CIVIL AND CRIMINAL JUSTICE

The Statutory Framework of Pretrial Release

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BY AMBER WIDGERY

The National Conference of State Legislatures is the bipartisan organization dedicated to serving the lawmakers and staffs of the nation's 50 states, its commonwealths and territories.

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- Promote policy innovation and communication among state legislatures.
- Ensure state legislatures a strong, cohesive voice in the federal system.

The conference operates from offices in Denver, Colorado and Washington, D.C.

State law is one piece of the puzzle that makes up the legal framework for pretrial release policy, which governs the eligibility and conditions of release of people after arrest. State constitutions and court rules also guide local pretrial practices. While practices vary from jurisdiction to jurisdiction, all must fall within the state legal framework created by constitutions, statutes and court rules.

In every state, the law creates a minimum standard that must be observed. While practices in local jurisdictions must meet that minimum standard, there are some that exceed this threshold by pursuing best practices that maximize release and liberty while maintaining public safety.

This kind of local innovation can demonstrate the effectiveness of emerging best practices and has been a driver of statewide action to raise the minimum standard of practice. In some instances, existing laws are flexible enough to allow improvements in local pretrial practices within the existing state framework. In others, state law can be a barrier to local reforms and may need revision to allow for innovation.

Statewide changes to legal frameworks for pretrial policy have been championed by legislative, executive and judicial actors at the state level. Litigation and community involvement have also initiated systemic changes, impacting both local practices and state frameworks.[1]

This report provides an overview of the current statutory framework for pretrial policy in the states.

The Foundation: Constitutional Right to Bail

States typically have a constitutional provision mirroring the federal Eighth Amendment prohibition on excessive bail. There also are constitutional or statutory provisions that provide the "right to bail"—the right to be released from jail prior to trial after a defendant agrees to return for court.[2] These provisions provide the foundation for pretrial policy and are distinguished from financial conditions of release imposed by a court, which are often referred to as "bail" or "money bail."

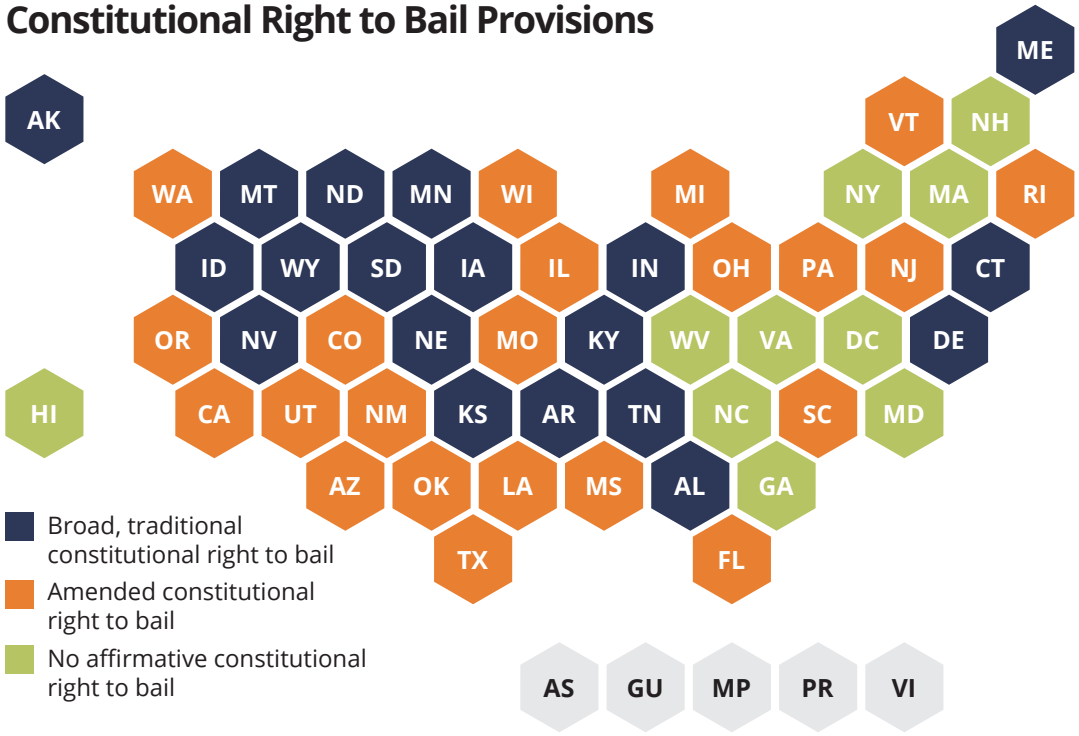
These constitutional provisions establish the release/detention framework, setting the current state boundaries for initial pretrial detention or release. Defendants are often detained because of their inability to meet conditions of release, particularly those with financial requirements. To the extent that financial resources are not a question, constitutional provisions set the baseline for who can legally be released or detained.

There are three different constitutional approaches in the states. Nineteen states[3] have a broad, or traditional, constitutional right to bail, generally following language adopted in Pennsylvania in 1682 "that all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great."[4]

In these 19 states, provisions require that every defendant not accused of an offense defined as a capital crime is entitled to have a court set conditions of release. Defendants who meet those conditions cannot be detained without bail to prevent flight or protect community safety.

Most common, 22 states[5] have right to bail provisions that have been amended to expand preventive detention. In most of these states, amendments have added a specific list of circumstances and offenses, or categories of offenses, for which a defendant can be held without a court setting conditions of release; i.e., held without bail. These typically include violent offenses, sex offenses or repeat offenses. Specified circumstances include a court finding that the defendant, if released, would present a danger to another person or the community, criminal history and supervision status at the time of the alleged offense.[6]

Constitutional Right to Bail Provisions



Source: NCSL, 2020

States that Amended Their Constitutional Right to Bail

In the 22 states that have amended their constitutional right to bail, detention has been expanded in a number of ways. Denial of release has been authorized if:

- Certain charges are alleged and there is a finding that the defendant would present a danger to the community or another person.
- Certain charges are alleged and a defendant was already on pretrial release for another offense.
- Certain charges were alleged and the defendant was already on post-conviction supervision.
- Certain charges are alleged and the defendant has a previous conviction for specified offenses.
- The defendant was on supervision or had a prior offense and there is a finding of dangerousness.
- A defendant violates conditions of release.

Nine states do not have an affirmative constitutional right to bail[7] but do mirror the federal statutory language that protects against excessive bail. The statutory provisions in these nine states generally allow for some preventive detention and the limitations on pretrial release can be broad.[8] In practice, statutory provisions in these states can function much the same way as the 22 states with amended constitutional provisions.

Constitutional Rights and Statutory Guidance on Victim Participation and Safety

State constitutions can enumerate victims' rights in the pretrial process in addition to providing rights to defendants. State statutes in nearly every state also address the role of victims in the pretrial process and specific considerations of victims that must be made during release proceedings.

The majority of states give victims the right to be notified when a defendant is released prior to trial, and several states require notification of conditions of release.[9] Laws addressing victim participation in the pretrial process include granting victims both the right to be heard and the right to be consulted.[10] There also are a handful of states that have statutory or constitutional requirements for courts to specifically consider victim safety when making release determinations and deciding conditions of pretrial release.

Statutory Authorization for Types of Release

State law provides for various types of pretrial release or what is generally known as bond. Bond is legally defined as a written promise,[11] and a bail bond has been defined as the promise between the defendant and the court, or between the defendant, a surety and the court.[12]

Bonds can be unsecured and consist of only a promise to appear in court as ordered. Bonds can also include other conditions of release beyond appearance, including secured and unsecured financial conditions and other nonfinancial conditions such as supervision by a pretrial services agency. Types of bond in state statute generally include 1) release on recognizance or personal recognizance bonds, 2) conditional release, 3) unsecured appearance bonds and 4) secured bonds. See Figure 1 for additional information on types of bond.

Fig. 1: Types of Bonds[13]

Recognizance/Personal Recognizance: Authorized in nearly every state and known as "PR bonds" or "ROR," these bonds are an agreement signed by the defendant promising to appear in court as required. Recognizance bonds can be issued by release authorities after arrest or by law enforcement in the form of citation in lieu of arrest, which is authorized in every state for at least some offenses.[14]

Conditional Release: Authorized in most states, defendants promise to appear, but a court can impose additional conditions of release, such as supervision by pretrial services or other monitoring.

Unsecured Appearance: Authorized in most states, these bond agreements require defendants to promise to appear for all court dates but set a financial penalty that is payable if the defendant fails to appear. No upfront monetary security is required for release.

Secured: Authorized in most states, secured bonds include promises to appear between courts and a defendant with a financial condition imposed on a defendant upfront in order to ensure appearance or public safety.[15] The various types of secured bonds include:

- **Surety Bonds** can be referenced generally in state law or broken down into two categories—commercial surety bonds and uncompensated surety bonds.
    - **Commercial surety bonds** require commercial bail bond companies to sign a promissory note to pay the full amount of the financial condition if the defendant violates conditions. The commercial surety charges the defendant a nonrefundable percentage fee for this service, usually a maximum of 15% of the amount or a specified dollar amount.[16] Commercial sureties are prohibited in Illinois, Kentucky, Massachusetts, Oregon and Wisconsin.[17]
    - **Uncompensated surety bonds** are those in which an organization or individual signs the promissory note to ensure the financial condition without profit. Uncompensated sureties could include family and friends or community bail funds.
- **Cash bonds** can be broken down into two categories—full cash bonds or deposit bonds. In both instances, defendants post money with the court that is returned to the defendant after adjudication if they don't violate conditions of release. State law authorizes administrative fees to be deducted from the amount returned in some states.
    - A **full cash bond** requires the defendant to post the entire financial condition set by the court in cash.
    - **Deposit bonds** require a defendant to pay a percentage of the full amount of the financial condition set by the court, often 10%. Some states specifically authorize deposit bonds in statute, but the practice can also be found in states where statutory language is silent and only references cash bonds generally without differentiating between the two types.
- **Property bonds**, or collateral bonds, require defendants to post property valued at the full amount of the financial condition with the court. Authorized in most states, they can require real property or other collateral such as U.S. savings bonds, state-issued bonds, local government bonds or other kinds of specified personal property.

Statutory Options for Conditions of Release

Courts in every state are authorized to impose additional conditions of release as part of the bond, or promise to appear, which they deem necessary to reasonably ensure appearance or public safety. Every state statutorily enumerates at least a handful of specific conditions other than bond that courts can impose on pretrial defendants eligible for release.[18]

Supervision and electronic monitoring are two of the most common conditions authorized by state statute. Supervision is often provided by pretrial services agencies. The majority of states use pretrial services agencies to some degree and Alaska, Kentucky, New Jersey and Washington, D.C., are known for having statewide agencies.[19]

Some states have looked to the judiciary to provide specific pretrial services. Colorado and New York both require courts to provide court reminder services.[20]

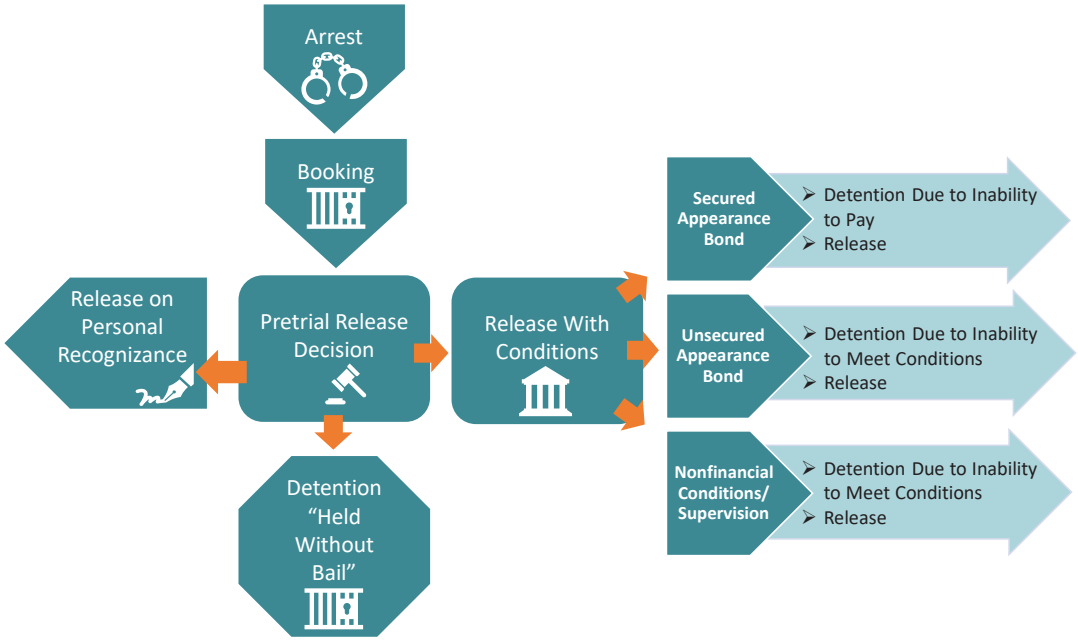
Partial confinement, including house arrest, work release, curfew and inpatient treatment are options in the majority of states. Additionally, most states authorize courts to restrict movement by limiting travel or presence in specified locations.

A number of conditions focus on victim safety. These include restrictions on where a defendant can reside, including with the victim; limitations on contact with certain people, groups or places; restrictions on the possession of weapons; prohibitions on threats of violence; and adherence to or creation of protection or no-contact orders.

Most states authorize prohibitions on the use of controlled substances and also authorize related monitoring or treatment for substance use disorders. Other kinds of treatment addressed in statute include mental health treatment, domestic violence counseling, and other courses of treatment that are medically recommended.

In addition to the specifically enumerated conditions described, nearly every state authorizes courts to impose any reasonable condition necessary to ensure appearance of the defendant or the safety of the victim or the community. This broad statutory authorization provides a significant amount of discretion for courts to tailor conditions of release to the individual defendant.

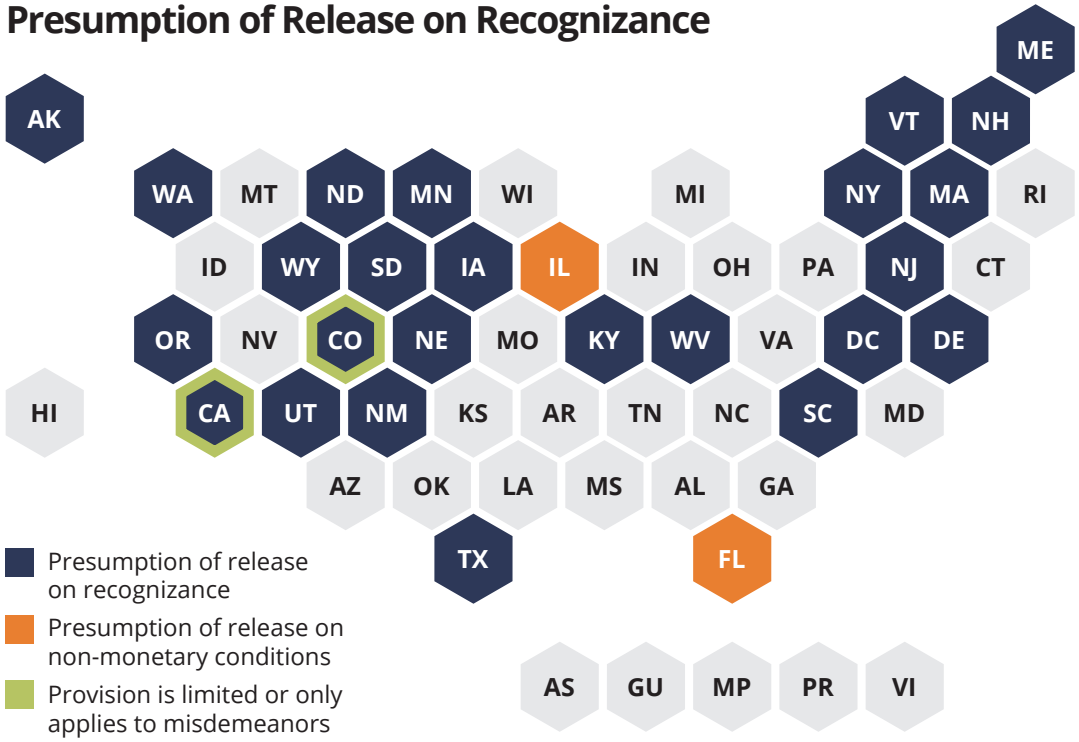
The Pretrial Release Process



Statutory Guidance to Courts on Release

In addition to authorizing types of release and listing options for release conditions, statutes provide guidance to courts on what type of bond and conditions of release will be imposed. Laws address questions of excessiveness, reasonableness, due process and equal protection considerations. Beyond that, virtually every state limits conditions ordered to only those that provide reasonable assurance of court appearance and, in some instances, public safety.

More than half the states have codified a presumption of release on recognizance or non-monetary conditions for some, if not all, defendants who are eligible for bail.[21] In a minority of states with this presumption, it is limited to misdemeanor cases.



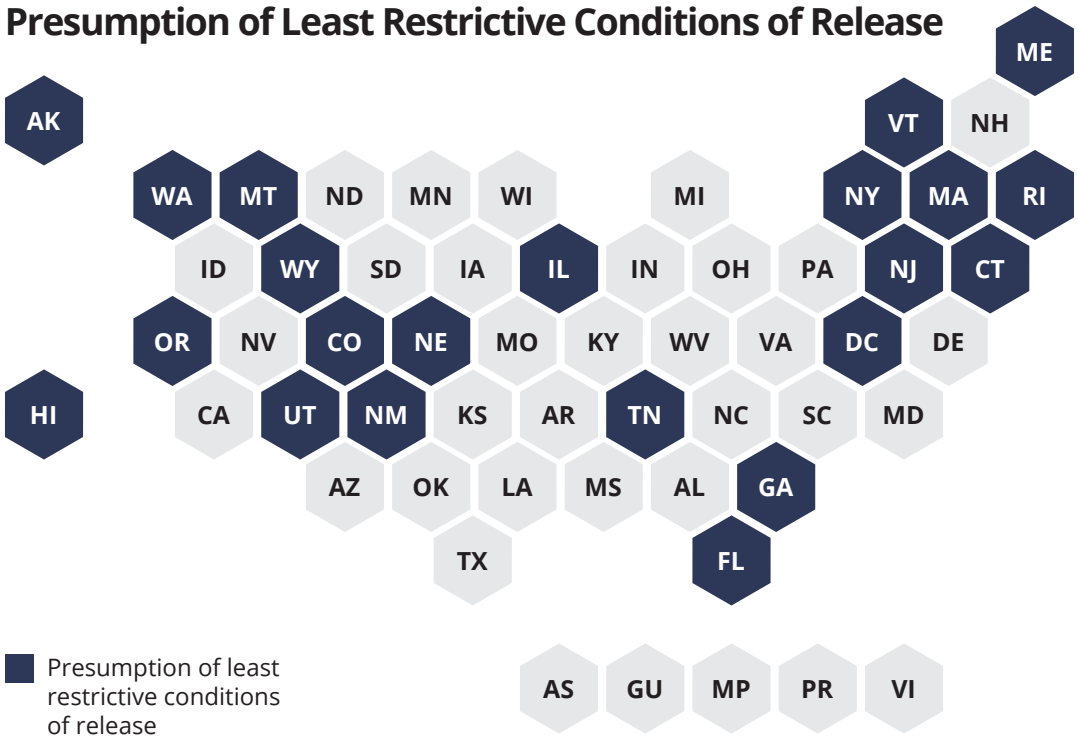
Source: NCSL, 2020

Nearly half the states and the Washington, D.C. have laws that expressly require courts to impose the least restrictive conditions necessary to ensure the appearance of the defendant and/or public safety.[22]

In a handful of states where this presumption is not codified, courts are required to first consider release on recognizance or unsecured appearance bond. Then, if the court determines that either method is insufficient to ensure appearance or public safety, other statutory release conditions may be considered. The provisions for least restrictive conditions require individualizing the pretrial process but are also an express codification of legal concepts that transcend statutory language in every state.[23]

Individualization of the pretrial release process is constitutionally required. To implement this requirement, states have enacted factors that courts must consider when making release determinations. These factors generally include criminal history, prior failures to appear and ties to the community, among others. For decades, these laws have directed courts to conduct unstructured assessments of risk using professional judgment and experience to evaluate the codified factors intended to help a court predict a defendant's potential for pretrial success or failure.

Increasingly, state laws are authorizing or requiring courts to consider an empirically based approach, or a structured risk assessment tool. These tools are the result of decades of research aimed at determining which factors have the most predictive value for success on pretrial release. Pretrial success has been de-



Source: NCSL, 2020

fined in statute. For example, Delaware defines it as "a defendant's compliance with orders to appear in court as directed and not commit any new criminal offense between the initial arrest and adjudication of the pending criminal charges."[24]

There are about two dozen risk assessment tools in use across the states.[25] Laws in Alaska, Delaware, Hawaii, Indiana, Kentucky, New Jersey and Vermont require courts to adopt or consider risk assessments in at least some, if not all, cases on a statewide basis.[26] Laws in Colorado, Illinois, Montana, New York, Pennsylvania, Rhode Island, Virginia and West Virginia authorize or encourage, but do not require, adopting a risk assessment tool on a statewide basis.[27]

Statutes are starting to regulate the use of risk assessments and promote best practices by requiring the tool to be validated on a regular basis, that the tool be free from racial or gender bias, and that documents, data and records related to the tool, and use of the tool, be publicly available.[28]

Statutory Guidance on Financial Conditions

A number of states have codified additional guidance to courts specific to financial conditions of release. Much of this guidance has been codified in recent years in response to increased attention to defendants being held pretrial, due mostly to inability to pay financial conditions of release or associated fees.[29]

Some of these statutes require courts to consider a defendants' ability to meet financial conditions of release. This ability to pay determination can also include fees associated with supervision or other conditions that would have a financial impact. Laws requiring ability to pay considerations exist in at least 11 states.[30]

Other laws aim to limit the impact of financial conditions of release. Texas[31] statute contains a presumption of inability to pay in certain cases if a defendant cannot make bond after 48 hours. A law in New Hampshire[32] prohibits courts from imposing a financial condition that would result in detention solely because of a defendant's inability to pay. Defendants in Colorado[33] must be released if they can meet the terms of a bond, even if they are unable to pay any outstanding fees or costs such as pretrial supervision, electronic monitoring, processing or booking fees.

Every state currently authorizes release on a cash or other secured bond.[34] This is the case even in jurisdictions that are widely known for moving away from reliance on financial conditions of release, such as New Jersey and the Washington, D.C..[35]

Removing money from the equation

New Jersey made a number of substantial changes to its pretrial framework that were implemented in 2017. The reforms created a statewide pretrial services agency, implemented a risk assessment tool, required release on the least restrictive conditions, and put in place procedural protections and statutory timelines for newly authorized preventative detention.[36] Following implementation, New Jersey reported significant decreases in pretrial detainees and a 20% decrease in jail populations.[37] Nearly all defendants were released, most without financial conditions. Only 5.6% of defendants were detained statewide and financial conditions were used in just 44 instances.[38]

States are starting to go beyond presumptions of nonfinancial conditions and ability to pay considerations to more directly restrict courts' use of financial conditions. Use of financial conditions of release are prohibited in Colorado for most traffic and petty offense cases unless payment would result in a timelier release of the defendant.[39] New York law also restricts the use of financial conditions for most misdemeanors and some felony offenses.[40]

Conclusion

Statutory frameworks and pretrial practices have changed considerably in the past decade. Ongoing legislative actions will be shaped by continued research and evaluation of pretrial data happening at the state and local levels. Changes to other pieces of the puzzle that make up the pretrial legal framework driven by courts, prosecutors, defenders and other system actors will also play a role in moving toward a fair, equitable and safe pretrial process.

Endnotes

1 See Pretrial Justice Institute, "What's Happening in Pretrial Justice" (Baltimore, Md.), https://www.pretrial.org/WHIPJ/; and National Conference of State Legislatures, "Pretrial Release: State Reports and Other Resources" (Denver, Colo.: NCSL), http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-policy-state-laws-reports-and-resources.aspx.

2 National Conference of State Legislatures, "Pretrial Release Eligibility"(Denver, Colo.: NCSL), https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx.

3 Ala. Const. art. I, § 16; Alaska Const. art. I, § 11; Ark. Const. art. 2, § 8; Conn. Const. art. I, § 8; Del. Const. art. I, § 12; Idaho Const. art. I, § 6; Ind. Const. art. I, § 17; Iowa Const. art. I, § 12; Kan. Const., Bill of Rights § 9; Ky. Const. § 16; Maine. Const. art. I, § 10; Minn. Const. art. I, § 6; Mont. Const. art. II, § 21; Neb. Const. art. I, § 9; Nev. Const. art. I, § 7; N.D. Const. art. I, § 11; S.D. Const. art. VI, § 8; Tenn. Const. art. I, § 15; Wyo. Const. art. I, § 14.

4 The Avalon Project, "Frame of Government of Pennsylvania, May 5, 1682" (New Haven, Conn.: Lillian Goldman Law Library, 2008), https://avalon.law.yale.edu/17th_century/pa04.asp; and Timothy R. Schnacke, Guidelines for Analyzing State and Local Pretrial Laws (Rockville, Md.: Pretrial Justice Institute, 2017).

5 Ariz. Const. art. II, § 22; Calif. Const. art. I, § 12; Colo. Const. art. II, § 19; Fla. Const. art. I, § 14; Ill. Const. art. I, § 9; La. Const. art. I, § 18; Mich. Const. art. I, § 15; Miss. Const. art. III, § 29; Mo. Const. art. I, §§ 20, 32; N.J. Const. art. I, ¶ 11; N.M. Const. art. II, § 13; Ohio Const. art. I, § 9; Okla. Const. art. II, § 8; Ore. Const. art. I, § 14, § 43; Pa. Const. art. I, § 14; R.I. Const. art. I, § 9; S.C. Const. art. I, § 15; Texas Const. art. I, §§ 11, 11a; Utah Const. art. I, § 8; Vt. Const. II, § 40; Wash. Const. art. I, § 20; Wis. Const. art. I, § 8.

6 See generally Wayne R. LaFave, Jerold H. Israel, Nancy J. King and Orin S. Kerr, *Criminal Procedure,* § 12.3(b), "Preventive detention and the state constitutions, 4 Crim. Proc. § 12.3(b)," (4th ed., Dec. 2019 Update) (Eagan, Minn.: Thomson/West).

7 Ga. Const. art. I, § 1, ¶ XVII; Hawai'i Const. art. I, § 12; Md. Const., Declaration of Rights, art. 25; Mass. Const.pt. I, art. 26; N.H. Const.pt. I, art. 33; N.Y. Const. art. I, § 5; N.C. Const. art. I, § 27; Va. Const. art. I, § 9; W.Va. Const. art. III, § 5.

8 LaFave, Criminal Procedure.

9 National Conference of State Legislatures, "Victims' Pretrial Release Rights and Protections" (Denver, Colo.: NCSL), http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-victims-rights-and-protections.aspx.

10 Ibid.

11 Black's Law Dictionary (11th ed.), "Bond" (Toronto, Ontario, Canada: Thomson Reuters, 2019).

12 University of Pretrial, "Bail Bond" (Rockville, Md.: Pretrial Justice Institute, 2017), https://university.pretrial.org/glossary/bailbond.

13 For statutory citations of types of bond in each state see National Conference of State Legislatures, "Pretrial Release Conditions" (Denver, Colo.: NCSL), https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-conditions.aspx#/ .

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15 Secured bonds may be set for the purposes for ensuring public safety in some states, but less than half of the states statutorily allow bail forfeiture for a conditions violation that is not related to appearance. See National Conference of State Legislatures, "Pretrial Release Violations & Bail Forfeiture" (Denver, Colo.: NCSL), http://www.ncsl.org/research/civil-and-criminal-justice/bail-forfeiture-procedures.aspx.

16 National Conference of State Legislatures, "Bail Bond Agent Business Practices" (Denver, Colo.: NCSL), http://www.ncsl.org/research/civil-and-criminal-justice/bail-bond-agent-business-practices.aspx.

17 National Conference of State Legislatures, "Bail Bond Agent Licensure" (Denver, Colo.: NCSL), http://www.ncsl.org/research/civil-and-criminal-justice/bail-bond-agent-licensure.aspx; and Massachusetts SB 2371 (2018).

18 Conditions provided for statutorily can be found on NCSL's webpage. See National Conference of State Legislatures, "Pretrial Release Conditions" (Denver, Colo.: NCSL), https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-conditions.aspx#/.

19 Amber Widgery, "Pretrial Release: State Laws and Recent Legislation," PowerPoint presentation prepared for Montana Law and Justice Interim Committee, May 2020, https://www.ncsl.org/Portals/1/Documents/cj/Widgery_Montana_LJIC_Final.pdf?ver=2020-07-10-133723-313&timestamp=1594409874646; see also Amber Widgery, "Providing Pretrial Services," Crime Brief (Denver, Colo.: National Conference of State Legislatures), https://www.ncsl.org/documents/cj/crimebrieffinal.pdf.

20 Ibid.

21 National Conference of State Legislatures, "Guidance for Setting Release Conditions" (Denver, Colo.: NCSL), http://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions.aspx.

22 Ibid.

23 For more information about the broader legal landscape regarding least restrictive conditions, see Timothy R. Schnacke, Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform (Washington, D.C.: National Institute of Corrections, 2014), http://www.clebp.org/images/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf

24 11 Del. C. §2102.

25 Sarah L. Desmarais and Evan M. Lowder, Pretrial Risk Assessment: A Primer for Judges, Prosecutors, and Defense Attorneys (Safety and Justice Challenge, 2019), http://www.safetyandjusticechallenge.org/resource/pretrial-risk-assessment-tools-a-primer-for-judges-prosecutors-and-defense-attorneys/.

26 National Conference of State Legislatures, "Guidance for Setting Release Conditions."

27 Ibid.

28 See, for example, SB California 36 (2019), Idaho HB 118 (2019) and New York SB 1509 (2019).

29 See, generally, John Mathews II and Felipe Curiel, "Criminal Justice Debt Problems" (American Bar Association web page, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/criminal-justice-debt-problems/.

30 National Conference of State Legislatures, "Guidance for Setting Release Conditions" (Denver, Colo.: NCSL), http://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions.aspx.

31 Texas SB 1913 (2017).

32 New Hampshire SB 556 (2018).

33 Colorado SB 191 (2019).

34 National Conference of State Legislatures, "Pretrial Release Conditions."

35 See Amber Widgery, "California Is Latest State to Change Bail," The NCSL Blog (2018), http://www.ncsl.org/blog/2018/08/29/california-is-latest-state-to-change-bail.aspx.

36 See New Jersey SB 946 (2014); and Amber Widgery, "N.J. Legislature Sends Bail Reform to Voters," The NCSL Blog (2014), https://www.ncsl.org/blog/2014/10/29/nj-legislature-sends-bail-reform-to-voters.aspx.

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38 Ibid.

39 Colorado HB 1225 (2019). See also Connecticut HB 7044 (2017) and Texas SB 1913 (2017).

40 New York SB 1509 (2019).

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