June 28, 2019

Administrative Office of the Illinois Courts, Probation Division
c/o Honorable Robbin J. Stuckert
3101 Old Jacksonville Road
Springfield, IL 62704

Submitted electronically to pretrialhearings@illinoiscourts.gov

Re: Comments on Pretrial Reform Recommendations from the American Civil Liberties Union

Dear Honorable Robbin J. Stuckert:

ACLU SMART JUSTICE

Campaign for Smart Justice
National Office
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The American Civil Liberties Union (ACLU) welcomes the opportunity to submit public comment to the Illinois Supreme Court Commission on Pretrial Practices (hereafter, "Commission"). The ACLU is a non-partisan civil rights and civil liberties organization that advocates for issues such as criminal justice reform, voting rights, immigrants' rights, and reproductive freedom, with a presence in all 50 states. We represent approximately 1.6 million members nationwide, including more than 70,000 members located in Illinois. For the past few years we have engaged in legislative and judicial pretrial advocacy, as well as litigation, in over 35 states. We hope to contribute this wealth of experience to support the Commission in making recommendations on Illinois' pretrial system.

As recently as 2015, three-quarters of Illinois' jail population consisted of people waiting in jail pretrial.[1] This means more than 12,000 presumptively innocent people were languishing in jail at any given time. Across the country, state and local jurisdictions have recognized the legal, pragmatic, and moral importance of pretrial liberty. The State of Illinois judiciary has shown leadership in local efforts, issuing rule changes that contributed to nearly a 20% decrease in the size of the pretrial population since 2006.[2] Yet pretrial detention remains an acute problem in Illinois, with an estimated 250,000 people who cycle through the state's jails each year. We encourage the Commission to take the essential next steps to correct remaining deficiencies in the state's pretrial practices.

Much of the national momentum around pretrial reform has been driven by the public's increasing outrage at the damage wrought by an over-reliance on cash bail. Unaffordable money bail causes significant harms—removal from family, inability to maintain work, exposure to violence, deleterious effects on mental health, inability to effectively meet with counsel, disruption in life responsibilities— without advancing the public interest, primarily due to fact that unaffordable money bail drives pretrial incarceration. Recent

[1] Illinois Criminal Justice Information Authority Data Clearinghouse, County Jail Average Daily Population, April 24, 2018. Figure represents the average sentenced and pre-sentenced daily population in county jails statewide in 2016; American Civil Liberties Union, *Blueprint for Smart Justice: Illinois*, 7 (2018), https://50stateblueprint.aclu.org/assets/reports/SJ-Blueprint-IL.pdf
[2] American Civil Liberties Union, *Blueprint for Smart Justice: Illinois*, 8 (2018), https://50stateblueprint.aclu.org/assets/reports/SJ-Blueprint-IL.pdf

evidence suggests that pretrial detention undermines public safety.[3] Pretrial detention causes ripple effects that harm to individuals and their families. Research demonstrates the avoidable detrimental harm that pretrial detention can cause, such as a decreasing the likelihood of obtaining formal employment.[4] Worse still, people who remain incarcerated pretrial receive harsher sentences than those who are released.[5] And it is incarceration itself, not simply incarceration based on poverty, that needs careful limitation.

The Commission should closely scrutinize all causes of pretrial incarceration to not only redress constitutional deficiencies, but to make Illinois a national leader in pretrial justice. The state's primary focus should be ensuring that the constitutional standards are adhered to, which requires limiting the number of people who are detained pretrial and endeavoring to find mechanisms of safe release. Illinois must also strengthen the due process regulations for those who are eventually detained. When detention hearings are held the court's evidentiary standard should be increased so that persons are only detained if clear and convincing evidence is presented that no condition or combinations of conditions can mitigate a specific and imminent threat of physical violence to specific persons or willful flight. These due process protections will not only help narrow who can be detained pretrial, but will also offer significant protections to those persons who are detained.[6]

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The Fundamental Right to Pretrial Release

We encourage the Commission make its recommendations keeping front of mind that the right to pretrial liberty is fundamental. *Stack v. Boyle*, 342 U.S. 1, 4 (1951); *United States v. Salerno*, 481 U.S. 739, 750 (1987). "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). In the pretrial context, one's interest in bodily freedom is especially significant because prior to conviction, a person accused of a crime is afforded the presumption of innocence: "that bedrock, axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." *In re Winship*, 397 U.S. 358, 363 (1970) (internal citation omitted). Thus, it is undisputed that "[i]n our society liberty is the norm, and detention prior to trial…is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987).

Given these fundamental rights, any denial of a person's right to pretrial freedom must be justified by specific, clear, and convincing evidence presented by the government. *See United States v. Salerno*, 481 U.S. 739 (1987). The government must further establish

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[3] Prison Policy Initiative, *Findings from Harris County: Money bail undermines criminal justice goals* (August 24, 2017), https://www.prisonpolicy.org/blog/2017/08/24/bail/

[4] Will Dobbie, Jacob Goldin and Crystal Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges,* (July 2016), https://scholar.princeton.edu/sites/default/files/wdobbie/files/dgy_bail_0.pdf

[5] Christopher T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, (2013), https://csgjusticecenter.org/wp-content/uploads/2013/12/Investigating-the-Impact-of-Pretrial-Detention-on-Sentencing-Outcomes.pdf

[6] American Civil Liberties Union, *A New Vision for Pretrial Justice in the United States*, (March 2019), https://www.aclu.org/sites/default/files/field_document/aclu_pretrial_reform_toplines_positions_report.pdf,

that infringements on pretrial freedom are necessary before a person is detained. Detention is only appropriate if the court has found by clear and convincing evidence that a person is a willful flight risk or an imminent and serious physical threat to a reasonably identifiable person or persons.[7] This means a court cannot detain an individual unless it concludes there is no other less restrictive alternative available. This strict limitation applies whether the detention is outright or *sub rosa*, i.e., pursuant to an unattainable condition of release such as unaffordable money bail. *United States v. McConnell*, 842 F.2d 105, 110 (5th Cir. 1988); *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001).

Who can be held pretrial and for how long?

The Illinois statute does not sufficiently tailor the offenses for which an accused person may be detained prior to trial. The law allows for pretrial detention, after a hearing, of people charged with stalking, felony offenses where imprisonment without conditional or revocable release may be levied upon conviction, unlawful use of a weapon (in certain situations), or with terrorist threats.[8] On their face these charges are not "extremely serious" and there is no evidence that these offenses are correlated to an elevated risk of flight or danger. There is also some precedent in Illinois that suggests that people can be detained to protect the integrity of the court process.[9] In addition to ensuring the charges creating detention eligibility are narrowly limited only to "extremely serious" instances, the Commission should also recommend against justifying pretrial detention based on a risk of interfering with the judicial process. Whereas this is a crime on its own,[10] we believe that it is improper to use as a basis of detention before it is even alleged to have occurred. Ensure all persons facing possible detention receive strong due process protections. Accusation of crime alone should never be a sufficient basis for detention. Detaining people based on probable cause of the charge alone undermines the presumption of innocence, which is a cornerstone of our democracy. At the release hearing, the court's role is to determine whether a person can be released back to their lives while they await trial, not merely whether there is enough evidence to justify an arrest. By the same justification, detention standards involving "proof evident and the presumption great" should be scrapped.

People not granted presumptive release must have the right to counsel, to pretrial discovery and to present and cross-examine any witnesses during their pretrial hearing. Even one day behind bars can have devastating consequences,[11] and the negative personal and public outcomes increase with each additional day. For some, the harms of pretrial detention are irreversible, as evidenced by the increasing rates of suicides amongst people held in local jails.[12] It is thus imperative that the Commission recommend that people be

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[7] Id.
[8] Id.
[9] *People ex rel. Hemingway v. Elrod*, 60 Ill.2d 74 (1975).
[10] 720 I.L.C.S. 5/32-1 (2012).
[11] Christopher T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, *The Hidden Costs of Pretrial Detention*, (2013), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf
[12] Bureau of Justice Statistics, Mortality in Correctional Institutions (2016), https://www.bjs.gov/index.cfm?ty=dcdetail&iid=243;
Matt Clarke, Department of Justice Releases Reports on Prison and Jail Deaths, Prison Legal News (January 8, 2018), https://www.prisonlegalnews.org/news/2018/jan/8/department-justice-releases-reports-prison-and-jail-deaths/

provided with a first appearance release hearing within 24 hours of arrest. These pretrial hearings must be provided with counsel, and with a strong presumption of release. People who are detained pretrial should have the strongest speedy trial rights to protect against indefinite detention. Under the current statute, people who are detained must be brought to trial within 120 days,[13] with a number of exclusions and exceptions. This is too long. The procedural barriers of the speedy trial statute, such as the requirement that a person in certain circumstances demand their trial to start the clock, and its lack of protections for defendants have long been criticized.[14] The deprivation of liberty through pretrial detention requires people to be brought to trial sooner. We encourage the Commission to recommend strengthening these speedy trial protections to require that people be brought to trial within thirty days or released without prejudice, limit excludable time, and remove any procedural barriers .

As detailed in this Commission's preliminary report, current pretrial practices in Illinois raise equity, fairness, and constitutional concerns. For example, defense counsel was only present at 49% of bail hearings.[15] These hearings involve crucial decisions about pretrial liberty, which is a vital right. The presence of an attorney can significantly improve the accuracy and fairness of outcomes. Moreover, the person accused was only present 82% of the time, including video appearances.[16] Thus, crucial release decisions are made in absentia for nearly one out of every five people. This deprives those facing charges of the ability to argue for a release on one's own recognizance or on decreased conditions, and the court cannot adequately determine a person's present ability to pay. It is because of due process and constitutional violations such as these that we implore the Commission to recommend strengthening procedural protections as a critical step in limiting the use of pretrial detention.

Who can Illinois automatically release?

A clear way to ensure that pretrial detention is appropriately limited while reducing the burden on local systems is to reduce the number of people booked into jails in the first instance to the greatest extent possible. It is therefore critical that Illinois widely adopt mandatory pre-booking citations or summons, or other release-based, diversionary practices. Doing so would significantly cut the number of people languishing in Illinois' jails awaiting trial. Illinois can accomplish this reduction without increasing failure to appear rates. Powerful evidence from other jurisdictions consistently demonstrates that increased pretrial release can be achieved without a negative impact on public safety or court appearance rates. In fact, people quickly released pretrial are *less* likely to miss court or be re-arrested than those who were forced to await their trial in jail.[17] Further, simple practices including court date reminders have been demonstrated to be highly

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[13] 725 I.L.C.S. 5/103-5 (2018).
[14] *Cf.*
David S. Rudstein, *Speedy Trial in Illinois: The Statutory Right*, DePaul Law Review (Winter 1976),
https://via.library.depaul.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2646&context=law-review
[15] Christopher T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, *The Hidden Costs of Pretrial Detention*, (2013),
https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf
[16] Id.
[17] Illinois Network for Pretrial Justice.pdf

effective in reducing failure to appear rates.[18] We encourage the Commission to recommend that jurisdictions adopt mandatory citations or summonses for all misdemeanors to limit the number of people who can be held in jail pretrial.

How do we release people who aren't automatically released?

The Commission should recommend strong presumptions of release to make clear that release should be the norm and that the government may only disturb under carefully circumscribed circumstances. Properly enforced, presumptions of release make a return to one's family, job, and community the default. In addition, we implore the Commission to recommend that courts be required to release people on the least restrictive condition or combination of conditions possible. Release without conditions should be standard, and courts must otherwise take an individualized approach to imposing release conditions.[19] Cash bail should be dramatically limited. At a minimum, courts should assess every individual's present ability-to-pay, which, because of the exigency created by pretrial detention, the Commission should define as what a person can access on their own within 24 hours. Resources from family and friends must not be considered. This approach helps guarantee that a lack of financial resources does not lead to extended time in incarceration and protects family and loved ones from exploitation in their most desperate moments.

We strongly encourage the Commission to recommend people receive hearings within 24 hours where there are strong presumptions of release, a properly tailored ability to pay determination, and a requirement to be released on least restrictive conditions.

Conclusion

We thank the Commission for the opportunity to provide written comment. The Commission has an opportunity to propel Illinois forward as a national leader on pretrial issues, and we are encouraged by the demonstrated commitment of the court to improve the state's pretrial practices. We ask that the recommendations above be incorporation into the Commission's final recommendations for pretrial reform, and look forward to the opportunity for dynamic feedback and partnership between the Commission and the many community stakeholders across Illinois. If you have any questions, please contact Udi Ofer, Director of the Campaign for Smart Justice, at uofer@aclu.org.

Sincerely,

Udi Ofer
Director of the Campaign for Smart Justice

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[18] Pretrial Justice Center for Courts, *Use of Court Date Reminder Notices to Improve Court Appearance Rates*, (September 2017), https://www.ncsc.org/~/media/Microsites/Files/PJCC/PJCC%20Brief%2010%20Sept%202017%20Court%20Date%20Notification%20Systems.ashx

[19] E.g., *United States v. Scott*, 424 F.3d 888 (9th Cir. 2005) (finding that mandatory drug testing violated the Fourth Amendment);