

Pretrial Justice Reform in Michigan

BACKGROUND:

- The American legal tradition and the Michigan Constitution have long favored pretrial liberty. Using the least restrictive conditions of release necessary to ensure safety allows men and women to responsibly await trial in their communities, maintain employment and care for their families.¹
- Although current court guidelines encourage the use of least restrictive conditions to ensure a defendant appears in court without commission of a new crime, money bail may be ordered for any offense.²
- Between 1970 and 2016, Michigan's pretrial incarceration population increased by 300 percent and the state sees wide geographic variation in pretrial detention practices.³
- The goal of pretrial jail time and conditions of release should be to prevent a credible risk of harm or flight before trial. Over-reliance on money bail skews this analysis, causing low-income defendants to remain in jail due to limited financial resources and enabling dangerous defendants who do have access to wealth to post bond and be released.⁴

THE RESPONSE:

- Michigan must refocus the use of pretrial jail time on a risk-based determination, rather than a wealth-based determination.
- This fall, Michigan state lawmakers introduced a package of pretrial justice policies that would advance pretrial liberty, justice, and public safety. The Michigan legislature should promptly review and advance these proposals that would:
 - Ensure Michigan courts impose the least restrictive nonmonetary conditions required to ensure safety before trial. Such conditions may include electronic monitoring, court reminders, drug testing, or pretrial supervision. Defendants who do not pose a flight or safety risk would be released on personal recognizance.
 - Enable use of money bail for individuals when a defendant has been charged with a specific crime and where nonmonetary conditions could not effectively address risks of flight or safety.
 - Enquire into a defendant's ability to pay before ordering money bond to prevent undue burdens on the poor.
- In addition, this package would provide Michigan courts with risk assessment tools to guide their pretrial decision making with a focus on safety and require robust data collection to advance transparency.

¹ Kathryn Riley, *How Bail Works in Michigan and Recommendations for Reform*, Mackinac Center for Public Policy (October 17, 2018), <https://www.mackinac.org/archives/2018/s2018-06.pdf>.

² Task Force on Jail and Pretrial Incarceration, *Report and Recommendations*, Michigan Joint Task Force on Jail and Pretrial Incarceration (January 10, 2020), <https://www.courts.michigan.gov/48e562/siteassets/committees,-boards-special-initiatves/jails/jails-task-force-final-report-and-recommendations.pdf>.

³ Task Force on Pretrial and Jail Incarceration, *supra* note 2, 13; Task Force on Jail and Pretrial Incarceration, *Summary of Jails Task Force Pretrial Policies*, Michigan Joint Task Force on Jail and Pretrial Incarceration (March 2021), <https://www.courts.michigan.gov/493abf/siteassets/committees,-boards-special-initiatves/jails/summary-of-jails-tf-pretrial-policies.pdf>.

⁴ Prison Fellowship, *Pretrial Detention: Bail and Bond*, Prison Fellowship (2021), <https://www.prisonfellowship.org/resources/advocacy/pretrial/pretrial-detention-bail-and-bond/>.

WHY IT MATTERS:

- Every Michigander, including those facing criminal charges, has innate, God-given dignity. Pretrial detention may result in loss of employment, housing, and child custody, and significantly increases the likelihood of conviction, harsher sentencing, and further involvement with the criminal justice system.⁵ Criminal justice systems should carefully limit jail time before trial to instances where it is necessary to protect the public.
- A primary role of government is to provide for community safety. At all stages before trial, this should be done in a manner that reflects the presumption of innocence.
- Overuse of jail before trial can undermine public safety. In fact, one study found that “the pretrial detention of 10,000 people with misdemeanor charges would result in 400 additional felonies and 600 more misdemeanors than if they had been released pretrial.”⁶
- Overuse of money bail can result in jail time for low-income, low-risk defendants and conflicts with the biblical mandate to defend the “rights of the poor and needy” (Proverbs 31:9).
- Nonmonetary conditions of pretrial release produce comparable public safety outcomes to cash bail options, but without the larger negative consequences for defendants, families, and communities.⁷ Michigan’s pretrial reforms would increase use of these tools
- Higher detention rates before trial are associated with increased unemployment for defendants and higher community-wide poverty and unemployment rates.⁸ Limiting pretrial jail time to when it is essential will allow Michigan employers to better keep talent in a challenging labor market.
- Drawing on valuable criminal justice system data, risk assessments help courts assess the recidivism and flight risks of defendants when determining pretrial status. This tool has allowed jurisdictions to carefully reduce their pretrial incarceration rate while keeping neighborhoods safe.⁹ ,

⁵ Emily Leslie & Nolan G. Pope, *The Unintended Consequences of Pretrial Detention on Case Outcomes: Evidence from New York City Arrangements*, 60 *J.L. & Econ.* 529 (2017), http://econweb.umd.edu/~pope/pretrial_paper.pdf; Christopher T. Lowenkamp, et al., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Laura and John Arnold Foundation (November 2013), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_state-sentencing_FNL.pdf; Leon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, Vera Institute of Justice (April 2019), <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/04/JusticeDenied-Evidence-Brief.pdf>.

⁶ Paul Heaton, et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *Stan. L. Rev.* 711 (2017), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/02/69-Stan-L-Rev-711.pdf>.

⁷ Diana Daburzzo, *New Jersey Set Out to Reform Its Cash Bail System. Now, the Results Are In*, Arnold Ventures (November 14, 2019), <https://www.arnoldventures.org/stories/new-jersey-set-out-to-reform-its-cash-bail-system-now-the-results-are-in/>.

⁸ Will Dobbie and Crystal Yang, *The Economic Costs of Pretrial Detention*, Brookings Papers on Economic Activity (March 2021), https://www.brookings.edu/wp-content/uploads/2021/03/BPEASP21_Dobbie-Yang_conf-draft.pdf; Arpit Gupta, Christopher Hansman, and Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, *The Journal of Legal Studies* (June 2016), <https://www.journals.uchicago.edu/doi/abs/10.1086/688907>.

⁹ *Testimony of Prison Fellowship Before the U.S. House Committee on the Judiciary* (November 14, 2019), https://www.prisonfellowship.org/wp-content/uploads/2020/01/Testimony-of-Prison-Fellowship-Bail-Reform_Final.pdf?r=KCMS