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## The Pretrial Fairness Act: Certainties and Suspicions

Ethan Mora

On January 1, 2023, Illinois will become the first state to prohibit cash bail in pretrial detention decisions.<sup>1</sup> This change is at the heart of the Pretrial Fairness Act (“PFA”), part of the SAFE-T (Safety, Accountability, Fairness and Equity—Today) legislation signed by Governor Pritzker on January 21, 2021.<sup>2</sup> The legislation amends a range of Illinois state law on criminal proceedings.<sup>3</sup> This article will review two intertwined changes in the PFA.<sup>4</sup> The PFA eliminates cash bail and introduces a general pretrial release rule.<sup>5</sup>

Under the outgoing framework, a defendant awaits trial in one of two conditions.<sup>6</sup> The defendant may be held in jail—preventative or pretrial detention—without bail due to the nature of their accused crime.<sup>7</sup> Violent offenses, sex offenses, and repeat offenses permit preventative detention in Illinois.<sup>8</sup> Illinois law also prescribes preventative detention for specific circumstances, including when the accused would endanger individuals or the community if released.<sup>9</sup> If the accused’s actions do not fall within Illinois’ pretrial detention ambit, they may be eligible for pretrial release.<sup>10</sup> Cash bail is one avenue to pretrial release.<sup>11</sup> Cash bail certifies to the court that the accused will stand for trial, as the cash paid is refunded if they make all necessary court appearances.<sup>12</sup> If, however, an individual does not post cash bail, they will be held in jail until trial.<sup>13</sup>

<sup>1</sup> Jessica Reichert, Aaron Zivic, and Karen Sheley, *The 2021 SAFE-T Act: ICJIA Roles and Responsibilities*, ICJIA (July 15, 2021), <https://icjia.illinois.gov/researchhub/articles/the-2021-safe-t-act-icjia-roles-and-responsibilities> [https://perma.cc/P8F5-ZNUL].

<sup>2</sup> Marcia Meis, *Illinois Courts Prepare for the Pretrial Fairness Act*, ILL. COURTS (March 30, 2021), <https://www.illinoiscourts.gov/News/935/Illinois-Courts-Prepare-for-the-Pretrial-Fairness-Act/news-detail/> [https://perma.cc/2GKN-N8LV].

<sup>3</sup> Reichert et al., *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*, *infra* note 42.

<sup>6</sup> Brook Hopkins, Chiraag Bains, and Colin Doyle, *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679, 681 (2019).

<sup>7</sup> Reichert et al., *supra* note 1.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 682.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

The elimination of cash bail under the Pretrial Fairness Act has been the subject of debate since its passage in January 2021.<sup>14</sup> Supporters argue that cash bond unevenly and unfairly affects minority groups.<sup>15</sup> Some classify cash bond as a “poor people’s tax” because those who cannot afford to post bail must remain in jail and risk losing their jobs.<sup>16</sup> Those who oppose the bill argue offenders will skip trial without cash bail and will be free to commit additional crimes.<sup>17</sup> As January 1 draws near, the debate will almost certainly become more vociferous.<sup>18</sup> The public and news outlets are interested in the PFA and its implications.<sup>19</sup> One recent headline described the PFA as “The Purge” Law, suggesting that, like the circumstances in the eponymous film, offenders will be able to commit crimes as they please before arraignment.<sup>20</sup> In light of the debate, this article reviews what is guaranteed to happen and what may or may not happen with the implementation of the PFA in 2023.<sup>21</sup>

#### HISTORY OF CASH BAIL

The Eighth Amendment provides the right to bail in the United States.<sup>22</sup> The language largely comes from the English 1689 Bill of Rights Act.<sup>23</sup> The Eighth Amendment protects from excessive bail on its text, but it was histori-

<sup>14</sup> Cheryl Corley, *Illinois Poised To Become 1st State To Drop Cash Bail System*, NPR (Jan. 25, 2021), <https://www.npr.org/2021/01/25/960465847/illinois-becomes-1st-state-to-drop-cash-bail-system> [https://perma.cc/HS48-Q9QD].

<sup>15</sup> *Id.*

<sup>16</sup> Cheryl Corley, *Illinois Becomes 1st State To Drop Cash Bail System*, NPR (Feb. 22, 2021, 9:35 PM), <https://www.npr.org/2021/02/22/970378490/illinois-becomes-first-state-to-eliminate-cash-bail> [https://perma.cc/7RUU-GCYD].

<sup>17</sup> Harrison Malkin, *Truth Test: Will Ending Cash Bail in Illinois Cause a Rise in Crime?* ILL. PUB. MEDIA (Sept. 22, 2022), <https://illinoisnewsroom.org/truth-test-will-ending-cash-bail-in-illinois-cause-a-rise-in-crime/> [https://perma.cc/7X5H-XDVS].

<sup>18</sup> *Id.*

<sup>19</sup> R. Peña, *Illinois Passes A Law Ending Cash Bail, Gains The Nickname ‘The Purge’ Law*, YAHOO NEWS (Sept. 16, 2022) <https://news.yahoo.com/illinois-becomes-first-state-pass-121500362.html> [https://perma.cc/R7NP-TRZK].

<sup>20</sup> *Id.*

<sup>21</sup> NBC5 Chicago, *Legal Experts Explain Why the Pretrial Fairness Act Isn’t a ‘Purge Law’ in Illinois*, NBC (Sept. 19, 2022, 12:10 PM), <https://www.nbcchicago.com/news/local/legal-experts-explain-why-the-pretrial-fairness-act-isnt-a-purge-law-in-illinois/2942257/> [https://perma.cc/S866-PRUM]; see Hopkins et al., *supra* note 6; NCSL, *Statutory Framework of Pretrial Release*, NCSL (Nov. 18, 2020), <https://www.ncsl.org/research/civil-and-criminal-justice/the-statutory-framework-of-pretrial-release.aspx> [https://perma.cc/EL8B-DDCY].

<sup>22</sup> U.S. Const. amend. XIII. CONGRESS.GOV, [https://constitution.congress.gov/browse/essay/amdt8-1-1/ALDE\\_00000960/](https://constitution.congress.gov/browse/essay/amdt8-1-1/ALDE_00000960/) [https://perma.cc/5E5Q-7VSY].

<sup>23</sup> *Id.*

cally understood as a preservation of the presumption of innocence.<sup>24</sup> Most states adopted language in their constitutions that explicitly guarantees bail.<sup>25</sup> Today, 19 states grant the right to bail for all crimes except capital offenses.<sup>26</sup> Illinois, until January 2023, will remain among the 22 states that expanded the scope of preventative detention.<sup>27</sup> States with expanded pretrial detention deny bail for capital offenses and certain other serious offenses.<sup>28</sup>

Cash bail in Illinois typically requires the accused to post, or pay, 10 percent of the bail set by the judge.<sup>29</sup> Cash bail is available in all cases save for capital offenses, certain life sentence crimes, stalking or aggravated stalking where the court finds there is a real and present threat to the alleged victim, use of weapons in a school, or terrorist threats.<sup>30</sup> Current law provides that cash bail “should be set only when it is determined that no other conditions of release will reasonably assure the defendant’s appearance in court.”<sup>31</sup>

Illinois has altered its pretrial procedures before.<sup>32</sup> The 1987 Pretrial Services Act directed Illinois’ circuit courts to establish a “pretrial services agency” that would collect and report data relevant to pretrial release before or after initial appearance.<sup>33</sup> The Act was limited in effectiveness, however; most of Illinois’ circuits do not have pretrial services agencies.<sup>34</sup> On January 7, 2022, Governor Pritzker signed an amendment to the 1987 Act that encouraged the Illinois Supreme Court to establish pretrial services agency “framework” in counties that do not have those services.<sup>35</sup> The PFA follows on the heels of these amendments; however, it is not the first change to cash bond in Illi-

<sup>24</sup> *Id.*; *Stack v. Boyle*, 342 U.S. 1, 4 (1951); *Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (the Court declined to conflate the presumption of innocence with pretrial procedure); *Carlson v. Landon*, 342 U.S. 524, 557 (1952) (Justice Black, dissenting, argues against the Court’s confinement of the constitutional right to bail to criminal proceedings).

<sup>25</sup> Il. Const. art. I, § 9.

<sup>26</sup> NCSL, *supra* note 21.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> 725 ILCS 5/110-7.

<sup>30</sup> 725 ILCS 5/110-4.

<sup>31</sup> 725 ILCS 5/110-2.

<sup>32</sup> *Id.*

<sup>33</sup> 725 ILCS 185/1 to 185/7.

<sup>34</sup> Marcia Meis, *Pretrial Services in Illinois - The Long Road from 1986-2023*, ILL. COURTS (Jan 26, 2022), <https://www.illinoiscourts.gov/News/1057/Pretrial-services-in-Illinois-The-long-road-from-19862023/news-detail/#:-:text=thirty%2Dsix%20days%20later%2C%20on,felonies%20and%20effective%20supervision%20of> [https://perma.cc/644X-5VCA].

<sup>35</sup> *Id.*, see 725 ILCS 185/1.5; the Supreme Court may establish a hiring framework to facilitate hiring new State pretrial services personnel in counties and circuit courts that are currently without pretrial services agencies.

nois.<sup>36</sup> In 2017, Chief Judge Timothy C. Evans ordered that cash bond had to be affordable for all defendants in Cook County, based on their present ability to pay bail.<sup>37</sup> This measure was expressly intended to prevent the incarceration of those who could not afford bail.<sup>38</sup> These measures are forerunners to the PFA, but are not as far-reaching.<sup>39</sup>

### THE PRETRIAL FAIRNESS ACT'S EFFECTS

The PFA, Public Act 101-0652, elides words dealing with bail from 252 Illinois statutes.<sup>40</sup> In most instances it replaces the elided words—“bail” and associated terms—with “pretrial release.”<sup>41</sup> More broadly, the Act amends Illinois’ Statute on Statutes by requiring that all references to “bail, bail bond, or conditions of bail” be construed as pretrial release.<sup>42</sup> The PFA supersedes Illinois’ amended constitutional right to cash bail, though it limits the offenses for which pretrial detention may be imposed.<sup>43</sup>

Excepting certain offenses when there was proof of guilt, all defendants were bailable before conviction under the statutory bail provision in 725 ILCS 5/110-4.<sup>44</sup> These non-bailable offenses constituted two groups: categorically non-bailable offenses and potentially non-bailable offenses.<sup>45</sup> Capital offenses and offenses where a conviction mandated a life sentence were categorically non-bailable.<sup>46</sup> The following offenses were considered non-bailable only if the court determined release of the defendant would pose a real and present threat to an individual or the community: felony offenses ineligible for probation,

<sup>36</sup> *Id.*

<sup>37</sup> CHICAGO, IL., CIR. CT. COOK CNTY. GEN. ORD. 18.8A (2017), <https://www.cookcountycourt.org/Portals/0/Orders/General%20Order%20No.%2018.8a.pdf>.

<sup>38</sup> Press Release, Circuit Court of Cook County, Evans Changes Cash-bail Process for More Pretrial Release (Jul. 17, 2017) (on file with court), <https://www.cookcountycourt.org/MEDIA/View-Press-Release/ArticleId/2561/Evans-changes-cash-bail-process-for-more-pretrial-release> [<https://perma.cc/9GSP-DB29>].

<sup>39</sup> *Id.*

<sup>40</sup> 5 ILCS 70/1.43; Pub. Act. 101-0652, 2021.

<sup>41</sup> *Id.*

<sup>42</sup> 5 ILCS 70/1.43.

<sup>43</sup> Maureen McKinney, *Here’s What That Bill Ending Cash Bail Does*, NPR (Jan. 29, 2021), <https://www.nprillinois.org/equity-justice/2021-01-29/heres-what-that-bill-ending-cash-bail-does> [<https://perma.cc/C4D4-VET2>].

<sup>44</sup> 725 ILCS 5/110-4.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

stalking or aggravated stalking, unlawful use of weapons in school, terrorist threats or attempts to make terrorist threats.<sup>47</sup>

Under the PFA, section 110-4 replaces the general rule that all defendants are bailable with a rule that all defendants are eligible for pretrial release.<sup>48</sup> Similarly to the old section, the statute then lists exceptions to the rule.<sup>49</sup> Section 110-4 provides that capital offenses and offenses where a conviction mandates life sentence are eligible for pretrial release only after the accused demonstrates there is no proof of their guilt.<sup>50</sup> Section 110-4 will not list crimes for which pretrial release is disallowed; pretrial release is only denied if the defendant has a “high likelihood of willful flight” or is charged with one of the following offenses and it is alleged that their pretrial release pending hearing of that offense would pose a real and present threat to an individual or the community: a forcible felony offense ineligible for probation, stalking or aggravated stalking, a crime in which the victim was a family or household member with the defendant, domestic battery or aggravated domestic battery, certain sex offenses in Illinois’ Criminal Code of 2012, offenses in connection with firearms under the Code, and involuntary servitude offenses.<sup>51</sup> In support of pretrial release denial, the State must identify a specific person or persons that the defendant poses a danger to and show there is proof or presumption that the defendant committed the offense.<sup>52</sup>

The contours of Illinois criminal law change in a few ways under the PFA.<sup>53</sup> Courts must still detain those accused of capital crimes and life imprisonment offenses.<sup>54</sup> However, those defendants may secure pretrial release, albeit after demonstrating there is no proof of their guilt.<sup>55</sup> For the remainder of the “deniable” offenses, the burden shifts to the State prosecutors to show that pretrial release would endanger individuals or the community.<sup>56</sup> The outgoing and incoming sections permit denial of bail and pretrial detainment, respectively, for “offenses for which a sentence of imprisonment, without conditional and revocable release, shall be imposed by law as a consequence of convic-

<sup>47</sup> 725 ILCS 5/110-4.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> 725 ILCS 5/110-6.1; see also 720 ILCS 5/2-11 *et seq.*

<sup>52</sup> *Id.*

<sup>53</sup> 725 ILCS 5/110-4.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

tion.”<sup>57</sup> Additionally, the PFA narrows the scope of pretrial release denial for felonies.<sup>58</sup> In 2023, those accused of *forcible* felonies ineligible for probation may be denied pretrial release.<sup>59</sup> The former section permitted denial of bail to those charged with felonies ineligible for probation.<sup>60</sup> Because the statute guides the denial of pretrial release, the inclusion of *forcible* now permits pretrial release for non-probationable felonies and forcible but probationable felonies.<sup>61</sup>

No single Illinois statute lists forcible non-probationable felonies.<sup>62</sup> Illinois’ sentencing provisions divide crimes into first degree murder, felonies, and misdemeanors.<sup>63</sup> In Illinois, forcible felonies include treason, first and second degree murder, criminal sexual assault, robbery, burglary, residential burglary, arson or aggravated arson, kidnapping or aggravated kidnapping, aggravated battery causing great harm or disability or disfigurement and all felonies involving use or threat of physical force against individuals.<sup>64</sup> Felonies in Illinois are non-probationable by one of two mechanisms.<sup>65</sup> A number of felonies are categorically non-probationable under 730 ILCS 5/5-5-3.<sup>66</sup> Additionally, other individual offenses may be non-probationable in their sentencing guidelines.<sup>67</sup>

Categorically non-probationable felonies are first degree murder without death penalty, attempted first degree murder, Class X felonies, manufacture or delivery or intent thereto with respect to controlled substances, or delivering those to a minor, Class 1 felonies if committed within 10 years of a prior Class 1 or during probation, residential burglary, criminal sexual assault, vehicular hijacking, and a number of others.<sup>68</sup> The Illinois Criminal Code of 2012, Controlled Substances Act, Methamphetamine Control and Community Protection Act, and the Vehicle Code identify individual felonies that are non-

<sup>57</sup> *Id.*

<sup>58</sup> 725 ILCS 5/110-6.1.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> 725 ILCS 5/110-6.1.

<sup>62</sup> 730 ILCS 5/5-5-3 *et seq.*

<sup>63</sup> 730 ILCS 5/5-4.5 *et seq.*

<sup>64</sup> 720 ILCS 5/2-8.

<sup>65</sup> Kathryn Saltmarsh, *SPAC Non-Probationable Offense List*, ILL. SENT’G POL’Y ADVISORY COUNCIL (Aug. 2021), <https://spac.illinois.gov/tags/non-probationable-list> [<https://perma.cc/CVG7-9CX6>].

<sup>66</sup> *Id.*; *infra* note 70.

<sup>67</sup> *Id.*; *infra* note 71.

<sup>68</sup> 730 ILCS 5/5-5-3 *et seq.*

probationable in their sentencing guidelines.<sup>69</sup> However, the non-probationable offenses within these Acts are not forcible felonies.<sup>70</sup> Nevertheless, the residual clause in Illinois' list of forcible felonies may expand what qualifies as a forcible felony.<sup>71</sup>

Summarily, first degree murder, criminal sexual assault, residential burglary, aggravated arson, aggravated kidnapping, and aggravated battery resulting in great bodily harm or permanent disability or disfigurement are forcible non-probationable felonies for which pretrial release may be denied under the PFA.<sup>72</sup> Due to the conjunctive nature of the PFA's forcible inclusion, any felonies that are not both forcible and non-probationable are eligible for pretrial release.<sup>73</sup> Forcible but probationable felonies are second degree murder, robbery, burglary, arson, and kidnapping.<sup>74</sup>

The inclusion of forcible also means that felonies ineligible for probation may receive pretrial release.<sup>75</sup> A felony is any offense that receives a sentence of one year or more in prison.<sup>76</sup> Crimes that may receive a sentence of one year or more, but are not forcible, are: possession of controlled substances,<sup>77</sup> possession of explosives,<sup>78</sup> vehicular hijacking,<sup>79</sup> theft over \$500,<sup>80</sup> and involuntary manslaughter or reckless homicide.<sup>81</sup> Possession of controlled substances is a felony and non-probationable in certain circumstances.<sup>82</sup> Vehicular hijacking is a non-probationable felony.<sup>83</sup> Consequently, individuals accused of these crimes will be eligible for pretrial release assuming they are not flight risks under the PFA.<sup>84</sup> It is worth noting that, to support pretrial detention, the accused must also be a real and present threat; this factor is not addressed because it remains unchanged with the passage of the PFA.<sup>85</sup>

<sup>69</sup> Saltmarsh, *supra* note 65.

<sup>70</sup> *Id.*

<sup>71</sup> *People v. Brown*, 2017 IL App (1st) 150146.

<sup>72</sup> 720 ILCS 5/2-8; 730 ILCS 5/5-5-3.

<sup>73</sup> 725 ILCS 5/110-4.

<sup>74</sup> 720 ILCS 5/2-8; 730 ILCS 5/5-5-3 *et seq.*

<sup>75</sup> *Id.*

<sup>76</sup> 720 ILCS 5/2-7.

<sup>77</sup> 720 ILCS 570/402 *et seq.*

<sup>78</sup> 720 ILCS 5/20-2.

<sup>79</sup> 720 ILCS 5/18-3.

<sup>80</sup> 720 ILCS 5/16-1.

<sup>81</sup> 720 ILCS 5/9-3.

<sup>82</sup> Saltmarsh, *supra* note 65.

<sup>83</sup> *Id.*, see also 720 ILCS 5/18-3(a).

<sup>84</sup> 725 ILCS 5/110-4.

<sup>85</sup> *Id.*



## CONCLUSION

The PFA is intended to address inequities associated with cash bail.<sup>86</sup> However, the PFA's vigor is not simply in just doing away with cash bail; the PFA also permits trial release for a wider range of crimes.<sup>87</sup> The practical effect is twofold: first, the PFA eliminates cash bail and makes it the general rule that all accused individuals are eligible for pretrial release.<sup>88</sup> Second, the PFA reduces the pool of crimes for which pretrial release may be denied with the addition of the forcible requirement.<sup>89</sup>

Under the PFA, individuals accused of forcible but probationable crimes—second degree murder, robbery, burglary, arson, and kidnapping—may expect pretrial release.<sup>90</sup> The effect of that statement must be tempered with the remembrance that pretrial release may be denied for any charge if the court finds the accused poses a high flight risk.<sup>91</sup> In consequence, the PFA is no “Purge Law”; the PFA is a curtailment of pretrial detention.

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<sup>86</sup> McKinney, *supra* note 43.

<sup>87</sup> 725 ILCS 5/110-6.1.

<sup>88</sup> 725 ILCS 5/110-4.

<sup>89</sup> 725 ILCS 5/110-6.1.

<sup>90</sup> *Id.*

<sup>91</sup> 725 ILCS 5/110-4.