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## FISCAL UPDATE Article

Fiscal Services Division

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### NCSL WEBINAR — COVID-19: JUSTICE RESPONSES FOR PRETRIAL RELEASE AND JAILS

**Webinar Series.** On April 29, 2020, the National Conference of State Legislatures (NCSL) held a webinar providing guidance related to easing state restrictions established as a response to the COVID-19 pandemic. The information in this article is current as of the date of the webinar.

**Responding to COVID-19 Within the Existing Legal Framework.** Prior to the rise of the COVID-19 pandemic, pretrial detainees accounted for over half of all the individuals residing in the more than 3,000 jails nationwide. The pretrial process is designed for those who are awaiting a trial or those detained for less than one year. Among the many changes brought about by COVID-19, social distancing has been very difficult if not impossible to fully practice and maintain in institutions like these. As a result, many jurisdictions are searching for safe and legal ways to reduce the number of detainees held at jails and prisons. Unlike prisons, most jails are operated locally, but as a rule, state law creates and dictates the general policy these institutions follow. Operational procedures vary from jurisdiction to jurisdiction, as legal frameworks are dictated by a state's constitution but implemented and enforced through county rules.

In response to the COVID-19 pandemic, some states and localities have increased their focus on procedural flexibility to maximize the number of releases and reduce population of jails and prisons. Efforts have increased to reduce unnecessary detention and modernize pretrial frameworks to reflect an individualized process. While jails and prisons maintain and prioritize a commitment to public safety, trends have shown that moving away from charge-based bail schedules and focusing on individual situations for each defendant have had positive outcomes. Some states have adjusted their pretrial framework practices in response to the implications of COVID-19 utilizing the following processes:

- **Citation in lieu of arrest.** Currently, the practice of citation in lieu of arrest is permitted in every state. The practice enables a defendant to be released under the promise to appear at the time of arrest or later on citation in lieu of booking. Currently, local agencies and officers who are utilizing this process are able to use their own discretion in determining whether or not a citation is in the best interest of the defendant and the public. Each state authorizes the process of citation in lieu of arrest for simple misdemeanors, and several states also authorize the process for some nonviolent felonies.
- **Release eligibility.** Once arrested and booked, defendants are entitled to have conditions set for their release eligibility. The majority of defendants are eligible for release, and continued detention throughout the indictment process remains an exception. Some states do not release defendants who are facing capital charges, whereas other states limit release eligibility based on individual constitutional law and statutory regulation.
- **Presumptions of release on recognizance and least restrictive conditions.** Fifty percent of states allow release procedures based on the defendant's recognizance or willingness to reappear at the time of a court hearing or arrest. State law often encourages the practice, and many states have codified the procedure to regulate its application. Additionally, other states allow for limited supervision of the defendant in the least restrictive and onerous manner. Some states require the process of release under individual recognizance initially, and if the defendant is not an appropriate candidate for such, supervision may be required. Most pretrial defendants are released, and many states have been taking advantage of this practice in light of the implications of COVID-19.

- **Limiting financial conditions of release.** Recent legislative trends have indicated that there is interest in reducing financial conditions tied to the release of a defendant. Defendants are often subject to limited access to funds. Some states limit financial conditions to certain crimes. In Colorado, petty crimes and simple traffic offenses are not subject to financial conditions, and in New Hampshire, current law prohibits financial conditions that result in detention based solely on the inability to pay. Trends have also indicated that more states are now requiring an ability-to-pay determination prior to setting release conditions, and some states are considering a reevaluation of the defendant's changing circumstances under what is commonly known as a "second look" provision.
- **Victim safety and participation.** State law in almost every state requires that the victim of a crime be notified of a defendant's release and have the right to participate in any following crime proceedings. In response to COVID-19, some states have encouraged additional victim safety procedures, such as temporary detention or "cooling off" periods, so as to be able to focus on jail population reduction without sacrificing the priority of the victim's safety.

**Case Study: Michigan.** Chief Justice of the Michigan Supreme Court Bridget McCormack provided a brief overview of how the state has employed some of the above measures to Michigan's criminal justice system, specifically its pretrial release system. In April 2019, Michigan Governor Gretchen Whitmer established a 21-member bipartisan joint state and county task force to review the state's pretrial detention and jail system. In January 2020, the task force released a report to the Michigan legislature with 18 recommendations, including allowing police more discretion to issue appearance tickets in lieu of arresting and jailing offenders, reducing the amount of time defendants spend in jail between the time of arrest and arraignment, and reducing fines and probation terms for some felonies. The task force also recommended a revision of bail laws to align with changes in the federal courts, encouraging the establishment of a framework that allows all defendants to be released on a promise to return to court without being required to pay bail unless a judge decides that a significant risk exists to the defendant's well-being or public safety as a whole.

Similar to other states, Michigan has recently experienced a very low crime rate but has seen increasing numbers of inmates in its institutions. Rural areas of Michigan have seen the most significant increase in prison numbers. In response to the rise of COVID-19, and keeping in mind that correctional institutions are at a higher risk for the spread of a virus, Governor Whitmer issued an executive order that gave sheriffs and deputies increased authority for reducing jail populations and adjusted the categories of inmates eligible for release. Additionally, Chief Justice McCormack issued guidance for sheriffs and deputies on how to handle growing prison populations during the time of a worldwide pandemic, asking sheriffs and deputies to reduce the number of issued warrants and arrests and expand pretrial releases or alternative sentence options.

Chief Justice McCormack noted that much of her guidance mirrors the task force's recommendations, and that anecdotally, she has heard from sheriffs and deputies that county jail populations have decreased anywhere from 25.0% to 75.0%. The response to the task force report in light of the COVID-19 pandemic has been largely positive, and as a result, many of Michigan's lower courts have been setting more recognizance and fewer cash bonds and have taken a preliminary look at reforming misdemeanor sentencing.

A copy of the task force report and additional data is available [here](#).

**Case Study: Kentucky.** Director of the Kentucky Administrative Office of the Courts Laurie K. Dudgeon also provided a brief overview of Kentucky's recent attempts to reform pretrial processes. Requests to initiate the pretrial release system were submitted by the Kentucky Department of Public Advocacy, and Governor Andy Beshear requested Kentucky lawmakers to pass criminal justice reform laws in January 2020. Similar to in Michigan, the implications of the COVID-19 pandemic forced the state to take another look at what could be done to reduce jail populations, as they are at higher risk for the spread of a virus.

In response to COVID-19, the Kentucky Supreme Court issued an order on March 12, 2020, to restrict all in-person court proceedings, including hearings for crimes related to domestic violence, child support hearings, and adjudication of juveniles. Trial judges are encouraged to hear cases remotely, and as of March 2020, all fines and fees related to court proceedings and “failure-to-appear” citations have been suspended. Additionally, on April 14, 2020, the order was expanded to encourage county jails to promote the release of individuals who show no risk to themselves or public safety, after a risk assessment has been completed. Additional guidance was provided as to what types of offenses are excluded from the list of offenses eligible for pretrial release. Director Dudgeon explained that prior to COVID-19, Kentucky averaged arrest rates of 600 to 700 people daily. Since the pandemic has forced county jails and law enforcement to adjust to new processes, arrests have decreased to 175 to 200 a day, and county jails have reported a reduction of over 42.0% in jail populations.

Additionally, Director Dudgeon noted that a large number of Kentucky’s arrests require drug testing. In response to COVID-19 and in an attempt to continue to practice social distancing, the Kentucky Supreme Court also indicated in its order that drug testing should occur only through an oral swab process while maintaining social distancing, rather than urine or other bodily fluid collection.

A copy of the court order and additional data is available [here](#).

**Additional NCSL Resources.** A recording of the webinar, as well as a copy of the webinar slides, can be found at: [www.ncsl.org/research/civil-and-criminal-justice/justice-responses-to-covid-19-ncsl-virtual-meetings-resources.aspx](http://www.ncsl.org/research/civil-and-criminal-justice/justice-responses-to-covid-19-ncsl-virtual-meetings-resources.aspx).

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