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# PRETRIAL RELEASE: STATE LAWS & RECENT LEGISLATION

AMBER WIDGERY | MAY 2020

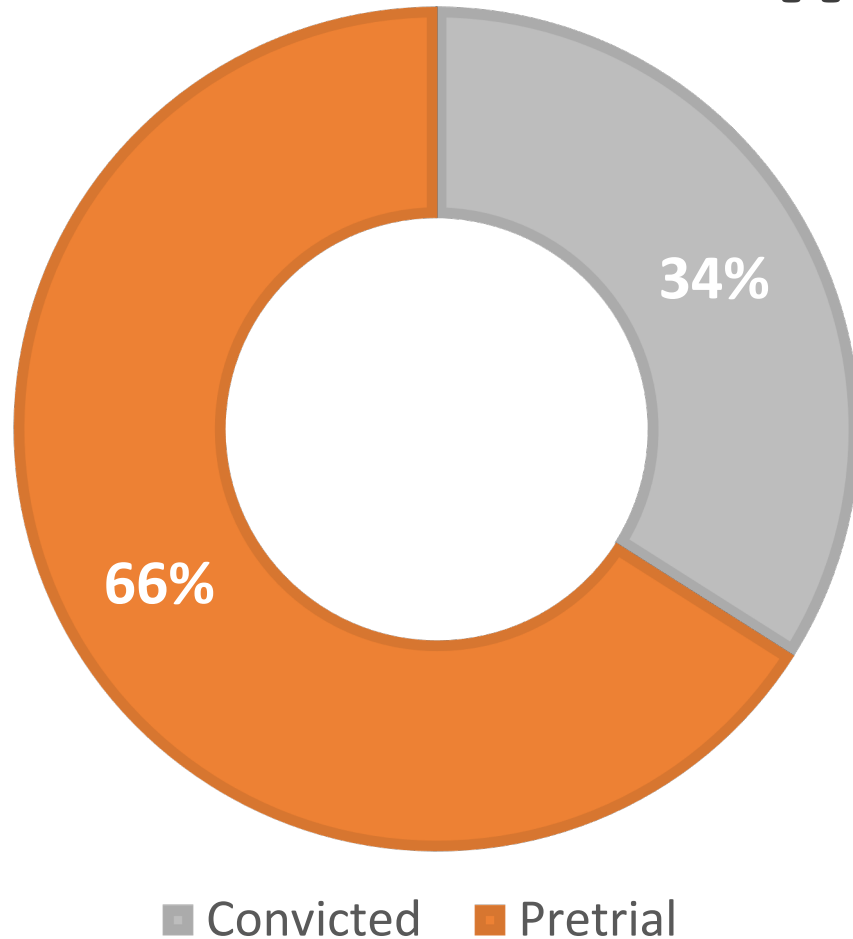


# NATIONAL CONFERENCE OF STATE LEGISLATURES



- Non-profit, bipartisan organization.
- Members are all 7,383 legislators and 30,000 legislative staff in 50 states, D.C. and U.S. territories.
- Offices in Denver and D.C.
- Among our goals - to provide legislatures with information and research about policy issues, both state and federal.
- NCSL tracks state policy developments in all public policy areas.

# WHO IS IN JAIL?



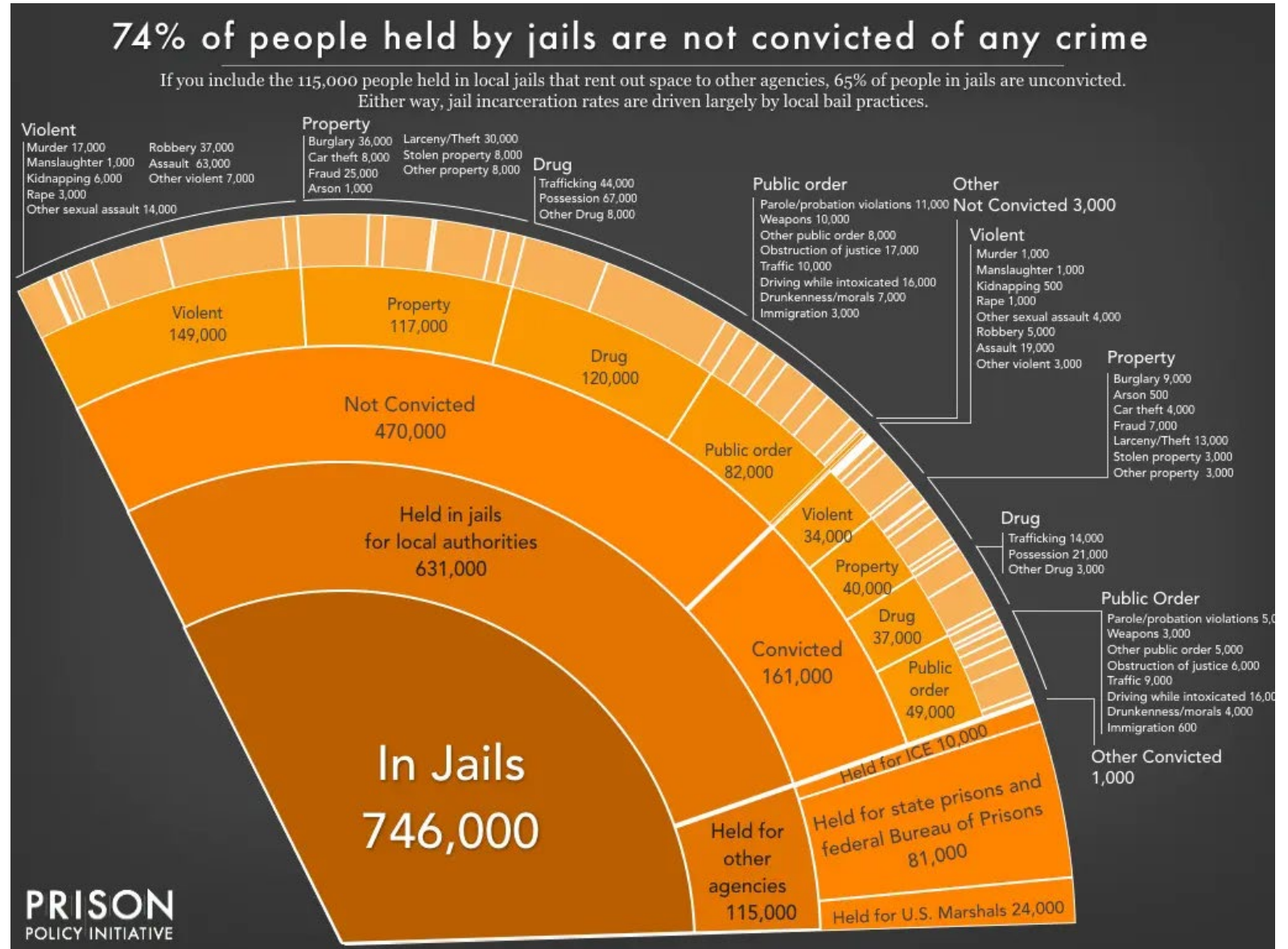
**PRETRIAL POPULATIONS, 2018**

## Population Changes 2008-2018:

- Jail incarceration rate decreased 12% and admissions to jails decreased 21%.
- 81% of jail beds were occupied, down from 95% in 2008.
- Male inmate population decreased 9% but female inmate population increased 15%.
- Convicted population down 14.7%, pretrial population down only .9%.

# OTHER ESTIMATES OF PRETRIAL POPULATION SIZE

If you exclude jail inmates held for other agencies, then an estimated 74% of the population is pretrial.



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# STATE LEGISLATION BY THE NUMBERS

- All 50 state legislatures have acted to change pretrial policy in some way since 2012.
- Nearly 1,000 bills were enacted between 2012 and 2019.
- The number of bills aimed at comprehensively reforming the pretrial process has increased between 2012 and 2019.

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## OVERARCHING THEMES

Legislative efforts to change pretrial policy have largely been bipartisan.

- Focus has been on:
  - Reducing arrests that result in a jail stay by increasing the use of citation and increasing deflection and community alternatives to the justice system.
  - Reducing pretrial population numbers in jails, specifically where defendants are not intentionally detained because of flight or public safety concerns.
  - Reducing the role of money in the system by eliminating bail schedules and providing guidance to courts to evaluate individual cases.

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# NATIONAL LEGISLATIVE TRENDS

## 1. Legislative Guidance for Courts

Legislation encouraging courts to prioritize release, reduce the role of money, set attainable conditions and individualize the process by focusing on individual risk and not charge nor a bail schedule.

## 2. Conditions of Release and Pretrial Services

Legislation requiring the least onerous conditions or expanding conditions of release, including creating or encouraging expansion of pretrial services programs that provide supervision or supportive services.

## 3. Reducing Pretrial Populations

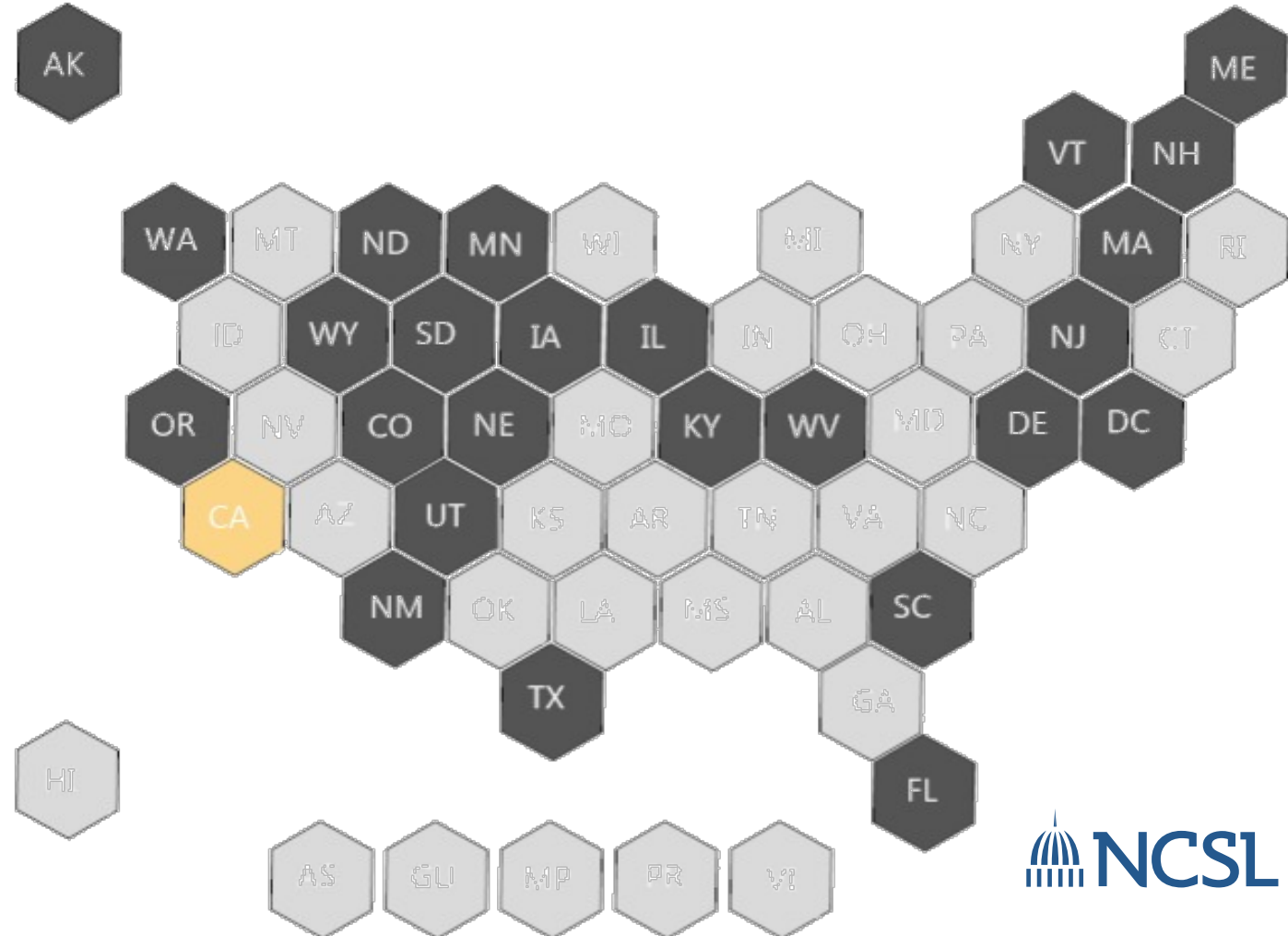
Legislation expanding citation in lieu of arrest, deflection, diversion and other alternatives to jail.

## 4. Constitutional and Foundational Changes

Legislation modifying constitutional bail provisions and victims' rights in the pretrial process.

# 1. GUIDANCE: PRESUMPTION OF RELEASE ON RECOGNIZANCE OR NONFINANCIAL CONDITIONS

- At least half of the states now have a legal presumption of release on recognizance or nonfinancial conditions of release.
- The implementation of California SB 10 will be decided by voters in November. If approved, it would be the first state to eliminate financial conditions entirely.





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# 1. GUIDANCE: LIMITING THE USE OF FINANCIAL CONDITIONS

Significant Recent Legislation has:

- Codified a presumption of release on recognizance and presumption of the least restrictive conditions for release.
- Limited courts' ability to impose financial conditions or prohibited financial conditions for certain classes of offenses.
- Required courts to consider a defendant's ability to pay financial conditions or pretrial supervision fees.
- Sped up review of conditions of release for those who aren't able to meet initial conditions.

# 1. GUIDANCE: RECENT ENACTMENTS LIMITING FINANCIAL CONDITIONS

- **CO HB 1225 (2019)** – Prohibits financial conditions of release for most traffic and petty offenses. Allows release on monetary conditions if payment would result in release prior to a judge setting conditions. Specifies that nothing prevents a court from issuing a warrant with monetary conditions after a defendant has failed to appear. Excludes certain offenses.
- **NY SB 1509 (2019)\*** – Eliminates monetary conditions of release for misdemeanors but excepts sex offenses and violation of a protection order offenses. Eliminates the use of certain pretrial detention in misdemeanor cases. Restricts the use of monetary conditions and detention for nonviolent felony offenses with specified exceptions.
- **CT HB 7044 (2017)** - Limits a court's ability to impose financial conditions in misdemeanor cases and restricts the use of cash-only bail. Shortens the period until bail review hearing and requires the court to remove financial conditions unless they make certain findings.
- **TX SB 1913 (2017)** – Addresses release by municipal and justice courts. Prohibits the use of bail bonds unless the defendant has failed to appear, or the court makes certain findings.

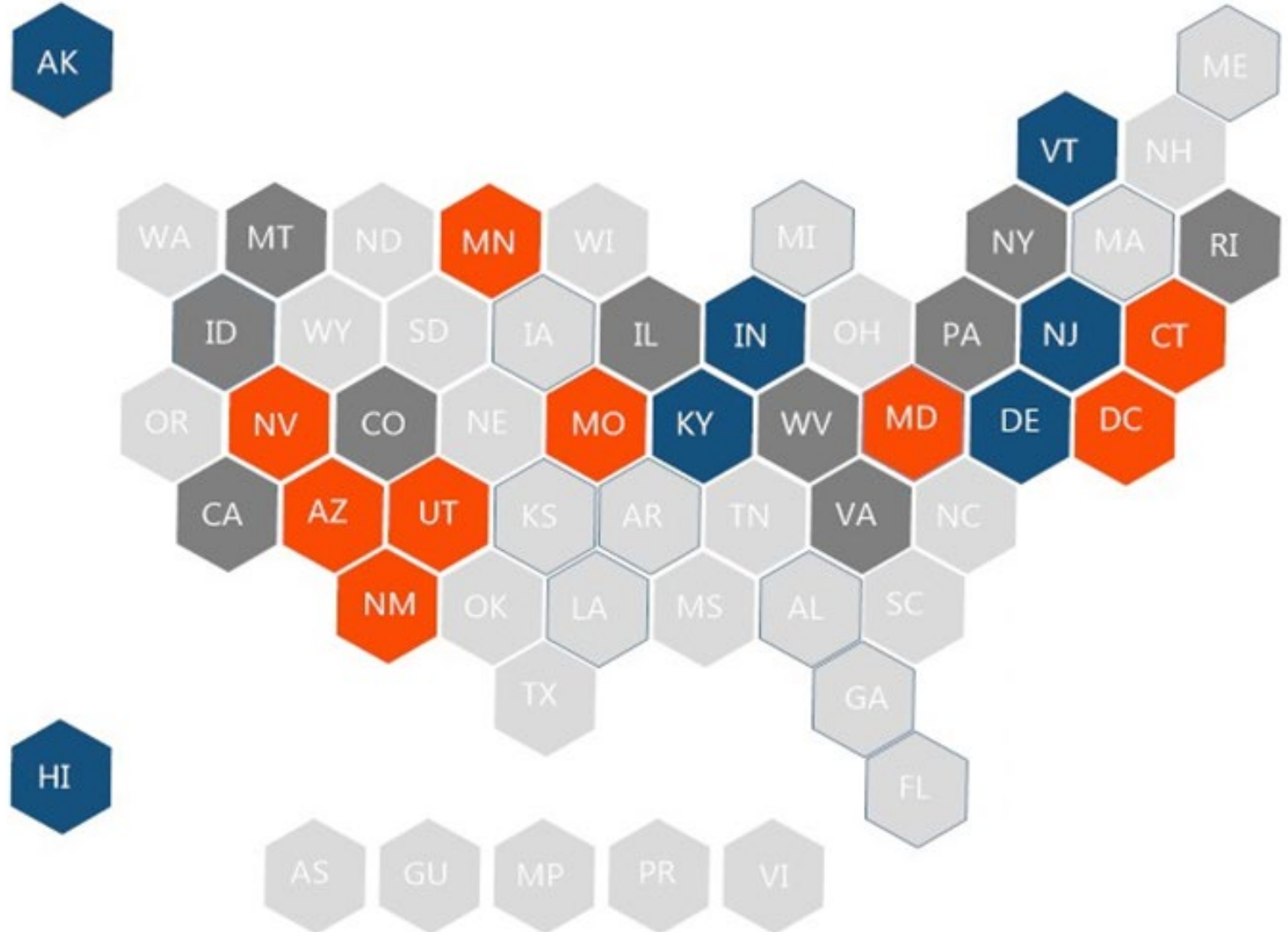
# 1. GUIDANCE: RECENT ABILITY TO PAY ENACTMENTS

- **IL SB 2034 (2017)** – Requires courts to consider socio-economic status when setting money bail or other conditions.
- **NE L 259 (2017)** – Requires courts to consider all methods of bond and conditions to avoid incarceration. Requires courts to consider ability to pay if they determine that a PR bond is not appropriate.
- **TX SB 1913 (2017)** – Addresses release by municipal and justice courts. Creates a presumption of inability to pay after 48 hours if the defendant does not post a bail bond and encourages use of a PR bond. Limits the use of warrants after FTA.
- **GA SB 407 (2018)** – Requires courts to consider a defendant's financial resources including income, assets and financial obligations prior to setting bail.
- **MA SB 2371 (2018)** – Requires court to consider defendant's financial resources when setting bail at an amount not higher than would reasonably ensure appearance.
- **NH SB 556 (2018)** – Prohibits courts from imposing a financial condition that will result in detention solely because of a defendant's inability to pay.
- **VT HB 728 (2018)** – Requires courts to consider a defendant's financial means prior to imposing any financial conditions of release.
- **CO SB 191 (2019)** – Requires release of a defendant if they can meet the terms of a financial bond, even if the defendant is unable to pay a related fee or cost such as pretrial supervision, electronic monitoring, processing or booking fees. Caps bond processing fees to \$10 and restricts other transaction fees.
- **NY SB 1509 (2019)** – Requires courts to consider a defendant's ability to pay when financial conditions of release are authorized.
- **HI SB 192 (2020)** – Authorizes courts to consider a defendant's employment status and financial circumstances.

# 1. GUIDANCE: STATEWIDE RISK ASSESSMENT

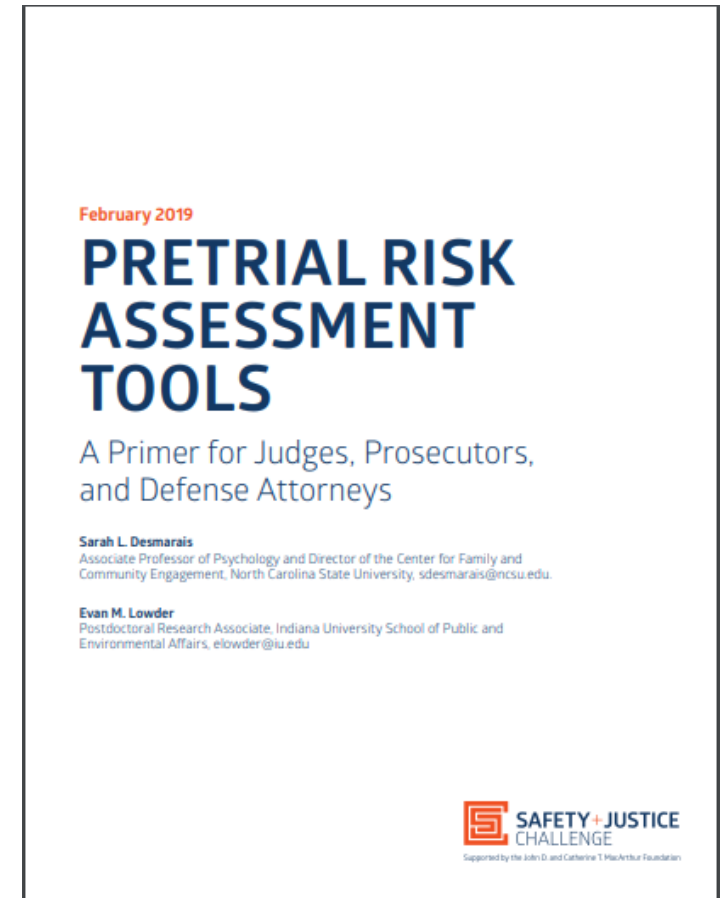
- 7 states require courts to adopt or consider a risk assessment in at least some circumstances.
- 10 states authorize, encourage or regulate the use of a risk assessment.
- 9 judicial branches have required or adopted a risk assessment for use in at least some cases.
- Washington D.C. has used a risk assessment since the 1960s.
- Local jurisdictions have adopted risk assessments where statewide action has not been taken; Iowa is the only state to prohibit the use of risk assessment.

- **Judicial/other action to adopt or standardize**
- **States that require adoption or consideration**
- **States that authorize or encourage use**



# 1. GUIDANCE: RISK ASSESSMENT TOOLS

- Can inform, not replace, judicial discretion.
- Risk thresholds are a policy decision for each jurisdiction and should be made after a tool is validated for a jurisdiction.
- A tool is only as good as the information available and can do more harm than good if not used according to design.
- Part of implementation should include re-validation and evaluation of impact.

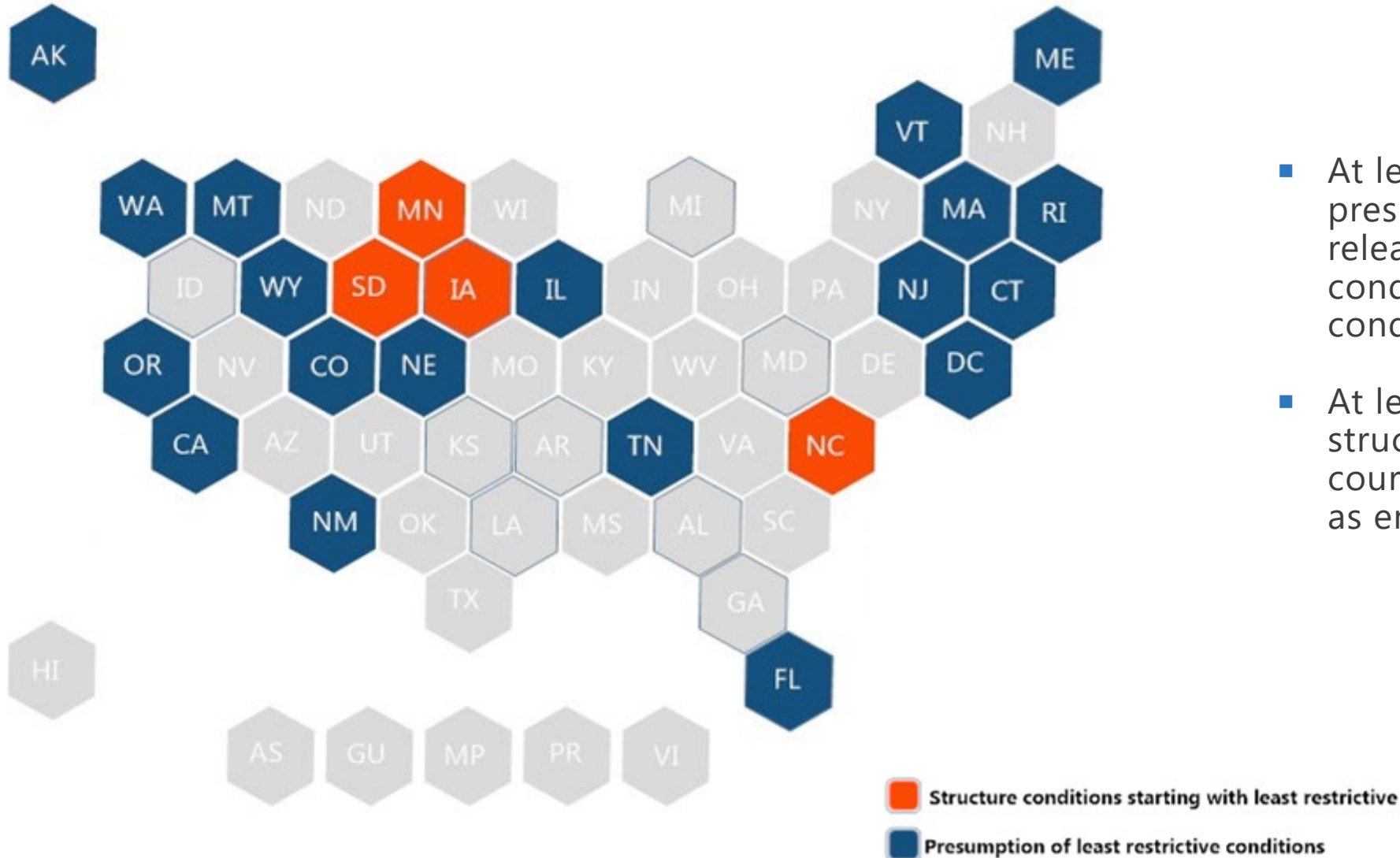


# 1. GUIDANCE: RECENT RISK ASSESSMENT ENACTMENTS

## Focus on regulating the use to adhere to best practices:

- **CA SB 36 (2019)** – Requires a pretrial services agency that uses a pretrial risk assessment tool to validate the tool on a regular basis and to make specified information regarding the tool, including validation studies, publicly available. Requires the Judicial Council to maintain a list of pretrial services agencies that have satisfied those validation requirements and complied with those transparency requirements.
- **ID HB 118 (2019)** – Requires all documents, data, records and information used to build and validate a risk assessment tool be publicly available for inspection, auditing and testing. Requires public availability of ongoing documents, data, records and written policies on usage and validation of a tool. Authorizes defendants to have access to calculations and data related to their own risk score and prohibits the use of proprietary tools.
- **NY SB 1509 (2019)** – Authorizes courts to consider a formal risk assessment. Requires a risk assessment to be publicly available, free of racial or gender bias and validated. Courts are restricted from considering future dangerousness or risk to public safety.

## 2. CONDITIONS: PRESUMPTION OF LEAST RESTRICTIVE CONDITIONS



- At least 18 states have a presumption requiring release on least restrictive conditions or least onerous conditions.
- At least 4 states have structured laws to require courts to impose conditions as enumerated.

## 2. CONDITIONS: RECENT REVIEW/SECOND LOOK ENACTMENTS

- **CT HB 7044 (2017)** - Shortens the period until bail review hearing for defendants charged with misdemeanors from within 30 days after the person's detention to within 14 days after his or her arraignment. Requires the court to remove financial conditions unless they make certain findings.
- **IL SB 2034 (2017)** – Creates a review hearing for defendants detained by financial conditions who are charged with petty offenses, misdemeanors or specified low-level felonies. Hearing must be held at earliest opportunity or within 7 days. Requires reduction of bail by \$30 for each day in jail for some offense classes.
- **DE HB 204 (2018)** – Requires review of conditions if a defendant is not released within 72 hours. Requires courts to review within 10 days. Adds language authorizing conditions beyond appearance agreement only if they are related to public safety, mitigating flight or the integrity of the process.
- **NH SB 556 (2018)** – Creates an option for motion for second look after a defendant is detained. Hearing must be within 36 hours.



## 2. CONDITIONS: STATUTORY CONDITIONS OF RELEASE

- Recent legislation has expanded the types of statutory conditions available to courts, including those aimed at protecting victims like stay away/protection orders, association restrictions, weapons possession, etc.
- Nearly every state authorizes courts to impose any condition reasonably necessary to ensure appearance or public safety.

Pretrial Release Conditions: Types of Bond ▾ Additional Conditions ▾

Use the dropdown buttons to select a type of bond or additional conditions. Comprehensive state information on the most common statutory conditions of pretrial release is available in the interactive map below.

Alabama

Ala. Code §15-13-111

## 2. PRETRIAL SERVICES: STATE ENACTMENTS

- Alaska, Kentucky, New Jersey and Washington D.C. each have robust statewide pretrial services programs.
- Some states like Colorado and Illinois require or encourage local jurisdictions to establish pretrial services agencies, while West Virginia provides the Supreme Court of Appeals with statewide oversight authority.
- Other states have required specific services on a statewide basis. For example, Colorado and New York recently required state courts to develop and implement court reminder systems.
- Incentivizing the use or creation of pretrial services programs with state grant funding requirements.

**Crime Brief**  
National Conference of State Legislatures  
June 2015

### Providing Pretrial Services

By Amber Widgery

West Virginia lawmakers authorized creation of pretrial release programs in 2014 to help provide a statewide response to chronically overcrowded regional jails that strain county budgets. West Virginia joins a growing number of states using or expanding pretrial services and programs, which generally are responsible for evaluating and safely supervising defendants awaiting trial.

Pretrial defendants can be released from jail in several ways. Some defendants are released on their own recognizance and supervised by a court. Others post financial bond and receive monitoring and supervision through a commercial bond agency. Still others are evaluated and released under the supervision of a pretrial release program. Risk assessments, which help identify defendants who are suitable for release, are increasingly used by states looking to employ evidence-based practices to protect the public and make the most effective use of criminal justice resources. These and other best practices for pretrial release are designed to reduce recidivism rates, improve conditions and ensure court appearances. At least 33 states and D.C. currently use such pretrial programs to

#### Functions of Pretrial Services Programs

The primary responsibilities of pretrial services provide information on defendants to officials charged to supervise defendants on pretrial release.

#### Evaluation

Evaluation helps to identify non-violent pose little risk to victims or the community to show up to court. Evaluation can also identify defendants who should be detained because they pose too great a risk to the community.

Evaluations performed by pretrial programs can help verify information gathered during an interview completing a risk assessment. Most risk assessments are completed at first arrest, prior convictions, prior instances of status, residence and history of substance abuse factors in their assessments, based on local population subject to a validation process do the best job of

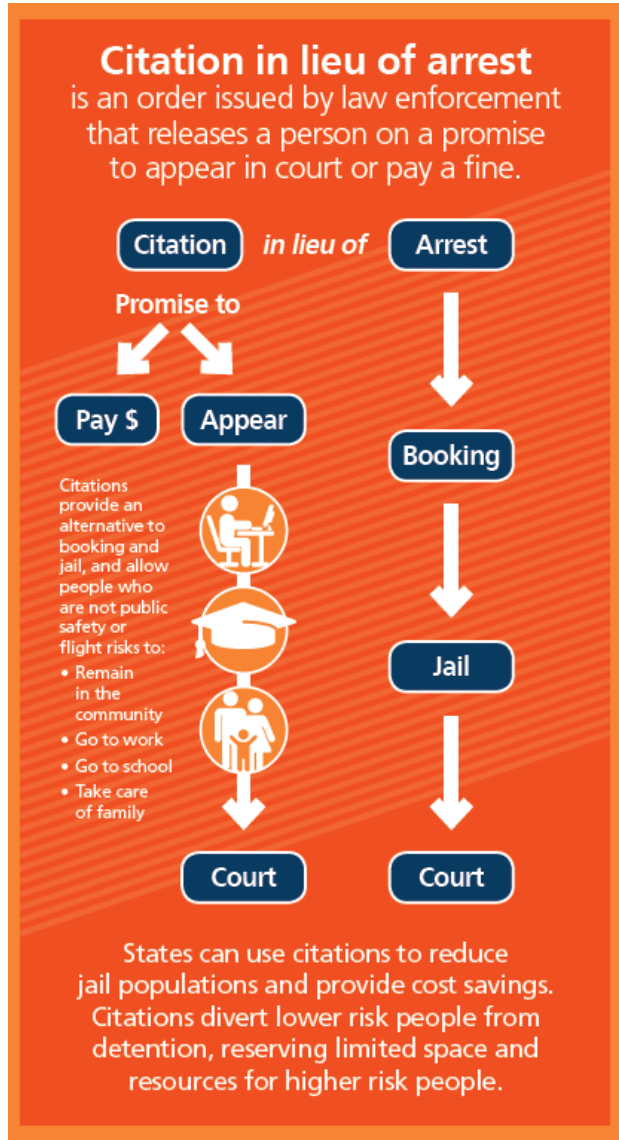
At least 33 states and D.C. have pretrial release programs.

**2009 SURVEY OF PRETRIAL SERVICES PROGRAMS**  
August 11, 2009

PRETRIAL JUSTICE

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### 3. POPULATION REDUCTION: CITATION IN LIEU OF ARREST



- Citation in lieu of arrest is permitted in every state.
- Most states authorize citations for low-level offenses.
- 8 states allow the use of citations for certain felonies.
- 7 states provide general authorization for law enforcement to issue citations without specifying level of offense.

# 3. POPULATION REDUCTION: TARGETED POPULATIONS

## Police-Mental Health Collaboration Programs



### ■ Crisis Intervention Teams (CIT)

Crisis intervention teams are composed of experienced law enforcement officers who volunteer to receive specialized training to respond to mental health calls. These officers are then dispatched to mental health calls or assist other officers who are not CIT trained.



### ■ Co-Responder Teams

Trained law enforcement officers and mental health professionals who respond to mental health calls as a team and generally work together for an entire shift, riding in the same car.



### ■ Mobile Crisis Teams

Mental health professionals working as a team with specialized training to help stabilize individuals during law enforcement encounters and during crisis situations. Teams can respond to law enforcement or mental health calls.



### ■ Case Management Teams

Behavioral health professionals, law enforcement officers, peers and others that form a team to coordinate care and develop collaborative solutions to reduce repeat interactions with individuals.



### ■ Crisis Stabilization Centers

Facilities where law enforcement officers can take individuals experiencing mental health crisis that serve as alternatives to jail and emergency departments.

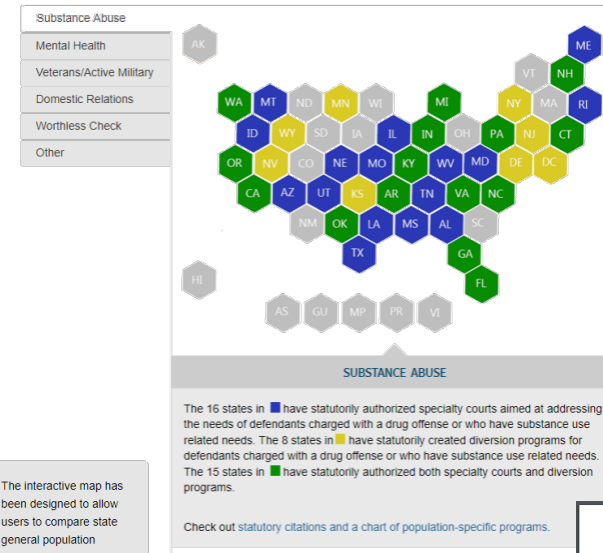
## State legislation has:

- Supported training for law enforcement.
- Authorized the use of or funded crisis triage centers.
- Supported pilot programs and studies of program outcomes.

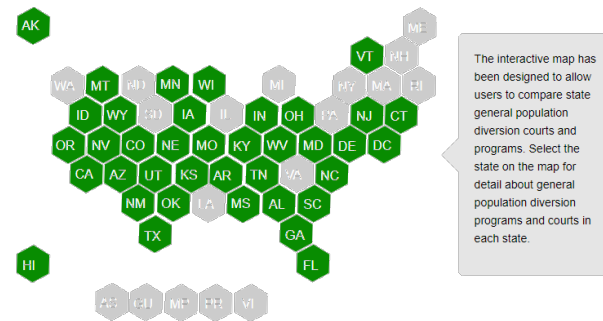
# 3. POPULATION REDUCTION: DEFLECTION AND DIVERSION

- Deflection is an emerging legislative trend that reroutes individuals with behavioral health needs before arrest or before contact with the justice system.
  - Examples: Law Enforcement Assisted Diversion (LEAD), Stop, Triage, Engage, Educate, Rehabilitate (STEER), & Drug Abuse Response Team (DART).
- Alternatively, statutory pretrial diversion is well established in 48 states and D.C. and reroutes defendants after arrest, but prior to adjudication or final entry of judgment.
  - Examples: Probation in lieu of judgement, deferred entry of judgement, pretrial diversion, pretrial intervention program, and treatment courts such as drug court, mental health court, or veterans' court.


Population Specific Diversion



General Population Diversion

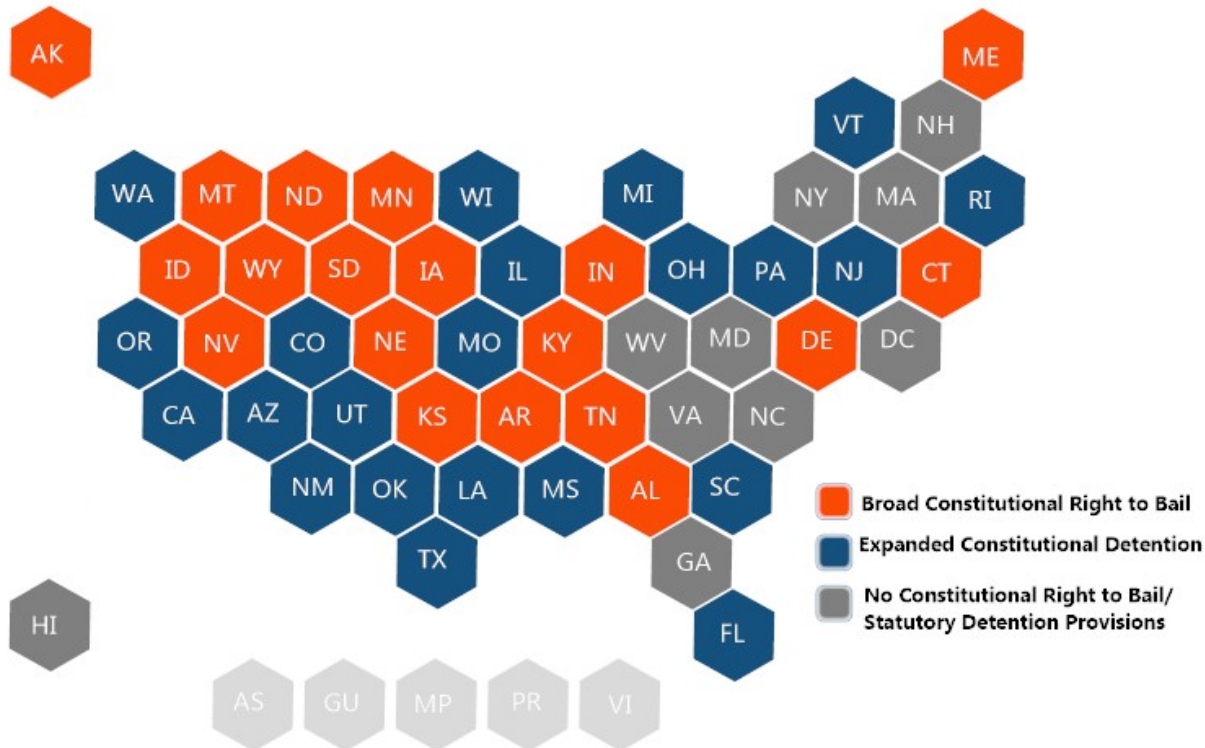


Thirty-seven states authorize programs that are not population specific and address the needs of defendants more generally than the programs listed above. These laws generally designate who has authorization to create a diversion program or designates administrative authority over a program to a specific individual or office such as prosecuting attorneys, local courts, or other local governmental agency. State statute also generally provides guidance on which defendants are eligible for participation in the diversion program and often specifically excludes defendants charged with a particular crime, defendants with specified criminal histories, or cases where certain circumstances, like death or bodily injury, were a factor.




# 4. CONSTITUTIONAL AND FOUNDATIONAL LAWS

## Constitutional Framework for Pretrial Release



## Victim's Rights:

- Every state has a statutory or constitutional provision for victim's rights.
- The majority of states give victims the right to be notified of a defendant's release.
- The majority of states have laws addressing victim participation during the pretrial stage.

## 4. CONSTITUTIONAL AND FOUNDATIONAL CHANGES

### Victim's Rights:

- Recent actions have modified constitutional and statutory victims' rights to require:
  - Court consideration of victim safety when determining release and conditions.
  - Expanded notice and participation rights for victims in pretrial proceedings.

### Framework Changes:

- New Jersey and New Mexico have modified their constitutions recently to authorize preventative detention of defendants based on risk.
- Other statutory changes have limited release eligibility for other defendants, generally short delays for domestic violence or sex crimes or expansion of preventative detention categories to include new capital or other offenses.