To:	Transition Team for Governor-elect Lamont and Lt. Governor-elect Bysiewicz
From:	Bail Reform Working Group, Criminal Justice Committee
Re:	Reforming Connecticut's Money-Bail System
Date:	December 31, 2018

This memo considers Connecticut's pretrial justice system and suggests possible reforms.

I. BACKGROUND

Under Connecticut's Constitution, bail must be ordered for all individuals charged with crimes.[1] Preventative pretrial detention is unavailable for anyone accused of an offense, regardless of the risk of re-arrest or failure to appear. Following arrest, police departments may release arrestees on a promise to appear or set a bond amount. Connecticut's statewide pretrial services agency, the Judicial Branch's Court Support Services Division (JB-CSSD) will interview and release the arrestee on a promise to appear with or without conditions, keep the police-set bond, or change the bond at the police department. If the arrestee remains detained prior to arraignment, JB-CSSD staff will recommend to the court at arraignment non-financial and financial conditions of release for arrestees. At arraignment, the court may issue a promise to appear or impose financial and/or non-financial conditions of release. JB-CSSD supervises non-financial conditions of release, and addresses failure to comply with those release conditions. In approximately 14% of cases involving custodial arrests, defendants are held in custody on financial bonds until case disposition—and a larger percent spend some period of time in custody before the case concludes (the median duration of pretrial detention for a person who is eventually released prior to disposition is 11 days).[2]

When financial conditions of release are imposed, an individual's ability to secure release pending trial depends on his or her ability to pay. Consider two individuals who present identical risks of re-arrest and failure to appear and who have identical bond amounts set in their cases: the defendant with financial resources will be released pending trial whereas the defendant without resources will stay detained. This makes a big difference: those detained pretrial, on average, plead guilty at higher rates and receive longer sentences than similarly-situated defendants who are released pretrial.[3] Moreover, pretrial detention—even for several days—is deeply disruptive for individuals and their families and can result in the loss of jobs and housing.[4] Indeed, studies show that for individuals assessed as low or moderate risk, short-term

[1] Connecticut's Constitution permits preventative detention for defendants charged with capital crimes. However, following the elimination of the death penalty in Connecticut, this provision no longer applies.
[2] Connecticut Sentencing Commission, *Pretrial Release and Detention in Connecticut*, https://www.ct.gov/ctsc/lib/ctsc/1Pretrial_Release_and_Detention_in_CT_2.14.2017.pdf [hereinafter *Pretrial Release and Detention in Connecticut*]. This report contains extensive information about Connecticut's pretrial justice system.
[3] *See, e.g.*, Paul S. Heaton, Sandra G. Mayson & Megan T. Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711 (2017).
[4] *See, e.g.*, Christopher T. Lowenkamp et al., Arnold Foundation, *The Hidden Costs of Pretrial Detention* (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf; Arpit Gupta et al., *The Heavy Costs of Bail: Evidence from Judge Randomization*, 45 J. Legal Stud. 20-21, 23 (2016), http://www.columbia.edu/~cjh2182/GuptaHansmanFrenchman.pdf.

pretrial detention is associated with an increased risk of re-arrest and failure to appear.[5] In addition, a recent report from the Connecticut Sentencing Commission concluded: "In Connecticut and elsewhere around the country, the bond amounts imposed on defendants as financial conditions of release—unlike the risk assessment instrument that helps decision makers determine whether to impose a financial condition—have never been validated. That is, there is no evidence that the amount of financial bond correlates with a defendant's likelihood of re-arrest or failure to appear."[6] Notably, a financial bond is forfeited if the accused person fails to appear for a subsequent court appearance. It is not forfeited if the person is re-arrested.

II. REFORMS IN CONNECTICUT AND NATIONWIDE

A. Reforms in Connecticut in 2017

Connecticut enacted legislation relating to bail in 2017. Under the reforms, judges may not set "cash only" bonds (i.e., bonds that require defendants to pay the full amount of the bond rather than a percentage to secure release).[7] In addition, the legislation requires courts to make certain findings before imposing a financial condition of release where a defendant is charged with a misdemeanor other than a family violence crime. The law also provides, subject to certain exceptions, that a person who remains detained in a misdemeanor case must be brought back to court within 14 days of arraignment. At that time, in cases other than family violence cases, the court must remove the financial condition unless it makes certain findings. These modest reforms in 2017 have not led to a reduction in the number of individuals detained pretrial in Connecticut.[8]

Currently, there are almost 300 people being held pretrial in DOC jails who are on a waiting list for a bed at a drug treatment facility. Because of budget cuts, there is funding now for only 188 treatment beds (funding for 123 beds was recently cut). Notably, the number of people held pretrial in Connecticut jails with immigration detainers has nearly doubled in the past two years (from 48 in December 2016 to 93 in December 2018). In the past year, it has become impossible to bail out anyone with an immigration detainer—despite DOC policies to the contrary. (For more details, see our separate memo addressing the intersection between our state criminal justice system and federal immigration enforcement).

B. Reforms Nationwide

In the past few years, there has been extensive litigation nationwide asserting that money bail systems in states and localities violate the Equal Protection and Due Process Clauses of the U.S. Constitution. Many jurisdictions have entered into settlement agreements in these cases and changed their practices, and litigation is ongoing in a number of places.[9] States such as New

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[5] Arnold Foundation, Pretrial Criminal Justice Research (Nov. 2013), https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf.
[6] *Pretrial Release and Detention*, *supra* note 1, at 7.
[7] Public Act 17-145 (Gen. Sess.); Public Act No. 17-2 (June Sp. Sess.).
[8] As of November 1, 2018, the number of people detained pretrial was 3,375 (compared to 3,214 people on November 1, 2017 and 3,332 people on November 1, 2016).
[9] Civil Rights Corp, *Challenging the Money Bail System* (describing lawsuits nationwide). https://www.civilrightscorps.org/work/wealth-based-detention.

Jersey, New Mexico, and California have recently moved away from money-bail systems and adopted preventative-detention schemes. Such schemes prevent individuals from being detained based on their inability to pay, and permit pretrial detention of individuals charged with some crimes (with no opportunity for release on bail) if certain procedures are followed and standards met.

III. RECOMMENDATIONS

Money bail systems are fundamentally unfair to those without resources. Rather than basing the pretrial release decision on an individual's risk of re-arrest or failure to appear, such systems allows an individual's wealth to determine whether he or she will be free pending trial. Money bail systems result in the detention of individuals who could be safely released in the community and the release of people who present a greater risk than many who end up detained.

However, despite the problems with money bail, preventative detention systems carry their own risks. For example, in the federal system, under the Bail Reform Act of 1984, courts are prohibited from imposing financial conditions that result in a defendant's detention, and preventative detention is permitted in some circumstances. The pretrial detention rate in the federal system has been steadily increasing since the 1984 Act was passed. As of 2017, excluding immigration cases, 60 percent of the federal pretrial population was detained.[10] Not all preventative detention schemes have such high rates of detention, however. Under the preventative detention scheme in place in the District of Columbia, an average of 88% of pretrial defendants were released pending trial over a recent five-year period.[11] The recent introduction of preventative detention in New Jersey enjoyed widespread bipartisan support and has resulted—at least initially—in a reduction in the population of people detained pretrial. Meanwhile, although progressive advocates fought for the end of money bail in California, many opposed the scheme that was ultimately enacted to replace it—fearing it will drive up the number of people detained. Many advocates nationwide have voiced concern about replacing money bail with systems that rely too heavily on risk assessment tools in making bail decisions, as many of these tools exacerbate racial disparities.

Thus, despite the clear problems with Connecticut's money-bail system, policy makers need to be very thoughtful about how to best move forward with reform. A preventative detention scheme that does not narrowly define the range of offenses eligible for detention and put in place stringent standards for detention could lead to an increase in the number of people detained pretrial in the state. Given this background, we recommend as follows:

- **Restore funding for drug treatment beds.** Almost 300 individuals are currently detained pretrial in DOC jails waiting for beds at residential drug treatment facilities. Recent cuts to the Judicial Branch's budget meant a reduction in funding for treatment beds. Investing in treatment now will reduce recidivism rates and save costs in the long term.

[10] U.S. Courts, U.S. District Courts-Pretrial Services and Detention for the 12-Month Period Ending September 30, 2017, Table H-14A, http://www.uscourts.gov/sites/default/files/data_tables/jb_h14a_0930.2017.pdf.
[11] *Pretrial Release in Connecticut*, supra, at 41 (providing data for the years 2010-2016).

- **Encourage the Commissioner of Correction to consider appropriate uses of DOC's power to release individuals charged with certain misdemeanors and low-level felonies.** Conn. Gen. Stat. § 18-100f provides that the Commissioner of Correction may release individuals charged with misdemeanors or D or E felonies (except with respect to certain crimes) to "a residence approved by the Department of Correction subject to such conditions as the commissioner may impose including, but not limited to, participation in a substance abuse treatment program and being subject to electronic monitoring or any other monitoring technology or services." The person remains under the supervision of DOC and release can be revoked. (The power cannot be used if the court orders otherwise).

- **Support a change in court rules (or enact legislation) allowing an arrestee to deposit 10% of the bond amount with the court whenever a bond is imposed, and permitting an arrestee to utilize this 10% option while detained at the police station after arrest.** Most people with surety bonds use a bail bondman to secure release. Typically, bondsmen require a nonrefundable payment of 7% or 10% of the bond amount. A judge has the authority under the Connecticut Practice Book to permit the bond to be satisfied by a deposit of 10% of the bond amount with the court.[12] That money is later returned to the defendant upon discharge of the bond. If the defendant fails to appear, he or she is liable to the court for the full amount.[13] However, this "10% cash bail" option is available only if specifically ordered by the judge. Making this this 10% option automatic in every case would allow arrestees to use this option at the police station prior to arraignment (the option is not currently available at the police station because a court must enter an order permitting it). Making the option automatic would increase its use and allow the release of individuals currently detained simply because friends and family are not willing or able to pay a nonrefundable fee to a bondsman. Increased use of this 10% option would mean returning resources to individuals and families often struggling to stabilize their lives and make ends meet. Nationally, the bail industry profits $2 billion annually, representing a massive wealth transfer from individuals and their families (who typically have extremely limited resources) to private bondsmen and insurance corporations. The purpose of bail is to incentivize court appearance, not to punish the presumptively innocent—so an affordable, refundable 10% cash payment (as opposed to the non-refundable premium) would better adhere to this purpose.

  Note: a bill on this topic was introduced in the 2017 legislation session based on a recommendation of the Connecticut Sentencing Commission. The bill provided that the 10% option would be available for bond amounts of $10,000 or less. However, the provision providing a 10% option was removed from the final version of the bill that passed.

- **Support a change in court rules (or enact legislation) requiring judges to conduct an inquiry into a defendant's ability to pay before the bond is set.** Currently, there is no such requirement at arraignment. JB-CSSD, which interviews all detained individuals

[12] Conn. Practice Book § 38-8.
[13] *Id.* § 38-9.

prior to arraignment, generally asks people how much bond they can post. However, there is no requirement for the judge to consider a defendant's ability to pay when setting the bond. Requiring the submission of bank or other financial records would be unworkable at a first arraignment. However, the defendant and his or her attorney could prepare a simple financial affidavit to be reviewed by the court.

- **Create a working group that includes members of the Connecticut Sentencing Commission and other organizations and individuals with expertise on pretrial detention and release (e.g., ACLU SmartJustice, Connecticut Bail Fund, Connecticut Immigrant Rights Alliance, and individuals impacted personally by pretrial incarceration). Task this group with developing recommendations for a design of a system that would remove money bail as a detention mechanism and create an in-or-out system of pretrial release and detention. Given the concerns about pretrial detention, the group should make recommendations regarding a constitutional amendment and implementing statutes that would ensure that pretrial detention is strictly limited.**