovation.org/publications/beyond-algorithm>, p. 17

²⁸ Id.

²⁹ Koepke, J. L. & Robinson, D. G. (2018). Danger ahead: risk assessment and the future of bail reform. *Washington Law Review*, 93, 1725-1807. Retrieved from <https://ssrn.com/abstract=3041622>; Ahee, W., Alvarez, M., Rivers, J., & Signorelli, G. (2016). Moving beyond money: A primer on bail reform. Criminal Justice Policy Program at Harvard Law School. Retrieved from <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>; Robinson, D. G. & Koepke, L. (2019). Civil rights and pretrial risk assessment instruments. Safety and Justice Challenge. Retrieved from <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/12/Robinson-Koepke-Civil-Rights-Critical-Issue-Brief.pdf>. One important transparency issue discussed in these authorities is whether the information and methodology used in developing the tool is publicly accessible. That issue was also addressed by the Wisconsin Supreme Court in the context of the use of risk assessment tools at sentencing in *State v. Loomis*, 881 N.W.2d 749. (Wis. 2016).

³⁰ In February 2020, one pretrial reform organization, the Pretrial Justice Institute (PJI), reversed its earlier position to now oppose the use of risk assessment information to determine *any* restrictions on a person’s personal liberty, including reporting visits, electronic monitoring, curfews, or drug testing (See, [PJI on risk assessment](#).) Citing some of the research summarized at endnote 23, supra, and other studies, other criminal justice reform organizations including the National Association of Pretrial Services Agencies (NAPSA), the Center for Effective Public Policy (CEPP) which is leading the Arnold Ventures initiative Advancing Pretrial Policy and Research (APPR), and the JFA Institute, quickly published strong rejoinders. See, (NAPSA) <https://drive.google.com/file/d/1x2HBqLTbkFJowJJ4FzNYQFzH0xrALvI7/view>; (CEPP and APPR) <https://cepp.com/a-statement-from-advancing-pre-trial-policy-and-research-appr/>; (JFA Institute) <http://www.jfa-associates.com/publications/NewReleases/TheValueofPretrial-RiskAssessmentInstruments.pdf>

³¹ Ahee, W., Alvarez, M., Rivers, J., & Signorelli, G. (2016). Moving beyond money: A primer on bail reform. Criminal Justice Policy Program at Harvard Law School. Retrieved from <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>

³² Schnacke, T. (2017). Model bail laws: Re-drawing the line between pretrial release and detention. Center for Legal Evidence-Based Practices. Retrieved from <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e0ff560c-6de6-db75-02ea-2af46f94e875&forceDialog=0>

³³ Arnold Ventures. (2019). Statement of principles on pretrial justice and use of pretrial risk assessment. Retrieved from <https://craftmediabucket.s3.amazonaws.com/uploads/AV-Statement-of-Principles-on-Pretrial-Justice.pdf>; Robinson, D. G. & Koepke, L.

(2019). Civil rights and pretrial risk assessment instruments. Safety and Justice Challenge. Retrieved from <http://www.safetyand-justicechallenge.org/wp-content/uploads/2019/12/Robinson-Koepke-Civil-Rights-Critical-Issue-Brief.pdf>

³⁴ Schnacke, T. (2017). Model bail laws: Re-drawing the line between pretrial release and detention. Center for Legal Evidence-Based Practices. Retrieved from <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e0ff560c-6de6-db75-02ea-2af46f94e875&forceDialog=0>

³⁵ See, <https://www.arnoldventures.org/>

³⁶ Baradaran, S. & McIntyre, F. L. (2012). Predicting violence. *Texas Law Review*, 90, 497-570. Retrieved from <http://texaslawreview.org/wp-content/uploads/2015/08/Baradaran-McIntyre-90-TLR-497.pdf>

³⁷ See Moving beyond money: A primer on bail reform. Criminal Justice Policy Program at Harvard Law School. Retrieved from <http://cipp.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>; Schnacke, T. (2017). Model bail laws: Re-drawing the line between pretrial release and detention. Center for Legal Evidence-Based Practices. Retrieved from <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e0ff560c-6de6-db75-02ea-2af46f94e875&forceDialog=0>; Pretrial Justice Institute. (2017). Guidelines for analyzing state and local pretrial laws. Retrieved from <https://higherlogicdownload.s3-external-1.amazonaws.com/PRETRIAL/Guidelines%20for%20Analyzing%20State%20and%20Local%20Pretrial%20Laws%20-%20PJI%202017.pdf?AWSAccessKeyId=AKIAVRD07IEREB57R7MT&Expires=1582123460&Signature=kIDUeGeLtl-cA9QAZW8Mx4xWRiyg%3D>

³⁸ The summaries were informed by statutory reviews, literature reviews, and interviews with state court and pretrial professionals in the District of Columbia, New Jersey, New Mexico, Arizona, and California.

³⁹ D.C. Code § 23–1322, Detention prior to trial. (2016). Retrieved from <https://code.dccouncil.us/dc/council/code/sections/23-1322.html>

⁴⁰ D.C. Law 4-164. District of Columbia Theft and White Collar Crimes Act of 1982. (1982). Retrieved from <https://code.dccouncil.us/dc/council/laws/4-164.html>; D.C. Code: § 22-722, Prohibited acts; penalty. Retrieved from <http://dcode.org/simple-2012/sections/22-722.html>

⁴¹ Pretrial Services Agency for the District of Columbia. (2019). Washington, DC Pretrial Facts and Figures; Pretrial Services Agency for the District of Columbia. The PSA developed its risk assessment tool for use in making pretrial release and supervision recommendations to the District of Columbia Superior Court and United States District Court for the District of Columbia, but the vast majority of recommendations are to the Superior Court. The tool was revalidated in FY 2018.

⁴² Pretrial Services Agency for the District of Columbia. (2019). Washington, DC Pretrial Facts and Figures; Pretrial Services Agency for the District of Columbia.

⁴³ Id.

⁴⁴ Pretrial Services Agency for the District of Columbia. (2019). Congressional Budget Justification and Performance Budget Request Fiscal Year 2020. Retrieved from <https://www.psa.gov/sites/default/files/FY2020%20PSA%20Congressional%20Budget%20Justification.pdf>

⁴⁵ Kennedy, S. (2019). Freedom and money – Bail in America. Pretrial Services Agency for the District of Columbia. Retrieved from <https://www.psa.gov/?q=node/97>

⁴⁶ Pretrial Services Agency for the District of Columbia. (2018). FY 2019 release rates for pretrial defendants within Washington, DC.

⁴⁷ N.J.P.L. c.31 C.2A:162-15 et seq. (2014). Retrieved from https://www.njleg.state.nj.us/2014/Bills/PL14/31_ .HTM

⁴⁸ State v. Ingram, 230 N.J. 190, 195 (N.J. 2017). Retrieved from <https://caselaw.findlaw.com/nj-supreme-court/1869501.html>

⁴⁹ State v. Pinkston, 233 N.J.495, 510 (N.J. 2018). Retrieved from <https://law.justia.com/cases/new-jersey/appellate-division-unpublished/2019/a4459-17.html>

⁵⁰ Grant, G. A. (2019). Jan 1 – Dec 31. 2018 report to the governor and the legislature. New Jersey Judiciary. Retrieved from <https://www.psa.gov/sites/default/files/2017%20Release%20Rates%20for%20DC%20Pretrial%20Defendants.pdf>

⁵¹ NM Const., Art. II, Sec. 13; NMRA 5-409 J. Retrieved from <https://www.nmlegis.gov/handouts/CJRS%20102717%20Item%204%20Rule%205-409.pdf>

⁵² Torrez v. Whitaker, 410 P.3d 201. (N.M. 2018). 2018 NMSC 5. Retrieved from https://www.nmcourts.gov/uploads/FileLinks/eb6f94d85eab4a979c8b6890cea23485/Torrez_v_Whitaker_36379_J_CWD_Filed_stamped_opinion_1_11_18.pdf

⁵³ State v. Groves, 410 P.3d 193. (N.M. 2018). 2018 NMSC 6. Retrieved from https://nmcourts.gov/uploads/FileLinks/eb6f94d85eab4a979c8b6890cea23485/Groves_Elexus_J_36363_J_CWD_Filed_stamped_OP_1_11_18.pdf

⁵⁴ Id.

⁵⁵ Ferguson, E., De La Cerda, H., & Guerin, P. (2019). Bernalillo County public safety review – July 2017 to March 2019. Institute for Social Research at University of New Mexico. Retrieved from <http://isr.unm.edu/reports/2019/bernalillo-county-public-safety-assessment-review-july-2017-to-march-2019.pdf>

⁵⁶ A.R.S. Title 13, Chap. 38, Art. 12. Retrieved from <https://www.azleg.gov/arsDetail/?title=13>; Ariz. R. Crim. P. 7.2. Right to Release. Retrieved from <https://casetext.com/rule/arizona-court-rules/arizona-rules-of-criminal-procedure/rights-of-parties/rule-7-release/rule-72-right-to-release>

⁵⁷ Ariz. Const. art II, §22A. Retrieved from https://www.azleg.gov/const/arizona_constitution.pdf. Includes persons charged with felony sexual assault, sexual conduct with a minor under fifteen years of age, and molestation of a child under fifteen years of age as persons categorically eligible for detention but Arizona appellate courts have held such provisions unconstitutional. *Simpson v. Miller*, 241 Ariz. 341. (2017).

241 Ariz. 341. Retrieved from <https://casetext.com/case/simpson-v-miller-10>; *Chantry v. Astrowsky*, 242 Ariz. 355, 395 P.3d 1114. (2017). Retrieved from <https://cite.case.law/ariz/242/355/>; *State v. Wein*, 417 P.3d 787. (2018). Retrieved from <https://casetext.com/case/state-v-wein-24>

⁵⁸ Ariz. R. Crim. P. 7.2. Right to Release. Retrieved from <https://casetext.com/rule/arizona-court-rules/arizona-rules-of-criminal-procedure/rights-of-parties/rule-7-release/rule-72-right-to-release>

⁵⁹ Cal. Penal Code § 1318-1320. Retrieved from https://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=PEN&division=&title=10.&part=2.&chapter=1.&article=

⁶⁰ Cal. Penal Code § 1320 (a). Retrieved from https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=10.&part=2.&chapter=1.&article=10.

⁶¹ Cal. Penal Code § 1320.7, 1320.24-1320.26. Retrieved from https://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=PEN&division=&title=10.&part=2.&chapter=1.&article=

⁶² Cal. Penal Code § 1320.18 (d), 1320.10 (d), 1320.13 (e)(2), 1320.18 (e)(2). 1320.20 (e)(2). Retrieved from https://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=PEN&division=&title=10.&part=2.&chapter=1.&article=

⁶³ VanNostrand, M. (2013). *New Jersey Jail Population Analysis: Identifying Opportunities to Safely and Responsibly Reduce the Jail Population*. Luminosity Inc. Retrieved from https://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf

⁶⁴ State of New Jersey. (2017). Attorney General Law Enforcement Directive 2016-6 v3.0: Modification of Directive Establishing Interim Policies, Practices, and Procedures to Implement Criminal Justice Reform Pursuant to P.L. 2015, c. 31. Retrieved from https://www.state.nj.us/lps/dcj/agguide/directives/ag-directive-2016-6_v3-0.pdf