Honorable Robbin J. Stuckert  
Chief Judge, DeKalb County  
133 W. State Street  
Sycamore, IL 60178

RE: Illinois Supreme Court Commission on Pretrial Practices

Dear Honorable Robbin J. Stuckert,

On behalf of the Criminal Justice Policy Program at Harvard Law School, we submit this testimony to the Illinois Supreme Court’s Commission on Pretrial Practices. We are pleased to learn that the Illinois Supreme Court is considering reforms to the state’s pretrial laws and practices. As national experts on bail who have closely studied Illinois’s pretrial practices, we encourage the state to eliminate money bail and enforce procedural safeguards for pretrial detention.

In Illinois and across the country, bail reform has gained momentum as the public learns how the money bail system discriminates based on wealth and race. No pretrial system should treat people differently based on the money in their bank accounts or the color of their skin. But in Illinois today, some people accused of crimes can post bond and walk free while they await trial, while those who cannot afford their bonds must languish in jail until their case is resolved. Money bail disproportionately harms Black and Latinx people accused of crimes who often have less personal and familial wealth than their white counterparts. Implicit and explicit racial biases can make those disparities worse. Indeed, recent empirical research has found that money bail is imposed more often on Black people than on white people, and that Black people receive higher bail amounts than white people.¹

The most grievous harm that money bail inflicts is jail. Pretrial reforms cannot focus on just money — reducing pretrial incarceration must be a central goal. Reducing pretrial incarceration can be accomplished only through clear limits on when and how judges can send people to jail pretrial. As we detail in our latest report, Bail Reform: A Guide for State and Local Policymakers, the only surefire way to reduce the number of people incarcerated pretrial is to eliminate money bail and to establish procedural safeguards for pretrial incarceration.²

In recent decades, the pretrial incarceration rate in the United States has skyrocketed beyond all historical and international norms. Illinois has followed this national trend: over the last few decades, Illinois’s pretrial jail population has tripled.

Through pretrial incarceration, the money bail system imposes tremendous costs on the public, those who are detained, their families, and their communities. Excessive pretrial incarceration harms public safety and undermines the rule of law.

People jailed pretrial lose their jobs, their homes, and custody of their children. As the Supreme Court has cautioned, a defendant detained pretrial “is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.” A host of recent quasi-experimental empirical studies have found that pretrial detention influences case outcomes by causally increasing a defendant’s chance of conviction and sentence length. Innocent people who are detained pretrial become so desperate to get out of jail that they will plead guilty to crimes that they did not commit in exchange for a sentence of time served. In other words, innocent people who mount a defense and are acquitted can face more jail time than innocent people who plead guilty.

Although judges send people to jail to prevent future crime, pretrial detention’s relationship to crime is mixed at best. Social science research has found that pretrial detention causally increases someone’s propensity to commit a crime in the future. This effect has been found even with jail stays as short as two days. Unless pretrial detention is used carefully and sparingly, the practice undermines public safety by destabilizing lives and causing crime.

Unwarranted pretrial incarceration also betrays our legal system’s founding principles. Across the globe, there are governments that determine guilt and mete out punishment without the hassle of trials, defense attorneys, or rules of evidence. But a free society incarcerates people only after they have been convicted of crimes, with rare and carefully limited exceptions. People accused of crimes are innocent until proven guilty, but pretrial incarceration flips this legal maxim on its head by jailing people before giving them the opportunity to defend themselves and without requiring the government to prove its case. In the rare instances when a defendant is a serious threat to someone’s safety, our Constitution requires that the government prove that pretrial detention is necessary at an adversarial hearing with strict procedural safeguards.

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7 Megan Stevenson & Sandra G. Mayson, Pretrial Detention and Bail, REFORMING CRIMINAL JUSTICE 22 (2017) (collecting studies).
9 Id.
At present, courts across Illinois fail to live up to this constitutional mandate. Largely through the mechanism of money bail, people are detained pretrial without required constitutional protections. **To remedy this injustice, we recommend that the commission endorse the following policies:**

1) The prohibition of secured money bail as a condition of pretrial release.
2) Strict procedural safeguards for pretrial detention:
   a) Pretrial detention hearings should be held only upon motion of the prosecutor, and the government should have the burden to prove by clear and convincing evidence that the accused person is a present danger to the physical safety of a person or the community.\(^{12}\)
   b) Defense counsel should be present at these hearings and have the opportunity to cross-examine the prosecution’s witnesses and present evidence.\(^{13}\)
   c) Pretrial detention should be allowed only for people charged with serious, violent felony crimes.\(^{14}\) People charged with all other crimes should be released or conditionally released pending trial.
   d) In jurisdictions that use actuarial risk assessments as part of a pretrial screening process, these assessments should not be used to make decisions to detain people pretrial.

Thank you for the opportunity to submit these comments. If we can be of any assistance to the commission as it contemplates reforms, we are available.

Sincerely,

Brook Hopkins,
Executive Director, Criminal Justice Policy Program, Harvard Law School

Colin Doyle,
Staff Attorney, Criminal Justice Policy Program, Harvard Law School

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\(^{12}\) E.g., N.J. STAT. ANN. § 2a:162-16, 18 (West 2017).
\(^{13}\) E.g., N.M. CT. R. 5-401(A)(2).