

**PROPOSED AMENDMENTS TO THE  
RULES GOVERNING PRETRIAL RELEASE  
IN NEW MEXICO COURTS**

**Commentary from the Supreme Court.** Following the decision in *State v. Brown*, 2014-NMSC-038, 338 P.3d 1276, the New Mexico Supreme Court created the Ad Hoc Pretrial Release Committee to study existing pretrial release law and practice and make recommendations to the Court regarding necessary changes to improve pretrial release procedures in New Mexico. This broad-based committee, with representation from the criminal defense bar, prosecution, judges, the bail industry, jails and detention centers, and the Legislature, has made a number of recommendations, including amendments to Rule 5-401 NMRA, governing pretrial decision-making in the district courts. Following the publication period and any resulting changes to Rule 5-401, the committee expects to recommend corresponding revisions to Rules 6-401, 7-401, and 8-401 NMRA, which govern pretrial procedures in the magistrate, metropolitan, and municipal courts.

The committee also recommends proposed new rules to govern early release procedures for defendants who are unlikely to pose a flight risk or a risk to public safety. *See* Rules 5-408, 6-408, 7-408, and 8-408 NMRA. The committee proposes the adoption of a new form, Form 9-302A NMRA, order for release on recognizance by designee, to implement Paragraph B of these rules.

The committee also recommended that the Court consider confidentiality provisions regarding information that an accused submits in order to exercise the right to pretrial release. The Court will refer those questions to the Rules of Evidence Committee for recommendations, and no confidentiality provisions are being circulated for comment at this time.

The recommended rule amendments are largely aimed at ensuring that pretrial release practices conform to the standards required by federal and state constitutional law and the principles that have been embodied in the pretrial release rules of New Mexico since their initial promulgation in 1972. Like the Federal Bail Reform Act of 1966, on which they were modeled, the New Mexico rules have always required that an accused who has not yet been adjudicated guilty of an offense should be released pending trial on the least restrictive conditions that would minimize flight risk and danger to the community, and have always provided that the requirement of money bonds may be imposed only if nonfinancial release conditions would be insufficient methods of release.

Key provisions of the proposed amendments are:

1. Adding to Rule 5-401(B) the clarifying statement that “[s]ecured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge.” Although the explicit language is new, the concept is not. The bail rules have always required individual assessment of an accused’s flight risk or danger to the community, and New Mexico and federal case law prohibit the use of fixed bonds based only on the nature of the accusation.

2. Adding language to Rule 5-401(C)(1) and Paragraph C of the proposed early release rules, Rules 5-408, 6-408, 7-408, and 8-408, that would explicitly permit the use of Supreme Court approved pretrial risk assessment instruments in setting individualized conditions of release. These evidence-based assessment tools, in use in a number of jurisdictions, are the result of empirical studies that determine the degree to which various factors, such as prior criminal history, have been shown to be helpful predictors of individual flight risk or danger to the community. The Second Judicial District Court currently is piloting a pretrial risk assessment instrument.

3. Adding in the proposed early release rules more guidance and regulation to the longstanding authority of a court to permit detention facilities and other designees to make the simpler release decisions for defendants who present neither a danger nor a flight risk without waiting for a court hearing.

4. Providing time guidelines for bond-setting and bond review hearings to avoid unnecessary delay.

The Court will not make its final decisions nor take action on these recommended revisions until after publication for comment and full review by both the committee and the Court of all resulting input, which is an important aspect of the rule-making process. If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://nmsupremecourt.nmcourts.gov/> or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk  
New Mexico Supreme Court  
P.O. Box 848  
Santa Fe, New Mexico 87504-0848  
nmsupremecourtclerk@nmcourts.gov  
505-827-4837 (fax)

Your comments must be received by the Clerk on or before **November 12, 2015**, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

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**5-401. [Bail] Pretrial release.**

A. **Right to bail; recognizance or unsecured appearance bond.** Pending trial, any person bailable under Article 2, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on the person's personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court, subject to any release conditions imposed [~~pursuant to~~] under Paragraph [C] D of this rule, unless the court makes a written finding that such release will not reasonably assure the appearance of the person as required.

B. **Secured bonds.** Secured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge. If the court makes a written finding that release on personal recognizance or upon execution of an unsecured appearance bond will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, in addition to any release conditions imposed [~~pursuant to~~] under Paragraph D of this rule, the court shall order the pretrial release of such person subject to the first of the following types of secured bonds [~~which~~] that will reasonably assure the appearance of the person as required and the safety of any person and the community:

(1) the execution by the person of [~~a bail~~] an appearance bond in [~~a~~] the full amount specified in the release order, [~~amount executed by the person and~~] secured by a deposit [~~of~~] in cash of ten percent (10%) of the amount [~~set for bail~~] specified, or secured by such greater or lesser [~~amount~~] percentage as is reasonably necessary to assure the appearance of the person as

required. The cash deposit may be returned to the person as provided in Paragraph J of this rule. The cash deposit may be made by or assigned to a paid surety licensed under the Bail Bondsmen Licensing Law provided such paid surety also executes a ~~[bail]~~ surety bond for the full amount ~~[of the bail set]~~ specified;

(2) the execution of ~~[a bail]~~ a property bond by the ~~[defendant]~~ person or by unpaid sureties in the full amount ~~[of the bond]~~ specified in the release order, secured by ~~[and]~~ the pledging of real property as required by Rule 5-401A NMRA; or

(3) either the execution of a [bail] surety bond with licensed sureties in the full amount specified in the release order as provided in Rule 5-401B NMRA, or the execution by the person of an appearance bond in the specified amount, [and] secured by a deposit [with the clerk of the court,] in cash[;] of one-hundred percent (100%) of the amount [of the bail set] specified, [such deposit to] which may be returned to the person as provided in Paragraph J of this rule.

Any ~~[bail]~~ surety, property, or appearance bond shall be substantially in the form approved by the Supreme Court.

C. **Factors to be considered in determining the type and conditions of release.** The court shall ~~[, in determining]~~ use the following information to determine the type of ~~[bail]~~ release and ~~[which]~~ conditions of release that will reasonably assure appearance of the person as required and the safety of any other person and the community~~[;]~~:

(1) the results of the pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any; and

(2) ~~[take into account]~~ the available information concerning~~[;]~~

~~[(1)]~~ (a) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;

~~[(2)]~~ (b) the weight of the evidence against the person;

~~[(3)]~~ (c) the history and characteristics of the person, including:

~~[(a)]~~ (i) the person's character and physical and mental condition;

~~[(b)]~~ (ii) the person's family ties;

~~[(c)]~~ (iii) the person's employment status, employment history, and financial resources available to secure a bond;

~~[(d)]~~ (iv) the person's past and present residences;

~~[(e)]~~ (v) the length of residence in the community;

~~[(f)]~~ (vi) any facts tending to indicate that the person has strong ties to the community;

~~[(g)]~~ (vii) any facts indicating the possibility that the person will commit new crimes if released;

~~[(h)]~~ (viii) the person's past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

~~[(i)]~~ (ix) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, or appeal ~~[or completion of an]~~ for any offense under federal, state, or local law;

~~[(4)]~~ (d) the nature and seriousness of the danger to any person or the community that would be posed by the person's release; and

~~[(5)]~~ (e) any other facts tending to indicate the person is likely to appear.

**D. Additional conditions; conditions to assure orderly administration of justice.**

The court, upon release of the defendant or any time thereafter, may enter an order, that such person's release be subject to:

(1) the condition that the person not commit a federal, state, or local crime during the period of release; and

(2) the least restrictive of, or combination of, the following conditions the court finds will reasonably assure the appearance of the person as required, the safety of any other person and the community, and the orderly administration of justice:

(a) a condition that the person remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(b) a condition that the person maintain employment, or, if unemployed, actively seek employment;

(c) a condition that the person maintain or commence an educational program;

(d) a condition that the person abide by specified restrictions on personal associations, place of abode, or travel;

(e) a condition that the person avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(f) a condition that the person report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

(g) a condition that the person comply with a specified curfew;

(h) a condition that the person refrain from possessing a firearm, destructive device, or other dangerous weapon;

(i) a condition that the person refrain from excessive or any use of alcohol and any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner;

(j) a condition that the person undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(k) a condition that the person submit to a urine analysis or alcohol test upon request of a person designated by the court;

(l) a condition that the person return to custody for specified hours following release for employment, schooling, or other limited purposes;

(m) a condition that the person satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

**E. Explanation of conditions by court.** The release order of the court shall:

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct;

(2) advise the person of:

(a) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(b) the consequences for violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(c) the consequences of intimidating a witness, victim, or informant, or otherwise obstructing justice; and

(3) unless the defendant is released on personal recognizance or an unsecured appearance bond, set forth the circumstances ~~[which]~~ that require ~~[that conditions of release be imposed]~~ the imposition of a secured bond.

F. **Detention.** Upon motion by the state to detain a person without bail pending trial, the court shall hold a hearing to determine whether bail may be denied ~~[pursuant to]~~ under Article 2, Section 13 of the New Mexico Constitution.

G. ~~[Review of ]~~**Order setting conditions of release; time of filing and review hearing.**

(1) The court shall issue an order setting conditions of release within forty-eight (48) hours after an arrested person is booked into a detention facility, unless such person has been released from custody by a designee under Rule 5-408 NMRA and Paragraph L of this rule.

(2) ~~[A person for whom bail is set by the district court and who after twenty-four (24) hours from the time of transfer to a detention facility]~~ If the court requires a secured bond for a person's release under Paragraph B of this rule, and the person continues to be detained twenty-four (24) hours after the issuance of the order imposing secured bond as a result of the person's inability to [meet the bail set] post the secured bond, the person shall, upon motion, be entitled to have a hearing to review the [amount of bail set] type of release and conditions of release set forth in the release order. The court shall hold the hearing within forty-eight (48) hours after the filing and service of the motion. Unless the release order is amended and the person is thereupon released, the court shall state in the record the reasons for [continuing the amount of bail set] declining to amend the release order. No person eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond.

(3) If the district court requires a secured bond for a person's release under Paragraph B of this rule, and the person continues to be detained as a result of the person's inability to post the secured bond, the court shall hold a hearing ten (10) days after the date of arraignment or waiver of arraignment to review the type of release and conditions of release set forth in the release order. The court shall schedule the hearing regardless of whether the defendant has filed a motion for review under Subparagraph (G)(2) of this rule, but the court may vacate the hearing upon stipulation of the parties. Unless the release order is amended and the person is thereupon released, the court shall state in the record the reasons for declining to amend the release order. No person eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond.

(4) A person who is ordered released on a condition ~~[which]~~ that requires ~~[that]~~ the person to return to custody after specified hours, upon ~~[application]~~ motion, shall be entitled to ~~[have]~~ a hearing to review the conditions imposed. Unless the requirement is removed and the person is thereupon released on another condition, the court shall state in the record the reason for the continuation of the requirement.

(5) A hearing to review conditions of release ~~[pursuant to]~~ under this paragraph shall be held by the district court.

H. **Amendment of type of release and conditions of release.** The court ~~[ordering the release of a person on any condition specified in this rule]~~ may at any time amend [its order at any time to increase the amount of bail set or impose additional or different conditions of release] the type of release and conditions of release set forth in the release order. If such amendment of the release order results in the detention of the person as a result of the person's inability to meet such conditions or in the release of the person on a condition requiring the person to return to custody after specified hours, the provisions of ~~[Paragraph G]~~ Subparagraphs (G)(2), (G)(3), or (G)(4) of this rule shall apply.

I. **Record of hearing.** A record shall be made of any hearing held by the district court ~~[pursuant to]~~ under this rule.

J. **Return of cash deposit.** If a person has been released by executing an appearance bond and ~~[depositing]~~ making a cash deposit ~~[set pursuant to]~~ under Subparagraph ~~[(1) or (3) of Paragraph B]~~ (B)(1) or Subparagraph (B)(3) of this rule, when the conditions of the appearance bond have been performed and the ~~[defendant's guilt for whom bail was required]~~ person's case has been adjudicated by the ~~[Court]~~ court, the clerk shall return the sum ~~[which]~~ that has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.

K. **Cases pending in magistrate or metropolitan court.** A person charged with an offense ~~[which]~~ that is not within magistrate or metropolitan court trial jurisdiction and who has not been bound over to the district court may file a petition in district court for release under this rule at any time after the person's arrest [with the clerk of the district court for release pursuant to this rule]. Jurisdiction of the magistrate or metropolitan court to release the accused shall be terminated upon the filing of a petition for release in the district court. Upon the filing of the petition, the district court may:

(1) continue the ~~[bail set]~~ type of release and any condition of release imposed by the magistrate or metropolitan court;

(2) impose any ~~[bail]~~ other type of release or condition of release authorized by Paragraphs A, B, or D of this rule;

(3) continue any revocation of release imposed ~~[pursuant to Rule 5-403]~~ by the magistrate or metropolitan court under Rule 6-403 NMRA or Rule 7-403 NMRA; or

(4) after a hearing, revoke the release of ~~[a defendant pursuant to]~~ the person under Subparagraph ~~[(2) of Paragraph A]~~ (A)(2) of Rule 5-403 NMRA.

L. **Release from custody by designee.** ~~[Any or all of the provisions of this rule, except the provisions of Paragraphs F, G, and K of this rule, may be carried out by responsible persons designated in writing by the]~~ The chief judge of the district court may designate responsible persons in writing to implement the early release procedures set forth in Rule 5-408 NMRA. A designee shall release an arrested person from custody prior to the person's first appearance before a judge if the person is eligible for early release under Rule 5-408, provided that a designee may contact a judge for special consideration based on exceptional circumstances. No person shall be qualified to serve as a designee if such person or such person's spouse is:

(1) related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state; or

(2) employed by a jail or detention facility unless designated in writing by the chief judge of the judicial district in which the jail or detention facility is located.

M. **Bind over [in] to district court.** For any case that is not within magistrate or metropolitan court jurisdiction, [The] upon notice to that court, any bond [shall remain in the magistrate or metropolitan court, except that it] shall be transferred to the district court upon the filing of an information or indictment [or bind over to that] in the district court.

N. **Evidence.** Information stated in, or offered in connection with, any order entered [~~pursuant to~~] under this rule need not conform to the Rules of Evidence.

O. **Forms.** Instruments required by this rule shall be substantially in the form approved by the Supreme Court.

P. **Judicial discretion.** Action by any court on any matter relating to [~~bail~~] pretrial release shall not preclude the statutory or constitutional disqualification of a judge.

[As amended, effective January 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990; September 1, 2005; as amended by Supreme Court Order 07-8300-29, effective December 10, 2007; by Supreme Court Order No. 10-8300-033, effective December 10, 2010; as amended by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**Committee commentary.** — [~~Under Section 13 of Article 2 of the New Mexico Constitution, every accused, except a person accused of first degree murder where the proof is evident or the presumption great, is entitled to bail. Paragraph E was added in 1990 to recognize the amendment of Article 2, Section 13 of the New Mexico Constitution which permits the denial of bail for 60 days by an order entered within 7 days after incarceration if:~~

(1) — ~~the defendant is accused of a felony and has been previously convicted of two or more felonies within the state; or~~

(2) — ~~the defendant is accused of a felony involving the use of a deadly weapon and has a prior felony conviction within this state.]~~

This rule provides “the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution.” *State v. Brown*, 2014-NMSC-038, ¶ 37, 338 P.3d 1276. This rule was derived from the Federal Bail Reform Act of 1966, as amended. [~~Under the federal bail law, the right to bail is restated as the right to have conditions of release set by the court.] See 18 U.S.C. §§ 3142 et seq. [The 1990 amendments to Paragraphs B and C of this rule were taken from Subsections (g) and (c), respectively, of 18 USCA § 1342.~~

~~— In 1990 this rule was amended to encourage more releases on personal recognizance. Release conditions may now be imposed in addition to the execution of a unsecured personal appearance bond or a secured bond.]~~ Because [~~bail~~] the type of release and additional conditions of release will usually be set initially by a magistrate or metropolitan court judge, Rules 6-401 and 7-401 NMRA govern the procedure in those courts. The magistrate, municipal, and metropolitan court [~~bail~~] pretrial release rules were derived from and are substantially identical to this rule.

Under this rule, the authorized types of [~~bonds authorized to be posted~~] release are set forth in the order of priority they are to be considered by the judge [~~or designee~~]. The first priority is release upon the execution of a personal recognizance or unsecured appearance bond. If the court determines that release on personal recognizance or upon the execution of an unsecured bond will not reasonably assure the appearance of the defendant as required, the court may require a secured bond.

If a secured bond is required to assure the appearance of the defendant, the judge or designee must first consider requiring an appearance bond with a cash deposit of 10% or such other percentage of the amount of the bond. If this is inadequate, the court then must consider a property bond where the property belongs to the defendant or other unpaid surety. If the court has not authorized a cash deposit of less than 100% of the amount of bond set, the defendant may execute an appearance bond and deposit one hundred percent (100%) of the amount of the bond with the court. Last of all the defendant may purchase a bond from a paid surety. A paid surety may execute a corporate surety bond or a property bond.

A real or personal property bond may only be executed by a paid surety if the conditions of Rule 5-401B NMRA are met. Under the 1990 amendments to Rule 5-401B NMRA, a bond which has as collateral real or personal property is authorized only in those districts in which an order has been entered finding that the pledging of an irrevocable letter of credit will result in the detention of persons otherwise eligible for release.

Although ~~[bail]~~ pretrial release hearings are not required to be a matter of record in the magistrate, metropolitan, or municipal courts, ~~[Form 9-302A]~~ Paragraph A of this rule requires the ~~[judge or designee to set forth]~~ court to make written findings regarding the reasons why a secured bond was required rather than release on personal recognizance or unsecured bond.

The provision allowing the court to set additional conditions of release in order to assure “the orderly administration of justice” was derived from American Bar Association Standards Relating to Pretrial Release, Section 5.5 (Approved Draft 1968) and 18 USCA § 3142 and Rule 46(b) of the Federal Rules of Criminal Procedure.

~~[Pursuant to]~~ Under NMSA 1978, Section 31-3-1 ~~[NMSA 1978]~~, the court may appoint a designee to carry out the provisions of this rule. As set forth in Paragraph L of this rule, a designee ~~[Designees]~~ must be named in writing. A person may not be appointed as a designee if such person is related within the second degree of blood or marriage to a paid surety licensed in this state to execute bail bonds. A jailer may ~~[not]~~ be appointed as a designee. Rule 5-408 NMRA governs the limited circumstances under which a designee shall release an arrested person from custody prior to that person’s first appearance before a judge.

Paragraph ~~[M]~~ N of this rule dovetails with ~~[Subparagraph (2) of Paragraph D of]~~ Rule ~~[11-1101]~~ 11-1101(D)(2) NMRA. Both provide that the Rules of Evidence are not applicable to proceedings in either the magistrate or district court with respect to matters of release or bail. [As amended by Supreme Court Order 07-8300-29, effective December 10, 2007; as amended by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**[NEW MATERIAL]**

**Rule 5-408. Pretrial release by designee.**

A. **Scope.** This rule shall be implemented by any person designated in writing by the chief judge of the district court under Rule 5-401(L) NMRA. A designee shall issue a written order to release a person from detention prior to the person’s first appearance before a judge if the person is eligible for early release under either Paragraph B or Paragraph C of this rule, provided that a designee may contact a judge for special consideration based on exceptional circumstances. A judge may issue a pretrial order imposing a type of release and conditions of release that differ from those set forth in Paragraphs B and C of this rule.

**B. Minor offenses; release on recognizance.**

(1) **Persons eligible.** A designee shall release a person from custody on personal recognizance, subject to the condition that the person not commit a federal, state, or local crime during the period of release, if the person

(a) has been arrested and detained for a municipal code violation, game and fish offense under Chapter 17 NMSA 1978, petty misdemeanor, or misdemeanor, subject to the exceptions listed in Subparagraph (B)(2) of this rule; and

(b) is either a first-time offender with no arrest history or a person with no history of arrests in the past twenty-four (24) months.

(2) **Exceptions.** A person arrested for any of the following offenses is not eligible for release on recognizance under this paragraph:

(a) battery under Section 30-3-4 NMSA 1978;

(b) aggravated battery under Section 30-3-5(B) NMSA 1978;

(c) assault against a household member under Section 30-3-12 NMSA 1978;

(d) battery against a household member under Section 30-3-15 NMSA 1978;

(e) aggravated battery against a household member under Section 30-3-16 NMSA 1978;

(f) criminal damage to property of a household member under Section 30-3-18 NMSA 1978;

(g) abandonment of a child under Section 30-6-1(B) NMSA 1978;

(h) negligent use of a deadly weapon under Section 30-7-4 NMSA 1978;

(i) stalking under Section 30-3A-3 NMSA 1978; or

(j) driving under the influence of intoxicating liquor or drugs in violation of Section 66-8-102 NMSA 1978 or any municipal code or ordinance.

**C. Early release based on risk assessment.** A designee shall release a person from custody prior to the person's first appearance before a judge if the person qualifies for early release based on a risk assessment and an early release schedule approved by the Supreme Court. The early release schedule shall provide for a specific type of release and conditions of release based on the likelihood that the person will appear in court as required, will not commit a new crime while released pending trial, and will not pose a danger to the safety of any other person or the community, as determined by a pretrial risk assessment instrument approved by the Supreme Court.

**D. Type of release and conditions of release set by judge.** A person who is not eligible for pretrial release by a designee under either Paragraph B or Paragraph C of this rule shall have the type of release and conditions of release set by a judge under Rule 5-401 NMRA within forty-eight (48) hours after the person is booked into the detention facility.

[Adopted by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**Committee commentary.** — Under NMSA 1978, Section 31-1-1 and Paragraph L of Rule 5-401, the chief judge of the district court may designate responsible persons in writing who are authorized to release certain arrested persons from detention prior to the arrested person's first appearance before a judge. The exceptions set forth in Subparagraph (B)(2) of this rule include the misdemeanors and petty misdemeanors listed in the Victims of Crime Act, NMSA 1978, §§ 31-26-1

to -16, and the Crimes Against Household Members Act, NMSA 1978, §§ 30-3-10 to -18, as well as battery and driving under the influence of intoxicating liquor or drugs.  
[Adopted by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**[NEW MATERIAL]**

**Rule 6-408. Pretrial release by designee.**

A. **Scope.** This rule shall be implemented by any person designated in writing by the presiding judge of the magistrate court under Rule 6-401(K) NMRA. A designee shall issue a written order to release a person from detention prior to the person's first appearance before a judge if the person is eligible for early release under either Paragraph B or Paragraph C of this rule, provided that a designee may contact a judge for special consideration based on exceptional circumstances. A judge may issue a pretrial order imposing a type of release and conditions of release that differ from those set forth in Paragraphs B and C of this rule.

B. **Minor offenses; release on recognizance.**

(1) **Persons eligible.** A designee shall release a person from custody on personal recognizance, subject to the condition that the person not commit a federal, state, or local crime during the period of release, if the person

(a) has been arrested and detained for a municipal code violation, game and fish offense under Chapter 17 NMSA 1978, petty misdemeanor, or misdemeanor, subject to the exceptions listed in Subparagraph (B)(2) of this rule; and

(b) is either a first-time offender with no arrest history or a person with no history of arrests in the past twenty-four (24) months.

(2) **Exceptions.** A person arrested for any of the following offenses is not eligible for release on recognizance under this paragraph:

(a) battery under Section 30-3-4 NMSA 1978;  
(b) aggravated battery under Section 30-3-5(B) NMSA 1978;  
(c) assault against a household member under Section 30-3-12 NMSA 1978;

(d) battery against a household member under Section 30-3-15 NMSA 1978;

(e) aggravated battery against a household member under Section 30-3-16 NMSA 1978;

(f) criminal damage to property of a household member under Section 30-3-18 NMSA 1978;

(g) abandonment of a child under Section 30-6-1(B) NMSA 1978;

(h) negligent use of a deadly weapon under Section 30-7-4 NMSA 1978;

(i) stalking under Section 30-3A-3 NMSA 1978; or

(j) driving under the influence of intoxicating liquor or drugs in violation of Section 66-8-102 NMSA 1978 or any municipal code or ordinance.

C. **Early release based on risk assessment.** A designee shall release a person from custody prior to the person's first appearance before a judge if the person qualifies for early release based on a risk assessment and an early release schedule approved by the Supreme Court. The early release schedule shall provide for a specific type of release and conditions of release based on the

likelihood that the person will appear in court as required, will not commit a new crime while released pending trial, and will not pose a danger to the safety of any other person or the community, as determined by a pretrial risk assessment instrument approved by the Supreme Court.

D. **Type of release and conditions of release set by judge.** A person who is not eligible for pretrial release by a designee under Paragraph B or Paragraph C of this rule shall have the type of release and conditions of release set by a judge under Rule 6-401 NMRA within forty-eight (48) hours after the person is booked into the detention facility.

**Committee commentary.** — Under NMSA 1978, Section 31-3-1 and Paragraph K of Rule 6-401, the presiding judge of the magistrate court may designate responsible persons in writing who are authorized to release certain arrested persons from detention prior to the arrested person's first appearance before a judge. The exceptions set forth in Subparagraph (B)(2) of this rule include the misdemeanors and petty misdemeanors listed in the Victims of Crime Act, NMSA 1978, §§ 31-26-1 to -16, and the Crimes Against Household Members Act, NMSA 1978, §§ 30-3-10 to -18, as well as battery and driving under the influence of intoxicating liquor or drugs.

[Adopted by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**[NEW MATERIAL]**

**Rule 7-408. Pretrial release by designee.**

A. **Scope.** This rule shall be implemented by any person designated in writing by the chief judge of the metropolitan court under Rule 7-401(J) NMRA. A designee shall issue a written order to release a person from detention prior to the person's first appearance before a judge if the person is eligible for early release under either Paragraph B or Paragraph C of this rule, provided that a designee may contact a judge for special consideration based on exceptional circumstances. A judge may issue a pretrial order imposing a type of release and conditions of release that differ from those set forth in Paragraphs B and C of this rule.

B. **Minor offenses; release on recognizance.**

(1) **Persons eligible.** A designee shall release a person from custody on personal recognizance, subject to the condition that the person not commit a federal, state, or local crime during the period of release, if the person

(a) has been arrested and detained for a municipal code violation, game and fish offense under Chapter 17 NMSA 1978, petty misdemeanor, or misdemeanor, subject to the exceptions listed in Subparagraph (B)(2) of this rule; and

(b) is either a first-time offender with no arrest history or a person with no history of arrests in the past twenty-four (24) months.

(2) **Exceptions.** A person arrested for any of the following offenses is not eligible for release on recognizance under this paragraph:

(a) battery under Section 30-3-4 NMSA 1978;

(b) aggravated battery under Section 30-3-5(B) NMSA 1978;

(c) assault against a household member under Section 30-3-12 NMSA 1978;

(d) battery against a household member under Section 30-3-15 NMSA 1978;

- (e) aggravated battery against a household member under Section 30-3-16 NMSA 1978;
- (f) criminal damage to property of a household member under Section 30-3-18 NMSA 1978;
- (g) abandonment of a child under Section 30-6-1(B) NMSA 1978;
- (h) negligent use of a deadly weapon under Section 30-7-4 NMSA 1978;
- (i) stalking under Section 30-3A-3 NMSA 1978; or
- (j) driving under the influence of intoxicating liquor or drugs in violation of Section 66-8-102 NMSA 1978 or any municipal code or ordinance.

C. **Early release based on risk assessment.** A designee shall release a person from custody prior to the person’s first appearance before a judge if the person qualifies for early release based on a risk assessment and an early release schedule approved by the Supreme Court. The early release schedule shall provide for a specific type of release and conditions of release based on the likelihood that the person will appear in court as required, will not commit a new crime while released pending trial, and will not pose a danger to the safety of any other person or the community, as determined by a pretrial risk assessment instrument approved by the Supreme Court.

D. **Type of release and conditions of release set by judge.** A person who is not eligible for pretrial release by a designee under Paragraph B or Paragraph C of this rule shall have the type of release and conditions of release set by a judge under Rule 7-401 NMRA within forty-eight (48) hours after the person is booked into the detention facility.

**Committee commentary.** — Under NMSA 1978, Section 31-1-1 and Paragraph K of Rule 5-401, the chief judge of the metropolitan court may designate responsible persons in writing who are authorized to release certain arrested persons from detention prior to the arrested person’s first appearance before a judge. The exceptions set forth in Subparagraph (B)(2) of this rule include the misdemeanors and petty misdemeanors listed in the Victims of Crime Act, NMSA 1978, §§ 31-26-1 to -16, and the Crimes Against Household Members Act, NMSA 1978, §§ 30-3-10 to -18, as well as battery and driving under the influence of intoxicating liquor or drugs.

[Adopted by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**[NEW MATERIAL]**

**Rule 8-408. Pretrial release by designee.**

A. **Scope.** This rule shall be implemented by any person designated in writing by the presiding judge of the municipal court under Rule 8-401(H) NMRA. A designee shall issue a written order to release a person from detention prior to the person’s first appearance before a judge if the person is eligible for early release under either Paragraph B or Paragraph C of this rule, provided that a designee may contact a judge for special consideration based on exceptional circumstances. A judge may issue a pretrial order imposing a type of release and conditions of release that differ from those set forth in Paragraphs B and C of this rule.

B. **Minor offenses; release on recognizance.**

(1) **Persons eligible.** A designee shall release a person from custody on personal recognizance, subject to the condition that the person not commit a federal, state, or local crime during the period of release, if the person

(a) has been arrested and detained for a municipal code violation or a petty misdemeanor, subject to the exceptions listed in Subparagraph (B)(2) of this rule; and  
(b) is either a first-time offender with no arrest history or a person with no history of arrests in the past twenty-four (24) months.

(2) **Exceptions.** A person arrested for any of the following offenses is not eligible for release on recognizance under this paragraph:

- (a) battery;
- (b) any offense involving domestic violence or a crime against a household member;
- (c) negligent use of a deadly weapon;
- (d) stalking; or
- (e) driving under the influence of intoxicating liquor or drugs.

**C. Early release based on risk assessment.** A designee shall release a person from custody prior to the person's first appearance before a judge if the person qualifies for early release based on a risk assessment and an early release schedule approved by the Supreme Court. The early release schedule shall provide for a specific type of release and conditions of release based on the likelihood that the person will appear in court as required, will not commit a new crime while released pending trial, and will not pose a danger to the safety of any other person or the community, as determined by a pretrial risk assessment instrument approved by the Supreme Court.

**D. Type of release and conditions of release set by judge.** A person who is not eligible for pretrial release by a designee under Paragraph B or Paragraph C of this rule shall have the type of release and conditions of release set by a judge under Rule 8-401 NMRA within forty-eight (48) hours after the person is booked into the detention facility.

**Committee commentary.** — Under NMSA 1978, Section 31-3-1 and Paragraph J of Rule 8-401, the presiding judge of the municipal court may designate responsible persons in writing who are authorized to release certain arrested persons from detention prior to the arrested person's first appearance before a judge.

[Adopted by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**[NEW MATERIAL]**

**9-302A. Order for release on recognizance by designee.**

[For use with District Court Rule 5-408(B) NMRA,  
Magistrate Court Rule 6-408(B) NMRA,  
Metropolitan Court Rule 7-408(B) NMRA, and  
Municipal Court Rule 8-408(B) NMRA]

STATE OF NEW MEXICO

[COUNTY OF \_\_\_\_\_]

[CITY OF \_\_\_\_\_]

\_\_\_\_\_ COURT

[STATE OF NEW MEXICO]  
[COUNTY OF \_\_\_\_\_]  
[CITY OF \_\_\_\_\_]

v. No. \_\_\_\_\_

\_\_\_\_\_, Defendant.

**ORDER FOR RELEASE ON  
RECOGNIZANCE BY DESIGNEE**

IT IS ORDERED that the defendant be released on personal recognizance on the defendant's promise to appear and subject to the condition that the defendant not commit any federal, state, or local crime during the period of release.

**APPEARANCE BOND**

I \_\_\_\_\_, defendant in the above-entitled matter, do hereby bind myself to the following conditions of release:

I agree to appear before the above court on \_\_\_\_\_, at \_\_\_\_\_ [a.m.] [p.m.] in courtroom \_\_\_\_\_ and at such other places as I may be required to appear, in accordance with any and all orders and directions relating to my appearance in the above-entitled matter as may be given or issued by the above court or any municipal, magistrate, metropolitan, district, or appellate court to which the above entitled case may be filed, removed, or transferred.

I understand that the court may have me arrested at any time, without notice, to review and reconsider these conditions.

I understand that if I fail to appear as required, I may be prosecuted and sent to [jail] [the penitentiary] for the separate offense of failure to appear. I agree to comply fully with each of the conditions imposed on my release and to notify the court promptly in the event I change my contact information indicated below.

I understand that my conditions of release may be revoked and that I may be charged with a separate criminal offense if I intimidate or threaten a witness, the victim, or an informant, or if I otherwise obstruct justice.

I further understand that my conditions of release will be revoked if I violate a federal, state, or local criminal law.

\_\_\_\_\_  
Defendant's signature

\_\_\_\_\_  
Date of signature

\_\_\_\_\_  
Time of release

\_\_\_\_\_  
Date of release

\_\_\_\_\_  
Cell phone number

\_\_\_\_\_  
Alternate phone number

\_\_\_\_\_  
Email address

\_\_\_\_\_  
Mailing address (include city, state, and zip code)

\_\_\_\_\_  
Physical address (include city, state, and zip code)

The above conditions of release are hereby approved. The defendant shall be released from custody upon the execution of this agreement.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Designee

[Approved by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**Proposed Rule Changes Comment Form.**

**Name:** Edna Sprague  
**Phone:** 505-883-3070  
**Email:** efs@atkinsonkelsey.com

**Rule No:** 5-401; 5-408; 6-408; 7-408; 8-408

SUPREME COURT OF NEW MEXICO  
FILED

OCT 19 2015



**Comments:**

I commend the Committee's work in this very important area. As an advocate for domestic violence victims I think it is extremely important to point out that the pretrial risk assessment instruments currently being used in the Second Judicial District do not take into consideration specific information regarding domestic violence. For example, the number of domestic violence arrests are not calculated - only the number of arrests generally are considered. Statistics show that the number of domestic violence incidents, regardless of conviction or arrest, are relevant to a lethality determination (the risk to a victim of death at the hands of an intimate partner). These factors might be considered as "aggravating factors" under the RAI, but there are instruments that consider them directly whereas the current RAI used does not. When this information is lacking the application of the RAI to the new rule is faulty. I would strongly encourage the committee to create a provision that allows for the consideration of factors specific to domestic violence when judges are determining pretrial release provision or encourage the use of an RAI that directly incorporates the risks inherent in domestic violence.

**Proposed Rule Changes Comment Form.**

**Name: JASON WHEELLESS**  
**Phone: 505-243-1676**  
**Email: jbwlaw505@gmail.com**

SUPREME COURT OF NEW MEXICO  
FILED

OCT 19 2015



**Rule No: Proposal 55**

**Comments:**

This, like LR2-400, would seem to complicate an issue that, to the extent it is a problem, is a problem created by the Supreme Court. LR2-400 was created to address a backlog that was created in large part by the abolition of the old 6 month rule, confusing speedy trial case law and Harper, 2011-NMSC-44(essentially rendering the district court rules toothless). Here the problem is the Brown case. What is now being written into fairly complicated rules that will create more litigation and backlogs in the courts could have easily been resolved in State v. Brown without the need for ever more rules. Its just unnecessary. It will create more work for the parties and the courts and will cost the taxpayer more money. Also, there isn't the technology or procedures in the courts to implement these rules with any efficiency. Since State v. Segura and Walter Brown, at least in Bernalillo Co., bond arraignments and other release hearings have become extremely cumbersome and time consuming. They now take a significant amount of the parties' and courts' time, time which would be better spent working on the substance of the case. If the Court imposes these new rules, it should provide the courts with the technology in the way of software that can more easily and quickly create orders.

These rules also reinforce a recent trend here in New Mexico where the Pre-Trial Services division has ever more power over our client's liberty interests. This is troubling for a few reasons. First, PTS is unaccountable to anyone but the courts. They're essentially untouchable and have a huge amount of power over defendants' lives. Their recommendations are often very self serving. Anyone who spends anytime in district court has seen that as their power has increased so have their numbers. This is not a coincidence. I see nothing in the rules that would curb that power or give a defendant anything more meaningful a challenge than a motion to the court. And since the courts tend to unquestioningly follow the recommendations of PTS that is a small concession. More troubling is that the proposed rules do not protect the rights of the accused against PTS imposed deprivations of liberty and warrantless searches. The courts more and more rely on PTS as a form of pre-trial probation. In many cases PTS is more restrictive than probation, especially when one considers that those that are under PTS supervision are not yet adjudicated guilty and retain all of their civil liberties. With no finding of guilt, defendants are regularly told to report at specific times, attend counseling, waive their rights against self incrimination and suspicionless searches or stay in jail. This raises consitutional issues that the rules simply do not take into account. See Dolan v. City of Tigard, 512 US 374; US v. Scott, 450 F3d 863; Cruzv. Kauai County, 279 F3d 1064. Whatever new rules or amendments that are adopted should take into account these issues. I would also caution against an overly burdensome rule regime that creates more and more litigation and runs counter to the spirit and purpose of LR2-400.

**Proposed Rule Changes Comment Form.**

**Name: Judge Joel Cano**

**Phone: 5755240094**

**Email: lcrmjlc@nmcourts.gov**

**Rule No: pre-trial release**

**Comments:**

The Proposed Order for Release should always contain the charges and appropriate statute numbers on it. That is the practice of the Dona Ana Magistrate Court. It keeps things straight with respect to defendants who might have multiple cases at once.

SUPREME COURT OF NEW MEXICO  
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OCT 20 2015



**Proposed Rule Changes Comment Form.**

**Name:** Stephen Wayne  
**Phone:** 5053864060  
**Email:** stephen.wayne@lopdm.us

**Rule No:** 5-401

**Comments:**

Overall I support the new rules and believe they are more just for people accused of crimes and will lower incarceration costs.

There appears to be an inconsistency in the exceptions when a secured bond may be imposed. This isn't new with the amendment but is an existing issue. Under 5-401(A), defendants shall be released ROR/unsecured unless the court makes a written finding that such release will not reasonably assure the appearance of the person as required. 5-401(B) then adds the exception that a court can set a secured bond if ROR/unsecured will endanger the safety of any other person or the community. Reading A and B together it could be argued that A requires an ROR/unsecured even if the court finds such release will endanger a person/community. Seems like the easy fix would be to always use the appearance and safety language together.

SUPREME COURT OF NEW MEXICO  
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OCT 21 2015



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October 21, 2015

SUPREME COURT OF NEW MEXICO  
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Mr. Joey D. Moya  
Clerk, New Mexico Supreme Court  
Post Office Box 848  
Santa Fe, New Mexico 87504-0848

OCT 21 2015



Re: Proposed Amendments/ Rules Governing Pretrial Release

Dear Joey:

In regard to the the above matter, I have reviewed the proposed Amendments and believe such proposal is a reasonable and responsible approach to correct an long standing practice described in State vs. Brown. Clearly the use of "Designee" is a practical and common sense approach as described in 5-408.

However, the exceptions to eligibility contained in the various provisions of the Courts to include *Battery* [5-408 (2) a]; *Negligent use of Deadly Weapon* [5-408 (2) h] and *Driving under Influence of Intoxicating liquor or drugs* [5-408 (2) j] appear to be contrary to the practical events that we see on a repeated basis. To disqualify persons charged with the named offenses will have the effect of continued custody of person up to 48 hours. Such condition will clearly add to Detention population for such time and would appear to be contrary to the stated effort of the Amendment.

Clearly, the exceptions in 5-408 (2) affecting household members is sound in order to prevent a domestic uproar from continuing or increasing and the 48 hour issue is probably appropriate. However, it has been my experience that offenses such as battery often arises from arguments/altercations that do not involve great danger. Likewise, we see on a regular basis the charge of Negligent use of a Weapon involving a person arrested for DWI who has a hunting rifle in a pickup or a weapon in a vehicle [not involved in any fashion of the offense]. Likewise, with Driving Under Influence, the delay [without ability to evaluate circumstances] would continue the detention of the charged individual. The point of the matter is that the blanket exclusion of persons being eligible on such matters without ability to *evaluate/consider* facts of the matter does not appear to be appropriate. Clearly if the charged persons has a history of convictions, such is a clear factor for consideration. However, if such person has become intoxicated at a wedding reception [actual case] due to lack of drinking before, such individual is automatically excluded from Designee Release from my reading of the Rule.

Rather than a blanket exclusion, it is my suggestion that Rule 5-408 (2) be modified to remove such exclusions from the Designee eligibility. Inasmuch as the release will be subject to sound evaluation by "Designee", it is my view that such eligibility matters will hinder the effort of the Amendment in the practical sense.

As stated, I believe this effort is appropriate and long needed, but only suggest that from a practical approach, Rule 5-408 (2) merits further consideration.

Sincerely,

TEMPLEMAN AND CRUTCHFIELD

By:

A handwritten signature in black ink, appearing to be "P. Crutchfield", written over the printed name "TEMPLEMAN AND CRUTCHFIELD". The signature is stylized and cursive.

CBC/

**Proposed Rule Changes Comment Form.**

**Name:** Rebecca Salwin  
**Phone:** 219-2837  
**Email:** rebecca.salwin@lopdm.us

**Rule No:** 5-401(G)(3)

**Comments:**

Topic: Automatic hearings for those in jail

Suggestion: Replace "10 days after the date of arraignment or waiver of arraignment" with "10 days after imposing the bond."

Explanation: This will ensure an automatic hearing for those in custody regardless of the case's timeline. Currently, the rule provides no automatic hearing for the common scenario where a defendant is released at arraignment, but later has bond imposed or increased to an affordable amount, resulting in his arrest and continued detention.

SUPREME COURT OF NEW MEXICO  
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OCT 22 2015



**Proposed Rule Changes Comment Form.**

**Name:** Rebecca Salwin  
**Phone:** 219-2837  
**Email:** rebecca.salwin@lopdm.us

**Rule No:** 5-401(C)(2)(a)

**Comments:**

Topic: Factors to determine conditions of release and bond

Suggestion: Edit to "the nature and circumstances of the offense charged, including whether the offense is a crime of violence."

Explanation: The RAI and common sense make clear that community safety and the safety of other individuals are related to whether the charges involve crimes of violence. The new information used to construct the RAI, based on actuarial data from a massive sample size, also makes clear that no special emphasis needs to be placed on whether the crime involves a narcotic drug, as the rule currently does. Narcotic use is not one of the factors that, according to the instrument, has predictive value for risk of flight or endangerment.

While the instrument lists 7 factors for score and weight, and additional 8 factors for aggravation, none of these 15 factors include or allude to narcotics. It appears that the latest data finds the use of a narcotic no longer requires special attention, as it does not carry a significant predictive value.

SUPREME COURT OF NEW MEXICO  
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OCT 22 2015



**Proposed Rule Changes Comment Form.**

**Name:** Rebecca Salwin  
**Phone:** 219-2837  
**Email:** rebecca.salwin@lopdm.us

**Rule No:** 5-401(E)(3)

**Comments:**

**Topic:** Written justification for conditions of release

**Suggestion:** Add "the imposition of conditions of release" to that which requires a written justification

**Explanation:** As is, the rule requires written findings for "the imposition of a secured bond" and no written findings for "personal recognizance or an unsecured bond." It does not explain what is required when the court orders non-monetary conditions. These conditions should require written findings as well. Some of the most common conditions (daily drug tests, substance abuse treatment, GPS monitoring, etc.) are far more burdensome than a small secured bond.

SUPREME COURT OF NEW MEXICO  
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OCT 22 2015



OCT 23 2015

Dear Supreme Court Clerk,



Please find below my additions/revisions to my earlier comments (submitted yesterday) on the proposed changes to Rule 5-401 NMRA:

All references to “current” subsections and quotations from the rule refer to the enumeration scheme and language in the proposed amended Rule.

Previously I submitted a comment to proposed Rule 5-401(C)(1) and –(2), suggesting that the connector between these two subsections be changed from “and” to “or.” I withdraw that comment and replace it with the following:

Proposed Rule 5-401(C) is headed, “Factors to be considered in determining the type and conditions of release.” I suggest splitting this subsection into Rule 5-401(C), to be headed, “Factors to be considered in determining the type of release” and Rule 5-401(D), to be headed, “Factors to be considered in determining the conditions of release.”

My reasoning is as follows:

First, I stand by my previous comment that retrial risk assessment instruments (RAIs) are based upon scientifically tested and proven factors that have been shown to maximize success rates and minimize failure rates. The RAIs come with built-in aggravating and mitigating factors. The RAIs incorporate and evaluate data in unexpected ways. However, they are used because they have been shown to work. Directing a court to use an RAI **and** to then incorporate other information from outside the RAI is to invalidate and make useless the results of the RAI.

Second, simply replacing the “and” at the end of Subsection (C)(1) with an “or” indicates that a court has an option of choosing either to use an RAI or the factors enumerated in (C)(2). Rule 5-401(C) should require that if a scientifically-proven and Supreme Court-approved RAI has been adopted in the district, a court shall use that RAI, and (2) if no such RAI has been approved in the district, a court shall use the factors enumerated in current subsection (C)(2) (subject to a caveat below).

Third, the determination of type of release should be separated from determination of conditions of release, and although the factors for each of these determinations overlap, they should not be conflated. This is especially the case, as pointed out above, where the type of release is to be determined by a pretrial risk assessment instrument.

Of course, an RAI is tailored to reliably designate the most appropriate **type** of release. It says nothing about **conditions** of release. As pointed out above, it is inappropriate for a court using an RAI to consider the factors in the current (C)(2) in determining the type of release; however, it is perfectly appropriate for such a court to consider the current (C)(2) factors in determining conditions of release. Segregating provisions on type of release from provisions on conditions of release will avoid confusion.

With respect to those district courts which will not have adopted an RAI, the factors to be considered for determining type of relief should still be segregated from factors to be considered for determining conditions of release. As noted above, the considerations for each of these issues has extensive overlap with the other, but the considerations are not co-extensive.

For one example, see current subsection (C)(2)(a), “The court shall use the following information to determine the type of release and conditions of release that will reasonably assure appearance of the person as required and the safety of any other person and the community: . . . the nature and circumstances of the offense charged, and whether the offense is a crime of violence or involves a narcotic drug.”

There is no argument that if a charged crime involves a narcotic drug, this clearly should factor into conditions of release. One might hope that a court will inquire into the accused’s related criminal history, attempt to determine if the issue is addiction or sporadic use, personal use or distribution, a casual transaction between friends or a regular commercial activity, etc. , in determining conditions of release.

However, it is noteworthy that – for one example – the RAI in use in the Second Judicial District does not include in its formula anything about “whether the offense . . . involves a narcotic drug.” Absent a showing of some correlation between the particular accused’s relationship to narcotic drugs and danger to the community or between narcotic drugs and the accused’s likelihood of making court appearances, mere involvement of a narcotic drug as an element of the offense charged should not be a factor in determining the type of release. (Again, it may well be reasonable to factor this into conditions of release.)

Alan Wagman  
Assistant Public Defender  
Law Office of the Public Defender  
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**Proposed Rule Changes Comment Form.**

SUPREME COURT OF NEW MEXICO  
FILED

**Name:** Steven O. Lee  
**Phone:** 5754300032  
**Email:** [judgestevenlee@yahoo.com](mailto:judgestevenlee@yahoo.com)

OCT 29 2015



**Rule No:** proposal 55

**Comments:**

I have a few comments on the new material 8-408.

It is my understanding is that all persons arrested for a petty misdemeanor and is a first time offender with no arrests within the last two years is to be released on their own recognizance with certain exceptions. This is to be done by the judge or a designee. Since all violations within municipalities are petty misdemeanors can a judge issue a standing order that states all persons that meet the definition above and unless they fall within the list of exceptions shall be released on their own recognizance?

I believe that the list of exceptions is incomplete and should include all offenses that have mandatory jail time if convicted. Some of the listed violations have multiple elements or definitions, the committee should be very careful when making this list.

The early release on risk assessment paragraph indicates that if a designee determines that a person that does not meet the previous definition for release on their own recognizance may be released based on the Supreme Court approved early release assessment guidelines. It appears that the assessment will have the type of release and the conditions of release. If they are not being released on their own recognizance what other type of release is authorized by the designee? Is the designee going to be allowed to determine a bond amount?

Paragraph D indicates that the judge shall set the type of release and the conditions of release within 48 hours after the person has been placed into the detention facility. There are two definitions of how hours are computed, 8-104 and 8-202. I think that it should be made clear which one is to be used. Defendants are not usually present during a probable cause hearing and it may not be considered by some judges to be the first appearance.

This is all I have for now. Thanks for your consideration.

Judge Steven O. Lee  
Municipal Court Judge, Alamogordo

**Proposed Rule Changes Comment Form.**

**Name: Judge Maurine Laney**  
**Phone: 575-388-9429**  
**Email: silmml@nmcourts.gov**

SUPREME COURT OF NEW MEXICO  
FILED

NOV - 4 2015



**Rule No: 5-401,6-401,7-401,8-401, 5-408, 6-408, 7-408, 8-408**

**Comments:**

My name is Maurine Laney. I am a the magistrate judge in the Grant County Division I court in Silver City. I have a number of concerns with the proposed changes to rules concerning pre-trial release. I have listed my concerns and suggestions below.

**Rule 5-401**

1. Proposed language in 5-401 A states "Pending trial, any person bailable under Article 2, Section 13 or the New Mexico Constitution, shall be ordered released pending trial on the person's personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court, subject to any release condition imposed under paragraph D of this rule, unless the court makes a written finding that such release will not reasonably assure the appearance of the person as required.

I would suggest that the following additional language be added, "or the safety of any person or the community."

2. The language in 5-401 B states "If the court makes a written finding that release on personal recognizance or upon execution of an unsecured appearance bond will not reasonable assure the appearance of the person as required or will endanger the safety of any other person or the community, in addition to any release conditions imposed..."

I would suggest that the language be changed to "safety of any person or the community". As a Judge, I have found that there are times where a defendant may not necessarily be a threat to others in the community, but may be a threat to him or herself. This can be true for defendants who are suicidal, but also true for a defendant who is suffering from a severe addiction, such as huffing spray paint, and, as a result gets arrested multiple times doing things like trying to jump off a building, or laying in the middle of the highway, etc.

3. The proposed procedure outlined in 5-401G(2) concerns me greatly. As I understand it, the proposed rule requires that bond be set by the judge within 48 hours of arrest. If defendant is unable to post bond after 24 hours, he/she may file a motion for a bond review hearing. Next, the court shall hold a bond review hearing within 48 hours of the filing of defendant's motion. If defendant is unable to post bond after 24 hours, and does not file a motion for bond review, the court shall set a bond review hearing within 10 days after date of arraignment or waiver of arraignment.

First, of all, I believe all of the time frames after the initial setting of the bond should be changed to business days instead of hours. Otherwise, there will be no way for the courts to meet the set deadlines. If I arraign a defendant on Friday afternoon and set a secured bond, according to this rule, he should be able to file a motion for bond review on Saturday or Sunday. Since the court is closed on weekends and holidays, there is no way for defendant to file his/her motion. I suggest that the rule state, if the person continues to be detained the following business day after the issuance of the order imposing secured bond...the person shall, upon motion, be entitled to have a hearing to review the bond.

Next, I am confident that 48 hours will not be a sufficient amount of time for the court to schedule a bond hearing. Only a few magistrate courts have access to a public defender and state prosecutor in their courtroom everyday. In my county, we do not have an office of the public defender. We have 4 attorneys in one firm under contract with the PD's office, who cover cases in 4 magistrate courts and three district courts that are spread out over a 2 hour driving distance. When a defendant is in jail under a secured bond, my court sends the paperwork to the contract public defender within 1 day. It then takes them a day or so, to process the packet and assign an attorney within the firm to handle the case. Under the proposed rule change, if a defendant files a motion for a bond review hearing, the hearing may have to be held, before their attorney has even received the file. How will they prepare? Also, if I set a defendant's bond at the jail on a Saturday or Sunday, he/she can file a motion for bond review as early as Monday morning when the court opens at 8:00am. At this point, defendant hasn't even been arraigned or had a first appearance yet. In order to meet the 48 hour rule, I would then have to give the file to a clerk to set the bond hearing, thereby delaying the first appearance or arraignment process. Additionally, cases that fall under the victims of crime act require that the State provide notice to the alleged victim of any hearing concerning a defendant's conditions of release. I have serious concerns that they will not be able to notify the alleged victims on such short notice. Finally, I am the only judge in my court. There will be times when I am scheduled to travel to other courts for a day to hear cases, times when I have to travel to Santa Fe or Albuquerque for service on various committees, and the occasional vacation day. If a defendant files a motion for review on Tuesday, and I'm scheduled to be in a different court on Thursday, this means my clerk will have to only one day to set the case or have to call for a judge from another court to come in on Thursday to cover. For these reasons, I ask that you not only change this to business days, but also increase the time frame in which the hearing must be held, and allow for enlargement of time when exceptional circumstances exist.

4. In the Committee commentary for rule 5-401, the existing language states "If the court determines that release upon the execution of a personal recognizance or upon the execution of an unsecured bond will not reasonably assure the appearance of the defendant as required, the court may require a secured bond."

I proposed that the following additional language be added, "or will not reasonably assure the safety of any person in the community,"

Rule 5-408

1. Proposed rule 5-408B(2) sets forth the charges which would be considered exceptions to the

rule requiring automatic release on personal recognizance. I agree with the charges listed, but, I would suggest that the following additional charges be added as exceptions:

Violation of an Order of Protection, 40-3-16; and  
Enticement of a Child, 30-9-1.

2. Proposed rule 5-408C states “The early release schedule shall provide for a specific type of release and conditions of release based on the likelihood that the person will appear in court as required, will not commit a new crime while released pending trial, and will not pose a danger to the safety of any other person or the community...”

I again propose that this language be changed to “will not pose a danger to the safety of any person”, so that we can also take into consideration whether defendant is a danger to him or herself.

In addition to these suggestions, I would like to request that the suggested risk assessment tool also be made available for comment prior to approval.

Thank you for the opportunity to comment. Your consideration is appreciated.

Maurine Laney,  
Magistrate Court Grant Div. I

**Proposed Rule Changes Comment Form.**

**Name: Judge Maurine Laney**  
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SUPREME COURT OF NEW MEXICO  
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NOV - 5 2015



**Rule No: 5-401,5-408, et. al.**

**Comments:**

Once again, thank you for the opportunity to comment on this very important issue. I wish to point out that very few rural communities have access to pretrial services. Those that do, usually do not have programs that can provide a free service to a defendant. In my district, we have a county funded surveillance program that offers GPS and drug testing. This program was very graciously provided by our county based on their recognition of the need for an alternative to jail. However, clients are required to pay \$65 for the installation of the bracelet, between \$65-\$100 per month for the service, and additional costs for drug tests. If judges are expected to utilize pretrial services, then every county in the state should have access to one, and, there should be some avenue to adjust the costs of such services for indigent defendants. Otherwise, we're right back where we started in this discussion...those that can afford to pay for pretrial services can be released, and those that can't afford pretrial services cannot.

Judge Maurine Laney  
Magistrate Court Grant Div. 1

**Proposed Rule Changes Comment Form.**

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SUPREME COURT OF NEW MEXICO  
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NOV - 6 2015



**Rule No: 55**

**Comments:**

Mr. Moya,

My name is Karen Mitchell and I am the Magistrate Judge in Harding County. I appreciate the difficult and thorough work of the Ad Hoc Pretrial Release Committee. Thank you for the opportunity to comment on the proposed rule changes. My comments are made in anticipation that changes to Rule 5-401 will be mirrored in future changes to Rule 6-401.

Rule 5-401:

1. I agree with Judge Maurine Laney's comments concerning the need to add the additional language, "or the safety of any person or the community" to Rule 5-401 A and B.
2. I would suggest the following change to Rule 5-401 B(1) "the execution by the person of a secured appearance bond in the full amount specified in the release order..." Section A refers to unsecured appearance bond and section B refers to secured bonds. When the term "appearance bond" is used in the courts, it is generally referring to an unsecured bond. Adding the word "secured" in 5-401 B(1) would help clarify the bond type. In the alternative, the section could be changed to read "the execution by the person of a secured bond in the full amount specified in the release order..."
3. I would suggest the language in 5-401 C remove the word "other" to maintain consistency throughout the Rule "assure the appearance of the person as required and the safety of any other person and the community:"
4. Certain language in 5-401 G concerns me, specifically "No person eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond." I understand the goal of this language and I agree with it philosophically; however, I believe the objective will be hard to accomplish. Anytime a judge sets a secured bond it should be based on the criteria identified in section C. If a defendant is unable to post that secured bond, they can argue they are detained solely because of their financial inability, if they were financially able, they would post the bond and be released on conditions. While a court must consider the available financial resources of any defendant, it is not the only consideration, and the court is never certain that a bond will or will not be posted. This language makes the court ripe for numerous and extensive hearings on the issue of bond.

5. I also share Judge Laney's concerns with the time frames laid out in 5-401 G. She did an excellent job of identifying the difficulty these changes will create in rural New Mexico so I will not reiterate them.

6. I agree with Judge Laney's suggestions concerning adding the additional language "or will not reasonably assure the safety of any person in the community," in the commentary section.

7. In general, the Rule appears to have gone from looking at the position in *State v. Brown*, 2014-NMSC-038, 338 P.3d 1276 which required that a court consider more than the charge alone (i.e. the court should consider all factors listed in the Rule) to placing a greater focus on the defendant's ability to post a bond. In rural New Mexico there are little if any resources available to ensure that a defendant complies with pretrial release conditions. Posting a bond to ensure that a defendant appears and complies with conditions of release is a great incentive for compliance.

Rule 6-408:

1. I agree with Judge Laney's suggestion to add Violation of an Order of Protection contrary to §40-3-16 and Enticement of a Child contrary to §30-9-1 to the list of exceptions under 6-408 B(2).

2. I also support Judge Laney's suggestion to change the language in 6-408 C to read "will not pose a danger to the safety of any person."

3. As I understand the Rule, section C refers to felony charges. I trust that since there are exceptions under minor offense, there will also be exceptions identified in the risk assessment tool for felony offenses. For example, I would be concerned if a defendant qualified for early release when charged with Criminal Sexual Contact of a Minor contrary to §30-9-13 or Assault with Intent to Commit a Violent Felony contrary to §30-3-3 and the only condition is that they not violate any federal, state or local laws. In general, I believe setting release conditions for serious felony charges is the duty and responsibility of the judge, not a designee. I welcome a standardized statewide assessment tool to assist in that responsibility. I would caution that the process must work the same throughout the state and not favor urban communities with their significant resources. To that end, I would appreciate the opportunity to comment on the risk assessment tool before it is implemented.

Thank you for the opportunity to comment on the proposed Rule changes. Your consideration is appreciated. If you have any questions, please contact me.

Sincerely,  
Karen P. Mitchell  
Harding County Magistrate Judge  
P.O. Box 9  
Roy, NM 87743  
(575) 485-2549

**Proposed Rule Changes Comment Form.**

SUPREME COURT OF NEW MEXICO  
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**Name: Jonathan L. Ibarra**  
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NOV - 6 2015



**Rule No: 5-401, etc.**

**Comments:**

I thank the Court and the ad hoc committee for the time and effort that went into these proposed rules. I do have a few comments.

5-401(B) - I don't have a problem with not using a standard bond in district court, of course - it should be an individualized determination. That said, there are places, I think, for initial bond schedules in lower courts.

5-401(C) - I agree with comments already sent in by Mr. Wagman and Ms. Salwin regarding the use of narcotics as a reason for the type of release, as opposed to the conditions of release. Mr. Wagman's suggestion of splitting considerations into types and conditions has some merit. Ms. Sprague's comment on domestic violence arrests is probably fair - that might not matter if the person is now being charged with some property crime, but would if the person is charged with a new DV.

5-401(E) - I again agree with Ms. Salwin - both the type of release and the conditions of release should be justified. Mr. Wheelless' comments about the burdens of pretrial supervision on defendants who have not been found guilty, especially as compared to probation requirements on people who have been convicted, are entirely accurate. In the Second Judicial District, Pretrial Services has essentially refused to supervise people without the ability to do UA's, even if the charge has nothing to do with alcohol or drugs. This makes absolutely no sense. The conditions should be the minimum necessary.

5-401(G) - I'm not exactly sure how this is going to work in practice. If this is on the initial arrest, they will typically be booked on a Magistrate or Metro case, and the district court only becomes involved after indictment or bind-over. To continue to hold the defendant at that point, the Court needs to file a Order Setting Conditions of Release? Before arraignment, that is? If so, that's fine, but that should be clear. Ms. Salwin's comments are also correct that this rule seems more designed for preliminary incarceration, not for incarceration of defendant who have allegedly violated their conditions of release. Her suggestion is a logical fix. Something needs to be done in this rule to deal with "Segura hearings." Paragraph H, which would seem to deal with the issue Ms. Salwin presented, does not really do so - in Bernalillo County, remand orders, not new Orders Setting Conditions of Release are filed. It needs to be clear that any type of change in the circumstances of the defendant that result in his incarceration need to be dealt with in a timely manner.

5-408, 6-408, 7-408, 8-408 - Others have commented on the crimes eligible or not for early release, and I agree generally with those comments. My issue is that anyone on a felony or on those excepted

charges will be held essentially without bond for up to 48 hours. This is very problematic, obviously. There are many people who previously might have been able to bond out who now will not be permitted to do so. Being in custody for 48 hours without bond can have devastating consequences for people - they could lose their jobs, or their children. There is a hard balance to strike for the court, which I understand, between treating people equally regardless of whether they would be able to make a "jailhouse bond" or not, and keeping people in custody for an extended amount of time without giving them any opportunity for release. But I am not sure that this is the correct balance. I believe that if the State wants to try to hold a person in custody for longer than about 12 hours (so that a judge doesn't have to be woken up in the middle of the night), they should have to have an order of the court holding them until their first appearance/arraignment. Even that could be too much for some people, but at least it gives people a way to get out of custody before 48 hours has passed.

9-302(A) - why are we saying it's okay for a defendant to be arrested without notice?

I will continue to review the rules and comments, and may add future comments.

Thank you for your consideration.

JLI

**Proposed Rule Changes Comment Form.**

**Name:** Rachel Felix  
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**Rule No:** NMRA 5-408(B)(2)

SUPREME COURT OF NEW MEXICO  
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NOV - 8 2015



**Comments:**

1. The following serious violent-type misdemeanors are missing from the exceptions for unsecured release in the proposed amendments under NMRA 5-408(B)(2), including: Violation of a restraining order issued under the Family Violence Act. NMSA 40-13-6; Unlawful carrying of a deadly weapon (and on University Premises). NMSA 1978 § 30-7-2; Enticement of a Child. NMSA 1978 § 30-9-1. These violent-type misdemeanor offenses need to be included in the proposed amendment to ensure procedural safeguards properly protect families under threat of violence and terror inflicted by a restrained party; to protect the public from those who unlawfully carry deadly weapons, especially university students (considering the national trend of violent shootings in public places); and enticement of a child, or any type of act committed with intent to inflict harm on a child should be considered a violent-type misdemeanor similar to child abuse.

**Proposed Rule Changes Comment Form.**

**Name: Rachel Felix**  
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SUPREME COURT OF NEW MEXICO  
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NOV - 9 2015

**Rule No: NMRA 5401**



**Comments:**

Assuming the Constitutional Amendment on Bail Reform in NM will be adopted by the state legislature in 2016, language should be added to the proposed amendment so that the end of the rule NMRA 5401(A) says, "unless the court makes written finding that such release will not reasonably assure the appearance of the person as required [or reasonably assure the safety of the community]."

Nothing in NMRA 5-401(F) allows a judge to order the pretrial detention upon motion of the state when a defendant poses a significant risk danger to the community in spite of conditions of release. According to the proposed amendment, if the state files a motion to detain a defendant, a hearing must be held to determine whether bail may be denied under Art. II, Sec. 13 of the NM State Constitution. This brings us full circle to the NM Constitution's current requirement that bail and/or conditions of release must be set unless (1) a felony offense has been committed by a defendant with 2 prior felonies, or (2) a felony offense committed with a deadly weapon by a prior felon. This fails to protect the community against dangerous individuals who are not repeat felons.

The Committee Commentary under NMRA 5401, indicates that New Mexico still conforms to the out-dated Bail Reform Act of 1966, "This rule was derived from the Federal Bail Reform Act of 1966, as amended". However, the law should conform to the Bail Reform Act of 1984, which allows judges to detain individuals when "... no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C.A. § 3142(e), as amended.

To comply with the Bail Reform Act of 1984, an amendment to upgrade Article II, Section 13 of the New Mexico State Constitution needs to be adopted by the legislature to allow for pretrial detention. Currently the NM Constitution only provides for the denial of bail for repeat felons charged with prior convictions, which fails to protect the community from foreseeable danger posed by violent criminals who will more than likely commit other violent crimes against the community. Furthermore, the denial of bail can only last for a period of 60 days for prior felons, "bail may be denied for 60 days". NM Const. Art. II Sec. 13. Therefore, the NM Constitution, as it stands today, limits the ability of judges to order pretrial detention to properly protect the community from violent criminals.

NOV - 9 2015



**Proposed Rule Changes Comment Form.**

**Name:** Charles Kraft

**Phone:** 505-835-2238

**Email:** charlie.kraft@lopdm.us

**Rule No:** 7-408(B)(2)

**Comments:**

I caution the Court against creating a one-size-fits-all determination for whether a defendant will be ROR'd without condition (other than violating any law) or whether a defendant will be subject to additional restrictions on their pretrial liberty. Under the proposed Rule 7-408(B)(2)(a), a defendant charged with battery will be ineligible for an ROR, as defined by Rule 7-408(B)(1). While on the surface it may appear that everyone who is arrested for allegedly committing a battery may on some level be dangerous, the reality is that many defendants get charged with battery (and battery on a household member) for such minor things as throwing a cupcake at a partner, dumping a glass of water on a friend, or tapping a partner with an empty plastic soda bottle (all of these examples were real cases). It seems illogical and fundamentally unfair to treat these defendants the same as defendant who are charged with battery where the facts are more legitimate to support the charge. Each case presents its own unique facts and circumstances; the law rarely works well when a one-size-fits-all approach is applied, especially when one's pretrial liberty is at stake.

**Proposed Rule Changes Comment Form.**

**Name:** Judge Maurine Laney  
**Phone:** 575-388-9429  
**Email:** silmml@nmcourts.gov

**Rule No:** pretrial release

**Comments:**

If the rule changes go into effect as proposed, please consider this scenario:

Defendant has arraignment or first appearance in magistrate court, and court sets a secured bond, but raises the issue of competency. Case is transferred to district court. Would the defendant still be entitled to an automatic bond hearing in district court within 10 days from the date of the original first appearance?

SUPREME COURT OF NEW MEXICO  
FILED

NOV 10 2015





NOV 11 2015

November 11, 2015

**RESPONSE TO PROPOSED AMENDMENTS TO THE RULES GOVERNING PRETRIAL RELEASE IN NEW MEXICO COURTS BY THE AMERICAN BAIL COALITION, AND JACKIE SANCHEZ, LICENSED BAIL AGENT, LINDA CONTRERAS, LICENSED BAIL AGENT, AND MARIO VALLEJOS, LICENSED BAIL AGENT.**

- I. The Supreme Court Should Not By Rule Delegate the Authority to a Third-Party to Set Bail and Conditions of Release, Nor Should the Supreme Court Begin Using A New Bail Schedule That Schedules All Other Types of Bail and Conditions of Release But Financial Conditions Because Such a Move Allows for the Setting of Bail By an Unregulated Third-Party Without a Judicial Officer Taking Into Account All of the Required Statutory Factors

Early release that is limited to a recognizance release is much different than weighing the statutory factors and deciding the type of bond and conditions of release. Yet, the Supreme Court is poised to allow for the delegation of judicial authority to set bail in all criminal cases in New Mexico. To allow a risk assessment to set bail in a route fashion is no more evidence-based than a charge-based financial bond schedule and does not involve the weighing and consideration of all of the statutory factors required to be considered in order to set bail. In fact, if the risk assessment, which cannot be validated for the purpose of setting bail or conditions of release anyway, were used, one would presume it would include the very financial bails that could be offered on a scheduled basis to defendants.

Yet, the Court says scheduling *financial conditions* is illegal because the statutory factors are not considered in each case—yet, somehow not so when it pertains to all other types of bonds and conditions of release. Delegating the authority to a third-party to implement this judicial science would remove consideration of all of the statutory factors by using the risk assessment instead as the *sole basis* for a delegate setting the type of bail and conditions of release based on a pre-ordained schedule, and would then simultaneously bar the imposition of any financial condition which may be the least restrictive and most appropriate under the statute and State Constitution that would lead to an immediate release. In this way, the Supreme Court's new bail scheme violates the rights of all of whom who will have a financial condition imposed and be able to meet that condition because it offers a way out for everyone else but that population.

The Court either believes in individualized bail setting by a judge rather than a bail schedule or it does not—the Court cannot have it both ways. To create a new bail schedule with all options available *but* financial conditions is a step in the very direction the Court said was illegal in *Brown*. The Court's rule is vulnerable to challenge on that basis, i.e., that bails are being set illegally without consideration of all of the statutory factors by a judge.



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Further, no risk assessment in the United States of American has been validated to set the *type of bail and conditions of release*, and therefore it should not be mechanically used for that purpose. We challenge the Supreme Court to cite with any particularity any risk assessment that has any scientific basis for the setting of the type of bond and condition of release. Instead, the proposal involves the rote application of greater conditions on greater risk cases—that is intuition-based, not evidence-based.

Further, the discretionary decision to set bail should not be delegated to a third party. People have a right to have a judge set their bail. Either a person is released on recognizance under the early release provision, or they are held until a judge sets bail. To hold otherwise is to say that individualized consideration is only necessary when a financial condition is imposed and that a risk-assessment may substitute for a judge considering all of the statutory factors.

In addition, the concept that the Supreme Court should adopt a statewide bond schedule by rule (that does not permit the use of any financial conditions) flies in the face of the purpose of setting bail and will entirely usurp the role of local trial judges in bail setting since the only way to get out in the intervening 48 hours after arrest is to have a person with delegated authority assess risk and then have an arbitrary assignment of the type of bond and conditions of release assigned based on a formula that is *not evidence-based* and has never been validated for that purpose. The Court also purports to allow for all conditions *but financial conditions* to be used on an interim basis. In so doing, the Court indicts its own legal reason to eliminate financial bond schedules by suggesting that non-financial types of bond or conditions of release could be scheduled based on delegating that decision to a computer, but that when it comes to financial conditions being scheduled based on the discretion of a judge, such is a constitutional problem. The Court simply cannot have it both ways.

The Court should take the position that it took in *Brown*, that people should get individualized consideration by a judge across the board or not. The limited recognizance release should be maintained, but should not be expanded to all cases, which is what the Supreme Court's rule purports to do under cover of a risk assessment that cannot be validated for the purpose for which it is used because setting the type of bail and conditions of release is inherently discretionary.

To say that a formula that looks at a handful of demographic and other factors can schedule bail by computer any better than experienced New Mexico judges is not proven by anything but pure conjecture. It also says that it is okay for a computer and technician to ignore *all other statutory factors* that are required to be considered, and simply set bail and conditions of release based on a risk score and arbitrary assumption that the non-financial conditions scheduled by the Supreme Court have some basis in science that has been validated to set bail and conditions of release in a fashion that may *obviate or reduce the risk presented*.

Judges should set bail in New Mexico, period. Those judges should be trial judges, not a committee of the Justices of the Supreme Court. No party should be delegated the authority to set bail, and the Supreme Court should not delegate such authority and then simultaneously set the



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schedule. It is questionable whether the Supreme Court has such authority in the first place. To do so will run afoul of the statute and constitutional rights of a defendant to have a judge set bail based on the factors enacted by the legislature.

- II. The Authority for Temporary Releases Using So-Called Jail House Bond Schedules Should Not Be Repealed; Neither the *Brown* Decision Nor the Erroneous Interpretation of Federal Law Requires Any Such Result; Such a Substantive Policy Decision Will Substantially Increase the Average Daily Population of Un-convicted Persons in New Mexico Jails Unless Resources Can be Provided to Local Courts so that Bail Can be Set Twenty-Four Hours a Day in All Jurisdictions

The American Bail Coalition believes that national best practices call for the setting of bail by judges in all cases whatsoever with good information twenty-four hours a day and seven days a week. When bail can be set expeditiously by judges, this reduces the chance of unnecessary pretrial incarceration for all. This is far from a national reality—judicial budgets are limited and interim solutions, like bail schedules which were specifically created to address this problem in the critical hours after arrest, should be used unless and until such a reality arrives. The Court clearly recognizes this reality by attempting to delegate the authority to set bail and conditions of release to a third party using a risk assessment and new non-financial bond schedule set not by trial judges but by the Supreme Court.

The Supreme Court's rules as drafted have a glaring defect that will dramatically increase the amount of time citizens in New Mexico will spend in jail. The rules, in specifically eliminating bond schedules based on the charge and financial conditions, will result in all persons for whom bail now must be set to sit in jail for up to 48 hours. Some would have gotten out in a matter of hours. This means no weekend and night releases for those arrested in jurisdictions where judges lack the resources to set bail twenty-four hours a day.

The Supreme Court has two choices to remedy this—require bail to be set twenty-four hours a day and fund the same or permit the limited use of bond schedules to remedy this situation.

The Supreme Court's recitation of federal law to the effect that bond schedules are unconstitutional is based on a national talking point by those seeking to eliminate all financial conditions of release and not based on a review of those cases or an understanding of the law in this area. In the Clanton, Alabama case, which was raised by Justice Daniels in his conversation on bail to the legislature as an example of a federal judge "enjoining" the use of a bond schedule, instead the Plaintiffs *specifically admitted that bail schedules are constitutional*. This occurred after the City Attorney cited in his brief well-settled law for the obvious proposition that, "Bond schedules, with a single exception from forty-five years ago, have never been held unconstitutional." No court has ruled on the novel equal protection theory advanced by the Equal Justice Foundation that the Court has apparently adopted by *judicial fiat* as federal law in New Mexico by the New Mexico



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Supreme Court. If bond schedules are prohibited by the federal law, then the Court should cite with particularity any law from the United States Court of Appeals for the Tenth Circuit or otherwise that has so held and upon which it now suggests it must re-write New Mexico bail law premised thereon. This is simply an erroneous interpretation of federal constitutional law by the New Mexico Supreme Court.

The Supreme Court, in interpreting its own decision in *Brown*, has gone way beyond the amazingly obvious and limited result that should have occurred in *Brown* had the Supreme Court then and in the aftermath of the case simply decided the case on the facts before it and not engaged in speculation as to the ultimate constitutionality of an issue not before it. Frankly, no judge in the United States of America would have ruled in favor of the State under the facts in *Brown*, the idea that a bail set by a judge using a bond schedule could forever detain someone and could, by operation of law, simply overcome *uncontroverted evidence* presented by a defendant that he was neither a flight risk or danger to the community.

The *Brown* case did not decide the limited legal question of whether a bail schedule can be used in the 48 hours before a person sees a judge. Those who escape jail and can secure a financial bond (or have a third party do so on their behalf) would say that such should be allowed so that they do not have to wait 48 hours under the Courts' new rule to see a judge who will then impose a financial condition that they *can* afford. In fact, the Court has no problem *now saying* that *everyone* must see a judge within 48 hours and that *no one*, except the quite limited exception of early release, will have any chance of getting out of jail within 48 hours in places where bail is not set on nights and weekends. Certainly detaining someone for 48 hours with no chance of getting out must be less constitutional than detaining someone for 48 hours with a chance of getting out. This is why federal courts have universally held that such schedules can be used on such a temporary basis.

The Court's proposed rules now adopt the very best practices that allow bond schedules under federal law to be constitutional—that there be sufficient and adequate due process, i.e., there is an expedited and meaningful review of bail settings. A forty-eight hour review is the precise standard that formed the basis for the settlement agreement in the *Clanton* case wherein the Plaintiffs admitted using bond schedules with a 48 hour review period was “*constitutional.*”

Practically, the elimination of bond schedules and the move toward assessment and supervision in combination drives greater pretrial detention for all. That is not a good outcome. Absent some fix, that is what will occur in every jurisdiction in New Mexico. Lack of a bond schedule will detain more people longer, particularly where bail cannot be set 24 hours a day. Assessments will also take time. In Jefferson County, Colorado, the move to no bail schedule with assessments and greater pretrial supervision drove up the un-convicted population who spent more than one day in jail by 140%. This, as the Supreme Court has conceded, has a devastating impact on people who should have been released in a matter of hours rather than a matter of days. Not



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allowing the stop-gap of bond schedules will cause this, as will other administrative delays occasioned by the shift.

The American Bail Coalition supports the setting of bail twenty-four hours a day in all cases in the State of New Mexico. If resources cannot be achieved to do so, then financial bond schedules should be allowed at the discretion of local judicial officers, in addition to the early release procedures, to facilitate releases in less than 48 hours of arrest. To do otherwise is to harm all of those who could meet a financial condition and for whom a financial condition will ultimately be imposed. If such temporary schedules get it wrong for some, the damage done to a small percentage of people can be corrected rather than instead making all sit in jail for 48 hours.

### III. The Supreme Court Should Not Create Specific Authority for the Supreme Court to Approve Risk Assessments and No Risk Assessments Have Been Validated in New Mexico; Risk Assessments Are However Already Generally Authorized in Current Law

The Supreme Court will unnecessarily sit as pre-judge and jury on the question of the validity of a risk assessment used to detain a person. The Supreme Court should not put itself in such a position. There are likely to be appeals that the Supreme Court must decide if the Supreme Court's vision of a bail system comes true and someone is held in jail pending trial with no possibility of release based on the integrity of a risk assessment as applied to a particular person.

In addition, the Supreme Court's ministerial approval of a risk assessment does not automatically translate the same into scientific validity as a matter of evidence and would usurp the role of a trial judge. To pre-endorse an instrument as scientifically valid is wholly inappropriate as a matter of legal policy, and should be left to local jurisdictions to employ if they so choose.

Trial judges are the gate-keepers of scientific evidence—just because this is a bail issue does not mean that the long-standing principles that guide the use of scientific evidence should simply be discarded. Surely, the Supreme Court would not approve a scientific instrument to be used in any other case at the trial level that could be used to achieve a particular result.

Instead, the validity of a risk assessment, and whether a judge chooses to consider the results of a risk assessment in a particular case, should be left to the discretion of the trial judges in the State of New Mexico. A litigant should not be entitled, as a matter of right, to have a judge consider the risk assessment as a specific factor. A risk assessment is instead a way for a judge to consider the impact of the existing factors. Finally, as mentioned, if a litigant wants to challenge the validity of a risk assessment, such litigant should not be in a situation where the tribunal who has the final say on an appeal from a trial judges' order has already decided the validity of the precise instrument previously in a forum that is now beyond review.

### IV. The Rules Should Specifically Prohibit the Automatic Setting of Bond Type or Conditions of Bond by Schedule Based on a Risk Assessment Score, and Should



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### Prohibit Recommendations for Specific Types of Bonds or Conditions of Release by Agencies That Assess Risk

Risk assessments, if validated and utilized properly, are not validated for any other purpose but to *assess pretrial risk* and cannot be used to in any way to scientifically set bail or conditions of release. In other words, a risky person does not automatically call for a routine set of escalating conditions based on an increasing computer score and arbitrary distinctions of low, medium or high risk. A risk assessment is an identifier of a probability of risk—it does not assist a judge in knowing scientifically what conditions imposed, financial, non-financial, supervisory, monitoring, SCRAM, GPS, etc. will in fact *mitigate* any such risk. At the back end of cases, we look at things like criminogenic needs and other factors to design individualization that will mitigate the risk presented in light of the goals of sentencing. In other words, we address what makes someone high-risk and address such needs. Such considerations are not part of risk assessments and risk assessments were not designed for that purpose. The American Bail Coalition would challenge the Supreme Court to identify a single risk assessment that is validated to *set the type of bond and conditions of release*—there are none.

Thus, for the same reasons the Court chooses to prohibit charge-based financial bond schedules, it should prohibit any automatic assignment by schedule of any type of bond or particular conditions of release including levels and types of supervision or any other conditions of release, including by an persons “designated” to set bond.

In addition, local or state agencies that assess risk and provide the results of the risk assessments to judges should be prohibited in opining on the ultimate question of what specific type of bond and conditions of release should be imposed since there is no scientific or other basis to make such suggestions. Bail conditions are different than probation or parole because they are short-term considerations limited to the general short-term dangerousness of the defendant and the defendant’s appearance in Court, and such conditions are not designed to address the other purposes of sentencing such as rehabilitation or restitution. The current risk assessments nationally are not validated for any such purpose, and thus the assessment of risk should be limited to just that—the probabilities that a person will commit another crime and/or not show up for court based on the application of the instrument to the facts of the case. Absent some other qualifications or validated process that guides these decisions, such recommendations should not be made. Further, such programs have an incentive to recommend supervision paid for by the defendant to the agency that recommends supervision.

#### V. Requiring All Courts to Consider the “Results of a Risk Assessment” Is Too Restrictive on Judicial Discretion and is Already Covered by the Existing Rules

The current rule already permits Courts to consider the results of a risk assessment. The last two factors in the current rule include considerations of danger to the community and facts indicating likelihood that someone will appear. That is what a risk assessment provides. There is further no need to require Courts to consider only risk assessments approved by the Supreme Court.



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If a risk assessment is used in a jurisdiction or by a litigant and if a court wants to entertain it, such should be the rule. Trial courts should be the gate-keeper as to what scientific evidence or other evidence a court will consider in setting bail.

To require mandatory consideration of a risk assessment sets up an appeal for a defendant who can argue that the assessment came up with a risk significantly different than the Court ultimately concluded. It could easily be used to as grounds for suggesting a finding of an abuse of discretion. The current, existing rule strikes the right balance because it allows courts to consider the results of any scientific interpretation of such facts by risk assessment instruments or other scientific basis, to be considered by judge on a discretionary basis.

At a minimum, if this language is added, it should say that a Court “may consider” the results of a risk assessment, but that no judge is required to do so.

### VI. The Court Should Follow the Lead of the Colorado General Assembly and Give Defendants a Choice When Deciding How to Meet a Financial Condition

The Colorado General Assembly enacted Senate Bill 14-212, in which it conferred upon defendants the ability to select among all options the best way for the defendant to meet a financial condition. This was premised on the idea that choice would facilitate release, and that restricting choice could theoretically restrict an option. Although 10% to the Court was ruled contrary to Colorado State Statute in 1978, the argument for choice in New Mexico would be that defendant choice should apply in all cases *including* the option of selecting 10% to the Court. In other words, the Judge would select a monetary amount of bail when they decide a financial condition is necessary, and the defendant could then select any method to meet that amount including using 10% to the Court or any of the methods to post the full amount including cash, property or surety.

### VII. Agencies that Charge Defendants Fees for Supervision Should be Required to Post a Schedule of Such Fees and Provide to Judges in All Cases Where Supervision is Imposed the Estimated Charges of Such “Non-Financial” Conditions so that Judges Can Properly Consider Such Charges in Light of the Potential Benefit of Financial or Other Conditions

Non-financial conditions and supervision is not free to defendants or to county or municipal governments. If agencies are to charge defendants or if a county is paying for supervision, such programs should be required to provide to the Courts a schedule of such fees and estimates of fees in each case where the Court may order conditions that result in fees being incurred. This will assist judges in weighing financial versus non-financial conditions, particularly in cases where a low, one-time financial condition may achieve the same obviation of risk as supervision at a more costly price to the defendant. This will further the goal of judges imposing the least restrictive conditions, financial and otherwise, that will facilitate the purposes of the giving of bail. This was also aid judges in understanding and assessing the impact of imposing these conditions on County resources when a County is picking up the tab.



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### VIII. Agencies that Assess and/or Supervise Defendants Should be Required to Report Annually Their Data Capturing the Success Rates of Such Persons Who Were Assessed or Supervised

The State of Colorado requires such agencies to provide annual information on their rates of success to the legislature annually, including failures to appear, new crime rates while on supervision, etc. The data reporting and collection was standardized several years ago. Because there is no regulatory oversight of such agencies like all other agencies that deal with criminal offenders including bail agents, such basic data collection and reporting is critical for decision-makers to understand the odds that supervision will have in terms of mitigating risk and achieving success. If the goal is truly to move to a more “evidence-based” system, then judges should be aware of how successful supervision practices are in light of other potential conditions. This will also help policy-makers understand the successes or failures of such programs.

### IX. The Supreme Court Should Not Alter the Rule as to Preventative Detention Until the People Vote to Change the Constitution

There is no reason to in any way change the rule as to the issue of preventative detention until the legislature refers the same to the voters who then approve it.

### X. The Court Should Not Engage in Creating or Furthering the Fiction of an Unsecured Bond; Unsecured Bonds Are Not Collected and Have No Better Incentive than A Simple Promise to Appear

Unsecured bonds make the State a creditor to all defendants with no security and will require aggressive collections efforts to translate into revenue. This rarely occurs in any jurisdiction in the nation, largely because it will saddle the poor with further collection costs occasioned by the forfeiture. In addition, the persons upon whom the State must collect will likely be quite uncollectable, and these funds will be left on the books until such time as they are declared uncollectable.

In addition, no science or research suggests any impact that an unsecured bond has on appearance or public safety. Since there is no outlay of financial resources in an unsecured transaction and no security, there is no involvement of a third party co-signor, there is no involvement of a bail agent, there is very little if any economic incentive created by a promise to pay versus a simple promise to appear.

Simply put, there is no reason to create or further the fiction of an unsecured financial bond in the rules. A secured bond or a recognizance bond should be the two options. All mention of unsecured bonds should be eliminated.

### XI. The Supreme Court Should Reject the Dated ABA Standard and Existing Rules to the Effect that Financial Conditions are Always More Restrictive than Non-Financial Conditions



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Financial and all other conditions of release should be placed on a level playing field—judges should be free to choose from the menu of options any and all options they believe appropriate. Judges should decide in their discretion without aid from the Supreme Court or rules or statutes that decide what is or what is not the least restrictive form of release in any particular case. To say that a financial condition is always more restrictive ignores modern technological reality.

The ABA Standard when it was created was created in a time where there was no electronic monitoring. There were no GPS devices or SCRAM units. There were not even cellular phones being used ubiquitously if at all. Rotary phones were still the order of the day. To continue to suggest that financial conditions are always the most restrictive is a conclusion based on reference to non-financial conditions, which when it was created in the 1970s did not include the possibility of technological and computer-based tracking of defendants and monitoring of their blood using technology at the expense of the defendant. The standards were re-approved in 2007, but the technological expansion in electronic monitoring has grown leaps and bounds over the past decade.

Judges have always been charged with imposing the least restrictive conditions of release in order to achieve the purposes of bail. To assume that a recognizance release with any set of conditions of monitoring by the very entity that seeks to arrest and prosecute a defendant is less restrictive than a financial condition should not be made at the level of a rule. It may be that the financial condition of paying for technological monitoring and supervision is more financially restrictive and more restrictive in terms of a defendant's liberty and other constitutional rights such as privacy.

A judge in each case should be tasked with comparing the restrictiveness of such conditions and should not be bound by the false assumption that any financial condition is more restrictive than any so-called “non-financial” condition, which could include house arrest, monitoring of blood, drug screening, SCRAM units, GPS monitoring, etc. *at the financial expense of the defendant*. The proposed rules include the continuing sanction of this erroneous and outdated standard.

### XII. No Statistical Study of the New Mexico Jails or Bail System Was Completed to Inform the Changes to the Rules

Many assertions have been made based on national talking points that were not investigated by the Ad Hoc Committee. For example, no research was done indicating the number or percentage of the “rich” defendants on high risk cases that were getting out and committing additional crimes was done. This is the reason for preventative detention, as Justice Daniels put it, the gangsters can “hook and crook” their way out of jail on high bonds only to then commit more crimes. This simply is not happening—the target population the Supreme Court says should be detained is already being detained. On the low end, no research was done to determine how many persons on the low end of bonds are truly there due to the inability to afford bail. Other factors, like immigration holds, multiple pending cases, etc. were never investigated. Policy decisions that are



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being made by the Supreme Court are only informed by national talking points that are not backed up by any statistics within the State of New Mexico.

### XIII. Documents Attached for Review

As part of this submission, the American Bail Coalition requests review of the following documents to better inform this process:

- Judge McLaughlin's letter regarding Judge Lippman's bail reform in New York
- Various scholarly articles demonstrating the evidence-based success of financial conditions and why judges should always consider them in the mix when setting bail
- Briefing document on Jefferson County, Colorado reforms
- ABC Statement before New Mexico legislative committee on bail reform
- J. Clayton and T. Gloss article on bail reform in Colorado
- Pleadings from the Clanton, Alabama case

Supreme Court  
of the  
State of New York



Personal & Unofficial

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HON. EDWARD J. MCLAUGHLIN  
SUPREME COURT JUSTICE

October 6, 2015

Dear Editor:

Chief Judge Lippman's announced reform of the "broken" bail system insults judges, overlooks that bail review is available presently, fails to provide a complete record of bail/release decisions, and intrudes on the judiciary's independence. As reported, the gist of the press conference was a broad criticism of discretionary decisions made by scores of sincere judges in individual cases. Using the word "broken" and mockingly recalling Alice in Wonderland might raise press interest but it also surely further lowers judicial morale. The accusation is that daily countless judges in five boroughs, without consulting each other, knowingly made incorrect bail decisions. Merit judicial selection, as some call it, in place for decades, accounts for the vast majority of judges sitting in Criminal Court arraignments (selected judges of the Civil Court are the exception). Judges appointed by every mayor from Koch to de Blasio are accused of presiding over a "broken" bail system. This accusation is false. Their actual bail decisions were correct. That they produce an unwelcome result does not mean the decision was wrong or that the system is broken. When diverse sincere people make determinations over time, independently of each other, the results should be accepted as fair. Judging is not – and should not be – results oriented.

A defendant's failure to post bail does not mean that bail was set too high. Such reasoning is neither persuasive nor logical. It certainly does not justify the administrative branch of the judiciary interfering with the independence of its adjudicative branch. Furthermore, if it were such an egregious and unfair system over which judges have presided during the last decade, why this press briefing only now?

The bail system, indeed, may be broken but not for the reasons the Chief Judge espoused.

Citywide statistics show the huge number of unjailed defendants who do not come to court on their own. Aside from the judges sitting in criminal court and the attorneys who regularly practice there, few people know how many defendants at liberty do not come to court voluntarily. For example, in New York City's Criminal Courts to date in 2015, in the five boroughs, just short of 51,000 warrants were issued for such defendants. Nearly 34,000 of the warrants issued were for defendants who either had been released by judges who set no bail or

had posted bail. Warrants issued in 2013 and 2014 practically were identical. Judges, from their experiences in arraignment and calendar parts, are aware of the plethora of past non-appearances as they begin each new arraignment assignment. They decide the day's cases individually, using only appropriate criteria. Yet, no one suggests that the rampant non-appearance at, or following, arraignment in Criminal Court justifies factoring that data into bail decisions.

Imagine the outrage if the press conference had been devoted to decrying the vast amount of people who did not come to court. What would the reaction be were an administrator to state, "too many defendants do not come to court" or release conditions are "too low?" How would the press and public greet urging judges to consider carefully the embarrassing number of persons who have failed to return to court as an appropriate consideration in future bail decisions? Judges are sanctioned in the rare instance when they attempt to influence another judge's handling of a case. How should judges perceive the subject matter of the press conference in their future bail decisions?

Furthermore, however well-intentioned the Chief Judge as administrator was, the public's understanding of their criminal justice system was not aided by his conveying the misleading and insulting impression that his opinion could influence discretionary decisions of judges. The word "retraining" is particularly insulting. It is reminiscent of recent bureaucratic action where error could reasonably be assumed. "Retraining" to make discretionary decisions implies that the judges who made the tens of thousands of bail decisions, to which there are objections, were unaware of available statutory options or chose an illegal course. Perhaps most significantly, his remarks severely undermined judicial independence by implying that he could suggest a goal and that judges, like lemmings, would dutifully comply rather than make individualized, case-specific decisions as we are ethically obligated.

Noteworthy is the failure to provide contextual data about bail decisions made by the judges now faulted for setting the "too high" bail. The judges being criticized for detaining defendants are the same judges who release defendants. Discretion is designed to produce varying results. An independent judiciary, unfettered by interference, usually from without, is the guardian of our country's democracy.

Unexecuted bench warrants and absent defendants, covering every level of offense, vastly exceed the number of defendants incarcerated pre-trial. This mass thumbing of noses at the legal system followed sincere judicial bail decisions seemingly is neither noticed nor noted in the Chief Judge's announcement. Yet, defendants who fill courtrooms during calendar calls, having been released without bail or who have posted the required bail, evidence correct discretionary decisions.

Defendants released statutorily (CPL 170.70 and 180.80) could have provided a measure of empirical data missing in the "bail-is-too-high" assumption. The announcement did not

mention any study of this data source. Defendants who fail to return following statutory release provide some evidence that the bail set was appropriate. Defendants who appear, having been statutorily released, demonstrate that bail was unnecessary. Discretionary decisions are case-by-case, individual assessments, not preordained ones driven by an administrative goal or policy.

The Legislature enacted laws related to bail and trusts judges to follow them. Now, as administrator, Chief Judge Lippman feels that bail decisions are being incorrectly made, not because of legal error, but rather because he, and others, are dissatisfied with the number of people who cannot post the amount set by judges. Those judges, screened and appointed due to their fairness and commitment to the law, should be presumed to perform their duties accordingly. Dissatisfaction with discretionary decisions does not allow administrative interference. Legal ways exist to challenge any condition of bail. Since being enacted in 1971, the Criminal Procedure Law has provided for both setting and reviewing bail decisions. Review can occur both in the Supreme Court and the Appellate Division, depending on the jurisdictional and crime level factor of bail set in Criminal and Supreme Court. The review is initiated by the supposedly aggrieved party and counsel. An accused, unable to meet the bail conditions set by a judge, is not without legal remedy.

Announcing that bail generally is too high is tantamount to asserting that judges in thousands of bail decisions have ignored the law purposefully for unstated reasons, perhaps to curry favor, avoid criticism, or assure continued incarceration. "Purposefully" is apt because the bail statute lists factors to be evaluated, in the individual judge's discretion. Under existing law, to obtain a reduction of existing bail conditions, a reviewing court must determine that an abuse of discretion occurred in the original decision or that circumstances have changed from those known to the original judge. It would be insufficient, and illegal, for a reviewing judge to adjust bail conditions merely as a different exercise of discretion or from a perception that bails generally are "too high."

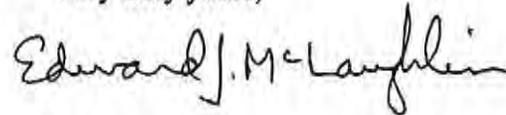
The reform plan establishes one judge per county to review bail decisions when a person had been incarcerated for a specified period without posting bail. The underfunded, understaffed court system often cannot provide requested trials and hearings for jailed and unjailed persons alike. For a designated judge to conduct a meaningful review of bail, the judge needs to become familiar with each case, including current data regarding the supposed proof and information about the statutory criteria as originally presented to the bail setting judge. The newly designated judge would hear from both sides about the situation, likely needing some investigation of a defense contention about viability or altered circumstances of the case. Would such a continual review process allow the designated judge to conduct any trials for defendants, especially incarcerated ones, or would the process reduce, by nearly five citywide, the judges available for trials?

Whether the court system reports the results of this process was not addressed at the news

conference. Did some persons, released by this process, not return to court as directed or allegedly commit a new crime? How often did a reviewing judge lower bail? How often did the reviewing judge maintain the existing conditions? Will the original judge's decision be seen as correct when circumstances thereafter justify a change in bail condition? Is it presumed that the original judge would not adjust bail upon hearing the new facts or that the defense attorney or the prosecutor would not alert the court to a change circumstance?

Speaking only for myself, I am offended by the tenor of Chief Judge Lippman's remarks and dismayed at the incomplete record on which he rests his case.

Very truly yours,

A handwritten signature in cursive script that reads "Edward J. McLaughlin". The signature is written in black ink and is positioned to the right of the typed name "Edward J. McLaughlin".

EJM/fjl

# THE FUGITIVE: EVIDENCE ON PUBLIC VERSUS PRIVATE LAW ENFORCEMENT FROM BAIL JUMPING\*

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and

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## ABSTRACT

On the day of their trial, a substantial number of felony defendants fail to appear. Public police have the primary responsibility for pursuing and rearresting defendants who were released on their own recognizance or on cash or government bail. Defendants who made bail by borrowing from a bond dealer, however, must worry about an entirely different pursuer. When a defendant who has borrowed money skips trial, the bond dealer forfeits the bond unless the fugitive is soon returned. As a result, bond dealers have an incentive to monitor their charges and ensure that they do not skip. When a defendant does skip, bond dealers hire bounty hunters to return the defendants to custody. We compare the effectiveness of these two different systems by examining failure-to-appear rates, fugitive rates, and capture rates of felony defendants who fall under the various systems. We apply propensity score and matching techniques.

## I. INTRODUCTION

APPROXIMATELY one-quarter of all released felony defendants fail to appear at trial. Some of these failures to appear are due to sickness or forgetfulness and are quickly corrected, but many represent planned abscondments. After 1 year, some 30 percent of the felony defendants who initially fail to appear remain fugitives from the law. In absolute numbers, some 200,000 felony defendants fail to appear every year, and of these, approximately 60,000 will remain fugitives for at least 1 year.<sup>1</sup>

\*The authors' names are in alphabetical order. We wish to thank Jonathan Guryan, Steve Levitt, Lance Lochner, Bruce Meyer, Jeff Milyo, Christopher Taber, Sam Peltzman, and seminar participants at Claremont McKenna College, the American Economic Association annual meetings (2002), George Mason University, Northwestern University, and the University of Chicago.

<sup>1</sup>These figures are from the State Court Processing Statistics (SCPS) program of the Bureau of Justice Statistics and can be found in U.S. Department of Justice, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties* (various years). We describe the data at greater length below. The SCPS program creates a sample representative of 1 month of cases from the 75 most populous counties (which account for about half of all reported crimes). In 1996, the sample represented 55,000 cases, which in turn represent some 660,000 filings in a year and 1,320,000 filings in the nation. The absolute figures are calculated using this total, and

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Defendants who fail to appear impose significant costs on others. Direct costs include the costs of rearranging and rescheduling court dates, the wasted time of judges, lawyers, and other court personnel, and the costs necessary to find and apprehend or rearrest fugitives. Other costs include the additional crimes that are committed by fugitives. In 1996, for example, 16 percent of released defendants were rearrested before their initial case came to trial.<sup>2</sup> We can be sure that the percentage of felony defendants who commit additional crimes is considerably higher than their rearrest rate. We might also expect that the felony defendants who fail to appear are the ones most likely to commit additional crimes. Indirect costs include the increased crime that results when high failure-to-appear (FTA) and fugitive rates reduce expected punishments.<sup>3</sup>

The dominant forms of release are by surety bond, that is, release on bail that is lent to the accused by a bond dealer, and nonfinancial release. Just over one-quarter of all released defendants are released on surety bond, and a very small percentage pay cash bail or put up their own property with the court (less than 5 percent combined); most of the rest are released on their own recognizance or on some form of public bail (called deposit bond) in which the defendant posts a small fraction, typically 10 percent or less, of the bail amount with the court.

Estimating the effectiveness of the pretrial release system in the United States can be characterized as a problem of treatment evaluation. Treatment evaluation problems can be difficult because treatment is rarely assigned randomly. Release assignment, for example, is based on a judge's assessment of the likelihood that a defendant will appear in court as well as on considerations of public safety. Correctly measuring treatment effects requires that we control for treatment assignment. In this paper, we control for selection by matching on the propensity score.<sup>4</sup>

We estimate the treatment effect for three outcomes—the probability that

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the release, failure-to-appear (FTA), and fugitive (defined as FTA for 1 year or more) rates from the random sample. See note 2 *infra*.

<sup>2</sup> U.S. Department of Justice, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 1996 (1999)* (<http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc96.pdf>).

<sup>3</sup> Justice delayed can mean justice denied in practice as well as in theory. Thousands of cases are dismissed on constitutional grounds every year because police fail to serve warrants in a timely manner. See Kenneth Howe & Erin Hallissy, *When Justice Goes Unserved: Thousands Wanted on Outstanding Warrants—but Law Enforcement Largely Ignores Them*, *S.F. Chron.*, June 22, 1999, at A1.

<sup>4</sup> For the matching method, see Donald B. Rubin, *Estimating Causal Effects of Treatments in Randomized and Nonrandomized Studies*, 66 *J. Educ. Psychol.* 688, 701 (1974); Donald B. Rubin, *Assignment to Treatment Group on the Basis of a Covariate*, 2 *J. Educ. Stat.* 1, 26 (1977); Paul R. Rosenbaum & Donald B. Rubin, *Reducing Bias in Observation Studies Using Subclassification on the Propensity Score*, 79 *J. Am. Stat. Assoc.* 516, 524 (1984); Rajeev H. Dehejia & Sadek Wahba, *Causal Effects in Non-experimental Studies: Re-evaluating the Evaluation of Training Programs* (Working Paper No. 6586, Nat'l Bur. Econ. Res. 1998); James J. Heckman, Hidehiko Ichimura, & Petra Todd, *Matching As an Econometric Evaluation Estimator*, 65 *Rev. Econ. Stud.* 261, 294 (1998).

a defendant fails to appear at least once, the probability that a defendant remains at large for 1 year or more conditional on having failed to appear (what we call the fugitive rate), and the probability that a defendant who failed to appear is recaptured as a function of time.

The earlier economic studies of the bail system examine the role of the bail amount in the decision to fail to appear, generally finding that higher bail reduces FTA rates.<sup>5</sup> These studies did not focus on the central issue of this paper—the different incentive effects of the various release types.<sup>6</sup>

## II. HISTORY OF PRETRIAL RELEASE AND INCENTIVE EFFECTS OF RELEASE SYSTEMS

Although money bail is still the most common form of release, money bail and especially the commercial surety industry have come under increasing and often virulent attack since the 1960s.<sup>7</sup> Bail began as a progressive measure to help defendants get out of jail when the default option was that all defendants would be held until trial. In the twentieth century, however, the default option was more often thought of as release, and thus money bail was reconceived as a factor that kept people in jail. In addition, the greater burden of money bail on the poor elicited growing concern.<sup>8</sup> As a result,

<sup>5</sup> William M. Landes, *The Bail System: An Economic Approach*, 2 *J. Legal Stud.* 79, 105 (1973); William M. Landes, *Legality and Reality: Some Evidence on Criminal Procedure*, 3 *J. Legal Stud.* 287 (1974); Stevens H. Clark, Jean L. Freeman, & Gary G. Koch, *Bail Risk: A Multivariate Analysis*, 5 *J. Legal Stud.* 341, 385 (1976); Samuel L. Myers, Jr., *The Economics of Bail Jumping*, 10 *J. Legal Stud.* 381, 396 (1981).

<sup>6</sup> Ian Ayres & Joel Waldfogel, *A Market Test for Discrimination in Bail Setting*, 46 *Stan. L. Rev.* 987, 1047 (1994), demonstrates the subtlety of the distinctions made by bond dealers in setting bail bond rates. Although the courts (in New Haven, Connecticut, in 1990) set higher bail amounts for minority defendants than for whites, Ayres and Waldfogel find that bond dealers acted in precisely the opposite manner. What this pattern suggests is that judges set higher bail for minority defendants than for white defendants with the same probability of flight. Bond dealers are then induced by competition to charge minorities relatively lower bail bond rates.

<sup>7</sup> Floyd Feeney, *Foreword*, in *Bail Reform in America*, at ix (Wayne H. Thomas, Jr., ed. 1976), for example, writes that "the present system of commercial surety bail should be simply and totally abolished. . . . It is not so much that bondsmen are evil—although they sometimes are—but rather that they serve no useful purpose." American Bar Association, *Criminal Justice Standards*, ch. 10, *Pretrial Release*, Standard 10-5.5, *Compensated Sureties*, 114-15 (1985), refers to the commercial bond business as "tawdry" and discusses "the central evil of the compensated surety system." When Oregon considered reintroducing commercial bail, Judge William Snouffer testified, "Bail bondsmen are a cancer on the body of criminal justice" (quoted in Spurgeon Kennedy & D. Alan Henry, *Commercial Surety Bail: Assessing Its Role in the Pretrial Release and Detention Decision* (1997)). Supreme Court Justice Harry Blackmun called the commercial bail system "offensive" and "odorous." See *Schilb v. Kuebel*, 404 U.S. 357 (1971).

<sup>8</sup> In order to provide appropriate incentives, money bail is typically higher for the rich than the poor. Thus, it is not a priori necessary that money bail should discriminate against the poor, although in practice this does occur owing to nonlinearities and fixed costs in the bail process. Assume that money bail is set so as to create equal FTA rates across income classes. In such a case, there is no discrimination against the poor in the setting of bail. But if the bail

significant efforts were made, beginning in the 1960s, to develop alternatives to money bail, and four states—Illinois, Kentucky, Oregon, and Wisconsin—have outlawed commercial bail altogether.

In place of commercial bail, Illinois introduced the Illinois Ten Percent Cash Bail or “deposit bond” system. In a deposit bond system, the defendant is required to post with the court an amount up to 10 percent of the face value of the bond. If the defendant fails to appear, the deposit may be lost and the defendant held liable for the full value of the bond. If the defendant appears for trial, the deposit is returned to the defendant, less a small service fee in some cases.<sup>9</sup> Some counties will also release defendants on unsecured bonds. Unsecured bonds are equivalent to zero-percent deposit bonds. That is, defendants released on an unsecured bond are liable for the full bail amount if they fail to appear, but they need not post anything to be released.

The pretrial release system is designed to ensure that defendants appear in court. It is often asserted that the commercial bail system discourages appearance. In a key Supreme Court case, for example, Justice Douglas argued that “the commercial bail system failed to provide an incentive to the defendant to comply with the terms of the bond. Whether or not he appeared at trial, the defendant was unable to recover the fee he had paid to the bondsman. No refund is or was made by the professional surety to a defendant for his routine compliance with the conditions of his bond.”<sup>10</sup>

Similarly, Jonathan Drimmer said, “Hiring a commercial bondsman removes the incentive for the defendant to appear at trial.”<sup>11</sup> John S. Goldkamp and Michael R. Gottfredson suggest that the “use of the bondsman defeated the rationale that defendants released on cash bail would have an incentive to return,”<sup>12</sup> and in their influential set of performance standards for pretrial release, the National Association of Pretrial Service Agencies<sup>13</sup> said that under commercial bail, “the defendant has no financial incentive to return to court.”<sup>14</sup>

In light of the persistent criticism that surety bail encourages failure to appear, it is perhaps surprising that the data consistently indicate that defendants released via surety bond have lower FTA rates than defendants released under other methods. Part of this might be explained by selection—FTA

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amounts necessary to ensure equal FTA rates are not linear in wealth, then such rates can generate unequal rates of release across income classes.

<sup>9</sup> National Association of Pretrial Service Agencies, *Performance Standards and Goals for Pretrial Release* (2d ed. 1998).

<sup>10</sup> *Schilb v. Kuebel*, 404 U.S. at 373.

<sup>11</sup> Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 *Hous. L. Rev.* 731, 742 (1996).

<sup>12</sup> John S. Goldkamp & Michael R. Gottfredson, *Policy Guidelines for Bail: An Experiment in Court Reform* 19 (1985).

<sup>13</sup> See note 9 *supra*.

<sup>14</sup> See also Thomas, ed., *supra* note 7, at 13. Because of this issue, Thomas calls the surety system “irrational.”

rates, for example, may be higher for those defendants charged with minor crimes—perhaps these defendants reason that police will not pursue a failure to appear when the underlying crime is minor—and defendants charged with minor crimes are more likely to be released on their own recognizance than on surety release. A second reason, however, is that bond dealers, just like other lenders, have numerous ways of creating appropriate incentives for borrowers.

Most obviously, a defendant who skips town will owe the bond dealer the entire amount of the bond. Defendants are often judgment proof, however, so bond dealers ask defendants for collateral and family cosigners to the bond (which is not done under the deposit bond system). If hardened criminals do not fear the law, they may yet fear their mother's wrath should the bond dealer take possession of their mother's home because they fail to show up for trial. In order to make flight less likely, bond dealers will also sometimes monitor their charges and require them to check in periodically. In addition, bond dealers often remind defendants of their court dates and, perhaps more important, remind the defendant's mother of the son's court date when the mother is a cosigner on the bond.<sup>15</sup>

If a defendant does fail to appear, the bond dealer is granted some time, typically 90–180 days, to recapture him before the bond dealer's bond is forfeited. Thus, bond dealers have a credible threat to pursue and rearrest any defendant who flees. Bond dealers report that just to break even, 95 percent of their clients must show up in court.<sup>16</sup> Thus, significant incentives exist to pursue and return skips to justice.

Bond dealers and their agents have powerful legal rights over any defendant who fails to appear, rights that exceed those of the public police. Bail enforcement agents, for example, have the right to break into a defendant's home without a warrant, make arrests using all necessary force including deadly force if needed, temporarily imprison defendants, and pursue and return a defendant across state lines without the necessity of entering into an extradition process.<sup>17</sup>

At the time they write the bond, bond dealers prepare for the possibility of flight by collecting information that may later prove useful. A typical application for bond, for example, will contain information on the defendant's residence, employer, former employer, spouse, children (names and schools), spouse's employer, mother, father, automobile (description, tags, financing),

<sup>15</sup> See Mary A. Toborg, *Bail Bondsmen and Criminal Courts*, 8 *Just. Sys. J.* 141, 156 (1983). Bail jumping is itself a crime that may result in additional penalties.

<sup>16</sup> Drimmer, *supra* note 11, at 793 (1996); Morgan Reynolds, *Privatizing Probation and Parole*, in *Entrepreneurial Economics: Bright Ideas from the Dismal Science* 117, 128 (Alexander Tabarrok ed. 2002).

<sup>17</sup> Drimmer, *supra* note 11. See also *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366 (1873).

union membership, previous arrests, and so on.<sup>18</sup> In addition, bond dealers have access to all kinds of public and private databases. Bob Burton,<sup>19</sup> a bounty hunter of some fame, for example, says that a major asset of any bounty hunter is a list of friends who work at the telephone, gas, or electric utility, the post office, or welfare agencies or in law enforcement.<sup>20</sup>

Bond dealers, however, recognize that what makes their pursuit of skips most effective is the time they devote to the task. In contrast, public police are often strained for resources, and the rearrest of defendants who fail to show up at trial is usually given low precedence.

The flow of arrest warrants for FTA has overwhelmed many police departments, so today many counties are faced with a massive stock of unserved arrest warrants. Baltimore alone had 54,000 unserved arrest warrants as of 1999.<sup>21</sup> In recent years, Cincinnati has had over 100,000 outstanding arrest warrants stemming from failures to appear in court. One Cincinnati defendant had 33 pending arrest warrants against him.<sup>22</sup> In response to the overwhelming number of arrest warrants, most of which will never be served because of lack of manpower, some counties have turned to extreme measures such as offering amnesty periods. Santa Clara County in California, for example, has a backlog of 45,000 unserved criminal arrest warrants and in response has advertised a hotline that defendants can use to schedule their own arrests.<sup>23</sup>

Although national figures are not available, it is clear that the problem of outstanding arrest warrants is widespread. Texas, for example, is relatively well off with only 132,000 outstanding felony and serious misdemeanor warrants, but Florida has 323,000, and Massachusetts, as of 1997, had around 275,000.<sup>24</sup> California has the largest backlog of arrest warrants in the nation. The California Department of Corrections estimated that as of December 1998, there were more than 2.5 million unserved arrest warrants.<sup>25</sup> Many of these arrest warrants are for minor offenses, but tens of thousands are for

<sup>18</sup> We thank Bryan Frank of Lexington National Insurance Corporation for discussion and for sending us a typical application form.

<sup>19</sup> Bob Burton, *Bail Enforcer: The Advanced Bounty Hunter* (1990).

<sup>20</sup> Good bond dealers master the tricks of their trade. One bond dealer pointed out to us, for example, that the first three digits in a social security number indicate in what state the number was issued. This information can suggest that an applicant might be lying if he claims to have been born in another state (many social security numbers are issued at birth or shortly thereafter), and it may provide a lead for where a skipped defendant may have family or friends.

<sup>21</sup> Francis X. Clines, *Baltimore Gladly Breaks 10-Year Homicide Streak*, *N.Y. Times*, January 3, 2001, at A11.

<sup>22</sup> George Lecky, *Police Name "200 Most Wanted," Cincinnati Post*, September 5, 1997, at 1A.

<sup>23</sup> See Jane Prendergast, *Warrant Amnesty Offered for 1 Day*, *Cincinnati Enquirer*, November 19, 1999, for description of a similar program in Kenton County, Kentucky. See also Henry K. Lee & Kenneth Howe, *Plan to Clear Backlog of Warrants: Santa Clara County Offering Amnesty to Some*, *S.F. Chron.*, January 12, 2000, at A15.

<sup>24</sup> Howe and Hallissy, *supra* note 3.

<sup>25</sup> *Id.*

people wanted for violent crimes, including more than 2,600 outstanding homicide warrants.<sup>26</sup> Kenneth Howe and Erin Hallissy report that “local, state and federal law enforcement agencies have largely abandoned their job of serving warrants in all but the most serious cases.” Explaining how this situation came about, they write, “As arrests increased, jails became overcrowded. To cope, judges, instead of locking up suspects, often released them without bail with a promise to return for their next court date. For their part, police, rather than arrest minor offenders, issued citations and then released the suspects with the same expectation. When suspects failed to appear for their court dates, judges issued bench warrants instructing police to take the suspects into custody. But this caused the number of warrants to balloon, and the police did not have the time or staff to serve them all.”<sup>27</sup>

### III. THE MATCHING MODEL WITH MULTIPLE TREATMENTS

Ideally, in a treatment evaluation we would like to identify two outcomes: one if the individual is treated,  $Y_T$ , and one if no treatment is administered,  $Y_{NT}$ . The effect of the treatment is then  $Y_T - Y_{NT}$ . But we cannot observe an individual in both states of the world, making a direct computation of  $Y_T - Y_{NT}$  impossible.<sup>28</sup> All methods of evaluation, therefore, must make some assumptions about “comparable” individuals. An intuitive method is to match each treated individual with a statistically similar untreated individual and compare differences in outcomes across a series of matches. Thus, two statistical doppelgangers would function as the same individual in different treatments.

An important advantage of matching methods is that they do not require assumptions about functional form. When the research question is about a mean treatment effect, as it is here, matching methods also allow for an economy of presentation because they focus attention on the question of interest rather than on a long series of variables that are used only for control purposes. Unfortunately, matching methods typically founder between a rock and a hard place. The technique works best when individuals are matched across many variables, but as the number of variables increases, the number of distinct “types” increases exponentially, so the ability to find an exact match falls dramatically.

In an important paper, Paul Rosenbaum and Donald Rubin go a long way to surmounting this problem.<sup>29</sup> They show that if matching on  $X$  is valid, then so is matching on the probability of selection into a treatment conditional on  $X$ . The multidimensional problem of matching on  $X$  is thus trans-

<sup>26</sup> *Id.*

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

<sup>28</sup> Rubin, Estimating Causal Effects of Treatments, *supra* note 4.

<sup>29</sup> Paul R. Rosenbaum & Donald B. Rubin, The Central Role of the Propensity Score in Observational Studies for Causal Effects, 70 *Biometrika* 41, 55 (1983).

formed into a single-dimension problem of matching on  $\Pr(T \geq 1|EX)$ , where  $T \geq 1$  denotes treatment.<sup>30</sup> The probability  $\Pr(T \geq 1|EX)$  is often called the propensity score, or  $p$ -score.

The matching technique extends naturally to applications with multiple treatments through the use of a multivalued propensity score with matching on conditional probabilities.<sup>31</sup> Assume that there are  $M$  mutually exclusive treatments, and let the outcome in each state be denoted  $Y_1, Y_2$ , and so forth. As before, we observe only a specific outcome but are interested in the counterfactual: what would the outcome have been if this person had been assigned to a different treatment? Rather than a single comparison, we are now interested in a series of pairwise comparisons between treatments  $m$  and  $l$ . The treatment effect on the treated is written

$$\tau_0^{m,l} \equiv E(Y^m | Y^l FT \geq m) - E(Y^m FT \geq m) - E(Y^l FT \geq m), \quad (1)$$

where  $\tau_0^{m,l}$  denotes the effect of treatment  $m$  rather than  $l$ .

Identification of (1) can occur under appropriate conditions, the most important being that treatment outcomes are independent of treatment selection after conditioning on a vector of attributes,  $X$  (the conditional independence assumption). Formally,

$$Y^1 \dots Y^M \perp T|EX \geq x. \quad (2)$$

If this assumption is valid, we can use the conditional propensity score to identify the treatment effect,<sup>32</sup>

$$\tau_0^{m,l} \equiv E(Y^m FT \geq m) - E_{p^{m|ml}}[E(Y^l Fp^{ml|ml}(X), T \geq l) FT \geq m]. \quad (3)$$

In practice, the conditional propensity score,  $p^{ml|ml}(x)$ , is computed indirectly

<sup>30</sup> Matching methods are common among applied statisticians and natural scientists but have only recently been analyzed and applied by econometricians and economists. Papers on the econometric theory of matching include Heckman, Ichimura, & Todd, *supra* note 4; and Guido W. Imbens, The Role of the Propensity Score in Estimating Dose-Response Functions (Technical Working Paper No. 237, Nat'l Bur. Econ. Res. 1999). More applied work includes James J. Heckman, Hidehiko Ichimura, & Petra E. Todd, Matching as an Econometric Evaluation Estimator: Evidence from Evaluating a Job Training Program, 64 Rev. Econ. Stud. 605, 654 (1997); Dehejia & Wahba, *supra* note 4; Michael Lechner, Programme Heterogeneity and Propensity Score Matching: An Application to the Evaluation of Active Labour Market Policies (Contributed Paper No. 647, Econ. Soc'y World Congress 2000). Our multitreatment application is closest to that of Michael Lechner, Identification and Estimation of Causal Effects of Multiple Treatments under the Conditional Independence Assumption (Discussion Paper No. 91, IZA 1999).

<sup>31</sup> Lechner, Identification and Estimation of Causal Effects, *supra* note 30; Imbens, *supra* note 30.

<sup>32</sup> Lechner, Identification and Estimation of Causal Effects, *supra* note 30.

from the marginal probabilities  $p'(x)$  and  $p''(x)$  estimated from a discrete-choice model. In this case,

$$E[p^{miml}(x)Fp'(x), p''(x)] \cong E\left[\frac{p''(x)}{p'(x) + p''(x)}Fp'(x), p''(x)\right] \cong p^{miml}(x). \quad (4)$$

We use an ordered probit model (see further below) to generate propensity scores.

It is important to emphasize that the propensity scores are not of direct interest but rather are the metric by which members of the treated group are matched to members of the “untreated” group (“differently” treated in our context). After matching, and given the conditional independence assumption, the treated and untreated groups can be analyzed as if treatment had been assigned randomly. Thus, differences in mean FTA rates across matched samples are estimates of the effect of treatment.

Less formally, matching on propensity scores can be understood as a pragmatic method for balancing the covariates of the sample across the different treatments.<sup>33</sup> Note that the covariates that we care most about balancing are those that affect the treatment outcome. Assume, for example, that  $X$  influences treatment selection but does not independently influence treatment outcome. If the goal of the selection model were to consistently estimate the causes of treatment selection, we would want to include  $X$  in the model, but it is not necessarily desirable to include it when the purpose is to create a metric for use in matching.<sup>34</sup> A simple example occurs when  $X$  predicts treatment exactly. Inclusion of  $X$  would defeat the goal of matching because all propensity scores would be either zero or one. Similarly, we will include model variables in the propensity score that may affect the treatment outcome even if they do not casually affect treatment selection.

#### IV. DATA AND DESCRIPTIVE STATISTICS

We use a data set compiled by the U.S. Department of Justice’s Bureau of Justice Statistics called State Court Processing Statistics, for 1990, 1992, 1994, and 1996 (Inter-university Consortium for Political and Social Research [ICPSR] study 2038). We supplement these data with an earlier version of the same collection, the National Pretrial Reporting Program, for 1988–89 (ICPSR study 9508). The data are a random sample of 1 month of felony filings from approximately 40 jurisdictions, where the sample was designed to represent the 75 most populous U.S. counties. The data contain detailed information on arrest charges, criminal background of the defendant (for

<sup>33</sup> Dehejia & Wahba, *supra* note 4.

<sup>34</sup> Boris Augurky & Christoph M. Schmidt, *The Propensity Score: A Means to an End* (Discussion Paper No. 271, IZA 2001).

example, number of prior arrests), sex and age of the defendant,<sup>35</sup> release type (surety, cash bond, own recognizance, and so on), rearrest charges for those rearrested, whether the defendant failed to appear, and whether the defendant was still at large after 1 year, among other categories.

In addition to the main release types, there are minor variations. Some counties, for example, release on an unsecured bond for which the defendant pays no money to the court but is liable for the bail amount should he fail to appear. Because the incentive effects are very similar, we include unsecured bonds in the deposit bond category.<sup>36</sup> Instead of a pure cash bond, it is sometimes possible to put up property as collateral. Since property bonds are rare (588 observations in our data, less than 2 percent of all releases), we drop them from the analysis.<sup>37</sup> Finally, some counties may occasionally use some form of supervised release. In the first year of our data set, supervised release is included in the own-recognizance category. Supervised release often means something as simple as a weekly telephone check-in, so including these with own recognizance is reasonable. Supervised release is not a standard term, however, and other forms, such as mandatory daily attendance of a drug treatment program, are likely to be more binding. To maintain comparability across years, we follow the practice established in the first year of the data set by classifying supervised release with own recognizance. Because supervised release is more binding than pure own recognizance, this can only lower FTA rates and other results in the own-recognizance sample, thus biasing our results away from finding significant differences among treatments.<sup>38</sup>

In Table 1, the mean FTA rates for release categories are along the main diagonal, with the number of observations in square brackets. The preliminary analysis suggests that FTA rates are lower under surety bond release than under most other types of release. Off-diagonal elements are the difference between the FTA rate for the row category and the FTA rate for the column category. The FTA rate for those released under surety bond is 17 percent. Compared with surety release, the FTA rate is 3 percentage points higher under cash bonds, 4 percentage points higher under deposit bonds, and 9 percentage points higher under own recognizance (all these differences are

<sup>35</sup> The State Court Processing Statistics data are more complete and better organized than the National Pretrial Reporting Program data. The former, for example, include information on the race of the defendant that the latter do not.

<sup>36</sup> We drop observations missing data on the bail amount.

<sup>37</sup> Another reason to drop property bonds is that it is difficult to compare the bail for these releases to other release types. A defendant, for example, may put up a \$250,000 house as collateral for \$25,000 in bail. Although we know the bail amount, we do not know the value of the collateral property other than that it must, by law in many cases, be higher than the value of the bail amount. A cash or surety bond, therefore, is not equivalent to a property bond for the same bail amount.

<sup>38</sup> We find similar results by restricting the data set to the years in which supervised release is given a distinct category.

TABLE 1  
MEAN FAILURE-TO-APPEAR RATES BY RELEASE CATEGORY, 1988-96

	Own Recognizance	Deposit Bond	Cash Bond	Surety Bond	Emergency Release
Own recognizance	26 [20,944]	5**	6**	9**	□ 19**
Deposit bond		21 [3,605]	1	4**	□ 23**
Cash bond			20 [2,482]	3**	□ 25**
Surety bond				17 [9,198]	□ 28**
Emergency release					45 [584]

NOTE.—Mean failure-to-appear (FTA) rates (in %) for release categories, rounded to the nearest integer, are along the main diagonal, with the number of observations in square brackets. Off-diagonal elements are the difference between the mean FTA rate for the row category and the mean FTA rate for the column category.

\*\* Statistically significant at the greater than 1% level.

statistically significant at greater than the 1 percent level). Put slightly differently, compared with surety release, the FTA rate is approximately 18 percent higher under cash bond, 33 percent higher under deposit bond, and more than 50 percent higher under own recognizance.

Table 1 also presents some information on emergency release. Emergency releasees are defendants who are released solely because of a court order to relieve prison overcrowding. Emergency release is not a treatment—the treatment is own recognizance—but rather an indication of what happens when neither judges nor bond dealers play their usual role in selecting defendants to be released.<sup>39</sup> One would expect that relative to those released under other categories, these defendants are likely to be accused of the most serious crimes, have the highest probability of being found guilty, and have the fewest community ties. In addition, these defendants have neither monetary incentive nor the threat of being recaptured by a bounty hunter to induce them to return to court. As a result, a whopping 45 percent of the defendants who are given emergency release fail to appear for trial. The large differences between the FTA rates of those released on emergency release and every other category indicate that substantial and successful selection occurs in the decision to release. Emergency release is thus of some special interest, although not directly related to the focus of this paper.

Although the preliminary data analysis is suggestive, the difference-in-means analysis could confound effects due to treatment with effects due to selection on, for example, defendant characteristics such as the alleged crime.

<sup>39</sup> Even under emergency release, some selection can occur. Judges and jailers, for example, could order that more inmates be paroled to make room for the most potentially dangerous accused defendants, inmates could be shipped out of state, or the court order could be (temporarily) ignored. The costs of selection, however, clearly rise substantially when jail space is tightly constrained.

## V. RESULTS

*A. Propensity Scores from Ordered Probit*

We generate propensity scores for matching using an ordered probit model. By law, judges must release defendants on the least restrictive conditions they believe are compatible with ensuring appearance at trial. Own recognizance, the least restrictive form of release, is our first category, followed by release on deposit bond. Although defendants released on deposit bond must put up some cash, which they will forfeit if they fail to appear, the amount is typically less than \$500.<sup>40</sup> Few people are ever held because of a failure to raise cash for a deposit bond. Defendants who were offered financial release (but not a deposit bond) and who paid their bonds in cash are the third category of release. Cash bond is more expensive than a deposit bond but does not involve the monitoring of sureties. Defendants released via surety bond are the fourth category. Although the Constitution guarantees that excessive bail shall not be required, it does not require that bail should always be set low enough for a defendant to be able to afford release. Indeed, judges sometimes set bail in the expectation (and hope) that the defendant will not be able to raise bail. Thus, we include defendants held on bail or detained without bail as the final, most restrictive category, not released. Emergency releases are also included in the final category because, had it not been for the emergency, these individuals would have not have been released. From the ordered probit, we generate conditional propensity scores for each possible pairwise comparison.<sup>41</sup>

Variables in the ordered probit specification include individual-specific indicators that denote whether the defendant has been accused of murder, rape, robbery, assault, other violent crime, burglary, theft, other property offense, drug trafficking, other drug-related offense, or driving-related offense (with misdemeanors and other crimes in the constant). We also include variables for past experience with the criminal justice system. Three binary variables are set equal to one if the defendant had some active criminal justice status at the time of the arrest (for example, was on parole or probation), had prior felony arrests, or failed appear at trial in the past. The defendant's sex and age are also included. Note that these variables are exactly the sorts of variables that judges use to make treatment selection

<sup>40</sup> The median deposit bond amount is \$5,000, and releasees typically must deposit 10 percent or less of the bond amount.

<sup>41</sup> We have also estimated the results using a multivariate logit model. The results are substantively similar (on the ordered probit model, see, for example, William H. Greene, *Econometric Analysis* (4th ed. 2000)).

decisions.<sup>42</sup> Other, nonindividual variables include the police clearance rate, defined as the number of arrests divided by the number of crimes per county. The clearance rate provides a crude measure of police availability that may affect FTA rates. County and year effects are included in the selection equation (county 29 and 1988 are excluded to prevent multicollinearity).<sup>43</sup> The results of the ordered probit estimation are presented in Appendix Table A1.

### B. Matching Quality

A match is defined as the pair of observations with the smallest difference in propensity scores so long as the difference is less than a predefined caliper. If a match cannot be made within the caliper distance, the observations are dropped. We use matching with replacement, so the order of matching is irrelevant, and every untreated observation is compared against every treated observation.<sup>44</sup>

The match quality is good, as we match large proportions of the sample despite using a caliper of only .0001.<sup>45</sup> Figure 1A presents a box-and-whiskers plot of the propensity scores for each treatment category (including the “treatment” of not released) conditional on the actual treatment. The leftmost part of the graph, for example, gives the box-and-whiskers plot for the propensity of being in the own-recognizance, deposit, cash, surety, and not-released treatments for all defendants in the own-recognizance treatment.<sup>46</sup>

<sup>42</sup> Ayres & Waldfogel, *supra* note 6, identifies eight characteristics that judges may consider in setting bail: (1) the nature and circumstances of the offense (if relevant), (2) the evidence against the defendant, (3) the defendant’s prior criminal record, (4) the defendant’s prior FTA record, (5) the defendant’s family ties, (6) the defendant’s employment record, (7) the defendant’s financial resources, and (8) the defendant’s community ties. Although Ayers and Waldfogel’s study deals only with Connecticut, the criteria are similar in other states.

<sup>43</sup> The use of county effects in the selection equation is noteworthy because it implies that matching will occur with “quasi”-fixed effects. A true fixed-effects estimator would require that comparable observations come from within the same county. The matching estimator takes into account county effects when seeking a match but does not insist that every match must be within county. In particular, some counties do not release on deposit bond, and others do not release on surety bond. A fixed-effects estimator would not use information from these counties in estimating the effect of the deposit and surety treatments. The matching estimator will use information from these counties if matching is strong on other variables. A pure fixed-effects estimator may also be important, however, and in the working version of this paper, Eric Helland & Alexander Tabarrok, Public versus Private Law Enforcement: Evidence from Bail Jumping (Working paper, George Mason Univ. 2003), we pursue this alternative approach. Results are consistent with those discussed here.

<sup>44</sup> Dehejia & Wahba, *supra* note 4, finds that matching with replacement is considerably superior to matching with nonreplacement.

<sup>45</sup> When matching on variables with fewer observations, such as fugitive rates conditional on failure to appear as we do below, we match using a caliper of .001. The caliper size makes little difference to the results.

<sup>46</sup> In a box-and-whiskers plot, the box contains the interquartile range (IQR): the observations between the 75th percentile (the top of the box) and the 25th percentile (the bottom of the box). The horizontal line toward the center of each box is the median observation. The whiskers are the so-called adjacent values that extend from the largest observation less than or equal

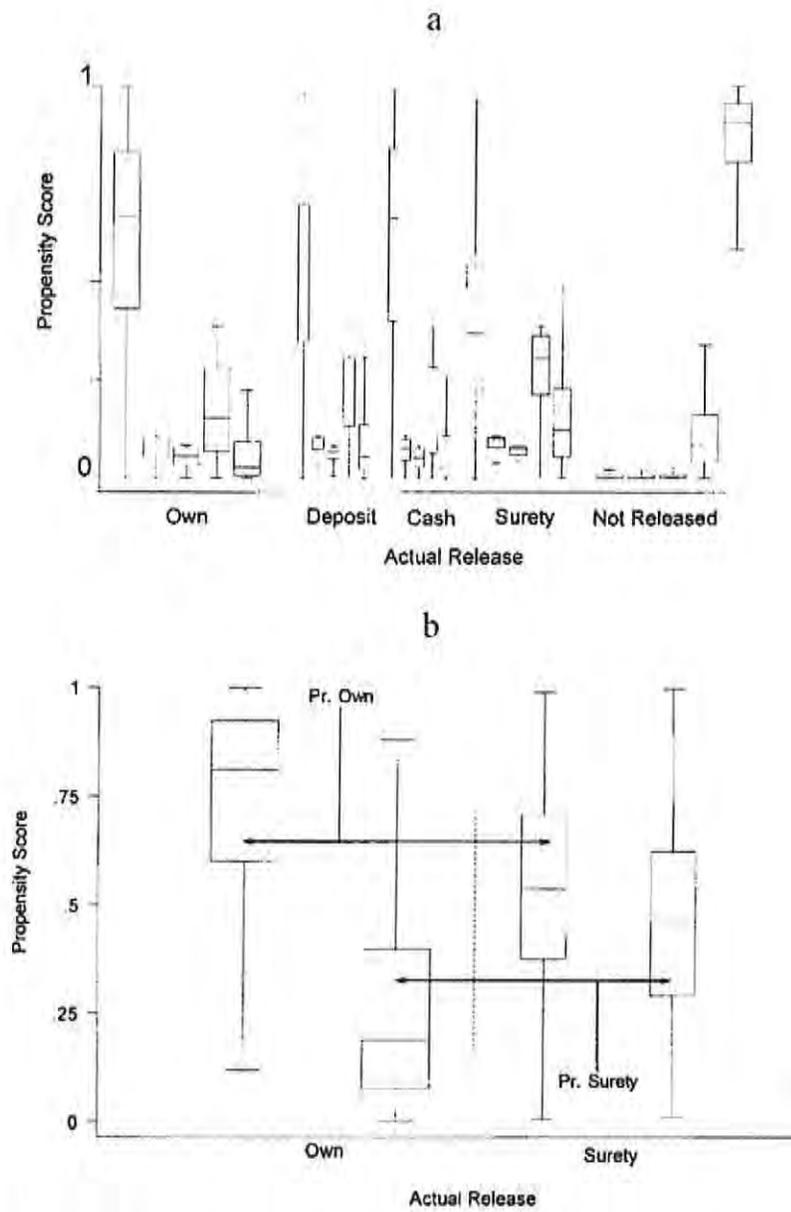


FIGURE 1.—*A*, *p*-score distribution for each release type conditional on actual release (the order within type is own recognizance, deposit, cash, surety, not released); *B*, pairwise *p*-score distributions for own recognizance versus surety.

Figure 1*B* gives the box-and-whiskers plot for the pairwise (conditional) probabilities for the own versus surety comparison. The “Pr. Own” and “Pr. Surety” arrows indicate that we can find comparable observations, statistical doppelgangers, for individuals released under either treatment. Many of the defendants released on surety bond, for example, were as likely to have been released on their own recognizance (third box from the left) as those who actually were released on their own recognizance (first box from the left). Similarly, many of the defendants who were released on their own recognizance were as likely to have been released on surety bond (second box from the left) as those who actually were released on surety bond (fourth box from the left). Note that it is important that the boxes overlap across treatments, not that they overlap within treatments—that is, the fact that in Figure 1*A* the propensity to be in the deposit bond treatment is everywhere lower than the propensity to be in the own-recognizance treatment simply reflects the fact that the deposit bond treatment is a low-probability event. More important is that the deposit bond treatment is a low-probability event regardless of actual treatment—we can thus find comparable observations across the treatments. Alternatively stated, the overlap in the boxes across treatments indicates that random factors play a large role in treatment selection, thus aiding our effort to find true comparable observations.<sup>47</sup>

Although we can find comparable observations across the release treatments, we cannot find good comparable observations for those who were not released. Indeed, the Figure 1*A* box-and-whiskers plot of the propensity not to be released among those who in fact were not released does not overlap at all with the propensity not to be released for those who were released. Defendants who are not released differ greatly from released defendants.<sup>48</sup> (This is consistent with the very high FTA rates that we found for emergency releasees in Table 1.) The fact that the model is capable of finding large selection effects if they exist, as they apparently do for those not released, bolsters the finding that selection on observable characteristics is not overly strong among the release treatments.

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to the 75th percentile plus 1.5# IQR and the smallest observation greater than or equal to the 25th percentile minus 1.5# IQR. Points outside the box and whiskers are called extreme values or outside points and for clarity are not plotted in this graph. In this plot, the width of the box is proportional to the square root of the number of observations in that category.

<sup>47</sup> Another interesting aspect of the box-and-whiskers plot is that it suggests that almost everyone can be released on their own recognizance, even those who might in another time and place be released only with high bail. Thirty percent of released defendants accused of murder, for example, were released on their own recognizance.

<sup>48</sup> It is possible to find defendants who were released who might not have been released—thus, the data are consistent with the adage that it is better to let 10 guilty men go free than jail one innocent man.

TABLE 2  
TREATMENT EFFECTS OF ROW VERSUS COLUMN RELEASE CATEGORY ON FAILURE-TO-APPEAR RATES USING MATCHED SAMPLES, 1988-96

	Own Recognizance	Deposit Bond	Cash Bond	Surety Bond
Own recognizance	26	3.2** (1.0; 1.1)	4.8** (1.1; 1.2)	6.5** (.78; .78)
Deposit bond	□ 3.1** (1.1; 1.2)	21	4.1** (1.5; 1.6)	3.1** (1.1; 1.3)
Cash bond	□ 5.8** (1.3; 1.6)	□ 1.5 (1.6; 2.0)	20	1.8; 2.0 (1.4; 1.8)
Surety bond	□ 7.3** (.78; .89)	□ 3.9** (1.1; 1.2)	1.7 (1.3; 1.4)	17

NOTE.—Mean failure-to-appear rates (in %) for release categories for the full sample are along the main diagonal. Off-diagonal elements are the estimated treatment effects of the row category versus the column category. Standard errors are in parentheses—the first standard error assumes that the  $p$ -score is estimated with certainty; the second uses bootstrapping to estimate the standard error including uncertainty of the  $p$ -score. Matching caliper  $p = .0001$ .

\*\* Statistically significant at the greater than 1% level (two sided).

### C. Estimated Treatment Effects: Failure to Appear

In Table 2, the row variable denotes the treated variable and the column the untreated variable.<sup>49</sup> For reference, the main diagonal includes the mean FTA rate in that category from the full sample.<sup>50</sup> Reading across the surety bond row, for example, we see the estimated difference in FTA rates caused by the surety treatment relative to the column treatment—that is, the estimate of the effect of treatment on the treated. The matching estimator suggests that similar individuals are 7.3 percentage points, or 28 percent, less likely to fail to appear when released on surety bond than when released on their own recognizance. Similar individuals are also 3.9 percentage points, or 18 percent, less likely to fail to appear when released on surety bond than when released on deposit bond. The estimated treatment effect for those on surety bonds versus cash is small and not statistically significant.<sup>51</sup>

<sup>49</sup> Two standard errors are presented in Table 2. The first takes into account uncertainty in the matched samples but assumes that the propensity score is known with certainty. The second estimate is a bootstrapped standard error that takes into account uncertainty that propagates from the estimation of the propensity score. The "regular" and bootstrapped standard errors are close, with the bootstrapped errors being approximately 8–20 percent higher. All the statistically significant results are significant at greater than the 1 percent level using either standard error. Since the estimation of the propensity score adds very little uncertainty to the matching estimators and because calculating bootstrapped errors is very time and resource intensive, we present only the regular standard errors in future results and leave adjustments to the reader. The bootstrapped errors were calculated using 100 replications of the model. The procedure took over 48 hours on a reasonably fast Pentium computer.

<sup>50</sup> The mean FTA rate for the full sample is included as rough guide to absolute effects. Note, however, that the matched sample is usually smaller than the full sample, so the mean FTA rate for the matched and full samples can be slightly different.

<sup>51</sup> As a test of matching quality, we also ran a linear regression on the matched samples that included surety bond and all the variables in Table 3. The results are similar, as they should be if the matched samples divide other covariates as if they were assigned randomly. The coefficient on surety bond in the surety versus own recognizance regression, for example, is

Unlike Table 1, both the top and bottom halves of Table 2 are filled in; this is because the estimate of the treatment on the treated is conceptually different from the estimate of the treatment on the untreated (differently treated). For example, the effect of the surety treatment relative to own recognizance for those who were released on surety bond is not necessarily the exact opposite of the effect of own recognizance relative to surety bond on those who were released on their own recognizance. As it happens, however, our estimates of these effects are similar. The estimate of the effect of own recognizance relative to surety on those who were released on their own recognizance, for example, is 6.5 percentage points, similar in size but opposite in sign to the  $\square$  7.3 surety effect relative to own recognizance of those who were released on surety bond. The similarities across diagonals suggest that either (or both) treatment selection or treatment effect does not interact strongly with defendant characteristics. One possible exception is that the deposit bond treatment relative to cash is estimated at 4.1 percentage points, while the cash bond treatment relative to deposit is estimated at  $\square$  1.5 percentage points.

#### *D. Estimated Treatment Effects: The Fugitive*

A surprisingly large number of felony defendants who fail to appear remain at large after 1 year, approximately 30 percent. Alternatively stated, some 7 percent of all released felony defendants skip town and are not brought back to justice within 1 year. Those who remain at large more than 1 year are called fugitives.

The surety treatment differs most from other treatments when a defendant purposively skips town, because this is when bounty hunters enter the picture.<sup>52</sup> If the surety treatment works, therefore, we should see it most clearly in the apprehension of fugitives. Given that a defendant fails to appear, we ask what the probability is that the defendant is not brought to justice within 1 year and how this varies with release type. It is important to note that once a defendant has decided to abscond, there is no reason why anything other than the different effectiveness of public police and bail enforcement agents should have a systematic effect on the probability of being recaptured.

Table 3 provides strong evidence that bounty hunters are highly effective at recapturing defendants who attempt to flee justice—considerably more so than the public police. The main diagonal of Table 3 contains the mean fugitive rate conditional on FTA along with the number of observations in

$\square$  6.5, which is within 1 standard deviation of the  $\square$  7.3 matching estimate. We do a more detailed comparison of linear regression and matching results further below.

<sup>52</sup> We use the term "bounty hunter" or "bail enforcement agent" to refer to private pursuers of felony defendants. Bond dealers typically pursue their own skips. Literal bounty hunters are typically not called in unless the skip is thought to have crossed state or international lines. Services like Wanted Alert (<http://www.wantedalert.com>) regularly post ads in *USA Today* that list fugitives and their bounties.

TABLE 3

TREATMENT EFFECT OF ROW VERSUS COLUMN RELEASE CATEGORY ON THE FUGITIVE RATE USING MATCHED SAMPLES, CONDITIONAL ON FAILURE TO APPEAR, 1988-96

	Own Recognizance	Deposit Bond	Cash Bond	Surety Bond
Own recognizance	32 [5,440]	□ 3** (2.6)	□ 4.9** (2.9)	9.4** (2.1)
Deposit bond	□ 2 (2.6)	33 [766]	□ 6.2 (4.1)	12.1** (2.7)
Cash bond	11.9** (3.0)	□ 3.8 (4.4)	40 [506]	18.6** (3.7)
Surety bond	□ 17** (2.0)	□ 15.5** (2.9)	□ 25.6** (4.2)	21 [1,537]

NOTE.—Mean fugitive rates (in %), defined as failures to appear that last longer than a year, for release categories for the full sample are along the main diagonal, with the number of observations in that category conditional on a failure to appear in square brackets. Off-diagonal elements are the difference between the mean fugitive rate for the row category and the mean fugitive rate for the column category estimated using matching. Standard errors are in parentheses. Matching caliper  $p < .001$ .

\*\* Statistically significant at the greater than 1% level (two sided).

each category. The estimated treatment effects for the row versus column variables are shown in the off-diagonals with standard errors in parentheses. The probability of remaining at large for more than a year conditional on an initial FTA is much lower for those released on surety bond. The surety treatment results in a fugitive rate that is lower by 17, 15.5, and 25.6 percentage points compared with the own-recognizance, deposit bond, and cash bond treatments, respectively. In percentage terms, the fugitive rates under surety release are 53, 47, and 64 percent lower than the fugitive rates under own recognizance, deposit bond, and cash bond, respectively. Similarly, the own recognizance, deposit, and cash bond treatments result in fugitive rates that are 29, 47, and 47 percent higher than under the surety treatment.

There are also some interesting nonsurety effects in Table 3. Note that the fugitive rate conditional on an FTA is higher for cash bond than for release on own recognizance. Earlier (see Table 2) we had found that the FTA rate was lower for cash bond than for release on own recognizance. This suggests that defendants on cash bond are less likely to fail to appear than those released on their own recognizance, but if they do fail to appear, they are less likely to be recaptured. The result is pleasingly intuitive. A defendant released on his own recognizance has little to lose from failing to appear and thus may fail to appear for trivial reasons. But a defendant released on cash bond has much to lose if he fails to appear, and thus those who do fail to appear do so with the goal of not being recaptured.

The propensity score method can be very informative about the entire distribution of treatment effects. In Figure 2, we graph smoothed (running-mean) FTA and fugitive rates against surety  $p$ -scores for the own-recognizance and surety treatments (conditional on being in either the surety or own-recognizance treatment). (We omit graphs for the other treatment comparisons for brevity.) The two downward-sloping, thinner curves graph smoothed FTA rates against the  $p$ -scores for those defendants released on

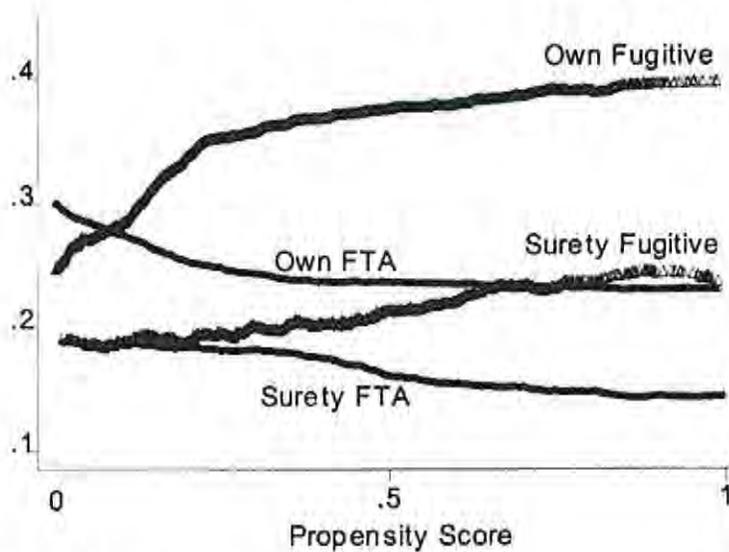


FIGURE 2.—Failure-to-appear and fugitive rates by own recognizance versus surety treatment plotted against  $p$ -scores.

their own recognizance or surety bond. The slope of each line indicates the direction and strength of the effect of observable characteristics on selection in that treatment. The difference between the own-recognizance and surety lines at any given propensity score is an estimate of the treatment effect, controlling for observable characteristics. The difference is roughly constant, which indicates that despite some mild selection, the treatment effect is roughly independent of observable characteristics.

For both the own-recognizance and surety treatments, FTA rates decrease as the propensity for being in the surety treatment increases. That is, FTA rates decrease as observable characteristics move in the direction of predicting surety release. The decline is gentle; moving from a near-zero propensity to a near-one propensity reduces the FTA rate by approximately 5 percentage points. The effect is sensible if we recall that many FTAs are short term—the defendant forgets the trial date or has another pressing engagement. These sorts of FTAs are likely to be more common for defendants with observable characteristics that predict low  $p$ -scores because judges release most defendants on their own recognizance and reserve surety release for defendants accused of more serious crimes. Few people will forget to show up for their murder trial, but some may do so if the trial involves a driving offense. At the same time, however, we expect that defendants accused of more serious crimes—who have more to lose from being found guilty—are more likely

to purposively abscond. If this is correct, we ought to see a positive correlation between the surety propensity score and the fugitive rate conditional on having failed to appear.

The two upward-sloping, thicker lines plot smoothed fugitive rates against the surety propensity score. As before, the slope of the plots gives the direction and strength of effects caused by selection on observable characteristics, and the vertical difference is the treatment effect for any given propensity score. As observable characteristics move in the direction of a greater propensity to be selected for surety release, the fugitive rate increases. It is interesting to note that the effect of selection on defendants released on surety bond is less than that on defendants released on their own recognizance (that is, the "slope" of the plot is less). This suggests that the surety treatment works well even for those defendants whose observable characteristics would predict higher FTA rates.

We examine the issue of unobservable characteristics at length below, but since selection by observable characteristics has little influence on fugitive rates, Figure 2 already suggests that observables would have to be very different from unobservables in order to greatly affect the results.

#### *E. Kaplan-Meier Estimation of Failure-to-Appear Duration*

The higher rate of recapture for those released on surety bond compared with other release types can be well illustrated with a survival function. For a subset of our data, just over 7,000 observations, we have information on the time from the failure to appear until recapture (return to the court). A survival function graphs the percentage of observations that survive at each time period. We estimate a survival function for each release type using the nonparametric Kaplan-Meier estimator. Typically, the Kaplan-Meier estimator is used only for preliminary analysis and is then followed by a parametric or semiparametric model. Although parametric and semiparametric models allow for covariates, they require sometimes tenuous assumptions about functional form. Instead, we follow our earlier approach of creating matched samples. Thus, using the same procedure, we create three matched samples: surety versus own recognizance, surety versus deposit, and surety versus cash. We then compare the survival function across each matched sample. The matching procedure ensures that covariates are balanced across the matched samples, so it is not necessary to include additional controls for covariates.

Figure 3 presents the survival functions. In each case, the survival function for those released on surety bond is markedly lower than that for those released on their own recognizance, deposit bond, or cash bond. The ability of bail enforcement agents relative to police to recapture defendants who

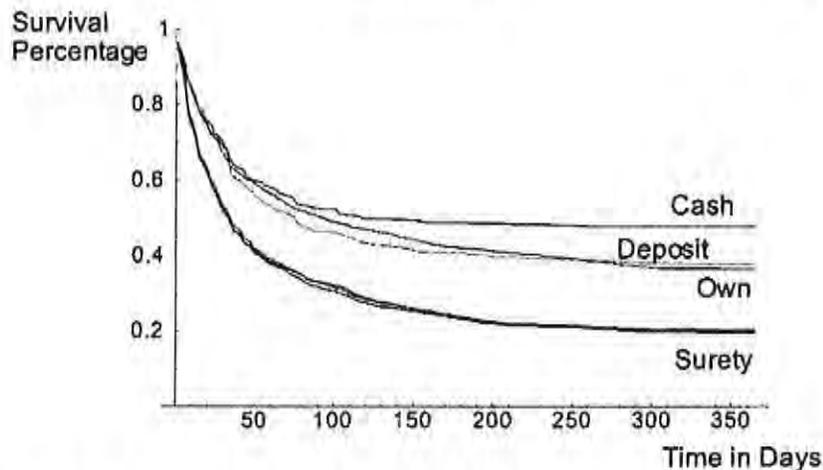


FIGURE 3.—Kaplan-Meier survival function for defendants on surety bond versus those released on cash bond or deposit bond or released on their own recognizance—using matched samples.

skip bail is evident within a week of the failure to appear.<sup>53</sup> By 200 days, the surety survival rate is some 20–30 percentage points, or 50 percent, lower than the survival rate for those out on cash bond, deposit bond, or their own recognizance; that is, the probability of being recaptured is some 50 percent higher for those released on surety bond relative to other releases. (Note that there are three surety bond survival functions, one for each comparison group, but these are nearly identical.)

A log-rank test confirms Figure 3; we can easily reject the null hypothesis of equality of the survivor functions—defendants released on surety bond are much more likely to be recaptured (that is, less likely to remain at large, or “survive”) than those released on their own recognizance, deposit bond, or cash bond.<sup>54</sup>

<sup>53</sup> A number of estimates have been made that bounty hunters take into custody between 25,000 and 35,000 fugitives a year, depending on the year (see various sources in Drimmer, *supra* note 11; and also W. P. Barr, letter to Charles T. Canady on the Bounty Hunter Responsibility Act, NABIC Bull., March 2000). These figures are consistent with a recapture rate of over 95 percent and are consistent with the number of fugitives on surety bond. It appears, therefore, that almost all fugitives on surety bond are recaptured by bail enforcement agents and not by the police. Bounty hunters, however, will sometimes track down defendants and then tip police as to their whereabouts, so police will sometimes be involved in some aspects of recapture.

<sup>54</sup> The exact results of the log-rank test and similar results matching on propensity score and bail can be found in Helland & Tabarrok, *supra* note 43.

TABLE 4  
EFFECT OF ALTERNATIVE TREATMENT VERSUS SURETY BOND ON FAILURE-TO-APPEAR AND  
FUGITIVE RATES (Conditional on Failure to Appear), 1988-96

	Own Recognizance versus Surety Bond	Deposit versus Surety Bond	Cash versus Surety Bond
Treatment effect on failure-to-appear rates	□ 7.8** (1.6)	□ 6.2** (1.8)	□ 1.6 (4.4)
Treatment effect on fugitive rates	□ 14.8** (2.3)	□ 19.8** (2.9)	□ 35.7** (8.0)

Note.—Individuals from states that have banned surety bonds are matched with similar individuals released on surety bond. Standard errors are in parentheses. The matching caliper is .0001.

\*\* Statistically significant at the greater than 1% level (two sided).

#### F. Comparison with Counties in States That Have Banned Commercial Bail

Some states have banned commercial bail. It seems plausible that matching can find two individuals who are comparable but for the fact that one individual could not have been assigned surety bail while the other could and was assigned surety bail. Comparing these individuals gives us a measure of what would happen if a county lifted its ban on commercial bail.<sup>55</sup>

Table 4 demonstrates that states that ban commercial bail pay a high price. We estimate that FTA rates are 7-8 percentage points, or approximately 30 percent, higher for individuals released on deposit or own recognizance than if the same individuals were released on surety bond.<sup>56</sup> As before, we find that cash bond is about as effective as surety bond at controlling FTA rates. The fugitive rate conditional on FTA is much higher under own recognizance, deposit, or cash release than under surety—higher by some 15, 20, and 36 percentage points, or 78, 85, and 93 percent, respectively—figures even larger than we found earlier.

#### VI. LOOKING FOR UNOBSERVABLE VARIABLES

Matching is a powerful and flexible tool, but it is not a research design that magically guarantees the identification of causal effects. In this section, we test for robustness and attempt to rule out the potentially confounding effects of unobservable characteristics. We focus on two identification strat-

<sup>55</sup> Since we are interested in the cross-county variation, the propensity scores for these tests were generated from an ordered probit that did not include county fixed effects but was otherwise identical to that used earlier.

<sup>56</sup> Note that in Table 4, we examine the treatment effect of own recognizance, deposit, and cash relative to surety because this is the relevant comparison when considering the experiment of lifting the ban on commercial bail. As noted earlier, the treatment effect on the treated and untreated groups are similar, so we could also have examined the surety treatment effect relative to the alternative release types.

TABLE 5  
MEAN REARREST RATES BY RELEASE  
CATEGORY, 1988-96

	Rate (%)	<i>N</i>
Own recognizance	14.9	20,945
Deposit bond	13.3	3,605
Cash bond	14	2,482
Surety bond	12	9,202

egies; a number of alternative strategies, described briefly below, are developed in the working paper.

Our first identification strategy takes advantage of the fact that some 14 percent of defendants out on pretrial release are arrested for another crime before they are sentenced for the first crime. It is plausible that the probability of being rearrested is positively correlated with the probability of becoming a fugitive. Assume, for example, that guilty defendants are less likely to show up for trial than innocent defendants and that innocent defendants are less likely to be rearrested than guilty defendants. There is good evidence for some such assumption because in the raw data, defendants who are never rearrested have an FTA rate of 11 percent, but defendants who are rearrested for another crime have an FTA rate of 43 percent.

If rearrest is positively correlated with the probability of becoming a fugitive and if treatment does not influence rearrest rates, then rearrest rates by treatment will track unobserved characteristics. Table 5 provides evidence for the second clause—in the raw data, there is very little variation in rearrest rates across treatment categories.<sup>57</sup> Thus, Table 6 (matching on propensity score and bail) presents faux “treatment effects” for the effect of various release types on rearrest rates. We emphasize that our hypothesis is that treatment does not influence rearrest—the faux treatment effects, therefore, are indications of the influence of unobserved variables.

In Table 6, the surety versus own recognizance and surety versus deposit comparisons show positive but very small and statistically insignificant effects, which suggests that unobserved variables have little influence on FTA and fugitive rates across these comparisons. The surety versus cash bond comparison suggests that the surety treatment increases rearrest rates by 4.5 percentage points, which implies that unobserved variables operate in a direction that offsets the true treatment effect of surety on FTA and fugitive

<sup>57</sup> In the raw data, there appears to be a slight decrease in rearrest rates for those released on commercial bail. Although the rearrest of a defendant is not usually grounds for the forfeiture of the bond dealer's bond, bond dealers do monitor their charges, and such monitoring might reduce rearrest rates. Bond dealers might be also be able to select defendants who are unlikely to flee and thus also unlikely to be rearrested. Once we control for observable characteristics, however, the slight decrease in arrest rates for those on commercial bail disappears and in some cases reverses (see Table 6).

TABLE 6  
EFFECT OF SURETY TREATMENT EFFECT VERSUS OTHER RELEASE TYPES ON REARREST RATES USING SAMPLES MATCHED ON *p*-SCORE AND BAIL, 1988-96

	Surety versus Own Recognizance	Surety versus Deposit Bond	Surety versus Cash Bond
Surety bond	.7 (.6)	.58 (1.0)	4.5** (1.3)
Matched observations	14,925	9,740	7,064

NOTE.—The matching caliper is .001.

\*\* Statistically significant at the greater than 1% level (two sided).

rates. Recall from Table 2 that we found that FTA rates were slightly higher under surety than under the cash bond treatment. The evidence from rearrest rates suggests that unobservable characteristics may be responsible for part of this and that the true treatment effect is somewhat lower. Similarly, although we found large negative effects on fugitive rates from the surety treatment (relative to cash treatment), the evidence suggests that, if anything, the true treatment effects are even more negative.<sup>58</sup>

The rearrest data allow for another interesting comparison. For a small subset of our data, 1,331 observations from 1988 and 1990, we know the rerelease type for those individuals who are arrested and released on a second charge. We do not know whether the individual failed to appear on the second charge, which is why we do not have repeated observations. Nevertheless, the second arrest and release data may be revealing.

Suppose that the initial release is own recognizance and the second release is via surety bond. By monitoring and possibly recapturing the defendant if he skips on the second trial, bail bondsmen and their agents create a positive externality with respect to fugitive rates on the first trial. This potential externality means that we need not compare own-recognizance to surety releases to measure a surety treatment effect. Instead, we can compare defendants released on their own recognizance with other defendants released on their own recognizance in their first release and on surety bond in their second release. Similarly, we can compare fugitive rates on the first trial for defendants whose first and second releases were own recognizance and own recognizance with those whose first and second releases were own recognizance and surety bond. With this comparison, we control for selection effects on the first release.

The unconditional fugitive rate of defendants who are released on their

<sup>58</sup> Since we find that rearrest rates vary little by treatment category, we should also find that treatment effects measured in the rearrest sample, that is, using only those defendants who were subsequently arrested for a second crime, should be similar to those found in the one-arrest sample. We have run these matching tests on propensity score and bail and do find similar results, which we omit for brevity.

TABLE 7  
UNCONDITIONAL FUGITIVE RATES BY ARREST-  
REARREST CATEGORY, 1988, 1990

Category	Rate
1. Own and not rearrested	8.48 [17,828]
2. Own-own	8.04 [191]
3. Own-surety	1.49 [134]
4. <i>t</i> -test (row 1 $\square$ row 3)	2.9; $p(1 \ 1 \ 3 \ p \ .0019)$
5. <i>t</i> -test (row 2 $\square$ row 3)	2.6; $p(2 \ 1 \ 3 \ p \ .0047)$

NOTE.—Own-own indicates first release on own recognizance and second release on own recognizance. Own-surety indicates first release on own recognizance and second release on surety bond.

own recognizance and not rearrested is 8.48 percent.<sup>59</sup> The fugitive rate of defendants who are released on their own recognizance and who are rearrested and then released again on their own recognizance is almost identical, 8.04 percent. But the fugitive rate for those defendants initially released on their own recognizance but then rearrested and rereleased on surety bond is just 1.9 percent. The difference between the own-recognizance and the own-recognizance  $\square$  surety fugitive rate is statistically significant at the greater than 1 percent level. The difference between the own-recognizance  $\square$  own-recognizance and own-recognizance  $\square$  surety rate, which controls for rearrest, is also statistically significant at the greater than 1 percent level. Table 7 summarizes.

In the working paper,<sup>60</sup> we supplement the above analysis in a variety of ways to control for county effects, individual effects observed by judges but unobserved by us, and pure unobserved effects of a very general nature.<sup>61</sup> Most generally, the cream that judges skim are released on their own recognizance and deposit bond, while the skim are released on cash or surety bond. Consistent with this, observable selection effects on fugitive rates are positive, and the evidence from a variety of independent tests suggests that unobservable characteristics are not biasing our results upward. Taken to-

<sup>59</sup> Earlier we focused on fugitive rates conditional on having FTA. We focus on unconditional fugitive rates here because we have fewer observations. We have data on rearrest and rerelease type for 1988 and 1990.

<sup>60</sup> Helland & Tabarrok, *supra* note 43.

<sup>61</sup> One of our supplementary tests is a completely independent test using instrumental variables. When jails become overcrowded, judges are pressured to release individuals on their own recognizance rather than run the risk of setting a bail amount that the defendant might not be able to secure. (We present evidence in the working paper that bond dealers understand that overcrowded jails mean less surety business.) We define Ratio as the county jail population divided by the official jail capacity. A value of Ratio greater than one indicates overcrowding. We suggest that jail overcrowding is not likely to be correlated with unobservables that affect FTA and fugitive rates. Using Ratio as an instrumental variable, we again find that surety bail significantly reduces fugitive rates. For details, see Helland & Tabarrok, *supra* note 43.

gether, the evidence suggests that we have good estimates that surety release reduces FTA rates, survival times, and fugitive rates.

#### VII. CONCLUSIONS

When the default was for every criminal defendant to be held until trial, it was easy to support the institution of surety bail. Surety bail increased the number of releases relative to the default and thereby spared the innocent some jail time. Surety release also provided good, albeit not perfect, assurance that the defendant would later appear to stand trial. When the default is that every defendant is released, or at least when many people believe that "innocent until proven guilty" establishes that release before trial is the ideal, support for the surety bail system becomes more complex. How should the probability of failing to appear and all the costs this implies, including higher crime rates, be traded off against the injustice of imprisoning the innocent or even the injustice of imprisoning the not-yet-proven guilty? We cannot provide an answer to this question, but we can provide a necessary input to this important debate.

Defendants released on surety bond are 28 percent less likely to fail to appear than similar defendants released on their own recognizance, and if they do fail to appear, they are 53 percent less likely to remain at large for extended periods of time. Deposit bonds perform only marginally better than release on own recognizance. Requiring defendants to pay their bonds in cash can reduce the FTA rate similar to that for those released on surety bond. Given that a defendant skips town, however, the probability of recapture is much higher for those defendants released on surety bond. As a result, the probability of being a fugitive is 64 percent lower for those released on surety bond compared with those released on cash bond. These findings indicate that bond dealers and bail enforcement agents (bounty hunters) are effective at discouraging flight and at recapturing defendants. Bounty hunters, not public police, appear to be the true long arms of the law.

## APPENDIX

TABLE A1

## ORDERED PROBIT ON STRINGENCY OF RELEASE

Variable	Coefficient	
Local conditions:		
Time, in days, to scheduled start of trial	□ .5821	(.0038)
Local clearance rate (total arrest/total crime)	.3957	(.1799)
Defendant is charged with:		
Murder	.35915**	(.051044)
Rape	.376661**	(.032135)
Robbery	.146899**	(.028193)
Assault	.208538**	(.039397)
Other violent crime	.048705 <sup>□</sup>	(.02932)
Burglary	□ .10109**	(.027554)
Theft	□ .16676**	(.029142)
Other property crime	.212824**	(.026824)
Drug trafficking	□ .1147**	(.027033)
Other drug crime	□ .01139	(.041254)
Driving-related crime	□ .18755**	(.016514)
Defendant characteristics:		
Age	.000854	(.000653)
Female (yesp 1)	.873055**	(.080055)
Active criminal justice status	.191588**	(.013974)
Previous felonies	.244761**	(.013558)
Previous failure to appear	.123918**	(.015137)

NOTE.—The model includes county and year effects (not shown). Asymptotic standard errors are in parentheses. There are 58,585 observations.

□ Statistically significant at the greater than 10% level.

\*\* Statistically significant at the greater than 1% level (two-sided test).

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# RESEARCH REPORT

## PRETRIAL RELEASE MECHANISMS IN DALLAS COUNTY, TEXAS:

### DIFFERENCES IN FAILURE TO APPEAR (FTA), RECIDIVISM/PRETRIAL MISCONDUCT, AND ASSOCIATED COSTS OF FTA\*

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\* This study was completed on behalf of the Dallas County (Texas) Criminal Justice Advisory Board (CJAB).

#### DISCLAIMER

No attempt by the research investigator, Professor Robert Morris, or the University of Texas at Dallas, will be made to explain the reasons behind the findings presented within this report. Nor will recommendations be made as to how the county should, or should not, respond to these findings. The information presented is driven solely by the data provided by Dallas County and caution should be used in any attempt to generalize these findings to other counties. The computer programming written to extract the data for analysis, as well as those used to establish model estimates, will be made publically available upon request to ensure research transparency and objectivity. Any audit of this programming by a qualified professional/s is welcomed. Contact Robert G. Morris, Ph.D. with questions: [morris@utdallas.edu](mailto:morris@utdallas.edu)

## EXECUTIVE SUMMARY

Relative to other elements of the criminal justice system, pretrial release and the mechanisms by which it operates, has received little attention from scholars and empirical research is lacking. To date, no study has been carried out that has focused on pretrial release mechanisms at the county level and their isolated effects on failure to appear (FTA) and recidivism/pretrial misconduct. Further, it remains unclear whether the costs associated with one particular form of release outweigh the costs of another. While a handful of studies have explored failure to appear and recidivism across release types, they have been limited by data problems or problematic research designs.

The purpose of this study was to address a number of very important issues that underlie pretrial release from jail, specific to varying mechanisms of release including: attorney bonds, cash bonds, commercial bonds, and pretrial services bonds.<sup>1</sup> Archival data was culled from official records collected by the Dallas County criminal justice system as well as from the Texas Department of Public Safety (DPS). The analyses presented here were based on all defendants booked into the Dallas County jail during 2008 for a crime/s in which the defendant was not previously arrested/jailed, and who were released via one of the above noted release mechanisms (n = 22,019). Specifically, this study addresses the following questions: (1) Do failure to appear (FTA) rates vary across release mechanisms and if so, by how much? (2) Does recidivism/pretrial misconduct vary across release mechanisms and if so, by how much? (3) What are the additional court costs (observed and estimated) associated with FTA rates across release types? and (4) What are the strongest predictors of FTA across each release mechanism?

**Methods and Findings.** Regarding FTA and recidivism/pretrial misconduct, this study approximated an experimental research design to provide for an objective “apples-to-apples” empirical analysis (propensity score matching). This analysis suggested that net of other effects (e.g., criminal history, age, indigence, etc.—see technical appendix), defendants released via commercial bonds were least likely to fail to appear in court compared to any other specific mechanism. This finding was consistent when assessed for all charge categories combined and when the data were stratified by felony and misdemeanor offenses, respectively. For felony defendants (among the matched pairs), those *not* released on commercial bond were between 39 and 56 percent more likely to fail to appear in court, with the largest difference being between cash and commercial, followed by pretrial and then attorney bonds. For misdemeanors, differences were similar, ranging between 26 and 32 percent with pretrial bonds being the most different from commercial, followed by attorney bonds, then cash bonds. Overall, analyses based on the data explored here suggest that commercial bonds were the most successful in terms of defendant appearance rates, followed by attorney bonds, cash bonds, and pretrial services releases.

Findings for the remaining bond type comparisons were mixed. For felonies and misdemeanors, limited/inconsistent support was found favoring FTA rates for pretrial services over cash bonds; other differences were not statistically significant.

<sup>1</sup> Personal recognizance was not analyzed here due to its very limited use in release for new crimes (less than 1%).

<sup>2</sup> Estimate adjusted for inflation from 1997 dollars. Base estimate taken from Block and Twist (1997), who

Regarding recidivism (or pretrial misconduct), analyses were carried out for new crimes occurring within 9 and 12 months of release for the book-in of record. It is important to note that such crimes may or may not have occurred during the pretrial phase for the book-in of record as this data was not readily available. The findings for recidivism were mixed and more commonly null (i.e., no difference was found between release types). Note: Extreme caution should be used in interpreting the recidivism/pretrial misconduct analysis due to the situational factors associated with recidivism that are completely external to the associated release mechanism.

As to the costs associated with FTA across each release type, model estimates suggest that commercial bond releases were the most cost-effective in Dallas County, based on the group of defendants captured by the study. This finding was corroborated by the observed data, which suggested that for the 22,000+ defendants captured by this study, assuming a public cost of \$1,775 per FTA<sup>2</sup>, the use of commercial bonds saved over \$7.6 million (or ~\$350k per 1,000 defendants) among felony defendants and over \$3.5 million (or \$160k per 1,000 defendants) among misdemeanor defendants, as compared to attorney bonds, cash bonds, and pretrial services bonds. For misdemeanors, the largest differences in costs were found between commercial bonds and pretrial services bonds. For felonies, the largest differences in costs were found between commercial bonds and cash bonds.

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<sup>2</sup> Estimate adjusted for inflation from 1997 dollars. Base estimate taken from Block and Twist (1997), who conducted a complete cost-benefit analysis of failure to appear in Los Angeles, CA.

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## STUDY HIGHLIGHTS

- The study explored failure to appear (FTA) and recidivism (at 9 and 12 months) based on longitudinal data for 22,019 defendants released from the county jail during 2008 for the first new offense occurring during that year.
- The analyses isolated the effect of particular bond types by statistically controlling for many correlates (i.e., predictors of) of FTA and recidivism/pretrial misconduct and approximating an experimental research design (see appendix for a complete listing and definitions).
- When comparing similarly situated defendants' probability of FTA for all case types, defendants released via a commercial bond (i.e., a bail bond company) were significantly and substantively less likely to fail to appear in court compared to attorney bonds, cash bonds, and pretrial services bonds, respectively. This finding held when analyzing all defendants simultaneously and when assessing felony and misdemeanor defendants separately.
- Regarding recidivism/pretrial misconduct (at 9 and 12 months) among misdemeanor defendants, no statistically/practically significant differences were found between any combination of the release mechanisms.
- Regarding recidivism/pretrial misconduct (9 and 12 months) for felony defendants, the findings supported cash and attorney bonds, however, there may be qualitative differences in how the recidivism relationship operates for these particular release mechanisms, as they are the most expensive form of financial bail.
- Differences for 12 month recidivism/pretrial misconduct were found between commercial bonds and pretrial services bonds for the model including running data for all charge categories combined, favoring pretrial services, however, the differences were nullified when assessing felonies and misdemeanors separately.
- Release on their own recognizance (OR) was rarely used for an initial release (less than 1% of defendants). For this reason, OR was excluded from the analysis.
- A basic cost-benefit analysis suggested that commercial bonds are the most cost effective release type in Dallas County, in terms of the court costs associated with FTA. Based on the observed data for the 22,000+ defendants captured by this study (all initial releases for a new crime in 2008), assuming a public cost (i.e., justice administration) of \$1,775 per FTA<sup>3</sup>, the use of commercial bonds saved over \$7.6 million (or ~\$350k per 1,000 defendants) among felony defendants and over \$3.5 million (or \$160k per 1,000 defendants) among misdemeanor defendants, as compared to attorney bonds, cash bonds, and pretrial services bonds. For misdemeanors, the largest differences in costs were found between commercial bonds and pretrial services bonds. For felonies, the largest differences in costs were found between commercial bonds and cash bonds.
- The strongest predictor variables of FTA across release mechanisms were also explored. Such variables were limited to those made available by Dallas County. The factors predicting FTA varied considerably across release mechanisms and are outlined within.

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<sup>3</sup> Estimate adjusted for inflation from 1997 dollars. Base estimated taken from Block and Twist (1997), who conducted a complete cost-benefit analysis of failure to appear in Los Angeles, CA.

## STUDY FINDINGS

## Descriptive Statistics for Study Defendants

Release Mechanisms Studied (All Charge Types)

Release Mechanism	Freq.	%
Attorney Bond	684	3.1
Cash Bond	4,219	19.2
Commercial Bond	14,705	66.8
Pretrial Bond	2,411	10.9
Total	22,019	100.0

Release Mechanisms Studied (Felony Defendants)

Release Mechanism	Freq.	%
Attorney Bond	326	5.1
Cash Bond	339	5.3
Commercial Bond	5,048	78.9
Pretrial Bond	682	10.7
Total	6,395	100.0

Release Mechanisms Studied (Misdemeanor Defendants)

Release Mechanism	Freq.	%
Attorney Bond	342	2.5
Cash Bond	3,529	25.2
Commercial Bond	8,548	61.0
Pretrial Bond	1,589	11.3
Total	14,008	100.0

Descriptive Statistics for **Failure to Appear (FTA)** in Court

**All Charge Types**

	# of Defendants	% FTA
Attorney Bond	684	34.1
Cash Bond	4,219	29.2
Commercial Bond	14,705	23.0
Pretrial Services Bond	2,411	37.0

TOTAL 22,019 Overall FTA Rate = 26.1%

**Felonies**

	# of Defendants	% FTA
Attorney Bond	326	28.2
Cash Bond	339	30.7
Commercial Bond	5,048	16.6
Pretrial Services Bond	682	26.1

TOTAL 6,395 Overall FTA Rate = 19.0%

**Misdemeanors**

	# of Defendants	% FTA
Attorney Bond	342	37.4
Cash Bond	3,529	30.2
Commercial Bond	8,548	26.7
Pretrial Services Bond	1,589	39.6

TOTAL 14,008 Overall FTA Rate = 29.3%

Descriptive Statistics for **Recidivism/Pretrial Misconduct** (9 months / 12 Months)**All Charge Types**

	# of Defendants	% Recidivating (9 Months/12 Months)
Attorney Bond	684	19.0 / 22.4
Cash Bond	4,219	11.7 / 13.8
Commercial Bond	14,705	23.5 / 27.3
Pretrial Services Bond	2,411	24.4 / 28.5

TOTAL 22,019

Overall Recidivism/Pretrial Misconduct Rate = 21.2% / 24.7%

**Felonies**

	# of Defendants	% Recidivating (9 Months/12 Months)
Attorney Bond	326	17.5 / 20.3
Cash Bond	339	9.7 / 12.1
Commercial Bond	5,048	26.2 / 29.7
Pretrial Services Bond	682	25.2 / 28.9

TOTAL 6,395

Overall Recidivism/Pretrial Misconduct Rate = 24.7% / 28.2%

**Misdemeanors**

	# of Defendants	% Recidivating (9 Months/12 Months)
Attorney Bond	342	20.2 / 24.0
Cash Bond	3,529	11.5 / 13.7
Commercial Bond	8,548	22.1 / 26.0
Pretrial Services Bond	1,589	24.6 / 29.1

TOTAL 14,008

Overall Recidivism/Pretrial Misconduct Rate = 19.7% / 23.2%

## ANALYTICAL FINDINGS

### PROPENSITY SCORE MATCHING ANALYSIS: FAILURE TO APPEAR

The below findings represent an “apples-to-apples” approach to exploring differences in FTA rates among similarly situated defendants, across the release mechanisms. These estimates have been conditioned (i.e., statistically adjusted on other influence factors) based on the defendant/crime characteristics outlined in the technical appendix, by means of a counterfactual statistical modeling strategy known as propensity score matching (PSM).

PSM was used to assess the effect sizes of different combinations of release mechanisms on 1) whether a defendant fails to appear (FTA) in court and on 2) whether the defendant recidivated within a specified time period post-release (9 or 12 months). This counterfactual model approximates an experimental design by allowing for comparisons to be made between defendants that had an equivalent probability of receiving some treatment (here the treatment being a release mechanism) over an alternative treatment. Similar analytical designs where the focus has been on multiple treatment effects are not uncommon in the social sciences (see Lechner, 1999; 2001)

\*\*\*NOTE: Prior to presenting the results, readers unfamiliar with PSM are encouraged to read the information provided in the technical appendix to get a basic idea of what the technique does and how to interpret the findings presented in the below tables.

The below table presents the statistically significant findings on FTA stemming from the propensity score matching analysis and using commercial bonds as a reference category (comparison) group. This approach was taken because significant differences were found only for comparisons that included similarly situated (matched) defendants released on a commercial bond defendants.

In short, the findings clearly demonstrate that when comparing similarly situated defendants against one another (apples-to-apples), commercial bonds were much less likely to fail to appear in court after release for the first time for a new offense. The differences are fairly consistent when analyzing all defendants and also when assessing felony and misdemeanor cases separately. Differences in FTA rates between defendants released via other release types (e.g., attorney bonds vs. pretrial bonds) were not statistically or substantively different from one another (i.e., FTA rates were equivalent for those comparison groups).

For felony defendants (among the matched pairs), those *not* released on commercial bond were between 39 and 56 percent more likely to fail to appear in court, with the largest difference between cash and commercial, followed by pretrial and then attorney bonds. For misdemeanors, difference were similar, ranging between 26 and 32 percent, with pretrial bonds being the most different from commercial, followed by attorney bonds, then cash bonds.

**Multi-treatment Propensity Score Matching Results on Failure to Appear: Attorney, Cash, and Pretrial Bonds as compared to Commercial Bonds.**

Treated vs. Matched Controls released on Commercial Bond	Mean FTA Rate (Treated)	Mean FTA Rate (Controls)	FTA Rate Difference	% Difference in FTA vs. Commercial
<b>All Defendants</b>				
Attorney	0.34	0.27	0.07	<b>21% higher</b>
Cash	0.29	0.20	0.09	<b>31% higher</b>
Pretrial	0.37	0.23	0.14	<b>39% higher</b>
<b>Felony</b>				
Attorney	0.28	0.17	0.11	<b>39% higher</b>
Cash	0.32	0.14	0.18	<b>56% higher</b>
Pretrial	0.26	0.15	0.11	<b>42% higher</b>
<b>Misdemeanor</b>				
Attorney	0.38	0.27	0.11	<b>29% higher</b>
Cash	0.31	0.23	0.08	<b>26% higher</b>
Pretrial	0.40	0.27	0.13	<b>32% higher</b>

Note: All findings are compared to Commercial Bonds (the reference category). Only statistically significant comparisons shown where equivalent findings were demonstrated between alternated reference categories ( $p < .05$ ). !

## Failure to Appear Analysis – Propensity Score Matching Results

### *How are the below tables interpreted?*

The below tables represent all differences between release types (unlike the above table which illustrates the same findings, but for statistically significant findings only). The PSM findings are presented to illustrate the differences in FTA rates between those treated and their matched controls for all releases, felonies, misdemeanors, and state jail felonies, respectively. On the diagonal of these tables are the unadjusted FTA rates for each release type. These statistics are presented for reference only. The off-diagonal statistics are the mean (average) difference in FTA rates (i.e., the treatment effect) between those released via a particular treatment (i.e., release mechanism)--which is identified by the left-hand column--compared to a particular alternative, identified by the top row of the table. Note that the percent range displayed (if statistically significant) reflects the estimated difference for matching based on an inverted treatment outcome (e.g., commercial vs. attorney compared to attorney vs. commercial)(Non-significant findings are indicated as such in the table).

As an example, looking at the top category, “Attorney Bond” on the far left column of the first table below, we can see that the unadjusted FTA rate for this release type is 34 percent. Following this row to the right, we see that there is no statistically significant difference in FTA rates between comparable (i.e., similarly situated) defendants released by an attorney bond compared to cash bonds. However, the conditioned difference in FTA rate for attorney bonds is 7-13% higher than for Commercial bonds. Further, we find no significant difference between attorney bond FTA rates and pretrial services bonds.

ALL DEFENDANTS - Average Treatment Effects: Failure to Appear (Unconditioned rates on the diagonal)

	Attorney Bonds	Cash Bonds	Commercial Bonds	Pretrial Services
Attorney Bond	<b>.34</b>	No Significant Difference	.07-.13 higher	No Significant Difference
Cash Bond		<b>.29</b>	.09-.10 higher	No Significant Difference
Commercial Bond			<b>.23</b>	.14-.15 lower
Pretrial Services				<b>.37</b>

*Note: Unadjusted failure to appear (FTA) rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.*

FELONY DEFENDANTS - Average Treatment Effects: Failure to Appear (Unconditioned rates on the diagonal)

	Attorney Bonds	Cash Bonds	Commercial Bonds	Pretrial Services
Attorney Bond	<b>.29</b>	No Significant Difference	.11-.12 higher	No Significant Difference
Cash Bond		<b>.30</b>	.15-.18 higher	Partial support favoring Pretrial
Commercial Bond			<b>.17</b>	.10-.11 lower
Pretrial Services				<b>.26</b>

*Note: Unadjusted failure to appear (FTA) rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.*

MISDEMEANOR DEFENDANTS - Average Treatment Effects: Failure to Appear (Unconditioned rates on the diagonal)

	Attorney Bonds	Cash Bonds	Commercial Bonds	Pretrial Services
Attorney Bond	<b>.37</b>	No Significant Difference	.10-.11 higher	No Significant Difference
Cash Bond		<b>.30</b>	.08 higher	Partial support favoring Pretrial
Commercial Bond			<b>.27</b>	.12-.13 lower
Pretrial Services				<b>.40</b>

*Note: Unadjusted failure to appear (FTA) rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.*

## Recidivism/Pretrial Misconduct Analysis – Propensity Score Matching Results

### 12 Months

*Note: Unadjusted Failure to appear (FTA) rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.*

#### ALL DEFENDANTS - Average Treatment Effects: Recidivism/Pretrial Misconduct w/in 12 months (Unconditioned rates on the diagonal)

	Attorney Bond	Cash Bond	Commercial Bond	Pretrial Services
Attorney Bond	.22	No Significant Difference	No Significant Difference	No Significant Difference
Cash Bond		.14	.02-.03 lower	No Significant Difference
Commercial Bond			.27	.14-.15 lower
Pretrial Services				.29

*Note: Unadjusted recidivism rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.*

#### FELONY DEFENDANTS - Average Treatment Effects: Recidivism/Pretrial Misconduct w/in 12 months (Unconditioned rates on the diagonal)

	Attorney Bond	Cash Bond	Commercial Bond	Pretrial Services
Attorney Bond	.21	No Significant Difference	.09-.13 lower	Partial support favoring Attorney
Cash Bond		.12	.06-.07 lower	.16-.19 lower
Commercial Bond			.30	No Significant Difference
Pretrial Services				.29

*Note: Unadjusted recidivism rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.*

(Continued from previous page)

MISDEMEANOR DEFENDANTS - Average Treatment Effects: Recidivism/Pretrial  
Misconduct w/in 12 months (Unconditioned rates on the diagonal)

	Attorney Bond	Cash Bond	Commercial Bond	Pretrial Services
Attorney Bond	<b>.24</b>	Partial support favoring Cash	Partial support favoring Commercial	No Significant Difference
Cash Bond		<b>.14</b>	.01-.02 lower	No Significant Difference
Commercial Bond			<b>.26</b>	No Significant Difference
Pretrial Services				<b>.29</b>

*Note: Unadjusted recidivism rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.*

## Recidivism/Pretrial Misconduct Analysis – Propensity Score Matching Results

### 9 Months

ALL DEFENDANTS - Average Treatment Effects: Recidivism/Pretrial Misconduct w/in 9 months (Unconditioned rates on the diagonal)

	Attorney Bond	Cash Bond	Commercial Bond	Pretrial Services
Attorney Bond	<b>.19</b>	No Significant Difference	No Significant Difference	No Significant Difference
Cash Bond		<b>.12</b>	.03 lower	No Significant Difference
Commercial Bond			<b>.24</b>	No Significant Difference
Pretrial Services				<b>.24</b>

*Note: Unadjusted recidivism rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.*

FELONY DEFENDANTS - Average Treatment Effects: Recidivism/Pretrial Misconduct w/in 9 months (Unconditioned rates on the diagonal)

	Attorney Bond	Cash Bond	Commercial Bond	Pretrial Services
Attorney Bond	<b>.19</b>	No Significant Difference	.08-.12 lower	Partial support favoring Attorney
Cash Bond		<b>.12</b>	.05-.08 lower	.16-.19 lower
Commercial Bond			<b>.24</b>	No Significant Difference
Pretrial Services				<b>.24</b>

*Note: Unadjusted recidivism rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.*

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MISDEMEANOR DEFENDANTS - Average Treatment Effects:  
 Recidivism/Pretrial Misconduct w/in 9months (Unconditioned rates on the  
 diagonal)

	Attorney Bond	Cash Bond	Commercial Bond	Pretrial Services
Attorney Bond	<b>.20</b>	No Significant Difference	No Significant Difference	No Significant Difference
Cash Bond		<b>.12</b>	Weak support favoring cash	No Significant Difference
Commercial Bond			<b>.22</b>	No Significant Difference
Pretrial Services				<b>.25</b>

*Note: Unadjusted recidivism rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.*

## COSTS OF FAILURE TO APPEAR

The below matrices represent a basic cost-benefit analysis based on the treatment effect of each release mechanism for treated versus matched controls. Since no exact figures were available on the cost of a single FTA, it was conservatively assumed that the public cost for an FTA is \$1,775 per FTA (see Block and Twist (1997)).

For this example, the below figures represent the costs associated with the processing of FTAs per 1,000 defendants. These numbers do not reflect the subsequent social costs that may stem from FTA. These differences (i.e., between release types) are based on the mean (average) treatment effect size differences presented in the propensity score matching analysis outlined above.

INTERPRETATION OF TABLES: The on-diagonal numbers are the costs for dollars spent on FTA processing for a particular release type based on the FTA rates from the matched pairs of defendants resulting from the PSM analysis. The off-diagonals represent the *differences* in cost between release types (row versus column). Note that positive (+) numbers reflect extra costs and negative (-) numbers represent savings. For example, in the first row of the table immediately below, we expect that for every 1,000 defendants released by way of an attorney bond an extra 7 to 13% of defendants will FTA, compared to similar defendants released via a commercial bond. The mid-point (half the distance between the range) of that estimate being 10% or  $(10 = [6/2] + 7)$ . This equates to an additional cost of \$60,350 for FTA processing ( $\$603,500 \times .10 = \$60,350$ ) for those 1,000 defendants released via an attorney bond who were equally likely to have been released on a commercial bond. An alternative interpretation would be that if these same individuals were released via a commercial bond, the savings in FTA processing costs would have been -\$60,350. Because there was no difference in the effect of release type on FTA between attorney bonds and cash bonds, the cost difference was assumed to be \$0.

### COSTS of Failure to appear for 1,000 similar defendants released from jail.

#### All Charge Types

	Attorney	Cash	Commercial	Pretrial
Attorney	<b>\$603,500</b>	\$0	\$60,350	\$0
Cash	\$0	<b>\$514,750</b>	\$48,901	\$0
Commercial	-\$60,350	-\$48,901	<b>\$408,250</b>	-\$59,196
Pretrial	\$0	\$0	\$59,196	<b>\$656,750</b>

#### Felonies

	Attorney	Cash	Commercial	Pretrial
Attorney	<b>\$514,750</b>	\$0	\$59,196	\$0
Cash	\$0	<b>\$532,500</b>	\$87,863	\$0
Commercial	-\$59,196	-\$87,863	<b>\$301,750</b>	-\$31,684
Pretrial	\$0	\$0	\$31,684	<b>\$461,500</b>

#### Misdemeanors

	Attorney	Cash	Commercial	Pretrial
Attorney	<b>\$656,750</b>	\$0	\$68,959	\$0
Cash	\$0	<b>\$532,500</b>	\$42,600	\$0
Commercial	-\$68,959	-\$42,600	<b>\$479,250</b>	-\$59,906
Pretrial	\$0	\$0	\$59,906	<b>\$710,000</b>

(Continued from above)

From this analysis, which was based on model estimated differences, commercial bonds represent the most cost-effective mechanism in terms of preventing FTA, as compared to other release types. These differences hold for similar defendants charged with either a misdemeanor or a felony charge. No differences in cost are predicted between attorney bonds and cash bonds, attorney bonds and pretrial services bonds, or cash bonds and pretrial services bonds.

### Cost Estimates Based on Actual FTA Records

Other costs, based on the actual (historical) numbers may also be of interest. The below tables reflect the costs of FTA (assuming \$1,775 per FTA) across each release mechanism observed for the inmates represented in the study (i.e., those entering jail for a new offense in 2008).

Commercial bonds are used as a reference category (i.e., as compared to) for percent differences due to it being the most common release mechanism. NOTE: These numbers reflect only NEW CRIMES for 2008 and NOT ALL releases from jail or FTAs occurring during 2008.

#### All Charge Types

	# of Defendants	% FTA	Cost per 1000 Defendants	Rate Difference	\$ Difference
Attorney Bonds	684	34.1	\$605,275	+11	\$197,025
Cash Bonds	4,219	29.2	\$518,300	+6	\$110,050
Commercial Bonds	14,705	23.0	\$408,250	Ref. Category	Ref. Category
Pretrial Services	2,411	37.0	\$656,750	+14	\$248,500

#### Felonies

	# of Defendants	% FTA	Cost per 1000 Defendants	Rate Difference	\$ Difference
Attorney Bonds	236	28.2	\$500,550	+12	\$205,900
Cash Bonds	339	30.7	\$544,925	+14	\$250,275
Commercial Bonds	5,048	16.6	\$294,650	Ref. Category	Ref. Category
Pretrial Services	682	26.1	\$463,275	+10	\$168,625

#### Misdemeanors

	# of Defendants	% FTA	Cost per 1000 Defendants	Rate Difference	\$ Difference
Attorney Bonds	342	37.4	\$663,850	+11	\$189,925
Cash Bonds	3,529	30.2	\$536,050	+4	\$62,125
Commercial Bonds	8,548	26.7	\$473,925	Ref. Category	Ref. Category
Pretrial Services	1,589	39.6	\$702,900	+13	\$228,975

Example Calculation:

(Felony) Attorney Bonds vs. Commercial

a) Cost per 1000 Defendants =  $[\$1,775 \times 1,000] \times 0.282 = \$500,550$

b) \$ Difference =  $\$500,550 - \$294,650 = \$205,900$

**Estimating the “strongest” predictors of FTA and Recidivism/Pretrial Misconduct among Absconders across release types.**

This analysis was based on a logistic regression modeling approach assessing two outcomes (FTA and FTA plus recidivism/misconduct at 12 months). These estimates are conditioned on the type of offense charged with the 2008 book-in. Variables with (+) next to them are positive findings, (-) are negative. Here, the meaning of positive is that for an increase in the variable, there is an increased chance (odds) of failure to appear. Negative refers to a reduction in the chance of failure to appear.

**Attorney Bonds:**

*Failure to Appear:*

Celerity (+)  
 Felony (-)  
 Indigence (+)  
 Time Criminally Active (-)  
 Days in Jail (+)

*Recidivism/Pretrial Misconduct among Absconders:*

Felony (-)  
 Celerity (-)  
 Jail history (-)

**Cash Bonds:**

*Failure to Appear:*

Felony (-)  
 Age (-)  
 Indigence (+)  
 Celerity (+)  
 Days in Jail (+)  
 Jail History (+)  
 FTA History (+)  
 US Born (-)

*Recidivism/Pretrial Misconduct among Absconders:*

Age (-)  
 Celerity (-)  
 Jail history (-)  
 US Born (-)  
 Criminal History (+)

**Commercial Bonds:**

Felony (-)  
 Male (+)  
 Indigence (+)  
 Celerity (+)  
 Days in Jail (+)  
 Mental Illness (+)  
 Jail History (+)  
 Hispanic vs. all other (+)  
 Year of First Arrest (+)  
 Criminal History (+)  
 FTA History (+)

*Recidivism/Pretrial Misconduct among Absconders:*

Age (-)  
 Celerity (-)  
 Hispanic vs. White (-)  
 Criminal History (+)

**Pretrial Services Bonds:**

Felony (-)  
 Male (+)  
 Indigence (+)  
 Jail History (+)  
 Married (-)  
 Hispanic vs. all other (+)

*Recidivism/Pretrial Misconduct among Absconders:*

Felony (+)  
 Mental Illness (+)  
 US Born (-)  
 Criminal History (+)

(+) Positive association with FTA (i.e., increased odds of occurrence)  
 (-) Negative association with FTA (i.e., reduced odds of occurrence)

## STUDY LIMITATIONS

- The findings presented herein are limited to one county (Dallas County, Texas) and are not necessarily generalizable to counties other than those of similar demographic make-ups and those with similar pretrial release practices/proportions. Readers should use caution in any attempt to make inferences about other counties based on these findings.
- Release on recognizance is an important mechanism of release but was rarely used by Dallas County for new crimes (less than 1% defendants). For this reason, own recognizance releases are not analyzed.
- Pretrial services bonds may involve a diversionary program for some defendants. The data provided no indication of whether this was the case, thus no information is provided in terms of FTA for any particular diversion program.
- While the statistics presented here from the propensity score matching analysis are relatively robust, there are indicators of release type and FTA that were not collected by, or made available from, Dallas County. These include employment status, residential status, as well as pre-release and risk assessment measures. However, the Dallas County data are unique in the fact that they do include many measures that other data sources do not include, such as drug offense history, mental illness, and indigence.
- Analyses were not carried out specific to any particular criminal offense (e.g., DWI). The findings may change when exploring particular offenses.
- The measure of recidivism/pretrial misconduct does not exclusively account for rearrests for a new crime during the pretrial phase for the book-in of interest. Crimes that occurred after the pretrial phase, but within the window of opportunity (here 9 or 12 months) are also counted as recidivism. Additional data will be required to develop a recidivism measure that is exclusively representative of pretrial misconduct.
- The indicator of FTA for pretrial services releases was limited to bonds that were held "insufficient" rather than an official indicator of non-appearance in court. This was due to limits on the data collection procedures currently in practice by the County. It is possible that some bonds held insufficient do not reflect a failure to appear, however, in discussion with Dallas County Pretrial Services, it was determined that this possibility was minimal.

## TECHNICAL APPENDIX

### *What is propensity score matching (PSM)?*

PSM is a well-known statistical matching procedure that approximates an experimental design by matching cases, (i.e., defendants), based on a near equivalent probability of having been released from jail by way of one mechanism versus a possible alternative. (For this study, within a maximum difference of 0.1% (caliper = .001) probability, which is considered very conservative). Here, the varying release types can be considered treatments, just like in an experiment. Since there are multiple treatments under study (i.e., the four release types), comparisons are made from one release-type to another, for every possible combination of treatments, respectively. The goal is to end up with an estimate of the “treatment effect.” This is the difference in average probability for defendants failing to appear, or recidivating, between two specific release mechanisms. Again, these comparisons are based on statistically matched (i.e., similarly situated) defendants equally likely to have received the treatment.

Restated, a series of predictor variables (outlined in the technical appendix) are used to estimate a defendant’s probability of receiving one treatment over another particular treatment. This estimate is the conditioned probability of receiving the treatment—also known as the propensity score. Upon establishing the quality and robustness of the propensity score, mean (average) levels of a final outcome (e.g., failure to appear in court) can be compared between the treated (i.e., those receiving the treatment) and the matched controls (i.e., those who did not receive the treatment, but who had an equal probability of having received it). *In the end, comparisons are made not between all defendants released by way of a particular method, but only between statistically matched pairs.*

### *How robust are these findings and how was this determined?*

The quality of the matching procedure was assessed in multiple ways, using contemporary statistical methods. These include 1) an assessment of balance on covariates between matched and unmatched samples, 2) a sensitivity analysis to determine how strong an unmeasured covariate (i.e., something not available in the data such as employment history) would need to be to change the results (Rosenbaum Bounds), and 3) a complementary weighted regression analysis that involved both matched and unmatched defendants (Inverse Probability of Treatment Weighting, IPTW).

These procedures resulted in a strong level of confidence that these PSM analysis findings are robust to the influence of unmeasured covariates and that the matching procedure was very good at finding suitable matches to those actually treated. The specific details on these diagnostics are available via the Center for Crime and Justice Studies webpage ([www.utdallas.edu/epps/ccjs](http://www.utdallas.edu/epps/ccjs)) and/or can be requested via email ([morris@udallas.edu](mailto:morris@udallas.edu)).

## ANALYSIS OVERVIEW

There are four major types of release (bonds) used in Dallas County that are explored here. Such bonds include: (1) cash bonds, (2) attorney bonds, (3) commercial bonds, and (4) pretrial

services bonds. Note that release on recognizance and “other” release types (e.g., release to TDCJ for incarceration) are not assessed. The PSM approach will assess the effect of each bond compared to an alternative bond, respectively, across all combinations of bond types. This is illustrated in Figure 1 below.

Figure 1: Counterfactual Comparison Groups

(1) Attorney	vs.	(2) Cash
(1) Attorney	vs.	(3) Commercial
(1) Attorney	vs.	(4) Pretrial
(2) Cash	vs.	(3) Commercial
(2) Cash	vs.	(4) Pretrial
(3) Commercial	vs.	(4) Pretrial

As noted, PSM matches individuals who received a treatment, here a type of bond, to others who did not receive the treatment, but who had a statistically identical probability of having received such. In other words, these are similarly situated defendants (e.g., similar offense, criminal history, demographics, etc.) This approach allows for the isolation of a particular bond effect as compared to every alternative. For example, this approach allows us to determine whether cash bonds do better at reducing the probability of FTA compared to an attorney bond, net of other predictive variables on FTA.

### *Measurement/Definition of Variables*

This section outlines and defines all data variables used in this study. The section is broken down by outcome variables, treatment variables (i.e., bond types) and control variables.

Statistical Model Output will be made available via Professor Morris’s webpage, and/or can be requested via email ([morris@utdallas.edu](mailto:morris@utdallas.edu))

#### *Outcome Variables*

Failure to Appear (FTA) is defined differently depending on the type of bond. For attorney, cash, and commercial bonds, FTA is defined by whether the Court passes a judgment *NISI* against the defendant. A *NISI* is a judicial declaration that a bond is forfeited unless s/he can provide a suitable reason why there was no court appearance. While it is not uncommon for a judgment *NISI* to be overturned, this is an indication of FTA in Court and was easily identified in the `bond_forfeiture` data file provided by Dallas County.

FTA for personal recognizance and pretrial services rarely results in a judgment *NISI* being entered by the Court. Unfortunately, there was not a specific data indicator provided by Dallas County indicative of FTA for these two bond types. In order to gather this information, data on FTA were extracted from court comments through a character extraction algorithm constructed by Dr. Morris, and approved by Mr. Ron Stretcher (the Director of Criminal Justice for Dallas Co.). The comment information was provided in the `dc_bonds` data file. For personal recognizance and pretrial services bonds, FTA was indicated by the issuance of a bond forfeiture, however, most personal bonds are not formally identified as being forfeited. Rather a bond is

held “insufficient” when a defendant out on a personal bond does not appear in court. The specific terms used in the character extraction algorithm are available upon request (email [morris@utdallas.edu](mailto:morris@utdallas.edu)).

Recidivism/Pretrial Misconduct is defined by a new arrest occurring after the offense of record for the study (i.e., an individual’s first arrest occurring in 2008). The recidivism measures here specifically exclude re-arrest for failure to appear (absconding) only; only “new” crimes are counted as part of the measure. This issue is important because we should expect higher return to jail rates for absconders since either the system or a surety actively attempts to capture absconders. It is important to note that the measure of recidivism/Pretrial Misconduct here does not exclusively reflect pretrial misconduct as such data (i.e., court hearing dates) were not readily available. Recidivism researchers agree that differing lengths of time be used to assess any effect on recidivism, generally at no more than 36 months. However, since these release mechanisms should impact recidivism sooner rather than later (if ever), recidivism was assessed at 9 and 12 months, respectively, to help account for new crimes during the pretrial phase. The reason for this approach is that the context of a release mechanism stays with a defendant only to the disposition of a criminal case. After that point, the relationship is terminated.

Data for the recidivism/Pretrial Misconduct measure stem from supplementary data provided by the Texas Department of Public Safety (DPS), as well as those from Dallas County. DPS arrest data were required as Dallas County does not have in its possession arrest data for arrests occurring in other jurisdictions and are not tied to a Dallas County arrest. Using both of these data sources for the same set of defendants, recidivism represents any “new crime” arrest occurring in Dallas County or elsewhere, provided it is on file with DPS, which took place after the first 2008 book in and occurred prior to January 1<sup>st</sup>, 2012.

### *Control Measures*

In addition to FTA, a series of variables serve as control variables for the present study. The variables outlined below are limited to what was available within the data provided by Dallas County. Definitions are provided as needed.

## **SOCIODEMOGRAPHIC VARIABLES**

<b>Age</b>	(in years) at Time of Arrest
<b>Age<sup>2</sup></b>	Age squared (i.e., age as a non-linear effect)
<b>Gender</b>	(Female=1, Male=0)
<b>Race</b>	(Black, White, Hispanic) – Those indicated as “other” on race were less than 3% of all defendants.
<b>Marital Status</b>	(Married=1, otherwise=0)
<b>Mental Illness History</b>	(1=yes, 0=no)

<b>Medical Problems</b>	(1=yes, 0=no)
<b>Indigence</b>	(1=yes, 0=no)
<b>Born in the United States</b>	(1=US born; 0=foreign born)

## CRIMINAL HISTORY VARIABLES

**Number of Prior Arrests** – refers to the number of arrests that a defendant has on file with either Dallas County or Texas Department of Public Safety (DPS). Reporting error exists between the arrests reported to DPS from Dallas County. In order to minimize such error, the number of prior arrests was based on the total number of unique arrests occurring prior to the book-in of record stemming from Dallas Co., DPS, or both (whichever was highest).

**Type of Offense for Book-in of Record** – refers to the offense/s for which a defendant was charged underlying the primary 2008 book-in (i.e., the book-in of record). This was codified in part by UCR Index Crime definitions. Each of these 16 crime types was indicated by a binary variable to allow for multiple charge types to be included in the analysis simultaneously. For example, someone arrested for burglary may also have a charge of aggravated assault for the same arrest (or book-in). The offense categories include: drug related crimes, family violence, homicide (not present in data), robbery, aggravated assault, burglary, larceny, auto theft, fraud, obstruction of justice, weapons related offenses, and driving while intoxicated (DWI or DUI).

**Offense of Record Category (OOR; misdemeanor vs. felony)** – The category of offense was used at times to produce results stratified between misdemeanors and felonies.

**Failure to Appear History** (1=at least one previous FTA; 0=no previous FTAs)

**Year of First Arrest on File** – This variable serves as a proxy for the amount of time that an individual has been criminally active, as far as it is indicated in official police records.

**Days in Jail for the OOR** – The number of days spent in jail for the offense of record.

**Celerity** – Celerity refers to the amount of time between the date of the offense and the date of arrest (in days). This variable was log-transformed prior to analyses to correct for skewness.

**Dallas County Jail History** – An indicator of whether a defendant had been booked into the County jail at any time prior to the book-in of record

### *Treatment Variables*

There are four main categories of bonds (release mechanisms) explored here. These include attorney bonds, cash bonds, commercial bonds, and pretrial services bonds.

The 2012 Texas Association of Counties (TAC) Bail Bond Handbook (p. 9) provides a detailed explanation of the bond process in Texas, which may vary between counties and defines a bail bond as:

*A "bail bond" is a written undertaking entered into by the defendant and the defendant's sureties for the appearance of the principal therein before a court or magistrate to answer a criminal accusation; provided, however, that the defendant on execution of the bail bond may deposit with the custodian of funds of the court in which the prosecution is pending current money of the United States in the amount of the bond in lieu of having sureties signing the same. Any cash funds deposited under this article shall be receipted for by the officer receiving the funds and, on order of the court, be refunded, after the defendant complies with the conditions of the defendant's bond, to:*

*(1) any person in the name of whom a receipt was issued, in the amount reflected on the face of the receipt, including the defendant if a receipt was issued to the defendant; or*

*(2) the defendant, if no other person is able to produce a receipt for the funds.*

### Attorney Bond

In Texas Bail Bond Board Counties, a state licensed attorney may post bonds as a surety for official clients in a criminal case, without the need to be licensed as a bail bond agent. The Sheriff of a County may inquire as to the security of the attorney in his/her ability to write a bond in accordance with TEXAS Code of Crim. Proc. Ch 17.

### Cash Bond

'A "cash bond" occurs when the criminal defendant executes the bond himself as principal and posts the entire amount of the bond in cash with the "custodian of funds of the court" in lieu of having sureties sign the bond.' A cash bond is "unsecured" and if the defendant fails to appear for trial, s/he is liable for the full bond amount.

### Commercial Bond

A commercial bond is one type of surety bond wherein the bond is made by a corporate surety (an insurance company), via a bonding company. In Texas, only a specially licensed insurance company can write such bonds. This form of bond occurs when a jailed defendant contacts a bail bond company and applies for bail. If approved, the defendant is released to the bonding company for a fee (generally 10-20% of the bail amount set by the court).

### *Personal Bonds*

**Personal Recognizance (not analyzed here)**, or release on recognizance, is one form of personal bond wherein the court releases an individual from jail without sureties or other security (i.e., financial penalty), but with the promise of the defendant that s/he will reappear for trial.

**Pretrial Services bonds** involve the release of a defendant under an unpaid, or \$20 fee, bond held accountable to the Pretrial Services Division. These bonds are intended for low-risk defendants who are unable to secure release solely to the fact that they cannot access funding needed for a financial bond. A pretrial services bond is technically a type of personal recognizance bond.

In Dallas County, pretrial services eligibility is determined by reviewing a list of inmates booked in the jail the previous business day (or over the weekend), who have yet to be released, and who reside in Dallas and the surrounding counties. Among these inmates, the current offense is checked for eligibility (see below list of exclusions), along with the set bond amount (Dallas County Pretrial Services, 2012). If an inmate is eligible, his/her criminal background is checked via TCIC and NCIC. If still eligible and incarcerated, the inmate is interviewed by Pretrial Services that day. The inmate is then required to provide reference information, which must be confirmed by two personal references. The inmate also has to agree to abide by the program rules. The references are given the information of the amount of the pretrial fee (20 dollars or 3% of the bond, whichever is greater). Information is entered into the computer that the pretrial bond has been approved and once the fee is paid, the inmate is released. If the fee is not paid, a determination is made whether or not the fee should be waived in order to keep the jail population down. The financial status (i.e., indigence) of an inmate is not considered in Dallas Co. pretrial services releases. Inmates released via pretrial services tend to be those who cannot access funding to secure a financial bond.\*

Specific eligibility requirements for pretrial services in Dallas Co. were determined via a Court Order in 1999 (Dallas County Court Order No. 99-1951), and were revised in 2007. Serious and violent offenses preclude an inmate's eligibility for pretrial services release as are inmates with a history of felony/assaultive offenses. In some cases, exceptions can be made with approval from a supervisor and/or the District Attorney's office. Pretrial services tend to include individuals charged with minor non-violent (e.g., thefts and fraud) and/or lesser drug possession offenses.

Formal risk assessment tools are not used by Dallas County Pretrial Services in making release decisions.

During the period of observation for this study, Dallas County's Pretrial unit was staffed by four pretrial services officers who operate during normal business hours only. Therefore, potential defendants are screened the next business day after book-in to the jail. The monitoring of defendants other than the required regular check-ins took place solely by telephone.

The offenses that are excluded by Pretrial Services are outlined in the following page:

\*Above paragraph paraphrased from in-person and email correspondence with Dallas County Pretrial Services (December, 2012).

#### Offenses Excluded by Pretrial Services Releases

1. Aggravated kidnapping
2. Aggravated Manufacture, Delivery or possessions of Controlled Substances
3. Aggravated Promotion of Prostitution
4. Aggravated Sexual Assault
5. Aggravated Robbery
6. Capital Murder
7. Criminal Solicitation
8. Aggravated Assault
9. Enticing a child
10. Prohibited Sexual Conduct
11. Indecency with a child
12. Injury to a child, elderly or disabled individual
13. Murder
14. Sexual assault
15. Parole violation
16. Sale, distribution or display of harmful materials to a minor
17. Sale or purchase of a child
18. Sexual performance by a child
19. Criminal solicitation of a minor
20. Any charge involving a firearm
21. Any charge involving assault with bodily injury
22. Stalking
23. Family violence
24. Violation of protective order or Magistrate's order; and
25. Harassment (includes telephone harassment)

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**Robert G. Morris, Ph.D.** is Associate Professor of Criminology as well as the Director of the Center for Crime and Justice Studies at the University of Texas at Dallas. Dr. Morris specializes in quantitative analytics, criminological theory, and contemporary issues in criminal justice, having published dozens of peer reviewed scholarly studies in top-ranked scientific journals such as *Justice Quarterly*, *Crime and Delinquency*, *Intelligence*, and *Journal of Quantitative Criminology*. He teaches doctoral level statistics/analysis courses at UT Dallas as well as undergraduate courses surrounding criminal justice and criminology. He is the recent recipient of numerous research and teaching awards including the prestigious UT System Regents' Outstanding Teaching Award (2011) and the Academy of Criminal Justice Sciences Outstanding Research Paper Award (2012). Dr. Morris received his Ph.D. in Criminal Justice from Sam Houston State University in 2007.



# Bureau of Justice Statistics Special Report

November 2007, NCJ 214994

*State Court Processing Statistics, 1990-2004*

## Pretrial Release of Felony Defendants in State Courts

By Thomas H. Cohen, Ph.D.  
and Brian A. Reaves, Ph.D.  
*BJS Statisticians*

Between 1990 and 2004, 62% of felony defendants in State courts in the 75 largest counties were released prior to the disposition of their case. Beginning in 1998, financial pretrial releases, requiring the posting of bail, were more prevalent than non-financial releases. This increase in the use of financial releases was mostly the result of a decrease in the use of release on recognizance (ROR), coupled with an increase in the use of commercial surety bonds. These findings are from a multi-year analysis of felony cases from the biennial State Court Processing Statistics (SCPS) program, sponsored by the Bureau of Justice Statistics.

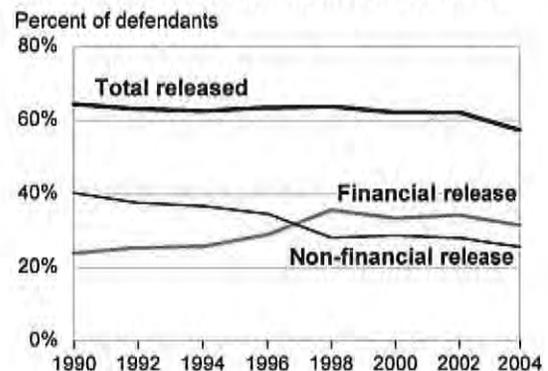
Among defendants detained until case disposition, 1 in 6 had been denied bail and 5 in 6 had bail set with financial conditions required for release that were not met. The higher the bail amount set, the lower the probability of release. About 7 in 10 defendants secured release when bail was set at less than \$5,000, but this proportion dropped to 1 in 10 when bail was set at \$100,000 or more.

Murder defendants were the least likely to be released pretrial. Defendants charged with rape, robbery, burglary, and motor vehicle theft also had release rates lower than the overall average. The highest release rate was for defendants charged with fraud.

Defendants were less likely to be released if they had a prior arrest or conviction or an active criminal justice status at the time of arrest (such as those on probation or parole). A history of missed court appearances also reduced the likelihood that a defendant would be released.

About a third of released defendants were charged with one or more types of pretrial misconduct. Nearly a fourth had a bench warrant issued for failing to appear in court, and about a sixth were arrested for a new offense. More than half of these new arrests were for felonies.

Since 1998, most pretrial releases of State court felony defendants in the 75 largest counties have been under financial conditions requiring the posting of bail



Logistic regression analyses that controlled for factors such as offense and criminal history found that Hispanics were less likely than non-Hispanic defendants to be released, and males were less likely than females to be released.

Logistic regression was also used to calculate the probability of pretrial misconduct for defendants with a given characteristic, independent of other factors. Characteristics associated with a greater probability of being rearrested while on pretrial release included being under age 21, having a prior arrest record, having a prior felony conviction, being released on an unsecured bond, or being part of an emergency release to relieve jail crowding.

Compared to release on recognizance, defendants on financial release were more likely to make all scheduled court appearances. Defendants released on an unsecured bond or as part of an emergency release were most likely to have a bench warrant issued because they failed to appear in court. The probability of failing to appear in court was higher among defendants who were black or Hispanic, had an active criminal justice status at the time of arrest, or had a prior failure to appear.

**About 3 in 5 felony defendants in the 75 largest counties were released prior to case disposition**

From 1990 to 2004, an estimated 62% of State court felony defendants in the 75 largest counties were released prior to the disposition of their case (table 1). Defendants were about as likely to be released on financial conditions requiring the posting of bail (30%) as to be granted a non-financial release (32%). Among the 38% of defendants detained until case disposition, about 5 in 6 had a bail amount set but did not post the financial bond required for release.

**Table 1. Type of pretrial release or detention for State court felony defendants in the 75 largest counties, 1990-2004**

Detention-release outcome	State court felony defendants in the 75 largest counties	
	Number	Percent
<b>Total</b>	424,252	100%
<b>Released before case disposition</b>	264,604	62%
Financial conditions	125,650	30%
Surety bond	86,107	20
Deposit bond	23,168	6
Full cash bond	12,348	3
Property bond	4,027	1
Non-financial conditions	136,153	32%
Personal recognizance	85,330	20
Conditional release	32,882	8
Unsecured bond	17,941	4
Emergency release	2,801	1%
<b>Detained until case disposition</b>	159,647	38%
Held on bail	132,572	32
Denied bail	27,075	6

Note: Counts based on weighted data representing 8 months (the month of May from each even-numbered year). Detail may not add to total because of rounding.

From 1990 to 2004, surety bond (33%) and release on recognizance (32%) each accounted for about a third of all releases. Other release types that accounted for at least 5% of releases during this period were conditional release (12%), deposit bond (9%), unsecured bond (7%), and full cash bond (5%). (See box on page 3 for definitions of release types.)

Type of pretrial release	Percent of all releases, 1990-2004
<b>Financial conditions</b>	48%
Surety bond	33
Deposit bond	9
Full cash bond	5
Property bond	2
<b>Non-financial conditions</b>	51%
Recognizance	32
Conditional	12
Unsecured bond	7
<b>Emergency release</b>	1%
<b>Number of releases</b>	264,604

**Since 1998 a majority of pretrial releases have included financial conditions**

Except for a decline to 57% in 2004, the percentage of defendants released each year varied only slightly, from 62% to 64%. A more pronounced trend was observed in the type of release used (figure 1). From 1990 to 1998, the percentage of released defendants under financial conditions rose from 24% to 36%, while non-financial releases dropped from 40% to 28%.

**Detention-release outcomes for State court felony defendants in the 75 largest counties, 1990-2004**

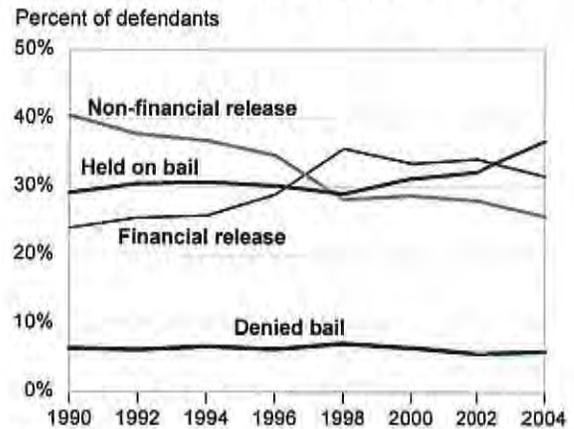


Figure 1

**Surety bond surpassed release on recognizance in 1998 as the most common type of pretrial release**

The trend away from non-financial releases to financial releases was accompanied by an increase in the use of surety bonds and a decrease in the use of release on recognizance (ROR) (figure 2). From 1990 through 1994, ROR accounted for 41% of releases, compared to 24% for surety bond. In 2002 and 2004, surety bonds were used for 42% of releases, compared to 23% for ROR.

**Type of pretrial release of State court felony defendants in the 75 largest counties, 1990-2004**

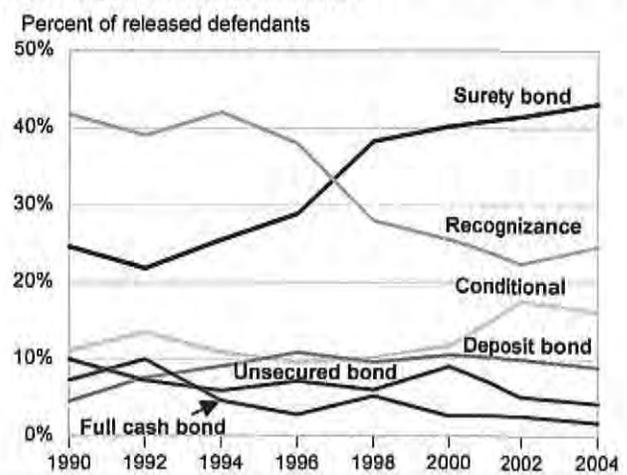


Figure 2

### Types of pretrial release used in State courts

Type of release	Defendant	Financial liability for failure to appear	Liable party
<b>Financial</b>			
Surety bond	Pays fee (usually 10% of bail amount) plus collateral if required, to commercial bail agent.	Full bail amount	Bail agent
Deposit bond	Posts deposit (usually 10% of bail amount) with court, which is usually refunded at successful completion of case.	Full bail amount	Defendant
Full cash bond	Posts full bail amount with court.	Full bail amount	Defendant
Property bond	Posts property title as collateral with court.	Full bail amount	Defendant
<b>Non-financial</b>			
Release on recognizance (ROR)	Signs written agreement to appear in court (includes citation releases by law enforcement).	None	N/A
Conditional (supervised) release	Agrees to comply with specific conditions such as regular reporting or drug use monitoring.	None	N/A
Unsecured bond	Has a bail amount set, but no payment is required to secure release.	Full bail amount	Defendant
Emergency release	Released as part of a court order to relieve jail crowding.	None	N/A

### Two-thirds of defendants had financial conditions required for release in 2004, compared to half in 1990

Including both released and detained defendants, the percentage required to post bond to secure release rose from 53% in 1990 to 68% in 2004 (not shown in table). Overall, about half (48%) of defendants required to post bail for release did so. From 1998 through 2004, 51% posted bail, compared to 45% in prior years.

### The higher the bail amount the lower the probability of pretrial release

The median bail amount for detained defendants (\$15,000) was 3 times that of released defendants (\$5,000); the mean amount was about 5 times higher (\$58,400 versus \$11,600) (not shown in table). For all defendants with a bail amount set, the median bail amount was \$9,000 and the mean was \$35,800.

There was a direct relationship between the bail amount and the probability of release. When the bail was under \$10,000, most defendants secured release, including 7 in 10 defendants with bail under \$5,000 (figure 3). The proportion released declined as the bail amount increased, dropping to 1 in 10 when bail was \$100,000 or higher.

### Defendants arrested for violent offenses or who had a criminal record were most likely to have a high bail amount or be denied bail

Courts typically use an offense-based schedule when setting bail. After assessing the likelihood that a defendant, if released, will not appear in court and assessing any danger the defendant may present to the community, the court may adjust the bail higher or lower. In the most serious cases, the court may deny bail altogether. The use of a high bail amount or the denial of bail was most evident in cases involving serious violent offenses. Eighty percent of defendants charged with murder had one of these conditions; with rape, 34%; and with robbery, 30% (table 2).

**Bail amount and release rates for State court felony defendants in the 75 largest counties, 1990-2004**

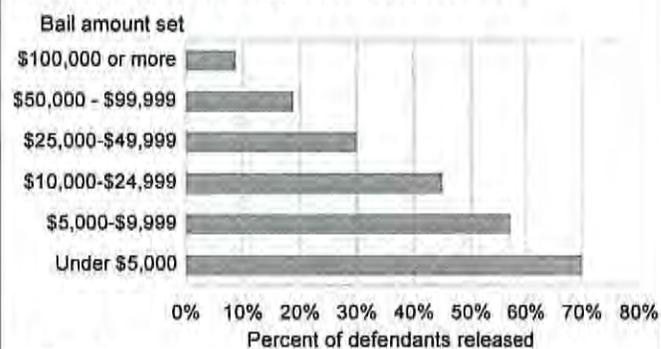


Figure 3

**Table 2. State court felony defendants in the 75 largest counties with bail set at \$50,000 or more or denied bail, 1990-2004**

Characteristic	Percent of defendants	
	Bail \$50,000 or more	Denied bail
<b>Most serious arrest charge</b>		
Murder	35%	45%
Rape	25	9
Robbery	20	10
Assault	13	7
Non-violent offenses	7	6
<b>Criminal justice status at arrest</b>		
Active	13%	13%
None	8	3
<b>Prior felony conviction</b>		
Yes	13%	10%
No	7	4

Defendants who had an active criminal justice status (13%) were about 4 times as likely as other defendants (3%) to have bail denied. Defendants with 1 or more prior felony convictions (10%) were more than twice as likely as those without such a conviction (4%) to have bail denied.

## Commercial bail and pretrial release

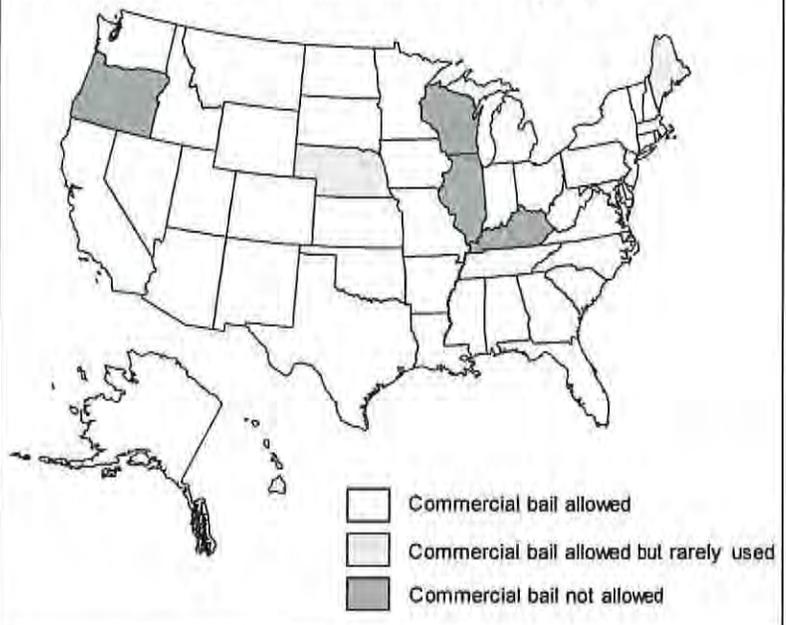
An estimated 14,000 commercial bail agents nationwide secure the release of more than 2 million defendants annually, according to the *Professional Bail Agents of the United States*. (See *Methodology* for other sources on bail and pretrial release.) Bond forfeiture regulations and procedures vary by jurisdiction, but most States regulate commercial bail and license bail agents through their departments of insurance. Four States do not allow commercial bail: Illinois, Kentucky, Oregon, and Wisconsin. Also, the District of Columbia, Maine, and Nebraska have little commercial bail activity.

Bail agents generally operate as independent contractors using credentials of a surety company when posting appearance bond for their client. For a fee, the surety company allows the bail agent to use its financial standing and credit as security on bonds. In turn, the bail agent charges the defendant a fee (usually 10% of the bail amount) for services. In addition, the bail agent often requires collateral from the defendant.

A bail agent usually has an opportunity to recover a defendant if they fail to appear. If the defendant is not returned, the agent is liable to the court for the full bail amount. Most jurisdictions permit revocation of the bond, which allows the agent to return the defendant to custody before the court date, freeing the agent from liability. The agent may be required to refund the defendant's fee in such cases. Courts can also set aside forfeiture judgments if good cause is shown as to why a defendant did not appear.

Commercial bail has been a target of critics since the 1960s. Some organizations, such as the American Bar Association and the National District Attorney's Association, have recommended its abolishment. Some critics have succeeded in obtaining reforms in the release process, beginning with the Manhattan Bail Project in 1961.

Commercial bail agents are active in almost every State



This project showed that defendants could be successfully released pretrial without the financial guarantee of a surety bail agent if verified information concerning their stability and community ties were presented to the court.

The success of the Manhattan Bail Project resulted in a wide range of pretrial reforms in the Federal system, culminating in the Bail Reform Act of 1966. This Act created a presumption in favor of release for most non-capital defendants and led to the creation of non-surety release options, such as refundable deposit bail and conditional release. Many States followed the Federal system and created such release options. The Bail Reform Act of 1984 set forth new procedures which allowed the pretrial detention of defendants believed to be a danger to the community in addition to a flight risk.

### Pros and cons of commercial bail

Issue	Proponents:	Critics:
Jail crowding	Reduces jail population by providing a means for defendants to obtain pretrial release.	Increases jail population because indigent defendants can't afford commercial bail services. Others are passed over because they are seen as a flight risk.
Private enterprise	Provides pretrial release and monitoring services at no cost to taxpayers.	A private, for-profit entity should not be involved in the detention-release decision process.
Performance incentives	Creates an incentive that results in the majority of defendants being returned to court because the bail agent is liable for defendants who fail to appear.	Bail agents don't always have their bonds forfeited or actively pursue absconders.
Value of service	Provides the opportunity for many defendants to secure their freedom while awaiting disposition of their case.	The fee and collateral are typically more than indigent defendants can afford. Defendants who have the money would be better off spending it on legal representation.

### Financial releases took longer on average than non-financial releases

About half of all pretrial releases occurred within 1 day of arrest, and about three-fourths within 1 week. Non-financial releases (59%) were more likely to occur within a day of arrest than financial releases (45%). For all release types, more than 90% occurred within 1 month of arrest. Among defendants released under financial conditions, the amount of time from arrest to release increased with bail amounts, ranging from a mean of 8 days for those with a bail amount of less than \$5,000 to 22 days for bail amounts of \$50,000 or more (not shown in table).

	Cumulative percent of releases occurring within —		
	1 day	1 week	1 month
All releases	52%	78%	92%
Financial	45	76	92
Non-financial	59	80	93

### About a quarter of released defendants had failed to appear in court during a prior case

A majority (61%) of the defendants released into the community to await disposition of their case had been arrested previously (table 3). This included 27% who had failed to appear in court during a prior case. About half had 1 or more prior convictions (48%), and nearly a third (30%) had at least one prior felony conviction. About 1 in 4 released defendants had an active criminal justice status from a prior case at the time of their arrest.

**Table 3. Criminal history of released and detained State court felony defendants in 75 largest counties, 1990-2004**

Criminal history	Released defendants	Detained defendants
<b>Prior arrest</b>	61%	83%
With at least 1 failure-to-appear	27	44
<b>Prior conviction</b>	48%	75%
Felony	30	57
Violent felony	7	15
<b>Active criminal justice status</b>	27%	51%

### The role of pretrial services programs in the release process

According to a BJA nationwide study, about 300 pretrial services programs were operating in the U.S. during 2001.\* More than two-thirds of the programs had begun since 1980 and nearly half since 1990. The programs operated in a variety of administrative settings, including probation offices, courts, sheriffs' offices, independent agencies, and private non-profit organizations.

Pretrial programs play an important role in the release process. Standards published by the American Bar Association and the National Association of Pretrial Services Agencies have specified core functions a model pretrial program should provide.

#### *Information gathering and assessment*

An important function of a pretrial program is to conduct a pretrial investigation to assist judicial officers in making release decisions. Prior to the initial court appearance, the pretrial program gathers information about the defendant, primarily through voluntary interviews and records checks. Some defendants may not be eligible for pretrial release because of the severity of the charged offense or an existing criminal justice status such as parole, probation, or an outstanding warrant.

\*John Clark and D. Alan Henry, *Pretrial Services Programming at the Start of the 21st Century: A Survey of Pretrial Services Programs*, Washington D.C.: Bureau of Justice Assistance, July 2003 (NCJ 199773).

Information collected from the pretrial investigation typically includes:

- residency
- employment status
- community ties
- criminal record
- court appearance record
- criminal justice status
- mental health status
- indications of substance abuse

Often a risk assessment tool is used to incorporate the information from the pretrial investigation into a score that guides the release decision. Periodic validation of the instrument ensures that it provides an accurate, unbiased measure of a defendant's potential for misconduct if released.

#### *Supervision and follow-up*

Pretrial services programs provide supervision and monitoring of a defendant's compliance with release conditions, such as testing for drug or alcohol use and electronic monitoring of defendants confined to a restricted area. These programs also assist with locating and returning defendants who fail to appear in court. Such assistance may include providing information to law enforcement officials or working directly with defendants to persuade them to return.

Pretrial programs may regularly review the status of detained defendants for changes in their eligibility for release and facilitate their release where appropriate.

Prior criminal activity was more prevalent among pretrial detainees. About half had a criminal justice status at the time of arrest. A large majority had prior arrests (83%) and convictions (75%). More than half (57%) had a prior felony conviction, including 15% with a conviction for a violent felony. Nearly half (44%) had a prior failure to appear.

#### Many factors influence the pretrial release decision

SCPS collects information on some of the factors courts consider when making pretrial release decisions, such as arrest offenses, criminal justice status, prior arrests, prior court appearance record, and prior convictions. It does not collect data on residency, employment status, community ties, mental health status, or substance abuse history.

The unique contribution of the factors collected in SCPS to the release decision can be assessed using logistic regression techniques. Logistic regression produces nonlinear estimations for each independent variable which can be transformed into predicted probabilities (table 4). In the case of pretrial release, the logistic regression analyses yielded patterns similar to that of the bivariate results. (See *Methodology* for more information on the logistic regression techniques).

Murder defendants (19%) had the lowest probability of being released, followed by those charged with robbery (44%), burglary (49%), motor vehicle theft (49%), or rape (53%). Defendants charged with fraud (82%) were the most likely to be released.

#### Male and Hispanic defendants less likely to be released than females and whites

Female defendants (74%) were more likely than males (60%) to be released pretrial. By race and Hispanic origin, non-Hispanic whites (68%) had a higher probability of release than Hispanics (55%). Pretrial detention rates for Hispanics may have been influenced by the use of immigration holds to detain those illegally in the U.S.

#### Defendants with a prior criminal record less likely to be released than those without a prior arrest

Defendants on parole (26%) or probation (43%) at the time of their arrest for the current offense were less likely to be released than those without an active criminal justice status (70%). Defendants who had a prior arrest, whether they had previously failed to appear in court (50%) or not (59%), had a lower probability of release than those without a prior arrest (79%).

Defendants with a prior conviction (51%, not shown in table) had a lower probability of being released than those without a conviction (77%). This was true even if the prior convictions were for misdemeanors only (63%). The effect of a conviction record on release was more pronounced if the defendant had at least one prior felony conviction (46%).

**Table 4. State court felony defendants in the 75 largest counties released prior to case disposition, 1990-2004**

Variable	Percent released	Predicted probability of release
<b>Most serious arrest charge</b>		
Murder	19%	11%**
Rape	53	44**
Robbery	44	36**
Assault	64	59*
Burglary	49	49**
Motor vehicle theft	49	50**
Larceny/theft	68	66
Forgery	72	67
Fraud	82	76**
Drug sales (reference)	63	63
Other drug (non-sales)	68	70*
Weapons	67	65
Driving-related	73	76**
<b>Age at arrest</b>		
Under 21 (reference)	68%	64%
21-29	62	63
30-39	59	60**
40 or older	62	60**
<b>Gender</b>		
Male (reference)	60%	60%
Female	74	69**
<b>Race/Hispanic origin</b>		
White non-Hispanic (reference)	68%	66%
Black non-Hispanic	62	64
Other non-Hispanic	65	63*
Hispanic, any race	55	51**
<b>Criminal justice status at arrest</b>		
No active status (reference)	70%	67%
Released on pending case	61	63
On probation	43	49**
On parole	26	37**
<b>Prior arrest and court appearance</b>		
No prior arrests (reference)	79%	65%
Prior arrest record without FTA	59	62*
Prior arrest record with FTA	50	58*
<b>Most serious prior conviction</b>		
No prior convictions (reference)	77%	70%
Misdemeanor	63	64**
Felony	46	51**

Note: Logistic regression (predicted probability) results exclude the year 1990 because of missing data. Asterisks indicate category differed from the reference category at one of the following significance levels: \* $\leq .05$ , \*\* $\leq .01$ . Not all variables in the model are shown. See *Methodology* on page 11 for more information.

**About 1 in 5 detained defendants eventually had their case dismissed or were acquitted**

Sixty percent of released defendants were eventually convicted — 46% of a felony and 14% of a misdemeanor (table 5). Conviction rates were higher for detained defendants, with 78% convicted, including 69% of a felony.

**On average, released defendants waited nearly 3 times longer than detainees for case adjudication**

Released defendants waited a median of 127 days from time of arrest until adjudication, nearly 3 times as long as those who were detained (45 days). For those released, the average time from release to adjudication was nearly 1 month longer for those on financial release (125 days) than for those released under non-financial conditions (101 days) (table 6). By specific release type, defendants released on recognizance had the shortest wait (98 days), while those released on property bond had the longest (140 days).

**Table 5. Adjudication outcomes for released and detained State court felony defendants in the 75 largest counties, 1990-2004**

	Released defendants	Detained defendants
<b>Adjudication outcome</b>		
Convicted	60%	78%
Felony	46	69
Misdemeanor	14	9
Not convicted	40%	22%
Dismissal/acquittal	31	19
Other outcome	9	2
<b>Median number of days from arrest to adjudication</b>	127 days	45 days

Note: Detail may not add to total because of rounding.

**Table 6. Time from pretrial release until adjudication of State court felony defendants in the 75 largest counties, 1990-2004**

Type of release	Average time	
	Mean	Median
All types	112 days	90 days
<b>Financial releases</b>	125 days	106 days
Surety bond	125	106
Full cash bond	122	100
Deposit bond	126	108
Property bond	140	120
<b>Non-financial releases</b>	101 days	75 days
Recognizance	98	72
Conditional	103	75
Unsecured bond	110	86

**Incidents of pretrial misconduct increased with length of time in release status**

The number of defendants charged with pretrial misconduct increased with the length of time spent in a release status. About a third (32%) of failure-to-appear bench warrants were issued within a month of release and about two-thirds (68%) within 3 months. The pattern was similar for rearrests, with 29% occurring within 1 month of release and 62% within 3 months.

	Cumulative percent of pretrial misconduct occurring within —			
	1 week	1 month	3 months	6 months
Any type	9%	32%	67%	88%
Failure to appear	9	32	68	89
Rearrest	8	29	62	85

**A third of released defendants were charged with pretrial misconduct within 1 year after release**

From 1990 through 2004, 33% of defendants were charged with committing one or more types of misconduct after being released but prior to the disposition of their case (figure 4). A bench warrant for failure to appear in court was issued for 23% of released defendants. An estimated 17% were arrested for a new offense, including 11% for a felony.

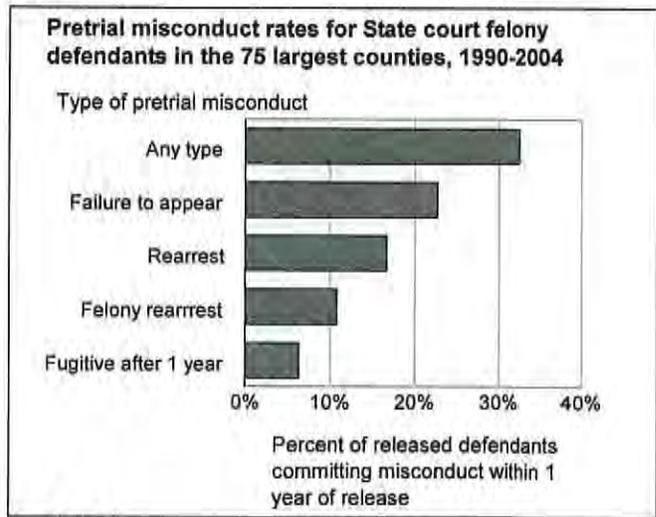


Figure 4

## Pretrial misconduct rates stable from 1990-2004

Overall misconduct rates varied only slightly from 1990 through 2004, ranging from a high of 35% to a low of 31% (figure 5). For failure to appear, the range was from 21% to 24%, and the fugitive rate ranged from 5% to 8%. Overall rearrest rates ranged from 13% to 21%, and felony rearrest rates from 10% to 13%.

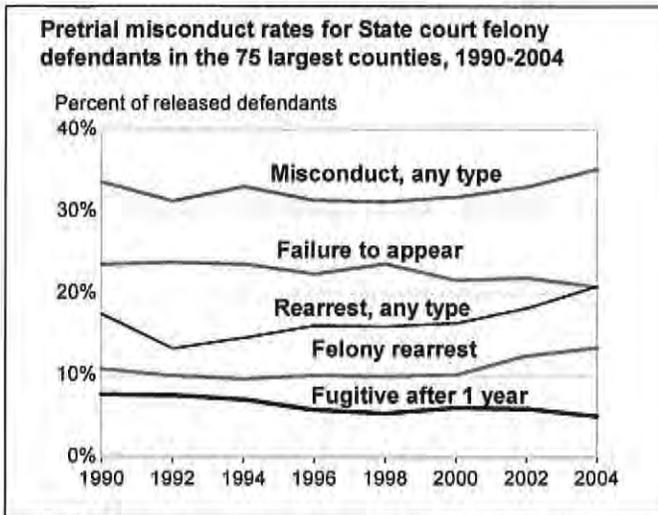


Figure 5

## Pretrial misconduct rates highest for emergency releases

About half (52%) of the 1% of defendants released under an emergency order to relieve jail crowding were charged with some type of misconduct (table 7). Pretrial misconduct rates for other types of releases ranged from 27% to 36%.

After emergency release (45%), the highest failure-to-appear rate was for defendants released on unsecured bond (30%). Property bond (14%), which also accounted for just 1% of releases, had the lowest failure-to-appear rate followed by surety bond (18%).

## About 1 in 4 defendants who failed to appear in court were fugitives at end of a 1-year study period

By type of release, the percent of the defendants who were fugitives after 1 year ranged from 10% for unsecured bond releases to 3% of those released on surety bond.

Overall, 28% of the defendants who failed to appear in court and had a bench warrant issued for their arrest were still fugitives at the end of a 1-year study period. This was 6% of all defendants released pretrial (not shown in table).

Compared to the overall average, the percentage of absconded defendants who remained a fugitive was lower for surety bond releases (19%).

Type of release	Number of defendants	Percent still a fugitive failing to appear after 1 year
All types	54,485	28%
Surety bond	13,411	19%
Emergency	1,168	22
Conditional	6,788	27
Property bond	490	30
Recognizance	20,883	30
Deposit	4,548	31
Unsecured bond	5,018	33
Full cash bond	2,179	36

## Likelihood of pretrial misconduct lower for defendants released after being charged with murder or rape

Defendants released after being charged with murder (19%) or rape (18%) had misconduct rates that were about half that for defendants charged with motor vehicle theft (39%), drug trafficking (39%), or burglary (37%).

## Younger, male, black, and Hispanic defendants more likely to be charged with pretrial misconduct

Released defendants age 20 or younger (33%) had higher misconduct rates than those age 40 or older (28%). This pattern also existed for rearrest and failure-to-appear rates. Male defendants (34%) had a higher misconduct rate than females (28%). Black (36%) and Hispanic (34%) defendants had a higher misconduct rate than whites (28%).

## Prior criminal activity associated with greater probability of pretrial misconduct

Defendants who had an active criminal justice status at the time of arrest — such as pretrial release (48%), parole (47%), or probation (44%) — had a higher misconduct rate than those who were not on a criminal justice status (27%). This difference was observed for both failure to appear and rearrest.

Defendants with a prior failure to appear (49%) had a higher misconduct rate than defendants who had previously made all court appearances (30%) or had never been arrested (23%). Defendants with a prior failure to appear (35%) were about twice as likely to have a bench warrant issued for failing to appear during the current case than other defendants (18%).

Defendants with at least one prior felony conviction (43%) had a higher rate of pretrial misconduct than defendants with misdemeanor convictions only (34%) or no prior convictions (27%).

**Table 7. State court felony defendants in the 75 largest counties charged with pretrial misconduct, 1990-2004**

Variable	Number of defendants	Percent of released defendants charged with pretrial misconduct			
		Any type	Rearrest	Failure to appear	Fugitive
<b>Type of pretrial release</b>					
Release on recognizance	80,865	34%	17%	26%	8%
Surety bond	78,023	29	16	18	3
Conditional release	31,162	32	15	22	6
Deposit bond	20,993	30	14	22	7
Unsecured bond	17,001	36	14	30	10
Full cash bond	11,190	30	15	20	7
Property bond	3,649	27	17	14	4
Emergency release	2,656	52	17	45	10
<b>Most serious arrest charge</b>					
Murder	741	19%	12%	9%	1%
Rape	3,481	18	9	10	2
Robbery	12,947	35	21	21	6
Assault	32,931	23	12	14	4
Burglary	18,377	37	19	25	6
Larceny/theft	26,687	33	16	25	7
Motor vehicle theft	6,415	39	20	29	7
Forgery	8,374	33	15	24	7
Fraud	9,094	21	8	15	5
Drug trafficking	47,182	39	21	27	8
Other drug	50,547	37	18	29	8
Weapons	8,574	27	13	17	5
Driving-related	8,148	28	14	18	5
<b>Age at arrest</b>					
20 or younger	55,505	33%	20%	21%	5%
21-29	90,768	34	17	24	7
30-39	71,049	33	16	24	7
40 or older	44,701	28	13	20	6
<b>Gender</b>					
Male	211,396	34%	18%	23%	6%
Female	52,291	28	12	21	6
<b>Race/Hispanic origin</b>					
Black, non-Hispanic	96,348	36%	19%	25%	7%
White, non-Hispanic	64,571	28	14	19	4
Hispanic, any race	49,544	34	17	25	8
Other, non-Hispanic	5,165	23	13	14	3
<b>Criminal justice status at arrest</b>					
On parole	6,012	47%	25%	32%	7%
On probation	25,765	44	26	30	6
Released pending prior case	25,955	48	30	30	7
No active status	167,227	27	12	19	6
<b>Prior arrests and FTA history</b>					
Prior arrest record with FTA	59,468	49%	27%	35%	8%
Prior arrest record, no FTA	75,806	30	17	18	5
No prior arrests	85,366	23	8	18	7
<b>Most serious prior conviction</b>					
Felony	75,187	43%	25%	28%	6%
Misdemeanor	44,989	34	19	23	5
No prior convictions	129,975	27	12	19	7

## Logistic regression analysis of pretrial misconduct

Logistic regression was used to assess the impact of given characteristics independent of other factors on the probability of a released defendant being charged with pretrial misconduct. The predicted probabilities generated from these analyses are presented in the adjacent table. (See *Methodology* for more information on logistic regression).

### Type of release

Predicted overall misconduct rates were higher for unsecured bond (42%) and emergency (56%) releases. This was also the case for rearrest and failure to appear rates. Property (17%), surety (20%), deposit (20%), and full cash (20%) bonds all had lower predicted failure-to-appear rates than recognizance (24%). The percent of released defendants predicted to be fugitives after 1 year was lowest for property (3%) and surety bonds (4%). Emergency release and property bonds each accounted for 1% of all releases, compared to about 30% each for surety bonds and recognizance. (See table 7 for the number of defendants accounted for by each type of pretrial release).

### Arrest offense

Drug trafficking defendants (38%) had higher predicted rates of overall misconduct, rearrest and failure-to-appear than defendants charged with murder (19%), rape (21%), assault (26%), fraud (29%), or a weapons offense (31%).

### Demographic characteristics

Defendants age 20 or younger (39%) had a higher predicted misconduct rate than those ages 21 to 39 (35%) or age 40 or older (30%). This pattern held for rearrest, but for court appearance record only defendants age 40 or older were predicted to perform better than those under age 21.

Male defendants (35%) were predicted to have a higher misconduct rate than females (32%). Hispanic (37%) and black (36%) defendants were predicted to be charged with misconduct more often than whites (32%). This difference also existed for failure to appear, but not rearrest.

### Criminal history

Defendants with an active criminal justice status at the time of arrest, such as parole (42%), probation (39%), or pretrial release (42%), had higher predicted misconduct rates than those without such a status (33%). This difference was observed for both failure to appear and rearrest.

Compared to those without prior arrests (29%), defendants with an arrest record were predicted to be charged with misconduct more often, especially if they had previously failed to appear in court (47%). This pattern was observed for both failure to appear and rearrest. Defendants with prior felony convictions (39%) had a higher predicted misconduct rate than other defendants (33%). This pattern also existed for rearrest, but not failure to appear.

Variable	Predicted probability of being charged with pretrial misconduct			
	Any type	Rearrest	Failure to appear	Fugitive
<b>Type of pretrial release</b>				
Recognizance (reference)	34%	17%	24%	6%
Surety bond	33	19	20**	4**
Conditional release	37	18	24	6
Deposit bond	32	18	20*	5
Unsecured bond	42**	21*	28*	8
Full cash bond	34	19	20*	6
Property bond	31	18	17**	3**
Emergency release	56**	26**	39*	8
<b>Most serious arrest charge</b>				
Drug trafficking (reference)	38%	20%	24%	6%
Murder	19**	11*	8**	7
Rape	21**	11**	10**	2**
Robbery	32**	18	19**	5
Assault	26**	15**	14**	3**
Burglary	37	19	23	5*
Larceny/theft	37	19	25	6
Motor Vehicle theft	39	20	27*	5
Forgery	38	19	27	6
Fraud	29**	15**	18**	4**
Other drug	42**	21	29**	7
Weapons	31**	16**	19**	4**
Driving-related	33**	16**	22	6
<b>Age at arrest</b>				
20 or younger (reference)	39%	24%	22%	4%
21-29	35**	19**	23	5**
30-39	35**	17**	23	6**
40 or older	30**	14**	20**	5**
<b>Gender</b>				
Male (reference)	35%	19%	22%	5%
Female	32**	16**	22	5
<b>Race/Hispanic origin</b>				
White, non-Hispanic (reference)	32%	18%	20%	4%
Black, non-Hispanic	36**	19	23**	5**
Other, non-Hispanic	27*	16	16*	3
Hispanic, any race	37**	19	25**	7**
<b>Criminal justice status at arrest</b>				
No active status (reference)	33%	17%	21%	5%
Released pending prior case	42**	24**	26**	5
On probation	39**	22**	25**	5
On parole	42**	20	29**	6
<b>Prior arrests and FTA history</b>				
No prior arrests (reference)	29%	13%	20%	5%
Prior arrest record with FTA	47**	26**	31**	6*
Prior arrest record, no FTA	33**	20**	19	4**
<b>Most serious prior conviction</b>				
No prior convictions (reference)	33%	17%	22%	6%
Misdemeanor	33	17	21	4**
Felony	39**	22**	23	4**

Note: Asterisks indicate category differed from reference category at one of the following significance levels: \* $\leq .05$ , \*\* $\leq .01$ . Not all variables in model are shown. See *Methodology* on page 11 for more information. /Murder defendants were excluded from the fugitive analysis.

## Methodology

### *Data utilized*

This report analyzed data from the State Court Processing Statistics (SCPS) series, covering felony cases filed in May of even-numbered years from 1990 through 2004. SCPS is a biennial data collection series that examines felony cases processed in a sample of 40 of the Nation's 75 most populous counties. The counties included in the sample have varied over time to account for changing national population patterns. For a year-by-year summary of the counties participating in SCPS, see Appendix table 1. For more information on the SCPS methodology see the BJS report *Felony Defendants in Large Urban Counties, 2002* at <http://www.ojp.usdoj.gov/bjs/abstract/fdluc02.htm>.

Each SCPS data collection tracks approximately 15,000 felony cases for up to one year, with the exception of murder defendants who are followed for up to two years. In addition to defendant demographic characteristics and criminal history, SCPS also obtains data on a variety of felony case processing factors, including the types of arrest charges filed, conditions of pretrial release such as bail amount and type of release, and instances of pretrial misconduct including failure to appear in court, rearrest while on pretrial release, and other violations that resulted in the revocation of release. Adjudication and sentencing outcomes are also recorded.

### *Using multivariate statistical techniques*

This report analyzes pretrial release and misconduct through both bivariate and multivariate statistical techniques. While the bivariate statistics provide a descriptive overview of pretrial release and misconduct among felony defendants in the 75 most populous counties, multivariate analysis can help disentangle the impacts that independent variables such as demographic characteristics, prior criminal history, severity of arrest charges, and release type have on dependent variables such as the probability of pretrial release and misconduct. Logistic regression models were used to estimate the probability of pretrial release and misconduct. This is one widely accepted method for analyzing the effects of multiple independent factors on dichotomous or binomial outcomes.

The regression analyses excluded data from 1990 because of the large number of cases missing data on race or Hispanic origin. The regression models also excluded cases that had missing data on either the independent or dependent variables. This resulted in reductions in the number of cases analyzed. From 1992 through 2004, 99,899 felony defendants were either released or detained, but when missing data were excluded from the regression models, the number of cases analyzed declined to 71,027.

To determine the impact of missing data, logistic regression models excluded certain independent factors to increase the number of analyzed cases. Since the results from these

analyses did not differ appreciably from the full model, missing data did not affect the results.

SCPS data are drawn from a sample and weighted to represent cases processed in the 75 most populous counties during the month of May. When the regressions used these weighted data, the large number of weighted cases resulted in statistical significance for nearly all the variables in the model. Effect weighting was employed to address this issue. Through effect weighting, the SCPS data were weighted to the number of cases actually sampled rather than the number of cases in the universe represented by the sample.

### *Generalized estimating equation techniques*

One primary assumption of binary logistic regression is that all observations in the dataset are independent. This assumption is not necessarily appropriate for the SCPS series because the data are collected on a county basis. The county-based nature of SCPS creates a presumption of clustered data. In clustered datasets, "the data can be grouped into natural or imposed clusters with observations in the same clusters tending to be more alike than observations in different clusters." The clustered nature of the SCPS data was handled by utilizing generalized estimating equation (GEE) techniques. Logistic regression modeling with generalized estimating equation (GEE) techniques provides for more efficient computation of regression coefficients and more robust standard error estimates.

### *Interpreting logistic regression probabilities*

Logistic regression produces nonlinear estimations for each independent variable that can be difficult to interpret. In this report, the logistic regression coefficients are made interpretable by transforming them into predicted probabilities (see table 4 and box on page 10). The predicted probabilities were calculated by setting all independent variables to their mean levels, setting the independent variable of interest to a value of one, multiplying the means of each independent variable by their respective logistic regression parameter estimates, taking the exponential function of the summed product of means and parameter estimates, and then calculating the probability of that exponential function.

### *Limitations of models*

The logistic regression analyses were limited and intended to reflect the effects of only selected factors that were available in the SCPS data. Other factors could potentially be related to pretrial release and misconduct. Examples of these include: defendants' residence, employment status, community ties, mental health status, and substance abuse. If data on these variables were available, the logistic regression results could be altered.

\*Paul D. Allison, 2001. *Logistic Regression Using the SAS System: Theory and Application*, Cary, N.C.: SAS Institute Inc., page 179.

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*Additional sources on bail and pretrial release include:*

Demuth, Stephen, "Racial and Ethnic Differences in Pretrial Release Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees." *Criminology*: 41(3): 873 (2003).

Feeley, Malcolm M., "Bail Reform," chap. 2 in *Court Reform on Trial: Why Simple Solutions Fail* (New York, NY: Basic Books, Inc., 1983, pp. 40-79).

Goldkamp, John, "Danger and Detention: A Second Generation of Bail Reform." *Journal of Criminal Law and Criminology*: 76:1 (1985).

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Kennedy, Spurgeon and D. Alan Henry. *Commercial Surety Bail: Assessing Its Role in the Pretrial Release and Detention Decision* <<http://www.pretrial.org/publications.html>> (1996).

Watson, Jerry W. and L. Jay Labe, "Bail Bonds," chap. 8 in *The Law of Miscellaneous and Commercial Surety Bonds*, Chicago, IL: American Bar Association, 2001, pp. 127-142.

The Bureau of Justice Statistics is the statistical agency of the U.S. Department of Justice. Jeffrey L. Sedgwick is the director.

This Special Report was written by Thomas H. Cohen, Ph.D., and Brian A. Reaves, Ph.D. William J. Sabol, Ph.D. provided technical assistance. Tracey Kyckelhahn provided verification. Tina Dorsey produced and edited the report, under the supervision of Doris J. James. Jayne Robinson prepared the report for final printing.

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This report in portable document format and in ASCII and its related statistical data and tables are available at the BJS World Wide Web Internet site: <<http://www.ojp.usdoj.gov/bjs/abstract/prfdsc.htm>>.

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**Appendix table 1. State Court Processing Statistics, participating jurisdictions, 1990-2004**

County or equivalent	Number of cases		Year of participation							
	Unweighted	Weighted	1990	1992	1994	1996	1998	2000	2002	2004
Jefferson (AL)	1,517	6,612			<input type="checkbox"/>					
Maricopa (AZ)	4,245	13,848	<input type="checkbox"/>							
Pima (AZ)	2,655	7,588			<input type="checkbox"/>					
Alameda (CA)	1,941	8,471			<input type="checkbox"/>					
Contra Costa (CA)	817	2,043			<input type="checkbox"/>					
Los Angeles (CA)	10,419	41,676	<input type="checkbox"/>							
Orange (CA)	2,984	9,964	<input type="checkbox"/>			<input type="checkbox"/>				
Riverside (CA)	1,646	5,926					<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sacramento (CA)	1,898	6,786	<input type="checkbox"/>							
San Bernardino (CA)	3,061	9,909	<input type="checkbox"/>							
San Diego (CA)	1,529	6,604	<input type="checkbox"/>	<input type="checkbox"/>				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
San Francisco (CA)	1,327	5,675		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			
San Mateo (CA)	526	1,315						<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Santa Clara (CA)	2,840	9,552	<input type="checkbox"/>							
Ventura (CA)	576	1,901			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			
New Haven (CT)	238	1,047						<input type="checkbox"/>		
Washington (DC)	263	1,315	<input type="checkbox"/>	<input type="checkbox"/>						
Broward (FL)	2,155	7,095	<input type="checkbox"/>							
Duval (FL)	387	1,935	<input type="checkbox"/>	<input type="checkbox"/>				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Miami-Dade (FL)	4,355	17,420	<input type="checkbox"/>							
Hillsborough (FL)	1,415	4,515	<input type="checkbox"/>							
Orange (FL)	1,367	5,938			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			
Palm Beach (FL)	1,154	4,255	<input type="checkbox"/>	<input type="checkbox"/>				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Pinellas (FL)	1,687	6,290	<input type="checkbox"/>	<input type="checkbox"/>				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Fulton (GA)	1,748	6,992	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Honolulu (HI)	890	2,692	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Cook (IL)	5,738	22,952	<input type="checkbox"/>							
DuPage (IL)	463	1,528			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			
Marion (IN)	2,878	9,908				<input type="checkbox"/>				
Jefferson (KY)	310	1,240			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			
Essex (MA)	546	2,004	<input type="checkbox"/>	<input type="checkbox"/>						
Middlesex (MA)	657	2,168			<input type="checkbox"/>					
Suffolk (MA)	1,546	5,753	<input type="checkbox"/>							
Baltimore (MD)	1,006	2,515						<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Baltimore (city) (MD)	1,542	4,108			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			
Montgomery (MD)	1,216	3,494		<input type="checkbox"/>			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Macomb (MI)	644	1,610						<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Wayne (MI)	2,030	8,120	<input type="checkbox"/>							
Jackson (MO)	999	3,297			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			
St. Louis (MO)	1,582	5,447	<input type="checkbox"/>							
Essex (NJ)	2,636	11,947	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Bronx (NY)	3,713	15,404	<input type="checkbox"/>							
Erie (NY)	1,048	4,134	<input type="checkbox"/>							
Kings (NY)	3,893	15,988	<input type="checkbox"/>							
Monroe (NY)	1,124	3,874	<input type="checkbox"/>							
Nassau (NY)	772	1,930						<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
New York (NY)	2,801	11,204	<input type="checkbox"/>							
Queens (NY)	2,058	7,943	<input type="checkbox"/>			<input type="checkbox"/>				
Suffolk (NY)	778	2,567			<input type="checkbox"/>	<input type="checkbox"/>				
Westchester (NY)	980	2,450						<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Franklin (OH)	618	2,719						<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Hamilton (OH)	1,188	4,970	<input type="checkbox"/>							
Allegheny (PA)	502	1,516	<input type="checkbox"/>							
Montgomery (PA)	567	2,225	<input type="checkbox"/>	<input type="checkbox"/>					<input type="checkbox"/>	<input type="checkbox"/>
Philadelphia (PA)	4,043	15,952	<input type="checkbox"/>							
Shelby (TN)	2,837	11,332	<input type="checkbox"/>							
Dallas (TX)	2,169	8,676	<input type="checkbox"/>							
El Paso (TX)	949	2,373						<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Harris (TX)	3,661	14,644	<input type="checkbox"/>							
Tarrant (TX)	1,526	6,941	<input type="checkbox"/>	<input type="checkbox"/>				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Travis (TX)	660	2,904						<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Salt Lake (UT)	1,212	4,981	<input type="checkbox"/>	<input type="checkbox"/>				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Fairfax (VA)	1,158	4,670	<input type="checkbox"/>	<input type="checkbox"/>				<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
King (WA)	1,324	5,591	<input type="checkbox"/>							
Milwaukee (WI)	1,542	5,161		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			

**Appendix table 2. Logistic regression analysis of pretrial release decision**

Variable	Mean	Estimate	Standard error
<b>Most serious arrest charge</b>			
Murder	0.0084	-2.6575**	0.2412
Rape	0.0142	-0.7846**	0.1173
Robbery	0.0588	-1.1088**	0.1004
Assault	0.1222	-0.1821*	0.0785
Other violent	0.0401	-0.1755	0.1173
Burglary	0.0870	-0.5562**	0.0817
Larceny	0.0888	0.1313	0.0805
Motor vehicle theft	0.0342	-0.5281**	0.0997
Forgery	0.0279	0.1781	0.1052
Fraud	0.0274	0.6323**	0.1660
Other property	0.0411	0.3007	0.1655
Other drug	0.1995	0.3023*	0.1384
Weapons	0.0272	0.1001	0.1074
Driving-related	0.0276	0.6147**	0.1306
Other public order	0.0294	0.0926	0.1332
<b>Age at arrest</b>			
21-29	0.3423	-0.0544	0.0357
30-39	0.2871	-0.1700**	0.0451
40 or older	0.1884	-0.1713**	0.0456
<b>Gender</b>			
Female	0.1735	0.4031**	0.0393
<b>Race/Hispanic origin</b>			
Black, non-Hispanic	0.4456	-0.1274	0.0690
Other, non-Hispanic	0.0229	-0.1592*	0.0734
Hispanic, any race	0.2432	-0.6488**	0.1122
<b>Criminal justice status at arrest</b>			
Other status	0.0283	-0.9417**	0.1509
Released pending prior case	0.1057	-0.1758	0.1325
On probation	0.1605	-0.7471**	0.0686
On parole	0.0610	-1.2450**	0.1671
<b>Prior arrest and FTA history</b>			
Prior arrest record with FTA	0.3050	-0.3144*	0.1468
Prior arrest record, no FTA	0.4205	-0.1597*	0.0749
<b>Most serious prior conviction</b>			
Felony	0.4156	-0.8396**	0.0756
Misdemeanor	0.1746	-0.2886**	0.0847
<b>Study year</b>			
1992	0.0940	0.2602	0.1513
1994	0.1212	0.1664	0.1515
1996	0.1332	0.3148*	0.1512
1998	0.1276	0.1924	0.1475
2000	0.1731	0.1250	0.1190
2002	0.1795	0.1576	0.1069
<b>Intercept</b>	1.0000	1.4226	0.1652
<b>Number of observations</b>	71,027		
<b>Log likelihood</b>	-41377.1132		

Note: Logistic regression figures derived from generalized estimating equation (GEE) methods. GEE logistic regression procedures were an appropriate technique because of the clustered nature of the felony case processing data. The regression estimates were transformed into predicted probabilities in the report by setting all independent variables at their mean levels, setting the independent variable of interest to a value of one, and then calculating the probability of the dependent measure outcome for that particular independent variable. Asterisks indicate category difference from the reference category at one of the following significance levels: \* $\geq .05$ , \*\* $\geq .01$ .

**Appendix table 3. Logistic regression analysis of pretrial misconduct**

Variable	Mean	Estimate	Standard error
<b>Most serious arrest charge</b>			
Murder	0.0019	-0.9339**	0.2569
Rape	0.0118	-0.8203**	0.1123
Robbery	0.0329	-0.2552**	0.0930
Assault	0.1212	-0.5577**	0.0584
Other violent	0.0414	-0.5564**	0.0829
Burglary	0.0684	-0.0368	0.0745
Larceny	0.0985	-0.0148	0.0585
Motor vehicle theft	0.0270	0.0616	0.0888
Forgery	0.0318	0.0264	0.0884
Fraud	0.0373	-0.3690**	0.1076
Other property	0.0472	-0.1442*	0.0624
Other drug	0.2255	0.1666**	0.0544
Weapons	0.0273	-0.2932**	0.0635
Driving-related	0.0327	-0.1878**	0.0694
Other public order	0.0290	-0.4768**	0.1095
<b>Age at arrest</b>			
21-29	0.3403	-0.1352**	0.0251
30-39	0.2737	-0.1736**	0.0428
40 or older	0.1865	-0.3842**	0.0399
<b>Gender</b>			
Female	0.2148	-0.1258**	0.0390
<b>Race/Hispanic origin</b>			
Black, non-Hispanic	0.4449	0.1695**	0.0317
Other, non-Hispanic	0.0238	-0.2248*	0.0897
Hispanic, any race	0.2021	0.2163**	0.0334
<b>Criminal justice status at arrest</b>			
Other status	0.0177	0.1061	0.1047
Released pending prior case	0.0943	0.4042**	0.0561
On probation	0.1105	0.2764**	0.0475
On parole	0.0239	0.3778**	0.1046
<b>Prior arrest and FTA history</b>			
Prior arrest record with FTA	0.2371	0.7565**	0.0540
Prior arrest record, no FTA	0.4111	0.1756**	0.0438
<b>Most serious prior conviction</b>			
Felony	0.3034	0.2417**	0.0496
Misdemeanor	0.1807	-0.0071	0.0482
<b>Type of pretrial release</b>			
Surety bond	0.3714	-0.0570	0.0682
Full cash bond	0.0352	-0.0408	0.1078
Deposit bond	0.0957	-0.0963	0.1114
Property bond	0.0118	-0.1435	0.1249
Conditional release	0.1443	0.1107	0.0850
Unsecured bond	0.0647	0.3188**	0.1036
Emergency release	0.0105	0.8663**	0.1830
<b>Study year</b>			
1992	0.1007	-0.2136	0.1483
1994	0.1199	-0.1810	0.1237
1996	0.1378	-0.2908	0.1746
1998	0.1171	-0.3394*	0.1588
2000	0.1797	-0.2050	0.1332
2002	0.1828	-0.1417	0.1146
<b>Intercept</b>	1.0000	-0.6608	0.1264
<b>Number of observations</b>	40,179		
<b>Log likelihood</b>	-23469.1617		

Note. See note on appendix table 2. Asterisks indicate category difference from the reference category at one of the following significance levels: \* $\geq .05$ , \*\* $\geq .01$ .

**Appendix table 4. Logistic regression analysis of pretrial rearrest for new offense**

Variable	Mean	Estimate	Standard error
<b>Most serious arrest charge</b>			
Murder	0.0018	-0.7451*	0.3078
Rape	0.0119	-0.7720**	0.1070
Robbery	0.0329	-0.1737	0.0987
Assault	0.1215	-0.3368**	0.0670
Other violent	0.0415	-0.3810**	0.0955
Burglary	0.0685	-0.0593	0.0708
Larceny	0.0986	-0.0569	0.0584
Motor vehicle theft	0.0270	-0.0229	0.0790
Forgery	0.0320	-0.1010	0.0875
Fraud	0.0377	-0.3578**	0.1238
Other property	0.0471	-0.1260	0.0752
Other drug	0.2233	0.0585	0.0604
Weapons	0.0275	-0.3018**	0.1159
Driving-related	0.0329	-0.3122**	0.0842
Other public order	0.0292	-0.3861**	0.0949
<b>Age at arrest</b>			
21-29	0.3407	-0.3505**	0.0338
30-39	0.2731	-0.4504**	0.0399
40 or older	0.1870	-0.6585**	0.0472
<b>Gender</b>			
Female	0.2155	-0.2279**	0.0344
<b>Race/Hispanic origin</b>			
Black, non-Hispanic	0.4468	0.0653	0.0430
Other, non-Hispanic	0.0238	-0.1297	0.1010
Hispanic, any race	0.1999	0.0705	0.0468
<b>Criminal justice status at arrest</b>			
Other status	0.0177	0.2058*	0.0979
Released pending prior case	0.0953	0.4476**	0.0485
On probation	0.1099	0.3147**	0.0501
On parole	0.0240	0.1713	0.1054
<b>Prior arrest and FTA history</b>			
Prior arrest record with FTA	0.2370	0.8455**	0.0701
Prior arrest record, no FTA	0.4136	0.4895**	0.0578
<b>Most serious prior conviction</b>			
Felony	0.3049	0.3581**	0.0617
Misdemeanor	0.1807	0.0471	0.0552
<b>Type of pretrial release</b>			
Surety bond	0.3747	0.1077	0.0611
Full cash bond	0.0350	0.0991	0.1273
Deposit bond	0.0969	0.0600	0.1089
Property bond	0.0119	0.0404	0.1462
Conditional release	0.1453	0.0640	0.0842
Unsecured bond	0.0655	0.2473*	0.1160
Emergency release	0.0104	0.5156**	0.1371
<b>Study year</b>			
1992	0.0981	-0.5280**	0.1859
1994	0.1145	-0.3974	0.2419
1996	0.1378	-0.4183	0.2615
1998	0.1152	-0.4412*	0.1998
2000	0.1836	-0.3840**	0.1466
2002	0.1866	-0.2230	0.1244
<b>Intercept</b>	1.0000	-1.3631	0.1478
<b>Number of observations</b>	39,209		
<b>Log Likelihood</b>	-15735.4776		

Note. See note on appendix table 2. Asterisks indicate category difference from the reference category at one of the following significance levels: \* $\geq .05$ , \*\* $\geq .01$ .

**Appendix table 5. Logistic regression analysis of pretrial failure to appear**

Variable	Mean	Estimate	Standard error
<b>Most serious arrest charge</b>			
Murder	0.0019	-1.3123**	0.3566
Rape	0.0118	-1.0242**	0.1934
Robbery	0.0329	-0.2917**	0.0810
Assault	0.1212	-0.6787**	0.0599
Other violent	0.0413	-0.7196**	0.0721
Burglary	0.0683	-0.0595	0.0690
Larceny	0.0987	0.0527	0.0667
Motor vehicle theft	0.0271	0.1741*	0.0895
Forgery	0.0319	0.1358	0.0897
Fraud	0.0374	-0.3719**	0.1115
Other property	0.0471	-0.0572	0.0756
Other drug	0.2245	0.2330**	0.0586
Weapons	0.0275	-0.2747**	0.0660
Driving-related	0.0328	-0.0964	0.0710
Other public order	0.0289	-0.4888**	0.1249
<b>Age at arrest</b>			
21-29	0.3404	0.0299	0.0296
30-39	0.2737	0.0363	0.0471
40 or older	0.1869	-0.1253**	0.0415
<b>Gender</b>			
Female	0.2150	-0.0300	0.0380
<b>Race/Hispanic origin</b>			
Black, non-Hispanic	0.4450	0.2006**	0.0377
Other, non-Hispanic	0.0238	-0.2509*	0.1023
Hispanic, any race	0.2019	0.2970**	0.0459
<b>Criminal justice status at arrest</b>			
Other status	0.0177	0.0778	0.1026
Released pending prior case	0.0947	0.2711**	0.0570
On probation	0.1103	0.2347**	0.0556
On parole	0.0238	0.4306**	0.1076
<b>Prior arrest and FTA history</b>			
Prior arrest record with FTA	0.2376	0.5902**	0.0646
Prior arrest record, no FTA	0.4106	-0.0505	0.0458
<b>Most serious prior conviction</b>			
Felony	0.3036	0.0494	0.0603
Misdemeanor	0.1805	-0.0439	0.0414
<b>Type of pretrial release</b>			
Surety bond	0.3712	-0.2713**	0.0890
Full cash bond	0.0353	-0.2444*	0.1047
Deposit bond	0.0962	-0.2307*	0.1193
Property bond	0.0117	-0.4271**	0.1499
Conditional release	0.1447	-0.0119	0.0958
Unsecured bond	0.0650	0.2051*	0.1063
Emergency release	0.0106	0.6762*	0.2823
<b>Study year</b>			
1992	0.1003	0.0228	0.0958
1994	0.1202	-0.0754	0.0906
1996	0.1356	-0.0846	0.0849
1998	0.1180	-0.0251	0.0864
2000	0.1801	-0.0041	0.0903
2002	0.1836	0.0413	0.1050
Intercept	1.0000	-1.3378	0.1278
Number of observations	39,838		
Log likelihood	-19756.0265		

Note. See not on appendix table 2. Asterisks indicate category difference from the reference category at one of the following significance levels: \* $\geq .05$ , \*\* $\geq .01$ .

**Appendix table 6. Logistic regression analysis of pretrial fugitive status**

Variable	Mean	Estimate	Standard error
<b>Most serious arrest charge</b>			
Rape	0.0118	-1.2836**	0.2824
Robbery	0.0330	-0.3058	0.1690
Assault	0.1215	-0.8666**	0.1170
Other violent	0.0414	-0.8022**	0.1352
Burglary	0.0684	-0.2789*	0.1133
Larceny	0.0988	0.0044	0.0817
Motor vehicle theft	0.0271	-0.2829	0.1506
Forgery	0.0320	-0.1446	0.1210
Fraud	0.0375	-0.5742**	0.2041
Other property	0.0471	-0.2003	0.1418
Other drug	0.2250	0.0861	0.1021
Weapons	0.0275	-0.3852**	0.1358
Driving - related	0.0329	-0.0587	0.1268
Other public order	0.0289	-0.6688**	0.1355
<b>Age at arrest</b>			
21-29	0.3404	0.3634**	0.0685
30-39	0.2739	0.3892**	0.0556
40 or older	0.1870	0.2437**	0.0700
<b>Gender</b>			
Female	0.2153	-0.1027	0.0717
<b>Race/Hispanic origin</b>			
Black, non-Hispanic	0.4449	0.2836**	0.0767
Other, non-Hispanic	0.0238	-0.1648	0.1917
Hispanic, any race	0.2020	0.6593**	0.0905
<b>Criminal justice status at arrest</b>			
Other status	0.0177	0.0222	0.1925
Released pending prior case	0.0949	0.0150	0.0744
On probation	0.1103	0.0332	0.0738
On parole	0.0236	0.2334	0.1520
<b>Prior arrest and FTA history</b>			
Prior arrest record with FTA	0.2379	0.1558*	0.0732
Prior arrest record, no FTA	0.4104	-0.3075**	0.0742
<b>Most serious prior conviction</b>			
Felony	0.3037	-0.2730**	0.1049
Misdemeanor	0.1806	-0.2527**	0.0663
<b>Type of pretrial release</b>			
Surety bond	0.3710	-0.6047**	0.1126
Full cash bond	0.0353	-0.0503	0.1600
Deposit bond	0.0962	-0.3515	0.3069
Property bond	0.0116	-0.7676**	0.2294
Conditional release	0.1448	-0.0633	0.1156
Unsecured bond	0.0650	0.1997	0.1726
Emergency release	0.0106	0.2469	0.2407
<b>Study year</b>			
1992	0.1002	0.3370**	0.1208
1994	0.1201	0.1748	0.1116
1996	0.1357	0.1633	0.0965
1998	0.1180	0.2129	0.1388
2000	0.1802	0.2684**	0.0908
2002	0.1835	0.1906	0.1112
Intercept	1.0000	-2.9223	0.1845
Number of observations	39,752		
Log Likelihood	-8391.7631		

Note. See not on appendix table 2. Asterisks indicate category difference from the reference category at one of the following significance levels: \* $\geq .05$ , \*\* $\geq .01$ .

*The JFA Institute*  
Denver, CO/Malibu, CA/Washington, D.C.

*Conducting Justice and Corrections Research for Effective Policy Making*

## Evaluation of the Current and Future Los Angeles County Jail Population

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April 10, 2012

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## **About the JFA Institute**

Founded in 2003, the JFA Institute is a multi-disciplinary research center whose mission is to conduct theoretical and applied research on the causes of crime and the justice system's responses to crime and offenders. It receives diverse funding from federal, state, and local governmental agencies, as well as from foundations interested in developing and evaluating innovative crime prevention, law enforcement, sentencing and correctional policies and programs designed to reduce crime and to improve the quality of the adult and juvenile justice systems. We disseminate our studies and policy recommendations through research reports, criminal justice and criminology periodicals, books, and seminars.

Since the recent creation of the new JFA organization in 2003, we have become actively involved in conducting research and providing technical assistance to state and local agencies in several states. Our major clients include the National Institute of Corrections, National Institute of Justice, Bureau of Justice Assistance, and over 20 states and local public correctional and law enforcement agencies.

JFA is currently conducting similar jail studies for the New York City Department of Corrections, Orleans Parish Prison, Maricopa County (Phoenix), Baltimore City Detention System, Santa Cruz County, and San Francisco County.

## **Project Summary**

### ***Population, Crime and Arrest Trends***

□

1. There has been a dramatic decline in the County's crime rate since 2000 and it is projected that the crime rate will continue to remain low.
2. The number of adults being arrested for felonies has declined, but the number being arrested for a misdemeanor level crime has not. The major reason why the misdemeanor arrest numbers have not declined is large increases for people arrested for possession of marijuana, violation of city ordinances and Failure to Appear (FTA) violations.
3. Collectively, the county's demographic, crime and arrest trends suggest no increases in the Los Angeles County Jail bookings.
4. While the County population will continue to increase, it will become an older population and have a smaller proportion of the at-risk population.

### ***County Jail Trends***

□

#### **Bookings**

5. There were approximately 400,000 admissions to the LASD's jail and field stations in 2011. Of this number about 143,000 were actually admitted to the jail custody division. Due to multiple bookings within a year, there were about 118,000 people booked into the custody division.
6. Consistent with the demographic, crime and arrest trends there has been a decline in bookings. Specifically, in 1990 there were 260,765 bookings. In 2000 it was 162,406. In 2011 it had dropped to 142,862.

#### **Jail Population**

7. Consistent with the decline in bookings, the jail population had significantly declined from a peak in 1990 of 22,000 to slightly under 15,000 by September 2011.
8. The decline in the jail population has served to lower the county's jail incarceration rate to 152 per 100,000 population which is well below the state rate of 189 per 100,000.
9. Jail population is largely composed of three separate legal statuses; pretrial (45%), sentenced with a pending charge (18%), sentenced (37%). The majority (78%) of the jail population is either charged or sentenced for a felony level crime.
10. About half of the pretrial inmates are charged with a violent or sex crime. Conversely only 25% of the sentenced population has been convicted of a violent or sex crime.
11. There is a very large medium custody population (about 70%) which is atypical of most California jail systems. The Northpointe Institute's classification system - in particular the re-classification system- is not being used properly which is causing some level of over-classification.

#### **Length of Stay**

12. The length of stay (LOS) has not been declining, remaining at the 40 day range. This number is significantly higher than the state average LOS of 17 days.
13. The longer LOS is related to a lack of pretrial release program, delays in court processing of criminal cases, and the sentence lengths being imposed by the court.
14. About 1/3<sup>rd</sup> of all bookings are released within three days – nearly 40 % are released within 7 days. Those who are not released within 7 days will remain in custody an average of 87 days.
15. Most (about 2/3<sup>rd</sup>s) of the inmates are being released to community and/or under the supervision of probation and state parole.
16. There is a large number of inmates being released to ICE. These ICE inmates occupy about 2,100 beds on any given day in the jail.

#### ***Projected Jail Population Projections***

17. Had AB 109 not passed, the current jail population would have likely remained at the 14,500 – 15,000 level.
18. With the passage of AB 109, the sentenced population will increase by about 7,000 over the next two years and then stabilize.
19. AB 109 will also serve to reduce the technical parole population and the CDCR inmate population waiting to be transferred to state prison.
20. The overall jail population will reach nearly 20,000 by the end of this year and peak at 21,000 by the end of 2013.

#### ***Recommended Alternatives to the Projected Population and Capacity Options***

21. The projected 21,000 inmate population can be safely reduced by about 3,000 inmates by implementing the proposed LASD pretrial supervision and a re-entry program for sentenced inmates using the innovative EBI programs. □  
□
22. The bed capacity of the entire system can be increased by about 1,500 beds by modifying the NCCF facility and assuming the management of the several CDCR Los Angeles County conservation camps. □  
□
23. If the above two recommendations are implemented, the Central Jail can be closed within two years and the LASD would still have sufficient bed space. At a minimum it is feasible to move all men out of Central jail by end of 2013. But this assumes the proposed LASD pretrial and re-entry programs are implemented.  
□
24. Other bed capacity options such as constructing a new female facility at the PCD and/or re-purpose the use of the Mira Loma facility collectively show

that should be more than sufficient bed capacity to manage the long-term projected jail population without the need for the Central Jail facility. □

□

**Other Issues**

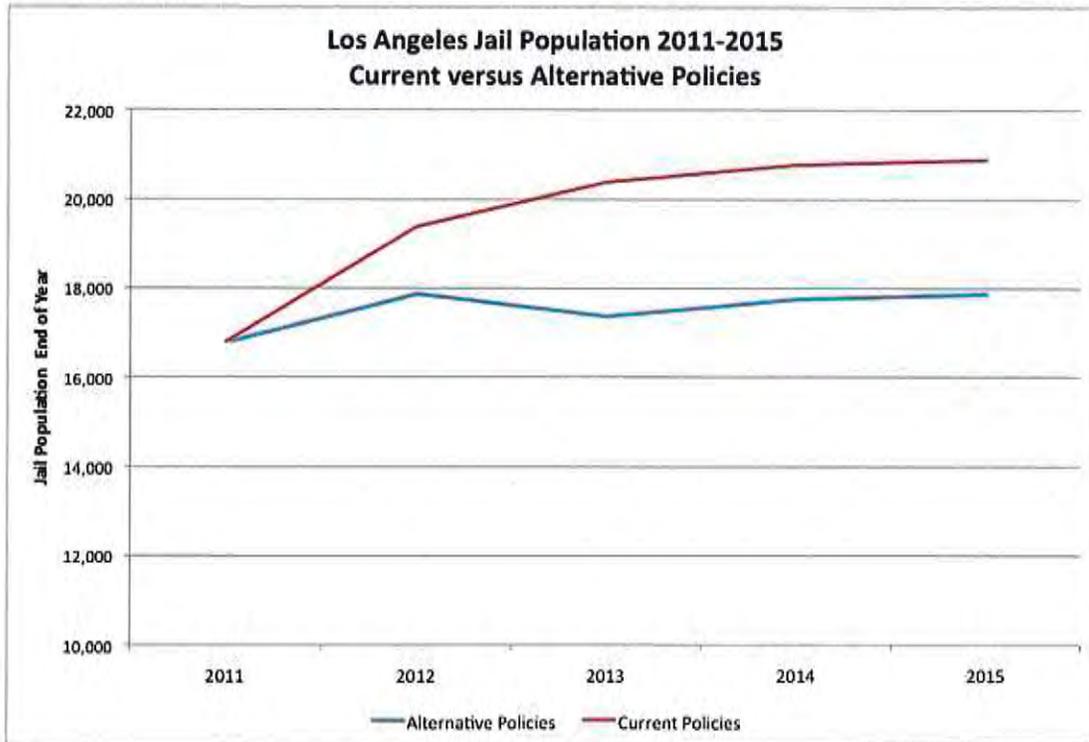
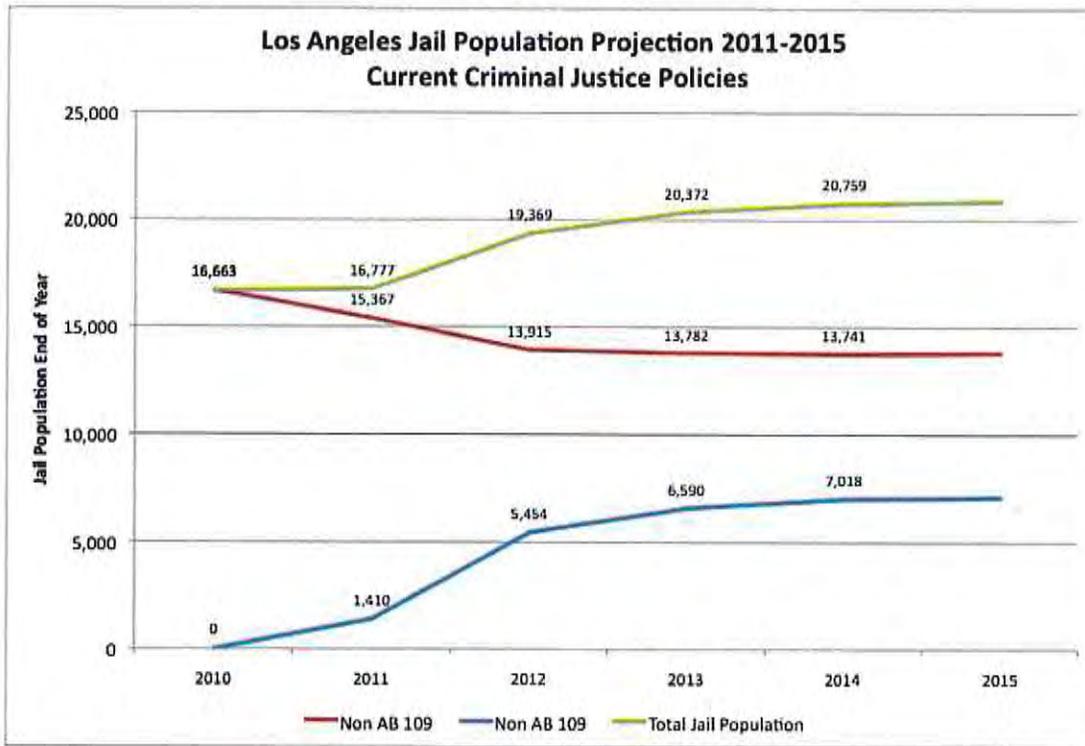
- 25. The Northpointe re-classification custody system needs to be adjusted to reduce the current level of over-classification of males and female inmates. □  
□
- 26. The COMPAS risk assessment instrument needs to be validated on a sample of released inmates. This is especially the case for the FTA risk instrument. □  
□
- 27. Since the LASD plans to expand the application of the EBI education programs, it would be appropriate at this time to begin a formal impact evaluation. Such a study can and should be done in tandem with the revalidation study of the COMPAS instrument.
- 28. The LASD should develop a dedicated Research, Planning and Evaluation division. Several existing LASD staff can be recruited to staff this unit. □

**Summary of Population and Capacity Options**

Item	Current Trend	Option A	Option B	Option C
Capacity	23,910	21,700	20,700	21,700
Central Jail	5,260	1,500	500	0
Functional Bed Capacity@ 90%	21,519	19,530	18,630	19,530
Populations by 2015				
Pretrial	10,325	9,325	9,325	9,325
County Sentenced	1,830	1,830	1,830	1,830
Awaiting Transfer to CDCR	600	600	600	600
CDCR Tech Violators	400	400	400	400
ICE Mira Loma	625	625	625	625
AB 109	7,096	5,096	5,096	5,096
Totals	20,876	17,876	17,876	17,876
Surplus Beds @90% Occupied	643	1,654	754	1,654

### Summary of LASD Suggested Bed Capacity Options

Facility	Current	Option A	Option B	Option C
Central Jail	5,260	1,500	500	0
Twin Towers	4,820	4,820	4,820	4,820
CRDF	2,380	2,380	2,380	2,380
Peter Pitchess DC				
NCCF	4,294	5,294	5,294	5,294
South	1,536	1,536	1,536	1,536
South Annex	1,624	1,624	1,624	1,624
East	1,944	1,994	1,994	1,994
Out Patient	600	600	600	600
Conservation Camps	0	500	500	500
New Women's Facility	0	0	0	1,500
Totals	22,458	20,248	19,248	20,248
Mira Loma	1,452	1,452	1,452	1,452
Grand Totals	23,910	21,700	20,700	21,700
At 90% Capacity	21,519	19,530	18,630	19,530



## Introduction

This report is designed to provide a comprehensive evaluation of the Los Angeles County jail population in terms of its attributes, current and future population trends. More importantly, it provides a plan that will allow the Los Angeles Sheriff's Department (LASD) to safely manage its jail population within its current jail facility capacity by implementing evidence-based policies that have been adopted in other jurisdictions. The plan has been reviewed by Sheriff Baca and he agrees with the plan's recommendations that will allow him to close the antiquated Central Jail facility and still safely manage the growing number of AB 109 inmates and thus avoid costly jail construction.

The study was requested and funded by the American Civil Liberties Union (ACLU). However, it was conducted with the strong support and cooperation of LASD and Sheriff Leroy Baca. A wide array of data were collected to complete the analysis and recommendations that was largely provided by the LASD. These data included detailed data on people admitted and released from the LASD jail system as well as aggregate level data on historical trends in Los Angeles County crime, arrest, jail bookings, releases and overall jail population. These data were used to better understand what factors are driving the jail population and what options can be employed to better manage that population in the future.

In September 2011, the Vera Institute released a major study on the Los Angeles jail system titled "Los Angeles County Jail Overcrowding Reduction Project".<sup>1</sup> That report was based on over two years of research and analysis conducted by Vera. It's fair to say that the report found many inefficiencies in the current criminal justice process that were, collectively increasing the jail population and costs. Over 30 recommendations were made by Vera, most of which were designed to reduce the jail population. Unfortunately to date, none of the recommendations have been adopted by the County's criminal justice system. Vera warned that there would be no impact unless "...every criminal justice agency leader must commit to reducing unnecessary detention and incarceration in the interest of justice and the efficient use of taxpayer resources" (p. iii). This level of commitment has not occurred as of yet.

The recent passage and implementation of AB 109 (California's Realignment Plan) makes it more urgent that action be taken. We estimate and the LASD concurs that the transfer of state sentenced inmates from the California Department of Corrections and Rehabilitation (CDCR) to the local jail will increase the County's jail population by as much as 7,000 inmates by the end of 2014.

This study focuses on actions that the LASD and Sheriff Baca can take to minimize the impact of AB 109 as well as the other issues noted by Vera that serve to inflate the jail population. Just two basic recommendations are offered which if implemented, will lower the projected jail population.

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<sup>1</sup> Los Angeles County Jail Overcrowding Reduction Project, Final Report, Revised, September 2011, Vera Institute of Justice.

## Los Angeles County Population, Crime and Criminal Justice Trends

A jail population is the product of the number of people being admitted and how long they remain in custody. In estimating the future size of any local jail population, it's important to understand some of the key factors that influence the number of jail admissions.

One such factor is the current and projected size of the County's resident population that is most likely to be arrested and booked into the adult jail system. This high-risk group consists of males between the ages of 18 and 39. According to the California Attorney General's Office, approximately 70% of the 1.2 million adult arrests that occurred in 2009 were people between the ages of 18 and 39. Further, 85% of these arrests were males. The demographics of the at-risk population is also credited by criminologists with the nation's and in particular California's declining crime rate.

The California Department of Finance provides projections of the state's and each county's future resident population. For Los Angeles County, the total county population is projected to grow by 24% over the next 40 years. However, for males age 15-39, the population grows, but at a much slower pace. Further, the proportion of the males age 15-39 year population declines slightly from 18% to 16% (a relative rate decline of 9%).

Table 1. Projected Los Angeles County Populations 2010-2050

Year	Total	Males Age 15-39	% Of Total
2010	10,514,663	1,871,503	18%
2020	11,214,237	2,019,401	18%
2030	11,920,289	2,050,341	17%
2040	12,491,606	2,014,661	16%
2050	13,061,787	2,111,033	16%
% Change	24%	13%	-9%

Source: California Department of Finance

The next factor to review is the County's crime rate. The California Attorney General's Office is the repository for all of the crime data that is submitted by each county's law enforcement agency. Within each county are multiple law enforcement agencies which always include the county's sheriff.

The total number of serious crimes, which consists of murder, rape, robbery, assault, burglary, theft and arson, has been declining for a number of years. Between 2000 and 2009, the most recent time frame available for California counties, shows a sharp decline in the total number of serious crime since 2000 (Chart 1 and Table 2). Specifically, there has been a 22% reduction with the largest decline being for violent crimes (53% decline).

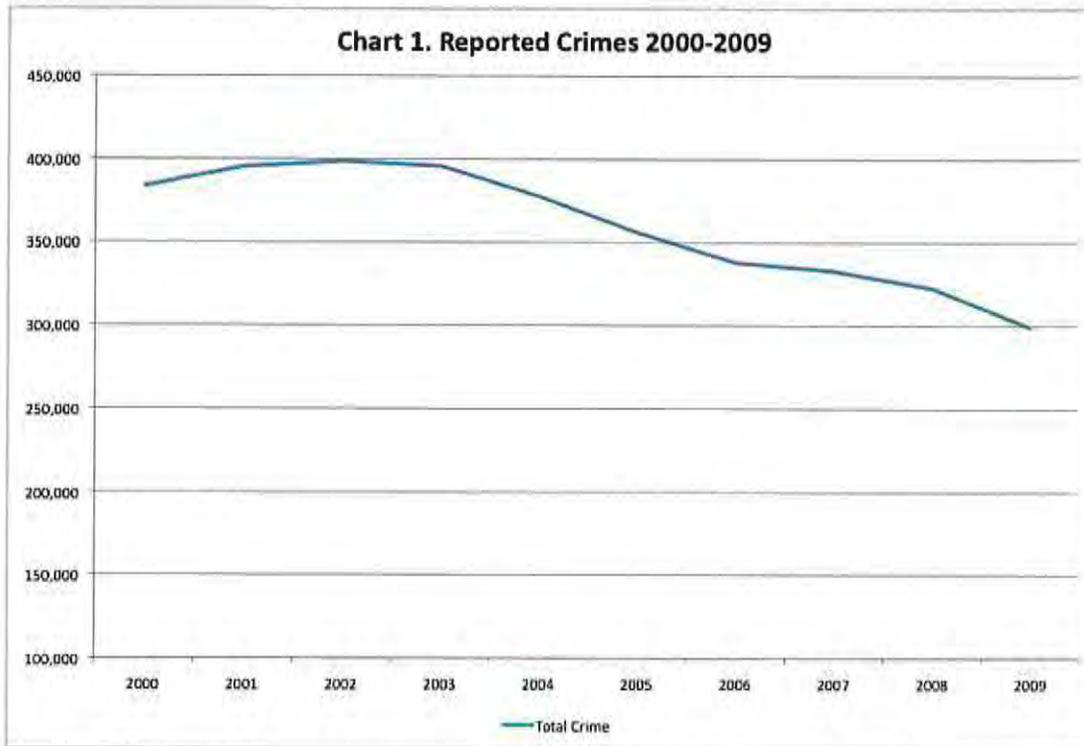


Table 2. Los Angeles County Reported Serious Crimes 2000-2009

Category/Crime	2000	2009	% Change
<b>Violent Crimes</b>	90,037	54,747	-39%
Homicide	1,000	699	-30%
Forcible Rape	2,761	2,114	-23%
Robbery	28,416	24,528	-14%
Aggravated Assault	57,860	27,406	-53%
<b>Property Crimes</b>	293,735	244,672	-17%
Burglary	60,597	50,558	-17%
M.V. Theft	64,265	46,710	-27%
Larceny-Theft	164,602	144,589	-12%
Arson	4,271	2,815	-34%
<b>Total Crime</b>	<b>383,772</b>	<b>299,419</b>	<b>-22%</b>

Source: California Attorney General, Criminal Justice Statistics Center

Both the Los Angeles Police Department (LAPD) and LASD (the two major sources of jail bookings) are reporting more current crime data. The LAPD is showing that serious reported crimes dropped by 7% between 2009 and 2010. The LASD has just released data for 2011 and 2012 for the months of January and February.

In its comparison, the LASD notes an uptick in the overall crime rate per 10,000 population the crime rate for those areas patrolled by the LASD (violent crimes have increased 6% while property crimes increased 10%). However, the five-year trend for the same two-month time period shows a 14% decline. More significantly, the crime rate today in the areas patrolled by the LASD is what it was in 1975 and the homicide rate is what it was in 1966.<sup>2</sup>

The number of people being arrested is a more central statistic as it reflects people who have the potential for being booked into the LASD jail system. In terms of adult arrests, the 2000 to 2009 patterns are somewhat mixed. The total number of arrests per year has increased 287,640 to 328,182.

For felony level arrests there was an increase from 2000 to 2005 followed by decline by 2009. Basically, the number in 2009 was almost the same as it was in 2000 despite an increase in the county population. So, the rate of arrests per 100,000 population has actually declined. The only increase with the felony level crime group was "other" which is not described in any detail.

Misdemeanor arrests represent a much larger group. Here, the trend has been upward but only for three crimes – possession of marijuana, violation of a city ordinance and Failure to Appear (FTA) for court orders. If one removes these three crimes from the total number of misdemeanor arrests, the adjusted total is unchanged. The significant fact about the FTA number is that such an arrest will result in a jail booking.

While this study does not directly concern FTA's, the sharp increase in these arrests suggests flaws in the current pretrial release process. For example, the Vera report noted that once released on bail or bond, the defendant does not receive any reminders from the court for the next scheduled court date.<sup>3</sup>

In terms of more recent data, the LASD reported a total of 48,370 adult felony arrests and 82,589 misdemeanor adult arrests or a total of 130,959 in 2010. This compares to 46,829 felony arrests in 2009 and 80,023 misdemeanors or a total of 126,352. The LAPD reported 129,133 adult arrests in 2010 versus 140,212 in 2009 – a 8% decline. If we combine these two major agency arrest numbers, we see no major increase in total adult arrests between 2009 and 2010.

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<sup>2</sup> [http://file.lacounty.gov/lasd/cms1\\_148405.pdf](http://file.lacounty.gov/lasd/cms1_148405.pdf)

<sup>3</sup> Vera Institute, 2011, page xv.

Table 3. Adult Arrests for Los Angeles County 2000-2009

Crime Type	2000	2005	2009
Adult Felony			
Total Felony	108,318	131,176	112,264
Violent	35,596	31,260	30,808
Property	28,245	32,073	29,302
Drugs	31,894	46,411	30,780
Other Sex	1,685	1,617	1,739
Other	10,898	19,815	19,635
Rate per 100,000 Adults	1,727.40	1,992.20	1,626.50
Adult Misdemeanor			
Total	179,322	197,487	215,918
Marijuana	9,044	10,801	14,727
City Ordinances	28,277	36,178	37,052
FTA	18,154	25,589	40,281
Total Adjusted	123,847	124,919	123,858
Rate per 100,000 Adults	2,859.70	2,999.20	3,128.20
Grand Total	287,640	328,663	328,182
Rate Per 100,000 Adults	4,587	4,991	4,755

Source: California Attorney General, Criminal Justice Statistics Center

### Historical Jail Admissions, Length of Stay and Average Daily Populations

We now shift our focus to the three key attributes of a jail system: The number of admissions, their length of stay (LOS), and the resulting daily jail population. In many ways, the size of a jail population is the product of decisions made by other criminal justice agencies. Certainly, the number of people arrested each year is a function of law enforcement deciding whom to arrest and for what charges. Once arrested, the courts decide whether to allow a defendant to be released on pretrial status (either via bail or own recognizance). If not released, the defendant will remain in custody until the court disposes of the charges that have been filed by the prosecutor. Once sentenced, the now offender may have to serve additional time in the jail until the sentence is completed. There are other nuances in the factors that drive a jail population. If a defendant fails to appear in court and is re-arrested, he or she will be returned to custody. If an offender fails probation or parole, that will also often result in admission to the jail until that matter is resolved. In the next section of the report additional data and analysis is presented on these and other matters affecting the jail population.

As noted in the Vera report, once arrested, there are several locations a person can be detained. The LASD operates over 20 field stations where an arrestee can be held in custody for a short period of time. The LAPD has its own detention facility, as do other law enforcement agencies. Since the focus of this study is the Los Angeles County Jail system which consists of eight major facilities (excluding the Mira Loma facility which is reserved for ICE inmates), we only analyzed people who were admitted to that core jail system.

As shown in Table 4, there has been a dramatic change in all three key jail population indicators. Since 1990, when the jail population was just over 22,000, it had dropped to just below 15,000 by September 2011. Similarly, the jail incarceration rate per 100,000 had dropped from 247 to 152 by October 2011.

The primary reason for decline was a dramatic reduction in the number of bookings – from 260,765 in 1990 to 142,862 in 2011. The decline in bookings appears to be the result of more persons being diverted at the LASD field stations and greater use of field citations. More recently, as noted above, there has been a decline in the number of persons arrested for felons.

The LOS data shows that since 2000, it has remained at the 40-day level. Compared to other large jail systems, this number appears to be high. For example, Maricopa County (Phoenix), Broward County (Ft. Lauderdale), and New York City, have lengths of stay that are below the 30-day range. But it may be that the LOS has not declined to the levels reported in other jurisdictions because as the Los Angeles jail population has declined, the residual jail population has become increasingly composed of persons charged with or sentenced for felony level crimes.

Table 4. Los Angeles County Jail Bookings, Length of Stay and Population  
1990 - 2011

Attribute	1990	2000	2010	2011
Jail Bookings	260,765	162,406	151,932	142,862
ALOS	31 days	43 days	40 days	39 days
Jail Population	22,003	19,297	16,663	14,863
Incarceration Rate	247	203	170	152
County Population	8.9 million	9.5 million	9.8 million	9.8 million
Crime Rate	4,595	2,754	2,021	NA

Source: California Department of Finance, California Attorney General, and LASD Booking and ADP Daily Reports

Table 5 makes some direct comparisons between the Los Angeles County jail population and overall California jail population. These data come from the California Department of Corrections (CDCR), Correctional Standards Authority (CSA) website plus data provided by the LASD. What is striking is that the only two statistics that distinguish the Los Angeles County jail population are the much longer LOS (39 days versus 17 days) and the much lower jail incarceration rate. The state's LOS would be much lower if Los Angeles was removed from the calculations. One would have expected the longer LOS to generate a much higher incarceration rate, but it does not.

Table 5. Comparisons Between Los Angeles County and State-wide Jail Populations  
September 2011

Indicator	California	Los Angeles
Total Population	71,293	14,749
Pretrial	71%	70%
Felony	80%	78%
Incarceration Rate per 100,000 population	189	152
Average LOS	17 days	39 days

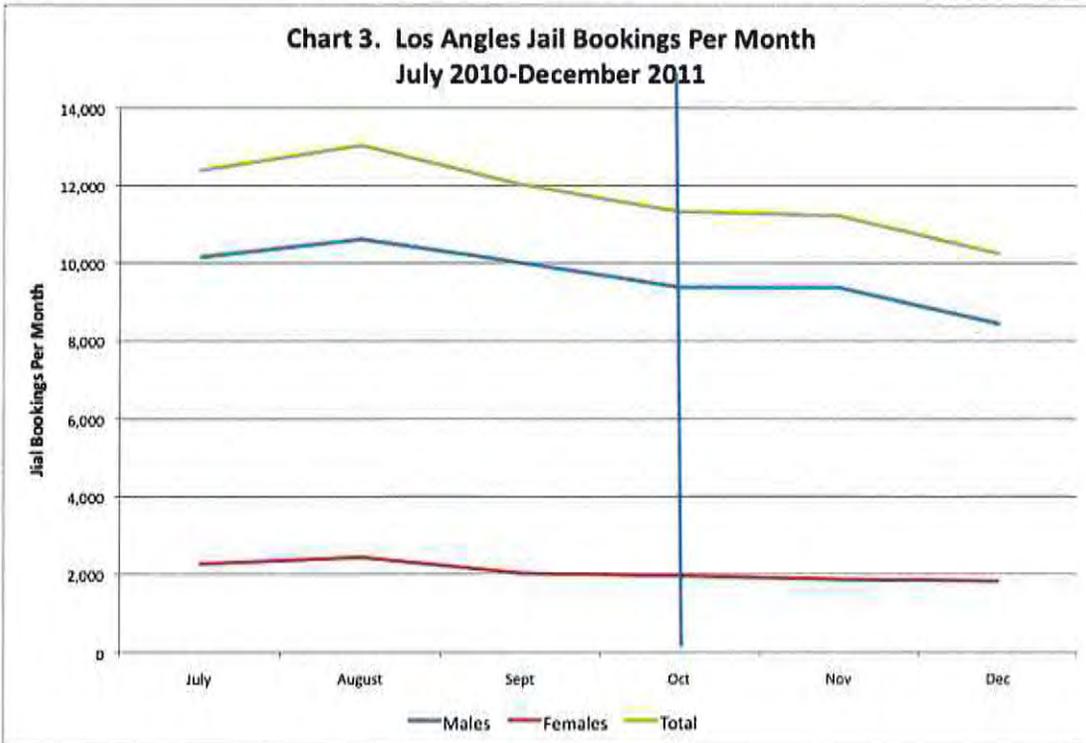
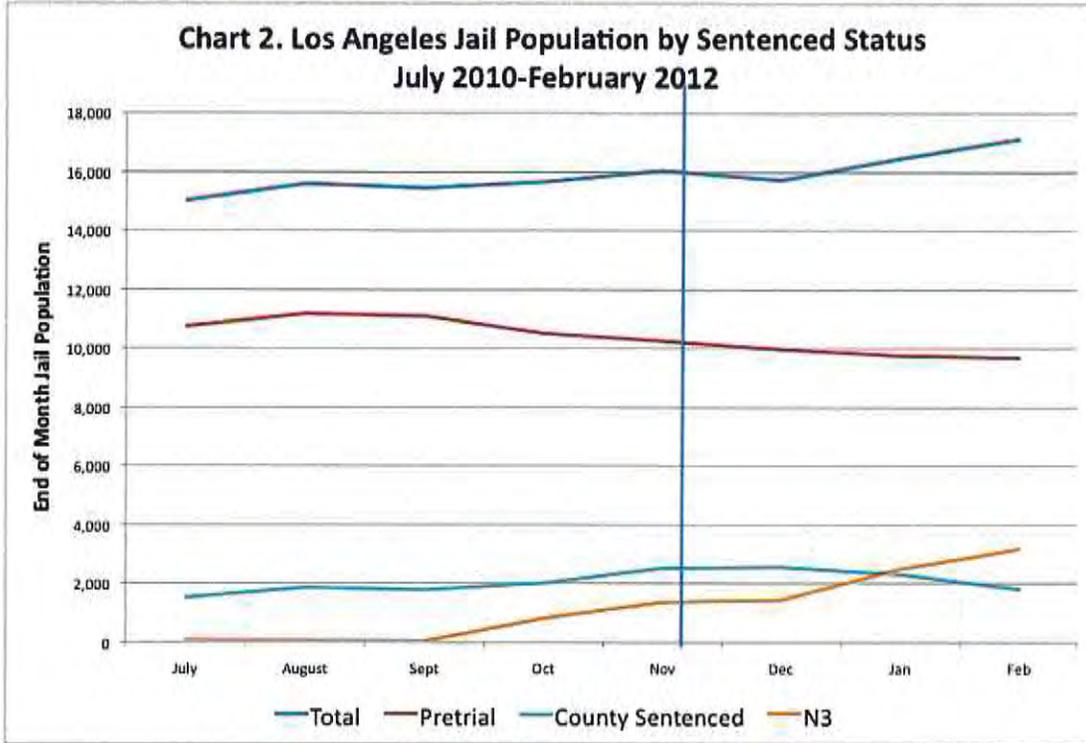
Source: CDCR, CSA Jail Survey, 3<sup>rd</sup> Quarter 2011

#### Current Los Angeles Jail Admissions, Releases and the Daily Population Attributes

The next section of the report evaluates in greater detail the more current trends in Los Angeles County jail admissions, releases and the daily population. The analysis is necessarily separated into two time frames – pre and post AB 109. As most readers are now aware, the passage of AB 109 is and will continue to have a profound impact on both the state prison and local jail populations. Effective October 1, 2011, the state courts began sentencing state prisoners convicted of non-violent crimes and who have no prior violent or sex convictions to serve their sentence in the local jails. It is estimated that over 20,000 inmates labeled as the N3s will now be housed in the local jails. Of that number, about 7,000 are projected to be housed in the Los Angeles County jail system. Consequently, all of the analysis must now take into account the sudden surge in the local jail populations.

Relative to AB 109, the legislation will have no impact on total bookings and releases. The same number of people who are arrested and convicted of N3 crimes will continue to be processed by the court system. The only difference is that after being sentenced, the prisoner will remain in jail until the sentence is completed. All of the good time he or she would have received in the state prison still applies. A major difference is that there is no longer any parole supervision requirements for the offender. Once the sentence is complete, the person's sentence is ended.

Chart 2 shows the most recent trends in the key legal statuses of the LA County jail population. Significantly the two key non-AB 109 populations (pretrial and county sentenced inmates) have actually declined slightly.



In fact, were it not for AB 109 the LA jail population would have been approximately 14,000. The increase has come from the AB 109 population which is rapidly approaching 3,500 and is likely to peak in two years at 7,000. If one looks at the bookings since July 2010, one sees a gradual decline in these numbers – again consistent with the demographic, crime and arrest trends (Chart 3).

As part of the study, JFA received a large data file that consisted of all persons admitted to the Los Angeles jail system via the Inmate Reception Center (IRC) since between January and December 2011. JFA programmers transformed that large data file into two key sub-files: One was a snapshot of the jail population as of December 2011 which consisted of 16,277 people; the other was a file of all inmates admitted and released in 2011. These two data files offered some detailed analysis of the attributes of people admitted and released from custody each year and the daily population that is housed in the system. We also received a second snapshot data file that was created by LASD staff on February 13, 2012 to verify our initial results and continue to track the growing AB 109 population.

#### The Daily Jail Population

Table 6 summarizes the key attributes of the daily population as of December 2011 for each of the major facilities. These statistics may differ slightly from the formal inmate counts reported by LASD on a daily basis, as there are some delays of entering all of the transfer and placement movements in a timely manner. But in general, the population attributes appear to be accurate and reflective of both the overall population and the population assigned to each facility.

Each facility and the system as a whole have capacities that exceed the inmate population. In total the inmate population was 16,277 while the total bed capacity was 20,445, not including the 1,624 beds at the temporarily closed South Annex facility. The total bed capacity as of this date was about 22,000. But as will be pointed out later on, the excess capacity will be largely exhausted in the next 18 months due to the influx of AB 109 inmates.

The population is largely male (88%) and largely non-white (49% Hispanic, 31% Black, and 15% white) with an average age of 34 years. Approximately 13% of the population is age 50 years or older while 28% are between the ages of 18 and 25 years.

Table 6A shows the primary offense of the February 12, 2012 population by sentence status. The primary offenses are homicide, assault, robbery, drug possession, drug possession with intent to sell, burglary and theft. Overall, about half of the pretrial and pretrial/sentenced populations are charged with violent or sex crimes. This profile shows that most of the minor crimes have been quickly removed from custody via the existing pretrial release process. The fact that most of the sentenced population have been convicted of a non-violent drug offense also shows that a sizeable portion of this population may be more suitable for alternative placements.

**Table 6. Attributes of the Los Angeles County Jail Population by Facility - December 2011**

Attribute	Central Jail	Twin Towers	CRDF	PDC NCCF	PDC South	PDC East	Out Patient	Mira Loma	Total
Bed Capacity	5,260	4,820	2,380	4,294	1,536	1,944	559	1,452	20,793
Totals	3,763	2,814	1,916	3,523	886	1,491	211	737	15,341
Gender									
Female	0%	1%	100%	0%	0%	0%	0%	0%	12%
Male	100%	99%	0%	100%	100%	100%	100%	100%	88%
Race									
Black	35%	34%	34%	32%	31%	29%	47%	0%	31%
Hispanic	44%	40%	39%	56%	45%	59%	38%	91%	49%
Asian	3%	4%	3%	2%	3%	3%	2%	9%	3%
White	18%	20%	23%	9%	20%	8%	12%	0%	15%
Average Age	36 yrs	38 yrs	35 yrs	31 yrs	39 yrs	28 yrs	45 yrs	34 yrs	34 yrs
Average Days in Custody to Date	150 days	121 days	101 days	106 days	98 days	153 days	123 days	102 days	127 days
Security Level									
Low	12%	0%	20%	0%	21%	0%	7%	100%	15%
Medium	68%	74%	67%	73%	79%	100%	72%	0%	70%
High	20%	16%	11%	26%	0%	0%	19%	0%	14%
Unclassified	0%	0%	1%	0%	0%	0%	0%	0%	1%
Legal Status									
Pretrial	42%	50%	39%	44%	25%	44%	46%	100%	45%
Pre and Sentenced	21%	19%	15%	21%	10%	25%	18%	0%	18%
Sentenced	37%	32%	47%	35%	65%	31%	36%	0%	37%
Charge Level									
Felony	84%	82%	80%	85%	78%	87%	88%	0%	78%
Misdemeanor	13%	15%	17%	12%	20%	9%	8%	0%	15%
ICE	0%	0%	0%	0%	0%	0%	0%	100%	5%
Other	3%	3%	3%	3%	2%	3%	3%	0%	3%
% of Total	25%	18%	12%	23%	6%	10%	1%	5%	100%

Source: LASD data files. Not included is the temporary IRC population (about 500 inmates) and the PDC South Annex facility which was closed as of December 2011. That facility has a capacity of 1,624.

**Table 6A. Los Angeles County Jail Population as of February 2012  
Primary Crime by Sentence Status**

Most Serious Charge	Pretrial		Pretrial and Sentenced		Sentenced	
Totals	6306	100.0%	3120	100.0%	7022	100.0%
Willful homicide	899	14.3%	555	17.8%	53	0.8%
Vehicular manslaughter	17	0.3%	8	0.3%	16	0.2%
Forcible rape	67	1.1%	32	1.0%	25	0.4%
Robbery	634	10.1%	390	12.5%	257	3.7%
Assault	1,082	17.2%	665	21.3%	1,279	18.2%
Kidnapping	90	1.4%	37	1.2%	10	0.1%
Lewd or Lascivious	169	2.7%	26	0.8%	45	0.6%
Other sex	142	2.3%	65	2.1%	96	1.4%
Sub-Total Violence/Sex	3,100	49.2%	1,778	57.0%	1,781	25.4%
Drug sale	162	2.6%	83	2.7%	298	4.2%
Drug poss w/ intent	167	2.6%	58	1.9%	246	3.5%
Marijuana possession	66	1.0%	34	1.1%	107	1.5%
Possession/other drug	648	10.3%	264	8.5%	1,163	16.6%
Sub-Total Drugs	1,043	16.5%	439	14.1%	1,814	25.8%
Burglary	549	8.7%	280	9.0%	763	10.9%
Theft	440	7.0%	211	6.8%	1,087	15.5%
MV theft	21	0.3%	12	0.4%	47	0.7%
Forgery	75	1.2%	47	1.5%	170	2.4%
Weapons	62	1.0%	44	1.4%	161	2.3%
DUI	107	1.7%	48	1.5%	239	3.4%
Arson	32	0.5%	4	0.1%	14	0.2%
Other felony	390	6.2%	170	5.4%	305	4.3%
Prob./parole violation	39	0.6%	33	1.1%	436	6.2%
Other	448	7.1%	54	1.7%	205	2.9%

The inmate classification system used by the LASD to house inmates is based on a decision-tree system that was developed by the Northpointe Institute. The vast majority of inmates are assigned to medium custody with only 14% placed in high custody and another 15% in low (or minimum) custody (Table 7). The proportion of low custody inmates is quite small compared to other jail systems and California jails. The CDCR, CSA jail survey noted earlier reported that for all of the California jails, the proportion assigned to minimum custody is 24%. That percentage would be even higher if the Los Angeles jail data were removed from the CSA statewide data which includes the LASD data.

Table 7: Comparison of State Jail and Los Angeles County Jail Inmate Custody Levels as of 2011

Custody Level	State Total		Los Angeles Jail	
	Inmates	%	Inmates	%
Max	22,478	32%	2,148	14%
Medium	31,425	44%	10,379	70%
Minimum	17,390	24%	2,304	15%
Total	71,293	100%	15,341	100%

Source: CDCR, CSA and LASD data files

There are two probable reasons for the low number of "low custody" inmates. First, the design of the Northpointe Institute decision tree instrument now includes a reclassification instrument that is to be applied to all inmates who have been in custody for 30-90 days depending upon their current custody level. The reclassification instrument, like all custody instruments, is designed to move prisoners to lower custody levels based on their institutional conduct. Since the vast majority of inmates do not become involved in serious disciplinary incidents while incarcerated, there should be a large shift from maximum to medium custody, and, from medium to minimum custody. As shown in Table 6, the average time served for the current jail population is 127 days which means that the vast majority of the current population should be on the reclassification instrument.

The Northpointe instrument design is also unique for three other reasons: It uses legal status as a restriction (pretrial versus sentence), it does not use age which is a good predictor of misconduct, and it does not have a separate scale for the females. All three of these omissions tend to over-classify inmates.

The Northpointe reclassification instrument also makes it difficult for some inmates to move to a lower custody level even if their conduct is positive. Further, based on interviews with the LASD classification staff and Northpointe representatives, the LASD is not applying the reclassification instrument as designed by Northpointe which is further restricting the movement of medium custody inmates to minimum custody thus causing some level of over-classification.

Spot audits of inmates housed at the South Facility found several well-behaved and older inmates who were housed in low security dorms, but were classified by Northpointe as high-medium (levels 7 and 6) custody. Clearly, the Northpointe system and the LASD's lack of adherence to the system needs to be addressed.

Another key statistic in Table 6 is the legal status of the inmate population. We had reported that the LASD aggregate level reports show that 70% of the current jail population is in pretrial status. But what that statistic does not show is that the 70% included inmates who have been sentenced on one or more charges and have at least one pending charge. Thus the percentage of "pure" pretrial cases is 45% and not 70%.

And for those that are in "pure" pretrial status (7,316 as of December 2011), 25% of them had a "no bail" order imposed by the court. These and other factors serve to greatly restrict the number of pretrial defendants who can be released on bail, surety bond or own recognizance. These other factors are described later on in the report.

#### Jail Admissions, Releases and Length of Stay

Last year, there were over 400,000 admissions into the LASD county-wide custody division which includes the various field stations.<sup>4</sup> As reported earlier, only 142,862 resulted in being booked into the main county jail system. This section of the report provides more detailed information on these admissions. What follows are some of the major findings:

1. Of the 142,862 bookings in a year approximately 25,000 were the same person who was admitted more than once in the 12-month time period. The actual number of mutually exclusive people booked into custody is approximately 118,000 (Table 8).
2. The overall LOS for the people who were released was approximately 40 days.
3. Approximately 37% of the bookings are released within 7 days.
4. Those who are not released within 7 days have an average LOS of approximately 87 days.
5. The vast majority (66%) of the releases are people being released to the community (pretrial) or under probation and parole supervision. Only 18% are being released prior to having their cases disposed of by the courts. This statistic shows that increasing the number of pretrial releases will have less of an impact on the jail population as opposed to a) reducing the time people spend waiting for their cases to be disposed of by the courts or b) reducing their time to serve after being sentenced.
6. The most common reasons for people being released from custody are a) completing inmates completing a sentence or b) being transferred to the custody of another correctional agency.
7. There are large number of releases being made to the CDCR for both new court commitments and parole violations. The numbers of releases will decline significantly with the implementation of AB109. Taking their place, in part, will be persons completing their AB 109 sentences at the Los Angeles County Jail.
8. However, the number of CDCR technical parole violation admissions and releases will decline as use of the parole supervision is no longer required for the AB 109 sentenced offenders.

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<sup>4</sup> This number is consistent with the number reported in the previously referenced Vera Institute study.

9. There is a large number of people who are released to the custody of ICE ( 19,725 releases in 2011). These releases are largely Hispanic males who spend an average of 39 days in custody and occupy approximately 2,000 beds on any given day. They are also largely low and medium custody under the Northpointe Institute classification system.

Table 8. Summary Statistics on Jail Admissions and Releases – 2011

Total County-wide LASD Admissions	400,000
Total Jail System Custody Bookings	142,000
Number of People Admitted	118,000
Overall Length of Stay	39 days
% released within	
1 day	19%
2 days	30%
3 days	36%
7 days	47%
Number Released after 7 days	70,000
Average LOS if not released within 7 days	87 days

Source: LASD data files

Table 9. Primary Release Reason – 2011

Release Reason	Total	%
Pretrial Releases	24,742	18%
Sheriff release	4,622	3%
Pretrial Release to Detainer	611	0%
Bond or Bail	7,643	5%
Sheriff Misdemeanor Citation	3,780	3%
Dismissal of Charges	1,437	1%
Court Ordered Release	4,198	3%
ROR	2,451	2%
Sentenced Releases	67,182	48%
Sentence Expired	9,079	7%
Sentenced to Probation	4,139	3%
Transfer to State Parole Supervision	15,153	11%
Sheriff Shortened Sentence	38,811	28%
Transfer to Other Custody	38,089	27%
Transfer to Other State Prison	548	0%
Transfer to CA Prison	17,816	13%
Transfer to ICE/US Immigration	19,725	14%
Other/Unknown	9,605	7%
<b>Total</b>	<b>139,618</b>	<b>100%</b>

Source: LASD data files

Table 10. Summary of Inmates Released to the Custody of ICE  
2011

Total ICE Releases to USIM	19,725	100%
Hispanic	18,095	92%
Male	19,002	96%
Low Custody	8,574	43%
Medium Custody	10,713	54%
LOS	39 days	
Daily Population	2,100	

Source: LASD data files

## Jail Population Projections

Relying upon these trends population projections were developed to estimate the future size of the jail population. These estimates are separated into groups. The first estimate is for the jail population that is not being sentenced under AB 109. In essence, it represents what the population would have been had AB 109 not passed. The second is just for the AB 109 population. It is based on a data file being managed by the LASD which records the offense, sentence length, and projected time to serve as an AB 109 inmate.

### Non-AB 109 Inmate Population

The current trends suggest that bookings and releases for the jail are likely to decline slightly over the next five years. The at-risk population for the County is not expected to increase. Crime rates are likely to remain low. In terms of arrests, they should also remain stable as a function of stable crime rates and no additions to the law enforcement patrol work force due to budget constraints. Overall there should be no increases in bookings for next few years under good trends and policies. The LOS for the non-AB109 releases should also remain constant at the 39-40 day rate.

Based on these assumptions, the Non-AB 109 jail population will remain at the current 15,000 with two adjustments. Traditionally, there is a pool of sentenced inmates who are awaiting transfer to the CDCR. Prior to October 1, 2011, this number averages about 1,100 inmates on any given day. Some portion of this group are now the AB 109 offenders who will included in the AB 109 estimate. As of February 1, 2012, the number of state inmates with no pending charges had dropped to 612 or about 500 below the pre AB 109 time period.

The second adjustment will be for the CDCR technical parole violators. Under AB 109, there is no post release supervision requirements for the N3 offenders. This means that the number of CDCR technical violators housed in the jail will also decline. Prior to AB 109, that number was 1,259. By February, it had declined to 748. One would expect that number to decline even further over the remainder of the year.

Based on these two adjustments, the base projection for the Non-AB 109 jail population declines to about 14,000 by the end of 2012 and remains at that level (See Table 11). Should crime rates continue to decline there would be a further reduction in the jail population but probably no more than another 1,000 reduction by 2015.

### AB 109 Population Projections

The LASD has provided JFA with a data file that records key information about the number and attributes of persons being sentenced under AB 109. As shown in Table 12, as of February 29, 2012 there had been 3,535 persons so sentenced. The average sentence is 765 days with a projected length of stay of 305 days (which includes their pretrial credits). Based on these numbers, this population will reach approximately 5,454 by the end of this year and peak at about 7,000 by the year 2014.

Table 11. Current and Projected Los Angeles Jail Population

Population	End of Year				
	2011	2012	2013	2014	2015
Male Pretrial	9,275	9,182	9,228	9,182	9,219
Female Pretrial	1,062	1,051	1,057	1,051	1,056
Male County Sent	1,728	1,711	1,719	1,711	1,718
Female County Sent	367	363	365	363	365
CDCR Sentenced	815	600	603	600	600
CDCR Tech Parole	754	400	402	400	400
ICE Mira Loma	751	625	628	635	625
Non AB 109 Total	14,752	13,933	14,002	13,942	13,982
AB 109 Males	1,542	4,482	5,460	5,822	5,896
AB 109 Females	298	972	1,130	1,196	1,200
Sub-Total AB 109	1,410	5,454	6,590	7,018	7,096
Grand Total	16,162	19,387	20,592	20,960	21,078

This number of 7,000 is consistent with an early projection made by JFA as part of the federal court order in the Plata/Coleman case governing prison crowding in the CDCR. That analysis also showed that significant percentages of this population were classified by the CDCR using its risk assessment tool as moderate to low risk to recidivate (Table 13).

Some California counties have been reporting a drop in probation dispositions as defendants opt out for an AB 109 sentence. This is due to the fact that most of these inmates have already served 3-6 months in pretrial status, and would prefer to serve the rest of their sentence in the jail with no post-release probation supervision.

Based on all of these trends it is estimated that the LA County Jail will reach almost 20,000 inmates by this year and peak at about 21,000 the following year and remain at that level through 2015. Again these projections may be reduced if the crime rate and bookings continue to decline albeit at a reduced rate. Any changes in the court processing of pretrial cases by the courts would also serve to reduce the length of stay and thus the pretrial population. Finally the size of the ICE population being held at the Mira Loma facility which numbered about 600 as of March 2012 is subject to change.

Table 12. Key Attributes of AB 109 Sentences  
October 2011 – February 2012

	N	%	Avg. Sent. (days)	Avg. Days to Serve
Total AB 109 Sentences	3,535	100.0%	765.0	305.5
Gender				
Male	2,898	82.0%	775.2	310.2
Female	637	18.0%	718.4	284.4
Most Serious Charge				
Vehicular manslaughter	4	0.1%	851.5	406.0
Forcible rape	3	0.1%	730.0	216.3
Robbery	9	0.3%	635.2	214.7
Assault	115	3.3%	737.8	259.5
Burglary	509	14.4%	691.5	286.8
Theft	884	25.0%	712.8	287.2
MV theft	39	1.1%	698.5	268.5
Forgery	118	3.3%	654.8	261.3
Marijuana	94	2.7%	691.5	271.2
Other drug	4	0.1%	699.3	321.3
Other sex	2	0.1%	486.0	55.5
Weapons	161	4.6%	613.0	234.5
DUI	102	2.9%	617.0	244.9
Hit and run	4	0.1%	608.0	214.5
Arson	1	0.0%	1095.0	206.0
Other felony	197	5.6%	715.3	272.6
Drug possession	915	25.9%	728.9	288.0
Drug possession/intent	193	5.5%	1189.6	484.3
Drug sale	170	4.8%	1437.1	597.2
Missing	11	0.3%	-	-

Table 13. Expected Attributes of the Los Angeles County AB 109 Inmates Based on Inmates Housed in the CDCR July 2011.

Attribute	Inmates	%	Attribute	Inmates	%
Total	7,195	100%	CDCR Risk Level		
			High Drug	958	13%
Race			High Property	1,525	21%
Black	2,314	32%	High Violent	927	13%
White	1,320	18%	Moderate	2,149	30%
Hispanic	3,245	45%	Low	1,493	21%
Gender			Mental Health Problem	1,050	15%
Male	6,098	85%	Gang Member?	1,167	16%
Female	1,097	15%	Any Prior Felonies?	4,331	60%
Crime			Any Prior Serious Felonies	0	0%
Person	569	8%	Any Prior Violent Felonies	0	0%
Drugs	3,400	47%	Committed Crime on Parole	2,146	30%
Property	2,724	38%	Committed Crime on Probation	1,120	16%
Other	502	7%	ICE Hold	648	9%

Source: CDCR data file

#### Recommended Population Control Options

In order to prevent the projected increase in the jail population two basic recommendations are being made to the LASD – implement a pretrial release program and a comprehensive re-entry program for all sentenced inmates. This section of the report describes what these two programs would look like and their impact on the projected jail population.

#### Pre-Trial Release

There is no question that the County lacks a comprehensive pretrial program. Although the Los Angeles County Probation Department operates such a program, it has little if any impact on those people being admitted to the custody division. What is required is such a program that will deal with the significant number of inmates who eventually are being released by the courts but are spending an excessive period of time in custody.

To test this proposition a pilot or “stress” test of criteria that could be applied to the pretrial population was conducted with the assistance of the LASD. The focus was on the existing pre-trial population. We began with the total pretrial population (about 10,545) and then applied the following criteria for all pretrial cases that had been in custody for at least 7 days with the number of inmates who are left after the criteria is applied:

1. Original pool of 10,545 pretrial inmates in custody;
2. Less those not already sentenced to another crime (7,044);
3. Less those with no outstanding warrants (4,978);
4. Less those with no “no bails” (2,964);

5. Less those with assaultive crimes that prohibit pretrial (1,753); and,
6. Less those in maximum or high security (1,367).

Here one can see that the number eligible for pretrial release drops to only 1,367. We then applied to a random sample of the COMPAS risk instrument and found that a large percentage were classified as high risk. However, the COMPAS risk instrument may need to be adjusted for three reasons. First, it has not been normed on the Los Angeles County population. Second, a prior study of COMPAS on Broward County jail population by the Florida State University found the FTA risk instrument was not a strong predictor of FTA. Third, as pointed out by JFA in its study of Broward County, the so called high risk pretrial releases actually have low FTA and pretrial arrest rates. So a better use of risk for this purpose would be higher risk rather than high risk.

The LASD has formulated a very comprehensive and detailed plan to implement a pretrial supervision program.<sup>5</sup> Based on the stress test noted above, that program, if implemented with a sound risk assessment and supervision component, should be able to reduce the projected pretrial population by 750 males and 250 females.<sup>6</sup>

#### Sentence Re-entry Programs

The most effective way to safely reduce the jail population will be to develop a re-entry program where sentenced inmates would have their imposed sentences reduced by participating in services that will serve to reduce their risk of re-offending.

The LASD has already made great strides in the area through its newly launched Education Based Incarceration (EBI) program. On any given day, approximately 1,200 inmates are receiving counseling and education services that are designed to reduce their risk.

As the same time, the County is not using so called "blended" sentences for the N3 inmates. Conversations with Contra Costa and San Diego County Probation Chiefs indicate that their counties are using the blended sentences in a large proportion of their AB 109 cases. But, it does not appear that this will occur any time soon in Los Angeles. However, under AB 109, the Sheriff has the legal authority to place these inmates in the community prior to the completion of their sentence under some form of supervision. In Los Angeles, this supervision would be similar to the level being provided by the proposed LASD pretrial community control division.

Prior research also shows that altering the inmate's LOS does not have an impact on recidivism for this class of offenders.<sup>7</sup> The CDCR has also reported that significant

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<sup>5</sup> "Pretrial Services Project, Research, Roadmap, and Vision. Reducing jail population by target-specific measures while maintaining public safety." LASD, Offender Services Division.

<sup>6</sup> Such a program could also be operated by the Los Angeles Probation Department or a program operated jointly by the LASD and Probation Department.

<sup>7</sup> California Expert Panel on Adult Offender and Recidivism Programming. (2007). Sacramento: CA: California Department of Corrections and Rehabilitation.

proportions of the AB 109 are not high risks to recidivate. So we can be confident by using the EBI program as re-entry program, it will be possible to moderately reduce their LOS without jeopardizing public safety.

One way that this could be achieved is for inmates who are sentenced to the county jail (after having served several months in pretrial custody) be given the opportunity to participate in one of the EBI's many programs. Upon completion of a program, the inmate would be released to community supervision and continuation of services as required.

The impact on the AB 109 population can be estimated based on the following assumptions.

1. There will be an estimated 8,500 AB 109 admissions each year.
2. 75% of these inmates will participate in the EBI programs prior to being released.
3. Upon completion, they will have their sentence reduced by an average of four months.
4. 20% of these people will be re-arrested and be returned to custody for an average of two additional months.
5. Based on these assumptions, the projected AB 109 population of 7,000 would be reduced by approximately 2,000 inmates.

#### Bed Capacity Options and Recommendations

As noted earlier in the report, the current jail system has over 22,000 beds that if staffed can be used to house inmates. This number does not include the 1,452 bed Mira Loma facility located in Lancaster which is currently used exclusively for ICE detainees. This section of the report describes several immediate and long-term opportunities to further increase the current bed capacity and that ultimately would allow the closing of the antiquated and poorly designed Central Jail facility. These are not the only options available but suggest some pragmatic steps the LASD could take.

There is consensus within the LASD and other external observers that the long-term objective is to eventually remove all of the male inmates now housed at the Central Jail facility. But in so doing, the LASD will lose 5,260 beds. The so-called "new" part of Central Jail has 1,836 beds but it is currently closed. The remainder of Central Jail is used for a wide variety of low, medium and high custody inmates. In particular, there are nearly 500 beds that are reserved for administrative segregation inmates and others that must be kept separate from other inmates (K-10s).

One option to increase the bed capacity and in particular the maximum security beds that the LASD would lose if Central Jail were to close, is to modify the current space at the North County Correctional Facility (NCCF). NCCF is a modern maximum security complex that is well suited for housing inmates in high and medium custody. It is designed to operate as five separate units and provide for disciplinary segregation and

excellent medical and mental health service capabilities. It also contains three large vocational service areas for printing, sign painting and clothing production. One option we would recommend is to transform the three vocational training units into secure housing units.

We estimate that the vocational area space could hold 600 cells, each being capable of being double celled for a total additional bed capacity of 1,200 inmates. But assuming that 100 of the cells would only be used for single cells, the more realistic bed capacity would be 1,000. This would be more than sufficient to cover the K-10 and Administrative Segregation beds now being used at Central Jail.

The vocational training services would be re-located in the newly constructed and larger vocational training and education service center for the Sheriff's EBI rehabilitation programs.

The second opportunity to add approximately 500 minimum security beds would happen by assuming the management of five CDCR conservation camps (including the Malibu 105 bed female unit).<sup>8</sup> These five camps are being relinquished by the CDCR and can be taken over by the LASD. These beds could be easily used to the rising AB 109 population since prior to the passage of AB 109, many of the inmates who are AB 109 candidates were housed in these camps

These two options, as shown in Table 14 would increase the overall LASD jail bed capacity by about 1,500 beds.

A second option would be to reconfigure and renovate part of Central Jail and use it to house most of the 1,900 women now housed at Century Regional Detention Facility (CRDF). The logic of this alternative would be as follows: The current negative culture associated with Central Jail would be transformed by having a much lower security population there. CRDF would be used largely to house medium and low custody male inmates. Having females would be a temporary move until a more permanent and modern facility could be constructed for the women.<sup>9</sup>

Finally, there is the potential to construct a new female facility. The LASD has preliminary plans for a 1,500 bed facility at the PDC. If the recommended pretrial and re-entry programs are implemented such a facility would be sufficient to house the entire female population. At issue is whether it would be wise to have all of the women at a single location or be able to house some portion of the population in the downtown area to facilitate court appearances and access to the medical facilities at the Twin Towers facilities. These are details that need to be developed once the full effects of the pretrial release and AB 109 re-entry programs are fully implemented.

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<sup>8</sup> There are an additional 5 fire camps that the county could add to the ones that are now being used to house state inmates.

All of the jail bed capacity figures are reduced by 10% to allow for seasonal fluctuations in the jail population and the need to separate special need and high-risk inmates. The 10% reduction will ensure the jail system will not be crowded for any sustained period of time.

Table 14. Summary of Possible Bed Capacity Options

Facility	Current	Option A	Option B	Option C
Central Jail	5,260	1,500	500	0
Twin Towers	4,820	4,820	4,820	4,820
CRDF	2,380	2,380	2,380	2,380
Peter Pitchess DC				
NCCF	4,294	5,294	5,294	5,294
South	1,536	1,536	1,536	1,536
South Annex	1,624	1,624	1,624	1,624
East	1,944	1,994	1,994	1,994
Out Patient	600	600	600	600
Conservation Camps	0	500	500	500
New Women's Facility	0	0	0	1,500
Totals	22,458	20,248	19,248	20,248
Mira Loma	1,452	1,452	1,452	1,452
Grand Totals	23,910	21,700	20,700	21,700
At 90% Capacity	21,519	19,530	18,630	19,530

#### Projected Populations and Capacity Options

Assuming the LASD is able to successfully implement the supervised pretrial and sentenced re-entry programs program, plus make the recommended capacity adjustments, would there be sufficient bed space to safely house the projected inmate population? The answer is yes. Table 15 summarizes the results of the projected effects of each scenario. The "base projection" represents the status quo with Central Jail remaining operational and opening up its now closed units. It would also mean that the LASD is unable to implement the supervised pretrial release program and the re-entry program.

Option A assumes that Central Jail remains partially opened by temporarily housing the female population at a renovated portion of the facility and the rest of them at one of the conservation camps. Central Jail may also be renovated to create classroom space to provide much needed treatment services to the female population.

Option B reduces the female jail population to 500 and mostly pretrial women whose family reside near downtown Los Angeles. Depending upon the ability of the LASD to launch the pretrial and re-entry programs, it may be possible to relocate a sizeable portion of the female population at the Twin Towers facility.

Table 15. Summary of Projected Inmates Population by 2015 and Capacity Options

Item	Current Trend	Option A	Option B	Option C
Capacity	23,910	21,700	20,700	21,700
Central Jail	5,260	1,500	500	0
Functional Bed Capacity@ 90%	21,519	19,530	18,630	19,530
Populations by 2015				
Pretrial	10,325	9,325	9,325	9,325
County Sentenced	1,830	1,830	1,830	1,830
Awaiting Transfer to CDCR	600	600	600	600
CDCR Tech Violators	400	400	400	400
ICE Mira Loma	625	625	625	625
AB 109	7,096	5,096	5,096	5,096
Totals	20,876	17,876	17,876	17,876
Surplus Beds @90% Occupied	643	1,654	754	1,654

Option C envisions the construction of the new female facility at the PDC complex. Current plans call for a 1,500 bed facility, which may or may not be needed for reasons cited earlier in the report.

All of the options provide sufficient bed space with a 10% vacancy rate throughout the system to ensure the jail system can safely manage the inmate population taking into account seasonal fluctuations in the population and the need to separate high risk and special needs inmates.

#### Other Issues

##### Inmate Classification

We have already noted that the current inmate classification system is over-classifying inmates for medium custody. This is occurring due to LASD policy and the design of the Northpointe Institute instrument. It should also be adjusted for females so that it does not over-classify them. This latter point will be important as the Department determines the

best long-term facility solution for the women. These issues can and should be corrected in consultation with Northpointe.

#### Pretrial Risk Assessment

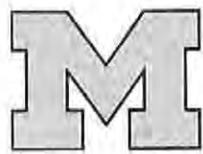
In a similar manner, the COMPAS risk assessment system should be tested and normed for the LASD jail population. In particular, the FTA risk assessment instrument should not be used until the re-validation work is completed.

#### Evaluation of the EBI Programs

Since the LASD plans to expand the application of the EBI education programs, it would be appropriate at this time to begin a formal impact evaluation. Such a study can and should be done in tandem with the revalidation study of the COMPAS instrument.

#### Establish a Formal Research, Planning and Analysis Division

The LASD is fortunate to have a number of staff that are highly skilled in data extraction and analysis. Yet, it seems much of this work and talent is not concentrated or structured within a single unit. The LASD is like a major corporation without a formal R&D capability. Such a unit would be issuing formal population projections every six months, analysis of population trends and critical incidents, and, cost-benefit evaluations of new LASD programs and policies. Such a division would be directed by a person with an advanced degree in research methods, but experience in local corrections.



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**EVIDENCE-BASED SENTENCING AND THE SCIENTIFIC  
RATIONALIZATION OF DISCRIMINATION**

*SONJA B. STARR*

*FORTHCOMING IN STANFORD L. REV. 66 (2014)*

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## Evidence-Based Sentencing and the Scientific Rationalization of Discrimination

Sonja B. Starr\*

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### ABSTRACT

*This paper critiques, on legal and empirical grounds, the growing trend of basing criminal sentences on actuarial recidivism risk prediction instruments that include demographic and socioeconomic variables. I argue that this practice violates the Equal Protection Clause and is bad policy: an explicit embrace of otherwise-condemned discrimination, sanitized by scientific language. To demonstrate that this practice should be subject to heightened constitutional scrutiny, I comprehensively review the relevant case law, much of which has been ignored by existing literature. To demonstrate that it cannot survive that scrutiny and is undesirable policy, I review the empirical evidence underlying the instruments. I show that they provide wildly imprecise individual risk predictions, that there is no compelling evidence that they outperform judges' informal predictions, that less discriminatory alternatives would likely perform as well, and that the instruments do not even address the right question: the effect of a given sentencing decision on recidivism risk. Finally, I also present new, suggestive empirical evidence, based on a randomized experiment using fictional cases, that these instruments should not be expected merely to substitute actuarial predictions for less scientific risk assessments, but instead to increase the weight given to recidivism risk versus other sentencing considerations.*

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\* Professor of Law, University of Michigan. Thanks to Don Herzog, Ellen Katz, Richard Primus, and participants in Michigan Law's Faculty Scholarship Brownbag Lunch for their comments, and to Grady Bridges, Matthew Lanahan, and Jarred Klorfein for research assistance.

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## INTRODUCTION

*“Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. ... In this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations....[T]he central aim of our entire judicial system [is that] all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court.”*

--Griffin v. Illinois, 351 U.S. 12, 16 (1956)

Criminal justice reformers have long worked toward a system in which defendants' treatment does not depend on their socioeconomic status or demographics, but on their criminal conduct. How to achieve that objective is a complicated and disputed question. Many readers might assume, however, that there is at least a general consensus on some key “don'ts.” For example, judges should not systematically sentence defendants more harshly because they are poor or uneducated, or more lightly because they are wealthy and educated. They should not follow a policy of increasing the sentences of male defendants, or reducing those of females, on the explicit basis of gender. They likewise should not increase a defendant's sentence specifically because she grew up without a stable, intact family, or because she lives in a disadvantaged and crime-ridden community.

It might surprise many readers, then, to learn that a growing number of U.S. jurisdictions are adopting policies that deliberately encourage judges to do all of these “don'ts.” These jurisdictions are directing sentencing judges to explicitly consider socioeconomic variables, gender, age, and sometimes family or neighborhood characteristics—not just in special contexts in which one of those variables might be particularly relevant (for instance, ability to pay in cases involving fines), but routinely, in all cases. This is not a fringe development. At least eight states are already implementing some form of it. One state supreme court has already enthusiastically endorsed it.<sup>1</sup> And it now has been embraced by the American Law Institute in the draft of the newly revised Model Penal Code—a development that reflects its mainstream acceptance and, given the Code's influence, may soon augur much more widespread adoption.<sup>2</sup> There is a similar trend in Canada, the United Kingdom, and other foreign jurisdictions.<sup>3</sup> Meanwhile, the majority of states now similarly direct parole boards to take demographic and socioeconomic factors into account.

The trend is called “evidence-based sentencing” (hereinafter EBS). “Evidence,” in this formulation, refers not to the evidence in the particular case, but to empirical research on factors predicting criminal recidivism. EBS seeks to help judges advance the crime-prevention objectives of punishment by equipping them with the tools of criminologists—recidivism risk prediction instruments grounded in regression models of past offenders' outcomes. The instruments give considerable weight to criminal history, which is already central to modern sentencing schemes. However, they also add something new: explicit inclusion of gender, age,

<sup>1</sup> Malenchik v. State, 928 N.E.2d 564 (Ind. 2010).

<sup>2</sup> Model Penal Code: Sentencing § 6B.09 (Discussion Draft No. 4, 2012) (hereinafter “Draft MPC”).

<sup>3</sup> See James Bonta, Offender Risk Assessment and Sentencing, 49 CAN. J. CRIMINOLOGY & CRIM. JUST. 519, 519-20 (2007).

and socioeconomic factors such as employment and education (with socioeconomically disadvantaged, male, and young defendants receiving higher risk scores). Some instruments also include family background, neighborhood of residence, and/or mental or emotional disorders.

EBS has been widely hailed by judges, advocates, and scholars as representing hope for a new age of scientifically guided sentencing. The idea is to replace judges' "clinical" evaluations of defendants (that is, reliance on their own expertise) with "actuarial" risk prediction, which is purportedly more accurate. Incongruously, this trend is being pushed by progressive reform advocates, who hope it will reduce incarceration rates by enabling courts to identify low-risk offenders. In this Article, I argue that they are making a mistake. As currently practiced, EBS should be seen neither as progressive nor as especially scientific—and it is almost surely unconstitutional.

This Article sets forth a constitutional and policy case against this approach, based on analysis of both the relevant doctrine and the empirical research supporting EBS. I show that the current prediction instruments should be subject to heightened equal protection scrutiny, and that the science falls short of allowing them to survive that scrutiny. The concept of "evidence-based practice" is broad, and I do not mean to issue a sweeping indictment of all its many criminal justice applications. Indeed, I strongly endorse the general objective of informing criminal justice policy with data. Nor do I argue that actuarial prediction of recidivism is always inappropriate. My objection is specifically to the use of demographic, socioeconomic, and family status variables to determine whether and how long a defendant is incarcerated. I am concerned that a well-intentioned desire for data-driven decision-making is causing discrimination to be rationalized based on rather weak empirical evidence. I focus principally on the instruments' use in sentencing, but virtually the same case can be made against their use in parole decisions, which is now established practice in thirty states.

The technocratic framing of EBS should not obscure an inescapable truth: sentencing based on such instruments amounts to overt discrimination based on demographics and socioeconomic status. The instruments typically do not include race as a variable (even their most enthusiastic defenders have limits to their comfort with group-based punishment), but sentencing based on socioeconomic predictors will have a racially disparate impact as well. Equal treatment of all persons is a central normative objective of the criminal justice system, and EBS may have serious social consequences, contributing to the concentration of the criminal justice system's punitive impact among those who already disproportionately bear its brunt. Moreover, the expressive message of EBS—the justification of disparate treatment based on statistical generalizations about crime risk—is, when stripped of the anodyne scientific language, toxic. Group-based generalizations about dangerousness are not innocuous; they have an insidious history in our culture. And the express embrace of additional punishment for the poor conveys the message that the system is rigged.

The instruments' use of gender and socioeconomic variables should be subject to heightened constitutional scrutiny. Gender is the only equal protection issue the existing literature pays any attention to, but I show that the socioeconomic variables trigger similar scrutiny under a line of Supreme Court doctrine concerning indigent criminal defendants—doctrine that the EBS literature completely ignores. In fact, the Court has specifically (and unanimously) condemned the notion of treating poverty as a predictor of recidivism risk in sentencing, even if there is statistical evidence supporting the correlation. Finally, while other variables in the instruments

(such as age and marital status) are subject only to rational basis review under current doctrine, I also argue that they raise substantial normative concerns.

Contrary to the other commentators that have considered the gender discrimination issue, I do not think the EBS instruments can survive heightened scrutiny, nor are they justified as a policy matter. There are doubtless important and even compelling state interests at stake. But heightened scrutiny requires the state to prove a strong relationship to those interests, and the case law on wealth classifications in criminal justice also requires analysis of alternatives, as does sensible policymaking. With these principles in mind, I turn to the strength of the empirical evidence supporting EBS. It falls short for three principal reasons.

First, the instruments provide nothing close to precise predictions of individual recidivism risk. The underlying regression models estimate average recidivism rates for offenders sharing the defendant's characteristics. While some models have reasonably narrow confidence intervals for this predicted average, the uncertainty about what an *individual* offender will do is *much* greater. Individual recidivism outcomes vary for many reasons that are not captured by the models. While some uncertainty is inherent in predicting probabilistic future events, the risk prediction models also leave out many measurable variables that one might expect to be important—for instance, there are typically no variables relating to the crime of conviction or the case's facts. The individual prediction problem is constitutionally important because the Supreme Court's cases on gender and indigent defendants have consistently held that disparate treatment cannot be justified based on statistical generalizations about group tendencies, even if they are empirically supported. Instead, individuals must be treated as individuals.

Second, it is not even clear that including the constitutionally problematic variables can substantially improve risk prediction in the aggregate. A core EBS premise is that actuarial risk prediction consistently outperforms clinical predictions. I examine the literature on which that claim is based, and find it unresponsive to this claim. To be sure, meta-analyses of "clinical versus actuarial" comparisons in various fields have given an edge on average to the actuarial—but not a large edge, and not a consistent one. The specifics of the actuarial instrument matter—one cannot say that any regression model is good by definition. Only a few comparative studies actually concern recidivism, and those have had mixed results. If anything, the studies support actuarial instruments that are very different from the crude ones that are actually being used—suggesting less discriminatory alternatives that could more effectively serve the state's penological interests. Another alternative is simply to drop the constitutionally problematic variables, perhaps to be replaced with crime characteristics. The empirical research gives no reason to believe that including these variables offers any nontrivial predictive improvement.

Third, even if the instruments predicted individual recidivism perfectly, they do not even attempt to predict the thing that judges need to know to use recidivism information in a utilitarian sentencing calculus. What judges need to know is not just how "risky" the defendant is in some absolute sense, but rather how the sentencing decision will *affect* his recidivism risk. For example, if a judge is deciding between a one-year and a two-year prison sentence for a minor drug dealer, it is not very helpful to know that the defendant's characteristics predict a "high" recidivism risk, absent additional information that tells the judge how much the additional year in prison will reduce (or increase) that risk. Current risk prediction instruments do not provide that additional information. Future research might be able to fill that gap, but it will not be easy. Estimating the causal relationship between sentences and recidivism is challenging, in part because sentencing judges take recidivism risk into account, introducing reverse causality

concerns. Some researchers have used quasi-experimental methods to tease out these causal pathways, but so far their estimates of incarceration's effects have not been demographically and socioeconomically specific.

Finally, I consider two interrelated counterarguments that defend EBS essentially by saying that it doesn't do much. The first is the claim that the instruments are innocuous because they do not directly specify a resulting sentence. Rather, they merely provide information—and what kind of obscurant would prefer sentencing to be ill-informed? This argument is not persuasive. The EBS instruments are meant to be *used* by judges, and to the extent they are used, they will systematically, and by design, produce disparate sentences across groups. The fact that the instruments do not exclusively determine the sentence might help in a “narrow tailoring” inquiry, but it is not enough alone to establish their constitutionality, nor their desirability.

The second counterargument might be labeled the “So what else is new?” defense. Risk prediction has always been central to sentencing, implicating its incapacitation, rehabilitation, and specific deterrence objectives. EBS advocates thus often argue that judges will inevitably predict risk, and may well rely on demographic and socioeconomic factors, even if they do not say so expressly. The instruments, on this view, are merely there to improve this assessment's accuracy. I argue, however, that EBS is not likely *merely* to replace one form of risk prediction with another. Rather, it will probably place a thumb on the sentencing scale in favor of more judicial emphasis on recidivism prevention relative to other sentencing goals. In many contexts, judges and other decision-makers tend to defer to “expert” assessments, especially with respect to scientific methods that they do not really understand. Moreover, providing risk predictions may simply increase the salience of crime prevention in judges' minds.

On this point, I also provide some new empirical evidence, based on a small experimental study that presented subjects with two fact patterns involving slight variations on the same crime. The two defendants varied sharply on several dimensions considered by risk prediction instruments. All subjects were presented with both scenarios and asked to recommend sentences; the experimental variation was that half the subjects were also presented with actuarial risk prediction scores. The effects of providing the scores were statistically significant and large. Subjects who did not receive the scores tended to give higher sentences to the lower-risk defendant, apparently focusing on small differences in the fact pattern that rendered that defendant more morally culpable. This pattern reversed when subjects received the scores, suggesting that the scores encouraged them to emphasize recidivism risk over moral desert. These results are tentative; judges in real cases might act differently. But the experiment adds to the existing empirical evidence that decision-making is affected by quantification and claims of scientific rigor.

Part I of this Article introduces the EBS instruments, describes their rise, and reviews the literature. Part II sets forth the disparity concern and makes the case for heightened constitutional scrutiny, and Part III applies that scrutiny to the empirical evidence underlying EBS. Part IV considers the above-described counterarguments. Finally, I offer some conclusions. Ultimately, in my view, the equality concerns are so serious that aggravating sentences on the basis of demographics and poverty would be bad policy even if the instruments advanced the state's interests far more substantially than they do. Likewise, the Supreme Court's case law on statistical discrimination may simply preclude deeming people dangerous on the basis of gender or poverty even if those generalizations were sufficiently well-supported that doing so would advance important state interests. But the fact that the instruments, and the use

of the problematic variables therein, do *not* advance those interests strongly (if at all) means that there is no defense of them available. This approach does not satisfy heightened constitutional scrutiny, and courts and policymakers should not embrace it.

### I. Actuarial Risk Prediction and the Movement Toward Evidence-Based Sentencing

“Evidence-based sentencing” (EBS) refers to the use of actuarial risk prediction instruments to guide the judge’s sentencing decision. The instruments are based on past regression analyses of the relationships between various offender characteristics and recidivism rates. Criminologists have developed a wide range of such instruments.<sup>4</sup> All incorporate criminal history variables, such as number of past convictions, past incarceration sentences, and number of violent or drug convictions.<sup>5</sup> Surprisingly, almost none include the crime of conviction in the case at hand. A few include very basic information such as whether it was a drug crime or a violent crime; others include no crime information.<sup>6</sup>

Most of the instruments include gender, age, and employment status; many also include education, and some include composite socioeconomic variables like “financial status.”<sup>7</sup> Although risk prediction instruments used by some parole boards included race until as late as the 1970s, the modern EBS instruments overwhelmingly do not. One exception is a “sentencing support” software program promoted by an Oregon state judge, Michael Marcus,<sup>8</sup> but this not been formally adopted by any state. There appears to be a general consensus that using race would be unconstitutional. In 2000, the Supreme Court granted certiorari in a capital case to consider whether “a defendant’s race or ethnic background may ever be used as an aggravating circumstance”; the issue was not a judicial sentencing instrument, but problematic testimony by a prosecution expert.<sup>9</sup> Before oral argument, the State of Texas conceded error and granted a new sentencing hearing, mooted the case.<sup>10</sup>

Most instruments now in sentencing use are limited to fairly objective factors, such as demographics, employment status, and criminal history.<sup>11</sup> But others include much more abstract, conceptual variables, which are meant to be coded by experienced evaluators. For instance, the Indiana Supreme Court in 2010 upheld against a state law challenge, and endorsed enthusiastically, use in sentencing of the Level of Services Inventory-Revised (LSI-R), which is also used by at least eight states elsewhere in the corrections process.<sup>12</sup> In addition to objective factors, the instrument also requires “subjective evaluations on ... performance and interactions at work, family and marital situation, accommodations stability and the level of crime in the neighborhood, participation in organized recreational activities and use of time, nature and extent

<sup>4</sup> See J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 S.M.U. L. REV. 1329, 1399 (2011) (listing variables in 19 different instruments); Malenchik, 928 N.E.2d at 571-73.

<sup>5</sup> See Oleson, *supra*.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See Draft MPC § 6B.09, cmt. (i) (discussing and criticizing this system); Michael H. Marcus, *Conversations on Evidence Based Sentencing*, 1 CHAP. J. CRIM. JUST. 61 (2009).

<sup>9</sup> See *Saldano v. State*, 70 S.W.3d 873, 875 (Tex. Crim. App. 2002) (describing the case’s history); Monahan, *A Jurisprudence of Risk Assessment*, 92 VA. L. REV. 391, 392-93 (2006).

<sup>10</sup> Monahan, *supra*, at 393.

<sup>11</sup> Oleson, *supra*.

<sup>12</sup> See BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 78-84 (2007) (describing the LSI-R’s uses).

of social involvement with companions, extent of alcohol or drug problems, emotional/psychological status, and personal attitudes.<sup>13</sup>

The instruments are mechanical: each possible value of each variable corresponds to a particular increase or reduction in the risk estimate *in every case*. The variables' weights are not determined based on each case's circumstances—for instance, men will *always* receive higher risk scores than otherwise-identical women (because, averaged across all cases, men have higher recidivism rates), even if the context is one in which men and women tend to have similar recidivism risks or in which women have higher risks.<sup>14</sup> This is a feature of the simple underlying regression models, which generally have no interaction terms. Moreover, in practice the instruments use even simpler point systems, in which the “high risk” answer to a yes-or-no question results in a point or two being added to the defendant's score, based only quite loosely on the underlying regression.<sup>15</sup>

Demographic variables and socioeconomic variables receive substantial weight. For instance, in Missouri, presentence reports include a score for each defendant on a scale from -8 to 7, where “4-7 is rated ‘good,’ 2-3 is ‘above average,’ 0-1 is ‘average,’ -1 to -2 is ‘below average,’ and -3 to -8 is ‘poor.’”<sup>16</sup> Unlike most instruments in use, Missouri's does not include gender. However, an unemployed high school dropout will score three points worse than an employed high school graduate—potentially making the difference between “good” and “average,” or between “average” and “poor.”<sup>17</sup> Likewise, a defendant under age 22 will score three points worse than a defendant over 45.<sup>18</sup> By comparison, having previously served time in prison is worth one point; having four or more prior misdemeanor convictions that resulted in jail time adds one point (three or fewer adds none); having previously had parole or probation revoked is worth one point; and a prison escape is worth one point.<sup>19</sup> Meanwhile, current crime type and severity receive no weight.

Recidivism risk prediction instruments have been developed in various forms by criminologists over nearly a century,<sup>20</sup> and their use in parole determinations dates back decades,

<sup>13</sup> Malenchik, 928 N.E.2d at 572.

<sup>14</sup> For instance, medical studies suggest that women are on average more vulnerable to addiction and relapse than men are, so it may be that for some drug crimes women are more likely to recidivate. *See, e.g.*, Jill B. Becker & Ming Hu, *Sex Differences in Drug Abuse*, 29 FRONT NEUROENDOCRINOL 36 (2008). Recidivism studies do not break down gender effects like this, however.

<sup>15</sup> The point additions are at best crude roundings of regression coefficients. Moreover, the instrument does not track the regression's functional form. The underlying studies typically use logistic regression models, in which the coefficients translate nonlinearly into changes in probability of recidivism. When the instruments translate the coefficients into fixed, additive increases on a point scale, they are “linearizing” the variables' effects, and the resulting instrument will be only loosely related to the underlying nonlinear model, especially (because of the probability curve's shape) for very high-risk or very low-risk cases.

<sup>16</sup> Michael A. Wolff, *Missouri's Information-Based Discretionary Sentencing System*, 4 OHIO ST. J. CRIM. L. 95, 113 (2006).

<sup>17</sup> *Id.* at 112-13.

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

<sup>19</sup> *Id.* A defendant with *every possible* criminal history risk factor (four or more misdemeanors resulting in jail, two or more prior felonies, prior imprisonment, prior prison escape, convictions within five years, revocation of probation and parole, and past conviction on the same offense as the current charge) will score eight points higher than one with no criminal history—just two points more than the combined effect of age, employment status, and high school graduation. *Id.*

<sup>20</sup> *See* HARCOURT, *supra*, at 1-2, 39-92 (reviewing this history).

although it has expanded sharply beginning in the 1980s.<sup>21</sup> Their use in sentencing is newer, however, and other than the state-specific instruments, none were initially designed for use in sentencing. For instance, the LSI-R manual specifically states that it “was never designed to assist in establishing the just penalty,” which did not discourage the Indiana Supreme Court from endorsing its use for that purpose.<sup>22</sup> The first state to incorporate such an instrument in sentencing was Virginia in 1994, but the trend has taken off nationwide much more recently. Judge Roger Warren, the President Emeritus of the National Center for State Courts, argues that two developments in 2007 catalyzed this acceleration: a formal resolution of the Conference of Chief Justices and the Conference of State Court Administrators<sup>23</sup> and a report by the NCSC, the Crime and Justice Institute, and the National Institute of Corrections.<sup>24</sup> Another factor may be the recent shift toward discretionary sentencing after *Blakely v. Washington* and *United States v. Booker*. Tight sentencing guidelines leave little room for considering the defendant’s individual risk, but in discretionary systems, judges are expected to assess it.<sup>25</sup>

Whatever the reasons, in recent years increasing number of states have followed Virginia’s lead.<sup>26</sup> In fact, Douglas Berman states that “[i]n some form, nearly every state in the nation has adopted, or at least been seriously considering how to incorporate, evidence-based research and alternatives to imprisonment into their sentencing policies and practices.”<sup>27</sup> EBS has many enthusiastic advocates in academia,<sup>28</sup> the judiciary and sentencing commissions,<sup>29</sup> and think tanks and advocacy organizations.<sup>30</sup> The National Center on State Courts has advocated using risk instruments to guide decision-making at all process stages, including training prosecutors and defense counsel to identify high- and low-risk offenders and thereby shaping

<sup>21</sup> *Id.* at 9, 77-80.

<sup>22</sup> Malenchik, 928 N.E.2d at 572-73.

<sup>23</sup> Conference of Chief Justices and Conference of State Court Administrators, Resolution 12 in Support of Sentencing Practices that Promote Public Safety and Reduce Recidivism, August 1, 2007; see Roger K. Warren, *Evidence-Based Sentencing: Are We Up to the Task?*, 23 FED. SENT. R. 153, 153 (2010).

<sup>24</sup> Nat’l Inst. Of Corr. and Crime & Justice Inst, *Evidence-Based Practice to Reduce Recidivism* (2007).

<sup>25</sup> See Steven L. Chanenson, *The Next Era of Sentencing Reform*, 53 EMORY L.J. 377 (2005).

<sup>26</sup> Warren, *supra*, usefully reviews national and state policies promoting EBS.

<sup>27</sup> Douglas A. Berman, *Editor’s Observations: Are Costs a Unique (and Uniquely Problematic) Kind of Sentencing Data?*, 24 FED. SENT. R. 159 (2012).

<sup>28</sup> E.g., Jordan M. Hyatt, Mark H. Bergstrom, & Steven Chanenson, *Follow the Evidence: Integrate Risk Assessment into Sentencing*, 23 FED. SENT. R. 266 (2011); Lynn S. Branham, *Follow the Leader: The Advisability and Propriety of Considering Cost and Recidivism Data at Sentencing*, 24 FED. SENT. R. 169 (2012); Richard E. Redding, *Evidence-Based Sentencing: The Science of Sentencing Policy and Practice*, 1 CHAP. J. CRIM. JUST. 1, 1 & n.4 (reviewing articles praising EBS, and stating that failure to employ EBS “constitutes sentencing malpractice and professional incompetence”).

<sup>29</sup> E.g., Marcus, *supra*; Warren, *supra*; Justice Michael Wolff (Chair, Missouri Sentencing Advisory Commission), *Evidence-Based Judicial Discretion: Promoting Public Safety through State Sentencing Reform*, 83 N.Y.U. L. Rev. 1389 (2008); Chief Justice William Ray Price, State of the Judiciary Address, Feb. 3, 2010, available at <http://www.courts.mo.gov/page.jsp?id=36875>; Mark H. Bergstrom (Pa. Commission on Sentencing) & Richard P. Kern (Va. Criminal Sentencing Commission), *A View from the Field: Practitioner’s Response to “Actuarial Sentencing: An ‘Unsettled’ Proposition*, 25 FED. SENT. R. 185 (2013).

<sup>30</sup> E.g., Pamela M. Casey, Roger K. Warren, & Jennifer K. Elek, USING OFFENDER RISK AND NEEDS INFORMATION AT SENTENCING 14 (Nat’l Ctr for State Courts 2011); PEW Ctr. on the States, *Arming the Courts with Research: 10 Evidence-Based Sentencing Initiatives to Control Crime and Reduce Costs*, 8 Pub. Safety Policy Brief 2-3 (2009); NAT’L CTR. FOR STATE COURTS, *EVIDENCE-BASED SENTENCING TO IMPROVE PUBLIC SAFETY AND REDUCE RECIDIVISM: A MODEL CURRICULUM FOR JUDGES* (2009); Matthew Kleiman, *Using Evidence-Based Practices in Sentencing Criminal Offenders*, in THE BOOK OF THE STATES (Council of State Gov’ts 2012).

plea-bargaining decisions.<sup>31</sup> Other academics have offered more cautious takes, but have ultimately offered qualified endorsements.<sup>32</sup>

The new Model Penal Code, currently undergoing its first revision since its adoption in 1962, embraces this new movement. This is a serious development, both because it reflects an emerging academic consensus and because of the MPC's influence. The original MPC was "one of the most successful law reform projects in American history," producing "revised, modernized penal codes in a substantial majority of the states."<sup>33</sup> Section 6B.09 of the new Code not only endorses use of "actuarial instruments or processes, supported by current and ongoing recidivism recidivism, that will estimate the relative risks that individual offenders pose to public safety," but also their formal incorporation into presumptive sentencing guidelines.<sup>34</sup> It also provides that when particularly low-risk offenders can be identified, otherwise-mandatory minimum sentences should be waived.<sup>35</sup> While parts of the revision are still being drafted, the American Law Institute has already approved Section 6B.09.<sup>36</sup>

The official Commentary to the MPC revision illustrates the core argument for EBS: recidivism risk prediction is inevitably part of sentencing, and should be guided by the best available scientific research:

Responsible actors in every sentencing system—from prosecutors to judges to parole officials—make daily judgments about...the risks of recidivism posed by offenders. These judgments, pervasive as they are, are notoriously imperfect. They often derive from the intuitions and abilities of individual decisionmakers, who typically lack professional training in the sciences of human behavior. .... Actuarial—or statistical—predictions of risk, derived from objective criteria, have been found superior to clinical predictions built on the professional training, experience, and judgment of the persons making predictions.<sup>37</sup>

Most EBS advocates frame it as a strategy for reducing incarceration and its budgetary costs and social harms.<sup>38</sup> These advocates argue, or assume, that the prediction instruments will primarily allow judges to identify low-risk offenders whose sentences can be reduced, not high-risk offenders whose sentences must be increased. Some suggest that, absent scientific information on risk, judges probably already err on the side of longer sentences.<sup>39</sup> Others suggest that the instruments should categorically only be used in mitigation.<sup>40</sup>

<sup>31</sup> Casey et al., *supra*, at 23-26.

<sup>32</sup> E.g., Margareth Etienne, *Legal and Practical Implications of Evidence-Based Sentencing by Judges*, 1 CHAPMAN J. CRIM. JUST. 43 (2009).

<sup>33</sup> Gerald Lynch, *Revising the Model Penal Code: Keeping It Real*, 1 OH. ST. J. CRIM. L. 219, 220 (2003) (also observing that the Code's classroom use makes it "the document through which most American lawyers come to understand criminal law").

<sup>34</sup> Draft MPC § 6B.09 (2).

<sup>35</sup> *Id.* at § 6B.09 (2).

<sup>36</sup> *See id.* at 133.

<sup>37</sup> Draft MPC, § 6B.09(2), cmt. (a). *See also, e.g.*, Wolff, *supra*, at 1406 (emphasizing superiority of actuarial prediction).

<sup>38</sup> E.g., Nat'l Ctr. for State Courts, *Using Offender Risk and Needs Assessment Information at Sentencing 2-3* (2011); Price, *supra* (citing EBS as a way to "move from anger-based sentencing" toward reduced incarceration); Wolff, *supra*, at 1390; PEW Ctr. on the States, *supra*, at 1; Michael Marcus, *MPC—The Root of the Problem: Just Deserts and Risk Assessment*, 61 FLA. L. REV. 751, 751 (2009).

<sup>39</sup> E.g., Bonta, *supra*, at 524.

<sup>40</sup> E.g., Etienne, *supra*.

In this spirit, the draft MPC Commentary asserts that “Section 6B.09 takes an attitude of skepticism and restraint concerning the use of high-risk predictions as a basis of elongated prison terms, while advocating the use of low-risk predictions as grounds for diverting otherwise prison-bound offenders to less onerous penalties.” However, despite this “attitude,” the actual *content* of Section 6B.09 endorses incorporation of risk assessment procedures into sentencing guidelines, including for the purpose of increasing sentences. The Commentary expresses hope that moving risk instruments from parole (the MPC would abolish parole) to sentencing will effectively constrain their “incapacitative” use, because access to counsel and greater transparency at sentencing would allow the defendant a chance to argue his case.<sup>41</sup> But the Commentary never explains how these procedural protections will ameliorate the instruments’ substantive consequences for defendants whose objective characteristics render them “high risk.” Even the best counsel will have trouble contesting the defendant’s age, gender, education level, employment status, and past criminal convictions.<sup>42</sup> Moreover, if state legislatures adopt Section 6B.09 but not the MPC’s recommendations concerning abolition of parole, the claim that parole-stage use is worse would be irrelevant.

Although most of the EBS literature is positive, or even celebratory, a few scholars have criticized it. The most thorough critique of risk prediction in criminal justice more broadly has come from Bernard Harcourt in his book *AGAINST PREDICTION*.<sup>43</sup> Some of Harcourt’s arguments center on law enforcement profiling, but others apply to sentencing and parole. In particular, he argues that prediction instruments contravene punishment theory, because punishment turns on *who the defendant is* (and what he is therefore expected to do in the future), rather than just what he has done.<sup>44</sup> Although Harcourt’s book primarily focuses on actuarial risk prediction, his theoretical objection is applicable to clinical prediction too—he seeks to “make criminal justice determinations blind to predictions of future dangerousness.”<sup>45</sup> Likewise, advocates of purely retributive punishment have always held that a defendant’s future risk is morally irrelevant to the state’s justification for punishment.<sup>46</sup> Indeed, beyond mere irrelevance, there may be direct conflict (raising practical dilemmas for defense counsel): some factors that heighten a defendant’s predicted recidivism risk, from young age to mental illness to socioeconomic disadvantage, are frequently considered *mitigating* factors from a retributive perspective.<sup>47</sup>

Other commentary on EBS has raised similar theoretical objections.<sup>48</sup> John Monahan, while advocating actuarial prediction in other contexts (such as civil commitment), has argued

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

<sup>42</sup> Because the MPC draft advocates *mandatory* sentencing guidelines, it points out that the Sixth Amendment would require aggravating factors (but not mitigating factors) to be found by juries. *Id.* cmt. (e). This constraint, if anything, seems likely to discourage states from including difficult-to-prove dynamic factors like “antisocial attitudes” in the instruments. For factors like gender, age, and employment, the jury trial requirement seems essentially irrelevant.

<sup>43</sup> HARCOURT, *supra* note 12.

<sup>44</sup> *Id.* at 31-34, 188-89. Another of Harcourt’s arguments is discussed below in Part III.C.

<sup>45</sup> *Id.* at 5; *see id.* at 237-38 (arguing that clinical judgment is just as vulnerable to his critique); Yoav Sapir, *Against Prevention? A Response to Harcourt’s Against Prediction on Actuarial and Clinical Predictions and the Faults of Incapacitation*, 33 *LAW & SOC. INQUIRY* 253, 258-61 (2008) (arguing that the problem with the instruments is really a broader problem with incapacitation as a punishment objective, including via clinical judgment).

<sup>46</sup> *E.g.*, Paul Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 *HARVARD L. REV.* 1429 (2001).

<sup>47</sup> *E.g.*, *Graham v. Florida*, 560 U.S. 48 (2010) (explaining mitigating role of young age).

<sup>48</sup> *See* Oleson, *supra*, at 1388-92 (reviewing literature).

against the current instruments' use in sentencing.<sup>49</sup> His view is that, while recidivism risk may be a legitimate sentencing consideration, blameworthiness is nonetheless the central question, and thus the only risk factors that should be considered are those that *also* bear on the defendant's moral culpability: past and present criminal conduct.<sup>50</sup> Some critics protest the probabilistic nature of risk prediction, ensuring "false positives" when those deemed high-risk do not, in fact, recidivate.<sup>51</sup> Others draw an unfavorable analogy to the science fiction movie "Minority Report," in which the government punishes "pre-crime," suggesting that even if the future could be known with certainty, punishing people for future acts is fundamentally unfair.<sup>52</sup> Many commentators raise such criticisms but do not treat them as dispositive, but merely as cautionary notes.<sup>53</sup> For others, like Harcourt, they are more fundamental flaws.

I do not seek to answer foundational sentencing-philosophy questions here. I accept EBS advocates' premise that recidivism prevention will inevitably play at least *some* role in the sentencing process in many cases (although I argue below that adoption of actuarial instruments will probably increase this role). The Supreme Court has affirmed the relevance of recidivism risk to sentencing, for example permitting judges to hear expert testimony concerning the defendant's dangerousness.<sup>54</sup>

Instead, this Article's central question is about discrimination and disparity: whether risk prediction instruments that classify defendants by demographic, socioeconomic, and family characteristics can be constitutionally or normatively justified. One could, after all, predict risk in other ways—for instance, based only on past or present criminal behavior, or based on individual assessment of a defendant's conduct, mental states, and attitudes. Current literature's treatment of the disparity concern is surprisingly limited; the MPC Commentary, for instance, barely mentions it. Among scholars who do raise the issue, most treat it as a policy concern, rather than (also) a constitutional one. For example, Harcourt, addressing the instruments' use in early release decisions, has argued that "risk is a proxy for race," observing that the instruments give heavy weight to criminal history, which is highly correlated with race.<sup>55</sup> He argues that this strategy will "unquestionably aggravate the already intolerable racial imbalance in our prison populations."<sup>56</sup> Kelly Hannah-Moffat has similarly critiqued the criminal history variables on grounds of racially disparate impact, and further emphasizes that criminal history may be influenced by past discriminatory decision-making.<sup>57</sup>

<sup>49</sup> In the civil commitment literature, scholars have focused on whether expert testimony predicting dangerousness is admissible evidence, rather than on the constitutionality or desirability of a particular judicial decision-making process. E.g., Alexander Scherr, *Daubert and Danger: The 'Fit' of Expert Predictions in Civil Commitments*, 55 HASTINGS L.J. 1, 5-28 (2003) (reviewing case law and literature). I do not focus on the evidence law issues here.

<sup>50</sup> Monahan, *supra*, at 427-28.

<sup>51</sup> The MPC Commentary raises, but ultimately is unswayed by, this objection; see *infra* note 62 and accompanying text.

<sup>52</sup> E.g., Oleson, *supra*, at 1390; Etienne, *supra*, at 59; Peter Moskos, Book Review, *Against Prediction*, 113 AM. J. SOCIOLOGY 1475, 1477 (2008).

<sup>53</sup> E.g., Oleson, *supra*, at 1397-98 (concluding simply that EBS "raises excruciatingly difficult questions" and that "judges and jurists must determine" how to answer them).

<sup>54</sup> *Barefoot v. Estelle*, 463 U.S. 880 (1983); see also *Jurek v. Texas*, 428 U.S. 262 (1976) (holding that "prediction of future criminal conduct is an essential element in many" criminal justice-related decisions).

<sup>55</sup> Bernard Harcourt, *Risk as a Proxy for Race*, CRIM. & PUBLIC POL'Y (forthcoming), draft available at <http://www.law.uchicago.edu/files/file/535-323-bh-race.pdf>.

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

<sup>57</sup> Kelly Hannah-Moffat, *Actuarial Sentencing: An 'Unsettled' Proposition*, at 17, available at [http://www.albany.edu/scj/documents/Hannah-Moffatt\\_RiskAssessment.pdf](http://www.albany.edu/scj/documents/Hannah-Moffatt_RiskAssessment.pdf).

The existing constitutional analyses, meanwhile, have focused on gender (and the hypothetical use of race), and have been limited in their doctrinal analysis.<sup>58</sup> The most extensive such analysis, by J.C. Oleson, concludes that the instruments survive even strict scrutiny.<sup>59</sup> Similarly, Monahan, while opposing use of demographic variables in sentencing on punishment-theory grounds, defends the constitutionality of their use in civil commitment, arguing that only race and gender raise constitutional issues at all, and that gender survives intermediate scrutiny because the gender differences are real and the state interests are substantial.<sup>60</sup>

In my view, the existing literature has seriously understated both the breadth and the gravity of the constitutional concern. There is a strong case that most or all of the risk prediction instruments now in use are unconstitutional, and current literature has not made that case or even seriously examined it. I seek to fill that gap, comprehensively analyzing the relevant case law and empirical research. I show both that the use of gender cannot be defended on the statistical bases that other authors have offered and that the problem goes well beyond gender—the socioeconomic variables, at least, should also receive heightened constitutional scrutiny. And if such scrutiny is applied, the empirical evidence is not currently strong enough to sustain the instruments, and it likely never will be.

In the criminological literature on the instruments, there is considerable debate over issues of reliability, validity, and precision. Current EBS scholarship often notes these concerns but ultimately advocates the instruments' use anyway.<sup>61</sup> The MPC Commentary is a striking example. It states that "error rates when projecting that a particular person will engage in serious criminality in the future are notoriously high" and that "most projections of future violence are wrong in significant numbers of cases," and yet concludes:

Although the problem of false positives is an enormous concern—almost paralyzing in its human costs—it cannot rule out, on moral or policy grounds, all use of projections of high risk in the sentencing process. If prediction technology shown to be reasonably accurate is not employed, and crime-preventive terms of confinement are not imposed, the justice system knowingly permits victimizations in the community that could have been avoided.<sup>62</sup>

In my view, for all their apparent agonizing, the MPC drafters and other EBS advocates are missing the legal import of the methodological concerns: If the instruments don't work well, their use in sentencing is almost surely unconstitutional, and terribly unwise as well. As I show in Part II, the Supreme Court has warned against disparate treatment based on generalizations about (at least) gender and poverty, *even if* the generalizations have statistical support. If the statistical support is shoddy, there is simply no defending them.

It is curious that the EBS literature has not taken the constitutional concern more seriously. EBS scholars have occasionally asserted that actuarial prediction is obviously

<sup>58</sup> E.g., Christopher Slobogin, *Risk Assessment and Risk Management in Juvenile Justice*, 27-WTR CRIM. JUST. 10, 13-14 (2013); Pari McGarraugh, Note, *Up or Out: Why "Sufficiently Reliable" Statistical Risk Assessment is Appropriate at Sentencing and Inappropriate at Parole*, 97 Minn. L. Rev. 1079, 1102 (2013).

<sup>59</sup> Oleson, *supra*, at 1388-92; see also Slobogin, *supra*, at 13-14 (briefly stating that gender discrimination probably survives intermediate scrutiny).

<sup>60</sup> Monahan, *supra*, at 429-432.

<sup>61</sup> E.g., Slobogin, *supra*, at 16-17; McGarraugh, *supra*, at 1105-07; see also Hannah-Moffat, *supra* (raising various concerns but reaching an ambivalent conclusion: "Arguably, we should pause to reflect on the complexities of risk-needs assessments and concordant calls for and against evidence-based risk jurisprudence.").

<sup>62</sup> MPC Draft §6B.09, cmt. (e).

constitutional because the Supreme Court has approved, against a due process challenge, admission of even-less-reliable expert *clinical* predictions of risk in sentencing proceedings.<sup>63</sup> This assertion is wrong. The equal protection issue is not presented in those cases, and in general is not presented by individualized clinical assessments of risk *per se*; it is presented by punishment of group membership, which is explicit in the actuarial instruments. And even assuming actuarial predictions are more accurate than clinical ones, a question to which I return in Part III, the fact that evidence is reliable enough to be admissible does not mean that it establishes a strong enough relationship to an important government interest to withstand heightened scrutiny.<sup>64</sup> In the next Part, I show that such scrutiny applies.

## II. The Disparate Treatment Concern

The most distinctive feature of EBS is that it formally incorporates discrimination based on socioeconomic status and demographic categories into sentencing. In this Part, I set forth the basic constitutional and policy objections to this practice. I begin with the constitutionality of gender-based sentencing in Section A (setting aside race because the current instruments do not include it).<sup>65</sup> Although it is uncontroversial that gender classifications are subject to heightened scrutiny, I examine the gender case law in some detail because it illuminates a core feature of the Supreme Court's equal protection jurisprudence that will make it very hard for EBS to *survive* heightened scrutiny: otherwise-unconstitutional discrimination cannot be justified by statistical generalizations about groups, even if the generalizations have empirical support. In Section B, I show that that the constitutional concern goes beyond gender: a form of heightened scrutiny (and a similar prohibition on group generalizations) also applies to socioeconomic discrimination in the criminal justice context. And in Section C, I articulate reasons policymakers should take the disparity concern seriously even if courts were to sustain EBS against constitutional challenges. This Part does not *complete* either the constitutional or the normative analysis; rather, it establishes the seriousness of the disparity concern and the resulting need at least for a very strong empirical justification for EBS. In Part III, I address whether such a justification exists.

Note that I frame my constitutional argument within existing doctrine, and thus do not argue for heightened scrutiny of certain other variables in the model—for instance, age and marital status are routine government classifications that are subject to rational basis review. There is, however, a plausible broader argument for strict scrutiny of group-based sentencing discrimination more generally, grounded in the “fundamental rights” branch of equal protection jurisprudence rather than the “suspect classifications” branch. Incarceration, after all, profoundly interferes with virtually every right the Supreme Court has deemed fundamental, and EBS makes these rights interferences turn on identity rather than criminal conduct. Although I would be happy to see the Supreme Court adopt such an approach, it is presently foreclosed to lower courts by language the Court used in a case called *Chapman v. United States*, and I do not focus

<sup>63</sup> E.g., Slobogin, *supra*, at 15; Steven J. Morse, *Mental Disorders and Criminal Law*, 101 J. CRIM. L. & CRIMINOLOGY 885, 944 (2011); see *Barefoot v. Estelle*, 463 U.S. 880 (1983).

<sup>64</sup> In *Barefoot*, the Court made clear that the defects in evidence would have to be extreme before their admission would be barred by the Due Process Clause on the grounds of sheer unreliability. 463 U.S. at 898-99.

<sup>65</sup> The instruments do include socioeconomic variables that are highly correlated with race, a point I return to in § C, but they would be hard to challenge constitutionally on that basis. The Supreme Court has consistently held that absent a racially disparate purpose, policies that are facially neutral as to race cannot be challenged merely on the grounds of a racially disparate impact. E.g., *Washington v. Davis*, 426 U.S. 229 (1976).

on it.<sup>66</sup> Certain variables used in some models might also merit new recognition as quasi-suspect—particularly variables relating to an offender’s family background or family members’ criminal history, which are closely analogous to illegitimacy, a quasi-suspect classification—but again, I do not rely on this possibility.<sup>67</sup> The policy critique in Section C thus applies more broadly, to more variables, than the constitutional arguments in Sections A and B do.

### A. Gender Classifications and the Problem with Statistical Discrimination

Virtually every risk prediction instrument in use incorporates gender. Because the coefficient on gender is the same for all defendants, every single male defendant will, due to gender alone, be assigned a higher risk score than an otherwise-identical woman. Gender classifications are subject to heightened constitutional scrutiny, requiring an “exceedingly

<sup>66</sup> *Chapman v. United States*, 500 U.S. 453, 464-65 (1991). In *Chapman*, the defendant challenged the U.S. Sentencing Guidelines’ method of calculating LSD weight, which included the carrier medium; the claim was that this method created unfair distinctions between people who carried the same amount of actual LSD. The Court rejected the notion that fundamental rights analysis should apply to sentencing distinctions within the statutory sentencing range, reasoning that once convicted, the offender no longer has a fundamental right to any sentence below the statutory maximum. Note that this holding does not preclude a challenge to a sentencing decision based on the nature of the classification; it speaks only to the “fundamental rights” branch. As I show below, both gender and poverty-based discrimination have triggered successful challenges to sentences within the statutory range.

Although *Chapman*’s holding is not entirely surprising (the Court in general is quite reluctant to apply constitutional scrutiny to sentences, see Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 Cal. L. Rev. 47, 49 (2011), and presumably worried that doing so in that case would require the extension of strict scrutiny to virtually every sentencing distinction), its reasoning, in my view, fails to take seriously the tremendous stakes of sentencing choices within statutory ranges. Those ranges are often very broad (say, zero to 20 years), and it is hard to imagine any government decision that would have a more drastic impact on a defendant’s exercise of fundamental liberties than the choice between, say, 5 and 20 years’ incarceration. Moreover, the Court’s characterization of the right at issue was unduly narrow; the question is not whether the defendant had a right to a sentence below the statutory maximum. Rather, underlying, clearly established fundamental rights are being taken away (including the defendant’s most basic physical liberty, which is directly and deliberately retracted by the incarceration decision, plus additional rights as procreation, communication, and voting). Cf. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (critiquing the Court’s past, overly narrow characterization of the right to sexual intimacy as a “right to homosexual sodomy”).

The outcome in *Chapman* is perfectly defensible, but it could have been reached with a different rationale. The drug-weighting rule was a classification of *criminal conduct*, not persons, and thus (absent evidence of some discriminatory motive) raised no equal protection concern at all; all persons are prospectively subject to the same weighting rules, and have an equal chance to conduct their activities to avoid the rule. Applying fundamental rights analysis to EBS thus would not imply that routine sentencing distinctions between crimes are also subject to strict scrutiny. One could likewise defend sentencing distinctions based on criminal history as also being conduct-based and universally applicable—all persons who commit crimes are subjecting themselves to potential higher sentences for subsequent crimes. But when the state systematically gives different sentences to different groups of people for the same crime, with the same past criminal conduct, the Constitution *should* demand a compelling justification.

<sup>67</sup> Such variables are outside the defendant’s control, unchangeable, generally unrelated to legitimate state policy, and often—especially in the case of familial incarceration or time in foster care—the basis for considerable social stigma and disadvantage. See Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions for People With Criminal Records*, 7 J. L. Society 18, 51 (2005) (reviewing case law and identifying factors that often trigger heightened scrutiny); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121 (1999) (reviewing literature on effects of parental incarceration); *United States v. Sprei*, 145 F.3d 528, 535 (2d Cir. 1998) (describing stigma and reduced marital prospects as an “inevitable result” of a parent’s incarceration); Daniel Pollack et. al., *Foster Care as a Mitigating Circumstance in Criminal Proceedings*, 22 TEMP. POL. & CIV. RTS. L. REV. 43, 59 (2012) (quoting Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 FUTURE CHILD. 75, 85 (2004)).

persuasive justification”—that is, the state must prove “that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”<sup>68</sup> Given this well-established doctrine, one might have thought that gender’s inclusion in the instruments would have occasioned considerable concern and debate. And yet most scholarship ignores this concern, or else briefly asserts that the state’s interests are important.<sup>69</sup> The draft Model Penal Code recommends excluding race, and the Commentary notes that sentencing based on race would be unconstitutional.<sup>70</sup> And yet the MPC drafters recommend including gender, and offer no commentary defending this on constitutional grounds, as though its constitutionality is self-evident.<sup>71</sup>

In the rare cases in which the issue has been presented, modern courts have consistently held (outside the EBS context) that it is unconstitutional to base sentences on gender.<sup>72</sup> There is, to be sure, considerable statistical research suggesting that judges (and prosecutors) *do* on average treat women defendants more leniently than men.<sup>73</sup> But it is virtually unheard of for modern judges to *say* that they are taking gender into account,<sup>74</sup> and demonstrating gender bias would usually be challenging. Before the past few decades, explicit consideration of gender as well as race was common, but few today defend that practice.<sup>75</sup> The U.S. Sentencing Guidelines, for example, expressly forbid the consideration of both race and sex.<sup>76</sup> Outside the literature on EBS, scholars have likewise mostly treated the gender gap as “unwarranted” sentencing disparity.<sup>77</sup>

Given this widespread consensus against sentencing based on gender, there is a certain surreal quality to the EBS literature’s mostly untroubled embrace of it. The justification offered (if any) is that women in fact pose substantially lower recidivism risk than men do.<sup>78</sup> Some scholars add that to fail to account for this fact is unfair to women, essentially punishing them for men’s recidivism risk.<sup>79</sup> More generally (referring to “gender, ethnicity, age, and disability”),

<sup>68</sup> *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>69</sup> *E.g.*, Slobogin, *supra*, at 14. McGarraugh, *supra* at 1102, states that gender should be removed from the instruments to preserve their constitutionality, but does not develop the legal reasoning for this point.

<sup>70</sup> Draft MPC, *supra*, Sec 6B.09 cmt. (i).

<sup>71</sup> *Id.*

<sup>72</sup> Carissa Byrne Hessick, *Race and Gender as Explicit Sentencing Factors*, 14 J. GENDER RACE & JUST. 127, 137 (2010); *United States v. Maples*, 501 F.2d 985, 989 (4th Cir. 1974); *Williams v. Currie*, 103 F. Supp. 2d 858, 868 (M.D.N.C. 2000).

<sup>73</sup> *E.g.*, Sonja B. Starr, *Estimating Gender Disparities in Federal Criminal Cases* (under review) (2013) (finding large gender gaps at multiple procedural stages that are unexplained by observable variables, and also reviewing other studies).

<sup>74</sup> Hessick, *supra*, at 128.

<sup>75</sup> *Id.* at 129-36.

<sup>76</sup> U.S.S.G. Sec 5H1.10.

<sup>77</sup> *E.g.*, Oren Gazal-Ayal, *A Global Perspective on Sentencing Reforms*, 76 LAW & CONTEMP. PROBS. 1, iii-iv (2013); Mona Lynch, *Expanding the Empirical Picture of Sentencing: An Invitation*, 23 FED. SENT. R. 313 (2011). Some scholars criticize increasing female incarceration rates, but do not generally argue that women should receive lower sentences based on gender per se. Rather, they argue that the system should take more account of certain mitigating factors that are more often present in female defendants’ cases. *E.g.*, Phyllis Goldfarb, *Counting the Drug War’s Female Casualties*, 6 J. GENDER RACE & JUST. 277, 291-93 (2002); Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and their Children*, 11 STAN. L. & POL’Y REV. 133 (1999).

<sup>78</sup> *E.g.*, Monahan, *supra*, at 431.

<sup>79</sup> See Margareth Etienne, *Sentencing Women: Reassessing the Claims of Disparity*, 14 J. GENDER, RACE, & JUSTICE 73, 82 (2010).

Judge Michael Marcus states: “We are not treating like offenders alike if we insist on ignoring factors that make them quite unlike in risk.”<sup>80</sup>

But this argument, which embraces a concept of “actuarial fairness,”<sup>81</sup> stands on unsound constitutional footing. The Supreme Court has consistently rejected defenses of gender classifications that are grounded in statistical generalizations about groups—even those with empirical support. In *Craig v. Boren*, for instance, the Court considered a challenge to a law subjecting men to a higher drinking age for certain alcoholic beverages than women. The state had defended the law with statistical evidence, including a study showing that young men were arrested for drunk driving at more than ten times the rate of young women (2% versus 0.18%). The Court noted observed that “prior cases have consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on far more predictive empirical relationships than this.” That is, what is prohibited is not *just* “outdated misconceptions” and merely “hypothesized” gender differences.<sup>82</sup> What is prohibited is inferring an individual tendency from group statistics. Note that the government’s argument in *Craig* could easily have been framed in “actuarial fairness” terms: arguably it would have been unfair to bar young women from drinking based on a drunk driving risk that came almost entirely from males. But the Court’s approach to equal protection means that individuals are neither entitled to a favorable statistical generalization based on gender, nor subject to unfavorable ones.

Examples of this principle abound. For instance, the Court has repeatedly held that government cannot base benefits policies on the assumption that wives are financially dependent on their husbands—even though, when the cases were decided in the 1970s, that presumption was usually correct.<sup>83</sup> The Court explained that “such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do” support their families.<sup>84</sup> Likewise, the Court has struck down gender-based peremptory challenges in jury selection, holding that the state cannot make assumptions about jurors based on gender, “even when some statistical support can be conjured up.”<sup>85</sup> And in *United States v. Virginia*, the Court ordered the Virginia Military Institute to admit women, rejecting its arguments about “typically male or typically female ‘tendencies.’” The Court observed: “The United States does not challenge any expert witness estimation on average capacities or preferences of men and women. ... It may be assumed, for purposes of this decision, that *most* women would not choose VMI’s adversative method.” But, the Court emphasized, the point is not what *most* women would choose. “[W]e have cautioned reviewing courts to take a hard look at generalizations or ‘tendencies’ of the kind pressed by Virginia... [T]he State’s great goal [of educating soldiers] is not substantially advanced by women’s categorical exclusion, in total disregard of their individual merit, from the State’s premier ‘citizen soldier’ corps.”<sup>86</sup>

<sup>80</sup> Marcus, *supra*, at 769.

<sup>81</sup> This is a concept that has traditionally (although subject to some limitations) dominated insurance law—the idea is that it is fair for insurers to tailor rates to the risks posed by particular groups, and unfair to expect groups to cross-subsidize one another’s risks. See, e.g., Tom Baker, *Health Insurance, Risk, and Responsibility After the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1577, 1597-1600 (2011).

<sup>82</sup> See Monahan, *supra*, at 432-433 (defending gender-based risk prediction for civil commitment).

<sup>83</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975).

<sup>84</sup> *Wiesenfeld*, 420 U.S. at 645.

<sup>85</sup> *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 n.11 (1994).

<sup>86</sup> In *City of Los Angeles v. Manhart*, 432 U.S. 702 (1978), the Court similarly struck down, on Title VII grounds, a requirement that female employees pay higher pension plan premiums because of their higher actuarial life expectancy. The Court stated:

In short, the Supreme Court has squarely rejected “statistical discrimination”—use of group tendencies as a proxy for individual characteristics—as a permissible justification for otherwise constitutionally forbidden discrimination. Economists often defend statistical discrimination as efficient, arguing that if a decision-maker lacks detailed information about an individual, relying on group-based averages (or even mere stereotypes, if the stereotypes have a grain of truth to them) will produce better decisions in the aggregate. But the Supreme Court has held that this defense of gender and race discrimination offends a core value embodied by the equal protection clause: that people have a right to be treated as individuals.

Individualism, indeed, is at the very heart of the Supreme Court’s equal protection case law.<sup>87</sup> Many scholars have criticized this characteristic, arguing that it renders the Court’s jurisprudence overly formalistic and too inattentive to substantive inequalities. On this view, the primary purpose of the Equal Protection Clause is to dismantle group-based subordination, not to ensure that government will treat individuals in ways that are blind to group identity; the latter approach may actually undermine the former if it prevents government from recognizing and acting to rectify societally entrenched inequalities.<sup>88</sup> I am sympathetic to this view myself, in fact, but I frame this Article within the approach that dominates current doctrine. In any event, an antisubordinationist approach to equal protection law would hardly be friendlier to EBS, an approach that amplifies inequality in the criminal justice system’s impact by inflicting additional criminal punishment on the poor and, via disparate impact, on people of color. In Section D, I explore further EBS’s social and distributive impacts, and explain why (even though men, in general, are not a subordinated class) its inclusion of gender can be expected to exacerbate this social impact on disadvantaged groups.

Thus, although gender discrimination is not wholly constitutionally forbidden, EBS proponents are going to face tough sledding if their defense of it depends on statistical generalizations about men and women. And it does—EBS is *all about* generalizing based on statistical averages, and its advocates defend it on the basis that the averages are right. At least in the gender context, that probably will not convince courts. The statistical relationship would at the very least have to be so strong that courts could deem the resulting *individual* predictions noticeably more sound than those the Supreme Court has rejected in the past, and could accordingly hold that an “exceedingly persuasive justification” for the classification was present. But this requirement sets a high bar—in *United States v. Virginia*, for instance, the Court’s only example of sex differences that the government *could* (within constraints) consider was the irreducible *physical* differences between men and women.<sup>89</sup>

Beyond gender, the Court’s emphasis on individualism and rejection of statistical discrimination should inform our thinking about the constitutionality of other variables as well.

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This case ... involves a generalization that the parties accept as unquestionably true: Women, as a class, do live longer than men....It is equally true, however, that all individuals in the respective classes do not share the characteristic that differentiates the average class representatives..... [Title VII] precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. ... Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

*Id.* at 707-08; see *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 620 (1990) (O’Connor, J., dissenting) (citing this passage to inform the interpretation of the Equal Protection Clause).

<sup>87</sup> See Richard Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 553 (2002).

<sup>88</sup> See *id.* at 554-59; Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9-10 (2004) (reviewing antisubordinationist scholarship).

<sup>89</sup> 518 U.S. at 533.

To be sure, it is not *always* forbidden for the government to rely on statistical generalizations; it would be hard to imagine government functioning if it did not, since it would have to tailor every action it takes to every individual. Government sometimes has to draw clear lines that may overgeneralize—for instance, the state sets a maximum blood-alcohol content for driving, rather than requiring each individual's fitness to drive to be individually assessed. Frederick Schauer has made this point forcefully, offering a fairly broad defense of reliance on statistically supported generalizations.<sup>90</sup> But as Schauer emphasizes, this practice properly has limits—certain kinds of generalizations (including those based on gender) are particularly socially harmful, or expressively invidious, even if they have statistical support.<sup>91</sup> The practice of applying more demanding equal protection scrutiny to some government classifications than to others is grounded in similar reasoning.

Note that the problem with EBS could be framed either as excess generalization (failure to treat people as individuals whose risk varies for reasons particular to them) or as *insufficient* generalization (failure to treat all those with the same criminal conduct the same way). Schauer, for instance, defended the then-mandatory U.S. Sentencing Guidelines, and particularly their bar on demographic and socioeconomic considerations, along the latter lines: “Ignoring real differences in sentencing -- sentencing socially beneficial heart surgeons to the same period of imprisonment for murder as socially parasitic career criminals -- may well serve the larger purpose of explaining that at a moment of enormous significance ... we are all in this together.”<sup>92</sup> In my view, the problem with EBS cannot be simply described in terms of generality versus particularity; the problem is not that the instruments generalize, but that they employ particular kinds of generalizations that are insidious, in a context that has huge consequences for individuals and communities.

## B. Wealth-Related Classifications in the Criminal Justice System

The constitutional problem with EBS goes beyond gender. In this Section, I show that current doctrine also supports application of heightened scrutiny to variables related to socioeconomic status, such as employment status, education, or income. The Supreme Court's case law in *other* contexts has consistently held that similar wealth-related classifications are not constitutionally suspect,<sup>93</sup> and perhaps this is why EBS scholars have completely ignored the potential constitutional concerns with these variables. But this case law is not dispositive in the sentencing context. Many criminal defendants have challenged policies and practices that effectively discriminate against the indigent, including discrimination in punishment. These defendants have often succeeded, and the Supreme Court and lower courts have applied to their claims a special form of heightened constitutional scrutiny, citing intertwined equal protection and due process considerations.

The treatment of indigent criminal defendants has for more than a half-century been a central focus of the Supreme Court's criminal procedure jurisprudence. Indeed, the Court has often used very strong language concerning the importance of eradicating wealth-related

<sup>90</sup> FREDERICK SCHAUER, *PROFILES, PROBABILITIES, AND STEREOTYPES* (2003).

<sup>91</sup> *Id.* at 38-41.

<sup>92</sup> *Id.* at 261-62. Although I am uncomfortable with group-based sentencing distinctions, I do not favor mandatory sentencing, because offenses are often defined too broadly to capture real differences in criminal conduct and culpability. Also, mandatory sentencing laws generally do not eliminate individualization of punishment, but shift the power to individualize toward prosecutors (a possibility Schauer acknowledges, *id.* at 256).

<sup>93</sup> *E.g.*, *Maier v. Roe*, 432 U.S. 464, 471 (1977).

disparities in criminal justice; in *Griffin v. Illinois*, for instance, it called this objective “the central aim of our entire judicial system.”<sup>94</sup> *Griffin* struck down the requirement that defendants pay court costs before receiving a trial transcript, which they need to prepare an appeal. The Court held that “[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color,” and that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”<sup>95</sup>

Numerous other cases also stand for the principle that both equal protection and due process concerns require that indigent criminal defendants not be subject to special burdens. Principally, these cases have focused on access to the criminal process: “the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.”<sup>96</sup> Notably, these cases have applied heightened scrutiny even when the wealth-based classification did not deprive the defendant of something to which he otherwise would have had a substantive right—the cases relating to appeal procedures, for instance, reiterated the then-established principle that a State need not provide an appeal as of right at all. Rather, *Griffin* and its progeny involved a special “equality principle” motivated by “the evil [of] discrimination against the indigent.”<sup>97</sup> For this reason, a challenge to EBS need not establish that the defendant has some free-standing constitutional entitlement to a lower sentence than he received.

For our purposes, the most on-point Supreme Court case is *Bearden v. Georgia*, in which the district court had revoked the probation of an indigent defendant who had been unable to pay his court-ordered restitution.<sup>98</sup> The Court unanimously reversed, holding that incarcerating a defendant merely because he was unable to pay amounted to unconstitutional wealth-based discrimination.<sup>99</sup> Importantly, the Court in *Bearden* squarely rejected the state’s argument that poverty was a recidivism risk factor that justified additional incapacitation:

[T]he State asserts that its interest in rehabilitating the probationer and protecting society requires it to remove him from the temptation of committing other crimes. This is no more than a naked assertion that a probationer’s poverty by itself indicates he may commit crimes in the future. ... [T]he State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous. This would be little more than punishing a person for his poverty.<sup>100</sup>

The Court’s resistance to “lumping [the defendant] together with other poor persons” is very similar to its reasoning concerning statistical discrimination in the gender cases. The Court

<sup>94</sup> 351 U.S. 12, 16 (1956).

<sup>95</sup> *Id.* at 19. *Accord* *Mayer v. City of Chicago*, 404 U.S. 189 (1971).

<sup>96</sup> *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985); *see also* *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (citing the goal of achieving a justice system in which, regardless of finances, “every defendant stands equal before the law”).

<sup>97</sup> *Lewis v. Casey*, 518 U.S. 343, 369-72 & nn. 2-3 (1996) (Thomas, J., concurring) (reviewing case law); *see* *Douglas v. California*, 372 U.S. 353, 355-57 (1963); *United States v. MacCollom*, 426 U.S. 317, 331 (1976) (Brennan, J., dissenting) (referring to the “*Griffin* equality principle”).

<sup>98</sup> 461 U.S. 660 (1983).

<sup>99</sup> *Id.* *Bearden* built on *Williams v. Illinois*, 399 U.S. 235 (1970), in which the Court had similarly reversed a revocation of probation for failure to pay restitution. In *Williams*, the resulting incarceration sentence exceeded the statutory maximum for the crime, and the Court stated in dictum that absent that problem, no constitutional concern would have been raised. *Id.* at 243. In *Bearden*, however, the incarceration sentence did *not* exceed the statutory maximum, and the Court nonetheless held it unconstitutional, apparently rejecting the *Williams* dictum.

<sup>100</sup> 461 U.S. at 671.

observed that the state had cited “several empirical studies suggesting a correlation between poverty and crime,” but it was not persuaded by this appeal to a statistical generalization.<sup>101</sup>

*Bearden* does not establish that financial background is *always* irrelevant to sentencing. Although the Court decisively rejected the use of poverty to predict crime risk, it took more seriously a different defense of the provocation revocation. The Court emphasized one reason it may be permissible to consider ability to pay (and related factors such as employment history) when choosing between incarceration and restitution sentences:

The State, of course, has a fundamental interest in appropriately punishing persons—rich and poor—who violate its criminal laws. A defendant's poverty in no way immunizes him from punishment. Thus...the sentencing court can consider the entire background of the defendant, including his employment history and financial resources.<sup>102</sup>

That is, the State may consider financial factors as necessary to ensure the poor do not *avoid* punishment—as they would if sentenced only to pay a fine or restitution that they then cannot pay. But with EBS, poverty is not being considered to *enable equal punishment* of rich and poor, but to trigger extra, unequal punishment.<sup>103</sup> The Court further held that even when probation revocation is necessary to ensure that the poor do not avoid punishment, it is only permitted after an inquiry to determine if there are viable alternatives, such as “a reduced fine or alternate public service...Only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence may the State imprison a probationer who has made sufficient bona fide efforts to pay.”<sup>104</sup>

This requirement that less restrictive alternatives be considered is a hallmark of strict scrutiny. However, the Court resisted expressly categorizing its analysis within any particular tier of scrutiny. Indeed, reviewing the case law on indigent criminal defendants, the Court expressed ambivalence as to whether the key constitutional provision was really the Equal Protection Clause at all, as opposed to the Due Process Clause. As the Court explained, these constitutional concerns are intertwined in these cases, and in any event,

“[w]hether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as ‘the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose ....’”<sup>105</sup>

This language suggests an unconventional, perhaps somewhat flexible balancing test: a stronger legislative purpose and connection to that purpose might be required depending on the individual

<sup>101</sup> *Id.* at 671 n.11.

<sup>102</sup> *Id.* at 669-70.

<sup>103</sup> See also *Williams v. Illinois*, 388 U.S. at 244 (stating that ability to pay can be considered to avoid “inverse discrimination”); *United States v. Altamirano*, 11 F.3d 52, 53 (5<sup>th</sup> Cir. 1993) (discussing the circumstances in which courts can consider indigency). A defendant, indeed, is constitutionally entitled to a judicial inquiry into her ability to pay a fine. See, e.g., *Powers v. Hamilton County Public Defender Comm’n*, 501 F.3d 592, 608 (6<sup>th</sup> Cir. 2007).

<sup>104</sup> 461 U.S. at 671-72. Similarly, Justice White wrote that because “poverty does not insulate those who break the law from punishment,” the poor may be imprisoned if they cannot pay fines, but only “if the sentencing court makes a good-faith effort to impose a jail sentence that in terms of the state's sentencing objectives will be roughly equivalent to the fine and restitution that the defendant failed to pay.” That is, the magnitude of the punishment must be the same, even if the means is not. *Bearden*, 461 U.S. at 675 (White, J., concurring in the judgment).

<sup>105</sup> 461 U.S. at 666-67; see *Evitts v. Lucey*, 469 U.S. 387 (1985) (discussing the interrelationship between due process and equal protection concerns in these cases).

interest at stake and the extent to which it is effected. But in requiring a “careful inquiry” into each factor, including the existence of alternatives, it is clear that the Court means to require *some* form of heightened scrutiny, considerably more assertive than mere rational basis review.

Although *Bearden* involved revocation of probation, lower courts have treated it as a constraint on initial sentencing decisions. For instance, the Ninth Circuit has cited *Bearden* to reverse a district court’s decision to treat inability to pay restitution as an aggravating sentencing factor, explaining that “the court improperly injected socioeconomic status into the sentencing calculus” and that “the authority forbidding such an approach is abundant and unambiguous.”<sup>106</sup> Conversely, citing the same disparity concern, the Ninth Circuit has also reversed (as “unreasonable” under *United States v. Gall*) a decision to *reduce* a defendant’s sentence due to ability to pay restitution, holding: “Rewarding defendants who are able to make restitution in large lump sums...perpetuates class and wealth distinctions that have no place in criminal sentencing.”<sup>107</sup> Even before *Bearden*, several circuits had already held that equal protection entitles an indigent defendant who was unable to make bail to credit against the eventual sentence for time served, to avoid impermissible wealth-based distinctions in sentencing.<sup>108</sup>

The Supreme Court and lower courts have recognized a divergence between the Supreme Court’s treatment of indigent criminal defendants and its normally deferential review of wealth-based classifications: “legislation which has a disparate impact on the indigent defendant should be subject to a more searching scrutiny than requiring a mere rational relationship.”<sup>109</sup> The Supreme Court itself has repeatedly noted this divergence. In *United States v. Kerr*, a district court reasoned that special scrutiny is justified by a combination of the serious stakes and the nature of the class: “At stake here is not mere economic or social welfare regulations but deprivation of a man’s liberty. The courts ‘will squint hard at any legislation that deprives an individual of his liberty—his right to remain free.’ Moreover, the indigent, though not a suspect class, have suffered unfair persecution.”<sup>110</sup>

Outside the context of inability to pay fines and restitution, there is relatively little case law focusing on use of wealth classifications to determine substantive sentencing outcomes. This dearth should not be taken to suggest judicial approval—the issue likely rarely arises because the practice is rare. The criminal justice system has been rife with procedural obstacles to equal treatment of the indigent, and there are no doubt many subtle or *de facto* ways in which

<sup>106</sup> *United States v. Burgum*, 633 F.3d 810, 816 (9<sup>th</sup> Cir. 2011); accord *United States v. Parks*, 89 F.3d 570, 572 (1996) (“[The defendant] may be receiving an additional eight months on this sentence due to poverty. Such a result is surely anathema to the Constitution.”); see also *United States v. Ellis*, 907 F.2d 12, 13 (1<sup>st</sup> Cir. 1990) (stating that “the government cannot keep a person in prison solely because of indigency”); but see *State v. Todd*, 147 Idaho 321, 323 (2009) (upholding inability to pay as an aggravating factor).

<sup>107</sup> *United States v. Bragg*, 582 F.3d 965, 970 (9<sup>th</sup> Cir. 2009).

<sup>108</sup> See, e.g., *King v. Wyrick*, 516 F.3d 321, 323 (8<sup>th</sup> Cir. 1975); *Ham v. North Carolina*, 471 F.2d 406, 407, 408 (4<sup>th</sup> Cir. 1973); *Johnson v. Prast*, 548 F.2d 699, 703 (7<sup>th</sup> Cir. 1977); but see *Vasquez v. Cooper*, 862 F.2d 250 (10<sup>th</sup> Cir. 1988) (finding no constitutional violation because the court considered inability to pay when setting bail).

<sup>109</sup> *U.S. v. Luster*, 889 F.2d 1523 (6<sup>th</sup> Cir. 1989); see also *Maher v. Roe*, 432 U.S. 464, 471 n.6 (1977); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 461 n.\* (1988) (rejecting heightened scrutiny in a non-criminal case because “the criminal-sentencing decision at issue in *Bearden* is not analogous to the user fee ... before us”); *Dickerson v. Latessa*, 872 F.2d 1116, 1119-1120 (1<sup>st</sup> Cir. 1989) (observing that classifications implicating appeal rights receive heightened scrutiny only if they are wealth-based); *United States v. Avendano-Camacho*, 786 F.2d 1392, 1394 (9<sup>th</sup> Cir. 1986) (Kennedy, J.) (same); *United States v. Kerr*, 686 F. Supp. 1174 (W.D. Pa. 1988).

<sup>110</sup> *Kerr*, 686 F. Supp. at 1178 (quoting *Williams v. Illinois*, 399 U.S. at 263 (Harlan, J., concurring) and citing *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972)).

poverty might influence the sentence. But the practice of actually treating poverty as an aggravating factor in sentencing has not been prevalent (before EBS) and has been considered illegitimate. For instance, the formerly mandatory U.S. Sentencing Guidelines forbid consideration of socioeconomic status.<sup>111</sup> It is true that, now that the guidelines are merely advisory, federal courts do occasionally refer to education or employment when discussing the offender's circumstances (as do state courts—in contrast to gender, which is essentially never cited).<sup>112</sup> Such cases might well also be constitutionally problematic, unless such factors are used in service of the “equal punishment” principle discussed above; I do not focus here on the factors that can be considered in individualized judicial assessments of offenders. But at least such cases do not necessarily reflect a generalization that unemployed or uneducated people are categorically more dangerous, in the mechanical way that the EBS instruments do. Instead, the court can assess what each factor means in the context of a particular case—considering, for instance, whether the offender is making an effort to find employment or otherwise pursue rehabilitation, rather than simply blindly adding a given number of points based on current employment status or past educational attainment.

The federal Guidelines do include an enhancement for offenders with a “criminal livelihood,”<sup>113</sup> and defendants have occasionally challenged that enhancement as disparately affecting the poor, because the same criminal revenue would constitute a larger share of a low-income person's livelihood. Soon after the guideline's adoption, a least one district court held (citing *Bearden*) that, to avoid this potential constitutional concern, it should be interpreted to focus on the absolute amount of criminal income, rather than the share of total income, and the Sentencing Commission amended the guideline to come closer to this view.<sup>114</sup> After the amendment, the Sixth Circuit upheld the new guideline against a similar challenge, holding that although *Bearden* required heightened scrutiny of sentencing burdens on the poor, the amended guideline appropriately targeted “professional criminals” who have “chosen crime as a livelihood” and that any disproportionate effect on the poor did not reflect disparate treatment, but rather was “an incidental effect of the statute's objective.”<sup>115</sup>

This rationale, however, cannot be applied to EBS, in which poverty indicators are themselves treated as recidivism risk factors—exactly the statistical generalization that the Supreme Court squarely condemned in *Bearden*. As the district court put it in *Kerr*, even though *Bearden* recognized “a correlation between poverty and crime,...a person cannot be punished solely for his poverty. As a matter of constitutional belief, the presumption that the indigent will act criminally ‘is too precarious for a rule of law.’”<sup>116</sup>

It is difficult to see how the socioeconomic variables in EBS can avoid *Bearden*-like heightened scrutiny. Unemployment and education, the most common such variables, cannot

<sup>111</sup> U.S.S.G. 5H1.10; see also Joan Petersilia & Susan Turner, *Guideline-Based Justice: Prediction and Racial Minorities*, 9 CRIME & JUST. 151, 153-154, 160 (1987) (describing sentencing reformers' objective of eliminating role of “status” factors like employment).

<sup>112</sup> E.g., *United States v. Trimble*, 2013 WL 1235510 (11<sup>th</sup> Cir. 2013).

<sup>113</sup> U.S.S.G. 4B1.3.

<sup>114</sup> *United States v. Rivera*, 694 F.Supp. 1105 (S.D.N.Y.1988); see *United States v. Luster*, 889 F.2d 1523 (6<sup>th</sup> Cir. 1989) (describing the amendment). The amended guideline's quantitative inquiry concerns only the amount of criminal income; there is also a qualitative inquiry into whether crime was the defendant's “primary occupation.”

<sup>115</sup> *Luster*, 889 F.2d at 1530.

<sup>116</sup> 686 F. Supp. at 1179. Cf. *Edwards v. California*, 314 U.S. 160, 177 (striking down a vagrancy law and holding that it could not be “seriously contended that because a person is without employment and without funds he constitutes a ‘moral pestilence’.” Poverty and immorality are not synonymous.”).

meaningfully be distinguished from the ability to pay, nor can composite variables like “financial status.” All are proxies for poverty, and the case law in the *Bearden-Griffin* line makes interchangeable references to “wealth,” “poverty,” “class,” and so forth without fine distinctions. For instance, the Court has always treated “ability to pay” as being equivalent to poverty, even though the two are not identical—ability to pay also depends on what one’s other expenses are, whether one can borrow money from someone, and so forth. *Bearden* directly addresses, and limits, the circumstances under which courts can consider “employment history and financial resources,” specifically rejecting the consideration of such factors as recidivism predictors.<sup>117</sup> Indeed, the argument the Court was rejecting in that passage turned fundamentally on employment status; the empirical studies that Georgia had cited in *Bearden* to support its recidivism-risk argument were mainly studies of the relationship between unemployment and recidivism, and the state emphasized that the defendant’s recent job loss made him a higher recidivism risk.<sup>118</sup> Meanwhile, the point of including education in the recidivism instrument is that it is a proxy for the defendant’s future prospects for employment and legitimate earnings; it would be hard to defend the use of this factor using logic that clearly distinguished it from past, present, or future poverty. Neighborhood characteristics could potentially also be considered socioeconomic variables, since they are also very closely related to poverty, although this example is more disputable because these variables operate at a geographic level and do not draw distinctions among persons within the neighborhood.<sup>119</sup>

While there are limits to the courts’ efforts to protect indigent defendants, those limits have been found in cases testing what affirmative assistance the state must provide in order to level the criminal justice playing field. EBS, in contrast is a deliberate effort to *unevel* that field. As with gender, its defenders will be fighting an uphill battle to overcome heightened scrutiny, because if, as *Bearden* holds, one cannot impute individual risk based on the average risk posed by poor defendants, the rationale for EBS disappears.

### C. The Social Harm of Demographic and Socioeconomic Sentencing Discrimination

EBS’s use of demographic, socioeconomic, and family-related characteristics is also highly troubling on public policy grounds. As noted above, EBS advocates frequently emphasize its potential to help reduce incarceration rates.<sup>120</sup> But what they do not typically emphasize is that the mass incarceration problem in the United States is drastically disparate in its distribution. This unequal distribution is a core driver of its adverse social consequences, because it leaves certain neighborhoods and subpopulations decimated. Black men, for instance, are 52 times as likely to be incarcerated as white women are.<sup>121</sup> Young black men are especially at risk: one in nine black men under 35 are currently behind bars,<sup>122</sup> and one in three will be at some point in

<sup>117</sup> 461 U.S. at 671.

<sup>118</sup> Brief of the Respondent, *Bearden v. Georgia*, 1982 U.S. Sup. Ct. Briefs LEXIS 438, at 32-35.

<sup>119</sup> Given fairly high levels of residential segregation, see generally U.S. Census Bureau, Racial and Ethnic Residential Segregation in the United States: 1980-2000, available at [http://www.census.gov/hhes/www/housing/housing\\_patterns/pdf/censr-3.pdf](http://www.census.gov/hhes/www/housing/housing_patterns/pdf/censr-3.pdf), neighborhood might also be a racial proxy, but challengers would likely have trouble proving a racially discriminatory purpose.

<sup>120</sup> See *supra* note 38 and accompanying text.

<sup>121</sup> See HEATHER C. WEST, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES, 21 tbl.18 (2010).

<sup>122</sup> PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 3 (2008), available at <http://www.pewstates.org/research/reports/one-in-100-85899374411>.

their lives.<sup>123</sup> And the concentration of incarceration's effects is even more dramatic when one takes into account socioeconomic and neighborhood-level predictors. High school dropouts, for example, are 47 times as likely to be incarcerated as college graduates are, and young black male dropouts are incarcerated at a rate of approximately 22% at any given time.<sup>124</sup> An ample literature documents these disparities and their effects on communities.<sup>125</sup>

The EBS instruments produce higher risk estimates, other things equal, for the same subgroups that are already disproportionately incarcerated, and so it is reasonable to predict that EBS will exacerbate these disparities. Although we do not know whether EBS will reduce incarceration on balance, the most intuitive expectation is that it will increase incarceration for some people (those deemed high-risk) and reduce it for others (those deemed low-risk). If so, it will further concentrate mass incarceration's impact demographically.

This is likely to include concentrating its racial impact. I have ignored race in my constitutional analysis, because the instruments do not include it. But the socioeconomic, family, and neighborhood variables that they do include are highly correlated with race, as is criminal history, so they are likely to have a racially disparate impact.<sup>126</sup> Although the courts have not recognized equal protection claims grounded in disparate impact, policymakers should care about the consequences of their policies, and not just about the facial distinctions that they draw. Ample literature documents mass incarceration's severe consequences for African-American communities in particular. If EBS exacerbates this problem, it would be particularly hard to defend it as a progressive strategy for responding to the mass incarceration crisis.

The demographic concentration problem is one reason to worry about the gender and age variables, in addition to socioeconomic status. In other contexts, discrimination based on young age is often treated as not particularly morally troublesome. Young age is not a significant social disadvantage, nor is it even really a discrete group trait; everyone has it and then loses it. Likewise, many advocates no doubt worry less about gender discrimination that adversely affects men because men, taken as a whole, have dominant political and economic power. But the likely impact of EBS is not centered on "men taken as a whole," nor on young people generally. Rather, it will principally affect a subgroup of young men—those involved in the criminal justice system, mostly poor men of color—who are highly disadvantaged. The age and gender criteria exacerbate the extent to which incarceration's impact targets a particular slice of disadvantaged communities, effectively resulting in a substantial part of a generation of men being absent from communities and exacerbating the socially distortive effects of mass incarceration. A broad literature explores the effects of high, demographically concentrated incarceration rates on everything from marriage rates to overall community cohesion.<sup>127</sup>

<sup>123</sup> THOMAS BONCZAR, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001 (2003).

<sup>124</sup> Center for Labor Market Studies, *The Consequences of Dropping Out of School* (2009), available at <http://hdl.handle.net/2047/d20000596>; see also Robert J. Sampson & Charles Loeffler, *Punishment's Place: The Local Concentration of Mass Incarceration*, DAEDALUS (Summer 2010) (discussing neighborhood effects).

<sup>125</sup> E.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2011); TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007); *IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION* (Mary Patillo et al. eds., 2004).

<sup>126</sup> See Harcourt, *supra* note 55 (arguing that "prior criminal history has become a proxy for race").

<sup>127</sup> Todd R. Clear, *supra*, at 97; William A. Darity, Jr. & Samuel L. Myers, Jr., *Family Structure and the Marginalization of Black Men: Policy Implications*, in *THE DECLINE IN MARRIAGE OF AFRICAN AMERICANS* 263.

Another serious disadvantage is the expressive message sent by state endorsement of sentencing based on group traits. Consider specifically the traits associated with socioeconomic disadvantage. Though many Americans no doubt already suspect that the criminal justice system is biased against the poor, EBS ends any doubt on the matter. It involves the state telling judges explicitly that poor people should get longer sentences because they are poor—and, conversely, that socioeconomic privilege should translate into leniency. That is a message that, I suspect, many state actors would find embarrassing to defend in public. Doing so would require pointing to a justification that hardly improves matters: that the poor are dangerous. Generalizing about groups based on crime risk is a practice with a pernicious social history.<sup>128</sup> Dressing up that generalization in scientific language may have succeeded in forestalling public criticism, but mostly because few Americans understand these instruments or even are aware of them. If the instruments were better understood (and as EBS expands, perhaps they will be), they would send a clear message to disadvantaged groups: the system really is rigged. Further, if that message undermines the criminal justice system's legitimacy in disadvantaged communities, it could undermine EBS's crime prevention aims.<sup>129</sup>

Some EBS advocates propose that it should be used only to *mitigate* sentences, and such proposals have, at first glance, a seductive appeal—reducing incarceration rates is an important objective.<sup>130</sup> But there is no persuasive reason to believe access to risk predictions would tend to reduce sentences rather than increasing them (or doing both in different cases). Some advocates blame a retributivist approach to sentencing for the rise in incarceration, and suggest that EBS would help to make sentencing more moderate by encouraging a practical focus on crime prevention instead.<sup>131</sup> This line of argument is curious, however, because much of the political “tough on crime” movement over the past several decades has in fact been accompanied by public safety language, responding to the public's (oft-exaggerated) perceptions of crime risk.<sup>132</sup>

One could attempt to force unidirectional use of risk assessments, but it may be difficult. If judges are given the risk assessments before they choose the sentence, even if they are told to only use them for mitigation, it is difficult to expect them to completely ignore high-risk assessments.<sup>133</sup> And even if the risk score is not provided until an initial sentence is chosen, judges who know that subsequent mitigation will be available if it turns out that the defendant is

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286 (M. Belinda Tucker & Claudia Mitchell-Kernan eds., 1995); Bruce Western et al., *Incarceration and the Bonds Between Parents in Fragile Families*, in *IMPRISONING AMERICA*, *supra*, at 21-45; Elizabeth I. Johnson & Jane Waldfogel, *Children of Incarcerated Parents*, in *IMPRISONING AMERICA*, *supra*, at 98; James P. Lynch & William J. Sabol, *Effects of Incarceration on Informal Social Control in Communities*, in *IMPRISONING AMERICA*, *supra*, at 135-164.

<sup>128</sup> For a recent, prominent reflection on the way such generalizations about black men have affected African-American communities, see Barack Obama, Remarks by the President on Trayvon Martin (July 19, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/07/19/remarks-president-trayvon-martin>.

<sup>129</sup> See William Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1825-30 (1998) (discussing the effects of community perceptions of unfairness on law compliance).

<sup>130</sup> E.g., Etienne, *supra*; J. Richard Couzens, Evidence-Based Practices: Reducing Recidivism to Increase Public Safety: A Cooperative Effort by Courts and Probation 10 (June 27, 2011), available at <http://www.courts.ca.gov/documents/EVIDENCE-BASED-PRACTICES-Summary-6-27-11.pdf>; Kleiman, *supra*, at 301 (explaining that Virginia's EBS program diverts 25% of nonviolent prison-bound offenders to probation).

<sup>131</sup> Marcus, *supra*, at 751.

<sup>132</sup> Rachel Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1278-81 (2005).

<sup>133</sup> Analogously, limiting instructions to juries—instructions to consider evidence for one purpose but not another—are “notoriously ineffective” and “may be counterproductive because they call jurors' attention to the evidence that is supposed to be ignored.” Prescott & Starr, *supra*, at 323 (citing studies).

low risk might err on the side of higher preliminary sentences. Likewise, the risk scores could affect the parties' strategies; in particular, prosecutors might push for longer sentences for higher-risk offenders. Even if the scores are withheld at first from the parties, given that the instruments are quite simple, one would expect the parties to calculate the scores themselves and plan accordingly, and not to wait for the official report.

But let us hypothesize that it could be guaranteed that risk scores would only reduce sentences. Would such an approach be justified? I am loath to resist strategies for reducing unnecessary incarceration. But the key question here is not whether low-risk defendants should be diverted from incarceration—it is whether those low-risk diversion candidates should be identified based on constitutionally problematic demographic and socioeconomic characteristics (instead of past or present criminal conduct or other personal, behavioral assessments).

I conclude that such an approach raises the same problems as does EBS generally. As a constitutional matter, policies that benefit only the lowest-risk offenders may actually be more objectionable because they are less flexible and narrowly tailored—more like quotas than “plus factors.” Those with sufficiently unfavorable demographic and socioeconomic characteristics will never qualify as “low risk,” no matter how favorable their other characteristics. Consider the Missouri instrument described in Part I. A 20-year-old high school dropout with no job loses six points for those characteristics alone, and can never score higher than 1 on the scale (“average” risk), even if he has no criminal history and no other risk factors and has committed a relatively minor offense. Other instruments that consider gender and a wider variety of socioeconomic and family traits could be even more strongly driven by those factors.<sup>134</sup>

Special exceptions for the privileged cut against the foundational principle that the justice system should treat everyone equally. Moreover, one likely driver of the growth of incarceration is that the relatively privileged majority of the population has been spared its brunt.<sup>135</sup> Those who are primarily incarcerated—poor young men of color—are not politically well represented, and most other citizens have little reason to worry about the growth of incarceration. Progressives should hesitate before endorsing policies that give them another reason not to worry, even if those policies will have the immediate effect of somewhat restraining that growth.

Merely raising the potential policy concerns associated with discrimination and disparity does not necessarily end the argument, just as the constitutional inquiry is not ended by establishing that EBS merits heightened constitutional scrutiny. One must consider how strongly EBS advances competing state interests. In the next Part, then, I turn to the question whether the studies support EBS advocates' optimism.

### III. Assessing the Evidence for Evidence-Based Sentencing

Protecting society from crime while avoiding excessive incarceration is no doubt an important interest, even a “compelling” one. But the Constitution and good policy also require

<sup>134</sup> The mitigation-only approach also would not deprive defendants of standing to challenge EBS; a defendant who would have received diversion to probation had the risk instrument not considered his gender, for instance, is harmed by that consideration. The Supreme Court has often considered equal protection challenges in which the plaintiff claims she was denied a government benefit (such as university admission) on the basis of some improper consideration. *E.g.*, *Fisher*, \_\_ S.Ct. at \_\_.

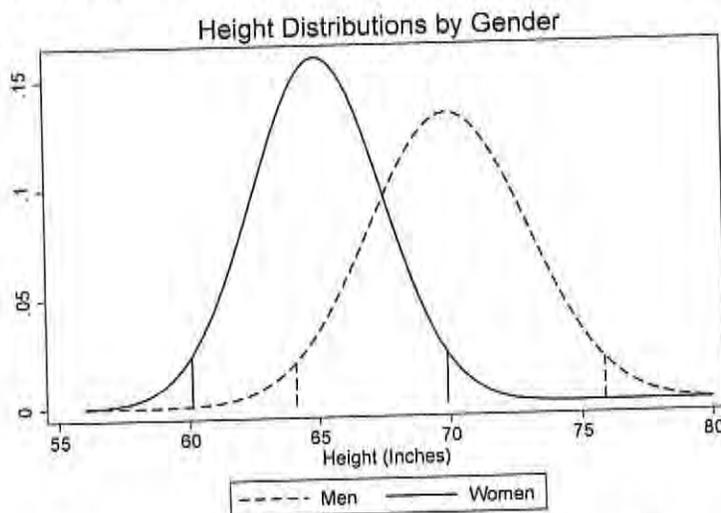
<sup>135</sup> James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 1001 (2010); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1974 (2008).

assessing the strength of the relationship between EBS and that interest. When heightened scrutiny applies, it is the state's burden to provide convincing evidence establishing that relationship. In this Part, I show that the current empirical evidence does not suffice.

### A. Precision, Group Averages, and Individual Predictions

The instruments' first serious limitation is that they do not provide anything even approaching a precise prediction of an individual's recidivism probability. At best, what they predict with reasonable precision is the *average* recidivism rate for all offenders who share with the defendant whichever characteristics are included as variables in the model. If the model is well specified and based on a sample that is representative of the population to which the results are extrapolated, then it might perform this task well. But that does not necessarily make it particularly useful for individual predictions. Individual vary much more than groups do, and even a relatively precisely estimated model will often not do well at predicting individual outcomes in particular cases.<sup>136</sup> Social scientists sometimes refer to the broader ranges attached to individual predictions as "prediction intervals" (or sometimes as "forecast" uncertainty or "confidence intervals for a forecast") to distinguish them from the "confidence intervals" that are estimated for the group mean or for the effect of a given variable.

To illustrate this point, let's start with an example that involves predicting a continuous outcome rather than a binary future event. To simplify, we will consider only one explanatory variable (sex) and one normally distributed outcome variable (height), which are quite strongly related. The height distributions of the U.S. male and female populations look approximately like Figure 1 below, which is based on average heights of 70 inches for males (standard deviation 3 inches) and 65 inches for females (standard deviation 3 inches).



But suppose one did not know the true population distributions, and one had to estimate them by taking a random sample. If one takes a large enough sample, it is easy to obtain quite precise estimates of the average male height and the average female height (as well as the average additional height associated with being male, which is just the difference between the

<sup>136</sup> See David J. Cooke & Christine Michie, *Limits of Diagnostic Precision and Predictive Utility in the Individual Case*, 34 LAW & HUM. BEHAV. 259, 259 (2010) ("It is a statistical truism that the mean of a distribution tells us about everyone, yet no one.").

group means). This point is illustrated in Table 1. I created simulated data for a “true population” of men and women that has the height distributions shown in Figure 1. Then I drew from that population random samples with sample sizes 20, 200, and 400, regressed height on gender within each sample, and recorded the predicted mean heights for men and women and the confidence intervals for those means.

Table 1. Precision of Predicted Means versus Individual Forecasts: An Illustration!

Sample Size	Male Height in Inches			Female Height in Inches		
	Mean (& Forecast)	95% Conf. Int. for the Mean	95% Pred. Int. for Individ. Forecast	Mean (& Forecast)	95% Conf. Int. for the Mean	95% Pred. Int. for Individ. Forecast
20	69.8	[68.2, 71.4]	[64.4, 75.1]	64.8	[63.2, 66.4]	[59.4, 70.1]
200	69.8	[69.3, 70.4]	[64.3, 75.4]	64.6	[64.0, 65.1]	[59.0, 70.1]
400	70.0	[69.6, 70.4]	[64.6, 75.4]	64.9	[64.5, 65.3]	[59.5, 70.3]

Samples are drawn from a simulated “true population” with population means and standard deviations of 70.0 (3.0) for men and 65.0 (2.5) for women.

Notice that even the smallest sample quite closely approximates the true population means of 70 and 65 inches, while the largest sample comes even closer. Exactly how close each sample comes involves chance (different random samples of the same sizes would have different means), but in general chance plays a smaller role the larger the sample is; as the sample grows the estimates should converge on the true population values. This expectation is captured in the estimation of confidence intervals for the mean, which get narrower as the sample gets larger. Confidence intervals are a way of accounting for chance in sampling. For the 400-person sample, one can express 95% confidence in quite a precise estimate: for males, between 69.6 inches and 70.4 inches, and for females, between 64.5 inches and 65.3 inches.<sup>137</sup> If you keep drawing more and more 400-person samples, they don’t tend to differ very much; with that sample size, you will generally do quite a good job approximating the underlying population, which is why the confidence interval is narrow. Meanwhile, the 20-person sample gives you wider 95% confidence intervals, each spanning more than three inches—a much rougher estimate.

But what if you wanted to use your 400-person sample not to estimate the averages for the population, but to predict the height of just the next random woman you meet? Your single best guess—the one that is statistically expected to err by the lowest margin—would be the group mean from your sample, which is 64.9. But you wouldn’t be *nearly* as confident in that prediction as you would in the prediction for the group mean. In fact, within that sample, only 13.5% of women have heights that are between 64.5 inches and 65.3 inches, which was your 95% confidence interval for the group mean. If you wanted to give an individual forecast for that next woman that you could be 95% confident in, it would have to be much less precise—you could predict that she would be somewhere between 59.5 inches and 70.3 inches, the 95% prediction interval for the individual forecast that is shown in Table 1. That’s a range of nearly

<sup>137</sup> To describe something as a 95% confidence interval for an estimated group mean is to express confidence that 95% of the time, when one draws a random sample and uses the same estimation procedure, the interval one estimates will contain the true group mean for the underlying population.

eleven inches—in other words, you don't know much at all about how tall to expect the next woman to be.<sup>138</sup>

One could make the example much more complicated, with multiple variables and more irregular distributions of outcomes, but the prediction interval for an individual forecast is always wider than the confidence interval for the mean—generally *much* wider.<sup>139</sup> Note that while the confidence intervals for the means gets much narrower as the sample gets larger, the prediction interval does not. The underlying uncertainty that it reflects is not mainly the possibility of having gotten an unusual sample; it's the variability in the underlying population that we saw in Figure 1. One *could* narrow the prediction interval by adding variables to the regression that help to explain this underlying variability—for example, the heights of the individual's parents.

The same basic intuition also applies to models of binary outcomes, like whether a defendant will recidivate—the expected outcome for an individual is much less certain than the expected rate for a group. Some of the recidivism risk prediction instruments include confidence intervals for the probabilities they predict. Indeed, some scholars have urged that confidence intervals should always be provided (rather than mere point estimates) so that judges can get an idea of how precise the instruments are.<sup>140</sup> But given that judges are using the instruments for the purpose of predicting a specific individual's probability of recidivism, providing them a confidence interval for the *group* recidivism rate might even be more misleading than not providing any at all. For instance, if judges are told “The estimated probability that Defendant X will recidivate is 30%, and the 95% confidence interval for that prediction is 25% to 35%,” that may well sound to the judge like a reasonably precise individual prediction, but it is not. It is merely a reasonably precise estimate of an average recidivism rate.<sup>141</sup> If the underlying study has a large sample size, such a prediction could be very precise even if the model's variables do not capture much of the variation in individual probabilities at all.

With binary outcomes, though, while the confidence interval for the mean may be misleading, the “prediction interval” is not a very useful alternative way of expressing the precision of an individual forecast, because it does not tell you anything that was not already

<sup>138</sup> Note that the estimated uncertainties in Table 1 are based on a regression of height on gender using standard Stata postestimation prediction commands. By construction, the uncertainties are the same for men and women. Another way to estimate a 95% prediction interval for the height of the next woman you meet would be to just ignore the men and give the range within which the middle 95% of the women in your sample fall. Because female height has a slightly narrower distribution, your interval would then be a bit narrower (about 10 inches), but this method would produce a wider interval for the next male's height (about 12 inches). These ranges are marked on Figure 1.

<sup>139</sup> See Cooke & Michie, *supra*, at 271 (illustrating this point using simulated data on violence risk among psychiatric patients, and showing how measurement error for subjective criteria amplifies the uncertainty of individual predictions).

<sup>140</sup> E.g., McGarraugh, *supra*, at 1095-96.

<sup>141</sup> This problem has some similarities to the broader problem of assessing scientific evidence of causation in legal contexts, in which “the law is interested not simply in whether a particular variable causes a particular effect [in general], but, ultimately, in whether a particular variable did cause the effect [in the specific case].” David L. Faigman, *A Preliminary Exploration of the Problem of Reasoning from General Scientific Data to Individualized Legal Decision-Making*, 75 BROOK. L. REV. 1115, 1119 (2010). But this issue is not identical, and my objection here is not that the models cannot establish “individual-level causation,” McGarraugh, *supra*, at 1101. The models are predictive, and make no causal claims, so their advocates cannot be accused of confusing correlation with causation. And they aim to predict future probabilistic events, not to prove what caused a particular past event. When one's goal is merely to predict, correlations can be useful, even if the causal pathway is uncertain. For instance, how one voted in the 2012 presidential election is no doubt a very strong predictor of how one will vote in 2016—information campaign strategists can use even if the former does not cause the latter.

made clear by the point estimate itself. Unless the predicted probability is extremely low or extremely high, a 95% confidence interval for an individual prediction will by nature always run from 0 to 1.<sup>142</sup> Recidivism is rarely nearly certain or nearly impossible. So even a good recidivism prediction model could produce prediction intervals of [0,1] for essentially every defendant: that is, the only prediction that can be made with 95% confidence about any given individual is that she will either recidivate or not. This fact does not reflect poorly on the design of the prediction instruments or the quality of the underlying research. It reflects the inherent uncertainty of this predictive task and the binary nature of the outcome.

In order to assess how well a model predicts recidivism risk for individuals, some other metric is necessary.<sup>143</sup> There is no single, agreed-upon method for assessing the individual predictive accuracy of a binary model, but there are several possibilities. One common metric used in the recidivism prediction literature is called the "area under the curve" (AUC) approach.<sup>144</sup> This method pairs each person who ended up recidivating with a random person who did not; the score is the fraction of these pairs in which the recidivist had been given the higher predicted risk score. A perfect, omniscient model would rank all eventual recidivists higher than all eventual non-recidivists, and the AUC score would be a 1, while coin flips would on average produce a score of 0.5. The best published scores for recidivism prediction instruments appear to be around 0.75, and these are rich models that include various dynamic risk factors, including detailed psychological assessments, rather than the simple point systems based on objective factors.<sup>145</sup> Many studies have reported AUC scores closer to 0.65.<sup>146</sup> By comparison, a prominent meta-analysis of studies of psychologists' clinical (non-actuarial) predictions of violence found a mean AUC score of 0.73, which the author characterized as a "modest, better than chance level of accuracy."<sup>147</sup> As another point of comparison, if one turns height into a binary variable called "tall" (which denotes being above the median height of the sample), our basic, one-variable model does much better at predicting who will be tall than any

<sup>142</sup> See R. Karl Hanson & Philip D. Howard, *Individual Confidence Intervals Do Not Inform Decision-Makers about the Accuracy of Risk Assessment Evaluations*, 34 L. & HUM. BEHAV. 275, 276 (2010)

<sup>143</sup> See Hanson & Howard, *supra*, at 276. Stephen D. Hart et al., *Precision of Actuarial Risk Assessment Instruments*, 174 BRIT. J. PSYCHIATRY s60 (2007), offer an alternative way of calculating a prediction interval for an individual. They use a traditional method for estimating the confidence interval for a probability prediction given a point estimate for the probability and a sample size, and calculate it for each risk-level category in two common violence prediction instruments, using a sample size of 1. See E.B. Wilson, *Probable Inference, The Law of Succession, and Statistical Inference*, 22 J. AM. STAT. ASSOC. 209 (1927). The intervals Hart et al. calculate do not always run from 0 to 1, but they are always very wide, ranging between 79 and 89 percentage points in width. The authors conclude that it is "impossible to make accurate predictions about individuals using these tests."

Hart et al. interpret their intervals as follows: "Given an individual with an ARAI score in this particular category, we can state with 95% certainty that the probability he will recidivate lies between the upper and lower limit." This is a slightly odd interpretation, given that, as the authors state, Wilson's confidence intervals are normally interpreted as expressing an interval within which one is confident that the *actual observed rate* for the new sample (not the *ex ante* probability) will fall. The actual observed binary outcome for one individual always must be 0 or 1, however, so I agree with Hanson and Howard, *supra*, that the prediction interval for all but the extreme cases should be 0, 1 (rather than, say, .10 to .94). But either way, it is wide.

<sup>144</sup> See Douglas Mossman, *Assessing Predictions of Violence: Being Accurate About Accuracy*, 62 J. CONSULTING & CLINICAL PSYCH. 783 (1994) (describing the method as well as competing approaches).

<sup>145</sup> See Mairead Dolan & Michael Doyle, *Violence Risk Prediction*, 177 BRIT. J. PSYCH. 303, 305-07 (2000); AOUSC, *supra*, at 9.

<sup>146</sup> Dolan & Doyle, *supra*, at 305-07.

<sup>147</sup> Mossman, *supra*, at 788.

actuarial model does at predicting who will recidivate—it has an AUC score of 0.825.<sup>148</sup> This is despite the fact that, as we saw, that model gives only rather wide bounds for individual predictions of height—gender is actually quite a strong predictor of height (most men are taller than most women), but it still leaves considerable individual variation unexplained.<sup>149</sup>

Another simple measure of prediction accuracy is the linear correlation between the predicted probabilities and the actual outcomes for offenders; this measure will be 0 if the instrument explains nothing more than chance and 1 if it predicts perfectly.<sup>150</sup> In 1994, a prominent meta-analysis of studies comparing several actuarial recidivism prediction instruments found that the LSI-R (the instrument that the Indiana Supreme Court upheld) had the highest reported correlation with outcomes, at 0.35.<sup>151</sup> By comparison, the gender-only model of the binary “tall” variable has a correlation coefficient of 0.65 (in the same sample used above).

All in all, these metrics suggest that the prediction models do have individual predictive value, but they do not make a resounding case for them. Again, this should not be seen as an indictment of the quality of the science—it is just that even given all the best insights of decades of criminological and psychological research, recidivism remains an extremely difficult outcome to predict at an individual level, much more difficult than height. The models improve considerably on chance, which for some policy purposes (or for the purpose of mental health treatment decisions, which is what many of the models were originally developed for) is no doubt quite valuable. But to justify group-based discrimination in sentencing, both the Constitution and good policy require a much more demanding standard for predictive accuracy. Moreover, note that the accuracy measures discussed here assess the *total* predictive power of each recidivism model, combining all its variables, and are thus overly generous for the purpose of assessing whether particular variables should be included in the model. The marginal predictive power added by just the constitutionally problematic variables is even less, as discussed in the next Section.

The basic difference between individual and group predictions has been pointed out by some scholars in the empirical literature surrounding the risk prediction instruments.<sup>152</sup> But it is lost in much of the EBS legal and policy literature, and more importantly, it may be lost on judges and prosecutors, who may have an inflated understanding of the estimates’ precision. Hannah-Moffat explored this issue by interviewing lawyers and probation officers in Canada,

<sup>148</sup> This is estimated in the same 400-person sample used above, pairing each “tall” person with one “short” person, scoring the prediction as correct (i.e., 1) if the tall person was male (i.e., predicted to be taller) and the short person was female, incorrect in the reverse case (0), and as 0.5 if the two had the same gender (i.e., predicted to have the same height), following the standard tie-breaking procedure used to calculate AUC scores. Conversely, if one pairs 200 random women with one random man each (eliminating the possibility of “tied” gender), the man is taller 89% of the time—much better than the chance level of 50%.

<sup>149</sup> Note that a 95% prediction interval for an individual forecast of the binary variable “tall” would run from 0 to 1 for both men and women—one could not be anywhere close to 95% confident that any given woman would be short, or that any given man would be tall. In the sample, 17.5% of women and 82.5% of men were “tall.”

<sup>150</sup> The square of this correlation coefficient is one variant on the “fit” measure “pseudo R-squared.” This and several other variants could be used to assess a model’s ability to explain individual variation, although none should be interpreted as a measure of the overall quality of the model. For a concise summary, see Institute for Digital Research & Education, *FAQ: What are pseudo R-squareds?*, [http://www.ats.ucla.edu/stat/mult\\_pkg/faq/general/Pseudo\\_RSquareds.htm](http://www.ats.ucla.edu/stat/mult_pkg/faq/general/Pseudo_RSquareds.htm).

<sup>151</sup> Paul Gendreau et al., *A Meta-Analysis of the Predictors of Adult Recidivism: What Works!*, 34 *CRIMINOLOGY* 575, tbl. 4 (1994).

<sup>152</sup> See, e.g., Hart et al., *supra*; Cooke & Michie, *supra*.

where risk instruments are common. She found that even if caveats about the difference between group and individual predictions are provided, the message often does not get through:

[F]ew understand and appropriately interpret probability scores. Despite receiving training on these tools and their interpretation, practitioners tended to struggle with the meaning of the risk score....Rather than understanding that an individual who obtains a high risk score *shares characteristics* of an aggregate group of high-risk offenders, the individual is likely to become *known* as a high-risk offender. Instead of being understood as correlations, risk scores are misconstrued in court submissions, pre-sentence reports, and the range of institutional file narratives that ascribe the characteristics of a risk category to the individual.<sup>153</sup>

Advocates of actuarial methods, in this and other contexts, have often sharply criticized the claim that it is not safe to draw conclusions about individuals based on group averages. Mark Cunningham and Thomas Reedy argue that the “distinction between individualized as opposed to group methods is a false dichotomy,” contending, essentially, that truly individualized methods do not exist; the discipline of psychology, and its sub-discipline of violence prediction, draws its fundamental scientific character from its willingness to draw insights from data collected on groups and apply them to individuals.<sup>154</sup> Likewise, EBS advocate Richard Redding quotes Paul Meehl, an early pioneer in actuarial prediction in psychology: “If a clinician says ‘This case is different’ or ‘It’s not like the ones in your [actuarial] table,’...the obvious question is ‘Why should we care whether you think this one is different or whether you are surer?’”<sup>155</sup> Jennifer Skeem and John Monahan, quoting Grove and Meehl, argue:

Our view is that group data can be, and in many cases empirically are, highly informative when making decisions about individual cases....[C]onsider the revolver analogy of Grove and Meehl:

...Two revolvers are placed on the table, and you are informed that one of them has five live rounds with one empty chamber, the other has five empty chambers and one live cartridge, and you are required to play Russian roulette....Would you seriously think ‘Well, it doesn’t make any difference what the odds are. Inasmuch as I’m only going to do this once, there is no aggregate involved, so I might as well pick either one of these two revolvers; it doesn’t matter which?’<sup>156</sup>

These responses strike me as off base. I do not argue, nor could anybody, that group averages have nothing to do with individual behavior. Of course group averages will *on average* predict outcomes for the individuals in the group—that much is a tautology—and thus provide some information that could guide individual decision-making. But that does not always mean that the group average tells us *much* about what to expect for any given individual. One does not have to be naïve to think that an individual case may be different from the average if it’s a situation in which individual outcomes in fact vary widely. The question is how much individual variation there is in a given population, and how much of that variation the variables in the

<sup>153</sup> Hannah-Moffat, *supra*, at 12-13.

<sup>154</sup> Mark D. Cunningham & Thomas J. Reedy, *Violence Risk Assessment at Federal Capital Sentencing*, 29 CRIM. JUST. & BEHAV. 512, 517 (2002); accord Jessica M. Tanner, “Continuing Threat” to Whom?: Risk Assessment in Virginia Capital Sentencing Hearings, 17 CAP. DEF. J. 381, 402-05 (2005).

<sup>155</sup> Redding, *supra*, at 12 n.52 (quoting Paul E. Meehl, CLINICAL VERSUS STATISTICAL PREDICTION (1954)).

<sup>156</sup> Jennifer L. Skeem & John Monahan, *Current Directions in Violence Risk Assessment*, U. Va. School of Law Public Law and Legal Theory Research Paper No. 2011-13, 9-10.

model explain. In the recidivism context (unlike, for instance, the Russian roulette context), the variables included in the instruments leave most of the variation unexplained.<sup>157</sup>

One could defend the instruments on the ground that the precision of individual predictions does not matter from an efficiency perspective. If the group average estimates are good, then the model will, averaged across cases, improve judges' predictions of recidivism, leading more efficient use overall of the state's incarceration resources to prevent crime.

There are two main problems with this response. First, it almost certainly does not suffice for constitutional purposes, at least with respect to any variable triggering heightened scrutiny. The argument amounts to the claim that it doesn't matter whether an instrument has any meaningful predictive power for individuals, so long as the group generalizations have some truth to them. But this is exactly the kind of statistical discrimination defense that the Supreme Court has repeatedly rejected. This point is one reason the Russian roulette analogy is inapt. I would, of course, choose the gun with just one bullet. And if the same dictator forced me to choose between driving on a highway on which 2% of the drivers were drunk and one in which 0.18% of the drivers were drunk, I would choose 0.18% every time. But just that disparity did not suffice, in *Craig v. Boren*, to justify a gender-discriminatory alcohol law. When demographic and socioeconomic characteristics are used to justify the state's serious adverse treatment of individuals, the Constitution requires more than a statistical generalization. Nobody would worry that choosing the gun with one bullet is unfair or harmful to the gun with five. But it is not harmless to base an individual's incarceration on a statistical inference that, based on his poverty or gender, treats him as the human equivalent of a loaded gun.

Second, the "efficient discrimination" argument is not even necessarily correct in terms of efficiency. It is not true that any model with *any* improved predictive power over chance will provide efficiency gains, because EBS isn't replacing chance. If the actuarial instruments don't capture much of the individual variation in recidivism probability, then there is certainly a possibility that the thing EBS is meant to displace—judges' "clinical" prediction of risk—might actually be more efficient because it captures more of that variation. This point is explored further in the next Section.

### **B. Do the Instruments Outperform Clinical Prediction and Other Alternatives?**

The *Bearden* test requires assessment of whether other available and nondiscriminatory (or less discriminatory) alternatives could accomplish the state's penological objectives. Here, I consider two such alternatives: actuarial methods that *do not* rely on constitutionally troubling variables; and judges' exercise of their professional judgment ("clinical" prediction). Even if analysis of alternatives were not constitutionally required, if EBS does not improve at least on the clinical method that it seeks to replace, it does not substantially advance the state's penological interests, and is also undesirable on policy grounds.

EBS advocates have concluded that it is superior to available alternatives, but they have had to stretch the existing evidence quite far to support this claim. J.C. Oleson, for instance, argues that even inclusion of race would be constitutionally permissible, and concludes that it is

<sup>157</sup> In the Russian roulette hypothetical, the decision-maker is given the only variable that matters. The number of bullets quite strongly predicts the individual's probability of dying; it would explain most of the individual variation, with the remaining variation being pure chance. The recidivism models are not in the same ballpark.

“straightforward” to show that no less restrictive means is available.<sup>158</sup> To support this conclusion, he cites just a single study from 1987, by Joan Petersilia and Susan Turner, for the proposition that “omitting race-correlated factors from a model to predict recidivism reduced the accuracy of the model by five to twelve percentage points.” Even taking this at face value, it hardly seems obvious that a statistical advantage this modest would justify explicit sentencing discrimination based on race; the Supreme Court has rejected gender discrimination based on stronger statistical evidence than that. And given the Supreme Court’s disparate impact jurisprudence, it is odd to justify including race itself based on the predictive power of *race-correlated* factors from the model.

More importantly for present purposes, the Petersilia and Turner study actually suggests that demographic and socioeconomic factors could be excluded from risk prediction instruments without losing any significant predictive value. The “race-correlated factors” in their study included *criminal history and crime characteristics*, which accounted for *all* the additional explanatory value provide by correlates of race (and which no sentencing scheme ignores).<sup>159</sup> Once those factors were already included, adding “demographic” and “other” variables—which included employment, education, marital status, substance abuse, and mental health variables—did not significantly improve the model’s predictive power. This is presumably because conduct is generally a better predictor of future conduct than static characteristics are, a point other studies corroborate. For instance, Douglas Mossman’s 1994 meta-analysis of studies concerning violence prediction found that “the average accuracy of predictions based on past behavior is higher” than either mental health professionals’ clinical judgments or actuarial instruments.<sup>160</sup>

More recent studies of risk prediction instruments have typically not broken down the extent to which adding socioeconomic and demographic variables improves the overall predictive power of the model (a distinct question from the *coefficients* on those variables). But Peterilia’s and Turner’s results, at least, suggest that a viable alternative is to base actuarial prediction only on crime characteristics and criminal history. Of course, existing sentencing schemes already incorporate those variables, so perhaps providing judges with risk predictions based on them would be redundant. It would be more sensible to have the sentencing commission or legislature incorporate the instruments’ insights when determining sentencing ranges. But the fact that an instrument like this might not be terribly useful to judges does not mean that the instruments with the additional variables are *more* useful; the Petersilia and Turner study, at least, suggests that they are not.

Even setting aside the possibility of using *different* actuarial instruments, what about the basic question whether the instruments outperform clinical prediction? It is gospel in the EBS literature that they do. But while scores of studies have found that actuarial prediction methods outperform clinical judgment, this finding is not universal, the average accuracy edge is not drastic, and the vast majority of studies are from wholly different contexts (such as medical diagnosis or business failure prediction). In one widely cited meta-analysis, Grove et al. evaluated all the studies addressing the actuarial versus clinical comparison that were published

<sup>158</sup> Oleson, *supra*, at 1386; *see id.* at 1387 (also concluding that “[o]nce the constitutional door is open to race, all other sentencing factors can pass through: gender, age, marital status, education, class, and so forth.”).

<sup>159</sup> Petersilia & Turner, *supra*, at 171 (showing, in the table for “All Convicted Defendants,” that 57% of outcomes could be accurately predicted by chance, 60% when racially noncorrelated factors were added, 67% when crime characteristics were added, 70% when criminal history variables were added, and still 70% when demographic and “other” variables were added).

<sup>160</sup> Mossman, *supra*, at 789-90.

between 1945 and 1994 and that met certain quality criteria; just five criminal recidivism studies made the cut, plus 131 other studies.<sup>161</sup> Overall, actuarial prediction performed on average about 10% better, but the authors warned: "However, our results qualify overbroad statements in the literature opining that such superiority is completely uniform; it is not. In half of the studies we analyzed, the clinical method is approximately as good as mechanical prediction, and in a few scattered instances, the clinical method was notably more accurate."<sup>162</sup>

If the actuarial advantage does not exist in half of studied contexts, then it is obvious that the specifics matter. And the EBS literature often cites research on far more complicated instruments than the simple ones (like Missouri's, described above) that states actually use. Take, for instance, a study by Grant Harris, Marie Rice, and Catherine Cormier testing an instrument called the Violence Risk Appraisal Guide, which has been cited by EBS advocates.<sup>163</sup> The VRAG consists of twelve variables, the first and most heavily weighted of which is itself a composite of twenty variables: "conning, lying, manipulation, callousness, lack of remorse, proneness to boredom, shallow affect, irresponsibility, impulsivity, poor behavior controls, criminal versatility, juvenile delinquency, sexual promiscuity, and parasitic lifestyle."<sup>164</sup> Assessing these factors requires an elaborate psychological profile, which in the study was carried out by groups of mental health clinicians who "knew the patients well."<sup>165</sup> Nothing like this is typically involved in EBS. Even in the case of sentencing instruments that try to use somewhat nuanced personality characteristics, like the LSI-R, it is not at all obvious that a probation officer filling out a presentence report can carry out a comparable analysis. The VRAG's success simply says nothing about the potential success of a totally different instrument and assessment process. Moreover, the comparability of the populations is also dubious; the VRAG studies involved Canadian psychiatric patients.<sup>166</sup>

Indeed, the past success of instruments that rely on elaborate personality profiles may, if anything, suggest a *disadvantage* of the EBS instruments. The studies show that ideally, after a trained clinician collects all the relevant information and makes the numerous required qualitative assessments, her ultimate predictions will be better informed if she then uses an actuarial model to tell her how much weight to give each factor. This result is unsurprising. But it is a far cry from saying that a different predictions will be better informed if she then uses an information (completely ignoring all of the qualitative personality factors) will outperform the judgment of a judge who has had a chance to assess the individual defendant and the complete facts of the case. The relevant comparison, in short, is not just between actuarial versus clinical weighting of variables. It is between actuarial weighting of a few variables versus clinical weighting of a much wider range of variables.<sup>167</sup> It is possible that the actuarial instruments would win that comparison, but we cannot conclude that based on existing research.

<sup>161</sup> W.M. Grove et al, *Clinical vs. Mechanical Prediction: A Meta-analysis*, 12 PSYCH. ASSESSMENT 19, 22-24 (2000) (listing studies).

<sup>162</sup> *Id.* at 22-24.

<sup>163</sup> Grant T. Harris et al., *Prospective Replication of the "Violence Risk Appraisal Guide" in Predicting Violent Recidivism Among Forensic Patients*, 26 LAW & HUM. BEHAV. 377 (2002); see Wolff, *supra*, at n.73.

<sup>164</sup> Harris et al., *supra*, at 378.

<sup>165</sup> *Id.* at 379.

<sup>166</sup> *Id.* at 381.

<sup>167</sup> Psychologist Stephen Hart states that similar simplified instruments for predicting sexual violence arguably do not deserve even the label "evidence-based" because "scientific and professional literature would not consider [it] informed, guided, or structured since they only include a relatively small set of risk factors." Stephen D. Hart, *Evidence-Based Assessment of Risk for Sexual Violence*, 1 CHAPMAN J. CRIM. JUST. 143, 155, 164 (2009).

A review of each of the five older recidivism studies that Grove et al. included in their meta-analysis likewise does not produce any meaningful support for the modern EBS instruments. Two of the five studies found no discernable advantage for actuarial prediction.<sup>168</sup> Glaeser (1955), one of two studies that found a substantial advantage, involves an archaic prediction instrument in which the most strongly predictive variable was the offender's (clinically assessed) "social development pattern": "Respected Citizen," "Inadequate," "Fairly Conventional," "Ne'er-Do-Well," "Floater," "Dissipated," and "Socially Maladjusted."<sup>169</sup> It also involved very few clinical decisionmakers (four psychiatrists and four sociologists who worked in a parole system in the 1940s), so one possible explanation for the results is that a couple of these people might have not have been terribly good at their jobs.<sup>170</sup> A study by Wormith and Goldstone (1984) evaluates an instrument with more objective criteria and also found that it predicted recidivism better than did the parole board's actual (clinical) decisions. But the study relied on a small Canadian sample that the authors warned "should not be construed as being representative of incarcerated offenders either nationally or internationally."<sup>171</sup> The authors also warned that their measures of clinical and actuarial judgment were not really fairly comparable, in that the "clinical prediction" was not actually a risk prediction at all (instead, it was a binary parole decision), whereas the actuarial prediction was.<sup>172</sup> Finally, a study by Sacks (1974) includes a brief analysis of the clinical versus actuarial comparison, but the comparison it draws is nonsensical (the clinical measure is a parole decision, but only those granted parole are included in the sample) and the purported actuarial advantage is in any case small and not tested for significance.<sup>173</sup>

Nor are more recently published studies more compelling. Oleson et al. (2011) purport to compare the accuracy of clinical and actuarial judgment in federal probation officers' assessment of a probationer's recidivism risk.<sup>174</sup> The study included over a thousand decision-makers (but only one individual's case) and used a modern instrument recently developed by the Administrative Office of the U.S. Courts, called the Federal Post-Conviction Risk Assessment

<sup>168</sup> Terrill L. Holland et al., *Comparison and Combination of Statistical and Clinical Predictions of Recidivism Among Adult Offenders*, 68 J. APPLIED PSYCH. 203 (1983) (finding that individual decisionmakers better predict violent recidivism, but actuarial prediction better predicts some measures of overall recidivism); James Smith & Richard I. Lanyon, *Prediction of Juvenile Probation Violators*, 32 J. CONSULTING & CLINICAL PSYCH, 54 (1968) (finding that a juvenile recidivism base expectancy table was slightly more accurate than the predictions of two clinical assessors, but was less accurate than simply predicting that everyone would recidivate would have been).

<sup>169</sup> Daniel Glaser, *The Efficacy of Alternative Approaches to Parole Prediction*, 20 AM. SOC. REV. 283, 285(1955).

<sup>170</sup> *Id.* Problems like this recur in other actuarial versus clinical studies as well—they state a sample size consisting of the number of subjects, and calculate statistical significance as though all of the observations were independent. This approach is misleading because there are usually a far smaller number of clinical decision-makers involved in the study (standard errors should instead be calculated with clustering on the decision-maker).

<sup>171</sup> J. Stephen Wormith & Colin S. Goldstone, *The Clinical and Statistical Prediction of Recidivism*, 11 CRIM. JUST. & BEHAV. 3 (1984).

<sup>172</sup> *Id.* at 20. A general issue with studies that compare real-world "clinical" parole decisions to recidivism risk prediction instruments is that the predictive value of a *prediction* is being compared to that of a *decision*. Wormith et al. explain that it is unsurprising that the parole decision does not predict recidivism as well as an actuarial prediction does, because the parole decision might be affected by factors unrelated to risk prediction, and by the desire to err on the side of caution. *Id.*

<sup>173</sup> Howard R. Sacks, *Promises, Performances, and Principles: An Empirical Study of Parole Decisionmaking in Connecticut*, 9 CONN. L. REV. 347, 402-403 (1977).

<sup>174</sup> J.C. Oleson et al., *Training to See Risk: Measuring the Accuracy of Clinical and Actuarial Risk Assessments Among Federal Probation Officers*, 75-SEP FED. PROBATION 52 (2011).

(PCRA).<sup>175</sup> The researchers asked officers to watch a video about an individual and predict his risk, and then to redo the exercise after being given the individual's PCRA score and training in the PCRA method. The researchers concluded that the officers were "more accurate" when they had the PCRA.<sup>176</sup> But their only evidence for that claim is that officers' risk scores after being given the PCRA and instructed on its implementation were *more consistent with the PCRA*. That is, in a study purporting to assess whether the PCRA improved prediction accuracy, the researchers assumed the PCRA was perfectly accurate; there was no other measure of what the "accurate" score was.<sup>177</sup>

In sum, the shibboleth that "actuarial prediction outperforms clinical prediction" is—like the actuarial risk predictions themselves—a generalization that is not true in every case. Its accuracy depends on the outcome being evaluated, the actuarial prediction instrument, the clinical predictors' skills, the information on which each is based, and the sample. There is little evidence that the recidivism risk prediction instruments offer any discernable advantage over the status quo, and even if they did, that does not mean particular contested variables need to be included in the model. Alternative models might work as well or better.

### C. Do the Risk Prediction Instruments Address the Right Question?

Even if the instruments *could* identify high-risk offenders, does that mean that using them would substantially advance the state's interests? EBS's advocates have typically taken this for granted, but the answer may well be no. The instruments tell us, at best, who is at the highest risk of recidivism. They do not tell us whose risk of recidivism will be the *most reduced* by incarceration. The two questions are not the same, and only the latter directly pertains to the state's penological interests.

At the outset, let's precisely identify the state interest that EBS is designed to serve. Its advocates generally refer either to crime prevention, reduction of incarceration, or both. These can be seen as two sides of the same coin: EBS is meant to help the state balance these interests, which are at least potentially in tension. I agree that this objective is compelling. Crime inflicts great harm on society, and so does excessive incarceration. Striking an appropriate balance between these concerns is an enormous and vital challenge.<sup>178</sup>

But that does not necessarily mean actuarial prediction of recidivism—even if it were perfect—substantially advances that interest. Suppose a judge is considering whether to sentence a defendant to five years in prison versus three. Assuming that the costs of incarceration are the same across defendants,<sup>179</sup> the question is whether the additional two years' incarceration will reduce enough crime to justify those costs. The EBS prediction instruments do not seek to answer that question. Their predictions are not conditional on the sentence. The

<sup>175</sup> This instrument includes qualitative and dynamic factors plus objective factors like age and education. It is in use for planning probation supervision and treatment interventions, not sentencing. Admin. Office of the U.S. Courts, Office of Probation and Pretrial Services, *An Overview of the Federal Post Conviction Assessment 1* (Sept. 2011).

<sup>176</sup> Oleson et al, *supra*, at 54-55.

<sup>177</sup> The AOUSC's other validation studies for the PCRA did not compare its effectiveness to clinical prediction, and did not find anything close to *perfect* accuracy. AOUSC, *supra*, at 9.

<sup>178</sup> One could frame the state interest as being about the efficient use of finite incarceration resources to maximize crime prevention effects. Unless states have reached their prison capacities and cannot expand, though, I assume that the incarceration rate isn't fixed, so sentencing judges don't think about incarcerating one defendant as trading off with incarceration of another. Instead, they think about whether that particular sentence is worth its costs.

<sup>179</sup> This assumption may not be true. Some defendants have families that are affected, for instance.

samples in the underlying studies include people given all kinds of sentences. They measure recidivism within a particular period, measured from the time of release or (for probationers) from sentencing, but there are no variables relating to the sentence in the regressions. The judge accordingly cannot use the instrument to answer the question “How much crime should I expect this defendant to commit if I incarcerate her for five years?”, or three years, or any other potential length. The judge only knows how “risky” she is in the abstract.<sup>180</sup>

This point has been ignored by the EBS literature. Bernard Harcourt, however, makes a similar point about the general deterrence consequences of police profiling and criminal history-based sentencing enhancements.<sup>181</sup> Some have argued that it is efficient for police to focus on groups that commit crimes at greater rates because it concentrates the deterrent effect of policing on the more dangerous groups. Harcourt responds that the fact that members of a particular group commit more crimes on average does not mean that that group is more readily deterred by policing. In fact, high-risk, socially disadvantaged groups may be less willing to cooperate with police, or less deterred by the marginal increase in detection risk, meaning that policing in their communities may actually deter *fewer* crimes than policing in other communities. The relevant question, Harcourt argues, is not rate of crime commission; it is “elasticity” to policing.<sup>182</sup>

Harcourt’s argument focuses on general deterrence effects on community crime rates, but a similar problem arises when one considers the effects of marginal changes in incarceration specifically on the defendant’s own future crime risk—that is, the very thing that the risk prediction instruments are ostensibly there to help judges minimize. If we are going to base incarceration length on group averages with the objective of reducing crime, then surely the relevant group characteristic is how much incarcerating its members reduces crime—its elasticity to incarceration. And that question is not the same as the question of recidivism probability. There is no particular reason to believe that groups that recidivate at higher rates are also more responsive to incarceration. EBS advocates presumably think that point is intuitive: lock up the people who are the riskiest, and you will be preventing more crimes. But that intuition oversimplifies the relationship between incarceration and recidivism.

Incarceration’s effect on an individual’s subsequent offending has two components. First, there is an *incapacitation effect*: while behind bars, he cannot commit crimes that he would have committed outside.<sup>183</sup> If the incapacitation effect were the *only* effect that incarceration has on subsequent crime, then it would be logical to assume that the state’s incarceration resources are best targeted at the highest-risk offenders. But the situation is not that simple, because of the second component: the effect on the defendant’s *post-release* crimes. I will refer to this as the “specific deterrence” effect, but it is really more complicated—it includes on the one hand specific deterrence (fear of reincarceration) plus any rehabilitative effect of prison programming, and on the other hand potentially criminogenic effects of incarceration (interfering with

<sup>180</sup> A related concern is that the length of incarceration may be a confounding variable in the underlying predictive model. If the people who have one set of characteristics tend to get longer sentences than those with other characteristics, then the comparison of their recidivism rates could be apples-to-oranges, because one group’s rate is the average after, say, an average of 3 years of incarceration and the other group’s rate is the average after 5. We thus don’t even know from the models who is the riskiest *today*, much less who is the riskiest X or Y number of years from now.

<sup>181</sup> HARCOURT, *supra* note 12, at 122-36.

<sup>182</sup> *Id.*; Bernard E. Harcourt, *A Reader’s Companion to Against Prediction*, 33 LAW & SOCIAL INQUIRY 265, 269 (2008).

<sup>183</sup> This incapacitation effect should be discounted for crime in prison, a complication I will bracket for simplicity.

subsequent employability, building criminal networks, and so forth). There is no intuitive reason to assume that the specific deterrence effect is determined by, or even correlated with, the defendant's recidivism risk level. It is very possible that higher-risk defendants (or some of them, anyway) might be more *inelastic* to specific deterrence and rehabilitation, and might be more vulnerable to the possible criminogenic effects of incarceration. If so, lengthening high-risk offenders' sentences might be more likely to increase the risk they pose after they get out, or at least to lower that risk less than locking up some low-risk offenders might.

If so, this disadvantage has to be weighed against the incapacitation advantage. Implicitly, the current EBS instruments (by ignoring the elasticity question) embrace the premise that only incapacitation matters, but this is not obvious. Most incarceration sentences are fairly short: in 2006, the median prison sentence in state courts was 1.7 years (and that is excluding jail sentences, which are shorter).<sup>184</sup> Moreover, EBS advocates often emphasize its value in determining whether a person should be incarcerated at all, versus probation; presumably, in cases on the incarceration margin, the incarceration sentence being considered is quite short. So, suppose a judge is considering whether to incarcerate a person for one year, versus zero. In that case the potential incapacitation effect lasts a year—a one-year slice of the defendant's offending is taken away. But all the other effects of the judge's choice may last, at least to some degree, the rest of the defendant's lifetime after that year.

There is simply no reason to assume the incapacitation effect is the most important factor, much less the only important factor—and if it is not, then the correspondence between risk prediction and crime-elasticity prediction may well be wholly lost. And this complication arises even if one assumes the relevant state interest only relates to reducing the *defendant's* crime risk. If we also consider effects on *other* individuals' crime commission, there are many more factors to consider, none of which have any intuitive connection to recidivism risk scores: general deterrence, expressive effects on social norms, future crime risk from the defendant's family members, substitution effects in criminal markets, and so forth.

While much of the current EBS literature totally ignores the question of responsiveness of recidivism risk to incarceration, some advocates have taken the general position that incarceration *increases* recidivism risk, citing as evidence simply the fact that persons released from prison recidivate at higher rates than probationers.<sup>185</sup> But this reasoning relies on an apples-to-oranges comparison. It is unsurprising that prisoners recidivate more often than probationers, because prisoners are usually more serious offenders with more prior criminal history. Also, the claim that incarceration generally increases recidivism would make the entire premise of EBS dubious: unless one is considering a life sentence, why identify the most dangerous criminals in order to incarcerate them if incarceration will only make them *more* dangerous? Risk prevention is only a plausible justification for incarceration if the sign on incarceration's effects goes the other way for at least some offenders—and a truly useful risk prediction instrument would try to identify who those offenders are.

<sup>184</sup> Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006—Statistics* tbl. 1.3 (2009), <http://www.bjs.gov/content/pub/pdf/fssc06st.pdf>.

<sup>185</sup> E.g., McGarraugh, *supra*, at 1107; Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 594 (2009); Michael A. Wolff, *Lock 'Em Up and Throw Away the Key? Cutting Recidivism by Analyzing Sentencing Outcomes*, 20 FED. SENT. R. 320, 320 (2008).

Drawing solid causal inferences in this area is difficult. Some studies have used regression or matching methods to compare recidivism rates after controlling for observed characteristics like crime type and criminal history.<sup>186</sup> But while this approach is better than a raw comparison of means, it still does not produce strong causal identification. Causal inference based on regression depends on the assumption that all the important potentially confounding variables have been observed and controlled for. This assumption is often not valid, so one has to be very cautious not to interpret regression results to mean more than they do.

A particular concern arises when the treatment variable of interest (here, incarceration) might itself be influenced by a decision-maker's anticipation of the outcome of interest (here, recidivism). Measuring a statistical association between the two variables provides no way to disentangle which component comes from incarceration causing recidivism, which from anticipated recidivism risk causing incarceration, and which from other confounding variables that affect both sentencing decisions and recidivism outcomes. Regression does not solve the reverse causality problem unless the control variables in the regression account for *all* the reasons that a judge might think a defendant poses a higher risk. As we have seen already, though, even the best recidivism models do not even come close to accounting for all of the sources of individual variation in risk. They surely do not account for all of the sources of variation in judicial anticipation of risk, either—for instance, judges' appraisal of the detailed facts of the case or defendants' courtroom demeanor.

Some recidivism studies have used more rigorous quasi-experimental methods to assess causation, seeking to exploit an exogenous source of variation in incarceration length—that is, a source of variation that is not itself affected by anticipated recidivism risk or by any of the other various factors that affect recidivism risk.<sup>187</sup> Several studies take advantage of the random assignment of judges or public defenders. The intuition is that getting randomly assigned to a particularly harsh judge, or to a less capable public defender, will tend to increase a defendant's sentence in a way unrelated to the defendant's characteristics—thus, while the sentence is not entirely random, it has an effectively random component. Instrumental variables methods are used to estimate the effect of this exogenous increase in sentences on subsequent recidivism. Other studies take advantage of legal reforms that introduce sentencing variation.<sup>188</sup>

These studies have fairly consistently found that increased sentence length on average reduces subsequent offending, although the effect seems to be nonlinear—the marginal effect of increasing sentence lengths declines and eventually disappears as sentence lengths get longer.<sup>189</sup> Thus, specific deterrence lengths on average cut in the same direction as incapacitation effects do.<sup>190</sup> Reported incapacitation effects typically appear larger,<sup>191</sup> but the results of the two types of studies are hard compare. Incapacitation studies generally estimate the number of crimes

<sup>186</sup> See, e.g., Oregon Dep't of Corrections, *The Effectiveness of Community-Based Sanctions in Reducing Recidivism* 18-19 (Sept. 2002).

<sup>187</sup> For a useful recent review of this literature, see David A. Abrams, *The Prisoner's Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905, 929-36 (2013).

<sup>188</sup> E.g., Shawn D. Bushway & Emily G. Owens, *Framing Punishment: A New Look at Incarceration and Deterrence* (Jan. 2010) (unpublished manuscript), [www.human.cornell.edu/pam/people/upload/Framing-Jan-2010.pdf](http://www.human.cornell.edu/pam/people/upload/Framing-Jan-2010.pdf); Ilyana Kuziemko, *Going Off Parole: How the Elimination of Discretionary Prison Release Affects the Social Cost of Crime* 13-22 (Nat'l Bureau of Econ. Research, Working Paper No. 13380, 2007), available at <http://www.nber.org/papers/w13380.pdf>.

<sup>189</sup> See Abrams, *supra*, at 936.

<sup>190</sup> *Id.* at 936-39 (reviewing incapacitation studies).

<sup>191</sup> *Id.*

avoided during each “person-year” of incarceration,<sup>192</sup> measuring incapacitation’s full effect, whereas specific deterrence studies of subsequent recidivism do not estimate the full specific deterrence effect (that is, the change in crime commission over the defendant’s whole remaining lifetime). Instead, such studies mostly have quite short follow-up periods, and generally measure not number of crimes committed but recidivism “survival,” i.e., whether an offender makes it through the study period without being rearrested or reconvicted, and if not, how long he lasts.<sup>193</sup> Moreover, incapacitation studies sometimes use reported crime as their measure,<sup>194</sup> whereas recidivism studies use the more underinclusive measures of rearrest or reconviction.

Regardless, what the existing research on causal effects has *not* done is to estimate either specific deterrence or incapacitation elasticities that are conditional on the kinds of characteristics that are included in the EBS risk prediction instruments. Instead, the research has focused on estimating the causal relationship between incarceration and crime at a more general level, perhaps subdivided by broad crime category or by deciles of the sentencing-severity distribution, but not by detailed socioeconomic, demographic, and family characteristics. One Urban Institute study, by Avi Bhati, does estimate incapacitation elasticities that are gender, race, and state-specific, but not specific deterrence elasticities, and not broken down by socioeconomic status. It finds no major differences in the total number of crimes averted by either gender or race.<sup>195</sup> Notably, variations by state were far more dramatic, suggesting the need to worry about another problem with the risk prediction instruments: extrapolation from the sample on which Kuziemko on specific deterrence effects finds that incarceration length increases have a “much stronger deterrent effect for older offenders than younger ones, for whom time served actually weakly increases recidivism.” That is, young age—one of the most heavily weighted predictors of increased recidivism risk in the current instruments—actually appears to correspond to a lower effectiveness of incarceration length increases in deterring post-release recidivism. This suggests that the EBS instruments are weighing this factor in the wrong direction.

Perhaps future research will improve matters. To effectively inform the state’s pursuit of its penological objectives, the research underlying future instruments would have to satisfy the following criteria:

- (1) the use of valid causal identification methods, e.g., exploiting random assignment of judges;
- (2) application of those methods to obtain estimates for incarceration’s effects that are interacted with the variables that the state seeks to include in the instrument;
- (3) accounting for nonlinear effects of incarceration length (e.g., the effect of a tenth year of incarceration is probably not the same as the effect of a first);

<sup>192</sup> E.g., Rucker Johnson & Steven Raphael, *How Much Crime Reduction Does the Marginal Prisoner Buy?* 28 (Oct. 2010) (unpublished manuscript), [http://list-socrates.berkeley.edu/~ruckerj/johnson\\_raphael\\_crimeincarcJLE.pdf](http://list-socrates.berkeley.edu/~ruckerj/johnson_raphael_crimeincarcJLE.pdf).

<sup>193</sup> E.g., Kuziemko, *supra*, at 22.

<sup>194</sup> E.g., Johnson & Raphael, *supra*, at 24.

<sup>195</sup> E.g., Avi Bhati, *An Information Theoretic Method for Estimating the Number of Crimes Averted by Incapacitation*, Urban Institute Research Report 24 tbl. 2 (July 2007) (showing estimated male elasticities that were slightly greater in most states, but not in every state and by very small margins). Expressed as a percentage reduction in crime rate, rather than an absolute number of crimes averted, females were actually more responsive to incarceration in every state studied. *Id.* at 27 tbl. 4.3.

- (4) long enough follow-up periods to allow researchers to meaningfully approximate the change in an individual's lifetime recidivism risk;<sup>196</sup>
- (5) incorporation of both incapacitation and specific deterrence effects, with comparable outcome measures;
- (6) testing of the instrument within the jurisdiction in which it will be used, on a representative sample; and
- (7) evidence of substantial *additional* explanatory power for each constitutionally problematic variable that the state seeks to include.

The current instruments do not do anything like this, and I am not optimistic that this research challenge will be overcome soon. And even it is, the above-discussed problems concerning the uncertainty of *individual* predictions would still apply to the prediction of individual elasticities.

Finally, it might also be objected that it would be unfair to treat an individual's greater expected responsiveness to incarceration as the basis for incarcerating her for longer—offenders might be penalized for *not* being incorrigible. I am sympathetic to this objection. But once sentencing is based on predicting future actions on the basis of demographic and socioeconomic considerations, “fairness” is no longer a decisive sentencing criterion anyway. I do not really advocate it, but at least an elasticity-prediction sentencing instrument would be connected to the state's penological interests. The current instruments are not.

#### IV. Will Risk Prediction Instruments Really Change Sentencing Practice?

Advocates of EBS sometimes defend it against disparity and retributive justice objects by arguing that it will not really change very much at all. These “defenses” come in two forms. The first is to observe the risk prediction instruments don't directly determine the sentence—they merely provide information to judges. The second defense is that minimization of the defendant's future crime risk already plays an important role in sentencing, so perhaps EBS merely replaces judges' individual judgments of that risk with more accurate actuarial predictions. I address these points in Sections A and B, respectively.

##### A. Does EBS Merely Provide Information?

One response to disparity concerns is to defend the instruments as innocuous insofar as they only provide information, rather than completely controlling the sentence.<sup>197</sup> The judge can take or leave the information, supplement it with her own clinical assessments of risk, and weigh other, non-recidivism-related factors. As a constitutional defense of EBS, this point could be framed in two ways. The strong form of the argument would assert that the state's adoption of

<sup>196</sup> Collecting data on an offender's entire life is unrealistic, but follow-up periods substantially longer than the typical one or two years are needed. Most people eventually desist from crime, and people who have not recidivated for 7 or 8 years (after release, if they were incarcerated) have quite low subsequent recidivism rates. *E.g.*, Megan C. Kurlychek, Robert Brame, & Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483 (2006). Thus, to study the effect of a first year of incarceration (versus none), eight or ten years of outcome data would probably be fine. The study should simply estimate total crime by each individual over a fixed period of time beginning at sentencing, conditional on (among other things) the share of that time that is spent in prison—that measure would incorporate both incapacitation and specific deterrence effects.

<sup>197</sup> *E.g.*, *Malenchik v. State*, 928 N.E.2d 564, 573 (Ind. 2010); David E. Patton, *Guns, Crime Control, and a Systemic Approach to Federal Sentencing*, 32 CARDOZO L. REV. 1427, 1456 (2011); Kleiman, *supra*, at 301.

the risk prediction instrument does not itself amount to disparate “treatment” at all. Rather, it merely provides social scientific information to a government decision-maker, and surely the Constitution does not require sentencing judges to be ill-informed.

The problem with this framing, however, is that the point of evidence-based sentencing is for the sentence to be *based* on the statistical “evidence,” at least in part. The risk score is not calculated for academic purposes. Even if the instrument itself is “only information,” the sentencing process that incorporates it is not. Sentencing law already tells judges to consider recidivism risk,<sup>198</sup> and the instrument tells the judge how to calculate that risk. Inescapably, unless judges completely ignore the instruments (rendering them pointless), some defendants will receive longer sentences than they would have but for their group characteristics, such as youth, male gender, or poverty. And that, indeed, is the whole point: if the state did not want unemployed people to be, on average, given longer sentences than otherwise-identical employed people, why put unemployment in the risk prediction instrument? Moreover, arguably even the information provision itself is constitutionally troubling: it represents state endorsement of statistical generalizations like those that, in the gender and poverty contexts, the Supreme Court has condemned.

To be sure, for any individual defendant, each factor included in the risk prediction models is not the *only* determinant of the sentence—it is merely one determinant of the risk score. If a court were looking for ways to distinguish *Bearden*, it could seize on this difference. That case involved revocation of probation, and the Court emphasized that because the trial court had initially chosen probation, it was clear that “the State is seeking here to use as the *sole* justification for imprisonment the poverty of a probationer.”<sup>199</sup> This distinction is unpersuasive, however. Anything treated as a sentencing factor will at least sometimes solely trigger a change in the sentence relative to what it would otherwise have been. To give a simple illustration, if a sentence is based on crime severity plus gender, and these factors together produce a 10-year sentence for a male when an otherwise identical woman would have received seven years, male gender is not solely responsible for the sentence; crime severity establishes the baseline of seven years. But male gender is solely responsible for the extra three years.

If this point is slightly more obscured in EBS cases than in *Bearden* itself, it is only because judges won’t routinely state what alternative sentence they would have given if the defendant had had different characteristics. In *Bearden* the dispositive role of poverty could not be hidden because of the posture of the case: the defendant had been sentenced to probation and restitution until he failed to pay. But surely if a court’s decision-making is unconstitutional in substance, it cannot become constitutional through obscurity of reasoning. In any event, here the use of the discriminatory factor is not obscure, even if its specific consequence for any given defendant is not transparent. A defendant subjected to an unconstitutional decision-making process should be entitled to resentencing.<sup>200</sup> Notably, the Supreme Court has often applied heightened constitutional scrutiny to the mere *consideration* of constitutionally suspect factors. In *Fisher v. University of Texas at Austin*, for instance, the Supreme Court applied strict scrutiny to the use of race as one of many factors in university admissions—indeed, as Justice Ginsburg

<sup>198</sup> E.g., 18 U.S.C. 3553(a).

<sup>199</sup> *Bearden*, 461 U.S. at 671.

<sup>200</sup> See *Chapman v. California*, 386 U.S. 18 (1967).

characterized it in dissent, as a “factor of a factor of a factor of a factor” that very likely was not the reason that the plaintiff in the case was denied admission.<sup>201</sup>

The claim that “it’s just information” thus should not enable EBS to *avoid* heightened equal protection scrutiny. A weaker, and more persuasive, version of this claim is that it should make it easier for EBS to *survive* such scrutiny under a “narrow tailoring” requirement. Analogously, in the affirmative action cases, the Court has held that race may be used as a “plus factor” (if there is no race-neutral alternative that will suffice), but it has squarely rejected the use of racial quotas.<sup>202</sup> But the fact that the risk prediction instruments do not completely displace all other sentencing factors is a point in its favor when assessing narrow tailoring, but it is hardly dispositive, as *Fisher* suggests. One must also consider the extent to which they advance the state’s interests as well as the availability of alternatives.

Moreover, although *Fisher* made narrow tailoring somewhat challenging to demonstrate even in the affirmative action context, it should be even harder to show in the EBS context. Educational affirmative action involves a state interest that is itself defined in race-conscious terms: student body diversity, of which “racial or ethnic origin” is an “important element,” although not the only one.<sup>203</sup> It is more than plausible that considering race as one admissions factor is narrowly tailored to the objective of ensuring racial diversity, and that no totally race-blind alternative will suffice to achieve that objective. In the EBS context, however, the state’s penological interests are not defined in group-conscious terms, and the problematic classifications in the instruments are not so closely linked to those interests.

#### **B. Does EBS Merely Replace One Form of Risk Prediction With Another?**

Another response to the disparity concern (and to the retributivist objection raised by other critics) is to say that none of this is new: risk prediction is already part of sentencing.<sup>204</sup> If judges are *not* given statistical risk predictions, many will predict risk on their own, perhaps relying implicitly on many of the same factors that the statistical instruments use, such as gender, age, and poverty; actuarial instruments will merely allow them to do so more accurately.<sup>205</sup> One could take this argument further: Conceivably, judges’ current clinical assessments could *overweight* some of those variables relative to the weights assigned by the actuarial instruments.<sup>206</sup> These possibilities not been empirically tested and cannot be ruled out.

As a constitutional matter, this “substitution” defense is not very persuasive. It is not likely that courts would uphold an across-the-board state policy explicitly endorsing an otherwise impermissible sentencing criterion on the rationale that the same variables *might* sometimes

<sup>201</sup> *Fisher v. University of Texas at Austin*, 570 U.S. \_\_\_, \_\_\_ (2013) (Ginsburg, J., dissenting).

<sup>202</sup> *Fisher*, 570 U.S. at \_\_\_.

<sup>203</sup> *Id.* at \_\_\_.

<sup>204</sup> See, e.g., 18 U.S.C. 3553.

<sup>205</sup> See, e.g., Oleson, *supra*, at 1373; Patton, *supra*, at 1456; Jennifer Skeem, *Risk Technology in Sentencing: Testing the Promises and Perils*, 30 JUSTICE Q. 297 (2013); Bergstrom & Kern, *supra*, at 2; Commentary to Draft MPC § 6B.09; Michael H. Marcus, *MPC--The Root of the Problem: Just Deserts and Risk Assessment*, 61 FLA. L. REV. 751, 757 (2009); Branham, *supra*, at 169.

<sup>206</sup> This is perhaps a particularly realistic possibility with respect to race, because of its absence from the instruments: if judges currently implicitly take race into account in predicting recidivism risk, it is possible that giving them a statistical prediction that is not race-specific could cause them to stop doing so. Thus, even if EBS increases the weight given to socioeconomic variables that are correlated with race, it could reduce the weight given to race itself, offsetting or even reversing its expected effect on racial disparity.

already have been used *sub rosa*. In general, the difficulty of eradicating subtle unconstitutional discrimination does not justify codifying or formally endorsing it.

Moreover, the “substitution” defense depends on a questionable empirical premise. Do the EBS instruments really merely substitute one form of risk prediction for another? Or does providing judges with statistical estimates of recidivism risk increase the salience of recidivism prevention in their decision-making vis-à-vis other punishment objectives? Notably, some EBS advocates affirmatively express the hope that EBS will lead to an expanded emphasis on recidivism prevention.<sup>207</sup> If it does, it will almost surely increase the role of the individual demographic and socioeconomic characteristics used in the EBS instruments. Those characteristics are not relevant to retributive motivations for punishment (or may even cut the other direction).

There are logical reasons to suspect that EBS might increase the emphasis judges place on risk prediction. Most judges no doubt recognize that predicting recidivism risk is difficult, and that difficulty might well lead many of them to discount this factor. If such a judge is presented with a quantified risk assessment framed as scientifically established, they may well give it more weight.<sup>208</sup> In many other legal, policy, and other decision-making contexts, scholars have observed that judges and other decision-makers often defer to scientific models that they do not really understand, and to “expert” viewpoints.<sup>209</sup> Moreover, sentencing is high-stakes, rendering the use of a simple, seemingly objective algorithm potentially appealing.<sup>211</sup> For elected judges, research has shown that political considerations influence sentences,<sup>212</sup> and reliance on risk predictions might provide political cover for release decisions while making it

<sup>207</sup> E.g., Hyatt, Bergstrom, & Chanenson, *supra*, at 266.

<sup>208</sup> See Hannah-Moffat, *supra*, at 7 (“Risk scores impart a moral certainty and legitimacy into the classifications that they produce, ‘allowing people to accept them as normative classifications and therefore as scripts for action.’”); Harcourt, *supra*, at 273 (describing the “pull of prediction”).

<sup>209</sup> E.g., Janine Pearson, *Construing Crane: Examining How State Courts Have Applied its Lack-of-Control Standard*, 160 U. PA. L. REV. 1527, 1550-53 (2012) (discussing jury overreliance on expert testimony of dangerousness in civil commitment hearings); Michael H. Shapiro, *Updating Constitutional Doctrine: An Extended Response to the Critique of Compulsory Vaccination*, 12 YALE J. HEALTH POL’Y, L. & ETHICS 87, 128-29 (discussing the problem of judicial overreliance on expert claims of causation); Kathryn M. Campbell, *Expert Estimates from ‘Social’ Scientists*, 16 CAN. CRIM. L. REV. 13 (2011); Robert L. Kane, *Creating Practice Guidelines: The Dangers of Over-Reliance on Expert Judgment*, 23 J.L. MED. & ETHICS 62, 63 (1995); Robert E. Schwenn & Steven P. Larson, 32 ROCKY MTN. MINERAL L. INST. PROC. 22 (1986) (describing courts’ and policymakers tendency to overrely on models and perceived expertise in the environmental context); Case, *Problems in Judicial Review Arising From the Use of Computer Models and Other Quantitative Methodologies in Environmental Decision Making*, 10 B.C. L. REV. 251, 256 (1982) (same).

<sup>210</sup> See Oleson, *supra*, at 1330 & n.2 (citing sources); D. Brock Hornby, *Speaking in Sentences*, 14 Green Bag 2d 147, 157 (2011); Judge Robert Pratt, *The Implications of Padilla v. Kentucky on Practice in United States District Courts*, 31 ST. LOUIS UNIV. PUBLIC L. REV. 169, 169 (2011) (“Sentencing is unquestionably the most difficult job of any district court judge.”); Judge Thomas M. Hardiman, *Foreword*, 49 DUQ. L. REV. 637, 637 (2011) (“Any preconceived notions that a judge may have about sentencing upon taking the bench are quickly dwarfed by the awesome responsibility it entails.”).

<sup>211</sup> This point may help to explain the continuing heavy weight federal judges give to the sentencing guidelines that they are not required to follow.

<sup>212</sup> Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 261 (2004) (finding that judges increase sentences as elections approach).

politically difficult to release offenders rated as high-risk.<sup>213</sup> Prosecutors might similarly feel political pressure to push for harsh sentences for offenders rated high-risk, but free to offer better deals to those rated low-risk.<sup>214</sup>

To be sure, some of the research on clinical versus actuarial prediction has suggested that clinicians may resist reliance on actuarial instruments, but that research comes from medical and mental health diagnosis settings in which the clinician may be much more confident in their professional diagnostic skills than judges are in their ability to foresee a defendant's future.<sup>215</sup> Even if a particular judge does not really trust the instrument, its prediction might influence her thinking through anchoring.<sup>216</sup> And presenting the judge with a risk prediction instrument may simply remind her that risk is a central basis on which the state expects her to base punishment.

All of this is speculative; no empirical research documents how risk prediction instruments affect judges' weighting of recidivism risk versus other factors. To provide some suggestive evidence informing the question, I carried out a small experimental study, with 83 law students as subjects. All subjects were given the same fact patterns describing two criminal defendants and told to recommend a sentence for each. The key experimental variation was that for half the subjects, the descriptions also included a paragraph with the defendant's score on a Recidivism Risk Prediction Instrument (RRPI) and a brief explanation of what the RRPI was.

The cases involved the same conviction (grand larceny of \$100,000 worth of jewelry) and the same minimal criminal history (one misdemeanor underage-drinking conviction). Both defendants were male, and no race was mentioned. Beyond that, their characteristics varied sharply. Robert was a middle-aged, married, college-educated executive in a jewelry store chain, and was motivated to steal from the chain's stores by concern about the cost of his daughters' college education. William was a 21-year-old, single, unemployed, alcoholic high school dropout with incarcerated siblings, recently evicted from his parents' home, who was visiting a mall looking for retail work when he saw a jewelry display case open and spontaneously grabbed a bunch of items. These fact patterns allowed some possible distinctions between the defendants' criminal conduct. William's crime was spontaneous, while Robert's involved an extended course of conduct, elaborate deceptive behavior (replacement of the jewels with fakes), and arguably more victims (buyers of the fakes). These distinctions allowed subjects primarily motivated by retribution to have a possible basis for distinguishing the two—likely in William's favor—whereas those inclined to rely on a defendant's characteristics to assess future dangerousness would likely give William a longer sentence.<sup>217</sup> Subjects were given a wide statutory sentencing range (zero to 20 years) and not told what punishment theories to prioritize.

All subjects were given all these underlying facts; the difference was whether they were also translated into an RRPI score. Robert's probability of recidivism was rated "low risk" while William's was "moderate-to-high risk." Although the RRPI is fictional, these ratings realistically approximate the difference that one would see using real instruments. For instance, on the Missouri instrument's -8 to 7 scale, Robert would have a perfect score of 7, while William

<sup>213</sup> Hannah-Moffat, *supra*, at 30 ("The use of risk scores can have considerable cache[t] with 'elected' judges and prosecutors who must defend their decisions to an electorate concerned with security.")

<sup>214</sup> *Id.*

<sup>215</sup> *E.g.*, Atul Gawande, THE CHECKLIST MANIFESTO (2009).

<sup>216</sup> See Prescott & Starr, *supra*, at 325-30 (reviewing anchoring research); Cass R. Sunstein et. al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1170 (2002).

<sup>217</sup> Students' comments after completing the exercise supported this interpretation.

would score -1 (“below average”). Subjects considered the scenarios in a prescribed, randomized order.

The results in Table 2 suggest that the RRPI score sharply affected the relative sentences some subjects gave to Robert and William. Among the 43 students who were not given the RRPI score, 17 gave Robert (the “low-risk” defendant) the higher sentence, 13 gave them the same sentence, and 13 gave William the higher sentence. Among the 40 students who received the RRPI score, only 8 gave Robert the higher sentence, 9 gave them the same sentence, and 23 gave William the higher sentence.

	(1) Robert Higher (Probit)	(2) William Higher (Probit)	(3) Which Higher? (William, Same, Robert) (Ordered Probit)	(4) Sentence (OLS)
RRPI	-0.603* (0.305)	0.710* (0.284)	0.662** (0.257)	-0.871 (0.733)
William				-0.711 (0.473)
william*RRPI				1.67* (0.61)

Cols. 1 & 2 show probit regressions of indicators for giving the “low-risk” or “high-risk” defendant, respectively, a higher sentence. Col. 3 shows an ordered probit regression of a variable valued at 2 if the high-risk defendant’s sentence was higher, 1 if they received the same sentence, and 0 if the low-risk defendant’s sentence was higher. Col. 4 is an OLS regression with sentence in years as the outcome. An indicator for which case the subjects considered first was also included. Standard errors in parentheses. \*p<0.05, \*\*p<0.01

I assessed the size and statistical significance of this shift toward higher sentences for William in several ways, using different definitions of the outcome variable. First, I used probit regressions to estimate the change in the probabilities that Robert would be given a higher sentence (Col. 1) or that William would (Col. 2.). These two are not just mirror-image inquiries, since there is a third option of giving both the same sentence. I next used an ordinal probit regression to assess change in the relative probability of each of these three possible outcomes (Col. 3). Next, I used the recommended sentence, in years, as the outcome variable, an approach that takes into account the magnitude and not just the direction of the sentencing distinctions (Col. 4). The results are statistically significant, and fairly sizeable, in all specifications. The use of the RRPI instrument is associated with an increase in William’s sentence, relative to Robert’s, of about 1.67 years (that is, 20 months), or about one-third of the overall average sentence (5 years). The average sentence given to William was about 0.8 years higher in the RRPI condition; the average sentence given to Robert was about 0.9 years lower.<sup>218</sup>

A reasonable interpretation of these results is that receiving the RRPI score caused at least some subjects to emphasize recidivism risk more, relative to other sentencing considerations, than they would have otherwise. Moreover, the instrument’s apparent effect on sentences was not unidirectional—the instrument’s estimated effect on the difference between

<sup>218</sup> Subjects who were given William’s case first gave significantly higher sentences to both defendants than those who were given Robert’s case first. But order did not significantly affect the *relative* sentences given nor the effect of the RRPI.

the two defendants reflected a combination of an increase in the high-risk defendant's sentence and a reduction in the low-risk defendant's sentence.

These results provide a piece of suggestive evidence that quantified risk assessments might affect the weight placed on different sentencing considerations. However, the study is small, and moreover, although much experimental research on decision-making uses student subjects, one has to be cautious in extrapolating the results of such studies to "real world" settings. A real criminal case is not a four-paragraph vignette, and judges are not law students—their experience and expertise may make them less suggestible. Still, it cannot be assumed that judges are wholly resistant to attempts to influence their sentencing decision-making. After all, judges tend to defer to non-binding sentencing guidelines, and research from other legal settings suggests that courts tend to defer to scientific expertise.<sup>219</sup> While it remains an unsettled question, for now there is no empirical evidence pointing the other way, and little reason to believe that EBS will *merely* substitute one form of risk prediction for another.

## CONCLUSION

The inclusion of demographic and socioeconomic variables in risk prediction instruments that are used to shape incarceration sentences is normatively troubling and, at least with respect to gender and socioeconomic variables, very likely unconstitutional. As the EBS movement charges full steam ahead, advocates have minimized the first concern and almost wholly ignored the second. This is a mistake. To be sure, EBS has an understandable appeal to those seeking a politically palatable way to cut back on the United States' sprawling system of mass incarceration. It is difficult to persuade policymakers to reduce incarceration at the cost of increased crime, and EBS offers a technocratic solution to this normative dilemma: just identify the people who can be released without increasing crime. But this identification is not that easy, and moreover, there is no reason to assume, and no good way to ensure, that EBS will only lead to sentences being reduced. Even if it does, there is something troubling, at best, about using group identity and socioeconomic privilege as a basis for reducing defendants' sentences.

Note that while I have focused on sentencing, essentially the same arguments apply to use of actuarial instruments in - decisions, which is now routine in thirty states, including almost all of those that have not abolished discretionary parole.<sup>220</sup> This practice has been given little attention by legal scholars or the public,<sup>221</sup> and has rarely been challenged in court, perhaps because of the absence of counsel in parole proceedings or because parole decision-making is not very transparent. Many prisoners may not even know of the existence of the risk prediction instruments, much less understand how they work or their constitutional infirmities.<sup>222</sup> But while risk prediction unquestionably is properly central to the parole decision,<sup>223</sup> the use of

<sup>219</sup> See *supra* note 209.

<sup>220</sup> HARCOURT, *supra*, at 78-80.

<sup>221</sup> Scholarly criticism has focused on procedural concerns—mainly on the prisoner's lack of counsel at parole hearings. For this reason, the MPC claims to "'domesticate[.]' the use of risk assessments by repositioning them in the open forum of the courtroom"—that is, by using them in sentencing instead of in parole (which the MPC seeks to abolish entirely). Draft MPC § 6B.09 cmt. (a). See also McGarraugh, *supra* (advocating barring the instruments at parole but using them in sentencing).

<sup>222</sup> In some states, the basis for the parole decision is confidential by law, so the parole board may refuse the prisoner's request to see the risk assessment. McGarraugh, *supra*, at 1079 & n.5.

<sup>223</sup> Indeed, risk is arguably the *only* legitimate parole consideration, because considerations such as retributive justice or general deterrence have already been considered by the sentencing judge. The only reason to leave the

demographic and socioeconomic variables to predict risk raises the same disparate treatment concerns that EBS does.<sup>224</sup> Moreover, the parole context may offer additional available alternatives to the constitutionally objectionable variables. For instance, rather than basing parole decisions on a prisoner's prior education or employment, one could consider his efforts while in prison to improve his future prospects, such as participation in job training or education programs. Such factors would speak to the prisoner's individual efforts to achieve rehabilitation, rather than to his socioeconomic background.

In contrast, it is easier to defend the use of risk prediction instruments in assignment of prisoners, probationers, and parolees to correctional and reentry programming (*e.g.*, job training), and to shape conditions of supervised release (*e.g.*, drug tests).<sup>225</sup> In this context, risk assessment is often combined with instruments assessing "criminological needs" and predicting "responsivity" to various such interventions. The empirical merits of such instruments are beyond this paper's scope, though I note that the responsivity instruments at least address the right question: what can be gained by treating an offender in a certain way? In any event, such uses of actuarial instruments raise less serious constitutional and policy concerns. To be sure, supervision conditions may be burdensome, especially if they affect the likelihood that probation or parole will be revoked, and programming decisions can affect access to valuable services. Still, the stakes are not as high as they are in sentencing, and therefore there is less reason to apply heightened scrutiny to socioeconomic classifications and other traits that are not treated as suspect outside the criminal justice context. Distributing access to correctional programming based on risk, needs, and responsivity assessments is not particularly different from distributing access to non-correctional social services and government benefits to those populations who most need them, which is a routine government function, subject to rational basis review unless suspect or quasi-suspect classifications are involved.

In sentencing, however, the defendant's most fundamental liberties and interests are at stake, as are the interests of families and communities. EBS advocates have not made a persuasive case that this crucial decision should turn on a defendant's gender, poverty, or other group characteristics. The risk prediction instruments offer little meaningful guidance as to each individual's recidivism risk, and they do not even attempt to offer guidance as to the way in which sentencing choices affect that risk. The instruments, and the problematic variables, advance the state's penological interests weakly if at all, and there are alternatives available. Risk prediction is here to stay as part of sentencing, and perhaps actuarial instruments can play a legitimate role. But they should not include these problematic variables, which do not offer much additional predictive value once crime characteristics and criminal history are taken into account. The current instruments simply do not justify the cost of state endorsement of express discrimination in sentencing.

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sentence indeterminate is to account for the fact that recidivism risk may evolve over time; those who believe risk prediction is an improper basis for punishment should simply oppose indeterminate sentencing. *See, e.g.*, Christopher Slobogin, *Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Sentencing*, 48 SAN DIEGO L. REV. 1127, 1128-30 (2011).

<sup>224</sup> Note that while the Supreme Court once labeled parole an "act of grace," the deprivation of which a prisoner could not contest, this theory is now considered "long-discredited." *Samson v. California*, 547 U.S. 843, 864 n.5 (2006). States have no obligation to provide a system of parole, but once they do, its operation is constrained by the Constitution. *Board of Pardons v. Allen*, 482 U.S. 369, 378 (1987); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1982).

<sup>225</sup> *See* Nat'l Ctr for State Cts, *supra*, at 16-20; Warren, *supra*; Melissa Aubin, *The District of Oregon Reentry Court: An Evidence-Based Model*, 22 Fed. Sent. R. 39 (2009) (discussing evidence-based practices in federal "reentry courts").

**Prepared Remarks for Guggenheim Symposium**  
**Sonja Starr**

Thanks to organizers; it's an honor to be here.

Anne's been a strong proponent of the expanded use of risk assessment in the criminal justice system, and I've been a vocal critic, though we've had a chance to talk about these issues in recent months and as it turns out we've discovered a lot of common ground. We both believe in using data to improve the practice of criminal justice, and we both care about equality concerns that arise when people are treated differently based on their characteristics. Anne's organization has been working to develop risk assessment instruments that try to address some of these equality concerns, which is a positive development, and she'll tell you a bit more about that shortly.

But my focus, meanwhile, is on calling the attention of the legal community and the media and the public to the very, very serious problems that exist with almost all of the risk assessment instruments that are already in widespread use in criminal justice systems around the country. We are already subjecting millions of criminal defendants to procedures that determine their treatment based on actuarial instruments that explicitly treat socioeconomic and demographic factors as risk factors, and that means that poor people and people with the "wrong" demographics are being systematically and purposely treated more harshly by the criminal justice system. This is a serious injustice that has not received much attention, in large part because the instruments are not transparent and people who are not social scientists tend not to understand how they work. Those of you who are journalists can play an important role in bringing this problem to light.

These actuarial instruments have been around for decades in the context of parole board decision-making especially, and they are also now used in a variety of other criminal justice contexts. My own research has focused mostly on the use of risk assessment in sentencing, which is the fastest-growing trend in this area. In at least 20 states, many or all judges are being given risk scores for defendants before they sentence them, often as part of a presentence investigation report. Many other states are considering legislation to do the same, and prominent organizations like the National Center for State Courts and the American Law Institute, which drafts the Model Penal Code, have called for the expansion of this practice, which they often refer to as "evidence-based sentencing."

I find "evidence-based sentencing" to be something of a misnomer, bordering on doublespeak, because the risk scores don't actually have anything at all to do with the evidence in the defendant's own criminal case, which is normally the main thing that determines the defendant's sentence. Instead the "evidence" in question comes from studies of past offenders with similar preexisting characteristics—it's extrapolating the defendant's future crime risk based on a profile. So really, a better term for this is "profiling." And judges are told to use these profiling-based risk

predictions to determine the defendant's sentence, just like parole boards use them to decide whether to release a prisoner early.

There are a number of reasons to be concerned about this practice, but my primary concern is that many of the characteristics that are included in these profiles are inappropriate--and in some cases unconstitutional--bases for punishment. Put simply, people should not be punished extra, or for that matter punished less, based on who they are or how much money they have.

The instruments being used in sentencing and parole vary, but all contain several variables related to criminal history. Most also contain gender, age, employment status, education level, and marital status. The most popular instruments, like the LSI-R, include a whole battery of questions that relate to the defendant's financial status and history, family background, and neighborhood. For example, from the LSI-R:

- Financial problems, such as past or present trouble paying bills, rated from 0 to 3
- Reliance on social assistance, including welfare, unemployment, disability pensions
- Dissatisfaction with marital or equivalent situation: they rate the happiness of a person's relationship from 0 to 3
- Rewarding nature of a person's relationship with his parents—so an absent parent or one with whom the defendant has a bad relationship counts against him
- Similar ratings for relationships with other family members
- Whether parents or other family members have a criminal record
- Quality of accommodations
- Stability of accommodations—how often the person has moved
- High crime neighborhood
- Participation in organized leisure activities like membership in clubs (lack of this is a risk factor)
- Criminal records of acquaintances.

Another popular instrument, COMPAS, which for example just got adopted statewide in Michigan, includes similar factors, plus others, like chance of finding work above minimum wage, high school grades, whether the defendant's parents have been incarcerated, whether the defendant's parents used drugs, whether the defendant or any of his family members have ever been a crime *victim*.

Essentially, every indicator of socioeconomic disadvantage that you can think of has been included, and all of them add to the risk score. I want to make clear that this happens automatically, mechanically—*every* defendant who is on social assistance will have the same number of points added to his risk score because of it. It's built into the formula. We're used to thinking about disparities in sentencing as being something subtle and unconscious, insidious, something we have to detect through complicated empirical analyses—we look for evidence of whether judges are subtly taking inappropriate factors into account. But this is something different. This is the state *codifying* discrimination on the basis of these factors—it is explicitly built

into the instrument. Any time the judge gives any weight to the risk score, she is giving weight to socioeconomic and demographic factors. The point of this system is that the state *wants* poor people, people with all these risk factors, to be punished extra, and it's directing judges to do so.

Somewhat surprisingly, the nature and severity of the crime on which the defendant is being sentenced are not included in any of the instruments. Perhaps it's for this reason that the LSI-R training manual specifically says that it "was never designed to assist in establishing a just penalty," although that is precisely what it is now widely being used for.

Race is generally not included in the assessments, although certainly many of these variables are extremely strongly correlated with race. When you sentence people to extra time for being poor, you are bound to increase racial disparities as well.

The trend toward evidence-based sentencing has been greeted in large part with celebration. Scholars as well as judges, sentencing commissioners, and organizations focused on sentencing reform have embraced it as a new era of scientific, rational, "smarter" sentencing. Perhaps surprisingly, some of the strongest advocates have been progressive critics of mass incarceration, who hope that using risk scores will allow incarceration to be avoided in some cases by helping judges to identify low-risk offenders.

I disagree. It is bad policy and almost surely unconstitutional for the state to direct judges to deem classes of people categorically more dangerous, and sentence them for longer, on the basis of their poverty and their demographic characteristics.

I agree that we have a mass incarceration crisis in this country, and we need to think creatively and in data-driven ways about policy solutions, but this particular use of data cannot be the right path. One of the reasons the social impacts of mass incarceration are so worrisome is that they are demographically, socioeconomically, and geographically concentrated. For instance, one in every nine black men under 35 is in prison right now, and one in three young black men will be at some point in his life. And if you narrow your focus to the poorest communities, or to particular crime-ridden neighborhoods, or to young men who are unemployed or lack high school diplomas, you get far higher numbers. There's a large literature documenting the hugely distortive effects on communities when you remove, say, half the young men in them. The risk prediction instruments could exacerbate all of these problems.

And that's one reason that people who maybe don't ordinarily worry so much about discrimination against men, or against the young or the unmarried, for instance, really should worry here. Those are all dimensions along which the impact of the criminal justice system is concentrated and concentration is something we should worry about.

I think that advocates of these instruments are in fact endorsing forms of explicit discrimination that they would never endorse were it not for the fact that they are somehow sanitized by the scientific framing that accompanies them—the fact that it's referred to as "evidence-based" and supported by regressions. But to me, behind this anodyne scientific language is an expressive message that is toxic. Stereotyping groups as criminally dangerous is a practice with a nasty cultural history in this country, and this practice involves the state officially labeling certain groups of people dangerous, on the basis of their identity and poverty, rather than their criminal conduct.

Basing sentences on gender as well as socioeconomic variables is also almost certainly unconstitutional, and my own research has been pitched at lawyers and judges to make this case.

First, gender. It's well established law that gender classifications require an "exceedingly persuasive justification"—this is a really tough test to pass. It's hardly ever legal for the state to treat people differently based on gender. Weirdly, though, even though everybody in the literature seems to take for granted that including race in the instruments would be unconstitutional, the use of gender doesn't seem to bother anyone. If scholars or advocates even mention it, they just say that because men really do on average pose higher recidivism risks, including gender in the instruments advances the state's important public safety interests and thus it passes the "exceedingly persuasive justification" test.

The problem with this response is twofold. First, this assumes the instruments actually advance those public safety interests effectively, which I think has not been persuasively established—I'll address that in a couple of minutes. Second, the argument runs afoul of one of the most central principles of the Supreme Court's gender discrimination jurisprudence: the prohibition on statistical discrimination. In general, the state cannot defend gender discrimination on the basis of generalizations about what men and women tend to do, even if those classifications are not just empty stereotypes but in fact are empirically well supported. In *Craig v. Boren*, for instance, the Court struck down a drinking-age law that discriminated against men even in the face of studies showing that young men posed more than ten times the drunk driving risk of young women.

There are lots of other examples in the case law, and this principle is something that really destroys any attempt to defend gender-based risk assessment, because the whole approach is grounded in reliance on statistical generalizations.

And this same principle is also the reason it's unconstitutional to discriminate in sentencing or parole based on financial factors such as unemployment, education, and income.

Until recently lawyers and legal scholars really had overlooked this problem. The reason for that is that generally, the courts are very tolerant of discrimination on the basis of socioeconomic status—they tend to defer to legislative judgments on that.

And so lawyers tend to think: Bringing a constitutional challenge based on socioeconomic discrimination is a loser.

But that's just not true when it comes to socioeconomic discrimination in the criminal justice system. For more than half a century, the Supreme Court has applied especially demanding scrutiny to policies adversely affecting poor defendants. The seminal case is *Griffin v. Illinois*, which described the provision of equal justice for poor and rich as the "central aim of our entire judicial system."

In *Bearden v. Georgia*, in 1983, the Supreme Court unanimously held that a defendant's probation could not be revoked because after losing his job he had become financially unable to pay a restitution order, since that would impermissibly make his sentence turn on his socioeconomic status.

Crucially, the Court in *Bearden* squarely rejected the state's attempt to argue, based on empirical studies of recidivism risk, that the defendant's unemployment and financial status rendered him an elevated public safety risk. The Court's response to this was much like its response to statistical discrimination in the gender context. It wrote:

"This is no more than a naked assertion that a probationer's poverty by itself indicates he may commit crimes in the future. ...[T]he State cannot justify incarcerating [him] solely by lumping him together with other poor persons and thereby classifying him as dangerous. This would be little more than punishing a person for his poverty."

And that's exactly the problem with so-called "evidence-based sentencing." These actuarial instruments lump defendants together with other people who share their socioeconomic characteristics, and on the basis of those other people's past conduct, they classify defendants as dangerous. They punish a person for his poverty. And the Supreme Court has already unanimously held that unconstitutional—it just seems like everyone's forgotten.

OK, so what if we tried to predict risk statistically, but *didn't* use these demographic and socioeconomic characteristics? Suppose instead, we took into account the nature of the defendant's crime, which current risk instruments mainly ignore, as well as past history? That would be far less morally and legally problematic, because it would be based on the defendant's criminal conduct. And I think there's good reason to believe it would be about as accurate. Nothing predicts future behavior like past behavior, and I know Anne and the Arnold Foundation have found that a behavior-based risk assessment instrument at least in the bail context gets quite accurate results, which is a big step forward.

The thing is, factors like demographics and socioeconomic *are* correlated with crime, but once you already have behavioral factors, current and past criminal conduct, in your model, adding those problematic variables might not add much

*marginal* predictive value. Sure, adding more factors might get you another percentage point or two or three of accuracy, but I don't think we should pursue every last marginal improvement in predictive accuracy at all costs, at the cost of our most fundamental principles of equality and justice.

Now, beyond these equality concerns, I do have a few other concerns about these risk assessment instruments.

One problem is that if the purpose of risk assessment is to protect the public from the defendant's future crimes, these actuarial analyses are not actually asking the question they would need to ask in order to advance that purpose. They predict recidivism risk in the abstract—just “how risky is this person.” They make no attempt to predict how the judge's sentencing choice would affect that risk—i.e., the responsiveness or “elasticity” of recidivism risk to differing lengths of incarceration.

And the people who have the highest recidivism risk are not necessarily the people whose recidivism risk is going to be the most reduced by incarceration—in fact, people who are more crime-prone to begin with may also be more likely to be hardened rather than helped by prison. We really don't have the science in place to know what subsets of people will have their behavior changed for the better by prison. Investigating this question requires studies that use rigorous causal inference methods—it's a very challenging empirical question. And so far, the best research on the way incarceration affects recidivism risk has been more general—does incarceration *generally* reduce crime risk--rather than focused on which characteristics are most associated with a greater responsiveness to incarceration.

Then there are some procedural concerns about risk assessment. One major concern is lack of transparency—people in many states are being sentenced on the basis of corporate, proprietary products that they don't have access to. Neither the defendant nor the judge knows the weight that has been given to each specific variable in producing the risk score. That's outrageous in my view.

In addition, defendants are essentially being forced to participate in an assessment interview, which includes detailed questions about their past and about their mental states. If they don't participate, they will be scored as uncooperative and may be punished for it. That seems like compelled self-incrimination, a violation of the Fifth Amendment.

I've got various other methodological objections that I've outlined in my paper, but I'll stop here. Thanks again, and I look forward to the rest of our discussion.



# AMERICAN BAIL COALITION

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## EVALUATION OF THE BAIL REFORM EFFORTS IN JEFFERSON COUNTY, COLORADO

Jeffrey J. Clayton, M.S., J.D., Policy Director, American Bail Coalition

October, 2015

### I. Summary of Project and Reform Efforts

On September 15, 2015, Jefferson County, Colorado issued a report on the so-called Jefferson County Bail Project, and what the County called the “residual efforts” of changing bail practices that resulted from the project and continue to be used in practice today. The project was started in January, 2010 by first eliminating the bond schedule, moving to greater supervision by a county-run pretrial services agency as an alternative to financial conditions, expanding the use of personal recognizance releases, and using a risk assessment instrument to guide bail-setting decisions. The American Bail Coalition obtained a series of documents, available upon request, from the County in order to evaluate whether the project and subsequent efforts were successful.

Although the County blames the lack of success of the project on the lack of stakeholder buy-in, the major elements of reforms that are being considered nationally were in fact implemented, and therefore what occurred as a result of such reforms warrants attention as to the results. In addition, the architects of the Jefferson County bail project have trumpeted the success of the project and used the success of the project as one of the key reforms informing the bail reform bill in Colorado in 2013, HB 13-1236, which was a move in part to reduce reliance on financial bail conditions in place of recognizance release and supervision based on the results of risk assessments. The same parties now continue their efforts nationally, selling the results of this suburban county west of Denver as a success story that should be modeled nationally.

### II. The Statistical Measures Demonstrate a Lack of Success

The table below is a compilation of jail statistics in trend from 2008 to 2014 that were provided by the Jefferson County Sheriffs’ Office. The table shows that by all indicators, the program did not achieve the desired results of fewer people incarcerated on a pretrial basis, shorter jail stays, and greater releases. Every percentage change indicator from 2008 to 2014 increased.

JEFFERSON COUNTY, COLORADO: Statistics on the Jefferson County Bail Reform Project Impact, 2008-2014  
(source: Jefferson County, Colorado Sheriff’s Office)

	2008	2009	2010	2011	2012	2013	2014	% Change
AVG DAILY PRETRIAL POPULATION	445	423	371	407	427	442	478	7.42%
AVG LENGTH OF JAIL STAY	23.59	24.46	25.27	24.71	25.32	25.89	24.96	5.81%
AVG LENGTH OF PRETRIAL JAIL STAY	6.53	7.65	8.24	6.81	8.23	8.06	8.44	29.25%
INMATES WITH PRETRIAL SERVICES BOND CONDITIONS	1929	1915	1470	2026	2333	2198	2271	17.73%
RELEASED WITHIN 1 DAY IN JAIL	1695	1637	1267	1756	1968	1807	1709	0.83%
NUMBER RELEASED MORE THAN 1 DAY IN JAIL	234	278	203	270	365	391	562	140.17%
AVERAGE NUMBER OF DAYS MORE THAN 1 DAY	3.19	3.9	4.87	5.47	3.89	4.1	3.33	4.39%



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The data shows longer pretrial jail stays, greater pretrial populations, and a dramatic increase in the numbers of defendants who spend more than one day in jail: a 140% increase.

In the report of September 15, 2015 provided by the pretrial program suggested high appearance rates while on supervision, and yet data received from the Colorado State Court Administrator's Office clearly indicates that the package of reforms in combination exacerbated the problem and led to more warrants for failing to appear. The data shows that from 2010 to 2014 warrants issued for failing to appear in felony cases in Jefferson County increased by 42.2%, and in misdemeanor cases by 34.0%.

In addition, it is also important to keep in mind that crime dropped during the same time period when these numbers related to the pretrial population actually increased. The table below contains the number of criminal cases filed in Jefferson County from 2008 to 2014.

Criminal Case Filings, Jefferson County Colorado, Fiscal Year 2008-2014  
Source, Annual Report, State Court Administrator's Office

	2008	2009	2010	2011	2012	2013	2014	% Change 2008 to 2014
Felony	3580	3686	3499	3640	3395	3423	3475	-2.93%
Misdemeanor	7506	7634	6671	6618	6740	6038	6102	-18.71%

This drop in crime is clearly reflected in the convicted population statistics, unlike the pretrial population statistics. Data from the Jefferson County Sheriffs' Office show that the convicted population in the jail declined by 19.4% between 2008 and 2014. Yet, the pretrial population continued to increase despite the decreasing arrests. In fact, the percentage of those in the jail who were not convicted increased by 20%, going from 35% in 2008 to 42% in 2014.

It is also important to consider that the amount of surety bail liability in Jefferson County also decreased by 28% during the period of 2009 to 2014.

### III. Conclusion

Despite claims that the Jefferson County Bail Reform Project, which informed changes in Colorado law and is being used as a national example of the success in bail reform efforts, the statistics do not in any way back that up. The move away from surety to bail to risk assessments, cash and recognizance bail, and greater supervision drove the pretrial population up and expanded the length of jail stays all during a period when the rates of crime dropped.



# AMERICAN BAIL COALITION

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## STATEMENT BEFORE THE NEW MEXICO SUPREME COURT ON BAIL REFORM

10/29/15

### I. Introduction

The American Bail Coalition works nationally to protect the constitutional right to bail. I am Jeff Clayton, Attorney at Law, and National Policy Director for the American Bail Coalition. It is my pleasure to appear here today.

### II. The New Mexico Supreme Court should not endorse any constitutional amendment pertaining to any substantive legal issues, whether it be bail issues or otherwise, because to do so would damage public confidence in the independence of the Judicial Branch of Government and erode respect for the rule of law.

New Mexico Judges and Justices are sworn to both “uphold” and “respect” the Constitution of the State of New Mexico—such officers are not sworn to advocate for the repeal of all or part of that Constitution or show disrespect for the Constitution of New Mexico. Justice Cardozo described the nature of the challenge of judging more eloquently than I:

The Judge, even when he is free, is still not wholly free. He is not to innovate at his pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty and goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized analogy, disciplined by system, and subordinated to the primordial order in the social life.<sup>1</sup>

Judges are required to conduct their duties in a fashion that preserves the independence of the judicial branch, and to conduct judicial business in a fashion that does not invade the province of the political branches of government to make and enforce the laws.

In fact, employees of the Judicial Branch within the State of New Mexico are not permitted to engage in the very conduct in which the Supreme Court appears poised to engage—to support under color of state authority specific political causes. The Judicial Branch’s Code of Conduct in New Mexico reads in relevant part:

Consistent with the rules and policies, Judicial Employees may express opinions on all political subjects and candidates provided that Judicial Employees do not give the impression that the Judicial Entity or the Judicial Branch endorses political candidates or supports political causes.

Commentary:

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<sup>1</sup> Benjamin Cardozo, *The Nature of the Judicial Process*, pp. 140-141 (Yale Univ. Press 1921).



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The Judicial Branch seeks to maintain neutrality in political matters. While Judicial Employees may express and act on personal opinions about political candidates and issues as other citizens, they should maintain neutrality in action and appearance when performing their duties on behalf of the Judicial Branch.<sup>2</sup>

While Judges are permitted to engage in political activities that improve the law, advocating for substantive policy reforms that are informed by a litany of normative judgments can hardly be called improving the administration of justice. Neither can it be said that the State Court Administrator's extensive media campaign, including the drafting of articles making policy judgments and specifically endorsing a change to the New Mexico Constitution, which is a political issue, could be called simply the improvement of the administration of justice.

If the Supreme Court, as a Court, lends its support to this constitutional amendment, or any others that involve the legal policy issues that are properly left to the people and the political branches of government, such actions will significantly erode public confidence in the rule of law and call into question the independence of the judicial branch that is fundamental to a free society.

### III. The New Mexico Supreme Court makes Numerous Statements in Favor of the Constitutional Amendment that Are Simply Not Backed by Reality

Judges should be faithful to the law—not decide at a policy level who are the “right” people to keep in jail, and who are the “wrong” people to keep in jail.

The New Mexico Constitution does allow for limited preventative detention. The statement to the contrary is erroneous. Judges can also set any other combination of monetary and non-monetary conditions in cases where preventative detention is not allowed which would secure the release of a defendant.

There was no data from the ad hoc committee that demonstrated that the “wrong” people were getting out, how many of them, and they were in fact primarily domestic violence or other “especially vulnerable victims.” That is pure assertion.

The statement that most offenders who commit crimes have previously been released on monetary bonds means nothing—repeat offenders are released on all types of bonds including recognizance bonds. Such persons simply climbed a ladder of criminality.

The Court stated that posting of money bond “can do nothing” to protect the safety of the community. That is also a false assertion—the bail agent has the power to re-arrest, the co-signor can request re-arrest, and when a person is at-large due to absconding and the criminal intervention cannot occur (i.e., prison, jail, probation, rehab, etc.), they are at high probability to commit additional crimes. This issue was not studied at all by the Committee—the various safety and benefit costs analyses of the various forms of release.

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<sup>2</sup> NM Judicial Branch Code of Conduct for Judicial Employees 2/9/2010, p. 12.



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**It cannot be simply concluded that people who have been arrested and are in jail pending trial are there “simply because they are too poor to afford bail.”** That is a national talking point that is also false. Instead, this is a question of fact for a judge on a case-by-case basis. If poverty is the sole factor, then the bail should be lowered. Nearly all state statutes, including New Mexico, require financial resources or employment as a factor in a bail setting decision. There are numerous reasons people stay in jail when a bond is set—legal strategy, multiple pending cases, immigration holds, etc. Such a generalized conclusion is devoid of the type of scientific nuance in methodology necessary to make such a conclusion. The conclusion also implicitly assumes that judges improperly set bail *too high* and the system of due process for review in New Mexico is inadequate to allow for sufficient review. The Committee did not similarly study the situations where the assumption would then be that judges then set bail *too low*, i.e, when people fail to show up. The Court is going down a dangerous road when “science” is substituted for judicial discretion.

To add to the Constitution that a person shall be detained “solely” due to inability to pay does nothing—the accused are detained because law enforcement officers use the discretionary power afforded to them by the State Constitution to arrest, which must be supported by probable cause to believe they committed a crime. So, no one is “detained” exclusively because they cannot afford bail. In addition, this is a question of fact that cries out for due process—due process that would require someone to *assert* that claim and prove *with evidence* that the “sole” reason for continuing detention is inability to pay.

The alleged “studies” that show that non-financial conditions of release can replace financial bail conditions are from groups specifically designed and funded to eliminate all financial conditions. No peer-reviewed academic studies have made such a conclusion. In fact, they have all made the opposite conclusion.

The citation to the various cases brought in the South (*Clanton*) are misleading—all were orders approving settlements. In the *Clanton* case, the Plaintiffs specifically admitted that bond schedules *are constitutional*. To pull information from a website rather than cite the actual settlement documents is completely misleading.

Further, to assert that bond schedules unnecessarily keep people in jail ignores those people who are able to get out of jail quickly under the bond schedule that must now wait longer in custody to have a bond set so that they can be released. The proposed solution to the “solely” cannot afford their bail problem, is more pretrial detention for all. In Jefferson County Colorado, the more jail for all is a reality—the number of people who spend more than one day in jail has increased by 140% since the reforms were implemented.

Pretrial detention for all is too expansive. Locking people up and throwing away the key is not the answer.

#### IV. The Supreme Court Should Slow Down The Rules Process for A Minimum of Six Months



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The Supreme Court does not cite with particularity which studies underpin the Court's substantive policy conclusion that risk-assessments are empirically validated, and the Court admits that none have been validated in New Mexico by stating that one in the 2<sup>nd</sup> Judicial District is in a "pilot" phase. The rules require the Court to approve a risk assessment. That cannot be competently done right now.

In addition, the Supreme Court is proceeding down the road to change the rules before the public or the legislature approves the Courts' proposed constitutional amendment, which is the linchpin of the entire scheme. Further, the rules themselves contain quotation of the proposed constitutional amendment, which has a lengthy period of first amendment debate before it becomes law, if at all.

Thus, the Supreme Court should delay the rules process for six months to permit the legislature and the public to act, and to allow for the validation and approval of the risk assessment to first take place.

CHANGES IN COLORADO BAIL LAWS,  
2013-2014: AN OVERVIEW FOR JUDGES  
AND PRACTITIONERS FROM THE  
PERSPECTIVE OF THE LICENSED BAIL  
AGENT

August, 2014

by: Jeffrey J. Clayton, Esq.

Trevor Gloss, Esq.

# CHANGES IN COLORADO BAIL LAWS, 2013-2014: AN OVERVIEW FOR JUDGES FROM THE PERSPECTIVE OF THE LICENSED BAIL AGENT

August, 2014

by: Jeffrey J. Clayton, Esq.<sup>1</sup>

Trevor Gloss, Esq.<sup>2</sup>

## I. Introduction

It is often said that you cannot let the process become the product. In the area of bail reform, anti-money bail activists say we are in a third generation of American bail reform that culminated in the passage of House Bill 13-1236, which reformed some of Colorado's bail laws.<sup>3</sup> This new revolution apparently includes a move to increased supervision pending trial as an alternative to financial conditions, a movement that frankly is more than fifty years old. Instead when the changes to the law that have occurred over the past two years are analyzed, the overall picture in terms of judicial discretion to set bond has not changed very much, although certainly there have been some changes of which judges and practitioners should be aware.

In the late fall of 2013, it came to the attention of these authors that anti-bail industry activists from the Pretrial Justice Institute and others, who are working specifically to abolish all financial conditions of bail in Colorado, provided training materials to the Colorado Judicial Department for purposes of being distributed to judges. At that time, it was offered to Professional Bail Agents of Colorado the ability to provide an alternate perspective of the recent changes to the laws to judges in Colorado.<sup>4</sup> Such perspective also might include presenting appropriate social science research concerning the inherent value of money bail and the financial and other costs to defendants of other non-monetary conditions (including supervision) that may turn out to be more financially costly and restrictive than secured financial conditions and do no better of a job.<sup>5</sup> Over the intervening months, we collected voluminous information from county-run pretrial programs,

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<sup>1</sup> M.S. (Public Policy Analysis), U. of Rochester, NY (1999), J.D., U. of Denver (2003). Mr. Clayton is an attorney in private practice who represents the Professional Bail Agents of Colorado, which is the only organization within the bail industry that participated in the Bail Subcommittee of the Colorado Commission on Criminal and Juvenile Justice (2011) and also participated extensively in the process that lead to the passage of HB 13-1236 and SB 14-212. Previously Mr. Clayton served as Deputy Legislative Liaison for the Colorado Judicial Department from 2009 – 2012, and Legislative and Policy Analyst, 2007-2008.

<sup>2</sup> J.D., U. of Denver (2012). Mr. Gloss is an attorney in private practice.

<sup>3</sup> See Schnake, Tim, Best Practices in Bond Setting (2013), at 19.

<sup>4</sup> [http://www.clebp.org/images/REVISED\\_New\\_Colorado\\_Bail\\_Law\\_06-14-2014\\_.pdf](http://www.clebp.org/images/REVISED_New_Colorado_Bail_Law_06-14-2014_.pdf) (last accessed 8/15/2014).

<sup>5</sup> The Professional Bail Agents of Colorado ("PBAC") is an association of licensed bail agents within the State of Colorado working to improve the professionalism of bail agents and advocate for improvements to the industry. The PBAC has also participated in cases as *amicus curiae*.

<sup>6</sup> In addition, we sought to provide counter-legal interpretations for the courts and practitioners to consider based on the plain reading of the statute and not continuing to argue that the statute incorporated, via legislative intent, various interpretations of the statute that stretch the meaning of the plain language of the statute.

conducted legal research, and re-examined the legislative history of the reform efforts. This document is based on those efforts. We thank the State Court Administrators Office for allowing this opportunity, and we thank the readers of this article for listening to our voice and considering our point of view.

Starting with HB 13-1236 in 2013, the Colorado General Assembly repealed and re-enacted all of the Title 16 statutes that govern bail setting and forfeitures in Colorado. Although commentators point to the bill and the process that lead to it as the third generation of American bail reform and the State Public Defender asserts that it “substantially alters the way judges are to administer bail in Colorado,”<sup>6</sup> the bill largely re-enacted existing law and reminded judges of powers they already had, with some limited exceptions. One of the proponents of the bill testified on the record that HB 13-1236, the repeal and re-enactment of Colorado’s bail statutes, contained 85 percent old-law.<sup>7</sup>

Despite anti-money bail activists having done everything to ignore and marginalize the value of secured bail and the services that hundreds of experienced, private criminal justice professionals, many of whom are P.O.S.T. certified former law enforcement officers, provide to our State, the truth is that the neither the Colorado Commission on Criminal and Juvenile Justice nor the General Assembly came to the anti-money bail activists’ conclusion that the law was being passed specifically to *eliminate* all financial conditions of release. In fact, no legislative body made the general legislative conclusion, at least in reading the statute, that the State Public Defender has asserted that “the General Assembly was primarily concerned with reducing unnecessary pretrial incarceration by limiting the use of secured financial conditions of release.”<sup>8</sup> Amendments adopted by the General Assembly to the original version of the bill that came from the Commission, as will be shown below, make it clear that the General Assembly did not intend to eliminate or even limit money bail conditions—they left all methods of bond on a level playing field with all of the relevant criteria, process and standards left in place as to all methods of bond. The central goal, at least as the legislation was passed in final form, was to decrease unnecessary incarceration through the use of *all appropriate* forms of release by widening individual consideration of a defendant, period. It was not to eliminate financial conditions where appropriate and found to be the least restrictive form of release that would actually lead to a release, which form of release can also be free from monitoring and supervision by the very entity that arrested and seeks to prosecute the defendant.

An overview of the process and conclusions of the Commission is necessary to understand how general concepts became specific changes to the law. We provide that in this document. In addition, because recommendations from the Commission were left out of the final legislation,

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<sup>6</sup> See Materials Provided by the Office of the State Public Defender for the Colorado Bar Association CLE 2014 Criminal Law, Spring Update: The New Bail Statutes.

<sup>7</sup> Cain, Maureen, Senate Judiciary Committee, April 10, 2013, at 48 Minutes, Colorado General Assembly, 2013 Senate Judiciary Archived Audio.

<sup>8</sup> See Materials of the Office of the State Public Defender, *supra* note 6.

including the only recommendation that passed the Commission unanimously, it is important to question why the items were left out of the bill and why the items were critical in terms of understanding what the problem may have been and the solutions to those problems. We then move on to cover the important changes to the law and provide some different legal interpretations of some key sections that are contrary to those of some commentators. We continue on to discuss significant problems with the existing science that county pretrial agencies are using, how effectively and efficiently pretrial agencies are in carrying out their duties, and the financial and other impacts on defendants based on a study of public records obtained from those county programs. The public safety benefits of surety bail are examined, including evidence that surety bail works better than the average country pretrial program using recent Colorado data. The role of incentives in a bail transaction is then examined.

We are not here to criticize the exercise of discretion by state or local judicial officers or question the wisdom of how courts carry out their duties,<sup>9</sup> nor are we here to advocate that everyone should have a financial or any condition when they do not need one. Instead, the goal is to provide judges and others an alternate view of this asserted new third era of bail reform in America that lead to our State's supposed "new" bail system. We hope to provide good information and simply provoke thinking about these issues—ultimately, we think judges will use what works and is the least burdensome on a defendant, as they have always done. We believe that you cannot rely on the false philosophical and legal assumptions that all financial conditions should be eliminated, but instead how financial conditions, when appropriate, fit within a comprehensive system of pretrial release governed by the State Constitution, statutes enacted by the General Assembly and court rules.

## **II. Colorado Commission on Criminal and Juvenile Justice—Bail Subcommittee Process and Final Recommendations of the Commission, 2011-2012**

On December 2, 2011, the CCJJ Bail Subcommittee Task Force, co-chaired by First District Court Judge Margie Enquist and Sheriff Grayson Robinson (later State Public Defender Doug Wilson), was convened.<sup>10</sup> The purpose of convening the group was to revisit recommendations made by the CCJJ concerning bail, including having proposed in 2008 a statewide monetary bond schedule.<sup>11</sup> In particular, the charge of the Task Force was as follows:

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<sup>9</sup> We were, frankly, struck at some of what we considered particularly harsh criticism of the bench, in general and in regards to certain judicial districts, from several of the presenters in the Colorado Defense Bar Association's recent spring, 2014 criminal law update concerning the new bail statutes.

<sup>10</sup> CCJJ Bail Subcommittee Task Force, Meeting Minutes, December 2, 2011.

[http://www.colorado.gov/ccjdir/Resources/Committees/BailSub/Minutes/2011-12-02\\_BailSubc\\_Minutes.pdf](http://www.colorado.gov/ccjdir/Resources/Committees/BailSub/Minutes/2011-12-02_BailSubc_Minutes.pdf) (last accessed 8/31/2014).

<sup>11</sup> *Id.*; see also Colorado Commission on Criminal and Juvenile Justice, Annual Report (2013), at 9.

[http://www.colorado.gov/ccjdir/Resources/Resources/Report/2013-12\\_CCJJAnnRpt.pdf](http://www.colorado.gov/ccjdir/Resources/Resources/Report/2013-12_CCJJAnnRpt.pdf) (last accessed 8/14/2014).

The mission of the Bail Committee is to conduct a *comprehensive review and analysis* of the Colorado bail system. This review and analysis should include, but not be limited to: the purpose of bail; current practice; strengths and weaknesses; evidence based practice/emerging best practice locally and nationally; and, identifying gaps between the current system and the preferred system for Colorado. Upon the completion of the analysis, develop recommendations (policy and/or legislative) for submission to the Commission by September 30, 2012, that will enhance the efficiency and effectiveness of the Colorado bail system.<sup>12</sup>

The Committee embarked on its mission and had 11 meeting over 11 months. Upon conclusion of its work, the Committee made recommendations to the Colorado Commission on Criminal and Juvenile Justice that formed the basis for HB 12-1236.

There were four recommendations made by the Bail Subcommittee were:

- (1) Implement evidence-based decision making practices and standardize bail release decision making guidelines;
- (2) Discourage the use of financial bond for pretrial detainees and reduce the use of bonding schedules;
- (3) Expand and improve pretrial approaches and opportunities in Colorado;
- (4) Standardized jail data collection across all Colorado jurisdictions.<sup>13</sup>

The two examples provided as to recommendation #1 in the report are use of the Colorado Pretrial Assessment Tool and a new proposed bonding schedule that was contemplated by the Commission that uses the term “conditions” without defining “conditions.” That “new” bond schedule is printed in Appendix E, along with new bail schedules from some of the districts. It was clear from that recommendation, and the legislation that passed, that assembling the bond schedule or when and how to use financial conditions would be left to local decision-making.<sup>14</sup>

Evidence-based is a term ordinarily used in the sentencing or post-conviction context because it means decreased use of punishment in favor of addressing the factors that lead to criminality in order to decrease recidivism. Unfortunately, the Commission’s new bail bonding schedule is not evidence-based, and the CPAT is not either, because the CPAT only provides information as to how risky, based on a single numerical score, a defendant is, but does not provide an empirical basis to define *what specific type of bond and conditions of release* are evidence-based in terms of obviating the risk factors presented.<sup>15</sup> In addition, the categories of risk are then

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<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> *Id.* at 35-38.

<sup>14</sup> CCJJ Bail Subcommittee, Minutes, “Recommendation Review and Potential Voting,” September 7, 2012, at 3.

<sup>15</sup> The CPAT can only help a court sort a person into risk categories they create based on the point system of the CPAT, but it was not designed to assist courts in determining what type of bond or conditions are evidence-based in terms of reducing risk of committing a new crime or failing to appear. In fact, the statute does not allow a program to recommend the type of bond. We discuss this in detail, providing extensive citations, below.

broken into two different categories of risk—risk of failing to appear and risk of “picking up a new charge.”<sup>16</sup> Risk of picking up a new charge goes from 9 percent in the low category of risk to up to 42 percent in the high risk categories, while the rate of failure to appear ranges from 5 percent in the lower category to 49 percent in the high risk categories. In the risk category just above the low risk category, 20 percent will pick up a new criminal charge during the pendency of their case. How a particular judge may set various tolerances in terms of the type of security and supervision that may be appropriate will vary based on how heavily a judge chooses to weight public safety or appearance rates. In fact, a recent revision to the statutes by the General Assembly makes this point clear, apparently to correct the practice of using the instrument to predict more than pretrial risk by enacting statute that states that the pretrial risk assessment tool, such as the CPAT, was “...to be used by the [pretrial services] program, the court, and the parties to the case solely for the purpose of assessing pretrial risk.”<sup>17</sup> At the cut points, a one point difference in a demographic or other factor can result in supervision or additional conditions. How does a court impose an additional non-monetary condition that remedies the #1 factor of failure in the pretrial context—age at first offense?<sup>18</sup> In addition, one would want to understand the financial impacts imposed on offenders by imposing both supervision and the costs of supervision on them, and the end result, since if offenders must pay for their conditions a financial condition has been imposed upon them in addition to the supervisory condition. In many cases, as will be shown below, “non-monetary conditions” such as supervision and behavior monitoring can be quite expensive to the defendant and sometimes actually more than having imposing secured financial conditions.

Nonetheless, for the Professional Bail Agents, regardless of the inherent flaws in the CPAT tool, that portion of the goal was ultimately agreeable—obtain and provide to judges the information they need to make the best educated decisions about the risk of the defendant and more importantly what conditions may reduce the risk. In addition, in terms of the standardization of the bail decision-making guidelines, which was a goal of the bill, we think is likely going to be less standardized across the State as a result of HB 13-1236 because it asks for greater individualized consideration by judges and leaves as much or more to the discretion of judges in setting the type of bond and conditions of release. Charge-based bond schedules cannot be used as they were before. Similarly, we do not think the statute contemplates the sort of check box new bond schedules in Appendix C either.

In the second recommendation, the Subcommittee and the CCJJ stopped short of saying “eliminate” or “get rid of” money bonds or financial conditions. Instead, the recommendation used the words “discourage” and in the explanation, the Commission wrote that the

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<sup>16</sup> See Power Point Presentation Provided by Jones, Mike, for the Colorado Bar Association CLE 2014 Criminal Law, Spring Update: The New Bail Statutes, at 5.

<sup>17</sup> Senate Bill 14-212, Section 4, which amended § 16-4-106(4)(a), C.R.S. (2013). L. 2014, p. 1998. The final version of the enacted bill is included in Appendix D.

<sup>18</sup> See Colorado Pretrial Assessment Tool: Administration, Scoring and Reporting Manual, Vol. 1 (February, 2013), by the Pretrial Justice Institute, Washington, D.C., [http://www.pretrial.org/download/pjl-reports/CPAT%20Manual%20v1%20\(rev\)%20-%20PJI%202013.pdf](http://www.pretrial.org/download/pjl-reports/CPAT%20Manual%20v1%20(rev)%20-%20PJI%202013.pdf) (last accessed 08/16/2014).

recommendation was intended to “limit the use of monetary bonds in the bail decision making process.”<sup>19</sup> There was no explanation as to what the statute should then look like in terms of doing the limiting and what part of the process. Because of how broad the recommendation was, those who would draft and move forward the legislation would have wide latitude to “limit” or “discourage” financial bail in the proposed statute with really any ascertainable limit short of elimination. It seemed clear at the time and looking back on it that some anti-bail industry advocates wanted to eliminate all financial conditions but did not want to come right out and say it.

The third recommendation is really two parts—assessment and supervision. As mentioned, giving Courts better information on risk is not objectionable. That helps everyone understand the risk of the defendant. Interestingly, the several new bond schedules provided in Appendix E materials have mandatory categories of supervision based on a numerical score. Those are not evidence-based. The fundamentally flawed assumption is that additional or more conditions or supervision *will cure* a particular aggregate risk score. Many of the demographic factors the CPAT collects are beyond remedy anyway, and of course as will be shown below a flaw of the CPAT is that it does not take into account substance abuse as a factor. We will call into question whether substituting non-monetary conditions for monetary conditions for the vast majority of defendants is appropriate, reasonable, or the least burdensome alternative. That is so because the reform efforts simply assume that all defendants are too poor to afford anything and that money never motivates anyone in the criminal justice system, a fallacy we question below.<sup>20</sup>

The fourth recommendation, which was the only recommendation to pass the CCJJ unanimously, illustrates the lack of research that backed the underlying reform and cries out for remedy prior to any addition movement to further “limit” financial conditions. The Bail Agent representative on the Subcommittee advocated for a jail study so that the Subcommittee could determine who is in jail, why they are in, and what opportunities there may be to decrease unnecessary incarceration. Instead, you see thrown around the 50% statistic—half of all in jail are being held in jail prior to trial. We do not know if that is true generally. One is then led to believe

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<sup>19</sup> *Id.* at 37.

<sup>20</sup> Designing the criminal justice system to meet the needs of just the poor ignores the fact that a substantial portion of defendants, a majority prior to the recent boom in public defender spending occasioned by the *Rothgery* decision, are not indigent. Statistics from the State Court Administrators Office Annual Reports show that in Fiscal Year 2012 there were 35,434 new felony filings and 70,068 new misdemeanor filings. According to data presented to the General Assembly, the State Public Defenders Office closed 20,049 felonies and 27,701 misdemeanors in that fiscal year. Thus, the State Public Defender did not represent 43 percent of defendants charged with a felony and did not represent 60 percent of those charged with a misdemeanor. In fact, in 2012, 55 percent of all criminal defendants did not have a public defender when charged with a misdemeanor or felony. See [http://www.leg.state.co.us/Clics/Clics2013A/commsumm.nsf/b4a3962433b52fa787256e5f00670a71/af0a72d585234cb787257af7004dcd1d/\\$FILE/13JtJud0118AttachQ.pdf](http://www.leg.state.co.us/Clics/Clics2013A/commsumm.nsf/b4a3962433b52fa787256e5f00670a71/af0a72d585234cb787257af7004dcd1d/$FILE/13JtJud0118AttachQ.pdf)

that financial conditions are the driving force in keeping people in jail, but it appears that the vast majority of pretrial defendants are, by some operation of federal or state law, simply not bailable.

Of course, although the apparent problem is money bail is keeping people in jail, we know that some percentage of those in the jail prior to trial cannot get out regardless—that could be driven by a variety of factors that the Commission did not investigate including statutory no bail cases and immigration holds. The data we think, if it were compiled, would show that in a vast majority of cases, people are not able to get out of jail because of other reasons than they cannot afford the bond imposed. This calls into question focusing on attacking financial conditions rather than focusing on other reasons that yield greater benefits to local jails and criminal defendants. In fact, ICE holds are probably the number one cause of unnecessary pretrial incarceration in Colorado. In Denver and Broomfield Counties, the Colorado Fiscal Policy Institute and a local university professor found that ICE detention holds were requested, by ICE, in 41 percent of all arrests in two Colorado jurisdictions.<sup>21</sup> Further, a full 67 percent of those detained on ICE holds in the two year sample had a top charge of a misdemeanor, folks that would otherwise obtained some form of low bond or recognizance release and would have been released.<sup>22</sup> In addition, once the ICE detainer expires and the person is bailable, the evidence shows that they spend, on average, 22 additional days behind bars prior to disposition than defendants who were not subjected to an ICE hold.<sup>23</sup> This is but one factor the Commission failed to consider—that on any given day as much as *41 percent of pretrial defendants are sitting there on ICE holds*, and, that even after the holds expire the average person who had an ice hold will spend 22 additional days in jail on top of the 45 that the average defendant will spend in jail.<sup>24</sup> The authors of the study also point this as an increasing trend since legislation was passed in 2006.<sup>25</sup> If we cautiously assume that half of the other 59% of defendants who were not held on an ICE hold cannot get out because they are statutory no bail cases, then, without accounting for any other factors, including money bail, pending other cases, etc., that would mean 70.5 percent of all defendants on any given day are no bail cases anyway.

Much of the need for reform was driven by the thinking that pretrial incarceration was increasing due to financial conditions, thus increasing jail crowding. It is not clear that pretrial incarceration is increasing and, if it is, we do not yet know why. The Commission concluded as such after studying the issue for a year. In obtaining data from the counties on jail trends, one county found that the length of stay on sentences had increased from approximately 40 to now 60 days, whereas time of pretrial detention had not changed from around 18 days on average. That

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<sup>21</sup> See White, Kathy and Dwight, Lucy. "Misplaced Priorities: SB90 and the Costs to Local Communities." The Colorado Fiscal Institute and the University of Colorado. December 2012. <http://coloradoimmigrant.org/downloads/CO%20FISCAL%20INSTITUTE%20SB%2090%20REPORT%20DECEMBER%202012.pdf> (last accessed 8/24/2014).

<sup>22</sup> *Id.*

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

<sup>24</sup> *Id.* (the jail stay statistics come from the authors' analysis of Denver jail data in calendar years 2010 and 2011).

<sup>25</sup> *Id.*

makes sense with the continued trend of downgrading drug crimes and other crimes from felonies to misdemeanors. At the end of the day, there ultimately still seems more to the story of county jail crowding than what the data available showed at the time.

So, the Commission made the recommendation to collect data and standardize jail collection because it is “*impossible* to obtain accurate information on [jail] population trends and possible causes for those trends” and thus “it is difficult to identify statewide, regional, or local problems and solutions, particularly as these relate to facility overcrowding.”<sup>26</sup> Yet, this recommendation was never placed in the legislation and has not been implemented.<sup>27</sup> Anti-bail industry advocates admit that the recommendation was not implemented due to “logistical concerns.” Ostensibly, there would have been some additional fiscal cost to do so by the Sheriffs and the Division of Criminal Justice to do so. At bottom, the Commission unanimously recognized the deficiency in the available data in terms of identifying statewide problems and solutions, and rather than meeting the charge of conducting a comprehensive study, instead moved forward to apparently reform all of Colorado bail law with money bail as the number one problem based on three vague recommendations.

How do three of the four recommendations become a bill? The sponsor of the bill drafted the bill with the approval of the CCJJ Legislative Committee. The Legislative Subcommittee of the CCJJ “determines whether legislation derived from CCJJ recommendations continues to reflect the original recommendation intent.”<sup>28</sup> Because the recommendations were so vague, the Legislative Subcommittee would have had a difficult time stating that attempting to reduce the use of monetary bail by 1% or 99% would not have fit within the language of the recommendation to “discourage the use of” or “limit” monetary bail. As expected, the initial bill language was approved as consistent with the CCJJ recommendations.

### **III. Important Portions of the “New” Law and Legislative History**

#### **A. Full Side-by-Side of the Changes Are Contained in the Appendices**

When bills are drafted as what are called “strike-below” amendments, it is often difficult to ascertain the substantive portions of the old law that were deleted and the substantive portions of the new law that were added. The authors of this article have completed a full side-by-side comparison of the new law created by HB 13-1236 and the old law, and include that for reference in Appendix A. In this section, we discuss some of the key elements of the new law, provide legislative history where there is a lack of clarity, and suggest that while the General Assembly has incorporated the CCJJ’s recommendations in part into the new law, ultimately the adjustments

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<sup>26</sup> CCJJ Annual Report, *supra* note 10, at 38 (emphasis added).

<sup>27</sup> The authors checked with the Department of Public Safety, wherein the Division of Criminal Justice is housed, and confirmed that, as of August, 2014, the recommendation has not been implemented because the Division has received no such data.

<sup>28</sup> <http://www.colorado.gov/cs/Satellite/CDPS-CCJJ/CBON/1251623050572> (last accessed August 31, 2014).

are fairly minimal in terms of discretion of courts to set the type of bond and conditions of release.

**B. The Definition of Bail is Changed from "An Amount of Money" to "Security"; The Definition of Bail is Changed to Reflect that Not All Bail Can be Monetary; These Changes are Legally Insignificant Since All Bonds, Including PR Bonds, Still Require an Amount of Money Specified by the Court and Such Amounts Are Collectable.**

Proponents of eliminating money bail have pointed to the changed definition of bail as significant.<sup>29</sup> The definition changed from bail meaning "an amount of money" to "security, which may include a bond with or without monetary conditions."<sup>30</sup> Because courts already had wide discretion to grant personal recognizance bonds, this definition change will have little if any impact on the ability for a court to release a person on a personal recognizance bond or any other bond. In addition, the change to the definition of "bond" simply added the two phrases "a bail bond" and "if any" as follows:

"Bond" means *a bail bond which is* an undertaking, with or without sureties or security, entered into by a person in custody by which he binds himself to comply with the conditions of the undertaking and in default of such compliance to pay the amount of bail or other sum fixed, *if any*, in the bond.<sup>31</sup>

One might assume that these provisions relieve the Court of specifying a financial bond amount when granting a personal recognizance bond; however, § 16-4-104(1)(a) states that when a court imposes a personal recognizance bond that the court does so by imposing "an amount specified by the court."<sup>32</sup> Subsection (1)(b) doesn't use the same language, but read in context it is an addition to (1)(a) where a court moves on to specify additional non-financial conditions (which of course is itself an unnecessary restatement of the authority of courts contained in § 16-4-105(8), C.R.S. (2014), to impose appropriate bond conditions, including financial conditions). So, while the definition of "bail" is changed from "an amount" to security which may or may not include monetary conditions, the General Assembly still required a collectable amount be imposed on PR bonds, allowed for the imposition of a qualified co-signor, and then proceeded to clarify in SB 14-212 in the 2014 legislative session that those amounts imposed on PR bonds are may be forfeited and are collectable.<sup>33</sup> While other portions of the statute may encourage courts to focus on using

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<sup>29</sup> See materials of the State Public Defender accompanying the Colorado Bar Association CLE 2014 Criminal Law, Spring Update: The New Bail Statutes and Schnake, Tim, Best Practices in Bond Setting: Colorado's New Law (2014), [http://www.clebp.org/images/REVISED\\_Colorado\\_Bail\\_Law\\_Summary\\_06-14-2014\\_.pdf](http://www.clebp.org/images/REVISED_Colorado_Bail_Law_Summary_06-14-2014_.pdf) (last accessed 8/15/2014).

<sup>30</sup> § 16-1-104(3), C.R.S. (2014).

<sup>31</sup> § 16-1-104(5), C.R.S. (2014)(emphasis added portions are the additions made to the 2012 version of the law).

<sup>32</sup> § 14-6-104(1)(a), C.R.S. (2014).

<sup>33</sup> See SB-14-212, Section 7, in Appendix D, which adds unsecured personal recognizance bonds to the section on forfeiting bonds, § 16-4-111, C.R.S. (2014), and allows courts to declare a forfeiture and enter judgment against the

non-monetary instead of monetary conditions, the change in the definitions has little legal significance.

**C. The Standards for Setting Bond and Conditions of Release are Vastly the Same—Bond Schedules Are Still Allowed But Must Take Into Account At Least One Factor Other Than The Charge and It is Unclear Whether You Can Put on a Schedule Release Conditions Based on a General Risk Score**

We turn now briefly to the standards a court must use when deciding the “type of bond and conditions of release.” In general, the changes are not, as one commentator suggests, “substantial,” but there a couple of changes worth noting. As mentioned, Appendix A contains the side-by-side comparison of all of the changes for your review.

The first significant change is concerning the use of bond schedules. The new law states as follows:

To the extent a court uses a bond schedule, the court shall incorporate into such schedule conditions of release and factors that consider the individualized risk and circumstances of a person in custody and all other relevant criteria and not solely the level of offense.<sup>34</sup>

This is a confusing section for a couple of reasons. Proponents of the legislation argued vociferously that charge-based bond schedules were bad and should be banned. Yet, the legislation does not come right out and say that—it says a bond schedule cannot “solely” be based on the “level of offense.” How might this come into play? In reviewing various uses of the term “level of offense” in various cases, mostly in the sentencing context, level of offense generally means the felony or misdemeanor class of offense, e.g., felony in the first degree, felony in the second degree, class 1 misdemeanor, etc. Under that definition this means a bond schedule that is based solely on classes of the offense cannot be used without adding an additional factor. It still could, however, be based on a particular charge. For example, one jurisdiction had a bond schedule that was a list of charges—each of the various felony charges had differing monetary bond amounts for charges within a similar class. Under those circumstances, we feel that a charge-based bond schedule could still be employed because the charge could be interpreted as a factor that counts as individualized risk (for example, certain charges involving domestic violence), and the statute excluded only “the level of offense” as being used as the “sole” factor.

In using a bond schedule, however, the Court is also required to incorporate: (1) conditions of release; (2) “factors” that consider the individualized risk and circumstances of a person in custody; and, (3) all other relevant criteria.<sup>35</sup> Note also that a court is required to take into account

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defendant on an unsecured personal recognizance bond. The assumption, obviously, is that there would be an amount imposed in all personal recognizance bonds in which to forfeit and upon which to enter judgment.

<sup>34</sup> § 16-4-103(4)(b), C.R.S. (2014).

<sup>35</sup> *Id.*

the individual “characteristics” of the defendant as well.<sup>36</sup> It is unclear how any bond schedule would include “all other relevant,” presumably the statutory, criteria on the schedule. In addition, the court must incorporate consideration of the financial status of the defendant, which is a required consideration.<sup>37</sup> Instead, what some jurisdictions have done is simply let the CPAT be a magic black box that the offense level used to be—we input the information into it, and then we take the score. The score plus the top charge offense level, not the individualized risk factors or circumstances that lead to a high score, drives the automatic assigning of conditions and the decision on what type of bond to impose. This is actually contrary to the CPAT itself, which the authors say is not to be used to assign “blanket conditions” within a particular risk category.<sup>38</sup>

We are of the opinion that the General Assembly made it clear that the exact procedure going on in the jurisdictions that have a bond schedule that assigns conditions not otherwise mandated by statute based on the offense level and the CPAT aggregate risk score are, aside from failing to be evidence-based, contrary to the statute. Instead, the statute requires that any condition of conduct imposed as a bond condition that is not mandated by the statute “must be tailored to address a specific concern.”<sup>39</sup> A bond schedule that assigns conditions based on an aggregate scoring system such as the CPAT, by definition does not address a specific concern. Instead, it addresses the general concern that the sum of the risk factors is high, under whatever definition of “high” the court chooses to adopt. In addition, there is absolutely no tie between most of the CPAT factors and any conditions that may be imposed to decrease risk. If a person was arrested young, which is the number one factor according to the CPAT that will lead to pretrial failure, and has a record a mile long, what individualized conditions should be imposed based on that? The CPAT certainly is of no help. Do we make the person do drug screenings? Do they check in more? Do we take their passport? How much more do we restrict that person’s liberty? Assigning conditions based on the aggregate CPAT score and offense level does not assign conditions based on a “specific concern,” and thus these authors believe those schedules that do so based on a general score or offense level are also contrary to the statute.

**D. The Statute Requires Courts to Impose the Least Restrictive Form of Release, Which is Undefined by the Statute—The General Assembly Declined to Adopt ABA Standards Approach Suggesting that Financial Conditions are Presumptively the Most Restrictive in the Statute—Judges Must Interpret “Least Restrictive” In Terms of All Types of Bond and Condition of Release Available**

The State Public Defender, in a recent Continuing Legal Education course suggested that while the statute failed to define least restrictive conditions that “the ABA best-practice standards

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<sup>36</sup> § 16-4-104(3)(a), C.R.S. (2014).

<sup>37</sup> *Id.*

<sup>38</sup> The Colorado Pretrial Assessment Tool (CPAT): A Joint Partnership among Ten Colorado Counties, the Pretrial Justice Institute, and the JFA Institute, Revised Report, October 19, 2012, at 21.

<sup>39</sup> § 16-4-103(4)(a), C.R.S. (2014) (“...any condition of conduct not mandated by statute must be tailored to address a specific concern.”).

describe secured monetary conditions (e.g., cash or surety bonds) as more restrictive than unsecured bonds (e.g., personal recognizance bonds with or without conditions).” Yet, that statement is only partially accurate—instead, the ABA standards set up a scenario where secured monetary bail is a last resort when it may be less restrictive than a litany of non-monetary conditions. The ABA standards, and others, simply *assume* that monetary conditions are always more restrictive than non-monetary conditions, no matter how onerous and expensive to the defendant, in *all* cases—and certainly that can be true in any individual case, but often monetary conditions are the least restrictive form of release because it may not involve further supervision by the police or the State, at the cost to the defendant, but instead creates the appropriate financial incentives in those involved in the transaction to satisfy the statutory terms and create the necessary security. Because the General Assembly did not define least restrictive, it is ultimately a question of judicial discretion. And, certainly, Judges have been operating under that constitutional standard for some time prior to the “new” law having been created, and because those standards flow from the federal constitution, will continue that practice.<sup>40</sup>

The exact language that appears in the ABA standards is: “Release on financial conditions should be used only when no other conditions will ensure appearance.”<sup>41</sup> In the comments to the ABA Standards, the following is said: “Under Standard 10-5.3(a), financial conditions may be employed, but only when no less restrictive non-financial release condition will suffice to ensure the defendant's appearance in court.”<sup>42</sup> The language that appeared in the introduced version of the bill, **which was removed by the General Assembly**, was very similar in that it adopted language from the ABA standards in order to create the ABA framework of monetary conditions as a last resort.<sup>43</sup> Thus, the plain language of the statute enacted by the General Assembly was to put secured financial conditions on a level playing field—in other words, judges assess what they think will work from all of the four of the types of bond under the new law: unsecured PR, unsecured PR with additional “non-monetary conditions,” secured monetary bond, and secured real estate bond. Such was also part and parcel of the negotiations conducted by these authors that

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<sup>40</sup> See *People v. Sanders*, 185 Colo. 153, 522 P.2d 735 (1974)(citing *Stack v. Boyle*, 342 U.S. 1 (1951) and the ABA Standards Relating to Pretrial Release (approved draft 1968)) (“...the primary function of bail is to assure the presence of the accused, and that this end should be met by means which impose the least possible hardship upon the accused.”). It is unclear whether “least possible hardship” is legally distinct from “least restrictive,” although we would argue that “least possible hardship” as a standard flows from the State and Federal constitutions.

<sup>41</sup> *American Bar Association Standards for Criminal Justice (3rd Ed.)*, Pretrial Release (2007)

<sup>42</sup> *Id.*

<sup>43</sup> See the Introduced Version of HB 13-1236 in Appendix B, page 8 and compare with the Final Version of the Bill Signed by the Governor, Page 7 that is also contained in Appendix C. The introduced version, which the General Assembly amended out of the bill, with the exception of property bonds, stated that secured monetary bonds (cash, property, sureties, or surety) could only be imposed “when it is determined that release on an unsecured personal recognizance bond with additional conditions but without monetary conditions *does not reasonably ensure* the appearance of the person in court or the safety of any person or persons or the community” (emphasis added.).

lead to the General Assembly adopting such an amendment—that judges should remain unconstrained when deciding which of the one four bond types to impose.

Instead, monetary conditions of release in many if not most cases will be the least restrictive form of release. The testimony from bail agents and the industry that supported that amendment was to that effect. Thus, it is difficult to assert that the intent of the General Assembly was to enact the ABA definition of least restrictive, particularly when the language that would have provided the statutory grounds, regardless of legislative intent, to argue that the General Assembly did adopt the last resort methodology was deleted from the introduced version of the bill in the House Judiciary Committee. We believe that in overemphasizing the problem of the indigent offender with no social ties, we blur ourselves to the reality that a financial condition of release for most people is the least restrictive, particularly in terms of the State's continuing intervention and supervision of their lives. The General Assembly recognized it as such so that judges would not have to make findings against the effective use of a PR bond with any number of a combination of conditions generally paid for by the defendant in order to say that a secured financial condition would instead be adequate to meet the constitutional and statutory purposes in the setting of bail.

One commentator suggests that because a court must make an additional finding that a secured monetary bond is “necessary,” and that it was placed in a separate category of a type of bond, that such standard suggests the General Assembly intended to adopt the as a last resort methodology laid out in the ABA Standards.<sup>44</sup> Or, as the same commentator argued, because the phrase “least restrictive form of release” was used, the General Assembly has then made what he concedes is ultimately a policy judgment made by the ABA that money is always the most restrictive.<sup>45</sup> This is a thin line of reasoning at best—secured monetary bail was always in a separate section and the additional “necessary” standard has no additional legal significance when the statute is read as a whole.<sup>46</sup> Necessary means saying that imposing a particular bond type is “convenient or useful.”<sup>47</sup> The Colorado Supreme Court cited one case for the proposition that

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<sup>44</sup> See Schnake, *supra* note 3, at 38-42.

<sup>45</sup> *Id.* at 39 (“The presumption constitutes a policy judgment that restrictions on a defendant’s freedom before trial should be limited to situations where restrictions are clearly needed, and should be tailored to the circumstances of the individual case.”)(citing *American Bar Association Standards for Criminal Justice* (3rd Ed.) Pretrial Release (2007)).

<sup>46</sup> Mr. Schnake, in his analysis, argues that “necessary” is to be understood as “necessary in light of all alternatives.” In other words that the General Assembly had adopted the last resort methodology even though there is nothing in the statute that requires such a finding and only that, upon finding that the order imposing bail is “appropriate” and “reasonable,” a secured monetary bond must also be found to be “necessary” in light of all other alternatives. No such language appears in the statute. We believe that “necessary” means necessary to meet the constitutional and statutory purposes, not “necessary” because nothing else will work. In addition, we think that making a finding of appropriate and reasonable meets the definition of necessary, i.e., that it also be expedient, convenient, or useful.

<sup>47</sup> See legal definition of “necessary” from Black’s Law Dictionary: <http://thelawdictionary.org/necessary/> (last accessed August 14, 2014).

“necessary” is a “word of great flexibility” and may mean “expedient or reasonably convenient.”<sup>48</sup> The general standard for the imposition of any of the four types of bonds is that a court must find that such bond type is “appropriate” in terms of meeting the constitutional and statutory criteria in setting bond.<sup>49</sup> In addition, all bonds must be “reasonable”—although the general language concerning “reasonably ensuring the appearance of the defendant” and safety of the community appears again in the secured monetary bond sub-section, that is simply a restatement of the general standard that governs setting one of the four bond types.<sup>50</sup> Further, the statute requires a court to consider “*all methods of bond and conditions of release to avoid unnecessary pretrial incarceration.*”<sup>51</sup>

Thus, to suggest that because a court must find that a secured monetary bond is “necessary” somehow incorporates the ABA last resort methodology seems to be quite a stretch. We believe that when a court finds that a monetary bond is “appropriate” and “reasonable” to meet the statutory purposes, an additional finding that it is also “necessary” is without additional legal significance. Certainly, the ABA believes that “least restrictive” *never* means money, and judges can take notice of the conclusion made by the ABA. We think that is an open debate and depends on the factual circumstances of each case. Because the General Assembly did not define least restrictive, the court should use the plain language of the statute and consider all types of bonds and conditions of release in the entire basket of options in assessing what is least restrictive. The authors believe that was the intent of the amendment, and it certainly was the purpose in the authors meeting with the bill sponsor and proponents to request such a change—to level the playing field and not adopt in statute a presumption of an assumptive policy judgment made by the American Bar Association, but instead let our Colorado judges grapple with what least burdensome or restrictive means on a case-by-case basis. We do not think any judges will find secured monetary bond is less restrictive than a straight personal recognizance bond with no additional conditions—that is obvious. The question is the impact caused to the defendant by the degree of restriction or burden occasioned by imposing a combination of “non-monetary” conditions on the defendant, including further supervision by the police, compared to a defendant posting a financial condition.

#### **E. The Types of Bonds Available to the Court Are Largely the Same with the General Assembly having Created Two Types of PR Bonds that Are Legally Indistinct**

In terms of the types of bonds available to the Courts, the legislature has created two categories of personal recognizance bonds, secured monetary bonds, and secured real estate bonds.<sup>52</sup> Under the old law, there were two types of bonds: personal recognizance and secured monetary bond. Then there were enumerated types of secured monetary bond (cash, property,

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<sup>48</sup> See *Hawes v. Colorado Div. of Ins.*, 65 P.3d 1008, 1028 (Colo. 2003)(citing *Lake County Bd. of Review v. Prop. Tax Appeal Bd.*, 119 Ill.2d 419, 116 Ill.Dec. 567, 519 N.E.2d 459, 463 (1988)).

<sup>49</sup> § 16-4-104(1), C.R.S. (2014).

<sup>50</sup> § 16-4-103(3)(a), C.R.S. (2014).

<sup>51</sup> § 16-4-103(3)(c), C.R.S. (2014)(emphasis added).

<sup>52</sup> § 16-4-104(1)(a) – (c), C.R.S. (2014).

surety, sureties). Nonetheless, courts were always free to impose additional conditions of release, including pretrial supervision, on all bonds.<sup>53</sup> The new law of PR and PR with “additional non-monetary” conditions is without an important legal distinction except that the legislature separated it into two categories. It is unclear whether the second section of PR bonds, which does not contain the requirement of setting a PR bond amount and the section concerning requiring additional obligors. It seems as though, as pointed out above, that § 16-4-104(1)(b) is meant to also include the requirement of setting a monetary amount and as allowing the court to require an obligor, but to distinguish instead the two forms of PR bonds—those with additional non-monetary conditions (b) and those without (a) instead of creating two different rules on those topics.

**F. The Legislation Removed the District Attorney’s Consent to PR Bonds Contained in the Old Law in Certain Cases Involving Prior Criminality, But Now Requires a Court to Impose Additional Conditions, Either Monetary or Non-Monetary, on All Bonds When the District Attorney Fails to Consent to a PR Bond in Those Particular Fact Patterns**

In several sections of the previous law, one dating back to 1972, a District Attorney had to consent to the imposition of a personal recognizance bond in certain circumstances, and the Court could not proceed to impose a personal recognizance bond in such circumstances where the District Attorney did not consent.<sup>54</sup> Those three fact circumstances were: (1) when the defendant is out on bond in another case involving a felony or class 1 misdemeanor<sup>55</sup>; (2) when the defendant has had a prior class 1 misdemeanor within 2 years or a felony within 5 years<sup>56</sup>; and, (3) prior failures to appear on a class 1 misdemeanor or felony over the last five years.<sup>57</sup>

One commentator describes the rationale for the repeal of these sections of the old law having been based on “a misunderstanding of the role of conditions of release in the administration of bail.”<sup>58</sup> Instead, the authors would suggest that the CPAT itself provides strong evidence that the General Assembly had it right: prior criminality is central to pretrial risk. In fact, factors of prior criminality (age at first arrest, prior supervision, on supervision, past jail or prison sentence,

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<sup>53</sup> § 16-4-103(2)(f), C.R.S. (2012).

<sup>54</sup> § 16-4-105(1)(m) – (n.5), C.R.S. (2012).

<sup>55</sup> § 16-4-105(1)(m), C.R.S. (2012): “Unless the district attorney consents, no person shall be released on personal recognizance if he is presently at liberty on another bond of any kind in another criminal action involving a felony or a class 1 misdemeanor.”

<sup>56</sup> § 16-4-105(1)(n), C.R.S. (2012): “Unless the district attorney consents, no person shall be released on personal recognizance if he has a record of conviction of a class 1 misdemeanor within two years, or a felony within five years, prior to the release hearing.”

<sup>57</sup> § 16-4-105(1)(n.5), C.R.S. (2012): “Unless the district attorney consents, no person who is eighteen years of age or older or is being charged as an adult pursuant to section 19-2-517, C.R.S., or transferred to the district court pursuant to section 19-2-518, C.R.S., shall be released on personal recognizance if the person’s criminal record indicates that he or she failed to appear on bond in any case involving a felony or class 1 misdemeanor charge in the preceding five years.”

<sup>58</sup> Schnake, *supra* note 3, at 55.

etc.) make up 63 percent of the total point risk score available on the CPAT instrument itself.<sup>59</sup> These sections likely, we would assume, remain in the law because they are good, evidence-based rules of thumb and probably factors judges have been considering for hundreds of years. Under the new law, it is clear that Courts now have the additional option to impose *either or both of* additional secured monetary or non-monetary conditions in these three factual circumstances in the case where a District Attorney objects to a straight PR bond. Before, the only over-ruling of a District Attorney's discretion was secured monetary bond. We are not aware of the number of situations under the old law where a Court was unable to proceed with an intended PR bond due to the District Attorney's objection that would then now ignore the District Attorney's objection to a PR bond and proceed anyway. We believe the number of these cases to be small.

### **G. The New Law Removed All Mandatory Monetary Bond Amounts Previously Set in Statute**

The General Assembly had, over the years, imposed specific monetary bail amounts in the statute as a starting or preference point for Courts. Those were contained in § 16-4-103(1), C.R.S. (2012). The three categories that were repealed were: (1) \$10,000 "or such amount as set in a bail hearing" for D.U.I. when D.U.R.<sup>60</sup>; (2) vehicular eluding and D.U.I. arising out of same incident, \$50,000<sup>61</sup>; and, (3) some felony drug dealing crimes, \$50,000.<sup>62</sup>

One author describes these subsections of the statute as "presumptive bail" and argues that such sections of the statute were repealed because they were the "antithesis of a risk-based bail system."<sup>63</sup> Yet, each of these subsections were passed by individual bill after proceeding through the legislative process and having been signed by the Governor, and none could hardly have been

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<sup>59</sup> The categories and the amount and percentage they make up of the 52 of 82 point (or 63 percent) of the CPAT risk score are: age at first arrest (up to 15 points, 18.3 percent of total points); past jail sentence (up to 4 points, 4.8 percent of total points); past prison sentence (up to 10 points, 12.1 percent of total points); having an active warrant (up to 5 points, 6.1 percent of total points); having other pending cases (up to 13 points, 15.9 percent of total points); currently on supervision (up to 5 points, 6.1 percent of total points); and, history of revoked bond or supervision (up to 4 points, 4.8 percent of total points). See Colorado Pretrial Assessment Tool: Administration, Scoring and Reporting Manual, Vol. 1 (February, 2013), by the Pretrial Justice Institute, Washington, D.C., at 5. [http://www.pretrial.org/download/pji-reports/CPAT%20Manual%20v1%20\(rev\)%20-%20PJI%202013.pdf](http://www.pretrial.org/download/pji-reports/CPAT%20Manual%20v1%20(rev)%20-%20PJI%202013.pdf) (last accessed 08/16/2014).

<sup>60</sup> § 16-4-103(1)(b), C.R.S. (2012): "If a person is arrested under section 42-2-138 (1) (d) (i), C.R.S., for driving while such person's driver's license or privilege to drive, either as a resident or nonresident, is restrained solely or partially because of a conviction of a driving offense pursuant to section 42-4-1301 (1) or (2) (a), C.R.S., then the bail for such person shall be ten thousand dollars or such amount as is set at a bail hearing."

<sup>61</sup> § 16-4-103(1)(b.5), C.R.S. (2012): "If a person is arrested for vehicular eluding under section 18-9-116.5, C.R.S., and driving under the influence under section 42-4-1301, C.R.S., arising out of the same incident, the bail for such person shall be fifty thousand dollars or such amount as is set by the court after consideration of all relevant factors."

<sup>62</sup> § 16-4-103(1)(d), C.R.S. (2012): "If a person is arrested for distribution of a schedule I or schedule II controlled substance pursuant to section 18-18-405, C.R.S., then the court shall set bail for such person at fifty thousand dollars; except that, upon the motion of the district attorney or defendant and a showing of good cause, the court may set bail at an amount other than the specified amount."

<sup>63</sup> Schnake, *supra* note 3, at 34.

called a strict presumption due to wide latitude for courts to depart from such amounts. Nonetheless, regardless of the wisdom of General Assembly rejecting previous specific legislative judgments, these sections of the law no longer exist—there are no monetary bail amounts specified anywhere in the new law.

**H. In Setting Secured Conditions, The New Law from 2013 and 2014 Makes it Clear that Courts Should Set a Single Amount of the Financial Condition and the Defendant May Then Choose How to Satisfy It by Any One of the Enumerated Methods—This Eliminates 10% to the Court Bond Systems, largely eliminates Cash- or Surety-Only Bonds Except in Certain Limited Factual Scenarios, and Eliminates Combination or Alternate Bonds**

It is the belief and understanding of these authors that the new general rule is that judges, when setting a secured monetary amount, simply select the amount and proceed no further. The exception is that a specific method may be specified by the court if the court makes factual findings on the record that requiring a defendant to post using one of the specific statutory methods is necessary to meet the statutory purposes.<sup>64</sup>

This statutory construct is consistent with the majority rule of state supreme courts who have held that setting cash-only bail is unconstitutional.<sup>65</sup> Although the Colorado Supreme Court has yet to decide the constitutional question, there was some suggestion in a Court of Appeals opinion drafted by then-Chief Judge Janice Davidson that hints that Colorado would be likely to follow such majority rule.<sup>66</sup> Yet, the General Assembly inserted the exact language that is the rationale for the majority rule into the statute (defendant choice), and so while there is an open constitutional question, the statute seems to eliminate the routine practice of imposing cash-only

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<sup>64</sup> It is important to point out that this language was included in the original CCJJ bill, and was not placed there at the request of the surety bail industry. When confronted with this language it became an interesting point of discussion in terms of how judges would grapple with it—would they impose lower bonds to price the surety industry out or impose higher bonds knowing that in cases where the court was allowing 10 percent to the court that instead they would be requiring a defendant or co-signor to pay a premium fee of no less than 15 percent. At the end of the day, the decision was made to not object to this language and to proceed forward as it was constructed because it was consistent with the majority rule of other State Supreme Courts that had held that the liberty of the defendant could be better protected with defendant choice, and that likely, on balance, this section increases the amount of people who will get out of jail because they lack liquid funds to post a cash-only bond but have the wherewithal to hire a surety to post a bond for them. Because Courts or sheriffs continue to illegally run 10% cash to the court systems or do bonds in the alternative to run a 10% to the Court system, there was in fact support for the clarification brought about by SB 14-212, to clarify that the choice of how to satisfy a secured monetary amount, as intended by the CCJJ, was to be the defendant's choice in all but the rare exception of cases.

<sup>65</sup> See, for example, *State v. Brooks*, 604 N.W.2d 345, 353 (Minn. 2000)('sufficient sureties' clause means that court may not select the form of bond security and, therefore, court-imposed 'cash only' pretrial bail is unconstitutional.).

<sup>66</sup> See *Fullerton v. County Court*, 124 P.3d 866 (Colo. Ct. App. 2005) ("Accordingly, we agree with the majority of jurisdictions considering the issue that, in reference to bail, the term 'sureties' refers to a broad range of guarantees used for the purpose of securing the appearance of the defendant. Such guarantees include, but are not limited to, bonds secured by cash.").

bail, and it also appears to eliminate allowing courts to set bonds in combination or in the alternate (e.g., \$10,000 surety bond or 10% cash to the Court; or \$10,000 property or surety, or \$1,000 cash).<sup>67</sup> In addition, under *People v. District Court*, if a Court cannot specify an amount that is 10 percent of the “amount” of the bond using an alternate method, cash, because the statute requires a defendant to post “the full amount,”<sup>68</sup> then it stands to reason that Courts similarly could not be permitted to substitute *any other percentage* in regards to the use of other methods of posting a secured bond.

Secured bonds are quite similar to the old law with a few clarifications. First, the old law allowed the various methods of securing a bond, surety agent, cash, etc. to be posted in “any one or more, or combination of, the following ways ...” Now the statute reads as follows:

The financial conditions shall state an amount of money that the person must post with the court in order for the person to be released. The person may be released from custody upon execution of the bond in the full amount of money to be secured in any one of the following methods, as selected by the person to be released, unless the Court makes factual findings on the record with respect to the person to be released that a certain method of bond, as selected by the court, is necessary to ensure the appearance of the person in Court or the safety of the person.<sup>69</sup>

This provision, in the authors’ view, was intended to eliminate the practice of alternate or combination bonds where a court would impose different financial amounts depending on the type of or method of security a defendant chose. In addition, this language largely eliminates cash-only bail as a routine practice since the court is now required to make specific factual findings “on the record” in order to specify a particular method of posting a secured monetary bond. The exception does not allow alternate or combination bonds either—it only allows a court, after having set an amount of secured monetary bail to then specify one method a defendant must use to post it.

One commentator claims that because the statute uses the phrase “financial conditions” instead of “financial condition” that such use of the plural provides new authority for judges to impose financial conditions of differing amounts based on the method the defendant employs to satisfy the financial conditions. That is the only counter-argument the authors have heard in terms of the interpretation presented here, which one commentator noted we presented at a CLE

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<sup>67</sup> In *Brooks*, 604 N.W. 2d 345, 348, the Minnesota Supreme Court adopted Brooks’ contention that the constitution afforded the defendant the choice to post a bond as an alternative to cash. Ten percent deposit bail to the Court, which courts have allowed under the old law and continue to allow under the new law, has been clearly prohibited in Colorado since 1978. See *People v. District Court*, 581 P.2d 300 (1978). The language upon which that decision relies, that a person must post “the full amount” of the bond is still contained in the new statute.

<sup>68</sup> See *People v. District Court*, 581 P.2d 300, 302 (“...the statutory requirement that the ‘full amount of bail’ be secured negates the contention that courts may permit the deposit of a percentage of the full amount of the bail.”).

<sup>69</sup> § 16-4-104(1)(c), C.R.S. (2014).

luncheon, which is that courts generally set an amount of secured monetary bail and the defendant elects from amongst the options the one method he or she prefers.<sup>70</sup> Indeed, it is a particularly important conclusion in terms of defendants' rights, at least as those supreme courts who have held this is a constitutional question, to impute a power of the court, to do 10 percent to the court or cash-only bail, "not expressly or impliedly authorize[d]" by that statute by instead suggesting that power does exist due to the use of plural "conditions" instead of "condition."<sup>71</sup> In other words, that a court could set different financial "conditions" based on how the defendant chose to satisfy the bond—for example, \$10,000 surety, \$1,000 cash, or \$10,000 property. Or, that a Court continue to just say, \$1,000 cash-only on a bond schedule or as a routine matter. Yet, when you read the full paragraph in context, you note that the "financial conditions "shall state *an amount* of money" that the person must, and the person must post "*the full amount* of money ... to be secured in any *one of* the following methods..." In addition, each of the subsections that provide the method for the defendant to post the bond describe it is "*the amount* of the bond."<sup>72</sup> That practice of alternate bond or 10% to the court already seemed prohibited anyway by *People v. District Court*,<sup>73</sup> and there is nothing here that seems enough to stray from that conclusion given that the key phrases upon which that decision relied are maintained in the statute.

It is unclear why the General Assembly would use the term "financial conditions" instead of "financial condition." They did so also in the context of "secured real estate conditions" as well instead of simply saying a "secured real estate conditions." It is unclear why they would do that. Perhaps the same commentator would argue that the court can specify different amounts of the secured financial conditions based on the type of property involved, i.e., whether it is a time-share, used as a vacation rental, or used as a primary residence. Instead, the authors believe "conditions" is used generally to describe all "conditions," secured, non-monetary, or any other conditions allowed to be imposed by the court. In addition, there is more to a financial condition in a surety bond than simply the posting of the bond—the bond includes all standard and additional conditions of release, the statute provides for varying terms and conditions in terms of forfeiture of the bond, there are statutory terms of exoneration from liability, the state has conferred in this section of the law the power to arrest the defendant and to take the defendant into custody and return him to the sheriff, etc. That seems a more reasonable interpretation than instead arguing that the statute implies a new power by using the plural "conditions" instead of "conditions."

In addition, it seemed clear from the language that this provision intended to adopt the majority rule of other States, by statute, concerning interpreting the various similar state constitutional provisions as not allowing a court to impose a *cash-only bond* but instead to specify an amount of a financial condition, and that the defendant could choose to satisfy a financial

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<sup>70</sup> We would also point out that the State Public Defenders' Office, in the recent CLE cited herein, also pointed out that a party asserting that cash-only bail is largely disallowed would be likely to prevail on that point before the Colorado Supreme Court.

<sup>71</sup> *People v. District Court*, 581 P.2d 300, 302 (1978).

<sup>72</sup> § 16-4-104(c), C.R.S. (2014) (emphasis added).

<sup>73</sup> *People v. District Court*, 581 P.2d 300 (1978).

condition in any means available to him or her.<sup>74</sup> This was provision later clarified in the 2014 session of the General Assembly, when SB 14-212 was passed and became law.<sup>75</sup> The specific statutory language of that bill adopts the exact language, in statute, that the majority of State Supreme Courts have relied on as the basis for having found a constitutional restriction on trial courts to impose cash-only financial conditions: defendant choice. Although it is still an open question as to whether the Supreme Court would adopt the majority constitutional view on this issue, it is clear that the General Assembly has adopted it by statute. Now the analysis for a court to ignore this section of the statute is more difficult—a court must conclude that the General Assembly lacks the power to do in statute what it has done in terms of restricting judicial discretion to impose one particular “method” and that the Colorado State Constitution does not prohibit but instead allows courts to impose cash-only bail. We think instead the new statute is clear and is, at least, a view of one branch of government in how to interpret the constitution that states that “all persons shall be bailable by sufficient sureties.”

The exception to the rule of defendant choice in the new statute allows a Court to impose cash-only or surety-only secured monetary bail if “the Court makes factual findings on the record that a certain method of bond, as selected by the Court, is necessary to ensure the appearance of the person in court or the safety of any person, persons, or the community.”<sup>76</sup> This exception does not allow percentage bail or creating different amounts based upon how the defendant chooses to post the bond—instead, it only allows a court to specify “a” method that is available to the defendant to post “the full amount.” It is certainly an open question as to whether the exception would be held constitutional if challenged since the Colorado Supreme Court has not answered the question of whether cash-only bail, surety-only bail, or property-only bail could be constitutional in Colorado.<sup>77</sup> If the Colorado Supreme Court were to agree with the Minnesota Supreme Court’s conclusion in *Brooks* that the constitution prohibits cash-only bail, then the exception provided by the General Assembly for a court to impose one method of satisfying the amount of a secured monetary bond is also unconstitutional. In addition, the General Assembly did not give judges any

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<sup>74</sup> See, for example, *State v. Brooks*, 604 N.W.2d 345, 348 (Minn. 2000)(The Minnesota Supreme Court accepted Brooks’ contention that “the phrase ‘sufficient sureties’ demonstrates the intent that defendants be allowed to post a bond as an alternative to cash.”).

<sup>75</sup> See Appendix C and D. The 2013 final version (HB 12-1236) of the law did not contain the exception that affirmatively authorizes the court to specify “one of” of the methods a defendant may choose to satisfy the amount of the secured financial condition, which was added by SB 14-212, nor did it contain the language that the defendant may choose how to satisfy the monetary condition, which was added by SB 14-212. Prior to this change, these authors asserted, on strong legal grounds, that there was no exception under the statute and that the court’s role was simply to set, if appropriate and reasonable, a secured monetary bond amount and go no further. Some argued for the need for the exception to the general rule. Apparently those who proceeded to argue for the creation of an exception to that general rule thought the rule was as strict as these authors believed it was, and they were able to convince the General Assembly to provide an exception. No exception would be necessary if it was true that a court could continue to impose cash-only bonds in all cases under the law as it became after the passage of HB 13-1236.

<sup>76</sup> § 16-4-104(c), C.R.S. (2014).

<sup>77</sup> See *Fullerton*, *supra* note 65.

additional guidance as to what facts and factors may lead to the conclusion that a surety-only or cash-only bond would be appropriate.

In short, the new statute directs a court, if imposing a secured bond, to set an amount of money that the defendant must post in order to be released from jail. A defendant then decides how to best he or she may post that security among the list of options. A defendant selects “one” method to post the “full amount of money.” That is the general rule, and the General Assembly has allowed the court to impose a specific method of satisfying “the amount” of the bond by making specific factual findings on the record that support restricting the defendant’s choice to the method instead selected by the court.

**I. The General Assembly Eliminated a Statutory Hurdle Contained in the Introduced Version of the Bill Designed to Limit Courts’ Ability to Impose Monetary Bail and, by doing so, Put Monetary Bail Back on a Level Playing Field Consistent with the Old Law**

As mentioned previously, the introduced version of the bill would have required court’s to make a specific finding in the negative that any combination of conditions that could be imposed on a person on a PR bond “will not” meet the statutory purposes in order to have the discretion to impose a financial condition. In other words, all potential conditions given to a person on a PR bond would have to be provably not workable prior to imposing a financial condition.

The House Judiciary Committee amended that section of the bill out, based on a request and testimony from the bail industry, and leveled the playing field for judges in terms of the bond types in the statute and the conditions to be imposed such that a court may apply the statutory framework and select the appropriate type of bond and conditions of release. This clearly is a rejection of the notion that secured financial conditions must either be the last resort or rung up a decision-making ladder. There is, however, one questionable exception—property bonds.

**J. Property Bonds Have Been Separated Out From Secured Monetary Bonds, and Courts Will Have to Make A Specific Finding in the Negative to Impose a Property Bond**

Property bonds have been separated out as a new type of bond in the new statute,<sup>78</sup> and courts must rule that the presumption against their use has been overcome prior to using them. Previously, they were treated as a secured monetary bond, courts were free to, and often did, impose a “cash-property-surety” bond. Without an additional finding by the court that an unsecured PR bond without financial conditions “will not reasonably ensure the appearance of the defendant in court or the safety of any person or persons within the community,” the court could not allow a property bond. This section, we think, does adopt the ABA standards last-resort methodology, but only as to property-only bonds. We believe that such section is vulnerable to

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<sup>78</sup> § 16-4-104(d), C.R.S. (2014).

challenge under *Brooks* because it may create a situation where all other options will work but will be more burdensome than posting a property bond. That is why, we think, the constitutional interpretation of the Minnesota Supreme Court in *Brooks* is the better thinking on this issue, and this statutory provision is precisely why—property as a last resort rather than as a first resort when the least burdensome form of release would be a property bond instead of a PR bond with a litany of mechanically imposed conditions on the defendant’s liberty.

#### **IV. Pretrial Agency Effectiveness and Impact on Defendants**

##### **1. Non-Monetary Conditions—Most Defendants Are Expected to Pay for Many of the Non-Monetary Conditions Imposed Upon Them; Courts Should Consider the Total Impact of These Costs in Terms of the Restrictiveness of the Bond and The Reasonableness of the Conditions Imposed**

Courts should consider the financial impacts on a defendant, including the ability to pay for those conditions or face continued incarceration, when imposing so-called “non-monetary conditions.” As will be shown, non-monetary conditions are a mix of both monetary and non-monetary conditions—they are fees charged to a defendant for a service that pretrial agencies are providing. Some of these services are typically provided by bail agencies as part of every bond and in particular phone check-ins and reminders, which form the backbone of all pretrial agencies successful FTA reduction strategies.<sup>79</sup>

How much do non-monetary conditions cost a defendant? In late 2013, these authors obtained a variety of records from eight of the ten jurisdictions that chose to respond to the requests submitted pursuant to the Colorado Open Records Act. A summary of some of what was discovered in terms of the costs to the defendants of these programs is included below. We conclude that defendants faced significant financial charges, as much as \$500 per month, to be “supervised” by such agencies.

In one large jurisdiction, alcohol monitoring will cost a defendant \$9 per day, an RF \$5, a Cell \$7, and a GPS unit \$11 per day. That equates to \$270 a month for an alcohol monitoring unit, and \$330 a month for a GPS monitoring unit. In some cases, there can be multiple monitoring devices involved. Many jurisdictions charge an intake fee, such as Arapahoe County’s mandatory \$40 intake fee, which amounted to \$38,461.39 collected from defendants in 2012. In addition, other jurisdictions have monthly supervision fees. One jurisdiction adds a \$50 PR bond fee to all PR bonds, and will not allow the release of the defendant from jail until the \$50 PR bond fee is

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<sup>79</sup> One might argue, given the fact that Court date reminders appear to be the number one benefit of “county supervision,” whether the Court system as a whole should adopt some sort of automatic tickler system for all cases and including criminal defendants using modern technology whether it be texting them, calling them, emailing them, or contacting them by mail. By leveraging the advanced technology employed by the State Judicial Department, this solution could save all stakeholders significant resources and not require counties to create programs to call people.

paid. That same jurisdiction charges a \$22 per day work release fee. Another jurisdiction charges a \$25 out of county fee to non-residents of their county who are put on pretrial supervision. Monthly supervision fees are often added generally between \$25 and \$50 a month. In addition, some agencies charge the offenders for alcohol and drug screenings.

So, a potential defendant could be charged upwards of \$500 a month for pretrial supervision. Over a six month period this can amount to several thousand dollars. Certainly that does not represent all cases—in some cases the cost of supervision, particularly for low-level offenders can be quite low. Although a court may not prefer to impose a secured financial condition instead of or in addition to such conditions, a court could impose a secured financial condition of \$20,000 for a defendant cost not in excess of \$3,000. In other words, when the court is comparing the effectiveness of secured monetary release, the court should consider such effectiveness in light of the costs to the defendant of his own pretrial supervision.

Some say the benefit of cash-only or cash to the court bail is that the defendants' money, instead of going to a bail agent, can be used to pay the fines, fees, costs, restitution and surcharges he will have to pay when he is convicted or pleads guilty. In fact, legislation passed several years ago by the State Judicial Department directs the Clerk of the Court to take the otherwise returnable proceeds of a cash-bond posted by the defendant and to instead confiscates such cash and apply it to the defendants' balance of court costs, fines, fees and surcharges occasioned by his conviction. Instead, that practice has been found to be *per se* "excessive bail" and therefore unconstitutional in other jurisdictions, including the leading opinion on-point by the United States Court of Appeals for the Eleventh Circuit, since it is contrary to and beyond the constitutional purposes of bail.<sup>80</sup> Ultimately, someone will successfully challenge this section of the statute and it will be held unconstitutional.

In addition, these authors have heard countless anecdotal stories from agents who have posted bonds for defendants who then continued to sit in jail until the pretrial conditions were in place, either due to delays cause by pretrial programs or a defendant's lack of ability to pay for the "non-monetary conditions." In one case a defendant sat in jail for 5 days after the posting of a surety bond then waiting for an electronic monitoring device to be hooked up, all due to an oversight of a county pretrial program employee in failing the contact the appropriate party to hook up the device and the unresponsiveness of such programs to the defendant's family who had repeatedly been stifled in their attempts to figure out why the defendant continued to sit in jail.

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<sup>80</sup> See *United States v. Rose*, 791 F.2d 1477, 1480 (11th Cir. 1986) ("We have no doubt that the addition of any condition to an appearance bond to the effect that it shall be retained by the clerk to pay any fine that may subsequently be levied against the defendant after the criminal trial is over is for a purpose other than that for which bail is required to be given under the Eighth Amendment. Such provision is therefore 'excessive' and is in violation of the Constitution."); and, *State ex rel. Baker v. Troutman*, 553 N.E.2d 1053, 1056, 50 Ohio St.3d 270, 273 (Ohio 1990) (holding that an order requiring a cash-deposit to be applied to pay the costs and fines owed by a defendant was "excessive bail under Section 9, Article I because it placed limiting conditions on bail that were unrelated to appearance of the accused.").

There has been yet no research as to the impact of getting compliance with non-monetary conditions in terms of its impact on releases and returns to jail, and there is certainly some cause for concern. We cannot simply assume that non-monetary conditions have no impact on release or re-arrest. That needs to be taken into account.

**2. The Colorado Pretrial Assessment Tool (“CPAT”) is Not Evidence-Based in Terms of Its Use in Setting the Type of Bond and Conditions of Release that will Mitigate That Risk and Neither Are the Bond Schedules Used in Several of the Counties**

Many in the criminal justice system pride themselves on continuing to push for evidence-based reform. That is certainly an important concept that has been used to make numerous good for the system reforms over the past six or seven years. Unfortunately, the bond schedules used in the various so-called progressive jurisdictions rely on a flawed empirical instrument not designed to match what factors may contribute to pretrial failure with the appropriate conditions to reduce that risk. There is no science that says that assigning drug treatment to someone who gets a certain aggregate numerical “risk” score will do anything to reduce pretrial risk, particularly if that person does not have a drug problem, or even if they do. The same is true of all conditions recommended by county pretrial agencies. This becomes a bigger issue since substance abuse was not incorporated into the CPAT as a factor across the entire system. In addition, as Representative Salazar noted during the hearing at the House Judiciary Committee, use of the CPAT tool in weighing and judging factors can still work against the poor,<sup>81</sup> which was ultimately one of the driving forces behind all of the reforms coming from the anti-money bail advocacy—that the rich buy simply their way out of jail and the poor sit in jail.

The CPAT tells a judge that someone is risky to either fail to appear or be charged with a new crime at certain percentages (either set by the judge or a pretrial agency) that form the cut-points for the various four risk categories. It does not at all assist the Court in determining which type of bond to impose in light of the specific risk or the conditions of the bond to alleviate such specific risk, according to its authors:

Criminal justice decision-makers who use the CPAT need to be aware of the valid uses of the tool and cautioned against potential misuses. For example, the CPAT does not support the court’s assignment of increasing monetary amounts of bond as defendants’ risk scores increase or the assignment of certain bond types (e.g., personal recognizance, cash, surety) or blanket conditions for defendants in a given risk category.

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<sup>81</sup> Rep. Joseph Salazar, House Judiciary Committee, March 12, 2013, at 38 Minutes, Colorado General Assembly, 2013 House Judiciary Archived Audio. In a recent CLE at the Colorado Bar Association, the State Public Defender agreed that the CPAT was biased against his clients—of course, less biased, he said, than the current system.

Finally, the CPAT at this time does not indicate which bond types or bond conditions (e.g., pretrial supervision, drug testing, electronic monitoring) are most likely to mitigate an individual defendant's pretrial risk.<sup>82</sup>

In a later document, the CPAT authors caution practitioners that: "The CPAT is not designed to guide pretrial services agencies in making recommendations to judicial officers on the type of bond (e.g., personal recognizance, cash, surety, or property)."<sup>83</sup>

That is consistent with the new statute that only allows the pretrial services program to inform the court as to whether the person is bond eligible but may only recommend conditions of release but not the type of bond the court should impose.<sup>84</sup> This is also consistent with the practices in probation where the probation department presents the risk and how the risk can be mitigated through various conditions but does opine as to whether a court with discretion should order a particular sentence. In other words, the authors of the CPAT study concluded that they can predict who is risky, but they conceded openly that they cannot predict with scientific certainty what types of bonds or conditions of release will alleviate or reduce the risk presented. Instead, this instruction on how to recommend conditions does not appear to be the recommending conditions of release based on scientifically valid empirical instruments:

The pretrial services agency may then recommend to judicial officers any bond condition that the agency believes will reasonably manage the defendant's risk to public safety and for not appearing in court. Any recommended conditions should be based on information and observations obtained from the interview, review of criminal justice databases, and other sources of information, such as the arresting agency's documents, detention staff, victims, and/or the defendant's family members.<sup>85</sup>

In fact, there is no existing objective way, under the CPAT methodology or otherwise, to empirically or scientifically assign non-monetary conditions—the language of the instructions itself shows that by suggesting only where the information or observations a practitioner receives should come from rather than how to objectively assign conditions based on the facts presented. Just make a decision that is "reasonable." That is why ultimately all the CPAT does is create a single numerical risk score, and mechanically or without a scientific basis some jurisdictions then

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<sup>82</sup> The Colorado Pretrial Assessment Tool (CPAT): A Joint Partnership among Ten Colorado Counties, the Pretrial Justice Institute, and the JFA Institute, Revised Report, October 19, 2012, at 21.

<sup>83</sup> Colorado Pretrial Assessment Tool: Administration, Scoring and Reporting Manual, Vol. 1 (February, 2013), by the Pretrial Justice Institute, Washington, D.C., at 12. [http://www.pretrial.org/download/pil-reports/CPAT%20Manual%20v1%20\(rev\)%20-%20PJI%202013.pdf](http://www.pretrial.org/download/pil-reports/CPAT%20Manual%20v1%20(rev)%20-%20PJI%202013.pdf) (last accessed 08/16/2014).

<sup>84</sup> § 16-4-106(1), C.R.S. (2014). That section of the law does not provide authority for the programs to recommend the type of bond, but only authority to recommend the "conditions of release." No other section authorizes a pretrial services agency to recommend the type of bond. Despite this restriction, it is believed several programs are making recommendations as to the type of bond in addition to the conditions of release, in violation of the statute.

<sup>85</sup> See CPAT Administration, Scoring and Reporting Manual, *supra* note 83.

assign increasingly restrictive blanket conditions based (supervision or no supervision, or enhanced versus regulation supervision) on an increasing arbitrary score or the level of offense. The higher the score, the tighter the noose.

So, despite this movement to evidence-based pretrial decision-making, we are still left with the same system we have always had—a judge assesses the individual and statutory factors and make a decision as to the appropriate type of bond and conditions of release. That conditions could be assigned to someone who will succeed and yet who would have succeeded during this short pre-trial window without them is not a victory for justice. Similarly, under-assigning conditions on persons who need different or more appropriate conditions is not a victory for justice either. Aggregating factors into a single score dilutes what specifically caused the score to be high—and, mechanically assigning conditions based on a single score is no more evidence-based than assigning bond and conditions of release based on the charge. In fact, it is simply unclear from the CPAT how one would even begin to assign additional conditions to remedy the largely demographic factors, such as being arrested before you are 18 years of age.

In order of importance according to the CPAT authors, those factors a Court might consider as indicia of risk are and therefore are part of the risk score are: (1) age at first arrest; (2) having other pending cases; (3) contributing to residential payments; (4) having a phone; (5) having active warrants; (6) currently on supervision; (7) owning or renting a residence; (8) alcohol problem; (9) receiving or have received mental health treatment; (10) served a past jail sentence; (11) have a history of a revoked bond or revocation from supervision.<sup>86</sup> Note the presence of “alcohol problem” in the results, and the lack of “substance abuse” as a factor. The CPAT authors have been challenged on this point, and to date provide no cogent explanation as to its absence other than correlation with other factors. Yet, in data provided by one county, approximately one third of all felony defendants failed a drug screening while on supervision. Assigning drug treatment as a condition only created bond violations in those 1/3 of people who chose not to comply—their risk of failure was not mitigated. And, officials in one county have stated that one of the central reasons that their pretrial reforms have been successful is diverting these drug addicts away from the system and into treatment, and yet they still do not take substance abuse into account as a factor in terms of assessing risk or setting bond. Diverting low level offenders out of the system keeps more of them out than any other possible pretrial supervision reform could.

Because the CPAT does not assist judges or pretrial programs in assigning conditions in an evidence-based fashion, Judges ultimately have the discretion to set appropriate bonds and should continue to have such discretion. The CPAT is no mystery—the statutory factors and the factors of prior criminality courts have always considered are backed up generally by this “tool” of questionable use. Although pretrial programs may recommend the type of bond and conditions of release, there is no scientific basis in what they do—they are sorting people into a pre-made system of increasing arbitrary conditions based on their checkbox system of risk and arbitrary

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<sup>86</sup> See CPAT, A Joint Partnership, *supra* note 82, at 13.

category tolerances of percentage risk of failures to appear and new crimes rather than looking at the individual's criminogenic factors and the risk to the community, and then assigning additional conditions upon those defendants in a way that will reduce such factors and minimize risk to the community. We would assume that the risk of failure, like in probation, is not related to how they got here but what interventions may stabilize their lives, even temporarily, such as employment or housing. This should also be viewed with the lens that any intervention or short-term monitoring will be short-lived—either the person will be set free or face additional criminal justice interventions by state agencies upon plea or conviction. We often wonder, should every addict who will shortly face a long-term criminal intervention (either probation or prison plus parole) as a result of his conduct driven by his destructive drug habit be expected to quit cold-turkey because of an arrest and pass 24-hour a day drug screening the day after arrest? If it were so easy, one might ask why we need drug or alcohol treatment programs at all if we could simple use pretrial supervision programs to command all people to immediately cease engaging in those behaviors that are destructive to their lives and the safety of the community.

### **3. Wide Variations in County Pretrial Agency Policies and Practices**

In reviewing records of the eight county programs we received, we note a wide variety of differing practices. We do not feel it is necessary to criticize some of the failures of those programs here. Instead, we offer to courts that they should not make assumptions concerning what pretrial programs do, and instead be aware of the policies of those programs and how that may impact either the success of these programs and the impact on the defendant's liberty. These areas include, but not are not limited to, policies regarding how the interview is conducted in the jail, policies regarding advising a defendant as to his right to choose his method of secured bond, standard client charge schedules, revocation policies, policies to deal with indigent parties, dealing with *Brady* materials, qualifications and training requirements of pretrial supervision agents, standard complaint processes for offenders, and policies that guide the exercise of discretion in revoking bond or treating a violation as a technical violation. For example, only one county jurisdiction had a policy that touched or concerned dealing with *Brady* materials and dealing with issues of self-incrimination. The data we present below shows extreme variation amongst success rates in these programs—to assume they all work and work well is an incorrect assumption.

### **4. Non-Monetary Conditions Can Be A Condition Precedent to Release**

One commentator argues that non-monetary conditions should be preferred because they, unlike a financial condition, will not hold a defendant in jail. These authors believe that such a conclusion warrants further investigation based on several such occurrences where a non-monetary conditions did keep a defendant in jail, even after the secured financial condition had been met. Although policies, practices, and procedures vary, we would think courts would want to be aware

of the county policies that may allow for this to occur and to prevent it from occurring.<sup>87</sup> On several occasions, these authors have been informed that persons who received a surety bond and non-monetary conditions continued to sit in jail while the pretrial agency facilitated compliance with non-monetary conditions. In one case, a juvenile sat in jail for 5 additional days after the surety bond was posted due to the failure of the pretrial agency to accomplish its duties in a timely fashion. Another subsidiary question is when a defendant fails to pay for his conditions, is that person then re-incarcerated? We would assume that courts would want to be aware of what defendants must pay to have the conditions place on them and that it would be clear when a failure is grounds for a revocation. When viewed through the lens of transaction costs, monthly payments create a greater opportunity for failure and re-arrest than does a single financial transaction at the front end of the case.

What is presented here is anecdotal—we do not know how often or when defendants are kept in jail due to agencies needing to do something to get the non-monetary conditions in place. Yet, this should certainly be a consideration when imposing a non-monetary condition, particularly when the condition is not tailored to a specific condition—will a non-monetary condition continue to hold someone in jail when a monetary condition would have gotten them out.

#### **5. Although Advocates Can Say Pretrial Supervision Works No Worse Than Surety Bail in Terms of Appearance and New Crime Rate, Surety Bail Actually Provides Greater Value Based on the Risk of the Defendant And As Shown Below**

When a person fails to appear, largely the role of the pretrial agency is over. They may provide contact or other information to the police, but generally it is case-closed. We do not know what occurs when a person simply takes off. There is no incentive for that pretrial program to find him. In addition, pretrial agencies have no additional power to do anything. That is a critical component that was missing from the CCJJ analysis and current analysis which is what happens when there *is* a failure—what are the outcomes.

Proponents in favor of non-monetary versus monetary conditions can only point to similar at-large rates in terms of unsecured versus secured bonds, but those studies do not take into account the risk of the defendants who abscond and how judges make sorting decisions based on that risk, nor do they distinguish between the monetary value of the bonds, and therefore the incentive provided to the surety agent.<sup>88</sup> The statistic that secured bonds have a similar rate of absconding

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<sup>87</sup> Or, at a minimum, have a reasoned policy as to what conditions must be met prior to release and some information to the defendant or the party posting his bond what additional conditions must be met and how to satisfy those conditions.

<sup>88</sup> The authors often give this example—a bail agent is not going to hire a bounty hunter in a \$500 surety bond where the defendant has fled to Florida because the costs of doing so are typically more than paying the \$500 forfeiture. That does not mean, as discussed, that bail agents simply give up. They do take intermediate steps to attempt to get the defendant back in court, including using the co-signor as leverage to persuade the defendant to comply. As discussed below, courts should focus on the incentives in a bail transaction within a particular case to make sure those incentives are working. Agents will take action to get the person back on track, of course, but

to unsecured is actually surprising—the data show that higher risk defendants (which, as discussed, the CPAT generally defines as those with factors of prior criminality) fail at a higher rate, which we would assume would mean that surety bonds do a worse job for the risk than unsecured bonds do for those of the lowest level of risk. The fact that the at-large rates is similar is a complement to the surety industry because, in imposing a surety bond, a court has determined that the person is of a higher risk and cannot be released on personal recognizance.

**6. County-Run Pretrial Supervision Is Extremely Variable in Terms of Success Rates, and Despite Having Lower Risk Clients, the County Supervision Programs Have a Higher Average Failure to Appear Rate than Surety Bail**

According to a report sent by State Court Administrator Gerald Marroney to the House and Senate Judiciary Committees of the Colorado General Assembly on November 1, 2013, the pretrial programs run in the State of Colorado had a 12% overall failure to appear rate, with the range across the county programs of 2.8 to 37.7 percent failure to appear rate. **The overall failure to appear rate of county-run pretrial supervision programs is 24% higher than the bail industry using the sample taken by the Professional Bail Agents from bail industry data,** presented below. In addition, although the same number is not tracked for other forms of release, those on supervision by county-run pretrial agencies committed new crimes in 9% of all cases.

In addition, this data is not controlled for risk when comparing pretrial agency success to surety bail. Most would agree that the riskiest of defendants get a surety bond in the vast majority of jurisdictions that have no county-run program, and so it is likely that the pretrial agency success numbers would be much lower when compared to surety bail if they handled the same risk population.

**V. Surety Bail is Largely Successful According to Industry Statistics--the Failure to Appear Rate is Reasonably Low, Lower Than the State Average of Those Supervised by County Programs, and Has Less Variation in Terms of Failure Appear Rates; In Addition, Bail Agent Actions Lead to Getting the Case Back on Track, Via Arrest or Consent, in 76% of Cases Where the Defendant Fails to Appear**

Because there is no statewide database that tracks the success of the bail industry, the Professional Bail Agents of Colorado obtained access and reviewed propriety industry statistical data in order to determine the worth of surety bail in the State of Colorado. Keep in mind of course, that as mentioned, surety bond clients are generally higher risk.

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there is a limit economically to how much an agent can do in the case of a \$500 bond. Similarly, sheriffs departments are to be reimbursed for transporting defendants who have been captured in a foreign jurisdiction, but only up to the amount of the bond. They lack incentives to spend additional law enforcement resources to chase down a low bond jumper. Thus, low surety bonds, much like low cash bonds, actually provide so little incentive to the criminal justice system as a whole, not to mention the defendants, that use in particular cases should be well-founded.

The study done by the Professional Bail Agents of Colorado embraced 16,541 cases from six different bail agencies that were both large, small and medium sized, in 2010 and 2011. All identifying information has been stripped as to the identity of the agency and none of the data contained the names of any defendant, third-party, or any other information protected from disclosure by state law. In each of those cases, a surety bond was posted for a defendant by the agent or agency in question.

The overall failure to appear rate in the sample of 16,541 cases was 9.7% failure to appear rate, with a range across the bail agencies of a low of 4.6 to a high of 13.5%. In 40% of cases surveyed where there was a failure to appear, a bail agent either arrested the defendant or took actions that lead to the arrest of the defendant by the police. In 36% of cases where there was a failure to appear, the bail agent signed a consent of surety to stay on the bond so that the defendant could avoid re-arrest. Data was not available to determine what portion of the consents included the bail agent contacting the defendant and persuading the defendant to return to Court with the consent or taking other actions to get the Defendant back on track, although the belief is that it is substantial portion. So, **in 76% of cases where there is a failure to appear**, the bail agents were able to get the case back on track.

## **VI. The Role of Incentives in A Bail Transaction**

One of the statutory factors to consider is a defendant's ties to the community. This statutory factor is one reason why surety bail works—it creates incentives for the community to guarantee that the defendant takes responsibility for what he or she needs to do. It also gets them involved in helping the defendant to successfully resolve the case. Anti-bail industry advocates argue that money does not motivate the defendant, and in many cases that is certainly true. Surety bail does, however, create incentives within the justice system and community that achieve the ultimate statutory purposes of appearance and safety to the community. Yet, in some jurisdictions where courts have gone to widespread use of the now-prohibited cash-only bail, there is no party to the financial transaction other than the defendant that has an incentive to change their behavior toward the defendant to make sure it turns out in the proper direction. It also creates less incentive to the defendant than a surety bail transaction because once the money is paid the defendant has nothing else to lose, the bail agent will under no circumstances ever look for him since the bail agent was never involved, and the defendant neither violates the trust or promises made to the third-party co-signor who agreed to get him out of jail and take liability for the amount of the bond since there is not one.

In a surety bail transaction, a third-party typically signs the bail contract as the indemnitor. Not only does the third-party pay the premium fee (no more than 15% of the amount of the bond), but the third-party also becomes liable in the amount of the bond if the defendant fails to appear. In some cases a third-party or the defendant may put up collateral to secure the bond. This creates an incentive for the third-party to guarantee the appearance of the defendant, or face a penalty that could be six or seven times greater the premium already paid.

Second, a surety bail agent is financially liable on a bail transaction and must first pay the forfeiture of the amount of the bond if the defendant fails to appear. Only at a later time would a bail agent be able to then take legal action pursuant to the bail contract to require a third-party to reimburse the bail agent. One criticism has always been that bail agents will simply not bail these guys out—that can be true for lack of incentives or high risk when one of two things are true: (1) the bond is so low that the statutory minimum \$50 premium or 15% maximum allowable by statute does not cover the expenses to get someone out; or, (2) the agent feels the risk of loss in terms of the level of risk the defendant presents is too high, for example: the agent is confident that the defendant will, again, abscond to Florida and the cost of extradition to be paid to the sheriff or cost of sending a bail recovery agent is several times the size of the bond. It is probably also important to point out that courts need to be able to understand the regulations on the industry in order to better use the system for what it was designed to do.<sup>89</sup> That may also further facilitate the industry changing or improving to meet the needs of the insured, the court.<sup>90</sup>

Third, bail agents are responsible for paying the costs of extradition up to the value of the bond,<sup>91</sup> and thus in the cash-bonding or personal recognizance context, the sheriff will bear the cost of returning the defendant if he flees to another jurisdiction unlike in the surety bond context. Certainly, this is a part of the statutory purpose of security in guaranteeing appearance. This is, however, certainly probably the least understood portion of bail law in Colorado by prosecutors, judges and defense lawyers. Yet, it is an important consideration when deciding the type of “security” that is reasonable and necessary. For bail agents, it is also a useful tool—when the defendant is incarcerated in a foreign jurisdiction, the bail agent is then unable to bring them back, but they can argue for the return of the defendant at the cost of the agent to provide incentives for the sheriff to return the defendant. Yet, in most misdemeanor cases, a nationwide warrant upon an FTA will not be entered, which means when an absconded defendant is incarcerated in a foreign jurisdiction he will be released, rather than face extradition and return at the cost of the bail agent. The problem for District Attorneys and the police, however, is trying to distinguish which cases should be entered so that the police can get these absconders at no cost to the state.

Courts need to consider the role of these incentives when imposing the type of bond and conditions of release. Although in some cases higher bond amounts may be considered too restrictive, if there is a great flight risk, the higher the bond the more likely the third-party and the bail agent will take actions, including seeking out and arresting the defendant, in order to avoid

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<sup>89</sup> Toward that end, these authors have drafted a manual several hundred pages in length, approved by the Department of Regulatory Agencies, for use in educating bail agents regarding the regulations that govern the surety bail industry. In speaking to others in the system on all sides, there is a need for greater education. We will provide to any judicial officers, upon request, a copy of our manual so that they can better understand how the industry works. In addition, these authors are going to turn the manual and some additional research into a continuing legal education course that will be a basic outline of how the bail industry works.

<sup>90</sup> See *Trujillo v. Colo. Division of Insurance*, 320 P.3d 1208, 2014 CO 17 (Colo. 2014). The Court of Appeals had held that the defendant is the insured in a surety bail transaction, but the Colorado Supreme Court instead held that the court is the insured in a surety bail transaction.

<sup>91</sup> § 16-4-110(1)(c)(I), C.R.S. (2014).

liability. That is not to say all bonds should be high, but the option is there under a particular factual scenario. Certainly, this may not work for the indigent offender who has no means to abscond anyway, yet in the case of the most defendants who may take flight, it would provide sufficient incentives to the surety agent and the sheriff to return the defendant to the court. Commentators who are anti-bail industry generally concede that we have little if any information to validate the positive impact of the bail industry under these circumstances. Yet, based on the information presented here, the financial incentive works 3 out of 4 times.

In addition, Courts should, as we mentioned previously, consider whether low level bonds do anything in terms of guaranteeing appearance or safety. A \$100 cash-only bond (or \$300 surety bond) does nothing in terms of motivating a defendant, a co-signor, a sheriff, a member of the community, or a bail agent. The PBAC suggested in the negotiations surrounding HB 13-1236 and HB 14-212 that all low secured money bonds, and particularly cash-only, likely have only but one purpose—to simply hold in the indigent—and thus the PBAC argued that the General Assembly should consider not allowing financial conditions below a particular amount. No one seemed to know what that sweet spot should be—some thought no bonds below \$750 would be a good starting place for discussion.

## **VII. Conclusion**

The new bail laws do make substantive changes that should be noted. For these authors, some of these were warranted, such as the defendant's choice rule. On the whole, however, all that has really occurred is that all forms of bail are still on a level playing field and judges must decide what is reasonable under any certain set of facts. That decision, it appears, should be less mechanical. While the call for science to help us understand the risk of the defendants and how to mitigate that risk has gone on for decades, we are really no closer in terms of identifying them than we were before—as the CPAT shows, the more you have been in the system and failed, the more you are going to fail. We are certainly no closer in terms of how to mitigate their risk of failure since the empirical model used in Colorado was not designed to recommend what the statute requires of courts: the type of bond and conditions of release to impose. We do know diverting them out of the system is certainly the best option. These authors and the PBAC have asked why are arresting some of the low level offenders that will walk on a personal recognizance bond anyway—why is that necessary at all and what other costs on the system could be avoided by reducing it?

At the end of the day, judges must still exercise their discretion in an effort to attempt to get the desired outcomes. We hope the courts will consider the use and value of surety bonds as but one tool in the toolbox to be used in appropriate cases.

**APPENDIX A: Side-by-Side Comparison of the 2012 Colorado Bail Laws and the 2013 Colorado Bail Laws, Created by the Passage of House Bill 13-1236**

2013 Bail Laws	2012 Bail Laws
<p>In Colorado Revised Statutes, 16-1-104, amend (3) and (5) as follows:</p> <p>16-1-104. Definitions. (3) "Bail" means <del>the amount of money set by the court which is required to be obligated by a bond for the release of a person in custody to assure that he will appear before the court in which his appearance is required or that he will comply with other conditions set forth in a bond</del> <b>A SECURITY, WHICH MAY INCLUDE A BOND WITH OR WITHOUT MONETARY CONDITIONS, REQUIRED BY A COURT FOR THE RELEASE OF A PERSON IN CUSTODY SET TO PROVIDE REASONABLE ASSURANCE OF PUBLIC SAFETY AND COURT APPEARANCE.</b></p> <p>(5) "Bond" means <del>A BAIL BOND WHICH IS</del> an undertaking, with or without sureties or security, entered into by a person in custody by which he binds himself to comply with the conditions of the undertaking and in default of such compliance to pay the amount of bail or other sum fixed, IF ANY, in the bond.</p>	<p>(3) "Bail" means the amount of money set by the court which is required to be obligated by a bond for the release of a person in custody to assure that he will appear before the court in which his appearance is required or that he will comply with other conditions set forth in a bond.</p> <p>(5) "Bond" means an undertaking, with or without sureties or security, entered into by a person in custody by which he binds himself to comply with the conditions of the undertaking and in default of such compliance to pay the amount of bail or other sum fixed in the bond.</p>
<p><b>16-4-101.</b> Bailable offenses - definitions. (1) ALL PERSONS SHALL BE BAILABLE BY SUFFICIENT SURETIES EXCEPT:</p> <p>(a) FOR CAPITAL OFFENSES WHEN PROOF IS EVIDENT OR PRESUMPTION IS GREAT; OR</p> <p>(b) WHEN, AFTER A HEARING HELD WITHIN NINETY-SIX HOURS OF ARREST AND UPON REASONABLE NOTICE, THE COURT FINDS THAT THE PROOF IS EVIDENT OR THE PRESUMPTION IS GREAT AS TO THE CRIME</p>	<p><b>16-4-101.</b> Bailable offenses. (1) All persons shall be bailable by sufficient sureties except:</p> <p>(a) For capital offenses when proof is evident or presumption is great; or</p> <p>(b) When, after a hearing held within ninety-six hours of arrest and upon reasonable notice, the court finds that the</p>

ALLEGED TO HAVE BEEN COMMITTED AND FINDS THAT THE PUBLIC WOULD BE PLACED IN SIGNIFICANT PERIL IF THE ACCUSED WERE RELEASED ON BAIL AND SUCH PERSON IS ACCUSED IN ANY OF THE FOLLOWING CASES:

(I) A CRIME OF VIOLENCE ALLEGED TO HAVE BEEN COMMITTED WHILE ON PROBATION OR PAROLE RESULTING FROM THE CONVICTION OF A CRIME OF VIOLENCE;

(II) A CRIME OF VIOLENCE ALLEGED TO HAVE BEEN COMMITTED WHILE ON BAIL PENDING THE DISPOSITION OF A PREVIOUS CRIME OF VIOLENCE CHARGE FOR WHICH PROBABLE CAUSE HAS BEEN FOUND;

(III) A CRIME OF VIOLENCE ALLEGED TO HAVE BEEN COMMITTED AFTER TWO PREVIOUS FELONY CONVICTIONS, OR ONE SUCH PREVIOUS FELONY CONVICTION IF SUCH CONVICTION WAS FOR A CRIME OF VIOLENCE, UPON CHARGES SEPARATELY BROUGHT AND TRIED UNDER THE LAWS OF THIS STATE OR UNDER THE LAWS OF ANY OTHER STATE, THE UNITED STATES, OR ANY TERRITORY SUBJECT TO THE JURISDICTION OF THE UNITED STATES WHICH, IF COMMITTED IN THIS STATE, WOULD BE A FELONY;

(IV) A CRIME OF POSSESSION OF A WEAPON BY A PREVIOUS OFFENDER ALLEGED TO HAVE BEEN COMMITTED IN VIOLATION OF SECTION 18-12-108 (2) (b), (2) (c), (4) (b), (4) (c), OR (5), C.R.S.;

(V) SEXUAL ASSAULT, AS DESCRIBED IN SECTION 18-3-402, SEXUAL ASSAULT IN THE FIRST DEGREE, AS DESCRIBED IN SECTION

proof is evident or the presumption is great as to the crime alleged to have been committed and finds that the public would be placed in significant peril if the accused were released on bail and such person is accused in any of the following cases:

(I) A crime of violence alleged to have been committed while on probation or parole resulting from the conviction of a crime of violence;

(II) A crime of violence alleged to have been committed while on bail pending the disposition of a previous crime of violence charge for which probable cause has been found;

(III) A crime of violence alleged to have been committed after two previous felony convictions, or one such previous felony conviction if such conviction was for a crime of violence, upon charges separately brought and tried under the laws of this state or under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States which, if committed in this state, would be a felony;

(IV) A crime of possession of a weapon by a previous offender alleged to have been committed in violation of section 18-12-108 (2) (b), (2) (c), (4) (b), (4) (c), or (5), C.R.S.; or

18-3-402, AS IT EXISTED PRIOR TO JULY 1, 2000, SEXUAL ASSAULT IN THE SECOND DEGREE, AS DESCRIBED IN SECTION 18-3-403, AS IT EXISTED PRIOR TO JULY 1, 2000, SEXUAL ASSAULT ON A CHILD, AS DESCRIBED IN SECTION 18-3-405, OR SEXUAL ASSAULT ON A CHILD BY ONE IN A POSITION OF TRUST, AS DESCRIBED IN SECTION 18-3-405.3 IN WHICH THE VICTIM IS FOURTEEN YEARS OF AGE OR YOUNGER AND SEVEN OR MORE YEARS YOUNGER THAN THE ACCUSED.

(c) WHEN A PERSON HAS BEEN CONVICTED OF A CRIME OF VIOLENCE OR A CRIME OF POSSESSION OF A WEAPON BY A PREVIOUS OFFENDER, AS DESCRIBED IN SECTION 18-12-108 (2) (b), (2) (c), (4) (b), (4) (c), OR (5), C.R.S., AT THE TRIAL COURT LEVEL AND SUCH PERSON IS APPEALING SUCH CONVICTION OR AWAITING SENTENCING FOR SUCH CONVICTION AND THE COURT FINDS THAT THE PUBLIC WOULD BE PLACED IN SIGNIFICANT PERIL IF THE CONVICTED PERSON WERE RELEASED ON BAIL.

(2) FOR PURPOSES OF THIS SECTION, "CRIME OF VIOLENCE" SHALL HAVE THE SAME MEANING AS SET FORTH IN SECTION 18-1.3-406 (2), C.R.S.

(3) IN ANY CAPITAL CASE, THE DEFENDANT MAY MAKE A WRITTEN MOTION FOR ADMISSION TO BAIL UPON THE GROUND THAT THE PROOF IS NOT EVIDENT OR THAT PRESUMPTION IS NOT GREAT, AND THE COURT SHALL PROMPTLY CONDUCT A HEARING UPON SUCH MOTION. AT SUCH HEARING, THE BURDEN SHALL BE UPON THE PEOPLE TO ESTABLISH THAT THE

(c) When a person has been convicted of a crime of violence or a crime of possession of a weapon by a previous offender, as described in section 18-12-108 (2) (b), (2) (c), (4) (b), (4) (c), or (5), C.R.S., at the trial court level and such person is appealing such conviction or awaiting sentencing for such conviction and the court finds that the public would be placed in significant peril if the convicted person were released on bail.

(2) For purposes of this section, "crime of violence" shall have the same meaning as that set forth in section 18-1.3-406 (2), C.R.S.

PROOF IS EVIDENT OR THAT THE PRESUMPTION IS GREAT. THE COURT MAY COMBINE IN A SINGLE HEARING THE QUESTIONS AS TO WHETHER THE PROOF IS EVIDENT OR THE PRESUMPTION GREAT WITH THE DETERMINATION OF THE EXISTENCE OF PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT COMMITTED THE CRIME CHARGED.

(4) EXCEPT IN THE CASE OF A CAPITAL OFFENSE, IF A PERSON IS DENIED BAIL UNDER THIS SECTION, THE TRIAL OF THE PERSON SHALL BE COMMENCED NOT MORE THAN NINETY-ONE DAYS AFTER THE DATE ON WHICH BAIL IS DENIED. IF THE TRIAL IS NOT COMMENCED WITHIN NINETY-ONE DAYS AND THE DELAY IS NOT ATTRIBUTABLE TO THE DEFENSE, THE COURT SHALL IMMEDIATELY SCHEDULE A BAIL HEARING AND SHALL SET THE AMOUNT OF THE BAIL FOR THE PERSON.

(5) WHEN A PERSON IS ARRESTED FOR A CRIME OF VIOLENCE, AS DEFINED IN SECTION 16-1-104 (8.5), OR A CRIMINAL OFFENSE ALLEGING THE USE OR POSSESSION OF A DEADLY WEAPON OR THE CAUSING OF BODILY INJURY TO ANOTHER PERSON, OR A CRIMINAL OFFENSE ALLEGING THE POSSESSION OF A WEAPON BY A PREVIOUS OFFENDER, AS DESCRIBED IN SECTION 18-12-108 (2) (b), (2) (c), (4) (b), (4) (c), OR (5), C.R.S., AND SUCH PERSON IS ON PAROLE, THE LAW ENFORCEMENT AGENCY MAKING THE ARREST SHALL NOTIFY THE DEPARTMENT OF CORRECTIONS WITHIN TWENTY-FOUR HOURS. THE PERSON SO ARRESTED SHALL NOT BE ELIGIBLE FOR BAIL TO BE SET UNTIL AT LEAST SEVENTY-

(3) In any capital case, the defendant may make a written motion for admission to bail upon the ground that the proof is not evident or that presumption is not great, and the court shall promptly conduct a hearing upon such motion. At such hearing, the burden shall be upon the people to establish that the proof is evident or that the presumption is great. The court may combine in a single hearing the questions as to whether the proof is evident or the presumption great with the determination of the existence of probable cause to believe that the defendant committed the crime charged.

(4) Except in the case of a capital offense, if a person is denied bail under this section, the trial of the person shall be commenced not more than ninety-one days after the date on which bail is denied. If the trial is not commenced within ninety-one days and the delay is not attributable to the defense, the court shall immediately schedule a bail hearing and shall set the amount of the bail for the person.

(5) When a person is arrested for a crime of violence, as defined in section 16-1-104 (8.5), or a criminal offense alleging the use or possession of a deadly weapon or the causing of bodily injury to another person, or a criminal offense alleging the possession of a weapon by a previous offender, as described in section 18-12-108

TWO HOURS FROM THE TIME OF HIS OR HER ARREST HAS PASSED.

(2) (b), (2) (c), (4) (b), (4) (c), or (5), C.R.S., and such person is on parole, the law enforcement agency making the arrest shall notify the department of corrections within twenty-four hours. The person so arrested shall not be eligible for bail to be set until at least seventy- two hours from the time of his or her arrest has passed.

**16-4-102.** Right to bail - before conviction. ANY PERSON WHO IS IN CUSTODY, AND FOR WHOM THE COURT HAS NOT SET BOND AND CONDITIONS OF RELEASE PURSUANT TO THE APPLICABLE RULE OF CRIMINAL PROCEDURE, AND WHO IS NOT SUBJECT TO THE PROVISIONS OF SECTION 16-4-101 (5), ~~HAS THE RIGHT TO A HEARING TO DETERMINE BOND AND CONDITIONS OF RELEASE.~~ A PERSON IN CUSTODY MAY ALSO REQUEST A HEARING SO THAT BOND AND CONDITIONS OF RELEASE CAN BE SET. UPON RECEIVING THE REQUEST, THE JUDGE SHALL NOTIFY THE DISTRICT ATTORNEY IMMEDIATELY OF THE ARRESTED PERSON'S REQUEST, AND THE DISTRICT ATTORNEY SHALL HAVE THE RIGHT TO ATTEND AND ADVISE THE COURT OF MATTERS PERTINENT TO THE TYPE OF BOND AND CONDITIONS OF RELEASE TO BE SET. THE JUDGE SHALL ALSO ORDER THE APPROPRIATE LAW ENFORCEMENT AGENCY HAVING CUSTODY OF THE PRISONER TO BRING HIM OR HER BEFORE THE COURT FORTHWITH, AND THE JUDGE SHALL SET BOND AND CONDITIONS OF RELEASE IF THE OFFENSE FOR WHICH THE PERSON WAS ARRESTED IS BAILABLE. IT SHALL NOT BE A PREREQUISITE TO BAIL

**16-4-102.** Right to bail - before conviction. Any person who is in custody ~~and for whom no bail has been set~~ pursuant to the applicable rule of criminal procedure, and who is not subject to the provisions of section 16-4-101 (5), ~~may advise any judge of a court of record in the county where he is being held of that fact with a request that bail be set.~~ Upon receiving the request, the judge shall ~~cause the district attorney to be notified immediately of the arrested person's request, and said district attorney shall have the right to attend and advise the court of matters pertinent to the amount of bail to be set.~~ The judge shall also order the appropriate law enforcement agency having custody of the prisoner to bring him before the court forthwith, and the judge shall set bail if the offense for which the person was arrested is bailable. It shall not be a prerequisite to bail that a criminal charge of any kind has been filed.

THAT A CRIMINAL CHARGE OF ANY KIND HAS BEEN FILED.

**16-4-103. Setting and selection type of bond - criteria.** (1) AT THE FIRST APPEARANCE OF A PERSON IN CUSTODY BEFORE A COURT OF RECORD, THE COURT SHALL DETERMINE THE TYPE OF BOND AND CONDITIONS OF RELEASE UNLESS THE PERSON IS SUBJECT TO THE PROVISIONS OF SECTION 16-4-101.

(2) IF AN INDICTMENT, INFORMATION, OR COMPLAINT HAS BEEN FILED AND THE TYPE OF BOND AND CONDITIONS OF RELEASE HAVE BEEN FIXED UPON RETURN OF THE INDICTMENT OR FILING OF THE INFORMATION OR COMPLAINT, THE COURT SHALL REVIEW THE PROPRIETY OF THE TYPE OF BOND AND CONDITIONS OF RELEASE UPON FIRST APPEARANCE OF A PERSON IN CUSTODY.

(3) (a) THE TYPE OF BOND AND CONDITIONS OF RELEASE SHALL BE SUFFICIENT TO REASONABLY ENSURE THE APPEARANCE OF THE PERSON AS REQUIRED AND TO PROTECT THE SAFETY OF ANY PERSON OR THE COMMUNITY, TAKING INTO CONSIDERATION THE INDIVIDUAL CHARACTERISTICS OF EACH PERSON IN CUSTODY, INCLUDING THE PERSON'S FINANCIAL CONDITION.

(b) IN DETERMINING THE TYPE OF BOND AND CONDITIONS OF RELEASE, IF PRACTICABLE AND AVAILABLE IN THE JURISDICTION, THE COURT SHALL USE AN EMPIRICALLY DEVELOPED RISK ASSESSMENT INSTRUMENT DESIGNED TO IMPROVE PRETRIAL RELEASE DECISIONS BY PROVIDING TO THE COURT INFORMATION THAT CLASSIFIES A PERSON

**16-4-103. Fixing of bail and conditions of bail bond.** (1) (a) At the first appearance of a person in custody before a judge of a court of record, the amount of bail and type of bond shall be fixed by the judge, unless the person is subject to the provisions of section 16-4-101 (5), or an indictment, information, or complaint has theretofore been filed and the amount of bail and type of bond has been fixed upon the return of the indictment, or filing of the information or complaint, in which event the propriety of the bond shall be subject to reappraisal. The amount of bail and type of bond shall be sufficient to assure compliance with the conditions set forth in the bail bond. (b) If a person is arrested under section 42-2-138 (1) (d) (I), C.R.S., for driving while such person's driver's license or privilege to drive, either as a resident or nonresident, is restrained solely or partially because of a conviction of a driving offense pursuant to section 42-4-1301 (1) or (2) (a), C.R.S., then the bail for such person shall be ten thousand dollars or such amount as is set at a bail hearing. (b.5) If a person is arrested for vehicular eluding under section 18-9-116.5, C.R.S., and driving under the influence under section 42-4-1301, C.R.S., arising out of the same incident, the bail for such person shall be fifty thousand dollars or such amount as is set by the court after

**IN CUSTODY BASED UPON PREDICTED LEVEL OF RISK OF PRETRIAL FAILURE.**

(4) WHEN THE TYPE OF BOND AND CONDITIONS OF RELEASE ARE DETERMINED BY THE COURT, THE COURT SHALL: [(Moved in part from 16-4-105)]

(a) PRESUME THAT ALL PERSONS IN CUSTODY ARE ELIGIBLE FOR RELEASE ON BOND WITH THE APPROPRIATE AND LEAST-RESTRICTIVE CONDITIONS CONSISTENT WITH PROVISIONS IN PARAGRAPH (a) OF SUBSECTION (3) OF THIS SECTION UNLESS A PERSON IS OTHERWISE INELIGIBLE FOR RELEASE PURSUANT TO THE PROVISIONS OF SECTION 16-4-101 AND SECTION 19 OF ARTICLE II OF THE COLORADO CONSTITUTION. A MONETARY CONDITION OF RELEASE MUST BE REASONABLE AND ANY OTHER CONDITION OF CONDUCT NOT MANDATED BY STATUTE MUST BE TAILORED TO ADDRESS A SPECIFIC CONCERN.

(b) TO THE EXTENT A COURT USES A BOND SCHEDULE, THE COURT SHALL INCORPORATE INTO THE BOND SCHEDULE CONDITIONS OF RELEASE AND FACTORS THAT CONSIDER THE INDIVIDUALIZED RISK AND CIRCUMSTANCES OF A PERSON IN CUSTODY AND ALL OTHER RELEVANT CRITERIA AND NOT SOLELY THE LEVEL OF OFFENSE; AND

(c) CONSIDER ALL METHODS OF BOND AND CONDITIONS OF RELEASE TO AVOID UNNECESSARY PRETRIAL INCARCERATION AND LEVELS OF COMMUNITY-BASED SUPERVISION AS CONDITIONS OF PRETRIAL RELEASE.

consideration of all relevant factors. (e) Because of the danger posed to the person and to others, a person who is arrested for an offense under section 42-4-1301 (1) or (2) (a), C.R.S., may not attend a bail hearing until such person is no longer intoxicated or under the influence of drugs. Such person shall be held in custody until such person may safely attend such hearing. (d) (I) If a person is arrested for distribution of a schedule I or schedule II controlled substance pursuant to section 18-18-405, C.R.S., then the court shall set bail for such person at fifty thousand dollars; except that, upon the motion of the district attorney or defendant and a showing of good cause, the court may set bail at an amount other than the specified amount. (II) The bail amount specified in subparagraph (I) of this paragraph (d) shall be adjusted for inflation on January 1, 2018, and on January 1 every ten years thereafter. The adjustment shall be based on the cumulative annual adjustment for inflation for each year since July 1, 2008. The adjustments made pursuant to this subparagraph (II) shall be rounded upward or downward to the nearest ten-dollar increment. (III) As used in this paragraph (d), "inflation" means the annual percentage change of inflation indicated in the United States department of labor, bureau of labor statistics, consumer price index for Denver Boulder, all items, all

(5) THE COURT MAY ALSO CONSIDER THE FOLLOWING CRITERIA AS APPROPRIATE AND RELEVANT IN MAKING A DETERMINATION OF THE TYPE OF BOND AND CONDITIONS OF RELEASE: [(Moved in part from 16-4-105)]

(a) THE EMPLOYMENT STATUS AND HISTORY OF THE PERSON IN CUSTODY;

(b) THE NATURE AND EXTENT OF FAMILY RELATIONSHIPS OF THE PERSON IN CUSTODY;

(c) PAST AND PRESENT RESIDENCES OF THE PERSON IN CUSTODY;

(d) THE CHARACTER AND REPUTATION OF THE PERSON IN CUSTODY;

(e) IDENTITY OF PERSONS WHO AGREE TO ASSIST THE PERSON IN CUSTODY IN ATTENDING COURT AT THE PROPER TIME;

(f) THE LIKELY SENTENCE, CONSIDERING THE NATURE AND THE OFFENSE PRESENTLY CHARGED;

(g) THE PRIOR CRIMINAL RECORD, IF ANY, OF THE PERSON IN CUSTODY AND ANY PRIOR FAILURES TO APPEAR FOR COURT;

(h) ANY FACTS INDICATING THE POSSIBILITY OF VIOLATIONS OF THE LAW IF THE PERSON IN CUSTODY IS RELEASED WITHOUT CERTAIN CONDITIONS OF RELEASE;

(i) ANY FACTS INDICATING THAT THE DEFENDANT IS LIKELY TO INTIMIDATE OR HARASS POSSIBLE WITNESSES; AND

(j) ANY OTHER FACTS TENDING TO INDICATE THAT THE PERSON IN CUSTODY

urban consumers, or its successor index.

(IV) The state court administrator shall certify the adjusted bail amount within fourteen days after the appropriate information is available. The adjusted bail amount shall be applicable to all pending cases one month after its certification. (e) (I) If a person is arrested for driving under the influence or driving while ability impaired, pursuant to section 42-4-1301, C.R.S., and the person has one or more previous convictions for an offense in section 42-4-1301, C.R.S., or one or more convictions in any other jurisdiction that would

constitute a violation of section 42-4-1301, C.R.S., as a condition of any bail bond, the court shall order that the defendant abstain from the use of alcohol or the illegal use of drugs, and such abstinence shall be monitored. (II) A defendant seeking relief from any of the conditions imposed pursuant to subparagraph (I) of this paragraph (e) shall file a motion with the court, and the court shall conduct a hearing upon the motion. The court shall consider whether the condition from which the defendant is seeking relief is in the interest of justice and whether public safety would be endangered if the condition were not enforced. When determining whether to grant relief pursuant to this subparagraph (II), the court shall consider whether the defendant has voluntarily enrolled in and is

HAS STRONG TIES TO THE COMMUNITY AND IS NOT LIKELY TO FLEE THE JURISDICTION.

(6) WHEN A PERSON IS CHARGED WITH AN OFFENSE PUNISHABLE BY FINE ONLY, ANY MONETARY CONDITION OF RELEASE SHALL NOT EXCEED THE AMOUNT OF THE MAXIMUM FINE PENALTY.

participating in an appropriate substance abuse treatment program. (2) (a) A condition of every bail bond, and the only condition for a breach of which a surety or security on the bail bond may be subjected to forfeiture, is that the released person appear to answer the charge against such person at a place and upon a date certain and at any place or upon any date to which the proceeding is transferred or continued. (b) For a defendant who has been arrested for a felony offense, a condition of bail bond shall be that the court shall require the defendant to execute or subscribe a written prior waiver of extradition stating that the defendant consents to extradition to this state and waives all formal procedures incidental to extradition proceedings in the event that he or she is arrested in another state while at liberty on such bail bond and acknowledging that he or she shall not be admitted to bail in any other state pending extradition to this state. (c) Further conditions of every bail bond shall be that the released person not commit any felony while at liberty on such bail bond and that the court in which the action is pending have the power to revoke the release of the defendant, to increase the bail bond, or to change any bail bond condition if it is shown that a competent court has found probable cause to believe that the defendant has committed a felony while released pending adjudication of a prior felony

~~charge. (d) A further condition of every bail bond in cases of domestic violence as defined in section 18-6-800.3 (1), C.R.S., or in cases of stalking pursuant to section 18-3-602, C.R.S., shall be that the released person acknowledge the protection order as provided in section 18-1-1001 (5), C.R.S. (e) A further condition of every bail bond in a case of an offense under section 42-2-138 (1) (d) (I), C.R.S., of driving while such person's driver's license or privilege to drive, either as a resident or nonresident, is restrained solely or partially because of a conviction of a driving offense pursuant to section 42-4-1301 (1) or (2) (a), C.R.S., shall be that such person not drive any motor vehicle during the period of such driving restraint. (f) In addition to the conditions specified in this subsection (2), the judge may impose such additional conditions upon the conduct of the defendant as will, in the judge's opinion, render it more likely that the defendant will fulfill the other bail bond conditions. These additional conditions may include submission of the defendant to the supervision of some qualified person or organization. (3) In any instance of bond forfeiture or judgment ordered by the court where bond is made by persons other than a compensated surety, as defined in section 16-4-112 (2) (c), or the defendant, the judge shall issue notice of declared forfeiture or judgment and afford an~~

~~opportunity for hearing under section 16-4-110 to all persons pledging security for the defendant's appearance, to show cause, if any, why their security should not be declared forfeit and due the court. No judicial order or disposition of security pledged by third parties shall affect an order of forfeiture entered against a defendant except as may be expressly provided by the court.~~

**16-4-104. Types of bond set by the court. (1) THE COURT SHALL DETERMINE, AFTER CONSIDERATION OF ALL RELEVANT CRITERIA, WHICH OF THE FOLLOWING TYPES OF BOND IS APPROPRIATE FOR THE PRETRIAL RELEASE OF A PERSON IN CUSTODY, SUBJECT TO THE RELEVANT STATUTORY CONDITIONS OF RELEASE LISTED IN SECTION 16-4-105. THE PERSON MAY BE RELEASED UPON EXECUTION OF:**

**(a) AN UNSECURED PERSONAL RECOGNIZANCE BOND IN AN AMOUNT SPECIFIED BY THE COURT. THE COURT MAY REQUIRE ADDITIONAL OBLIGORS ON THE BOND AS A CONDITION OF THE BOND.**

**(b) AN UNSECURED PERSONAL RECOGNIZANCE BOND WITH ADDITIONAL NON-MONETARY CONDITIONS OF RELEASE**

**16-4-104. Bail bond—alternatives. (1)** ~~When the amount of bail is fixed by the judge of a court of record, the judge shall also determine which of the following kinds of bond shall be required for the pretrial release of the defendant: (a) The defendant may be released from custody upon execution by him of a personal recognizance. The court may require additional obligors on the bond as a condition of granting the same. (b) The defendant may be released from custody upon execution of bond in the full amount of the bail to be secured in any one or more, or any combination of, the following ways: (I) By a deposit, with the clerk of the court, of an amount equal to the required~~

DESIGNED SPECIFICALLY TO REASONABLY ENSURE THE APPEARANCE OF THE PERSON IN COURT AND THE SAFETY OF ANY PERSON OR PERSONS OR THE COMMUNITY;

(c) A BOND WITH SECURED MONETARY CONDITIONS WHEN REASONABLE AND NECESSARY TO ENSURE THE APPEARANCE OF THE PERSON IN COURT OR THE SAFETY OF ANY PERSON OR PERSONS OR THE COMMUNITY. THE FINANCIAL CONDITIONS SHALL STATE AN AMOUNT OF MONEY THAT THE PERSON MUST POST WITH THE COURT IN ORDER FOR THE PERSON TO BE RELEASED. THE PERSON MAY BE RELEASED FROM CUSTODY UPON EXECUTION OF BOND IN THE FULL AMOUNT OF MONEY TO BE SECURED IN ANY ONE OF THE FOLLOWING WAYS:

(I) BY A DEPOSIT WITH THE CLERK OF THE COURT OF AN AMOUNT OF CASH EQUAL TO THE MONETARY CONDITION OF THE BOND;

(II) BY REAL ESTATE SITUATED IN THIS STATE WITH UNENCUMBERED EQUITY NOT EXEMPT FROM EXECUTION OWNED BY THE ACCUSED OR ANY OTHER PERSON ACTING AS SURETY ON THE BOND, WHICH UNENCUMBERED EQUITY SHALL BE AT LEAST ONE AND ONE-HALF THE AMOUNT OF THE SECURITY SET IN THE BOND;

(III) BY SURETIES WORTH AT LEAST ONE AND ONE-HALF OF THE SECURITY SET IN THE BOND; OR

(IV) BY A BAIL BONDING AGENT, AS DEFINED IN SECTION 16-1-104

(3.5).

bail, of cash, or stocks and bonds of a kind in which trustees are authorized to invest trust funds under the laws of this state; or (II) By real estate situated in this state with unencumbered equity not exempt from execution owned by the accused or any other person acting as surety on the bond, which unencumbered equity shall be at least one and one-half the amount of the bail set in the bond; or

(III) By cash or securities worth at least one and one-half the amount of bail set in the bond or by a bail bonding agent.

(2) If the bond is secured by stocks or bonds, the accused or sureties shall deposit the stock and bond certificates with the clerk of the court and also file with the bond a sworn schedule which shall be approved by the clerk of the court and shall contain the following: (a) A list of the stocks and bonds deposited describing each in sufficient detail that it may be identified; and (b) The market value of each stock and bond; and (c) The total market value of the stocks and bonds listed; and (d) A statement that the affiant is the owner of the stocks and bonds listed and they are not exempt from execution; and (e) A statement that such stocks and bonds are security for compliance by the accused with the primary condition of the bond; and (f) A signed blank stock power for each stock certificate or registered bond

(d) A BOND WITH SECURED REAL ESTATE CONDITIONS WHEN IT IS DETERMINED THAT RELEASE ON AN UNSECURED PERSONAL RECOGNIZANCE BOND WITHOUT MONETARY CONDITIONS WILL NOT REASONABLY ENSURE THE APPEARANCE OF THE PERSON IN COURT OR THE SAFETY OF ANY PERSON OR PERSONS OR THE COMMUNITY. FOR A BOND SECURED BY REAL ESTATE, THE BOND SHALL NOT BE ACCEPTED BY THE CLERK OF THE COURT UNLESS THE RECORD OWNER OF SUCH PROPERTY PRESENTS TO THE CLERK OF THE COURT THE ORIGINAL DEED OF TRUST AS SET FORTH IN SUBPARAGRAPH (IV) OF THIS PARAGRAPH (d) AND THE APPLICABLE RECORDING FEE. UPON RECEIPT OF THE DEED OF TRUST AND FEE, THE CLERK OF THE COURT SHALL RECORD THE DEED OF TRUST WITH THE CLERK AND RECORDER FOR THE COUNTY IN WHICH THE PROPERTY IS LOCATED. *[(Moved form later in provision)]* FOR A BOND SECURED BY REAL ESTATE, THE AMOUNT OF THE OWNER'S UNENCUMBERED EQUITY SHALL BE DETERMINED BY DEDUCTING THE AMOUNT OF ALL ENCUMBRANCES LISTED IN THE OWNER AND ENCUMBRANCES CERTIFICATE FROM THE ACTUAL VALUE OF SUCH REAL ESTATE AS SHOWN ON THE CURRENT NOTICE OF VALUATION. THE OWNER OF THE REAL ESTATE SHALL FILE WITH THE BOND THE FOLLOWING, WHICH SHALL CONSTITUTE A MATERIAL PART OF THE BOND:

(I) THE CURRENT NOTICE OF VALUATION FOR SUCH REAL ESTATE PREPARED BY THE COUNTY ASSESSOR PURSUANT TO SECTION 39-5-121, C.R.S.; AND

~~deposited.~~ (3) (a) (I) If the bond is to be secured by real estate, the bail bonding agent shall provide the property owner with a written disclosure statement in the following form at the time an initial application is filed: Disclosure of lien against real property Do not sign this document until you read and understand it! This bail bond will be secured by real property you own or in which you have an interest. Failure to pay the bail bond premiums when due or the defendant's failure to comply with the conditions of bail could result in the loss of your property! (II) The disclosure required in subparagraph (I) of this paragraph (a) shall be printed in fourteen point bold-faced type either: (A) On a separate and specific document attached to or accompanying the application; or (B) In a clear and conspicuous statement on the face of the application. (III) ~~Before a property owner executes any instrument creating a lien against real property, the bail bonding agent shall provide the property owner with a completed copy of the instrument creating the lien against real property and the disclosure statement described in subparagraph (II) of this paragraph (a). If a bail bonding agent fails to comply fully with the requirements of subparagraphs (I) and (II) of this paragraph (a) and this subparagraph (III), any instrument creating a lien against real property shall be~~

(II) EVIDENCE OF TITLE ISSUED BY A TITLE INSURANCE COMPANY OR AGENT LICENSED PURSUANT TO ARTICLE 11 OF TITLE 10, C.R.S., WITHIN THIRTY-FIVE DAYS AFTER THE DATE UPON WHICH THE BOND IS FILED; AND

(III) A SWORN STATEMENT BY THE OWNER OF THE REAL ESTATE THAT THE REAL ESTATE IS SECURITY FOR THE COMPLIANCE BY THE ACCUSED WITH THE PRIMARY CONDITION OF THE BOND; AND

(IV) A DEED OF TRUST TO THE PUBLIC TRUSTEE OF THE COUNTY IN WHICH THE REAL ESTATE IS LOCATED THAT IS EXECUTED AND ACKNOWLEDGED BY ALL RECORD OWNERS OF THE REAL ESTATE. THE DEED OF TRUST SHALL NAME THE CLERK OF THE COURT APPROVING THE BOND AS BENEFICIARY. THE DEED OF TRUST SHALL SECURE AN AMOUNT EQUAL TO ONE AND ONE-HALF TIMES THE AMOUNT OF THE BOND.

**(2) UNLESS THE DISTRICT ATTORNEY CONSENTS OR UNLESS THE COURT IMPOSES CERTAIN ADDITIONAL INDIVIDUALIZED CONDITIONS OF RELEASE AS DESCRIBED IN SECTION 16-4-105, A PERSON MUST NOT BE RELEASED ON AN UNSECURED PERSONAL RECOGNIZANCE BOND PURSUANT TO PARAGRAPH (a) OF SUBSECTION (1) OF THIS SECTION UNDER THE FOLLOWING CIRCUMSTANCES: [(Moved partially from 105)]**

**(a) THE PERSON IS PRESENTLY FREE ON ANOTHER BOND OF ANY KIND IN ANOTHER CRIMINAL ACTION INVOLVING A FELONY OR A CLASS 1 MISDEMEANOR;**

~~voidable. (IV) The bonding agent shall deliver to the property owner a fully executed and notarized reconveyance of title, a certificate of discharge, or a full release of any lien against real property that secures performance of the conditions of a bail bond within thirty-five days after receiving notice that the time for appealing an order that exonerated the bail bond has expired. The bonding agent shall also deliver to the property owner the original cancelled note as evidence that the indebtedness secured by any lien instrument has been paid or that the purposes of said instrument have been fully satisfied and the original deed of trust, security agreement, or other instrument which secured the bail bond obligation. If a timely notice of appeal is filed, the thirty-five-day period shall begin on the day the appellate court's affirmation of the order becomes final. If the bonding agent fails to comply with the requirements of this subparagraph (IV), the property owner may petition the district court to issue an order directing the clerk of such court to execute a full reconveyance of title, a certificate of discharge, or a full release of any lien against real property created to secure performance of the conditions of the bail bond. The petition shall be verified and shall allege facts showing that the bonding agent has failed to comply with the provisions of this subparagraph (IV). (V)~~

(b) THE PERSON HAS A RECORD OF CONVICTION OF A CLASS 1 MISDEMEANOR WITHIN TWO YEARS OR A FELONY WITHIN FIVE YEARS, PRIOR TO THE BAIL HEARING; OR

(c) THE PERSON HAS *WILLFULLY* FAILED TO APPEAR ON BOND IN ANY CASE INVOLVING A FELONY OR A CLASS 1 MISDEMEANOR CHARGE IN THE PRECEDING FIVE YEARS.

(3) A PERSON MAY NOT BE RELEASED ON AN UNSECURED PERSONAL RECOGNIZANCE BOND IF, AT THE TIME OF SUCH APPLICATION, THE PERSON IS PRESENTLY ON RELEASE UNDER A SURETY BOND FOR FELONY OR CLASS 1 MISDEMEANOR CHARGES UNLESS THE SURETY THEREON IS NOTIFIED AND AFFORDED AN OPPORTUNITY TO SURRENDER THE PERSON INTO CUSTODY ON SUCH TERMS AS THE COURT DEEMS JUST UNDER THE PROVISIONS OF SECTION 16-4-108.

(4) BECAUSE OF THE DANGER POSED TO ANY PERSON AND THE COMMUNITY, A PERSON WHO IS ARRESTED FOR AN OFFENSE UNDER SECTION 42-4-1301 (1) OR (2) (a), C.R.S., MAY NOT ATTEND A BAIL HEARING UNTIL THE PERSON IS NO LONGER INTOXICATED OR UNDER THE INFLUENCE OF DRUGS. THE PERSON SHALL BE HELD IN CUSTODY UNTIL THE PERSON MAY SAFELY ATTEND SUCH HEARING.

~~Any bail bonding agent who violates this paragraph (a) shall be liable to the property owner for all damages which may be sustained by reason of the violation, plus statutory damages in the sum of three hundred dollars. The property owner shall be entitled to recover court costs and reasonable attorney fees, as determined by the court, upon prevailing in any action brought to enforce the provisions of this paragraph (a).~~ (b) If the bond is secured by real estate, the amount of the owner's unencumbered equity shall be determined by deducting the amount of all encumbrances listed in the owner and encumbrances certificate from the actual value of such real estate as shown on the current notice of valuation. The owner of the real estate shall file with the bond the following, which shall constitute a material part of the bond:

(I) The current notice of valuation for such real estate prepared by the county assessor pursuant to section 39-5-121, C.R.S.; and

(II) Evidence of title issued by a title insurance company or agent licensed pursuant to article 11 of title 10, C.R.S., within thirty-five days after the date upon which the bond is filed; and

(III) A sworn statement by the owner of the real estate that the real estate is security for

the compliance by the accused with the primary condition of the bond; and

(IV) A deed of trust to the public trustee of the county in which such real estate is located which shall be executed and acknowledged by all record owners of such real estate which shall name as beneficiary the clerk of the court approving such bond and which shall secure an amount equal to one and one-half times the amount of the bond.

(c) (I) If the bond is secured by real estate, such bond shall not be accepted by the clerk of the court unless the record owner of such property has presented to the clerk of such court the original deed of trust as set forth in subparagraph (IV) of paragraph (b) of this subsection (3) and the applicable recording fee. ~~Upon receipt of such deed of trust and fee, the clerk of the court shall cause the deed of trust to be recorded with the clerk and recorder for the county in which the property is located.~~

~~(II) Upon satisfaction of the terms of the bond, the clerk of the court shall, within fourteen days after such satisfaction, execute a release of the deed of trust and an affidavit which states that the obligation for which the deed of trust had been recorded has been satisfied, either fully or partially, and that the release of such deed of trust may be recorded at the expense of~~

	<p>the record owner of the property described in such deed of trust. (III) If there is a forfeiture of the bond pursuant to sections 16-4-103 and 16-4-109, and if the forfeiture is not set aside pursuant to section 16-4-109 (3), the deed of trust may be foreclosed as provided by law. (IV) If there is a forfeiture of the bond pursuant to sections 16-4-103 and 16-4-109, but the forfeiture is set aside pursuant to section 16-4-109 (3), the clerk of the court shall execute a release of the deed of trust and an affidavit which states that the obligation for which the deed of trust had been recorded has been satisfied, either fully or partially, and that the release of such deed of trust may be recorded at the expense of the record owner of the real estate described in such deed of trust.</p>
<p><b>16-4-105. Conditions of release on bond.</b> [(Modified and moved from 103)] (1) FOR EACH BOND, THE COURT SHALL REQUIRE THAT THE RELEASED PERSON APPEAR TO ANSWER THE CHARGE AGAINST THE PERSON AT A PLACE AND UPON A DATE CERTAIN AND AT ANY PLACE OR UPON ANY DATE TO WHICH THE PROCEEDING IS TRANSFERRED OR CONTINUED. THIS CONDITION IS THE <i>ONLY CONDITION</i> FOR WHICH A BREACH OF SURETY OR SECURITY ON THE BAIL BOND MAY BE SUBJECT TO FORFEITURE.</p> <p>(2) FOR A PERSON WHO HAS BEEN ARRESTED FOR A FELONY OFFENSE, THE COURT SHALL REQUIRE AS A CONDITION OF A BOND THAT THE PERSON EXECUTE A</p>	<p><b>16-4-105. Selection by judge of the amount of bail and type of bond—criteria.</b> (1) In determining the amount of bail and the type of bond to be furnished by the defendant, the judge fixing the same shall consider and be governed by the following criteria: (a) The amount of bail shall not be oppressive; (b) When a person is charged with an offense punishable by fine only, the amount of bail shall not exceed the amount of the maximum penalty; (c) The defendant's employment status and history and his financial condition; (d) The nature and extent of his family relationships; (e) His past and present residences; (f) His</p>

WAIVER OF EXTRADITION STATING THE PERSON CONSENTS TO EXTRADITION TO THIS STATE AND WAIVES ALL FORMAL PROCEDURES INCIDENTAL TO EXTRADITION PROCEEDINGS IN THE EVENT THAT HE OR SHE IS ARRESTED IN ANOTHER STATE WHILE AT LIBERTY ON SUCH BAIL BOND AND ACKNOWLEDGING THAT HE OR SHE SHALL NOT BE ADMITTED TO BAIL IN ANY OTHER STATE PENDING EXTRADITION TO THIS STATE.

(3) ADDITIONAL CONDITIONS OF EVERY BOND IS THAT THE RELEASED PERSON SHALL NOT COMMIT ANY FELONY WHILE FREE ON SUCH A BAIL BOND, AND THE COURT IN WHICH THE ACTION IS PENDING HAS THE POWER TO REVOKE THE RELEASE OF THE PERSON, TO CHANGE ANY BOND CONDITION, INCLUDING THE AMOUNT OF ANY MONETARY CONDITION IF IT IS SHOWN THAT A COMPETENT COURT HAS FOUND PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT HAS COMMITTED A FELONY WHILE RELEASED, PENDING THE RESOLUTION OF A PRIOR FELONY CHARGE.

(4) AN ADDITIONAL CONDITION OF EVERY BOND IN CASES OF DOMESTIC VIOLENCE AS DEFINED IN SECTION 18-6-800.3 (1), C.R.S., IS THAT THE RELEASED PERSON ACKNOWLEDGE THE PROTECTION ORDER AS PROVIDED IN SECTION 18-1-1001 (5), C.R.S. [(Modified version from 103)]

(5) AN ADDITIONAL CONDITION OF EVERY BOND IN A CASE OF AN OFFENSE UNDER SECTION 42-2-138 (1) (d) (I), C.R.S., OF DRIVING WHILE SUCH PERSON'S DRIVER'S LICENSE OR PRIVILEGE TO DRIVE, EITHER AS A RESIDENT OR NONRESIDENT, IS

character and reputation; (g) Identity of persons who agree to assist him in attending court at the proper time; (h) The nature of the offense presently charged and the apparent probability of conviction and the likely sentence; (i) The defendant's prior criminal record, if any, and, if he previously has been released pending trial, whether he appeared as required; (j) Any facts indicating the possibility of violations of law if the defendant is released without restrictions; (k) Any facts indicating a likelihood that there will be an intimidation or harassment of possible witnesses by the defendant; (k.5) The fact that the defendant is accused of unlawfully using or distributing controlled substances on the grounds of any public or private elementary, middle, or secondary school, or within one thousand feet of the perimeter of any such school grounds on any street, alley, parkway, sidewalk, public park, playground, or other area of premises that is accessible to the public, or within any private dwelling that is accessible to the public for the purpose of the sale, distribution, use, or exchange of controlled substances in violation of article 18 of title 18, C.R.S., or in any school vehicle, as defined in section 42-1-102 (88.5), C.R.S., engaged in the transportation of persons who are students; (k.7) The fact that the defendant is accused of soliciting, inducing, encouraging, intimidating,

RESTRAINED SOLELY OR PARTIALLY BECAUSE OF A CONVICTION OF A DRIVING OFFENSE PURSUANT TO SECTION 42-4-1301 (1) OR (2) (a), C.R.S., IS THAT SUCH PERSON NOT DRIVE ANY MOTOR VEHICLE DURING THE PERIOD OF SUCH DRIVING RESTRAINT. *[(Modified version from 103)]*

(6) (a) IF A PERSON IS ARRESTED FOR DRIVING UNDER THE INFLUENCE OR DRIVING WHILE ABILITY IMPAIRED, PURSUANT TO SECTION 42-4-1301, C.R.S., AND THE PERSON HAS ONE OR MORE PREVIOUS CONVICTIONS FOR AN OFFENSE IN SECTION 42-4-1301, C.R.S., OR ONE OR MORE CONVICTIONS IN ANY OTHER JURISDICTION THAT WOULD CONSTITUTE A VIOLATION OF SECTION 42-4-1301, C.R.S., AS A CONDITION OF ANY BOND, THE COURT SHALL ORDER THAT THE PERSON ABSTAIN FROM THE USE OF ALCOHOL OR ILLEGAL DRUGS, AND SUCH ABSTINENCE SHALL BE MONITORED. *[(Modified version from 105)]*

(b) A PERSON SEEKING RELIEF FROM ANY OF THE CONDITIONS IMPOSED PURSUANT TO PARAGRAPH (a) OF THIS SUBSECTION (6) SHALL FILE A MOTION WITH THE COURT, AND THE COURT SHALL CONDUCT A HEARING UPON THE MOTION. THE COURT SHALL CONSIDER WHETHER THE CONDITION FROM WHICH THE PERSON IS SEEKING RELIEF IS IN THE INTEREST OF JUSTICE AND WHETHER PUBLIC SAFETY WOULD BE ENDANGERED IF THE CONDITION WERE NOT ENFORCED. WHEN DETERMINING WHETHER TO GRANT RELIEF PURSUANT TO THIS PARAGRAPH (b), THE COURT SHALL CONSIDER WHETHER THE PERSON HAS VOLUNTARILY ENROLLED

~~employing, or procuring a child to act as his agent to assist in the unlawful distribution, manufacture, dispensing, sale, or possession for the purposes of sale of any controlled substance; (l) Any other facts tending to indicate that the defendant has strong ties to the community and is not likely to flee the jurisdiction; (m) Unless the district attorney consents, no person shall be released on personal recognizance if he is presently at liberty on another bond of any kind in another criminal action involving a felony or a class 1 misdemeanor; (n) Unless the district attorney consents, no person shall be released on personal recognizance if he has a record of conviction of a class 1 misdemeanor within two years, or a felony within five years, prior to the release hearing; (n.5) Unless the district attorney consents, no person who is eighteen years of age or older or is being charged as an adult pursuant to section 19-2-517, C.R.S., or transferred to the district court pursuant to section 19-2-518, C.R.S., shall be released on personal recognizance if the person's criminal record indicates that he or she failed to appear on bond in any case involving a felony or class 1 misdemeanor charge in the preceding five years; (o) No person shall be released on personal recognizance until and unless the judge ordering the release has before him reliable information concerning the accused,~~

AND IS PARTICIPATING IN AN APPROPRIATE SUBSTANCE ABUSE TREATMENT PROGRAM.

(7) A PERSON *MAY* BE RELEASED ON A BOND WITH MONETARY CONDITION OF BOND, WHEN APPROPRIATE, AS DESCRIBED IN SECTION 16-4-104 (1) (c).

(8) IN ADDITION TO THE CONDITIONS SPECIFIED IN THIS SECTION, THE COURT *MAY* IMPOSE ANY ADDITIONAL CONDITIONS ON THE CONDUCT OF THE PERSON RELEASED THAT WILL ASSIST IN OBTAINING THE APPEARANCE OF THE PERSON IN COURT AND THE SAFETY OF ANY PERSON OR PERSONS AND THE COMMUNITY. THESE CONDITIONS MAY INCLUDE, BUT ARE NOT LIMITED TO, SUPERVISION BY A QUALIFIED PERSON OR ORGANIZATION OR SUPERVISION BY A PRETRIAL SERVICES PROGRAM ESTABLISHED PURSUANT TO SECTION 16-4-106. WHILE UNDER THE SUPERVISION OF A QUALIFIED ORGANIZATION OR PRETRIAL SERVICES PROGRAM, THE CONDITIONS OF RELEASE IMPOSED BY THE COURT MAY INCLUDE, BUT ARE NOT LIMITED TO:

(a) PERIODIC TELEPHONE CONTACT WITH THE PROGRAM;

(b) PERIODIC OFFICE VISITS BY THE PERSON TO THE PRETRIAL SERVICES PROGRAM OR ORGANIZATION;

(c) PERIODIC VISITS TO THE PERSON'S HOME BY THE PROGRAM OR ORGANIZATION;

(d) MENTAL HEALTH OR SUBSTANCE ABUSE TREATMENT FOR THE PERSON, INCLUDING RESIDENTIAL TREATMENT IF

prepared or verified by a person designated by the court, or substantiated by sworn testimony at a hearing before the judge, from which an intelligent decision based on the criteria set forth in this section can be made. Such information shall be submitted either orally or in writing without unnecessary delay. (p) ~~No person shall be released on personal recognizance if, at the time of such application, the person is presently on release under surety bond for felony or class 1 misdemeanor charges unless the surety thereon is notified and afforded an opportunity to surrender the person into custody on such terms as the judge deems just under the provisions of section 16-4-108;~~ (p.5) Any defendant who fails to appear while free on bond in conjunction with a class 1 misdemeanor or a felony and who is subsequently arrested shall not be eligible for a personal recognizance bond for that case in which such defendant failed to appear; except that, if the defendant can provide satisfactory evidence to the court that the failure to appear was due to circumstances or events beyond the control of the defendant, the court shall have the discretion to grant a personal recognizance bond; (q) If a pretrial services program as described in subsection (3) of this section exists in the judicial district in which the defendant is being held, the judge fixing the amount of bail and the type of bond to

THE DEFENDANT CONSENTS TO THE TREATMENT;

(e) PERIODIC ALCOHOL OR DRUG TESTING OF THE PERSON;

(f) DOMESTIC VIOLENCE COUNSELING FOR THE DEFENDANT IF THE DEFENDANT CONSENTS TO THE COUNSELING;

(g) ELECTRONIC OR GLOBAL POSITION MONITORING OF THE PERSON;

(h) PRETRIAL WORK RELEASE FOR THE PERSON; AND

(i) OTHER SUPERVISION TECHNIQUES SHOWN BY RESEARCH TO INCREASE COURT APPEARANCE AND PUBLIC SAFETY RATES FOR PERSONS RELEASED ON BOND.

be furnished by the defendant may utilize the services provided by such program in entering an order concerning such defendant.

(2) If a defendant has been required by the judge to furnish a secured bond and he is unable within two days to furnish security, if he believes that, upon the presentation of evidence not heard or considered by the judge, he would be entitled to release on personal recognizance, such defendant may file a written motion for reconsideration in which he shall set forth the matters not theretofore considered by the judge who entered the order for bond in the first instance. The judge may summarily deny the motion or promptly conduct a hearing thereon.

(3) (a) The chief judge of any judicial district may order any persons who are applying for pretrial release to be evaluated by a pretrial services program established pursuant to this subsection (3) which shall make a recommendation regarding whether there should be a pretrial release of any particular defendant. Such chief judge may make such order in any or all of the counties of such chief judge's district. (b) Any county or city and county may establish a pretrial services program which may be utilized by the district court of such county or city and county. Any pretrial services program shall be established

~~pursuant to a plan formulated by a community advisory board created for such purpose and appointed by the chief judge of the judicial district. Membership upon such community advisory board shall include, but shall not be limited to, a representative of a local law enforcement agency, a representative of the district attorney, a representative of the public defender, and a representative of the citizens at large. The plan formulated by such community advisory board shall be approved by the chief judge of the judicial district prior to the establishment and utilization of the pretrial services program. The requirement contained in this paragraph (b) that any pretrial services program be established pursuant to a plan formulated by a community advisory board shall not apply to any pretrial services program which exists prior to May 31, 1991. (c) Any pretrial services program approved pursuant to paragraph (b) of this subsection (3) shall meet the following criteria: (I) Such program shall establish a procedure for the screening of persons who are detained due to an arrest for the alleged commission of a crime so that such information may be provided to the judge who is setting the amount of bail and type of bond. The program shall provide such information as will provide the court with the ability to make a more appropriate initial bond decision which is based upon~~

~~facts relating to the defendant's risk of danger to the community and the defendant's risk of failure to appear for court. (II) Such program shall make all reasonable attempts to provide the court with such information delineated in subsection (1) of this section as is appropriate to each defendant. (d) Any pretrial services program may also include different methods and levels of community-based supervision as a condition of pretrial release. The program may use established supervision methods for defendants who are released prior to trial in order to decrease unnecessary pretrial incarceration. The program may include any of the following conditions for pretrial release or any combination thereof: (I) Periodic telephone contact with the defendant; (II) Periodic office visits by the defendant to the pretrial services program; (III) Periodic home visits to the defendant's home; (IV) Periodic drug testing of the defendant; (V) Mental health or substance abuse treatment for the defendant, including residential treatment; (VI) Domestic violence counseling for the defendant; (VII) Electronic or global position monitoring of the defendant; and (VIII) Pretrial work release of the defendant. (e) Commencing July 1, 2012, each pretrial services program established pursuant to this subsection (3) shall provide an annual report to the state judicial~~

department no later than November 1 of each year, regardless of whether the program existed prior to May 31, 1991. The judicial department shall present an annual combined report to the house and senate judiciary committees, or any successor committees, of the general assembly. The report to the judicial department shall include, but is not limited to, the following information: (I) The total number of pretrial assessments performed by the program and submitted to the court; (II) The total number of closed cases by the program in which the defendant was released from custody and supervised by the program; (III) The total number of closed cases in which the defendant was released from custody, was supervised by the program, and, while under supervision, appeared for all scheduled court appearances on the case; (IV) The total number of closed cases in which the defendant was released from custody, was supervised by the program, and was not charged with a new criminal offense that was alleged to have occurred while under supervision and that carried the possibility of a sentence to jail or imprisonment; (V) The total number of closed cases in which the defendant was released from custody and was supervised by the program, and the defendant's bond was not revoked by the court due to a violation of any other terms and conditions of

	<p>supervision; and (VI) Any additional information the state judicial department may request. (f) For the reports required in paragraph (e) of this subsection (3), the pretrial services program shall include information detailing the number of persons released on a commercial surety bond in addition to pretrial supervision, the number of persons released on a cash, private surety, or property bond in addition to pretrial supervision, and the number of persons released on any form of a personal recognizance bond in addition to pretrial supervision.</p>
<p><b>16-4-106. Pretrial services programs.</b> <del>(Partially moved from 105)</del> (1) THE CHIEF JUDGE OF ANY JUDICIAL DISTRICT MAY ORDER A PERSON WHO IS ELIGIBLE FOR BOND OR OTHER PRETRIAL RELEASE TO BE EVALUATED BY A PRETRIAL SERVICES PROGRAM ESTABLISHED PURSUANT TO THIS SECTION, WHICH PROGRAM MAY ADVISE THE COURT IF THE PERSON IS BOND ELIGIBLE, MAY PROVIDE INFORMATION THAT ENABLES THE COURT TO MAKE AN APPROPRIATE DECISION ON BOND AND CONDITIONS OF RELEASE, AND MAY RECOMMEND CONDITIONS OF RELEASE CONSISTENT WITH THIS SECTION. THE CHIEF JUDGE MAY MAKE SUCH ORDER IN ANY OR ALL OF THE COUNTIES OF THE CHIEF JUDGE'S JUDICIAL DISTRICT.</p> <p>(2) THE CHIEF JUDGE OF ANY JUDICIAL DISTRICT SHALL ENDEAVOR TO CONSULT, ON AN ANNUAL BASIS, WITH THE COUNTY OR COUNTIES WITHIN THE JUDICIAL DISTRICT IN AN EFFORT TO SUPPORT AND</p>	<p><del>16-4-106. When original bond continued. Once a bond has been executed and the person released from custody thereon, whether a charge is then pending or is thereafter filed or transferred to a court of competent jurisdiction, the original bond shall continue in effect until final disposition of the case in the trial court. If a charge filed in the county court is dismissed and the district attorney states on the record that the charge will be refiled in the district court or that the dismissal by the county court will be appealed to the district court, the county court before entering the dismissal shall fix a return date, not later than sixty-three days thereafter, upon which the defendant must appear in the district court and continue the bond. Any bond continued pursuant to this</del></p>

ENCOURAGE THE DEVELOPMENT BY THE COUNTY OR COUNTIES, TO THE EXTENT PRACTICABLE AND WITHIN AVAILABLE RESOURCES, OF PRETRIAL SERVICES PROGRAMS THAT SUPPORT THE WORK OF THE COURT AND EVIDENCE-BASED DECISION-MAKING IN DETERMINING THE TYPE OF BOND AND CONDITIONS OF RELEASE.

(3) TO REDUCE BARRIERS TO THE PRETRIAL RELEASE OF PERSONS IN CUSTODY WHOSE RELEASE ON BOND WITH APPROPRIATE CONDITIONS REASONABLY ASSURES COURT APPEARANCE AND PUBLIC SAFETY, ALL COUNTIES AND CITIES AND COUNTIES ARE ENCOURAGED TO DEVELOP A PRETRIAL SERVICES PROGRAM IN CONSULTATION WITH THE CHIEF JUDGE OF THE JUDICIAL DISTRICT IN AN EFFORT TO ESTABLISH A PRETRIAL SERVICES PROGRAM THAT MAY BE UTILIZED BY THE DISTRICT COURT OF SUCH COUNTY OR CITY AND COUNTY. ANY PRETRIAL SERVICES PROGRAM MUST BE ESTABLISHED PURSUANT TO A PLAN FORMULATED BY A COMMUNITY ADVISORY BOARD CREATED FOR SUCH PURPOSE AND APPOINTED BY THE CHIEF JUDGE OF THE JUDICIAL DISTRICT. MEMBERSHIP ON SUCH COMMUNITY ADVISORY BOARD MUST INCLUDE, AT A MINIMUM, A REPRESENTATIVE OF A LOCAL LAW ENFORCEMENT AGENCY, A REPRESENTATIVE OF THE DISTRICT ATTORNEY, A REPRESENTATIVE OF THE PUBLIC DEFENDER, AND A REPRESENTATIVE OF THE CITIZENS AT LARGE. THE CHIEF JUDGE IS ENCOURAGED TO APPOINT TO THE COMMUNITY ADVISORY BOARD AT LEAST ONE

section is subject to the provisions of section 16-4-107.

REPRESENTATIVE OF THE BAIL BOND INDUSTRY WHO CONDUCTS BUSINESS IN THE JUDICIAL DISTRICT, WHICH MAY INCLUDE A BAIL BONDSMAN, A BAIL SURETY, OR OTHER DESIGNATED BAIL INDUSTRY REPRESENTATIVE. THE PLAN FORMULATED BY SUCH COMMUNITY ADVISORY BOARD MUST BE APPROVED BY THE CHIEF JUDGE OF THE JUDICIAL DISTRICT PRIOR TO THE ESTABLISHMENT AND UTILIZATION OF THE PRETRIAL SERVICES PROGRAM. THE OPTION CONTAINED IN THIS SECTION THAT A PRETRIAL SERVICES PROGRAM BE ESTABLISHED PURSUANT TO A PLAN FORMULATED BY THE COMMUNITY ADVISORY BOARD DOES NOT APPLY TO ANY PRETRIAL SERVICES PROGRAM THAT EXISTED BEFORE MAY 31, 1991.

(4) ANY PRETRIAL SERVICES PROGRAM APPROVED PURSUANT TO THIS SECTION MUST MEET THE FOLLOWING CRITERIA:

(a) THE PROGRAM MUST ESTABLISH A PROCEDURE FOR THE SCREENING OF PERSONS WHO ARE DETAINED DUE TO AN ARREST FOR THE ALLEGED COMMISSION OF A CRIME SO THAT SUCH INFORMATION MAY BE PROVIDED TO THE JUDGE WHO IS SETTING THE BOND AND CONDITIONS OF RELEASE. THE PROGRAM MUST PROVIDE INFORMATION THAT PROVIDES THE COURT WITH THE ABILITY TO MAKE AN APPROPRIATE INITIAL BOND DECISION THAT IS BASED UPON FACTS RELATING TO THE PERSON'S RISK OF FAILURE TO APPEAR FOR COURT AND RISK OF DANGER TO THE COMMUNITY.

(b) THE PROGRAM MUST MAKE ALL REASONABLE ATTEMPTS TO PROVIDE THE COURT WITH SUCH INFORMATION DELINEATED IN THIS SECTION AS IS APPROPRIATE TO EACH INDIVIDUAL PERSON SEEKING RELEASE FROM CUSTODY;

(c) THE PROGRAM, IN CONJUNCTION WITH THE COMMUNITY ADVISORY BOARD, MUST MAKE ALL REASONABLE EFFORTS TO IMPLEMENT AN EMPIRICALLY DEVELOPED PRETRIAL RISK ASSESSMENT TOOL AND A STRUCTURED DECISION-MAKING DESIGN BASED UPON THE PERSON'S CHARGE AND THE RISK ASSESSMENT SCORE;

(d) THE PROGRAM MUST WORK WITH ALL APPROPRIATE AGENCIES AND ASSIST WITH ALL EFFORTS TO COMPLY WITH SECTIONS 24-4.1-302.5 AND 24-4.1-303, C.R.S.

(5) ANY PRETRIAL SERVICES PROGRAM MAY ALSO INCLUDE DIFFERENT METHODS AND LEVELS OF COMMUNITY-BASED SUPERVISION AS A CONDITION OF RELEASE, AND THE PROGRAM MUST USE ESTABLISHED METHODS FOR PERSONS WHO ARE RELEASED PRIOR TO TRIAL IN ORDER TO DECREASE UNNECESSARY PRETRIAL DETENTION. THE PROGRAM MAY INCLUDE, BUT IS NOT LIMITED TO, ANY OF THE CRITERIA AS OUTLINED IN SECTION 16-4-105 (8) AS CONDITIONS FOR PRETRIAL RELEASE.

(6) COMMENCING JULY 1, 2012, EACH PRETRIAL SERVICES PROGRAM ESTABLISHED PURSUANT TO THIS SECTION SHALL PROVIDE AN ANNUAL REPORT TO THE JUDICIAL DEPARTMENT NO LATER THAN NOVEMBER 1 OF EACH YEAR.

REGARDLESS OF WHETHER THE PROGRAM EXISTED PRIOR TO MAY 31, 1991. [(Moved and modified from 105)] THE JUDICIAL DEPARTMENT SHALL PRESENT AN ANNUAL COMBINED REPORT TO THE HOUSE AND SENATE JUDICIARY COMMITTEES OF THE HOUSE OF REPRESENTATIVES AND THE SENATE, OR ANY SUCCESSOR COMMITTEES, OF THE GENERAL ASSEMBLY. THE REPORT TO THE JUDICIAL DEPARTMENT MUST INCLUDE, BUT IS NOT LIMITED TO, THE FOLLOWING INFORMATION:

(a) THE TOTAL NUMBER OF PRETRIAL ASSESSMENTS PERFORMED BY THE PROGRAM AND SUBMITTED TO THE COURT;

(b) THE TOTAL NUMBER OF CLOSED CASES BY THE PROGRAM IN WHICH THE PERSON WAS RELEASED FROM CUSTODY AND SUPERVISED BY THE PROGRAM;

(c) THE TOTAL NUMBER OF CLOSED CASES IN WHICH THE PERSON WAS RELEASED FROM CUSTODY, WAS SUPERVISED BY THE PROGRAM, AND, WHILE UNDER SUPERVISION, APPEARED FOR ALL SCHEDULED COURT APPEARANCES ON THE CASE;

(d) THE TOTAL NUMBER OF CLOSED CASES IN WHICH THE PERSON WAS RELEASED FROM CUSTODY, WAS SUPERVISED BY THE PROGRAM, AND WAS NOT CHARGED WITH A NEW CRIMINAL OFFENSE THAT WAS ALLEGED TO HAVE OCCURRED WHILE UNDER SUPERVISION AND THAT CARRIED THE POSSIBILITY OF A SENTENCE TO JAIL OR IMPRISONMENT; (e) THE TOTAL NUMBER OF CLOSED CASES IN WHICH THE PERSON WAS RELEASED FROM CUSTODY AND WAS SUPERVISED BY THE PROGRAM,

AND THE PERSON'S BOND WAS NOT REVOKED BY THE COURT DUE TO A VIOLATION OF ANY OTHER TERMS AND CONDITIONS OF SUPERVISION; AND

(f) ANY ADDITIONAL INFORMATION THE JUDICIAL DEPARTMENT MAY REQUEST.

(7) FOR THE REPORTS REQUIRED IN SUBSECTION (6) OF THIS SECTION, THE PRETRIAL SERVICES PROGRAM SHALL INCLUDE INFORMATION DETAILING THE NUMBER OF PERSONS RELEASED ON A COMMERCIAL SURETY BOND IN ADDITION TO PRETRIAL SUPERVISION, THE NUMBER OF PERSONS RELEASED ON A CASH, PRIVATE SURETY, OR PROPERTY BOND IN ADDITION TO PRETRIAL SUPERVISION, AND THE NUMBER OF PERSONS RELEASED ON ANY FORM OF A PERSONAL RECOGNIZANCE BOND IN ADDITION TO PRETRIAL SUPERVISION.

**16-4-107. Hearing after setting of monetary conditions of bond. IF A PERSON IS IN CUSTODY AND THE COURT IMPOSED A MONETARY BOND FOR RELEASE, AND THE PERSON, AFTER SEVEN DAYS FROM THE SETTING OF THE MONETARY BOND, IS UNABLE TO MEET THE MONETARY OBLIGATIONS OF THE BOND, THE PERSON MAY FILE A WRITTEN MOTION FOR RECONSIDERATION OF THE MONETARY CONDITIONS OF THE BOND. THE PERSON MAY ONLY FILE THE WRITTEN MOTION IF HE OR SHE BELIEVES THAT, UPON PRESENTATION OF EVIDENCE NOT FULLY CONSIDERED BY THE COURT, HE OR SHE IS ENTITLED TO A PERSONAL RECOGNIZANCE BOND OR AN UNSECURED BOND WITH CONDITIONS OF RELEASE OR A CHANGE IN**

**16-4-107. Reduction or increase of bail—change in type of bond. (1) Upon application by the district attorney or the defendant, the court before which the proceeding is pending may increase or decrease the amount of bail, may require additional security for a bond, may dispense with security theretofore provided, or may alter any condition of the bond. (2) Reasonable notice of an application for modification of a bond by the defendant shall be given to the district attorney. (3) Reasonable notice of application for modification of a bond by the district attorney shall be given to the**

THE MONETARY CONDITIONS OF BOND. THE COURT SHALL PROMPTLY CONDUCT A HEARING ON THIS MOTION FOR RECONSIDERATION, BUT THE HEARING MUST BE HELD WITHIN FOURTEEN DAYS AFTER THE FILING OF THE MOTION. HOWEVER, THE COURT MAY SUMMARILY DENY THE MOTION IF THE COURT FINDS THAT THERE IS NO ADDITIONAL EVIDENCE NOT FULLY CONSIDERED BY THE COURT PRESENTED IN THE WRITTEN MOTION. IN CONSIDERING THE MOTION, THE COURT SHALL CONSIDER THE RESULTS OF ANY EMPIRICALLY DEVELOPED RISK ASSESSMENT INSTRUMENT.

defendant, except as provided in subsection (4) of this section. (4) (a) Upon verified application by the district attorney or a bonding commissioner stating facts or circumstances constituting a breach or a threatened breach of any of the conditions of the bond, the court may issue a warrant commanding any peace officer to bring the defendant without unnecessary delay before the court for a hearing on the matters set forth in the application. Upon issuance of the warrant, the bonding commissioner shall notify the bail bond agent of record, if applicable. At the conclusion of the hearing, the court may enter an order authorized by subsection (1) of this section. If a bonding commissioner files an application for a hearing pursuant to this subsection (4), the bonding commissioner shall notify the district attorney, for the jurisdiction in which the application is made, of the application within twenty-four hours following the filing of the application. (b) As used in this subsection (4), "bonding commissioner" means a person employed by a pretrial services program as described in section 16-4-105 (3), and so designated as a bonding commissioner by the chief or presiding judge of the judicial district. (5) The district attorney has the right to appear at all hearings seeking modification of the terms and conditions of bail and may

	advise the court on all pertinent matters during the hearing.
<p><b>16-4-108.</b> When original bond continued.  <i>[(Modified and moved from 106)]</i> ONCE A BOND HAS BEEN EXECUTED AND THE PERSON RELEASED FROM CUSTODY THEREON, WHETHER A CHARGE IS THEN PENDING OR IS THEREAFTER FILED OR TRANSFERRED TO A COURT OF COMPETENT JURISDICTION, THE ORIGINAL BOND SHALL CONTINUE IN EFFECT UNTIL FINAL DISPOSITION OF THE CASE IN THE TRIAL COURT. IF A CHARGE FILED IN THE COUNTY COURT IS DISMISSED AND THE DISTRICT ATTORNEY STATES ON THE RECORD THAT THE CHARGE WILL BE REFILED IN THE DISTRICT COURT OR THAT THE DISMISSAL BY THE COUNTY COURT WILL BE APPEALED TO THE DISTRICT COURT, THE COUNTY COURT BEFORE ENTERING THE DISMISSAL SHALL FIX A RETURN DATE, NOT LATER THAN SIXTY-THREE DAYS THEREAFTER, UPON WHICH THE DEFENDANT MUST APPEAR IN THE DISTRICT COURT AND CONTINUE THE BOND. ANY BOND CONTINUED PURSUANT TO THIS SECTION IS SUBJECT TO THE PROVISIONS OF SECTION 16-4-109.</p>	<p><b>16-4-108. Exoneration from bond liability.</b>  <del>(1) Any person executing a bail bond as principal or as surety shall be exonerated as follows: (a) When the condition of the bond has been satisfied; or (b) When the amount of the forfeiture has been paid; or (b.5) (I) When the surety appears and provides satisfactory evidence to the court that the defendant is unable to appear before the court due to such defendant's death or the detention or incarceration of such defendant in a foreign jurisdiction if the defendant is incarcerated for a period in excess of ninety one days and the state of Colorado has refused to extradite such defendant; except that, if the state extradites such defendant, all costs associated with such extradition shall be borne by the surety up to the amount of the bond. (II) For the purposes of this paragraph (b.5), "costs associated with extradition" shall be calculated as and limited to the round-trip mileage between the Colorado court of jurisdiction and the location of the defendant's incarceration at the rate allowed for reimbursement pursuant to section 24-9-104, C.R.S., up to the amount of the bond. (c) Upon surrender of the defendant into custody at any time before a judgment has been entered against the sureties for forfeiture of the bond, upon</del></p>

~~payment of all costs occasioned thereby. A surety may seize and surrender the defendant to the sheriff of the county wherein the bond is taken, and it is the duty of the sheriff, on such surrender and delivery to him of a certified copy of the bond by which the surety is bound, to take the person into custody and, by writing, acknowledge the surrender. If a compensated surety is exonerated by surrendering a defendant prior to the initial appearance date fixed in the bond, the court, after a hearing, may require the surety to refund part or all of the bond premium paid by the defendant if necessary to prevent unjust enrichment. (d) Repealed. (e) After three years have elapsed from the posting of the bond, unless a judgment has been entered against the surety or the principal for the forfeiture of the bond, or unless the court grants an extension of the three-year time period for good cause shown, upon motion by the prosecuting attorney. (1.5) If, within fourteen days after the posting of a bond by a defendant, the terms and conditions of said bond are changed or altered either by order of court or upon the motion of the district attorney or the defendant, the court, after a hearing, may order a compensated surety to refund a portion of the premium paid by the defendant, if necessary, to prevent unjust enrichment. If more than fourteen days have elapsed after posting of a bond by a~~

	<p>defendant, the court shall not order the refund of any premium. (2) Upon entry of an order for deferred prosecution or deferred judgment as authorized in sections 18-1.3-101 and 18-1.3-102, C.R.S., sureties upon any bond given for the appearance of the defendant shall be released from liability on such bond.</p>
<p><b>16-4-109.</b> Reduction or increase of monetary conditions of bond - change in type of bond or conditions of bond - definitions. <i>[(Modified and moved from 107)]</i> (1) UPON APPLICATION BY THE DISTRICT ATTORNEY OR THE DEFENDANT, THE COURT BEFORE WHICH THE PROCEEDING IS PENDING MAY INCREASE OR DECREASE THE FINANCIAL CONDITIONS OF BOND, MAY REQUIRE ADDITIONAL SECURITY FOR A BOND, MAY DISPENSE WITH SECURITY THERETOFORE PROVIDED, OR MAY ALTER ANY OTHER CONDITION OF THE BOND.</p> <p>(2) REASONABLE NOTICE OF AN APPLICATION FOR MODIFICATION OF A BOND BY THE DEFENDANT SHALL BE GIVEN TO THE DISTRICT ATTORNEY.</p> <p>(3) REASONABLE NOTICE OF APPLICATION FOR MODIFICATION OF A BOND BY THE DISTRICT ATTORNEY SHALL BE GIVEN TO THE DEFENDANT, EXCEPT AS PROVIDED IN SUBSECTION (4) OF THIS SECTION.</p> <p>(4) (a) UPON VERIFIED APPLICATION BY THE DISTRICT ATTORNEY OR A BONDING COMMISSIONER STATING FACTS OR CIRCUMSTANCES CONSTITUTING A BREACH OR A THREATENED BREACH OF ANY OF THE CONDITIONS OF THE BOND,</p>	<p><b>16-4-109.</b> Disposition of security deposits upon forfeiture or termination of bond. (1) (a) If a defendant is released upon deposit of cash in any amount or upon deposit of any stocks or bonds and the defendant is later discharged from all liability under the terms of the bond, the clerk of the court shall return the deposit to the person who made the deposit. (b) (I) Notwithstanding the provisions of paragraph (a) of this subsection (1), if the depositor of the cash bond is the defendant and the defendant owes court costs, fees, fines, restitution, or surcharges at the time the defendant is discharged from all liability under the terms of the bond, the court may apply the deposit toward any amount owed by the defendant in court costs, fees, fines, restitution, or surcharges. If any amount of the deposit remains after paying the defendant's outstanding court costs, fees, fines, restitution, or surcharges, the court shall return the remainder of the deposit to the defendant. (II) Notwithstanding the provisions of paragraph (a) of this subsection (1), if the depositor of the cash</p>

THE COURT MAY ISSUE A WARRANT COMMANDING ANY PEACE OFFICER TO BRING THE DEFENDANT WITHOUT UNNECESSARY DELAY BEFORE THE COURT FOR A HEARING ON THE MATTERS SET FORTH IN THE APPLICATION. UPON ISSUANCE OF THE WARRANT, THE BONDING COMMISSIONER SHALL NOTIFY THE BAIL BOND AGENT OF RECORD BY ELECTRONIC MAIL TO THE AGENT IF AVAILABLE WITHIN TWENTY-FOUR HOURS OR BY CERTIFIED MAIL NOT MORE THAN FOURTEEN DAYS AFTER THE WARRANT IS ISSUED. AT THE CONCLUSION OF THE HEARING, THE COURT MAY ENTER AN ORDER AUTHORIZED BY SUBSECTION (1) OF THIS SECTION. IF A BONDING COMMISSIONER FILES AN APPLICATION FOR A HEARING PURSUANT TO THIS SUBSECTION (4), THE BONDING COMMISSIONER SHALL NOTIFY THE DISTRICT ATTORNEY, FOR THE JURISDICTION IN WHICH THE APPLICATION IS MADE, OF THE APPLICATION WITHIN TWENTY-FOUR HOURS FOLLOWING THE FILING OF THE APPLICATION.

(b) AS USED IN THIS SUBSECTION (4), "BONDING COMMISSIONER" MEANS A PERSON EMPLOYED BY A PRETRIAL SERVICES PROGRAM AS DESCRIBED IN SECTION 16-4-106 (3), AND SO DESIGNATED AS A BONDING COMMISSIONER BY THE CHIEF OR PRESIDING JUDGE OF THE JUDICIAL DISTRICT.

(5) THE DISTRICT ATTORNEY HAS THE RIGHT TO APPEAR AT ALL HEARINGS SEEKING MODIFICATION OF THE TERMS AND CONDITIONS OF BOND AND MAY

~~bond is not the defendant, but the defendant owes court costs, fees, fines, restitution, or surcharges at the time the defendant is discharged from all liability under the terms of the bond, the court may apply the deposit toward the amount owed by the defendant in court costs, fees, fines, restitution, or surcharges if the depositor agrees in writing to the use of the deposit for such purpose. If any amount of the deposit remains after paying the defendant's outstanding court costs, fees, fines, restitution, or surcharges, the court shall return the remainder of the deposit to the depositor. (2) Where the defendant has been released upon deposit of cash, stocks, bonds, or property or upon a surety bond secured by property, if the defendant fails to appear in accordance with the primary condition of the bond, the court shall declare a forfeiture. Notice of the order of forfeiture shall be mailed by the court to the defendant, all sureties, and all depositors or assignees of any deposits of cash or property if such sureties, depositors, or assignees have direct contact with the court, at their last known addresses. Such notice shall be sent within fourteen days after the entry of the order of forfeiture. If the defendant does not appear and surrender to the court having jurisdiction within thirty-five days from the date of the forfeiture or within that period satisfy the court that appearance and~~

ADVISE THE COURT ON ALL PERTINENT MATTERS DURING THE HEARING.

surrender by the defendant is impossible and without fault by such defendant, the court may enter judgment for the state against the defendant for the amount of the bail and costs of the court proceedings. Any cash deposits made with the clerk of the court shall be applied to the payment of costs. If any amount of such cash deposit remains after the payment of costs, it shall be applied to payment of the judgment. (3) The court may order that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice so requires. (4) If, within one year after judgment, the person who executed the forfeited bond as principal or as surety effects the apprehension or surrender of the defendant to the sheriff of the county from which the bond was taken or to the court which granted the bond, the court may vacate the judgment and order a remission less necessary and actual costs of the court. (5) The provisions of this section shall not apply to appearance bonds written by compensated sureties, as defined in section 16-4-112 (2) (c), which bonds shall be subject to the provisions of section 16-4-112. (6) On and after July 1, 2008, all moneys collected from payment toward a judgment entered for the state pursuant to subsection (2) of this section shall be transmitted to the state treasurer for deposit in the judicial stabilization cash fund created in section 13-32-101 (6), C.R.S.

**16-4-110. Exoneration from bond liability.**

[(Modified and moved from 108)] (1) ANY PERSON EXECUTING A BAIL BOND AS PRINCIPAL OR AS SURETY SHALL BE EXONERATED AS FOLLOWS:

(a) WHEN THE CONDITION OF THE BOND HAS BEEN SATISFIED; OR

(b) WHEN THE AMOUNT OF THE FORFEITURE HAS BEEN PAID; OR

(c) (I) WHEN THE SURETY APPEARS AND PROVIDES SATISFACTORY EVIDENCE TO THE COURT THAT THE DEFENDANT IS UNABLE TO APPEAR BEFORE THE COURT DUE TO SUCH DEFENDANT'S DEATH OR THE DETENTION OR INCARCERATION OF SUCH DEFENDANT IN A FOREIGN JURISDICTION IF THE DEFENDANT IS INCARCERATED FOR A PERIOD IN EXCESS OF NINETY-ONE DAYS AND THE STATE OF COLORADO HAS REFUSED TO EXTRADITE SUCH DEFENDANT; EXCEPT THAT, IF THE STATE EXTRADITES SUCH DEFENDANT, ALL COSTS ASSOCIATED WITH SUCH EXTRADITION SHALL BE BORNE BY THE SURETY UP TO THE AMOUNT OF THE BOND.

(II) FOR THE PURPOSES OF THIS PARAGRAPH (c), "COSTS ASSOCIATED WITH EXTRADITION" SHALL BE CALCULATED AS AND LIMITED TO THE ROUND-TRIP MILEAGE BETWEEN THE COLORADO COURT OF JURISDICTION AND THE LOCATION OF THE DEFENDANT'S INCARCERATION AT THE RATE ALLOWED FOR REIMBURSEMENT PURSUANT TO SECTION 24-9-104, C.R.S., UP TO THE AMOUNT OF THE BOND.

(d) UPON SURRENDER OF THE DEFENDANT INTO CUSTODY AT ANY TIME BEFORE A

~~16-4-110. Enforcement when forfeiture not set aside. By entering into a bond, each obligor, whether he or she is the principal or a surety, submits to the jurisdiction of the court. His or her liability under the bond may be enforced, without the necessity of an independent action, as follows: The court shall order the issuance of a citation directed to the obligor to show cause, if any there be, why judgment should not be entered against him or her forthwith and execution issue thereon. Said citation may be served personally or by certified mail upon the obligor directed to the address given in the bond. Hearing on the citation shall be held not less than twenty-one days after service. The defendant's attorney and the prosecuting attorney shall be given notice of the hearing. At the conclusion of the hearing, the court may enter a judgment for the state and against the obligor, and execution shall issue thereon as on other judgments. The district attorney shall have execution issued forthwith upon the judgment and deliver it to the sheriff to be executed by levy upon the stocks, bond, or real estate which has been accepted as security for the bond.~~

JUDGMENT HAS BEEN ENTERED AGAINST THE SURETIES FOR FORFEITURE OF THE BOND, UPON PAYMENT OF ALL COSTS OCCASIONED THEREBY. A SURETY MAY SEIZE AND SURRENDER THE DEFENDANT TO THE SHERIFF OF THE COUNTY WHEREIN THE BOND IS TAKEN, AND IT IS THE DUTY OF THE SHERIFF, ON SUCH SURRENDER AND DELIVERY TO HIM OR HER OF A CERTIFIED COPY OF THE BOND BY WHICH THE SURETY IS BOUND, TO TAKE THE PERSON INTO CUSTODY AND, BY WRITING, ACKNOWLEDGE THE SURRENDER. IF A COMPENSATED SURETY IS EXONERATED BY SURRENDERING A DEFENDANT PRIOR TO THE INITIAL APPEARANCE DATE FIXED IN THE BOND, THE COURT, AFTER A HEARING, MAY REQUIRE THE SURETY TO REFUND PART OR ALL OF THE BOND PREMIUM PAID BY THE DEFENDANT IF NECESSARY TO PREVENT UNJUST ENRICHMENT.

(e) AFTER THREE YEARS HAVE ELAPSED FROM THE POSTING OF THE BOND, UNLESS A JUDGMENT HAS BEEN ENTERED AGAINST THE SURETY OR THE PRINCIPAL FOR THE FORFEITURE OF THE BOND, OR UNLESS THE COURT GRANTS AN EXTENSION OF THE THREE-YEAR TIME PERIOD FOR GOOD CAUSE SHOWN, UPON MOTION BY THE PROSECUTING ATTORNEY AND NOTICE TO SURETY OF RECORD.

(2) IF, WITHIN FOURTEEN DAYS AFTER THE POSTING OF A BOND BY A DEFENDANT, THE TERMS AND CONDITIONS OF SAID BOND ARE CHANGED OR ALTERED EITHER BY ORDER OF COURT OR UPON THE MOTION OF THE DISTRICT ATTORNEY OR THE DEFENDANT, THE COURT, AFTER A

HEARING, MAY ORDER A COMPENSATED SURETY TO REFUND A PORTION OF THE PREMIUM PAID BY THE DEFENDANT, IF NECESSARY, TO PREVENT UNJUST ENRICHMENT. IF MORE THAN FOURTEEN DAYS HAVE ELAPSED AFTER POSTING OF A BOND BY A DEFENDANT, THE COURT SHALL NOT ORDER THE REFUND OF ANY PREMIUM.

(3) UPON ENTRY OF AN ORDER FOR DEFERRED PROSECUTION OR DEFERRED JUDGMENT AS AUTHORIZED IN SECTIONS 18-1.3-101 AND 18-1.3-102, C.R.S., SURETIES UPON ANY BOND GIVEN FOR THE APPEARANCE OF THE DEFENDANT SHALL BE RELEASED FROM LIABILITY ON SUCH BOND.

**16-4-111.** Disposition of security deposits upon forfeiture or termination of bond. *[(Modified and moved from 109)]* (1) (a) IF A DEFENDANT IS RELEASED UPON DEPOSIT OF CASH IN ANY AMOUNT OR UPON DEPOSIT OF ANY STOCKS OR BONDS AND THE DEFENDANT IS LATER DISCHARGED FROM ALL LIABILITY UNDER THE TERMS OF THE BOND, THE CLERK OF THE COURT SHALL RETURN THE DEPOSIT TO THE PERSON WHO MADE THE DEPOSIT.

(b) (1) NOTWITHSTANDING THE PROVISIONS OF PARAGRAPH (a) OF THIS SUBSECTION (1), IF THE DEPOSITOR OF THE CASH BOND IS THE DEFENDANT AND THE DEFENDANT OWES COURT COSTS, FEES, FINES, RESTITUTION, OR SURCHARGES AT THE TIME THE DEFENDANT IS DISCHARGED FROM ALL LIABILITY UNDER THE TERMS OF THE BOND, THE COURT MAY APPLY THE DEPOSIT TOWARD ANY AMOUNT OWED BY

~~**16-4-111.** Type of bond in certain misdemeanor cases. (1) In exercising the discretion mentioned in section 16-4-104, the judge shall release the accused person upon personal recognizance if the charge is a class 3 misdemeanor or a petty offense, or any unclassified offense for a violation of which the maximum penalty does not exceed six months' imprisonment, and he shall not be required to supply a surety bond, or give security of any kind for his appearance for trial other than his personal recognizance, unless one or more of the following facts are found to be present: (a) The arrested person fails to sufficiently identify himself; or (b) The arrested person refuses to sign a personal recognizance; or (c) The continued detention or posting of a surety bond is necessary to prevent~~

THE DEFENDANT IN COURT COSTS, FEES, FINES, RESTITUTION, OR SURCHARGES. IF ANY AMOUNT OF THE DEPOSIT REMAINS AFTER PAYING THE DEFENDANT'S OUTSTANDING COURT COSTS, FEES, FINES, RESTITUTION, OR SURCHARGES, THE COURT SHALL RETURN THE REMAINDER OF THE DEPOSIT TO THE DEFENDANT.

(II) NOTWITHSTANDING THE PROVISIONS OF PARAGRAPH (a) OF THIS SUBSECTION (1), IF THE DEPOSITOR OF THE CASH BOND IS NOT THE DEFENDANT, BUT THE DEFENDANT OWES COURT COSTS, FEES, FINES, RESTITUTION, OR SURCHARGES AT THE TIME THE DEFENDANT IS DISCHARGED FROM ALL LIABILITY UNDER THE TERMS OF THE BOND, THE COURT MAY APPLY THE DEPOSIT TOWARD THE AMOUNT OWED BY THE DEFENDANT IN COURT COSTS, FEES, FINES, RESTITUTION, OR SURCHARGES IF THE DEPOSITOR AGREES IN WRITING TO THE USE OF THE DEPOSIT FOR SUCH PURPOSE. IF ANY AMOUNT OF THE DEPOSIT REMAINS AFTER PAYING THE DEFENDANT'S OUTSTANDING COURT COSTS, FEES, FINES, RESTITUTION, OR SURCHARGES, THE COURT SHALL RETURN THE REMAINDER OF THE DEPOSIT TO THE DEPOSITOR.

*[(Modified and moved from 104)]*

(2) (a) UPON SATISFACTION OF THE TERMS OF THE BOND, THE CLERK OF THE COURT SHALL EXECUTE, WITHIN FOURTEEN DAYS AFTER SUCH SATISFACTION, A RELEASE OF ANY DEED OF TRUST GIVEN TO SECURE THE BOND AND AN AFFIDAVIT THAT STATES THAT THE OBLIGATION FOR WHICH THE DEED OF TRUST HAD BEEN RECORDED HAS BEEN SATISFIED, EITHER FULLY OR

~~imminent bodily harm to the accused or to another; or (d) The arrested person has no ties to the jurisdiction of the court reasonably sufficient to assure his appearance, and there is substantial likelihood that he will fail to appear for trial if released upon his personal recognizance; or (e) The arrested person has previously failed to appear for trial for an offense concerning which he had given his written promise to appear; or (f) There is outstanding a warrant for his arrest on any other charge or there are pending proceedings against him for suspension or revocation of parole or probation.~~

PARTIALLY, AND THAT THE RELEASE OF SUCH DEED OF TRUST MAY BE RECORDED AT THE EXPENSE OF THE RECORD OWNER OF THE PROPERTY DESCRIBED IN SUCH DEED OF TRUST.

(b) IF THERE IS A FORFEITURE OF THE BOND PURSUANT TO THIS SECTION, AND IF THE FORFEITURE IS NOT SET ASIDE PURSUANT TO SUBSECTION (4) OF THIS SECTION, THE DEED OF TRUST MAY BE FORECLOSED AS PROVIDED BY LAW.

(c) IF THERE IS A FORFEITURE OF THE BOND PURSUANT TO THIS SECTION, BUT THE FORFEITURE IS SET ASIDE PURSUANT TO SUBSECTION (3) OF THIS SECTION, THE CLERK OF THE COURT SHALL EXECUTE A RELEASE OF ANY DEED OF TRUST GIVEN TO SECURE THE BOND AND AN AFFIDAVIT THAT STATES THAT THE OBLIGATION FOR WHICH THE DEED OF TRUST HAD BEEN RECORDED HAS BEEN SATISFIED, EITHER FULLY OR PARTIALLY, AND THAT THE RELEASE OF SUCH DEED OF TRUST MAY BE RECORDED AT THE EXPENSE OF THE RECORD OWNER OF THE REAL ESTATE DESCRIBED IN SUCH DEED OF TRUST.

(3) WHERE THE DEFENDANT HAS BEEN RELEASED UPON DEPOSIT OF CASH, STOCKS, BONDS, OR PROPERTY OR UPON A SURETY BOND SECURED BY PROPERTY, IF THE DEFENDANT FAILS TO APPEAR IN ACCORDANCE WITH THE PRIMARY CONDITION OF THE BOND, THE COURT SHALL DECLARE A FORFEITURE. NOTICE OF THE ORDER OF FORFEITURE SHALL BE MAILED BY THE COURT TO THE DEFENDANT, ALL SURETIES, AND ALL DEPOSITORS OR ASSIGNEES OF ANY

DEPOSITS OF CASH OR PROPERTY IF SUCH SURETIES, DEPOSITORS, OR ASSIGNEES HAVE DIRECT CONTACT WITH THE COURT, AT THEIR LAST-KNOWN ADDRESSES. SUCH NOTICE SHALL BE SENT WITHIN FOURTEEN DAYS AFTER THE ENTRY OF THE ORDER OF FORFEITURE. IF THE DEFENDANT DOES NOT APPEAR AND SURRENDER TO THE COURT HAVING JURISDICTION WITHIN THIRTY-FIVE DAYS FROM THE DATE OF THE FORFEITURE OR WITHIN THAT PERIOD SATISFY THE COURT THAT APPEARANCE AND SURRENDER BY THE DEFENDANT IS IMPOSSIBLE AND WITHOUT FAULT BY SUCH DEFENDANT, THE COURT MAY ENTER JUDGMENT FOR THE STATE AGAINST THE DEFENDANT FOR THE AMOUNT OF THE BOND AND COSTS OF THE COURT PROCEEDINGS. ANY CASH DEPOSITS MADE WITH THE CLERK OF THE COURT SHALL BE APPLIED TO THE PAYMENT OF COSTS. IF ANY AMOUNT OF SUCH CASH DEPOSIT REMAINS AFTER THE PAYMENT OF COSTS, IT SHALL BE APPLIED TO PAYMENT OF THE JUDGMENT.

(4) THE COURT MAY ORDER THAT A FORFEITURE BE SET ASIDE, UPON SUCH CONDITIONS AS THE COURT MAY IMPOSE, IF IT APPEARS THAT JUSTICE SO REQUIRES.

(5) IF, WITHIN ONE YEAR AFTER JUDGMENT, THE PERSON WHO EXECUTED THE FORFEITED BOND AS PRINCIPAL OR AS SURETY EFFECTS THE APPREHENSION OR SURRENDER OF THE DEFENDANT TO THE SHERIFF OF THE COUNTY FROM WHICH THE BOND WAS TAKEN OR TO THE COURT WHICH GRANTED THE BOND, THE COURT MAY VACATE THE JUDGMENT AND ORDER

A REMISSION LESS NECESSARY AND ACTUAL COSTS OF THE COURT.

(6) THE PROVISIONS OF THIS SECTION SHALL NOT APPLY TO APPEARANCE BONDS WRITTEN BY COMPENSATED SURETIES, AS DEFINED IN SECTION 16-4-114 (2) (c), WHICH BONDS SHALL BE SUBJECT TO THE PROVISIONS OF SECTION 16-4-114.

(7) ON AND AFTER JULY 1, 2008, ALL MONEYS COLLECTED FROM PAYMENT TOWARD A JUDGMENT ENTERED FOR THE STATE PURSUANT TO PARAGRAPH (b) OF SUBSECTION (1) OF THIS SECTION SHALL BE TRANSMITTED TO THE STATE TREASURER FOR DEPOSIT IN THE JUDICIAL STABILIZATION CASH FUND CREATED IN SECTION 13-32-101 (6), C.R.S.

**16-4-112.** Enforcement when forfeiture not set aside. *[(Modified and moved from 110)]* BY ENTERING INTO A BOND, EACH OBLIGOR, WHETHER HE OR SHE IS THE PRINCIPAL OR A SURETY, SUBMITS TO THE JURISDICTION OF THE COURT. HIS OR HER LIABILITY UNDER THE BOND MAY BE ENFORCED, WITHOUT THE NECESSITY OF AN INDEPENDENT ACTION, AS FOLLOWS: THE COURT SHALL ORDER THE ISSUANCE OF A CITATION DIRECTED TO THE OBLIGOR TO SHOW CAUSE, IF ANY THERE BE, WHY JUDGMENT SHOULD NOT BE ENTERED AGAINST HIM OR HER FORTHWITH AND EXECUTION ISSUE THEREON. SAID CITATION MAY BE SERVED PERSONALLY OR BY CERTIFIED MAIL UPON THE OBLIGOR DIRECTED TO THE ADDRESS GIVEN IN THE BOND. HEARING ON THE CITATION SHALL BE HELD NOT LESS THAN TWENTY-ONE DAYS AFTER SERVICE. THE DEFENDANT'S

~~**16-4-112.** Enforcement procedures for compensated sureties – definitions. (1) (a) The general assembly hereby finds, determines, and declares that the simplicity, effectiveness, and uniformity of bail forfeiture procedures applicable to compensated sureties who are subject to the regulatory authority of the Colorado division of insurance are matters of statewide concern. (b) It is the intent of the general assembly in adopting this section to: (I) Adopt a board system that will simplify and expedite bail bond forfeiture procedures by authorizing courts to bar compensated sureties who fail to pay forfeiture judgments from writing further bonds; (II) Minimize the need for day-to-day involvement of the division of~~

ATTORNEY AND THE PROSECUTING ATTORNEY SHALL BE GIVEN NOTICE OF THE HEARING. AT THE CONCLUSION OF THE HEARING, THE COURT MAY ENTER A JUDGMENT FOR THE STATE AND AGAINST THE OBLIGOR, AND EXECUTION SHALL ISSUE THEREON AS ON OTHER JUDGMENTS. THE DISTRICT ATTORNEY SHALL HAVE EXECUTION ISSUED FORTHWITH UPON THE JUDGMENT AND DELIVER IT TO THE SHERIFF TO BE EXECUTED BY LEVY UPON THE STOCKS, BOND, OR REAL ESTATE WHICH HAS BEEN ACCEPTED AS SECURITY FOR THE BOND.

~~insurance in routine forfeiture enforcement; and (III) Reduce court administrative workload. (2) As used in this section, unless the context otherwise requires: (a) "Bail insurance company" means an insurer as defined in section 10-1-102 (13), C.R.S., engaged in the business of writing appearance bonds through bonding agents, which company is subject to regulation by the division of insurance in the department of regulatory agencies. (b) "Board system" means any reasonable method established by a court to publicly post or disseminate the name of any compensated surety who is prohibited from posting bail bonds. (c) "Compensated surety" means any person who is in the business of writing appearance bonds and who is subject to regulation by the division of insurance in the department of regulatory agencies, including bonding agents and bail insurance companies. Nothing in this paragraph (c) authorizes bail insurance companies to write appearance bonds except through bail bonding agents. (d) "On the board" means that the name of a compensated surety has been publicly posted or disseminated by a court as being ineligible to write bail bonds pursuant to paragraph (c) or (f) of subsection (5) of this section. (3) Each court of record in this state shall implement a board system for the recording and dissemination of the names of those compensated sureties who~~

are prohibited from posting bail bonds in the state due to an unpaid judgment as set forth in this section. (4) By entering into a bond, each obligor, including the bond principal and compensated surety, submits to the jurisdiction of the court and acknowledges the applicability of the forfeiture procedures set forth in this section. (5) Liability of bond obligors on bonds issued by compensated sureties may be enforced, without the necessity of an independent action, as follows: (a) In the event a defendant does not appear before the court and is in violation of the primary condition of an appearance bond, the court may declare the bond forfeited. (b) (I) If a bond is declared forfeited by the court, notice of the bail forfeiture order shall be served on the bonding agent by certified mail and on the bail insurance company by regular mail within fourteen days after the entry of said forfeiture. If the compensated surety on the bond is a cash bonding agent, only the cash bonding agent shall be notified of the forfeiture. Service of notice of the bail forfeiture on the defendant is not required. (II) The notice described in subparagraph (I) of this paragraph (b) shall include, but need not be limited to: (A) A statement intended to inform the compensated surety of the entry of forfeiture; (B) An advisement that the compensated surety has the right to request a show cause hearing pursuant to

~~subparagraph (III) of this paragraph (b) within fourteen days after receipt of notice of forfeiture, by procedures set by the court; and (C) An advisement that if the compensated surety does not request a show cause hearing pursuant to subparagraph (III) of this paragraph (b), judgment shall be entered upon expiration of thirty five days following the entry of forfeiture. (III) A compensated surety, upon whom notice of a bail forfeiture order has been served, shall have fourteen days after receipt of notice of such forfeiture to request a hearing to show cause why judgment on the forfeiture should not be entered for the state against the compensated surety. Such request shall be granted by the court and a hearing shall be set within thirty five days after entry of forfeiture or at the court's earliest convenience. At the conclusion of the hearing requested by the compensated surety, if any, the court may enter judgment for the state against the compensated surety, or the court may in its discretion order further hearings. Upon expiration of thirty five days after the entry of forfeiture, the court shall enter judgment for the state against the compensated surety if the compensated surety did not request within fourteen days after receipt of notice of such forfeiture a hearing to show cause. (IV) If such a show cause hearing was timely set but the hearing did not occur within thirty-~~

~~five days after the entry of forfeiture, any entry of judgment at the conclusion of the hearing against the compensated surety shall not be vacated on the grounds that the matter was not timely heard. If judgment is entered against a compensated surety upon the conclusion of a requested show cause hearing, and such hearing did not occur within thirty five days after the entry of forfeiture, execution upon said judgment shall be automatically stayed for no more than one hundred twenty six days after entry of forfeiture. (V) (A) If at any time prior to the entry of judgment, the defendant appears in court, either voluntarily or in custody after surrender or arrest, the court shall on its own motion direct that the bail forfeiture be set aside and the bond exonerated at the time the defendant first appears in court; except that, if the state extradites such defendant, all necessary and actual costs associated with such extradition shall be borne by the surety up to the amount of the bond. (B) If, at a time prior to the entry of judgment, the surety provides proof to the court that the defendant is in custody in any other jurisdiction within the state, the court shall on its own motion direct that the bail forfeiture be set aside and the bond exonerated; except that, if the court extradites the defendant, all necessary and actual costs associated with the extradition shall be borne by the surety up to the~~

amount of the bond. If the court elects to extradite the defendant, any forfeiture will be stayed until such time the defendant appears in the court where the bond returns. (C) A compensated surety shall be exonerated from liability upon the bond by satisfaction of the bail forfeiture judgment, surrender of the defendant, or order of the court. If the surety provides proof to the court that the defendant is in custody in any other jurisdiction within the state, within ninety one days after the entry of judgment, the court shall on its own motion direct that the bail forfeiture judgment be vacated and the bond exonerated; except that, if the court extradites the defendant, all necessary and actual costs associated with the extradition shall be borne by the surety up to the amount of the bond. If the court elects to extradite the defendant, any judgment will be stayed until the time the defendant appears in the court where the bond returns. (c) Execution upon said bail forfeiture judgment shall be automatically stayed for ninety one days from the date of entry of judgment; except that, if judgment is entered against a compensated surety upon the conclusion of a requested show cause hearing, and such hearing did not occur within thirty five days after the entry of forfeiture, the judgment shall be automatically stayed as set forth in subparagraph (IV) of paragraph (b) of this subsection (5). (d) Upon the expiration of

~~the stay of execution described in paragraph (c) of this subsection (5), the bail forfeiture judgment shall be paid forthwith by the compensated surety, if not previously paid, unless the defendant appears in court, either voluntarily or in custody after surrender or arrest, or the court enters an order granting an additional stay of execution or otherwise vacates the judgment. (e) If a bail forfeiture judgment is not paid on or before the expiration date of the stay of execution described in paragraph (c) of this subsection (5), the name of the bonding agent shall be placed on the board of the court that entered the judgment. The bonding agent shall be prohibited from executing any further bail bonds in this state until the judgment giving rise to placement on the board is satisfied, vacated, or otherwise discharged by order of the court. (f) If a bail forfeiture judgment remains unpaid for thirty five days after the name of the bonding agent is placed on the board, the court shall send notice by certified mail to the bail insurance company for whom the bonding agent has executed the bond that if said judgment is not paid within fourteen days after the date of mailing of said notice, the name of the bail insurance company shall be placed on the board and such company shall be prohibited from executing any further bail bonds in this state until the judgment giving rise to placement on the~~

~~board is satisfied, vacated, or otherwise discharged by order of the court.~~

~~(g) A compensated surety shall be removed forthwith from the board only after every judgment for which the compensated surety was placed on the board is satisfied, vacated, or discharged or stayed by entry of an additional stay of execution. No compensated surety shall be placed on the board in the absence of the notice required by paragraph (b) or (f) of this subsection (5). (h) The court may order that a bail forfeiture judgment be vacated and set aside or that execution thereon be stayed upon such conditions as the court may impose, if it appears that justice so requires. (i) A compensated surety shall be exonerated from liability upon the bond by satisfaction of the bail forfeiture judgment, surrender of the defendant, or by order of the court. If the defendant appears in court, either voluntarily or in custody after surrender or arrest, within ninety one days after the entry of judgment, the court, at the time the defendant first appears in court, shall on its own motion direct that the bail forfeiture judgment be vacated and the bond exonerated; except that, if the state extradites such defendant, all necessary and actual costs associated with such extradition shall be borne by the surety up to the amount of the bond. (j) If, within one year after payment of the bail forfeiture judgment, the compensated surety effects~~

~~the apprehension or surrender of the defendant and provides reasonable notice to the court to which the bond returns that the defendant is available for extradition, the court shall vacate the judgment and order a remission of the amount paid on the bond less any necessary and actual costs incurred by the state and the sheriff who has actually extradited the defendant. (k) Bail bonds shall be deemed valid notwithstanding the fact that a bond may have been written by a compensated surety who has been placed on the board pursuant to paragraph (e) or (f) of this subsection (5) and is otherwise prohibited from writing bail bonds. The ineligibility of a compensated surety to write bonds because the name of the compensated surety has been placed on the board pursuant to paragraph (e) or (f) of this subsection (5) shall not be a defense to liability on any appearance bond accepted by a court. (l) The automatic stay of execution upon a bail forfeiture judgment as described in paragraph (e) of this subsection (5) shall expire pursuant to its terms unless the defendant appears and surrenders to the court having jurisdiction or satisfies the court that appearance and surrender by the defendant was impossible and without fault by such defendant. The court may order that a forfeiture be set aside and judgment vacated as set forth in paragraph (h) of this subsection (5). (6) A bail insurance~~

	<p><del>company shall not write bail bonds unless through a licensed bail bonding agent.</del></p>
<p><b>16-4-113.</b> Type of bond in certain misdemeanor cases. <i>[(Modified and moved from 111)]</i> (1) IN EXERCISING THE DISCRETION MENTIONED IN SECTION 16-4-104, THE JUDGE SHALL RELEASE THE ACCUSED PERSON UPON PERSONAL RECOGNIZANCE IF THE CHARGE IS A CLASS 3 MISDEMEANOR OR A PETTY OFFENSE, OR ANY UNCLASSIFIED OFFENSE FOR A VIOLATION OF WHICH THE MAXIMUM PENALTY DOES NOT EXCEED SIX MONTHS' IMPRISONMENT, AND HE OR SHE SHALL NOT BE REQUIRED TO SUPPLY A SURETY BOND, OR GIVE SECURITY OF ANY KIND FOR HIS OR HER APPEARANCE FOR TRIAL OTHER THAN HIS OR HER PERSONAL RECOGNIZANCE, UNLESS ONE OR MORE OF THE FOLLOWING FACTS ARE FOUND TO BE PRESENT:</p> <p>(a) THE ARRESTED PERSON FAILS TO SUFFICIENTLY IDENTIFY HIMSELF OR HERSELF; OR</p> <p>(b) THE ARRESTED PERSON REFUSES TO SIGN A PERSONAL RECOGNIZANCE; OR</p> <p>(c) THE CONTINUED DETENTION OR POSTING OF A SURETY BOND IS NECESSARY TO PREVENT IMMINENT BODILY HARM TO THE ACCUSED OR TO ANOTHER; OR</p> <p>(d) THE ARRESTED PERSON HAS NO TIES TO THE JURISDICTION OF THE COURT REASONABLY SUFFICIENT TO ASSURE HIS OR HER APPEARANCE, AND THERE IS SUBSTANTIAL LIKELIHOOD THAT HE OR SHE WILL FAIL TO APPEAR FOR TRIAL IF</p>	

RELEASED UPON HIS OR HER PERSONAL  
RECOGNIZANCE; OR

(e) THE ARRESTED PERSON HAS  
PREVIOUSLY FAILED TO APPEAR FOR TRIAL  
FOR AN OFFENSE CONCERNING WHICH HE  
OR SHE HAD GIVEN HIS WRITTEN PROMISE  
TO APPEAR; OR

(f) THERE IS OUTSTANDING A WARRANT  
FOR HIS OR HER ARREST ON ANY OTHER  
CHARGE OR THERE ARE PENDING  
PROCEEDINGS AGAINST HIM OR HER FOR  
SUSPENSION OR REVOCATION OF PAROLE  
OR PROBATION.

16-4-114. Enforcement procedures for compensated  
sureties - definitions. [(Modified and Moved from  
[12)] (1) (a) THE GENERAL ASSEMBLY  
HEREBY FINDS, DETERMINES, AND  
DECLARES THAT THE SIMPLICITY,  
EFFECTIVENESS, AND UNIFORMITY OF BAIL  
FORFEITURE PROCEDURES APPLICABLE TO  
COMPENSATED SURETIES WHO ARE  
SUBJECT TO THE REGULATORY AUTHORITY  
OF THE COLORADO DIVISION OF  
INSURANCE ARE MATTERS OF STATEWIDE  
CONCERN.

(b) IT IS THE INTENT OF THE GENERAL  
ASSEMBLY IN ADOPTING THIS SECTION TO:

(I) ADOPT A BOARD SYSTEM THAT WILL  
SIMPLIFY AND EXPEDITE BAIL FORFEITURE  
PROCEDURES BY AUTHORIZING COURTS TO  
BAR COMPENSATED SURETIES WHO FAIL  
TO PAY FORFEITURE JUDGMENTS FROM  
WRITING FURTHER BONDS; (II) MINIMIZE  
THE NEED FOR DAY-TO-DAY INVOLVEMENT  
OF THE DIVISION OF INSURANCE IN  
ROUTINE FORFEITURE ENFORCEMENT; AND

(III) REDUCE COURT ADMINISTRATIVE WORKLOAD.

(2) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "BAIL INSURANCE COMPANY" MEANS AN INSURER AS DEFINED IN SECTION 10-1-102 (13), C.R.S., ENGAGED IN THE BUSINESS OF WRITING APPEARANCE BONDS THROUGH BONDING AGENTS, WHICH COMPANY IS SUBJECT TO REGULATION BY THE DIVISION OF INSURANCE IN THE DEPARTMENT OF REGULATORY AGENCIES.

(b) "BOARD SYSTEM" MEANS ANY REASONABLE METHOD ESTABLISHED BY A COURT TO PUBLICLY POST OR DISSEMINATE THE NAME OF ANY COMPENSATED SURETY WHO IS PROHIBITED FROM POSTING BAIL BONDS.

(c) "COMPENSATED SURETY" MEANS ANY PERSON WHO IS IN THE BUSINESS OF WRITING APPEARANCE BONDS AND WHO IS SUBJECT TO REGULATION BY THE DIVISION OF INSURANCE IN THE DEPARTMENT OF REGULATORY AGENCIES, INCLUDING BONDING AGENTS AND BAIL INSURANCE COMPANIES. NOTHING IN THIS PARAGRAPH

(c) AUTHORIZES BAIL INSURANCE COMPANIES TO WRITE APPEARANCE BONDS EXCEPT THROUGH BAIL BONDING AGENTS.

(d) "ON THE BOARD" MEANS THAT THE NAME OF A COMPENSATED SURETY HAS BEEN PUBLICLY POSTED OR DISSEMINATED BY A COURT AS BEING INELIGIBLE TO WRITE BAIL BONDS PURSUANT TO PARAGRAPH (c) OR (f) OF SUBSECTION (5) OF THIS SECTION.

(3) EACH COURT OF RECORD IN THIS STATE SHALL IMPLEMENT A BOARD SYSTEM FOR THE RECORDING AND DISSEMINATION OF THE NAMES OF THOSE COMPENSATED SURETIES WHO ARE PROHIBITED FROM POSTING BAIL BONDS IN THE STATE DUE TO AN UNPAID JUDGMENT AS SET FORTH IN THIS SECTION.

(4) BY ENTERING INTO A BOND, EACH OBLIGOR, INCLUDING THE BOND PRINCIPAL AND COMPENSATED SURETY, SUBMITS TO THE JURISDICTION OF THE COURT AND ACKNOWLEDGES THE APPLICABILITY OF THE FORFEITURE PROCEDURES SET FORTH IN THIS SECTION.

(5) LIABILITY OF BOND OBLIGORS ON BONDS ISSUED BY COMPENSATED SURETIES MAY BE ENFORCED, WITHOUT THE NECESSITY OF AN INDEPENDENT ACTION, AS FOLLOWS:

(a) IN THE EVENT A DEFENDANT DOES NOT APPEAR BEFORE THE COURT AND IS IN VIOLATION OF THE PRIMARY CONDITION OF AN APPEARANCE BOND, THE COURT MAY DECLARE THE BOND FORFEITED.

(b) (i) IF A BOND IS DECLARED FORFEITED BY THE COURT, NOTICE OF THE BAIL FORFEITURE ORDER SHALL BE SERVED ON THE BONDING AGENT BY CERTIFIED MAIL AND ON THE BAIL INSURANCE COMPANY BY REGULAR MAIL WITHIN FOURTEEN DAYS AFTER THE ENTRY OF SAID FORFEITURE. IF THE COMPENSATED SURETY ON THE BOND IS A CASH BONDING AGENT, ONLY THE CASH BONDING AGENT SHALL BE NOTIFIED OF THE FORFEITURE. SERVICE OF NOTICE OF THE BAIL

FORFEITURE ON THE DEFENDANT IS NOT REQUIRED.

(II) THE NOTICE DESCRIBED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH (b) SHALL INCLUDE, BUT NEED NOT BE LIMITED TO:

(A) A STATEMENT INTENDED TO INFORM THE COMPENSATED SURETY OF THE ENTRY OF FORFEITURE;

(B) AN ADVISEMENT THAT THE COMPENSATED SURETY HAS THE RIGHT TO REQUEST A SHOW CAUSE HEARING PURSUANT TO SUBPARAGRAPH (III) OF THIS PARAGRAPH (b) WITHIN FOURTEEN DAYS AFTER RECEIPT OF NOTICE OF FORFEITURE, BY PROCEDURES SET BY THE COURT; AND

(C) AN ADVISEMENT THAT IF THE COMPENSATED SURETY DOES NOT REQUEST A SHOW CAUSE HEARING PURSUANT TO SUBPARAGRAPH (III) OF THIS PARAGRAPH (b), JUDGMENT SHALL BE ENTERED UPON EXPIRATION OF THIRTY-FIVE DAYS FOLLOWING THE ENTRY OF FORFEITURE.

(III) A COMPENSATED SURETY, UPON WHOM NOTICE OF A BAIL FORFEITURE ORDER HAS BEEN SERVED, SHALL HAVE FOURTEEN DAYS AFTER RECEIPT OF NOTICE OF SUCH FORFEITURE TO REQUEST A HEARING TO SHOW CAUSE WHY JUDGMENT ON THE FORFEITURE SHOULD NOT BE ENTERED FOR THE STATE AGAINST THE COMPENSATED SURETY. SUCH REQUEST SHALL BE GRANTED BY THE COURT AND A HEARING SHALL BE SET WITHIN THIRTY-FIVE DAYS AFTER ENTRY OF FORFEITURE OR AT THE COURT'S

EARLIEST CONVENIENCE. AT THE CONCLUSION OF THE HEARING REQUESTED BY THE COMPENSATED SURETY, IF ANY, THE COURT MAY ENTER JUDGMENT FOR THE STATE AGAINST THE COMPENSATED SURETY, OR THE COURT MAY IN ITS DISCRETION ORDER FURTHER HEARINGS. UPON EXPIRATION OF THIRTY-FIVE DAYS AFTER THE ENTRY OF FORFEITURE, THE COURT SHALL ENTER JUDGMENT FOR THE STATE AGAINST THE COMPENSATED SURETY IF THE COMPENSATED SURETY DID NOT REQUEST WITHIN FOURTEEN DAYS AFTER RECEIPT OF NOTICE OF SUCH FORFEITURE A HEARING TO SHOW CAUSE.

(IV) IF SUCH A SHOW CAUSE HEARING WAS TIMELY SET BUT THE HEARING DID NOT OCCUR WITHIN THIRTY-FIVE DAYS AFTER THE ENTRY OF FORFEITURE, ANY ENTRY OF JUDGMENT AT THE CONCLUSION OF THE HEARING AGAINST THE COMPENSATED SURETY SHALL NOT BE VACATED ON THE GROUNDS THAT THE MATTER WAS NOT TIMELY HEARD. IF JUDGMENT IS ENTERED AGAINST A COMPENSATED SURETY UPON THE CONCLUSION OF A REQUESTED SHOW CAUSE HEARING, AND SUCH HEARING DID NOT OCCUR WITHIN THIRTY-FIVE DAYS AFTER THE ENTRY OF FORFEITURE, EXECUTION UPON SAID JUDGMENT SHALL BE AUTOMATICALLY STAYED FOR NO MORE THAN ONE HUNDRED TWENTY-SIX DAYS AFTER ENTRY OF FORFEITURE.

(V) (A) IF AT ANY TIME PRIOR TO THE ENTRY OF JUDGMENT, THE DEFENDANT APPEARS IN COURT, EITHER VOLUNTARILY OR IN CUSTODY AFTER SURRENDER OR ARREST, THE COURT SHALL ON ITS OWN MOTION DIRECT THAT THE BAIL

FORFEITURE BE SET ASIDE AND THE BOND EXONERATED AT THE TIME THE DEFENDANT FIRST APPEARS IN COURT; EXCEPT THAT, IF THE STATE EXTRADITES SUCH DEFENDANT, ALL NECESSARY AND ACTUAL COSTS ASSOCIATED WITH SUCH EXTRADITION SHALL BE BORNE BY THE SURETY UP TO THE AMOUNT OF THE BOND.

(B) IF, AT A TIME PRIOR TO THE ENTRY OF JUDGMENT, THE SURETY PROVIDES PROOF TO THE COURT THAT THE DEFENDANT IS IN CUSTODY IN ANY OTHER JURISDICTION WITHIN THE STATE, THE COURT SHALL ON ITS OWN MOTION DIRECT THAT THE BAIL FORFEITURE BE SET ASIDE AND THE BOND EXONERATED; EXCEPT THAT, IF THE COURT EXTRADITES THE DEFENDANT, ALL NECESSARY AND ACTUAL COSTS ASSOCIATED WITH THE EXTRADITION SHALL BE BORNE BY THE SURETY UP TO THE AMOUNT OF THE BOND. IF THE COURT ELECTS TO EXTRADITE THE DEFENDANT, ANY FORFEITURE WILL BE STAYED UNTIL SUCH TIME THE DEFENDANT APPEARS IN THE COURT WHERE THE BOND RETURNS.

(C) A COMPENSATED SURETY SHALL BE EXONERATED FROM LIABILITY UPON THE BOND BY SATISFACTION OF THE BAIL FORFEITURE JUDGMENT, SURRENDER OF THE DEFENDANT, OR ORDER OF THE COURT. IF THE SURETY PROVIDES PROOF TO THE COURT THAT THE DEFENDANT IS IN CUSTODY IN ANY OTHER JURISDICTION WITHIN THE STATE, WITHIN NINETY-ONE DAYS AFTER THE ENTRY OF JUDGMENT, THE COURT SHALL ON ITS OWN MOTION DIRECT THAT THE BAIL FORFEITURE JUDGMENT BE VACATED AND THE BOND EXONERATED; EXCEPT THAT, IF THE COURT

EXTRADITES THE DEFENDANT, ALL NECESSARY AND ACTUAL COSTS ASSOCIATED WITH THE EXTRADITION SHALL BE BORNE BY THE SURETY UP TO THE AMOUNT OF THE BOND. IF THE COURT ELECTS TO EXTRADITE THE DEFENDANT, ANY JUDGMENT WILL BE STAYED UNTIL THE TIME THE DEFENDANT APPEARS IN THE COURT WHERE THE BOND RETURNS.

(c) EXECUTION UPON SAID BAIL FORFEITURE JUDGMENT SHALL BE AUTOMATICALLY STAYED FOR NINETY-ONE DAYS FROM THE DATE OF ENTRY OF JUDGMENT; EXCEPT THAT, IF JUDGMENT IS ENTERED AGAINST A COMPENSATED SURETY UPON THE CONCLUSION OF A REQUESTED SHOW CAUSE HEARING, AND SUCH HEARING DID NOT OCCUR WITHIN THIRTY-FIVE DAYS AFTER THE ENTRY OF FORFEITURE, THE JUDGMENT SHALL BE AUTOMATICALLY STAYED AS SET FORTH IN SUBPARAGRAPH (iv) OF PARAGRAPH (b) OF THIS SUBSECTION (5).

(d) UPON THE EXPIRATION OF THE STAY OF EXECUTION DESCRIBED IN PARAGRAPH (c) OF THIS SUBSECTION (5), THE BAIL FORFEITURE JUDGMENT SHALL BE PAID FORTHWITH BY THE COMPENSATED SURETY, IF NOT PREVIOUSLY PAID, UNLESS THE DEFENDANT APPEARS IN COURT, EITHER VOLUNTARILY OR IN CUSTODY AFTER SURRENDER OR ARREST, OR THE COURT ENTERS AN ORDER GRANTING AN ADDITIONAL STAY OF EXECUTION OR OTHERWISE VACATES THE JUDGMENT.

(e) IF A BAIL FORFEITURE JUDGMENT IS NOT PAID ON OR BEFORE THE EXPIRATION DATE OF THE STAY OF EXECUTION

DESCRIBED IN PARAGRAPH (c) OF THIS SUBSECTION (5), THE NAME OF THE BONDING AGENT SHALL BE PLACED ON THE BOARD OF THE COURT THAT ENTERED THE JUDGMENT. THE BONDING AGENT SHALL BE PROHIBITED FROM EXECUTING ANY FURTHER BAIL BONDS IN THIS STATE UNTIL THE JUDGMENT GIVING RISE TO PLACEMENT ON THE BOARD IS SATISFIED, VACATED, OR OTHERWISE DISCHARGED BY ORDER OF THE COURT.

(f) IF A BAIL FORFEITURE JUDGMENT REMAINS UNPAID FOR THIRTY-FIVE DAYS AFTER THE NAME OF THE BONDING AGENT IS PLACED ON THE BOARD, THE COURT SHALL SEND NOTICE BY CERTIFIED MAIL TO THE BAIL INSURANCE COMPANY FOR WHOM THE BONDING AGENT HAS EXECUTED THE BOND THAT IF SAID JUDGMENT IS NOT PAID WITHIN FOURTEEN DAYS AFTER THE DATE OF MAILING OF SAID NOTICE, THE NAME OF THE BAIL INSURANCE COMPANY SHALL BE PLACED ON THE BOARD AND SUCH COMPANY SHALL BE PROHIBITED FROM EXECUTING ANY FURTHER BAIL BONDS IN THIS STATE UNTIL THE JUDGMENT GIVING RISE TO PLACEMENT ON THE BOARD IS SATISFIED, VACATED, OR OTHERWISE DISCHARGED BY ORDER OF THE COURT.

(g) A COMPENSATED SURETY SHALL BE REMOVED FORTHWITH FROM THE BOARD ONLY AFTER EVERY JUDGMENT FOR WHICH THE COMPENSATED SURETY WAS PLACED ON THE BOARD IS SATISFIED, VACATED, OR DISCHARGED OR STAYED BY ENTRY OF AN ADDITIONAL STAY OF EXECUTION. NO COMPENSATED SURETY SHALL BE PLACED ON THE BOARD IN THE

ABSENCE OF THE NOTICE REQUIRED BY PARAGRAPH (b) OR (f) OF THIS SUBSECTION (5).

(h) THE COURT MAY ORDER THAT A BAIL FORFEITURE JUDGMENT BE VACATED AND SET ASIDE OR THAT EXECUTION THEREON BE STAYED UPON SUCH CONDITIONS AS THE COURT MAY IMPOSE, IF IT APPEARS THAT JUSTICE SO REQUIRES.

(i) A COMPENSATED SURETY SHALL BE EXONERATED FROM LIABILITY UPON THE BOND BY SATISFACTION OF THE BAIL FORFEITURE JUDGMENT, SURRENDER OF THE DEFENDANT, OR BY ORDER OF THE COURT. IF THE DEFENDANT APPEARS IN COURT, EITHER VOLUNTARILY OR IN CUSTODY AFTER SURRENDER OR ARREST, WITHIN NINETY-ONE DAYS AFTER THE ENTRY OF JUDGMENT, THE COURT, AT THE TIME THE DEFENDANT FIRST APPEARS IN COURT, SHALL ON ITS OWN MOTION DIRECT THAT THE BAIL FORFEITURE JUDGMENT BE VACATED AND THE BOND EXONERATED; EXCEPT THAT, IF THE STATE EXTRADITES SUCH DEFENDANT, ALL NECESSARY AND ACTUAL COSTS ASSOCIATED WITH SUCH EXTRADITION SHALL BE BORNE BY THE SURETY UP TO THE AMOUNT OF THE BOND.

(j) IF, WITHIN ONE YEAR AFTER PAYMENT OF THE BAIL FORFEITURE JUDGMENT, THE COMPENSATED SURETY EFFECTS THE APPREHENSION OR SURRENDER OF THE DEFENDANT AND PROVIDES REASONABLE NOTICE TO THE COURT TO WHICH THE BOND RETURNS THAT THE DEFENDANT IS AVAILABLE FOR EXTRADITION, THE COURT SHALL VACATE THE JUDGMENT AND

ORDER A REMISSION OF THE AMOUNT PAID ON THE BOND LESS ANY NECESSARY AND ACTUAL COSTS INCURRED BY THE STATE AND THE SHERIFF WHO HAS ACTUALLY EXTRADITED THE DEFENDANT.

(k) BAIL BONDS SHALL BE DEEMED VALID NOTWITHSTANDING THE FACT THAT A BOND MAY HAVE BEEN WRITTEN BY A COMPENSATED SURETY WHO HAS BEEN PLACED ON THE BOARD PURSUANT TO PARAGRAPH (e) OR (f) OF THIS SUBSECTION (5) AND IS OTHERWISE PROHIBITED FROM WRITING BAIL BONDS. THE INELIGIBILITY OF A COMPENSATED SURETY TO WRITE BONDS BECAUSE THE NAME OF THE COMPENSATED SURETY HAS BEEN PLACED ON THE BOARD PURSUANT TO PARAGRAPH (e) OR (f) OF THIS SUBSECTION (5) SHALL NOT BE A DEFENSE TO LIABILITY ON ANY APPEARANCE BOND ACCEPTED BY A COURT.

(l) THE AUTOMATIC STAY OF EXECUTION UPON A BAIL FORFEITURE JUDGMENT AS DESCRIBED IN PARAGRAPH (c) OF THIS SUBSECTION (5) SHALL EXPIRE PURSUANT TO ITS TERMS UNLESS THE DEFENDANT APPEARS AND SURRENDERS TO THE COURT HAVING JURISDICTION OR SATISFIES THE COURT THAT APPEARANCE AND SURRENDER BY THE DEFENDANT WAS IMPOSSIBLE AND WITHOUT FAULT BY SUCH DEFENDANT. THE COURT MAY ORDER THAT A FORFEITURE BE SET ASIDE AND JUDGMENT VACATED AS SET FORTH IN PARAGRAPH (h) OF THIS SUBSECTION (5).

(6) A BAIL INSURANCE COMPANY SHALL NOT WRITE BAIL BONDS UNLESS THROUGH A LICENSED BAIL BONDING AGENT.

**16-4-115. Severability. IF ANY PROVISION OF THIS PART 1 OR THE APPLICATION THEREOF TO ANY PERSON OR CIRCUMSTANCE IS HELD INVALID, SUCH INVALIDITY DOES NOT AFFECT OTHER PROVISIONS OR APPLICATIONS OF THIS PART 1 THAT CAN BE GIVEN EFFECT WITHOUT THE INVALID PROVISION OR APPLICATION, AND TO THIS END THE PROVISIONS OF THIS PART 1 ARE DECLARED TO BE SEVERABLE.**

First Regular Session  
Sixty-ninth General Assembly  
STATE OF COLORADO

INTRODUCED

LLS NO. 13-0717.01 Michael Dohr x4347

HOUSE BILL 13-1236

HOUSE SPONSORSHIP

Levy, Labuda, Lee

SENATE SPONSORSHIP

Ulibarri, Giron, Guzman

House Committees  
Judiciary

Senate Committees

A BILL FOR AN ACT

101 CONCERNING PRE-TRIAL RELEASE FROM CUSTODY.

Bill Summary

*(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://www.leg.state.co.us/billsummaries>.)*

The bill repeals and reenacts the provisions of the criminal procedure code related to bail bonds. The new provision places a greater emphasis on evidence-based and individualized decision-making during the bond-setting process and discourages use of monetary conditions for bond. The bill makes conforming amendments.

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.  
Capital letters indicate new material to be added to existing statute.  
Dashes through the words indicate deletions from existing statute.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** In Colorado Revised Statutes, 16-1-104, **amend** (3);  
3 and **add** (9.5) as follows:

4 **16-1-104. Definitions.** (3) "Bail" means the amount of money set  
5 by the court which is required to be obligated by a bond for the release of  
6 a person in custody to assure that he will appear before the court in which  
7 his appearance is required or that he will comply with other conditions set  
8 forth in a bond A PLEDGE, SUCH AS A BOND, REQUIRED BY A COURT FOR  
9 THE RELEASE OF A PERSON IN CUSTODY WITH CONDITIONS SET TO PROVIDE  
10 REASONABLE ASSURANCE OF PUBLIC SAFETY AND COURT APPEARANCE.

11 (9.5) "EVIDENCE-BASED DECISION-MAKING" MEANS  
12 DECISION-MAKING THAT INCORPORATES INTO THE BAIL PROCESS  
13 SIGNIFICANT AND RELEVANT SCIENTIFICALLY BASED RESEARCH.  
14 SCIENTIFICALLY BASED RESEARCH MEANS RESEARCH THAT OBTAINS  
15 RELIABLE AND VALID KNOWLEDGE BY EMPLOYING SYSTEMATIC,  
16 EMPIRICAL METHODS THAT TEST THE STATED HYPOTHESES AND JUSTIFY  
17 THE GENERAL CONCLUSIONS DRAWN.

18 **SECTION 2.** In Colorado Revised Statutes, **repeal and reenact,**  
19 **with amendments,** part 1 of article 4 of title 16 as follows:

20 PART 1

21 RELEASE ON BAIL

22 **16-4-101. Bailable offenses - definitions.** (1) ALL PERSONS  
23 SHALL BE BAILABLE BY SUFFICIENT SURETIES EXCEPT:

24 (a) FOR CAPITAL OFFENSES WHEN PROOF IS EVIDENT OR  
25 PRESUMPTION IS GREAT; OR

26 (b) WHEN, AFTER A HEARING HELD WITHIN NINETY-SIX HOURS OF  
27 ARREST AND UPON REASONABLE NOTICE, THE COURT FINDS THAT THE

1 PROOF IS EVIDENT OR THE PRESUMPTION IS GREAT AS TO THE CRIME  
2 ALLEGED TO HAVE BEEN COMMITTED AND FINDS THAT THE PUBLIC WOULD  
3 BE PLACED IN SIGNIFICANT PERIL IF THE ACCUSED WERE RELEASED ON BAIL  
4 AND SUCH PERSON IS ACCUSED IN ANY OF THE FOLLOWING CASES:

5 (I) A CRIME OF VIOLENCE ALLEGED TO HAVE BEEN COMMITTED  
6 WHILE ON PROBATION OR PAROLE RESULTING FROM THE CONVICTION OF A  
7 CRIME OF VIOLENCE;

8 (II) A CRIME OF VIOLENCE ALLEGED TO HAVE BEEN COMMITTED  
9 WHILE ON BAIL PENDING THE DISPOSITION OF A PREVIOUS CRIME OF  
10 VIOLENCE CHARGE FOR WHICH PROBABLE CAUSE HAS BEEN FOUND;

11 (III) A CRIME OF VIOLENCE ALLEGED TO HAVE BEEN COMMITTED  
12 AFTER TWO PREVIOUS FELONY CONVICTIONS, OR ONE SUCH PREVIOUS  
13 FELONY CONVICTION IF SUCH CONVICTION WAS FOR A CRIME OF VIOLENCE,  
14 UPON CHARGES SEPARATELY BROUGHT AND TRIED UNDER THE LAWS OF  
15 THIS STATE OR UNDER THE LAWS OF ANY OTHER STATE, THE UNITED  
16 STATES, OR ANY TERRITORY SUBJECT TO THE JURISDICTION OF THE UNITED  
17 STATES WHICH, IF COMMITTED IN THIS STATE, WOULD BE A FELONY;

18 (IV) A CRIME OF POSSESSION OF A WEAPON BY A PREVIOUS  
19 OFFENDER ALLEGED TO HAVE BEEN COMMITTED IN VIOLATION OF SECTION  
20 18-12-108 (2) (b), (2) (c), (4) (b), (4) (c), OR (5), C.R.S.; OR

21 (c) WHEN A PERSON HAS BEEN CONVICTED OF A CRIME OF  
22 VIOLENCE OR A CRIME OF POSSESSION OF A WEAPON BY A PREVIOUS  
23 OFFENDER, AS DESCRIBED IN SECTION 18-12-108 (2) (b), (2) (c), (4) (b),  
24 (4) (c), OR (5), C.R.S., AT THE TRIAL COURT LEVEL AND SUCH PERSON IS  
25 APPEALING SUCH CONVICTION OR AWAITING SENTENCING FOR SUCH  
26 CONVICTION AND THE COURT FINDS THAT THE PUBLIC WOULD BE PLACED  
27 IN SIGNIFICANT PERIL IF THE CONVICTED PERSON WERE RELEASED ON BAIL.

1           (2) FOR PURPOSES OF THIS SECTION, "CRIME OF VIOLENCE" SHALL  
2 HAVE THE SAME MEANING AS SET FORTH IN SECTION 18-1.3-406 (2), C.R.S.

3           (3) IN ANY CAPITAL CASE, THE DEFENDANT MAY MAKE A WRITTEN  
4 MOTION FOR ADMISSION TO BAIL UPON THE GROUND THAT THE PROOF IS  
5 NOT EVIDENT OR THAT PRESUMPTION IS NOT GREAT, AND THE COURT  
6 SHALL PROMPTLY CONDUCT A HEARING UPON SUCH MOTION. AT SUCH  
7 HEARING, THE BURDEN SHALL BE UPON THE PEOPLE TO ESTABLISH THAT  
8 THE PROOF IS EVIDENT OR THAT THE PRESUMPTION IS GREAT. THE COURT  
9 MAY COMBINE IN A SINGLE HEARING THE QUESTIONS AS TO WHETHER THE  
10 PROOF IS EVIDENT OR THE PRESUMPTION GREAT WITH THE DETERMINATION  
11 OF THE EXISTENCE OF PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT  
12 COMMITTED THE CRIME CHARGED.

13           (4) EXCEPT IN THE CASE OF A CAPITAL OFFENSE, IF A PERSON IS  
14 DENIED BAIL UNDER THIS SECTION, THE TRIAL OF THE PERSON SHALL BE  
15 COMMENCED NOT MORE THAN NINETY-ONE DAYS AFTER THE DATE ON  
16 WHICH BAIL IS DENIED. IF THE TRIAL IS NOT COMMENCED WITHIN  
17 NINETY-ONE DAYS AND THE DELAY IS NOT ATTRIBUTABLE TO THE  
18 DEFENSE, THE COURT SHALL IMMEDIATELY SCHEDULE A BAIL HEARING  
19 AND SHALL SET THE AMOUNT OF THE BAIL FOR THE PERSON.

20           (5) WHEN A PERSON IS ARRESTED FOR A CRIME OF VIOLENCE, AS  
21 DEFINED IN SECTION 16-1-104 (8.5), OR A CRIMINAL OFFENSE ALLEGING  
22 THE USE OR POSSESSION OF A DEADLY WEAPON OR THE CAUSING OF BODILY  
23 INJURY TO ANOTHER PERSON, OR A CRIMINAL OFFENSE ALLEGING THE  
24 POSSESSION OF A WEAPON BY A PREVIOUS OFFENDER, AS DESCRIBED IN  
25 SECTION 18-12-108 (2) (b), (2) (c), (4) (b), (4) (c), OR (5), C.R.S., AND  
26 SUCH PERSON IS ON PAROLE, THE LAW ENFORCEMENT AGENCY MAKING  
27 THE ARREST SHALL NOTIFY THE DEPARTMENT OF CORRECTIONS WITHIN

1 TWENTY-FOUR HOURS. THE PERSON SO ARRESTED SHALL NOT BE ELIGIBLE  
2 FOR BAIL TO BE SET UNTIL AT LEAST SEVENTY-TWO HOURS FROM THE TIME  
3 OF HIS OR HER ARREST HAS PASSED.

4 **16-4-102. Right to bail - before conviction.** (1) ANY PERSON  
5 WHO IS IN CUSTODY, AND FOR WHOM THE COURT HAS NOT SET BOND AND  
6 CONDITIONS OF RELEASE PURSUANT TO THE APPLICABLE RULE OF  
7 CRIMINAL PROCEDURE, AND WHO IS NOT SUBJECT TO THE PROVISIONS OF  
8 SECTION 16-4-101 (5), HAS THE RIGHT TO A HEARING TO DETERMINE BOND  
9 AND CONDITIONS OF RELEASE. A PERSON IN CUSTODY MAY ALSO REQUEST  
10 A HEARING SO THAT BOND AND CONDITIONS OF RELEASE CAN BE SET.  
11 UPON RECEIVING THE REQUEST, THE JUDGE SHALL NOTIFY THE DISTRICT  
12 ATTORNEY IMMEDIATELY OF THE ARRESTED PERSON'S REQUEST, AND THE  
13 DISTRICT ATTORNEY SHALL HAVE THE RIGHT TO ATTEND AND ADVISE THE  
14 COURT OF MATTERS PERTINENT TO THE BOND AND CONDITIONS OF  
15 RELEASE TO BE SET. THE JUDGE SHALL ALSO ORDER THE APPROPRIATE LAW  
16 ENFORCEMENT AGENCY HAVING CUSTODY OF THE PRISONER TO BRING HIM  
17 OR HER BEFORE THE COURT FORTHWITH, AND THE JUDGE SHALL SET BOND  
18 AND CONDITIONS OF RELEASE IF THE OFFENSE FOR WHICH THE PERSON WAS  
19 ARRESTED IS BAILABLE. IT SHALL NOT BE A PREREQUISITE TO BAIL THAT A  
20 CRIMINAL CHARGE OF ANY KIND HAS BEEN FILED.

21 (2) THE COURT SHALL IMPLEMENT EVIDENCE-BASED  
22 DECISION-MAKING PRACTICES AS DEFINED IN SECTION 16-1-104 (9.5), TO  
23 THE EXTENT PRACTICABLE AND AVAILABLE IN THE JURISDICTION,  
24 THROUGH THE USE OF AN EMPIRICALLY DEVELOPED RISK ASSESSMENT  
25 INSTRUMENT DESIGNED TO IMPROVE PRETRIAL RELEASE DECISIONS BY  
26 PROVIDING TO THE COURT INFORMATION THAT CLASSIFIES A PERSON IN  
27 CUSTODY BASED UPON THE PREDICTED LEVEL OF RISK OF PRETRIAL

1 FAILURE.

2 **16-4-103. Setting and selection of bond - criteria.** (1) AT THE  
3 FIRST APPEARANCE OF A PERSON IN CUSTODY BEFORE A COURT OF RECORD,  
4 THE COURT SHALL DETERMINE THE TYPE OF BOND AND CONDITIONS OF  
5 RELEASE UNLESS THE PERSON IS SUBJECT TO THE PROVISIONS OF SECTION  
6 16-4-101.

7 (2) IF AN INDICTMENT, INFORMATION, OR COMPLAINT HAS BEEN  
8 FILED AND THE TYPE OF BOND AND CONDITIONS OF RELEASE HAVE BEEN  
9 FIXED UPON RETURN OF THE INDICTMENT OR FILING OF THE INFORMATION  
10 OR COMPLAINT, THE COURT SHALL REVIEW THE PROPRIETY OF THE TYPE OF  
11 BOND AND CONDITIONS OF RELEASE UPON FIRST APPEARANCE OF A PERSON  
12 IN CUSTODY.

13 (3) THE TYPE OF BOND AND CONDITIONS OF RELEASE SHALL BE  
14 SUFFICIENT TO REASONABLY ENSURE THE APPEARANCE OF THE PERSON AS  
15 REQUIRED AND TO PROTECT THE SAFETY OF ANY PERSON OR THE  
16 COMMUNITY, TAKING INTO CONSIDERATION THE INDIVIDUAL  
17 CHARACTERISTICS OF EACH PERSON IN CUSTODY, INCLUDING THE PERSON'S  
18 FINANCIAL CONDITION.

19 (4) WHEN THE TYPE OF BOND AND CONDITIONS OF RELEASE ARE  
20 DETERMINED BY THE COURT, THE COURT SHALL:

21 (a) PRESUME THAT ALL PERSONS IN CUSTODY ARE ELIGIBLE FOR  
22 RELEASE ON BOND WITH THE APPROPRIATE AND LEAST-RESTRICTIVE  
23 CONDITIONS UNLESS A PERSON IS OTHERWISE INELIGIBLE FOR RELEASE  
24 SUBJECT TO THE PROVISIONS OF SECTION 16-4-101 AND SECTION 19 OF  
25 ARTICLE II OF THE COLORADO CONSTITUTION;

26 (b) LIMIT THE USE OF BOND SCHEDULES AND MONETARY  
27 CONDITIONS THAT ARE SOLELY BASED UPON THE LEVEL OF THE OFFENSE

1 WITHOUT CONSIDERATION OF THE INDIVIDUALIZED RISK AND  
2 CIRCUMSTANCES OF A PERSON IN CUSTODY AND ALL OTHER RELEVANT  
3 CRITERIA; AND

4 (c) CONSIDER DIFFERENT METHODS AND LEVELS OF  
5 COMMUNITY-BASED SUPERVISION AS CONDITIONS OF PRETRIAL RELEASE  
6 AS AN ALTERNATIVE TO MONETARY CONDITIONS OF RELEASE IN ORDER TO  
7 DECREASE UNNECESSARY PRETRIAL INCARCERATION.

8 (5) THE COURT MAY ALSO CONSIDER THE FOLLOWING CRITERIA AS  
9 APPROPRIATE AND RELEVANT IN MAKING A DETERMINATION OF THE TYPE  
10 OF BOND AND CONDITIONS OF RELEASE;

11 (a) THE EMPLOYMENT STATUS AND HISTORY OF THE PERSON IN  
12 CUSTODY;

13 (b) THE NATURE AND EXTENT OF FAMILY RELATIONSHIPS OF THE  
14 PERSON IN CUSTODY;

15 (c) PAST AND PRESENT RESIDENCES OF THE PERSON IN CUSTODY;

16 (d) THE CHARACTER AND REPUTATION OF THE PERSON IN  
17 CUSTODY;

18 (e) IDENTITY OF PERSONS WHO AGREE TO ASSIST THE PERSON IN  
19 CUSTODY IN ATTENDING COURT AT THE PROPER TIME;

20 (f) THE LIKELY SENTENCE, CONSIDERING THE NATURE AND THE  
21 OFFENSE PRESENTLY CHARGED;

22 (g) THE PRIOR CRIMINAL RECORD, IF ANY, OF THE PERSON IN  
23 CUSTODY AND ANY PRIOR FAILURES TO APPEAR FOR COURT;

24 (h) ANY FACTS INDICATING THE POSSIBILITY OF VIOLATIONS OF  
25 THE LAW IF THE PERSON IN CUSTODY IS RELEASED WITHOUT CERTAIN  
26 CONDITIONS OF RELEASE;

27 (i) ANY FACTS INDICATING THAT THE DEFENDANT IS LIKELY TO

1 INTIMIDATE OR HARASS POSSIBLE WITNESSES; AND

2 (j) ANY OTHER FACTS TENDING TO INDICATE THAT THE PERSON IN  
3 CUSTODY HAS STRONG TIES TO THE COMMUNITY AND IS NOT LIKELY TO  
4 FLEE THE JURISDICTION.

5 (6) WHEN A PERSON IS CHARGED WITH AN OFFENSE PUNISHABLE  
6 BY FINE ONLY, ANY MONETARY CONDITION OF RELEASE SHALL NOT  
7 EXCEED THE AMOUNT OF THE MAXIMUM FINE PENALTY.

8 **16-4-104. Types of bond set by the court.** (1) THE COURT SHALL  
9 DETERMINE, AFTER CONSIDERATION OF ALL RELEVANT CRITERIA, WHICH  
10 OF THE FOLLOWING TYPES OF BOND IS APPROPRIATE FOR THE PRETRIAL  
11 RELEASE OF A PERSON IN CUSTODY, SUBJECT TO THE RELEVANT  
12 STATUTORY CONDITIONS OF RELEASE LISTED IN SECTION 16-4-105. THE  
13 PERSON MAY BE RELEASED UPON EXECUTION OF:

14 (a) AN UNSECURED PERSONAL RECOGNIZANCE BOND IN AN  
15 AMOUNT SPECIFIED BY THE COURT. THE COURT MAY REQUIRE ADDITIONAL  
16 OBLIGORS ON THE BOND AS A CONDITION OF THE BOND.

17 (b) AN UNSECURED PERSONAL RECOGNIZANCE BOND WITH  
18 ADDITIONAL NON-MONETARY CONDITIONS OF RELEASE DESIGNED  
19 SPECIFICALLY TO REASONABLY ENSURE THE APPEARANCE OF THE PERSON  
20 IN COURT AND THE SAFETY OF ANY PERSON OR PERSONS OR THE  
21 COMMUNITY;

22 (c) A BOND WITH SECURED MONETARY CONDITIONS WHEN IT IS  
23 DETERMINED THAT RELEASE ON AN UNSECURED PERSONAL RECOGNIZANCE  
24 BOND WITH ADDITIONAL CONDITIONS BUT WITHOUT MONETARY  
25 CONDITIONS DOES NOT REASONABLY ENSURE THE APPEARANCE OF THE  
26 PERSON IN COURT OR THE SAFETY OF ANY PERSON OR PERSONS OR THE  
27 COMMUNITY. THE FINANCIAL CONDITIONS SHALL STATE AN AMOUNT OF

1 MONEY THAT THE PERSON MUST POST WITH THE COURT IN ORDER FOR THE  
2 PERSON TO BE RELEASED. THE PERSON MAY BE RELEASED FROM CUSTODY  
3 UPON EXECUTION OF BOND IN THE FULL AMOUNT OF MONEY TO BE  
4 SECURED IN ANY ONE OF THE FOLLOWING WAYS:

5 (I) BY A DEPOSIT WITH THE CLERK OF THE COURT OF AN AMOUNT  
6 OF CASH EQUAL TO THE REQUIRED SECURITY;

7 (II) BY REAL ESTATE SITUATED IN THIS STATE WITH  
8 UNENCUMBERED EQUITY NOT EXEMPT FROM EXECUTION OWNED BY THE  
9 ACCUSED OR ANY OTHER PERSON ACTING AS SURETY ON THE BOND, WHICH  
10 UNENCUMBERED EQUITY SHALL BE AT LEAST ONE AND ONE-HALF THE  
11 AMOUNT OF THE SECURITY SET IN THE BOND; OR

12 (III) BY SURETIES WORTH AT LEAST ONE AND ONE-HALF OF THE  
13 SECURITY SET IN THE BOND OR BY A BAIL BONDING AGENT OR A CASH  
14 BONDING AGENT QUALIFIED TO WRITE BAIL BONDS PURSUANT TO ARTICLE  
15 23 OF TITLE 10, C.R.S.

16 (d) A BOND WITH SECURED REAL ESTATE CONDITIONS WHEN IT IS  
17 DETERMINED THAT RELEASE ON AN UNSECURED PERSONAL RECOGNIZANCE  
18 BOND WITHOUT MONETARY CONDITIONS WILL NOT REASONABLY ENSURE  
19 THE APPEARANCE OF THE PERSON IN COURT OR THE SAFETY OF ANY  
20 PERSON OR PERSONS OR THE COMMUNITY. FOR A BOND SECURED BY REAL  
21 ESTATE, THE BOND SHALL NOT BE ACCEPTED BY THE CLERK OF THE COURT  
22 UNLESS THE RECORD OWNER OF SUCH PROPERTY PRESENTS TO THE CLERK  
23 OF THE COURT THE ORIGINAL DEED OF TRUST AS SET FORTH IN  
24 SUBPARAGRAPH (IV) OF THIS PARAGRAPH (d) AND THE APPLICABLE  
25 RECORDING FEE. UPON RECEIPT OF THE DEED OF TRUST AND FEE, THE  
26 CLERK OF THE COURT SHALL RECORD THE DEED OF TRUST WITH THE CLERK  
27 AND RECORDER FOR THE COUNTY IN WHICH THE PROPERTY IS LOCATED.

1 FOR A BOND SECURED BY REAL ESTATE, THE AMOUNT OF THE OWNER'S  
2 UNENCUMBERED EQUITY SHALL BE DETERMINED BY DEDUCTING THE  
3 AMOUNT OF ALL ENCUMBRANCES LISTED IN THE OWNER AND  
4 ENCUMBRANCES CERTIFICATE FROM THE ACTUAL VALUE OF SUCH REAL  
5 ESTATE AS SHOWN ON THE CURRENT NOTICE OF VALUATION. THE OWNER  
6 OF THE REAL ESTATE SHALL FILE WITH THE BOND THE FOLLOWING, WHICH  
7 SHALL CONSTITUTE A MATERIAL PART OF THE BOND:

8 (I) THE CURRENT NOTICE OF VALUATION FOR SUCH REAL ESTATE  
9 PREPARED BY THE COUNTY ASSESSOR PURSUANT TO SECTION 39-5-121,  
10 C.R.S.; AND

11 (II) EVIDENCE OF TITLE ISSUED BY A TITLE INSURANCE COMPANY  
12 OR AGENT LICENSED PURSUANT TO ARTICLE 11 OF TITLE 10, C.R.S.,  
13 WITHIN THIRTY-FIVE DAYS AFTER THE DATE UPON WHICH THE BOND IS  
14 FILED; AND

15 (III) A SWORN STATEMENT BY THE OWNER OF THE REAL ESTATE  
16 THAT THE REAL ESTATE IS SECURITY FOR THE COMPLIANCE BY THE  
17 ACCUSED WITH THE PRIMARY CONDITION OF THE BOND; AND

18 (IV) A DEED OF TRUST TO THE PUBLIC TRUSTEE OF THE COUNTY IN  
19 WHICH THE REAL ESTATE IS LOCATED THAT IS EXECUTED AND  
20 ACKNOWLEDGED BY ALL RECORD OWNERS OF THE REAL ESTATE. THE DEED  
21 OF TRUST SHALL NAME THE CLERK OF THE COURT APPROVING THE BOND  
22 AS BENEFICIARY. THE DEED OF TRUST SHALL SECURE AN AMOUNT EQUAL  
23 TO ONE AND ONE-HALF TIMES THE AMOUNT OF THE BOND.

24 (2) UNLESS THE DISTRICT ATTORNEY CONSENTS OR UNLESS THE  
25 COURT IMPOSES CERTAIN ADDITIONAL INDIVIDUALIZED CONDITIONS OF  
26 RELEASE AS DESCRIBED IN SECTION 16-4-105, A PERSON MUST NOT BE  
27 RELEASED ON AN UNSECURED PERSONAL RECOGNIZANCE BOND PURSUANT

1 TO PARAGRAPH (a) OF SUBSECTION (1) OF THIS SECTION UNDER THE  
2 FOLLOWING CIRCUMSTANCES:

3 (a) THE PERSON IS PRESENTLY FREE ON ANOTHER BOND OF ANY  
4 KIND IN ANOTHER CRIMINAL ACTION INVOLVING A FELONY OR A CLASS 1  
5 MISDEMEANOR;

6 (b) THE PERSON HAS A RECORD OF CONVICTION OF A CLASS 1  
7 MISDEMEANOR WITHIN TWO YEARS OR A FELONY WITHIN FIVE YEARS,  
8 PRIOR TO THE BAIL HEARING; OR

9 (c) THE PERSON HAS WILLFULLY FAILED TO APPEAR ON BOND IN  
10 ANY CASE INVOLVING A FELONY OR A CLASS 1 MISDEMEANOR CHARGE IN  
11 THE PRECEDING FIVE YEARS.

12 (3) A PERSON MAY NOT BE RELEASED ON AN UNSECURED  
13 PERSONAL RECOGNIZANCE BOND IF, AT THE TIME OF SUCH APPLICATION,  
14 THE PERSON IS PRESENTLY ON RELEASE UNDER A SURETY BOND FOR  
15 FELONY OR CLASS 1 MISDEMEANOR CHARGES UNLESS THE SURETY  
16 THEREON IS NOTIFIED AND AFFORDED AN OPPORTUNITY TO SURRENDER  
17 THE PERSON INTO CUSTODY ON SUCH TERMS AS THE COURT DEEMS JUST  
18 UNDER THE PROVISIONS OF SECTION 16-4-108.

19 (4) BECAUSE OF THE DANGER POSED TO ANY PERSON AND THE  
20 COMMUNITY, A PERSON WHO IS ARRESTED FOR AN OFFENSE UNDER  
21 SECTION 42-4-1301 (1) OR (2) (a), C.R.S., MAY NOT ATTEND A BAIL  
22 HEARING UNTIL THE PERSON IS NO LONGER INTOXICATED OR UNDER THE  
23 INFLUENCE OF DRUGS. THE PERSON SHALL BE HELD IN CUSTODY UNTIL THE  
24 PERSON MAY SAFELY ATTEND SUCH HEARING.

25 **16-4-105. Conditions of release on bond.** (1) FOR EACH BOND,  
26 THE COURT SHALL REQUIRE THAT THE RELEASED PERSON APPEAR TO  
27 ANSWER THE CHARGE AGAINST THE PERSON AT A PLACE AND UPON A DATE

1 CERTAIN AND AT ANY PLACE OR UPON ANY DATE TO WHICH THE  
2 PROCEEDING IS TRANSFERRED OR CONTINUED. THIS CONDITION IS THE  
3 ONLY CONDITION FOR WHICH A BREACH OF SURETY OR SECURITY ON THE  
4 BAIL BOND MAY BE SUBJECT TO FORFEITURE.

5 (2) FOR A PERSON WHO HAS BEEN ARRESTED FOR A FELONY  
6 OFFENSE, THE COURT SHALL REQUIRE AS A CONDITION OF A BOND THAT  
7 THE PERSON EXECUTE A WAIVER OF EXTRADITION STATING THE PERSON  
8 CONSENTS TO EXTRADITION TO THIS STATE AND WAIVES ALL FORMAL  
9 PROCEDURES INCIDENTAL TO EXTRADITION PROCEEDINGS IN THE EVENT  
10 THAT HE OR SHE IS ARRESTED IN ANOTHER STATE WHILE AT LIBERTY ON  
11 SUCH BAIL BOND AND ACKNOWLEDGING THAT HE OR SHE SHALL NOT BE  
12 ADMITTED TO BAIL IN ANY OTHER STATE PENDING EXTRADITION TO THIS  
13 STATE.

14 (3) ADDITIONAL CONDITIONS OF EVERY BOND IS THAT THE  
15 RELEASED PERSON SHALL NOT COMMIT ANY FELONY WHILE FREE ON SUCH  
16 A BAIL BOND, AND THE COURT IN WHICH THE ACTION IS PENDING HAS THE  
17 POWER TO REVOKE THE RELEASE OF THE PERSON, TO CHANGE ANY BOND  
18 CONDITION, INCLUDING THE AMOUNT OF ANY MONETARY CONDITION IF IT  
19 IS SHOWN THAT A COMPETENT COURT HAS FOUND PROBABLE CAUSE TO  
20 BELIEVE THAT THE DEFENDANT HAS COMMITTED A FELONY WHILE  
21 RELEASED, PENDING THE RESOLUTION OF A PRIOR FELONY CHARGE.

22 (4) AN ADDITIONAL CONDITION OF EVERY BOND IN CASES OF  
23 DOMESTIC VIOLENCE AS DEFINED IN SECTION 18-6-800.3 (1), C.R.S., IS  
24 THAT THE RELEASED PERSON ACKNOWLEDGE THE PROTECTION ORDER AS  
25 PROVIDED IN SECTION 18-1-1001 (5), C.R.S.

26 (5) AN ADDITIONAL CONDITION OF EVERY BOND IN A CASE OF AN  
27 OFFENSE UNDER SECTION 42-2-138 (1) (d) (I), C.R.S., OF DRIVING WHILE

1 SUCH PERSON'S DRIVER'S LICENSE OR PRIVILEGE TO DRIVE, EITHER AS A  
2 RESIDENT OR NONRESIDENT, IS RESTRAINED SOLELY OR PARTIALLY  
3 BECAUSE OF A CONVICTION OF A DRIVING OFFENSE PURSUANT TO SECTION  
4 42-4-1301 (1) OR (2) (a), C.R.S., IS THAT SUCH PERSON NOT DRIVE ANY  
5 MOTOR VEHICLE DURING THE PERIOD OF SUCH DRIVING RESTRAINT.

6 (6) (a) IF A PERSON IS ARRESTED FOR DRIVING UNDER THE  
7 INFLUENCE OR DRIVING WHILE ABILITY IMPAIRED, PURSUANT TO SECTION  
8 42-4-1301, C.R.S., AND THE PERSON HAS ONE OR MORE PREVIOUS  
9 CONVICTIONS FOR AN OFFENSE IN SECTION 42-4-1301, C.R.S., OR ONE OR  
10 MORE CONVICTIONS IN ANY OTHER JURISDICTION THAT WOULD  
11 CONSTITUTE A VIOLATION OF SECTION 42-4-1301, C.R.S., AS A CONDITION  
12 OF ANY BOND, THE COURT SHALL ORDER THAT THE PERSON ABSTAIN FROM  
13 THE USE OF ALCOHOL OR ILLEGAL DRUGS, AND SUCH ABSTINENCE SHALL  
14 BE MONITORED.

15 (b) A PERSON SEEKING RELIEF FROM ANY OF THE CONDITIONS  
16 IMPOSED PURSUANT TO PARAGRAPH (a) OF THIS SUBSECTION (6) SHALL  
17 FILE A MOTION WITH THE COURT, AND THE COURT SHALL CONDUCT A  
18 HEARING UPON THE MOTION. THE COURT SHALL CONSIDER WHETHER THE  
19 CONDITION FROM WHICH THE PERSON IS SEEKING RELIEF IS IN THE  
20 INTEREST OF JUSTICE AND WHETHER PUBLIC SAFETY WOULD BE  
21 ENDANGERED IF THE CONDITION WERE NOT ENFORCED. WHEN  
22 DETERMINING WHETHER TO GRANT RELIEF PURSUANT TO THIS PARAGRAPH  
23 (b), THE COURT SHALL CONSIDER WHETHER THE PERSON HAS  
24 VOLUNTARILY ENROLLED AND IS PARTICIPATING IN AN APPROPRIATE  
25 SUBSTANCE ABUSE TREATMENT PROGRAM.

26 (7) A PERSON MAY BE RELEASED ON A BOND WITH MONETARY  
27 CONDITION OF BOND, WHEN APPROPRIATE, AS DESCRIBED IN SECTION

1 16-4-104 (1) (c).

2 (8) IN ADDITION TO THE CONDITIONS SPECIFIED IN THIS SECTION,  
3 THE COURT MAY IMPOSE ANY ADDITIONAL CONDITIONS ON THE CONDUCT  
4 OF THE PERSON RELEASED THAT WILL ASSIST IN OBTAINING THE  
5 APPEARANCE OF THE PERSON IN COURT AND THE SAFETY OF ANY PERSON  
6 OR PERSONS AND THE COMMUNITY. THESE CONDITIONS MAY INCLUDE, BUT  
7 ARE NOT LIMITED TO, SUPERVISION BY A QUALIFIED PERSON OR  
8 ORGANIZATION OR SUPERVISION BY A PRETRIAL SERVICES PROGRAM  
9 ESTABLISHED PURSUANT TO SECTION 16-4-106. WHILE UNDER THE  
10 SUPERVISION OF A QUALIFIED ORGANIZATION OR PRETRIAL SERVICES  
11 PROGRAM, THE CONDITIONS OF RELEASE MAY INCLUDE, BUT ARE NOT  
12 LIMITED TO:

13 (a) PERIODIC TELEPHONE CONTACT WITH THE PROGRAM;

14 (b) PERIODIC OFFICE VISITS BY THE PERSON TO THE PRETRIAL  
15 SERVICES PROGRAM OR ORGANIZATION;

16 (c) PERIODIC VISITS TO THE PERSON'S HOME BY THE PROGRAM OR  
17 ORGANIZATION;

18 (d) MENTAL HEALTH OR SUBSTANCE ABUSE TREATMENT FOR THE  
19 PERSON, INCLUDING RESIDENTIAL TREATMENT;

20 (e) PERIODIC ALCOHOL OR DRUG TESTING OF THE PERSON;

21 (f) DOMESTIC VIOLENCE COUNSELING FOR THE PERSON;

22 (g) ELECTRONIC OR GLOBAL POSITION MONITORING OF THE  
23 PERSON;

24 (h) PRETRIAL WORK RELEASE FOR THE PERSON; AND

25 (i) OTHER SUPERVISION TECHNIQUES SHOWN BY RESEARCH TO  
26 INCREASE COURT APPEARANCE AND PUBLIC SAFETY RATES FOR PERSONS  
27 RELEASED ON BOND.

1           **16-4-106. Pretrial services programs.** (1) THE CHIEF JUDGE OF  
2 ANY JUDICIAL DISTRICT MAY ORDER A PERSON WHO IS ELIGIBLE FOR BOND  
3 OR OTHER PRETRIAL RELEASE TO BE EVALUATED BY A PRETRIAL SERVICES  
4 PROGRAM ESTABLISHED PURSUANT TO THIS SECTION, WHICH PROGRAM  
5 MUST ADVISE THE COURT ON BOND ELIGIBILITY AND RECOMMEND RELEASE  
6 OPTIONS CONSISTENT WITH THIS SECTION. THE CHIEF JUDGE MAY MAKE  
7 SUCH ORDER IN ANY OR ALL OF THE COUNTIES OF THE CHIEF JUDGE'S  
8 JUDICIAL DISTRICT.

9           (2) THE CHIEF JUDGE OF ANY JUDICIAL DISTRICT SHALL CONSULT,  
10 ON AN ANNUAL BASIS, WITH THE COUNTY OR COUNTIES WITHIN THE  
11 JUDICIAL DISTRICT IN AN EFFORT TO SUPPORT AND ENCOURAGE THE  
12 DEVELOPMENT BY THE COUNTY OR COUNTIES, TO THE EXTENT  
13 PRACTICABLE AND WITHIN AVAILABLE RESOURCES, OF PRETRIAL SERVICES  
14 PROGRAMS THAT SUPPORT THE WORK OF THE COURT AND EVIDENCE-BASED  
15 DECISION-MAKING AS DEFINED IN SECTION 16-1-104(9.5) IN DETERMINING  
16 THE TYPE OF BOND AND CONDITIONS OF RELEASE.

17           (3) ANY COUNTY OR CITY AND COUNTY SHALL CONSIDER THE  
18 DEVELOPMENT OF A PRETRIAL SERVICES PROGRAM, TO THE EXTENT  
19 PRACTICABLE AND WITHIN AVAILABLE RESOURCES, AND SHALL CONSULT  
20 WITH THE CHIEF JUDGE OF THE JUDICIAL DISTRICT IN AN EFFORT TO  
21 ESTABLISH A PRETRIAL SERVICES PROGRAM THAT MAY BE UTILIZED BY THE  
22 DISTRICT COURT OF SUCH COUNTY OR CITY AND COUNTY. ANY PRETRIAL  
23 SERVICES PROGRAM MUST BE ESTABLISHED PURSUANT TO A PLAN  
24 FORMULATED BY A COMMUNITY ADVISORY BOARD CREATED FOR SUCH  
25 PURPOSE AND APPOINTED BY THE CHIEF JUDGE OF THE JUDICIAL DISTRICT.  
26 MEMBERSHIP ON SUCH COMMUNITY ADVISORY BOARD MUST INCLUDE, BUT  
27 SHALL NOT BE LIMITED TO, A REPRESENTATIVE OF A LOCAL LAW

1 ENFORCEMENT AGENCY, A REPRESENTATIVE OF THE DISTRICT ATTORNEY,  
2 A REPRESENTATIVE OF THE PUBLIC DEFENDER, AND A REPRESENTATIVE OF  
3 THE CITIZENS AT LARGE. THE PLAN FORMULATED BY SUCH COMMUNITY  
4 ADVISORY BOARD MUST BE APPROVED BY THE CHIEF JUDGE OF THE  
5 JUDICIAL DISTRICT PRIOR TO THE ESTABLISHMENT AND UTILIZATION OF  
6 THE PRETRIAL SERVICES PROGRAM. THE REQUIREMENT CONTAINED IN THIS  
7 SECTION THAT A PRETRIAL SERVICES PROGRAM BE ESTABLISHED  
8 PURSUANT TO A PLAN FORMULATED BY THE COMMUNITY ADVISORY BOARD  
9 DOES NOT APPLY TO ANY PRETRIAL SERVICES PROGRAM THAT EXISTED  
10 BEFORE MAY 31, 1991.

11 (4) ANY PRETRIAL SERVICES PROGRAM APPROVED PURSUANT TO  
12 THIS SECTION MUST MEET THE FOLLOWING CRITERIA:

13 (a) THE PROGRAM MUST ESTABLISH A PROCEDURE FOR THE  
14 SCREENING OF PERSONS WHO ARE DETAINED DUE TO AN ARREST FOR THE  
15 ALLEGED COMMISSION OF A CRIME SO THAT SUCH INFORMATION MAY BE  
16 PROVIDED TO THE JUDGE WHO IS SETTING THE BOND AND CONDITIONS OF  
17 RELEASE. THE PROGRAM MUST PROVIDE INFORMATION THAT PROVIDES  
18 THE COURT WITH THE ABILITY TO MAKE AN APPROPRIATE INITIAL BOND  
19 DECISION THAT IS BASED UPON FACTS RELATING TO THE PERSON'S RISK OF  
20 FAILURE TO APPEAR FOR COURT AND RISK OF DANGER TO THE COMMUNITY.

21 (b) THE PROGRAM MUST MAKE ALL REASONABLE ATTEMPTS TO  
22 PROVIDE THE COURT WITH SUCH INFORMATION DELINEATED IN THIS  
23 SECTION AS IS APPROPRIATE TO EACH INDIVIDUAL PERSON SEEKING  
24 RELEASE FROM CUSTODY;

25 (c) THE PROGRAM, IN CONJUNCTION WITH THE COMMUNITY  
26 ADVISORY BOARD, MUST MAKE ALL REASONABLE EFFORTS TO COMPLY  
27 WITH THE PRINCIPLES OF EVIDENCE-BASED DECISION-MAKING AS DEFINED

1 IN SECTION 16-1-401 (9.5), INCLUDING BUT NOT LIMITED TO THE  
2 IMPLEMENTATION OF AN EVIDENCE-BASED PRETRIAL ASSESSMENT TOOL  
3 AND A STRUCTURED DECISION-MAKING DESIGN BASED UPON THE PERSON'S  
4 CHARGE AND THE RISK ASSESSMENT SCORE;

5 (d) THE PROGRAM MUST WORK WITH ALL APPROPRIATE AGENCIES  
6 AND ASSIST WITH ALL EFFORTS TO COMPLY WITH SECTIONS 24-4.1-302.5  
7 AND 24-4.1-303, C.R.S.

8 (5) ANY PRETRIAL SERVICES PROGRAM MAY ALSO INCLUDE  
9 DIFFERENT METHODS AND LEVELS OF COMMUNITY-BASED SUPERVISION AS  
10 A CONDITION OF RELEASE, AND THE PROGRAM MUST USE ESTABLISHED  
11 METHODS FOR PERSONS WHO ARE RELEASED PRIOR TO TRIAL IN ORDER TO  
12 DECREASE UNNECESSARY PRETRIAL DETENTION. THE PROGRAM MAY  
13 INCLUDE, BUT IS NOT LIMITED TO, ANY OF THE CRITERIA AS OUTLINED IN  
14 SECTION 16-4-105 (8) AS CONDITIONS FOR PRETRIAL RELEASE.

15 (6) COMMENCING JULY 1, 2012, EACH PRETRIAL SERVICES  
16 PROGRAM ESTABLISHED PURSUANT TO THIS SECTION SHALL PROVIDE AN  
17 ANNUAL REPORT TO THE JUDICIAL DEPARTMENT NO LATER THAN  
18 NOVEMBER 1 OF EACH YEAR, REGARDLESS OF WHETHER THE PROGRAM  
19 EXISTED PRIOR TO MAY 31, 1991. THE JUDICIAL DEPARTMENT SHALL  
20 PRESENT AN ANNUAL COMBINED REPORT TO THE HOUSE AND SENATE  
21 JUDICIARY COMMITTEES OF THE HOUSE OF REPRESENTATIVES AND THE  
22 SENATE, OR ANY SUCCESSOR COMMITTEES, OF THE GENERAL ASSEMBLY.  
23 THE REPORT TO THE JUDICIAL DEPARTMENT MUST INCLUDE, BUT IS NOT  
24 LIMITED TO, THE FOLLOWING INFORMATION:

25 (a) THE TOTAL NUMBER OF PRETRIAL ASSESSMENTS PERFORMED BY  
26 THE PROGRAM AND SUBMITTED TO THE COURT;

27 (b) THE TOTAL NUMBER OF CLOSED CASES BY THE PROGRAM IN

1 WHICH THE PERSON WAS RELEASED FROM CUSTODY AND SUPERVISED BY  
2 THE PROGRAM;

3 (c) THE TOTAL NUMBER OF CLOSED CASES IN WHICH THE PERSON  
4 WAS RELEASED FROM CUSTODY, WAS SUPERVISED BY THE PROGRAM, AND,  
5 WHILE UNDER SUPERVISION, APPEARED FOR ALL SCHEDULED COURT  
6 APPEARANCES ON THE CASE;

7 (d) THE TOTAL NUMBER OF CLOSED CASES IN WHICH THE PERSON  
8 WAS RELEASED FROM CUSTODY, WAS SUPERVISED BY THE PROGRAM, AND  
9 WAS NOT CHARGED WITH A NEW CRIMINAL OFFENSE THAT WAS ALLEGED  
10 TO HAVE OCCURRED WHILE UNDER SUPERVISION AND THAT CARRIED THE  
11 POSSIBILITY OF A SENTENCE TO JAIL OR IMPRISONMENT;

12 (e) THE TOTAL NUMBER OF CLOSED CASES IN WHICH THE PERSON  
13 WAS RELEASED FROM CUSTODY AND WAS SUPERVISED BY THE PROGRAM,  
14 AND THE PERSON'S BOND WAS NOT REVOKED BY THE COURT DUE TO A  
15 VIOLATION OF ANY OTHER TERMS AND CONDITIONS OF SUPERVISION; AND

16 (f) ANY ADDITIONAL INFORMATION THE JUDICIAL DEPARTMENT  
17 MAY REQUEST.

18 (7) FOR THE REPORTS REQUIRED IN SUBSECTION (6) OF THIS  
19 SECTION, THE PRETRIAL SERVICES PROGRAM SHALL INCLUDE INFORMATION  
20 DETAILING THE NUMBER OF PERSONS RELEASED ON A COMMERCIAL  
21 SURETY BOND IN ADDITION TO PRETRIAL SUPERVISION, THE NUMBER OF  
22 PERSONS RELEASED ON A CASH, PRIVATE SURETY, OR PROPERTY BOND IN  
23 ADDITION TO PRETRIAL SUPERVISION, AND THE NUMBER OF PERSONS  
24 RELEASED ON ANY FORM OF A PERSONAL RECOGNIZANCE BOND IN  
25 ADDITION TO PRETRIAL SUPERVISION.

26 **16-4-107. Hearing after setting of monetary conditions of**  
27 **bond.** IF A PERSON IS IN CUSTODY AND THE COURT IMPOSED A MONETARY

1 BOND FOR RELEASE, AND THE PERSON, AFTER SEVEN DAYS FROM THE  
2 SETTING OF THE MONETARY BOND, IS UNABLE TO MEET THE MONETARY  
3 OBLIGATIONS OF THE BOND, THE PERSON MAY FILE A WRITTEN MOTION FOR  
4 RECONSIDERATION OF THE MONETARY CONDITIONS OF THE BOND. THE  
5 PERSON MAY ONLY FILE THE WRITTEN MOTION IF HE OR SHE BELIEVES  
6 THAT, UPON PRESENTATION OF EVIDENCE NOT FULLY CONSIDERED BY THE  
7 COURT, HE OR SHE IS ENTITLED TO A PERSONAL RECOGNIZANCE BOND OR  
8 AN UNSECURED BOND WITH CONDITIONS OF RELEASE OR A CHANGE IN THE  
9 MONETARY CONDITIONS OF BOND. THE COURT SHALL PROMPTLY CONDUCT  
10 A HEARING ON THIS MOTION FOR RECONSIDERATION, BUT THE HEARING  
11 MUST BE HELD WITHIN FOURTEEN DAYS AFTER THE FILING OF THE MOTION.  
12 HOWEVER, THE COURT MAY SUMMARILY DENY THE MOTION IF THE COURT  
13 FINDS THAT THERE IS NO ADDITIONAL EVIDENCE NOT FULLY CONSIDERED  
14 BY THE COURT PRESENTED IN THE WRITTEN MOTION. IN CONSIDERING THE  
15 MOTION, THE COURT SHALL CONSIDER THE RESULTS OF ANY EMPIRICALLY  
16 DEVELOPED RISK ASSESSMENT INSTRUMENT.

17 **16-4-108. When original bond continued.** ONCE A BOND HAS  
18 BEEN EXECUTED AND THE PERSON RELEASED FROM CUSTODY THEREON,  
19 WHETHER A CHARGE IS THEN PENDING OR IS THEREAFTER FILED OR  
20 TRANSFERRED TO A COURT OF COMPETENT JURISDICTION, THE ORIGINAL  
21 BOND SHALL CONTINUE IN EFFECT UNTIL FINAL DISPOSITION OF THE CASE  
22 IN THE TRIAL COURT. IF A CHARGE FILED IN THE COUNTY COURT IS  
23 DISMISSED AND THE DISTRICT ATTORNEY STATES ON THE RECORD THAT  
24 THE CHARGE WILL BE REFILED IN THE DISTRICT COURT OR THAT THE  
25 DISMISSAL BY THE COUNTY COURT WILL BE APPEALED TO THE DISTRICT  
26 COURT, THE COUNTY COURT BEFORE ENTERING THE DISMISSAL SHALL FIX  
27 A RETURN DATE, NOT LATER THAN SIXTY-THREE DAYS THEREAFTER, UPON

1 WHICH THE DEFENDANT MUST APPEAR IN THE DISTRICT COURT AND  
2 CONTINUE THE BOND. ANY BOND CONTINUED PURSUANT TO THIS SECTION  
3 IS SUBJECT TO THE PROVISIONS OF SECTION 16-4-109.

4 **16-4-109. Reduction or increase of monetary conditions of**  
5 **bond - change in type of bond or conditions of bond - definitions.**

6 (1) UPON APPLICATION BY THE DISTRICT ATTORNEY OR THE DEFENDANT,  
7 THE COURT BEFORE WHICH THE PROCEEDING IS PENDING MAY INCREASE OR  
8 DECREASE THE FINANCIAL CONDITIONS OF BOND, MAY REQUIRE  
9 ADDITIONAL SECURITY FOR A BOND, MAY DISPENSE WITH SECURITY  
10 THERETOFORE PROVIDED, OR MAY ALTER ANY OTHER CONDITION OF THE  
11 BOND.

12 (2) REASONABLE NOTICE OF AN APPLICATION FOR MODIFICATION  
13 OF A BOND BY THE DEFENDANT SHALL BE GIVEN TO THE DISTRICT  
14 ATTORNEY.

15 (3) REASONABLE NOTICE OF APPLICATION FOR MODIFICATION OF  
16 A BOND BY THE DISTRICT ATTORNEY SHALL BE GIVEN TO THE DEFENDANT,  
17 EXCEPT AS PROVIDED IN SUBSECTION (4) OF THIS SECTION.

18 (4) (a) UPON VERIFIED APPLICATION BY THE DISTRICT ATTORNEY  
19 OR A BONDING COMMISSIONER STATING FACTS OR CIRCUMSTANCES  
20 CONSTITUTING A BREACH OR A THREATENED BREACH OF ANY OF THE  
21 CONDITIONS OF THE BOND, THE COURT MAY ISSUE A WARRANT  
22 COMMANDING ANY PEACE OFFICER TO BRING THE DEFENDANT WITHOUT  
23 UNNECESSARY DELAY BEFORE THE COURT FOR A HEARING ON THE  
24 MATTERS SET FORTH IN THE APPLICATION. UPON ISSUANCE OF THE  
25 WARRANT, THE BONDING COMMISSIONER SHALL NOTIFY THE BAIL BOND  
26 AGENT OF RECORD, IF APPLICABLE. AT THE CONCLUSION OF THE HEARING,  
27 THE COURT MAY ENTER AN ORDER AUTHORIZED BY SUBSECTION (1) OF

1 THIS SECTION. IF A BONDING COMMISSIONER FILES AN APPLICATION FOR A  
2 HEARING PURSUANT TO THIS SUBSECTION (4), THE BONDING  
3 COMMISSIONER SHALL NOTIFY THE DISTRICT ATTORNEY, FOR THE  
4 JURISDICTION IN WHICH THE APPLICATION IS MADE, OF THE APPLICATION  
5 WITHIN TWENTY-FOUR HOURS FOLLOWING THE FILING OF THE  
6 APPLICATION.

7 (b) AS USED IN THIS SUBSECTION (4), "BONDING COMMISSIONER"  
8 MEANS A PERSON EMPLOYED BY A PRETRIAL SERVICES PROGRAM AS  
9 DESCRIBED IN SECTION 16-4-106 (3), AND SO DESIGNATED AS A BONDING  
10 COMMISSIONER BY THE CHIEF OR PRESIDING JUDGE OF THE JUDICIAL  
11 DISTRICT.

12 (5) THE DISTRICT ATTORNEY HAS THE RIGHT TO APPEAR AT ALL  
13 HEARINGS SEEKING MODIFICATION OF THE TERMS AND CONDITIONS OF  
14 BOND AND MAY ADVISE THE COURT ON ALL PERTINENT MATTERS DURING  
15 THE HEARING.

16 **16-4-110. Exoneration from bond liability.** (1) ANY PERSON  
17 EXECUTING A BAIL BOND AS PRINCIPAL OR AS SURETY SHALL BE  
18 EXONERATED AS FOLLOWS:

19 (a) WHEN THE CONDITION OF THE BOND HAS BEEN SATISFIED; OR

20 (b) WHEN THE AMOUNT OF THE FORFEITURE HAS BEEN PAID; OR

21 (c) (I) WHEN THE SURETY APPEARS AND PROVIDES SATISFACTORY  
22 EVIDENCE TO THE COURT THAT THE DEFENDANT IS UNABLE TO APPEAR  
23 BEFORE THE COURT DUE TO SUCH DEFENDANT'S DEATH OR THE DETENTION  
24 OR INCARCERATION OF SUCH DEFENDANT IN A FOREIGN JURISDICTION IF  
25 THE DEFENDANT IS INCARCERATED FOR A PERIOD IN EXCESS OF  
26 NINETY-ONE DAYS AND THE STATE OF COLORADO HAS REFUSED TO  
27 EXTRADITE SUCH DEFENDANT; EXCEPT THAT, IF THE STATE EXTRADITES

1 SUCH DEFENDANT, ALL COSTS ASSOCIATED WITH SUCH EXTRADITION  
2 SHALL BE BORNE BY THE SURETY UP TO THE AMOUNT OF THE BOND.

3 (II) FOR THE PURPOSES OF THIS PARAGRAPH (c), "COSTS  
4 ASSOCIATED WITH EXTRADITION" SHALL BE CALCULATED AS AND LIMITED  
5 TO THE ROUND-TRIP MILEAGE BETWEEN THE COLORADO COURT OF  
6 JURISDICTION AND THE LOCATION OF THE DEFENDANT'S INCARCERATION  
7 AT THE RATE ALLOWED FOR REIMBURSEMENT PURSUANT TO SECTION  
8 24-9-104, C.R.S., UP TO THE AMOUNT OF THE BOND.

9 (d) UPON SURRENDER OF THE DEFENDANT INTO CUSTODY AT ANY  
10 TIME BEFORE A JUDGMENT HAS BEEN ENTERED AGAINST THE SURETIES FOR  
11 FORFEITURE OF THE BOND, UPON PAYMENT OF ALL COSTS OCCASIONED  
12 THEREBY. A SURETY MAY SEIZE AND SURRENDER THE DEFENDANT TO THE  
13 SHERIFF OF THE COUNTY WHEREIN THE BOND IS TAKEN, AND IT IS THE  
14 DUTY OF THE SHERIFF, ON SUCH SURRENDER AND DELIVERY TO HIM OR HER  
15 OF A CERTIFIED COPY OF THE BOND BY WHICH THE SURETY IS BOUND, TO  
16 TAKE THE PERSON INTO CUSTODY AND, BY WRITING, ACKNOWLEDGE THE  
17 SURRENDER. IF A COMPENSATED SURETY IS EXONERATED BY  
18 SURRENDERING A DEFENDANT PRIOR TO THE INITIAL APPEARANCE DATE  
19 FIXED IN THE BOND, THE COURT, AFTER A HEARING, MAY REQUIRE THE  
20 SURETY TO REFUND PART OR ALL OF THE BOND PREMIUM PAID BY THE  
21 DEFENDANT IF NECESSARY TO PREVENT UNJUST ENRICHMENT.

22 (e) AFTER THREE YEARS HAVE ELAPSED FROM THE POSTING OF THE  
23 BOND, UNLESS A JUDGMENT HAS BEEN ENTERED AGAINST THE SURETY OR  
24 THE PRINCIPAL FOR THE FORFEITURE OF THE BOND, OR UNLESS THE COURT  
25 GRANTS AN EXTENSION OF THE THREE-YEAR TIME PERIOD FOR GOOD  
26 CAUSE SHOWN, UPON MOTION BY THE PROSECUTING ATTORNEY.

27 (2) IF, WITHIN FOURTEEN DAYS AFTER THE POSTING OF A BOND BY

1 A DEFENDANT, THE TERMS AND CONDITIONS OF SAID BOND ARE CHANGED  
2 OR ALTERED EITHER BY ORDER OF COURT OR UPON THE MOTION OF THE  
3 DISTRICT ATTORNEY OR THE DEFENDANT, THE COURT, AFTER A HEARING,  
4 MAY ORDER A COMPENSATED SURETY TO REFUND A PORTION OF THE  
5 PREMIUM PAID BY THE DEFENDANT, IF NECESSARY, TO PREVENT UNJUST  
6 ENRICHMENT. IF MORE THAN FOURTEEN DAYS HAVE ELAPSED AFTER  
7 POSTING OF A BOND BY A DEFENDANT, THE COURT SHALL NOT ORDER THE  
8 REFUND OF ANY PREMIUM.

9 (3) UPON ENTRY OF AN ORDER FOR DEFERRED PROSECUTION OR  
10 DEFERRED JUDGMENT AS AUTHORIZED IN SECTIONS 18-1.3-101 AND  
11 18-1.3-102, C.R.S., SURETIES UPON ANY BOND GIVEN FOR THE  
12 APPEARANCE OF THE DEFENDANT SHALL BE RELEASED FROM LIABILITY ON  
13 SUCH BOND.

14 **16-4-111. Disposition of security deposits upon forfeiture or**  
15 **termination of bond.** (1) (a) IF A DEFENDANT IS RELEASED UPON DEPOSIT  
16 OF CASH IN ANY AMOUNT OR UPON DEPOSIT OF ANY STOCKS OR BONDS AND  
17 THE DEFENDANT IS LATER DISCHARGED FROM ALL LIABILITY UNDER THE  
18 TERMS OF THE BOND, THE CLERK OF THE COURT SHALL RETURN THE  
19 DEPOSIT TO THE PERSON WHO MADE THE DEPOSIT.

20 (b) (I) NOTWITHSTANDING THE PROVISIONS OF PARAGRAPH (a) OF  
21 THIS SUBSECTION (1), IF THE DEPOSITOR OF THE CASH BOND IS THE  
22 DEFENDANT AND THE DEFENDANT OWES COURT COSTS, FEES, FINES,  
23 RESTITUTION, OR SURCHARGES AT THE TIME THE DEFENDANT IS  
24 DISCHARGED FROM ALL LIABILITY UNDER THE TERMS OF THE BOND, THE  
25 COURT MAY APPLY THE DEPOSIT TOWARD ANY AMOUNT OWED BY THE  
26 DEFENDANT IN COURT COSTS, FEES, FINES, RESTITUTION, OR SURCHARGES.  
27 IF ANY AMOUNT OF THE DEPOSIT REMAINS AFTER PAYING THE

1 DEFENDANT'S OUTSTANDING COURT COSTS, FEES, FINES, RESTITUTION, OR  
2 SURCHARGES, THE COURT SHALL RETURN THE REMAINDER OF THE DEPOSIT  
3 TO THE DEFENDANT.

4 (II) NOTWITHSTANDING THE PROVISIONS OF PARAGRAPH (a) OF  
5 THIS SUBSECTION (1), IF THE DEPOSITOR OF THE CASH BOND IS NOT THE  
6 DEFENDANT, BUT THE DEFENDANT OWES COURT COSTS, FEES, FINES,  
7 RESTITUTION, OR SURCHARGES AT THE TIME THE DEFENDANT IS  
8 DISCHARGED FROM ALL LIABILITY UNDER THE TERMS OF THE BOND, THE  
9 COURT MAY APPLY THE DEPOSIT TOWARD THE AMOUNT OWED BY THE  
10 DEFENDANT IN COURT COSTS, FEES, FINES, RESTITUTION, OR SURCHARGES  
11 IF THE DEPOSITOR AGREES IN WRITING TO THE USE OF THE DEPOSIT FOR  
12 SUCH PURPOSE. IF ANY AMOUNT OF THE DEPOSIT REMAINS AFTER PAYING  
13 THE DEFENDANT'S OUTSTANDING COURT COSTS, FEES, FINES, RESTITUTION,  
14 OR SURCHARGES, THE COURT SHALL RETURN THE REMAINDER OF THE  
15 DEPOSIT TO THE DEPOSITOR.

16 (2) (a) UPON SATISFACTION OF THE TERMS OF THE BOND, THE  
17 CLERK OF THE COURT SHALL EXECUTE, WITHIN FOURTEEN DAYS AFTER  
18 SUCH SATISFACTION, A RELEASE OF ANY DEED OF TRUST GIVEN TO SECURE  
19 THE BOND AND AN AFFIDAVIT THAT STATES THAT THE OBLIGATION FOR  
20 WHICH THE DEED OF TRUST HAD BEEN RECORDED HAS BEEN SATISFIED,  
21 EITHER FULLY OR PARTIALLY, AND THAT THE RELEASE OF SUCH DEED OF  
22 TRUST MAY BE RECORDED AT THE EXPENSE OF THE RECORD OWNER OF THE  
23 PROPERTY DESCRIBED IN SUCH DEED OF TRUST.

24 (b) IF THERE IS A FORFEITURE OF THE BOND PURSUANT TO THIS  
25 SECTION, AND IF THE FORFEITURE IS NOT SET ASIDE PURSUANT TO  
26 SUBSECTION (4) OF THIS SECTION, THE DEED OF TRUST MAY BE  
27 FORECLOSED AS PROVIDED BY LAW.

1           (c) IF THERE IS A FORFEITURE OF THE BOND PURSUANT TO THIS  
2 SECTION, BUT THE FORFEITURE IS SET ASIDE PURSUANT TO SUBSECTION (3)  
3 OF THIS SECTION, THE CLERK OF THE COURT SHALL EXECUTE A RELEASE OF  
4 ANY DEED OF TRUST GIVEN TO SECURE THE BOND AND AN AFFIDAVIT THAT  
5 STATES THAT THE OBLIGATION FOR WHICH THE DEED OF TRUST HAD BEEN  
6 RECORDED HAS BEEN SATISFIED, EITHER FULLY OR PARTIALLY, AND THAT  
7 THE RELEASE OF SUCH DEED OF TRUST MAY BE RECORDED AT THE EXPENSE  
8 OF THE RECORD OWNER OF THE REAL ESTATE DESCRIBED IN SUCH DEED OF  
9 TRUST.

10           (3) WHERE THE DEFENDANT HAS BEEN RELEASED UPON DEPOSIT OF  
11 CASH, STOCKS, BONDS, OR PROPERTY OR UPON A SURETY BOND SECURED  
12 BY PROPERTY, IF THE DEFENDANT FAILS TO APPEAR IN ACCORDANCE WITH  
13 THE PRIMARY CONDITION OF THE BOND, THE COURT SHALL DECLARE A  
14 FORFEITURE. NOTICE OF THE ORDER OF FORFEITURE SHALL BE MAILED BY  
15 THE COURT TO THE DEFENDANT, ALL SURETIES, AND ALL DEPOSITORS OR  
16 ASSIGNEES OF ANY DEPOSITS OF CASH OR PROPERTY IF SUCH SURETIES,  
17 DEPOSITORS, OR ASSIGNEES HAVE DIRECT CONTACT WITH THE COURT, AT  
18 THEIR LAST-KNOWN ADDRESSES. SUCH NOTICE SHALL BE SENT WITHIN  
19 FOURTEEN DAYS AFTER THE ENTRY OF THE ORDER OF FORFEITURE. IF THE  
20 DEFENDANT DOES NOT APPEAR AND SURRENDER TO THE COURT HAVING  
21 JURISDICTION WITHIN THIRTY-FIVE DAYS FROM THE DATE OF THE  
22 FORFEITURE OR WITHIN THAT PERIOD SATISFY THE COURT THAT  
23 APPEARANCE AND SURRENDER BY THE DEFENDANT IS IMPOSSIBLE AND  
24 WITHOUT FAULT BY SUCH DEFENDANT, THE COURT MAY ENTER JUDGMENT  
25 FOR THE STATE AGAINST THE DEFENDANT FOR THE AMOUNT OF THE BOND  
26 AND COSTS OF THE COURT PROCEEDINGS. ANY CASH DEPOSITS MADE WITH  
27 THE CLERK OF THE COURT SHALL BE APPLIED TO THE PAYMENT OF COSTS.

1 IF ANY AMOUNT OF SUCH CASH DEPOSIT REMAINS AFTER THE PAYMENT OF  
2 COSTS, IT SHALL BE APPLIED TO PAYMENT OF THE JUDGMENT.

3 (4) THE COURT MAY ORDER THAT A FORFEITURE BE SET ASIDE,  
4 UPON SUCH CONDITIONS AS THE COURT MAY IMPOSE, IF IT APPEARS THAT  
5 JUSTICE SO REQUIRES.

6 (5) IF, WITHIN ONE YEAR AFTER JUDGMENT, THE PERSON WHO  
7 EXECUTED THE FORFEITED BOND AS PRINCIPAL OR AS SURETY EFFECTS THE  
8 APPREHENSION OR SURRENDER OF THE DEFENDANT TO THE SHERIFF OF THE  
9 COUNTY FROM WHICH THE BOND WAS TAKEN OR TO THE COURT WHICH  
10 GRANTED THE BOND, THE COURT MAY VACATE THE JUDGMENT AND ORDER  
11 A REMISSION LESS NECESSARY AND ACTUAL COSTS OF THE COURT.

12 (6) THE PROVISIONS OF THIS SECTION SHALL NOT APPLY TO  
13 APPEARANCE BONDS WRITTEN BY COMPENSATED SURETIES, AS DEFINED IN  
14 SECTION 16-4-114 (2) (c), WHICH BONDS SHALL BE SUBJECT TO THE  
15 PROVISIONS OF SECTION 16-4-114.

16 (7) ON AND AFTER JULY 1, 2008, ALL MONEYS COLLECTED FROM  
17 PAYMENT TOWARD A JUDGMENT ENTERED FOR THE STATE PURSUANT TO  
18 SUBSECTION (2) OF THIS SECTION SHALL BE TRANSMITTED TO THE STATE  
19 TREASURER FOR DEPOSIT IN THE JUDICIAL STABILIZATION CASH FUND  
20 CREATED IN SECTION 13-32-101 (6), C.R.S.

21 **16-4-112. Enforcement when forfeiture not set aside.** BY  
22 ENTERING INTO A BOND, EACH OBLIGOR, WHETHER HE OR SHE IS THE  
23 PRINCIPAL OR A SURETY, SUBMITS TO THE JURISDICTION OF THE COURT.  
24 HIS OR HER LIABILITY UNDER THE BOND MAY BE ENFORCED, WITHOUT THE  
25 NECESSITY OF AN INDEPENDENT ACTION, AS FOLLOWS: THE COURT SHALL  
26 ORDER THE ISSUANCE OF A CITATION DIRECTED TO THE OBLIGOR TO SHOW  
27 CAUSE, IF ANY THERE BE, WHY JUDGMENT SHOULD NOT BE ENTERED

1 AGAINST HIM OR HER FORTHWITH AND EXECUTION ISSUE THEREON. SAID  
2 CITATION MAY BE SERVED PERSONALLY OR BY CERTIFIED MAIL UPON THE  
3 OBLIGOR DIRECTED TO THE ADDRESS GIVEN IN THE BOND. HEARING ON THE  
4 CITATION SHALL BE HELD NOT LESS THAN TWENTY-ONE DAYS AFTER  
5 SERVICE. THE DEFENDANT'S ATTORNEY AND THE PROSECUTING ATTORNEY  
6 SHALL BE GIVEN NOTICE OF THE HEARING. AT THE CONCLUSION OF THE  
7 HEARING, THE COURT MAY ENTER A JUDGMENT FOR THE STATE AND  
8 AGAINST THE OBLIGOR, AND EXECUTION SHALL ISSUE THEREON AS ON  
9 OTHER JUDGMENTS. THE DISTRICT ATTORNEY SHALL HAVE EXECUTION  
10 ISSUED FORTHWITH UPON THE JUDGMENT AND DELIVER IT TO THE SHERIFF  
11 TO BE EXECUTED BY LEVY UPON THE STOCKS, BOND, OR REAL ESTATE  
12 WHICH HAS BEEN ACCEPTED AS SECURITY FOR THE BOND.

13 **16-4-113. Type of bond in certain misdemeanor cases.** (1) IN  
14 EXERCISING THE DISCRETION MENTIONED IN SECTION 16-4-104, THE JUDGE  
15 SHALL RELEASE THE ACCUSED PERSON UPON PERSONAL RECOGNIZANCE IF  
16 THE CHARGE IS A CLASS 3 MISDEMEANOR OR A PETTY OFFENSE, OR ANY  
17 UNCLASSIFIED OFFENSE FOR A VIOLATION OF WHICH THE MAXIMUM  
18 PENALTY DOES NOT EXCEED SIX MONTHS' IMPRISONMENT, AND HE OR SHE  
19 SHALL NOT BE REQUIRED TO SUPPLY A SURETY BOND, OR GIVE SECURITY  
20 OF ANY KIND FOR HIS OR HER APPEARANCE FOR TRIAL OTHER THAN HIS OR  
21 HER PERSONAL RECOGNIZANCE, UNLESS ONE OR MORE OF THE FOLLOWING  
22 FACTS ARE FOUND TO BE PRESENT:

23 (a) THE ARRESTED PERSON FAILS TO SUFFICIENTLY IDENTIFY  
24 HIMSELF OR HERSELF; OR

25 (b) THE ARRESTED PERSON REFUSES TO SIGN A PERSONAL  
26 RECOGNIZANCE; OR

27 (c) THE CONTINUED DETENTION OR POSTING OF A SURETY BOND IS

1 NECESSARY TO PREVENT IMMINENT BODILY HARM TO THE ACCUSED OR TO  
2 ANOTHER; OR

3 (d) THE ARRESTED PERSON HAS NO TIES TO THE JURISDICTION OF  
4 THE COURT REASONABLY SUFFICIENT TO ASSURE HIS OR HER APPEARANCE,  
5 AND THERE IS SUBSTANTIAL LIKELIHOOD THAT HE OR SHE WILL FAIL TO  
6 APPEAR FOR TRIAL IF RELEASED UPON HIS OR HER PERSONAL  
7 RECOGNIZANCE; OR

8 (e) THE ARRESTED PERSON HAS PREVIOUSLY FAILED TO APPEAR  
9 FOR TRIAL FOR AN OFFENSE CONCERNING WHICH HE OR SHE HAD GIVEN HIS  
10 WRITTEN PROMISE TO APPEAR; OR

11 (f) THERE IS OUTSTANDING A WARRANT FOR HIS OR HER ARREST ON  
12 ANY OTHER CHARGE OR THERE ARE PENDING PROCEEDINGS AGAINST HIM  
13 OR HER FOR SUSPENSION OR REVOCATION OF PAROLE OR PROBATION.

14 **16-4-114. Enforcement procedures for compensated sureties**

15 - **definitions.** (1) (a) THE GENERAL ASSEMBLY HEREBY FINDS,  
16 DETERMINES, AND DECLARES THAT THE SIMPLICITY, EFFECTIVENESS, AND  
17 UNIFORMITY OF BAIL FORFEITURE PROCEDURES APPLICABLE TO  
18 COMPENSATED SURETIES WHO ARE SUBJECT TO THE REGULATORY  
19 AUTHORITY OF THE COLORADO DIVISION OF INSURANCE ARE MATTERS OF  
20 STATEWIDE CONCERN.

21 (b) IT IS THE INTENT OF THE GENERAL ASSEMBLY IN ADOPTING THIS  
22 SECTION TO:

23 (I) ADOPT A BOARD SYSTEM THAT WILL SIMPLIFY AND EXPEDITE  
24 BAIL FORFEITURE PROCEDURES BY AUTHORIZING COURTS TO BAR  
25 COMPENSATED SURETIES WHO FAIL TO PAY FORFEITURE JUDGMENTS FROM  
26 WRITING FURTHER BONDS;

27 (II) MINIMIZE THE NEED FOR DAY-TO-DAY INVOLVEMENT OF THE

1 DIVISION OF INSURANCE IN ROUTINE FORFEITURE ENFORCEMENT; AND

2 (III) REDUCE COURT ADMINISTRATIVE WORKLOAD.

3 (2) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE  
4 REQUIRES:

5 (a) "BAIL INSURANCE COMPANY" MEANS AN INSURER AS DEFINED  
6 IN SECTION 10-1-102 (13), C.R.S., ENGAGED IN THE BUSINESS OF WRITING  
7 APPEARANCE BONDS THROUGH BONDING AGENTS, WHICH COMPANY IS  
8 SUBJECT TO REGULATION BY THE DIVISION OF INSURANCE IN THE  
9 DEPARTMENT OF REGULATORY AGENCIES.

10 (b) "BOARD SYSTEM" MEANS ANY REASONABLE METHOD  
11 ESTABLISHED BY A COURT TO PUBLICLY POST OR DISSEMINATE THE NAME  
12 OF ANY COMPENSATED SURETY WHO IS PROHIBITED FROM POSTING BAIL  
13 BONDS.

14 (c) "COMPENSATED SURETY" MEANS ANY PERSON WHO IS IN THE  
15 BUSINESS OF WRITING APPEARANCE BONDS AND WHO IS SUBJECT TO  
16 REGULATION BY THE DIVISION OF INSURANCE IN THE DEPARTMENT OF  
17 REGULATORY AGENCIES, INCLUDING BONDING AGENTS AND BAIL  
18 INSURANCE COMPANIES. NOTHING IN THIS PARAGRAPH (c) AUTHORIZES  
19 BAIL INSURANCE COMPANIES TO WRITE APPEARANCE BONDS EXCEPT  
20 THROUGH BAIL BONDING AGENTS.

21 (d) "ON THE BOARD" MEANS THAT THE NAME OF A COMPENSATED  
22 SURETY HAS BEEN PUBLICLY POSTED OR DISSEMINATED BY A COURT AS  
23 BEING INELIGIBLE TO WRITE BAIL BONDS PURSUANT TO PARAGRAPH (e) OR  
24 (f) OF SUBSECTION (5) OF THIS SECTION.

25 (3) EACH COURT OF RECORD IN THIS STATE SHALL IMPLEMENT A  
26 BOARD SYSTEM FOR THE RECORDING AND DISSEMINATION OF THE NAMES  
27 OF THOSE COMPENSATED SURETIES WHO ARE PROHIBITED FROM POSTING

1 BAIL BONDS IN THE STATE DUE TO AN UNPAID JUDGMENT AS SET FORTH IN  
2 THIS SECTION.

3 (4) BY ENTERING INTO A BOND, EACH OBLIGOR, INCLUDING THE  
4 BOND PRINCIPAL AND COMPENSATED SURETY, SUBMITS TO THE  
5 JURISDICTION OF THE COURT AND ACKNOWLEDGES THE APPLICABILITY OF  
6 THE FORFEITURE PROCEDURES SET FORTH IN THIS SECTION.

7 (5) LIABILITY OF BOND OBLIGORS ON BONDS ISSUED BY  
8 COMPENSATED SURETIES MAY BE ENFORCED, WITHOUT THE NECESSITY OF  
9 AN INDEPENDENT ACTION, AS FOLLOWS:

10 (a) IN THE EVENT A DEFENDANT DOES NOT APPEAR BEFORE THE  
11 COURT AND IS IN VIOLATION OF THE PRIMARY CONDITION OF AN  
12 APPEARANCE BOND, THE COURT MAY DECLARE THE BOND FORFEITED.

13 (b) (I) IF A BOND IS DECLARED FORFEITED BY THE COURT, NOTICE  
14 OF THE BAIL FORFEITURE ORDER SHALL BE SERVED ON THE BONDING  
15 AGENT BY CERTIFIED MAIL AND ON THE BAIL INSURANCE COMPANY BY  
16 REGULAR MAIL WITHIN FOURTEEN DAYS AFTER THE ENTRY OF SAID  
17 FORFEITURE. IF THE COMPENSATED SURETY ON THE BOND IS A CASH  
18 BONDING AGENT, ONLY THE CASH BONDING AGENT SHALL BE NOTIFIED OF  
19 THE FORFEITURE. SERVICE OF NOTICE OF THE BAIL FORFEITURE ON THE  
20 DEFENDANT IS NOT REQUIRED.

21 (II) THE NOTICE DESCRIBED IN SUBPARAGRAPH (I) OF THIS  
22 PARAGRAPH (b) SHALL INCLUDE, BUT NEED NOT BE LIMITED TO:

23 (A) A STATEMENT INTENDED TO INFORM THE COMPENSATED  
24 SURETY OF THE ENTRY OF FORFEITURE;

25 (B) AN ADVISEMENT THAT THE COMPENSATED SURETY HAS THE  
26 RIGHT TO REQUEST A SHOW CAUSE HEARING PURSUANT TO SUBPARAGRAPH  
27 (III) OF THIS PARAGRAPH (b) WITHIN FOURTEEN DAYS AFTER RECEIPT OF

1 NOTICE OF FORFEITURE, BY PROCEDURES SET BY THE COURT; AND

2 (C) AN ADVISEMENT THAT IF THE COMPENSATED SURETY DOES  
3 NOT REQUEST A SHOW CAUSE HEARING PURSUANT TO SUBPARAGRAPH (III)  
4 OF THIS PARAGRAPH (b), JUDGMENT SHALL BE ENTERED UPON EXPIRATION  
5 OF THIRTY-FIVE DAYS FOLLOWING THE ENTRY OF FORFEITURE.

6 (III) A COMPENSATED SURETY, UPON WHOM NOTICE OF A BAIL  
7 FORFEITURE ORDER HAS BEEN SERVED, SHALL HAVE FOURTEEN DAYS  
8 AFTER RECEIPT OF NOTICE OF SUCH FORFEITURE TO REQUEST A HEARING  
9 TO SHOW CAUSE WHY JUDGMENT ON THE FORFEITURE SHOULD NOT BE  
10 ENTERED FOR THE STATE AGAINST THE COMPENSATED SURETY. SUCH  
11 REQUEST SHALL BE GRANTED BY THE COURT AND A HEARING SHALL BE SET  
12 WITHIN THIRTY-FIVE DAYS AFTER ENTRY OF FORFEITURE OR AT THE  
13 COURT'S EARLIEST CONVENIENCE. AT THE CONCLUSION OF THE HEARING  
14 REQUESTED BY THE COMPENSATED SURETY, IF ANY, THE COURT MAY  
15 ENTER JUDGMENT FOR THE STATE AGAINST THE COMPENSATED SURETY, OR  
16 THE COURT MAY IN ITS DISCRETION ORDER FURTHER HEARINGS. UPON  
17 EXPIRATION OF THIRTY-FIVE DAYS AFTER THE ENTRY OF FORFEITURE, THE  
18 COURT SHALL ENTER JUDGMENT FOR THE STATE AGAINST THE  
19 COMPENSATED SURETY IF THE COMPENSATED SURETY DID NOT REQUEST  
20 WITHIN FOURTEEN DAYS AFTER RECEIPT OF NOTICE OF SUCH FORFEITURE  
21 A HEARING TO SHOW CAUSE.

22 (IV) IF SUCH A SHOW CAUSE HEARING WAS TIMELY SET BUT THE  
23 HEARING DID NOT OCCUR WITHIN THIRTY-FIVE DAYS AFTER THE ENTRY OF  
24 FORFEITURE, ANY ENTRY OF JUDGMENT AT THE CONCLUSION OF THE  
25 HEARING AGAINST THE COMPENSATED SURETY SHALL NOT BE VACATED ON  
26 THE GROUNDS THAT THE MATTER WAS NOT TIMELY HEARD. IF JUDGMENT  
27 IS ENTERED AGAINST A COMPENSATED SURETY UPON THE CONCLUSION OF

1 A REQUESTED SHOW CAUSE HEARING, AND SUCH HEARING DID NOT OCCUR  
2 WITHIN THIRTY-FIVE DAYS AFTER THE ENTRY OF FORFEITURE, EXECUTION  
3 UPON SAID JUDGMENT SHALL BE AUTOMATICALLY STAYED FOR NO MORE  
4 THAN ONE HUNDRED TWENTY-SIX DAYS AFTER ENTRY OF FORFEITURE.

5 (V) (A) IF AT ANY TIME PRIOR TO THE ENTRY OF JUDGMENT, THE  
6 DEFENDANT APPEARS IN COURT, EITHER VOLUNTARILY OR IN CUSTODY  
7 AFTER SURRENDER OR ARREST, THE COURT SHALL ON ITS OWN MOTION  
8 DIRECT THAT THE BAIL FORFEITURE BE SET ASIDE AND THE BOND  
9 EXONERATED AT THE TIME THE DEFENDANT FIRST APPEARS IN COURT;  
10 EXCEPT THAT, IF THE STATE EXTRADITES SUCH DEFENDANT, ALL  
11 NECESSARY AND ACTUAL COSTS ASSOCIATED WITH SUCH EXTRADITION  
12 SHALL BE BORNE BY THE SURETY UP TO THE AMOUNT OF THE BOND.

13 (B) IF, AT A TIME PRIOR TO THE ENTRY OF JUDGMENT, THE SURETY  
14 PROVIDES PROOF TO THE COURT THAT THE DEFENDANT IS IN CUSTODY IN  
15 ANY OTHER JURISDICTION WITHIN THE STATE, THE COURT SHALL ON ITS  
16 OWN MOTION DIRECT THAT THE BAIL FORFEITURE BE SET ASIDE AND THE  
17 BOND EXONERATED; EXCEPT THAT, IF THE COURT EXTRADITES THE  
18 DEFENDANT, ALL NECESSARY AND ACTUAL COSTS ASSOCIATED WITH THE  
19 EXTRADITION SHALL BE BORNE BY THE SURETY UP TO THE AMOUNT OF THE  
20 BOND. IF THE COURT ELECTS TO EXTRADITE THE DEFENDANT, ANY  
21 FORFEITURE WILL BE STAYED UNTIL SUCH TIME THE DEFENDANT APPEARS  
22 IN THE COURT WHERE THE BOND RETURNS.

23 (C) A COMPENSATED SURETY SHALL BE EXONERATED FROM  
24 LIABILITY UPON THE BOND BY SATISFACTION OF THE BAIL FORFEITURE  
25 JUDGMENT, SURRENDER OF THE DEFENDANT, OR ORDER OF THE COURT. IF  
26 THE SURETY PROVIDES PROOF TO THE COURT THAT THE DEFENDANT IS IN  
27 CUSTODY IN ANY OTHER JURISDICTION WITHIN THE STATE, WITHIN

1 NINETY-ONE DAYS AFTER THE ENTRY OF JUDGMENT, THE COURT SHALL ON  
2 ITS OWN MOTION DIRECT THAT THE BAIL FORFEITURE JUDGMENT BE  
3 VACATED AND THE BOND EXONERATED; EXCEPT THAT, IF THE COURT  
4 EXTRADITES THE DEFENDANT, ALL NECESSARY AND ACTUAL COSTS  
5 ASSOCIATED WITH THE EXTRADITION SHALL BE BORNE BY THE SURETY UP  
6 TO THE AMOUNT OF THE BOND. IF THE COURT ELECTS TO EXTRADITE THE  
7 DEFENDANT, ANY JUDGMENT WILL BE STAYED UNTIL THE TIME THE  
8 DEFENDANT APPEARS IN THE COURT WHERE THE BOND RETURNS.

9 (c) EXECUTION UPON SAID BAIL FORFEITURE JUDGMENT SHALL BE  
10 AUTOMATICALLY STAYED FOR NINETY-ONE DAYS FROM THE DATE OF  
11 ENTRY OF JUDGMENT; EXCEPT THAT, IF JUDGMENT IS ENTERED AGAINST A  
12 COMPENSATED SURETY UPON THE CONCLUSION OF A REQUESTED SHOW  
13 CAUSE HEARING, AND SUCH HEARING DID NOT OCCUR WITHIN THIRTY-FIVE  
14 DAYS AFTER THE ENTRY OF FORFEITURE, THE JUDGMENT SHALL BE  
15 AUTOMATICALLY STAYED AS SET FORTH IN SUBPARAGRAPH (IV) OF  
16 PARAGRAPH (b) OF THIS SUBSECTION (5).

17 (d) UPON THE EXPIRATION OF THE STAY OF EXECUTION DESCRIBED  
18 IN PARAGRAPH (c) OF THIS SUBSECTION (5), THE BAIL FORFEITURE  
19 JUDGMENT SHALL BE PAID FORTHWITH BY THE COMPENSATED SURETY, IF  
20 NOT PREVIOUSLY PAID, UNLESS THE DEFENDANT APPEARS IN COURT,  
21 EITHER VOLUNTARILY OR IN CUSTODY AFTER SURRENDER OR ARREST, OR  
22 THE COURT ENTERS AN ORDER GRANTING AN ADDITIONAL STAY OF  
23 EXECUTION OR OTHERWISE VACATES THE JUDGMENT.

24 (e) IF A BAIL FORFEITURE JUDGMENT IS NOT PAID ON OR BEFORE  
25 THE EXPIRATION DATE OF THE STAY OF EXECUTION DESCRIBED IN  
26 PARAGRAPH (c) OF THIS SUBSECTION (5), THE NAME OF THE BONDING  
27 AGENT SHALL BE PLACED ON THE BOARD OF THE COURT THAT ENTERED

1 THE JUDGMENT. THE BONDING AGENT SHALL BE PROHIBITED FROM  
2 EXECUTING ANY FURTHER BAIL BONDS IN THIS STATE UNTIL THE  
3 JUDGMENT GIVING RISE TO PLACEMENT ON THE BOARD IS SATISFIED,  
4 VACATED, OR OTHERWISE DISCHARGED BY ORDER OF THE COURT.

5 (f) IF A BAIL FORFEITURE JUDGMENT REMAINS UNPAID FOR  
6 THIRTY-FIVE DAYS AFTER THE NAME OF THE BONDING AGENT IS PLACED ON  
7 THE BOARD, THE COURT SHALL SEND NOTICE BY CERTIFIED MAIL TO THE  
8 BAIL INSURANCE COMPANY FOR WHOM THE BONDING AGENT HAS  
9 EXECUTED THE BOND THAT IF SAID JUDGMENT IS NOT PAID WITHIN  
10 FOURTEEN DAYS AFTER THE DATE OF MAILING OF SAID NOTICE, THE NAME  
11 OF THE BAIL INSURANCE COMPANY SHALL BE PLACED ON THE BOARD AND  
12 SUCH COMPANY SHALL BE PROHIBITED FROM EXECUTING ANY FURTHER  
13 BAIL BONDS IN THIS STATE UNTIL THE JUDGMENT GIVING RISE TO  
14 PLACEMENT ON THE BOARD IS SATISFIED, VACATED, OR OTHERWISE  
15 DISCHARGED BY ORDER OF THE COURT.

16 (g) A COMPENSATED SURETY SHALL BE REMOVED FORTHWITH  
17 FROM THE BOARD ONLY AFTER EVERY JUDGMENT FOR WHICH THE  
18 COMPENSATED SURETY WAS PLACED ON THE BOARD IS SATISFIED,  
19 VACATED, OR DISCHARGED OR STAYED BY ENTRY OF AN ADDITIONAL STAY  
20 OF EXECUTION. NO COMPENSATED SURETY SHALL BE PLACED ON THE  
21 BOARD IN THE ABSENCE OF THE NOTICE REQUIRED BY PARAGRAPH (b) OR  
22 (f) OF THIS SUBSECTION (5).

23 (h) THE COURT MAY ORDER THAT A BAIL FORFEITURE JUDGMENT  
24 BE VACATED AND SET ASIDE OR THAT EXECUTION THEREON BE STAYED  
25 UPON SUCH CONDITIONS AS THE COURT MAY IMPOSE, IF IT APPEARS THAT  
26 JUSTICE SO REQUIRES.

27 (i) A COMPENSATED SURETY SHALL BE EXONERATED FROM

1 LIABILITY UPON THE BOND BY SATISFACTION OF THE BAIL FORFEITURE  
2 JUDGMENT, SURRENDER OF THE DEFENDANT, OR BY ORDER OF THE COURT.  
3 IF THE DEFENDANT APPEARS IN COURT, EITHER VOLUNTARILY OR IN  
4 CUSTODY AFTER SURRENDER OR ARREST, WITHIN NINETY-ONE DAYS AFTER  
5 THE ENTRY OF JUDGMENT, THE COURT, AT THE TIME THE DEFENDANT FIRST  
6 APPEARS IN COURT, SHALL ON ITS OWN MOTION DIRECT THAT THE BAIL  
7 FORFEITURE JUDGMENT BE VACATED AND THE BOND EXONERATED;  
8 EXCEPT THAT, IF THE STATE EXTRADITES SUCH DEFENDANT, ALL  
9 NECESSARY AND ACTUAL COSTS ASSOCIATED WITH SUCH EXTRADITION  
10 SHALL BE BORNE BY THE SURETY UP TO THE AMOUNT OF THE BOND.

11 (j) IF, WITHIN ONE YEAR AFTER PAYMENT OF THE BAIL FORFEITURE  
12 JUDGMENT, THE COMPENSATED SURETY EFFECTS THE APPREHENSION OR  
13 SURRENDER OF THE DEFENDANT AND PROVIDES REASONABLE NOTICE TO  
14 THE COURT TO WHICH THE BOND RETURNS THAT THE DEFENDANT IS  
15 AVAILABLE FOR EXTRADITION, THE COURT SHALL VACATE THE JUDGMENT  
16 AND ORDER A REMISSION OF THE AMOUNT PAID ON THE BOND LESS ANY  
17 NECESSARY AND ACTUAL COSTS INCURRED BY THE STATE AND THE  
18 SHERIFF WHO HAS ACTUALLY EXTRADITED THE DEFENDANT.

19 (k) BAIL BONDS SHALL BE DEEMED VALID NOTWITHSTANDING THE  
20 FACT THAT A BOND MAY HAVE BEEN WRITTEN BY A COMPENSATED SURETY  
21 WHO HAS BEEN PLACED ON THE BOARD PURSUANT TO PARAGRAPH (e) OR  
22 (f) OF THIS SUBSECTION (5) AND IS OTHERWISE PROHIBITED FROM WRITING  
23 BAIL BONDS. THE INELIGIBILITY OF A COMPENSATED SURETY TO WRITE  
24 BONDS BECAUSE THE NAME OF THE COMPENSATED SURETY HAS BEEN  
25 PLACED ON THE BOARD PURSUANT TO PARAGRAPH (e) OR (f) OF THIS  
26 SUBSECTION (5) SHALL NOT BE A DEFENSE TO LIABILITY ON ANY  
27 APPEARANCE BOND ACCEPTED BY A COURT.

1           (1) THE AUTOMATIC STAY OF EXECUTION UPON A BAIL FORFEITURE  
2 JUDGMENT AS DESCRIBED IN PARAGRAPH (c) OF THIS SUBSECTION (5)  
3 SHALL EXPIRE PURSUANT TO ITS TERMS UNLESS THE DEFENDANT APPEARS  
4 AND SURRENDERS TO THE COURT HAVING JURISDICTION OR SATISFIES THE  
5 COURT THAT APPEARANCE AND SURRENDER BY THE DEFENDANT WAS  
6 IMPOSSIBLE AND WITHOUT FAULT BY SUCH DEFENDANT. THE COURT MAY  
7 ORDER THAT A FORFEITURE BE SET ASIDE AND JUDGMENT VACATED AS SET  
8 FORTH IN PARAGRAPH (h) OF THIS SUBSECTION (5).

9           (6) A BAIL INSURANCE COMPANY SHALL NOT WRITE BAIL BONDS  
10 UNLESS THROUGH A LICENSED BAIL BONDING AGENT.

11           **SECTION 3.** In Colorado Revised Statutes, 16-4-201, **amend** (1)  
12 (a) as follows:

13           **16-4-201. Bail after conviction.** (1) (a) After conviction, either  
14 before or after sentencing, the defendant may orally, or in writing, move  
15 for release on bail pending determination of a motion for a new trial or  
16 motion in arrest of judgment or during any stay of execution or pending  
17 review by an appellate court, and, except in cases where the defendant has  
18 been convicted of a capital offense, the trial court, in its discretion, may  
19 continue the bond given for pretrial release, or may release the defendant  
20 on ~~increased-bail~~ BOND WITH ADDITIONAL CONDITIONS INCLUDING  
21 MONETARY CONDITIONS, or require bond under one or more of the  
22 alternatives set forth in section 16-4-104.

23           **SECTION 4.** In Colorado Revised Statutes, 16-4-202, **amend** (1)  
24 introductory portion, (1) (h), (1) (i); and **add** (1) (j) as follows:

25           **16-4-202. Appeal bond hearing - factors to be considered.**  
26 (1) The court shall consider the following factors in deciding whether or  
27 not an appeal bond should be granted and determining ~~the amount of bail~~

1 and the type of bond to be AND CONDITIONS OF RELEASE required:

2 (h) The likelihood that the defendant will commit additional  
3 criminal offenses during the pendency of such defendant's appeal; and

4 (i) The defendant's likelihood of success on appeal; AND

5 (j) THE RESULT OF ANY EMPIRICALLY DEVELOPED RISK  
6 ASSESSMENT INSTRUMENT.

7 **SECTION 5.** In Colorado Revised Statutes, 10-1-211, amend (6)  
8 as follows:

9 **10-1-211. Protocols for market conduct actions.** (6) Subject to  
10 section ~~16-4-108~~ 16-4-110 (1) (c) and (2), C.R.S., a bail premium is  
11 earned in its entirety by a compensated surety upon the defendant's  
12 release from custody.

13 **SECTION 6.** In Colorado Revised Statutes, 10-2-705, add (3.5)  
14 as follows:

15 **10-2-705. Bail bond documents - requirements - rules.**  
16 (3.5) (a) IF THE BOND IS TO BE SECURED BY REAL ESTATE, THE BAIL  
17 BONDING AGENT SHALL PROVIDE THE PROPERTY OWNER WITH A WRITTEN  
18 DISCLOSURE STATEMENT IN THE FOLLOWING FORM AT THE TIME AN INITIAL  
19 APPLICATION IS FILED:

20 **DISCLOSURE OF LIEN AGAINST REAL PROPERTY**  
21 **DO NOT SIGN THIS DOCUMENT UNTIL YOU READ AND**  
22 **UNDERSTAND IT! THIS BAIL BOND WILL BE SECURED BY**  
23 **REAL PROPERTY YOU OWN OR IN WHICH YOU HAVE AN**  
24 **INTEREST. FAILURE TO PAY THE BAIL BOND PREMIUMS**  
25 **WHEN DUE OR THE DEFENDANT'S FAILURE TO COMPLY**  
26 **WITH THE CONDITIONS OF BAIL COULD RESULT IN THE**  
27 **LOSS OF YOUR PROPERTY!**

1           (b) THE DISCLOSURE REQUIRED IN PARAGRAPH (a) OF THIS  
2 SUBSECTION (3.5) SHALL BE PRINTED IN FOURTEEN-POINT, BOLD-FACED  
3 TYPE EITHER:

4           (I) ON A SEPARATE AND SPECIFIC DOCUMENT ATTACHED TO OR  
5 ACCOMPANYING THE APPLICATION; OR

6           (II) IN A CLEAR AND CONSPICUOUS STATEMENT ON THE FACE OF  
7 THE APPLICATION.

8           (c) BEFORE A PROPERTY OWNER EXECUTES ANY INSTRUMENT  
9 CREATING A LIEN AGAINST REAL PROPERTY, THE BAIL BONDING AGENT  
10 SHALL PROVIDE THE PROPERTY OWNER WITH A COMPLETED COPY OF THE  
11 INSTRUMENT CREATING THE LIEN AGAINST REAL PROPERTY AND THE  
12 DISCLOSURE STATEMENT DESCRIBED IN PARAGRAPH (a) OF THIS  
13 SUBSECTION (3.5). IF A BAIL BONDING AGENT FAILS TO COMPLY FULLY  
14 WITH THE REQUIREMENTS OF PARAGRAPHS (a) AND (b) OF THIS  
15 SUBSECTION (3.5) AND THIS PARAGRAPH (c), ANY INSTRUMENT CREATING  
16 A LIEN AGAINST REAL PROPERTY SHALL BE VOIDABLE.

17           (d) THE BONDING AGENT SHALL DELIVER TO THE PROPERTY OWNER  
18 A FULLY EXECUTED AND NOTARIZED RECONVEYANCE OF TITLE, A  
19 CERTIFICATE OF DISCHARGE, OR A FULL RELEASE OF ANY LIEN AGAINST  
20 REAL PROPERTY THAT SECURES PERFORMANCE OF THE CONDITIONS OF A  
21 BAIL BOND WITHIN THIRTY-FIVE DAYS AFTER RECEIVING NOTICE THAT THE  
22 TIME FOR APPEALING AN ORDER THAT EXONERATED THE BAIL BOND HAS  
23 EXPIRED. THE BONDING AGENT SHALL ALSO DELIVER TO THE PROPERTY  
24 OWNER THE ORIGINAL CANCELLED NOTE AS EVIDENCE THAT THE  
25 INDEBTEDNESS SECURED BY ANY LIEN INSTRUMENT HAS BEEN PAID OR  
26 THAT THE PURPOSES OF SAID INSTRUMENT HAVE BEEN FULLY SATISFIED  
27 AND THE ORIGINAL DEED OF TRUST, SECURITY AGREEMENT, OR OTHER

1 INSTRUMENT THAT SECURED THE BAIL BOND OBLIGATION. IF A TIMELY  
2 NOTICE OF APPEAL IS FILED, THE THIRTY-FIVE-DAY PERIOD SHALL BEGIN  
3 ON THE DAY THE APPELLATE COURT'S AFFIRMATION OF THE ORDER  
4 BECOMES FINAL. IF THE BONDING AGENT FAILS TO COMPLY WITH THE  
5 REQUIREMENTS OF THIS PARAGRAPH (d), THE PROPERTY OWNER MAY  
6 PETITION THE DISTRICT COURT TO ISSUE AN ORDER DIRECTING THE CLERK  
7 OF SUCH COURT TO EXECUTE A FULL RECONVEYANCE OF TITLE, A  
8 CERTIFICATE OF DISCHARGE, OR A FULL RELEASE OF ANY LIEN AGAINST  
9 REAL PROPERTY CREATED TO SECURE PERFORMANCE OF THE CONDITIONS  
10 OF THE BAIL BOND. THE PETITION SHALL BE VERIFIED AND SHALL ALLEGE  
11 FACTS SHOWING THAT THE BONDING AGENT HAS FAILED TO COMPLY WITH  
12 THE PROVISIONS OF THIS PARAGRAPH (d).

13 (e) ANY BAIL BONDING AGENT WHO VIOLATES THIS SUBSECTION  
14 (3.5) IS LIABLE TO THE PROPERTY OWNER FOR ALL DAMAGES THAT MAY BE  
15 SUSTAINED BY REASON OF THE VIOLATION, PLUS STATUTORY DAMAGES IN  
16 THE SUM OF THREE HUNDRED DOLLARS. THE PROPERTY OWNER SHALL BE  
17 ENTITLED TO RECOVER COURT COSTS AND REASONABLE ATTORNEY FEES,  
18 AS DETERMINED BY THE COURT, UPON PREVAILING IN ANY ACTION  
19 BROUGHT TO ENFORCE THE PROVISIONS OF THIS SUBSECTION (3.5).

20 **SECTION 7.** In Colorado Revised Statutes, 10-23-101, **amend**  
21 (2) as follows:

22 **10-23-101. Definitions.** As used in this article, unless the context  
23 otherwise requires:

24 (2) "On the board" means that the name of the person has been  
25 publicly posted or disseminated by a court as being ineligible to write bail  
26 bonds under section ~~16-4-112~~ 16-4-114 (5) (e) or (5) (f), C.R.S.

27 **SECTION 8.** In Colorado Revised Statutes, 10-23-105, **amend**

1 (1) and (2) as follows:

2 **10-23-105. Qualification bond - forfeiture.** (1) Each  
3 cash-bonding agent shall post a cash qualification bond of fifty thousand  
4 dollars with the division. The bond must be to the people of the state of  
5 Colorado in favor of any court in this state, whether municipal, county,  
6 district, or other court, and to the division for the purposes of this section.  
7 In the event of a forfeiture of a cash-bonding agent's qualification bond,  
8 the division has priority over all other claimants. To comply with this  
9 subsection (1), the bond must be conditioned upon full and prompt  
10 payment into the court ordering the bond forfeited. Cash-bonding agents  
11 shall not issue bonds except in accordance with section ~~16-4-104 (1) (b)~~  
12 ~~(H)~~ 16-4-104 (1) (c) (III), C.R.S. In the event of a qualification bond  
13 forfeiture, a cash-bonding agent shall not write new bail bonds until the  
14 qualification bond is restored to fifty thousand dollars.

15 (2) Each professional cash-bail agent shall post a cash  
16 qualification bond of no less than fifty thousand dollars with the division.  
17 The bond shall be to the people of the state of Colorado in favor of any  
18 court in this state, whether municipal, county, district, or other court, and  
19 to the division for the purposes of this section. A professional cash-bail  
20 agent shall not furnish a single bail greater than twice the amount of the  
21 bond posted with the division. In the event of a forfeiture of a  
22 professional cash-bail agent's qualification bond, the division has priority  
23 over all other claimants to the bond. To comply with this subsection (2),  
24 the bond must be conditioned upon full and prompt payment into the  
25 court ordering the bond forfeited. Professional cash-bail agents shall not  
26 issue bonds except in accordance with section ~~16-4-104 (1) (b) (H)~~  
27 16-4-104 (1) (c) (III), C.R.S. In the event of a qualification bond

1 forfeiture, a professional cash-bail agent shall not write new bail bonds  
2 until the qualification bond is restored to at least fifty thousand dollars.

3 **SECTION 9.** In Colorado Revised Statutes, 10-23-108, **add** (3.5)  
4 as follows:

5 **10-23-108. Bail bond documents - requirements - rules.**

6 (3.5) (a) IF THE BOND IS TO BE SECURED BY REAL ESTATE, THE BAIL  
7 BONDING AGENT SHALL PROVIDE THE PROPERTY OWNER WITH A WRITTEN  
8 DISCLOSURE STATEMENT IN THE FOLLOWING FORM AT THE TIME AN INITIAL  
9 APPLICATION IS FILED:

10 **DISCLOSURE OF LIEN AGAINST REAL PROPERTY**

11 **DO NOT SIGN THIS DOCUMENT UNTIL YOU READ AND**  
12 **UNDERSTAND IT! THIS BAIL BOND WILL BE SECURED BY**  
13 **REAL PROPERTY YOU OWN OR IN WHICH YOU HAVE AN**  
14 **INTEREST. FAILURE TO PAY THE BAIL BOND PREMIUMS**  
15 **WHEN DUE OR THE DEFENDANT'S FAILURE TO COMPLY**  
16 **WITH THE CONDITIONS OF BAIL COULD RESULT IN THE**  
17 **LOSS OF YOUR PROPERTY!**

18 (b) THE DISCLOSURE REQUIRED IN PARAGRAPH (a) OF THIS  
19 SUBSECTION (3.5) SHALL BE PRINTED IN FOURTEEN-POINT, BOLD-FACED  
20 TYPE EITHER:

21 (I) ON A SEPARATE AND SPECIFIC DOCUMENT ATTACHED TO OR  
22 ACCOMPANYING THE APPLICATION; OR

23 (II) IN A CLEAR AND CONSPICUOUS STATEMENT ON THE FACE OF  
24 THE APPLICATION.

25 (c) BEFORE A PROPERTY OWNER EXECUTES ANY INSTRUMENT  
26 CREATING A LIEN AGAINST REAL PROPERTY, THE BAIL BONDING AGENT  
27 SHALL PROVIDE THE PROPERTY OWNER WITH A COMPLETED COPY OF THE

1 INSTRUMENT CREATING THE LIEN AGAINST REAL PROPERTY AND THE  
2 DISCLOSURE STATEMENT DESCRIBED IN PARAGRAPH (a) OF THIS  
3 SUBSECTION (3.5). IF A BAIL BONDING AGENT FAILS TO COMPLY FULLY  
4 WITH THE REQUIREMENTS OF PARAGRAPHS (a) AND (b) OF THIS  
5 SUBSECTION (3.5) AND THIS PARAGRAPH (c), ANY INSTRUMENT CREATING  
6 A LIEN AGAINST REAL PROPERTY SHALL BE VOIDABLE.

7 (d) THE BONDING AGENT SHALL DELIVER TO THE PROPERTY OWNER  
8 A FULLY EXECUTED AND NOTARIZED RECONVEYANCE OF TITLE, A  
9 CERTIFICATE OF DISCHARGE, OR A FULL RELEASE OF ANY LIEN AGAINST  
10 REAL PROPERTY THAT SECURES PERFORMANCE OF THE CONDITIONS OF A  
11 BAIL BOND WITHIN THIRTY-FIVE DAYS AFTER RECEIVING NOTICE THAT THE  
12 TIME FOR APPEALING AN ORDER THAT EXONERATED THE BAIL BOND HAS  
13 EXPIRED. THE BONDING AGENT SHALL ALSO DELIVER TO THE PROPERTY  
14 OWNER THE ORIGINAL CANCELLED NOTE AS EVIDENCE THAT THE  
15 INDEBTEDNESS SECURED BY ANY LIEN INSTRUMENT HAS BEEN PAID OR  
16 THAT THE PURPOSES OF SAID INSTRUMENT HAVE BEEN FULLY SATISFIED  
17 AND THE ORIGINAL DEED OF TRUST, SECURITY AGREEMENT, OR OTHER  
18 INSTRUMENT THAT SECURED THE BAIL BOND OBLIGATION. IF A TIMELY  
19 NOTICE OF APPEAL IS FILED, THE THIRTY-FIVE-DAY PERIOD SHALL BEGIN  
20 ON THE DAY THE APPELLATE COURT'S AFFIRMATION OF THE ORDER  
21 BECOMES FINAL. IF THE BONDING AGENT FAILS TO COMPLY WITH THE  
22 REQUIREMENTS OF THIS PARAGRAPH (d), THE PROPERTY OWNER MAY  
23 PETITION THE DISTRICT COURT TO ISSUE AN ORDER DIRECTING THE CLERK  
24 OF SUCH COURT TO EXECUTE A FULL RECONVEYANCE OF TITLE, A  
25 CERTIFICATE OF DISCHARGE, OR A FULL RELEASE OF ANY LIEN AGAINST  
26 REAL PROPERTY CREATED TO SECURE PERFORMANCE OF THE CONDITIONS  
27 OF THE BAIL BOND. THE PETITION SHALL BE VERIFIED AND SHALL ALLEGE

1 FACTS SHOWING THAT THE BONDING AGENT HAS FAILED TO COMPLY WITH  
2 THE PROVISIONS OF THIS PARAGRAPH (d).

3 (e) ANY BAIL BONDING AGENT WHO VIOLATES THIS SUBSECTION  
4 (3.5) SHALL BE LIABLE TO THE PROPERTY OWNER FOR ALL DAMAGES THAT  
5 MAY BE SUSTAINED BY REASON OF THE VIOLATION, PLUS STATUTORY  
6 DAMAGES IN THE SUM OF THREE HUNDRED DOLLARS. THE PROPERTY  
7 OWNER SHALL BE ENTITLED TO RECOVER COURT COSTS AND REASONABLE  
8 ATTORNEY FEES, AS DETERMINED BY THE COURT, UPON PREVAILING IN ANY  
9 ACTION BROUGHT TO ENFORCE THE PROVISIONS OF THIS SUBSECTION (3.5).

10 **SECTION 10.** In Colorado Revised Statutes, 18-13-130, **amend**  
11 (1) (g) as follows:

12 **18-13-130. Bail bond - prohibited activities - penalties.** (1) It  
13 is unlawful for any person who engages in the business of writing bail  
14 bonds to engage in any of the following activities related to a bail bond  
15 transaction:

16 (g) Post a bail bond in any court of record in this state while the  
17 name of the person is on the board under section ~~16-4-112~~ 16-4-114 (5)  
18 (e), C.R.S., or under any circumstance where the person has failed to pay  
19 a bail forfeiture judgment after all applicable stays of execution have  
20 expired and the bond has not been exonerated or discharged;

21 **SECTION 11.** In Colorado Revised Statutes, 19-2-509, **amend**  
22 (4) (a) as follows:

23 **19-2-509. Bail.** (4) (a) In determining ~~the amount of bail and the~~  
24 ~~type of bond to be furnished by~~ AND CONDITIONS OF RELEASE FOR the  
25 juvenile, the judge or magistrate fixing the same shall consider the criteria  
26 set forth in section ~~16-4-105 (1)~~ 16-4-103, C.R.S.

27 **SECTION 12. Safety clause.** The general assembly hereby finds,

1 determines, and declares that this act is necessary for the immediate  
2 preservation of the public peace, health, and safety.

NOTE: The governor signed this measure on 5/11/2013.

# An Act

HOUSE BILL 13-1236

BY REPRESENTATIVE(S) Levy, Labuda, Lee, Court, Fischer, Hulinghorst, Kagan, May, Rosenthal, Singer, Pabon; also SENATOR(S) Ulibarri, Giron, Guzman, Aguilar, Carroll, Heath, Hodge, King, Newell, Nicholson, Steadman, Tochtrop, Morse.

CONCERNING PRE-TRIAL RELEASE FROM CUSTODY.

*Be it enacted by the General Assembly of the State of Colorado:*

**SECTION 1.** In Colorado Revised Statutes, 16-1-104, **amend** (3) and (5) as follows:

**16-1-104. Definitions.** (3) "Bail" means ~~the amount of money set by the court which is required to be obligated by a bond for the release of a person in custody to assure that he will appear before the court in which his appearance is required or that he will comply with other conditions set forth in a bond~~ A SECURITY, WHICH MAY INCLUDE A BOND WITH OR WITHOUT MONETARY CONDITIONS, REQUIRED BY A COURT FOR THE RELEASE OF A PERSON IN CUSTODY SET TO PROVIDE REASONABLE ASSURANCE OF PUBLIC SAFETY AND COURT APPEARANCE.

(5) "Bond" means A BAIL BOND WHICH IS an undertaking, with or without sureties or security, entered into by a person in custody by which he

*Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.*

binds himself to comply with the conditions of the undertaking and in default of such compliance to pay the amount of bail or other sum fixed, IF ANY, in the bond.

**SECTION 2.** In Colorado Revised Statutes, **repeal and reenact, with amendments**, part 1 of article 4 of title 16 as follows:

PART 1  
RELEASE ON BAIL

**16-4-101. Bailable offenses - definitions.** (1) ALL PERSONS SHALL BE BAILABLE BY SUFFICIENT SURETIES EXCEPT:

(a) FOR CAPITAL OFFENSES WHEN PROOF IS EVIDENT OR PRESUMPTION IS GREAT; OR

(b) WHEN, AFTER A HEARING HELD WITHIN NINETY-SIX HOURS OF ARREST AND UPON REASONABLE NOTICE, THE COURT FINDS THAT THE PROOF IS EVIDENT OR THE PRESUMPTION IS GREAT AS TO THE CRIME ALLEGED TO HAVE BEEN COMMITTED AND FINDS THAT THE PUBLIC WOULD BE PLACED IN SIGNIFICANT PERIL IF THE ACCUSED WERE RELEASED ON BAIL AND SUCH PERSON IS ACCUSED IN ANY OF THE FOLLOWING CASES:

(I) A CRIME OF VIOLENCE ALLEGED TO HAVE BEEN COMMITTED WHILE ON PROBATION OR PAROLE RESULTING FROM THE CONVICTION OF A CRIME OF VIOLENCE;

(II) A CRIME OF VIOLENCE ALLEGED TO HAVE BEEN COMMITTED WHILE ON BAIL PENDING THE DISPOSITION OF A PREVIOUS CRIME OF VIOLENCE CHARGE FOR WHICH PROBABLE CAUSE HAS BEEN FOUND;

(III) A CRIME OF VIOLENCE ALLEGED TO HAVE BEEN COMMITTED AFTER TWO PREVIOUS FELONY CONVICTIONS, OR ONE SUCH PREVIOUS FELONY CONVICTION IF SUCH CONVICTION WAS FOR A CRIME OF VIOLENCE, UPON CHARGES SEPARATELY BROUGHT AND TRIED UNDER THE LAWS OF THIS STATE OR UNDER THE LAWS OF ANY OTHER STATE, THE UNITED STATES, OR ANY TERRITORY SUBJECT TO THE JURISDICTION OF THE UNITED STATES WHICH, IF COMMITTED IN THIS STATE, WOULD BE A FELONY;

(IV) A CRIME OF POSSESSION OF A WEAPON BY A PREVIOUS

OFFENDER ALLEGED TO HAVE BEEN COMMITTED IN VIOLATION OF SECTION 18-12-108 (2) (b), (2) (c), (4) (b), (4) (c), OR (5), C.R.S.;

(V) SEXUAL ASSAULT, AS DESCRIBED IN SECTION 18-3-402, SEXUAL ASSAULT IN THE FIRST DEGREE, AS DESCRIBED IN SECTION 18-3-402, AS IT EXISTED PRIOR TO JULY 1, 2000, SEXUAL ASSAULT IN THE SECOND DEGREE, AS DESCRIBED IN SECTION 18-3-403, AS IT EXISTED PRIOR TO JULY 1, 2000, SEXUAL ASSAULT ON A CHILD, AS DESCRIBED IN SECTION 18-3-405, OR SEXUAL ASSAULT ON A CHILD BY ONE IN A POSITION OF TRUST, AS DESCRIBED IN SECTION 18-3-405.3 IN WHICH THE VICTIM IS FOURTEEN YEARS OF AGE OR YOUNGER AND SEVEN OR MORE YEARS YOUNGER THAN THE ACCUSED.

(c) WHEN A PERSON HAS BEEN CONVICTED OF A CRIME OF VIOLENCE OR A CRIME OF POSSESSION OF A WEAPON BY A PREVIOUS OFFENDER, AS DESCRIBED IN SECTION 18-12-108 (2) (b), (2) (c), (4) (b), (4) (c), OR (5), C.R.S., AT THE TRIAL COURT LEVEL AND SUCH PERSON IS APPEALING SUCH CONVICTION OR AWAITING SENTENCING FOR SUCH CONVICTION AND THE COURT FINDS THAT THE PUBLIC WOULD BE PLACED IN SIGNIFICANT PERIL IF THE CONVICTED PERSON WERE RELEASED ON BAIL.

(2) FOR PURPOSES OF THIS SECTION, "CRIME OF VIOLENCE" SHALL HAVE THE SAME MEANING AS SET FORTH IN SECTION 18-1.3-406 (2), C.R.S.

(3) IN ANY CAPITAL CASE, THE DEFENDANT MAY MAKE A WRITTEN MOTION FOR ADMISSION TO BAIL UPON THE GROUND THAT THE PROOF IS NOT EVIDENT OR THAT PRESUMPTION IS NOT GREAT, AND THE COURT SHALL PROMPTLY CONDUCT A HEARING UPON SUCH MOTION. AT SUCH HEARING, THE BURDEN SHALL BE UPON THE PEOPLE TO ESTABLISH THAT THE PROOF IS EVIDENT OR THAT THE PRESUMPTION IS GREAT. THE COURT MAY COMBINE IN A SINGLE HEARING THE QUESTIONS AS TO WHETHER THE PROOF IS EVIDENT OR THE PRESUMPTION GREAT WITH THE DETERMINATION OF THE EXISTENCE OF PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT COMMITTED THE CRIME CHARGED.

(4) EXCEPT IN THE CASE OF A CAPITAL OFFENSE, IF A PERSON IS DENIED BAIL UNDER THIS SECTION, THE TRIAL OF THE PERSON SHALL BE COMMENCED NOT MORE THAN NINETY-ONE DAYS AFTER THE DATE ON WHICH BAIL IS DENIED. IF THE TRIAL IS NOT COMMENCED WITHIN NINETY-ONE DAYS AND THE DELAY IS NOT ATTRIBUTABLE TO THE DEFENSE, THE COURT SHALL IMMEDIATELY SCHEDULE A BAIL HEARING AND SHALL SET THE AMOUNT OF

THE BAIL FOR THE PERSON.

(5) WHEN A PERSON IS ARRESTED FOR A CRIME OF VIOLENCE, AS DEFINED IN SECTION 16-1-104 (8.5), OR A CRIMINAL OFFENSE ALLEGING THE USE OR POSSESSION OF A DEADLY WEAPON OR THE CAUSING OF BODILY INJURY TO ANOTHER PERSON, OR A CRIMINAL OFFENSE ALLEGING THE POSSESSION OF A WEAPON BY A PREVIOUS OFFENDER, AS DESCRIBED IN SECTION 18-12-108 (2) (b), (2) (c), (4) (b), (4) (c), OR (5), C.R.S., AND SUCH PERSON IS ON PAROLE, THE LAW ENFORCEMENT AGENCY MAKING THE ARREST SHALL NOTIFY THE DEPARTMENT OF CORRECTIONS WITHIN TWENTY-FOUR HOURS. THE PERSON SO ARRESTED SHALL NOT BE ELIGIBLE FOR BAIL TO BE SET UNTIL AT LEAST SEVENTY-TWO HOURS FROM THE TIME OF HIS OR HER ARREST HAS PASSED.

**16-4-102. Right to bail - before conviction.** ANY PERSON WHO IS IN CUSTODY, AND FOR WHOM THE COURT HAS NOT SET BOND AND CONDITIONS OF RELEASE PURSUANT TO THE APPLICABLE RULE OF CRIMINAL PROCEDURE, AND WHO IS NOT SUBJECT TO THE PROVISIONS OF SECTION 16-4-101 (5), HAS THE RIGHT TO A HEARING TO DETERMINE BOND AND CONDITIONS OF RELEASE. A PERSON IN CUSTODY MAY ALSO REQUEST A HEARING SO THAT BOND AND CONDITIONS OF RELEASE CAN BE SET. UPON RECEIVING THE REQUEST, THE JUDGE SHALL NOTIFY THE DISTRICT ATTORNEY IMMEDIATELY OF THE ARRESTED PERSON'S REQUEST, AND THE DISTRICT ATTORNEY SHALL HAVE THE RIGHT TO ATTEND AND ADVISE THE COURT OF MATTERS PERTINENT TO THE TYPE OF BOND AND CONDITIONS OF RELEASE TO BE SET. THE JUDGE SHALL ALSO ORDER THE APPROPRIATE LAW ENFORCEMENT AGENCY HAVING CUSTODY OF THE PRISONER TO BRING HIM OR HER BEFORE THE COURT FORTHWITH, AND THE JUDGE SHALL SET BOND AND CONDITIONS OF RELEASE IF THE OFFENSE FOR WHICH THE PERSON WAS ARRESTED IS BAILABLE. IT SHALL NOT BE A PREREQUISITE TO BAIL THAT A CRIMINAL CHARGE OF ANY KIND HAS BEEN FILED.

**16-4-103. Setting and selection type of bond - criteria.** (1) AT THE FIRST APPEARANCE OF A PERSON IN CUSTODY BEFORE A COURT OF RECORD, THE COURT SHALL DETERMINE THE TYPE OF BOND AND CONDITIONS OF RELEASE UNLESS THE PERSON IS SUBJECT TO THE PROVISIONS OF SECTION 16-4-101.

(2) IF AN INDICTMENT, INFORMATION, OR COMPLAINT HAS BEEN FILED AND THE TYPE OF BOND AND CONDITIONS OF RELEASE HAVE BEEN

FIXED UPON RETURN OF THE INDICTMENT OR FILING OF THE INFORMATION OR COMPLAINT, THE COURT SHALL REVIEW THE PROPRIETY OF THE TYPE OF BOND AND CONDITIONS OF RELEASE UPON FIRST APPEARANCE OF A PERSON IN CUSTODY.

(3) (a) THE TYPE OF BOND AND CONDITIONS OF RELEASE SHALL BE SUFFICIENT TO REASONABLY ENSURE THE APPEARANCE OF THE PERSON AS REQUIRED AND TO PROTECT THE SAFETY OF ANY PERSON OR THE COMMUNITY, TAKING INTO CONSIDERATION THE INDIVIDUAL CHARACTERISTICS OF EACH PERSON IN CUSTODY, INCLUDING THE PERSON'S FINANCIAL CONDITION.

(b) IN DETERMINING THE TYPE OF BOND AND CONDITIONS OF RELEASE, IF PRACTICABLE AND AVAILABLE IN THE JURISDICTION, THE COURT SHALL USE AN EMPIRICALLY DEVELOPED RISK ASSESSMENT INSTRUMENT DESIGNED TO IMPROVE PRETRIAL RELEASE DECISIONS BY PROVIDING TO THE COURT INFORMATION THAT CLASSIFIES A PERSON IN CUSTODY BASED UPON PREDICTED LEVEL OF RISK OF PRETRIAL FAILURE.

(4) WHEN THE TYPE OF BOND AND CONDITIONS OF RELEASE ARE DETERMINED BY THE COURT, THE COURT SHALL:

(a) PRESUME THAT ALL PERSONS IN CUSTODY ARE ELIGIBLE FOR RELEASE ON BOND WITH THE APPROPRIATE AND LEAST-RESTRICTIVE CONDITIONS CONSISTENT WITH PROVISIONS IN PARAGRAPH (a) OF SUBSECTION (3) OF THIS SECTION UNLESS A PERSON IS OTHERWISE INELIGIBLE FOR RELEASE PURSUANT TO THE PROVISIONS OF SECTION 16-4-101 AND SECTION 19 OF ARTICLE II OF THE COLORADO CONSTITUTION. A MONETARY CONDITION OF RELEASE MUST BE REASONABLE AND ANY OTHER CONDITION OF CONDUCT NOT MANDATED BY STATUTE MUST BE TAILORED TO ADDRESS A SPECIFIC CONCERN.

(b) TO THE EXTENT A COURT USES A BOND SCHEDULE, THE COURT SHALL INCORPORATE INTO THE BOND SCHEDULE CONDITIONS OF RELEASE AND FACTORS THAT CONSIDER THE INDIVIDUALIZED RISK AND CIRCUMSTANCES OF A PERSON IN CUSTODY AND ALL OTHER RELEVANT CRITERIA AND NOT SOLELY THE LEVEL OF OFFENSE; AND

(c) CONSIDER ALL METHODS OF BOND AND CONDITIONS OF RELEASE TO AVOID UNNECESSARY PRETRIAL INCARCERATION AND LEVELS OF

COMMUNITY-BASED SUPERVISION AS CONDITIONS OF PRETRIAL RELEASE.

(5) THE COURT MAY ALSO CONSIDER THE FOLLOWING CRITERIA AS APPROPRIATE AND RELEVANT IN MAKING A DETERMINATION OF THE TYPE OF BOND AND CONDITIONS OF RELEASE:

(a) THE EMPLOYMENT STATUS AND HISTORY OF THE PERSON IN CUSTODY;

(b) THE NATURE AND EXTENT OF FAMILY RELATIONSHIPS OF THE PERSON IN CUSTODY;

(c) PAST AND PRESENT RESIDENCES OF THE PERSON IN CUSTODY;

(d) THE CHARACTER AND REPUTATION OF THE PERSON IN CUSTODY;

(e) IDENTITY OF PERSONS WHO AGREE TO ASSIST THE PERSON IN CUSTODY IN ATTENDING COURT AT THE PROPER TIME;

(f) THE LIKELY SENTENCE, CONSIDERING THE NATURE AND THE OFFENSE PRESENTLY CHARGED;

(g) THE PRIOR CRIMINAL RECORD, IF ANY, OF THE PERSON IN CUSTODY AND ANY PRIOR FAILURES TO APPEAR FOR COURT;

(h) ANY FACTS INDICATING THE POSSIBILITY OF VIOLATIONS OF THE LAW IF THE PERSON IN CUSTODY IS RELEASED WITHOUT CERTAIN CONDITIONS OF RELEASE;

(i) ANY FACTS INDICATING THAT THE DEFENDANT IS LIKELY TO INTIMIDATE OR HARASS POSSIBLE WITNESSES; AND

(j) ANY OTHER FACTS TENDING TO INDICATE THAT THE PERSON IN CUSTODY HAS STRONG TIES TO THE COMMUNITY AND IS NOT LIKELY TO FLEE THE JURISDICTION.

(6) WHEN A PERSON IS CHARGED WITH AN OFFENSE PUNISHABLE BY FINE ONLY, ANY MONETARY CONDITION OF RELEASE SHALL NOT EXCEED THE AMOUNT OF THE MAXIMUM FINE PENALTY.

**16-4-104. Types of bond set by the court.** (1) THE COURT SHALL DETERMINE, AFTER CONSIDERATION OF ALL RELEVANT CRITERIA, WHICH OF THE FOLLOWING TYPES OF BOND IS APPROPRIATE FOR THE PRETRIAL RELEASE OF A PERSON IN CUSTODY, SUBJECT TO THE RELEVANT STATUTORY CONDITIONS OF RELEASE LISTED IN SECTION 16-4-105. THE PERSON MAY BE RELEASED UPON EXECUTION OF:

(a) AN UNSECURED PERSONAL RECOGNIZANCE BOND IN AN AMOUNT SPECIFIED BY THE COURT. THE COURT MAY REQUIRE ADDITIONAL OBLIGORS ON THE BOND AS A CONDITION OF THE BOND.

(b) AN UNSECURED PERSONAL RECOGNIZANCE BOND WITH ADDITIONAL NON-MONETARY CONDITIONS OF RELEASE DESIGNED SPECIFICALLY TO REASONABLY ENSURE THE APPEARANCE OF THE PERSON IN COURT AND THE SAFETY OF ANY PERSON OR PERSONS OR THE COMMUNITY;

(c) A BOND WITH SECURED MONETARY CONDITIONS WHEN REASONABLE AND NECESSARY TO ENSURE THE APPEARANCE OF THE PERSON IN COURT OR THE SAFETY OF ANY PERSON OR PERSONS OR THE COMMUNITY. THE FINANCIAL CONDITIONS SHALL STATE AN AMOUNT OF MONEY THAT THE PERSON MUST POST WITH THE COURT IN ORDER FOR THE PERSON TO BE RELEASED. THE PERSON MAY BE RELEASED FROM CUSTODY UPON EXECUTION OF BOND IN THE FULL AMOUNT OF MONEY TO BE SECURED IN ANY ONE OF THE FOLLOWING WAYS:

(I) BY A DEPOSIT WITH THE CLERK OF THE COURT OF AN AMOUNT OF CASH EQUAL TO THE MONETARY CONDITION OF THE BOND;

(II) BY REAL ESTATE SITUATED IN THIS STATE WITH UNENCUMBERED EQUITY NOT EXEMPT FROM EXECUTION OWNED BY THE ACCUSED OR ANY OTHER PERSON ACTING AS SURETY ON THE BOND, WHICH UNENCUMBERED EQUITY SHALL BE AT LEAST ONE AND ONE-HALF THE AMOUNT OF THE SECURITY SET IN THE BOND;

(III) BY SURETIES WORTH AT LEAST ONE AND ONE-HALF OF THE SECURITY SET IN THE BOND; OR

(IV) BY A BAIL BONDING AGENT, AS DEFINED IN SECTION 16-1-104 (3.5).

(d) A BOND WITH SECURED REAL ESTATE CONDITIONS WHEN IT IS DETERMINED THAT RELEASE ON AN UNSECURED PERSONAL RECOGNIZANCE BOND WITHOUT MONETARY CONDITIONS WILL NOT REASONABLY ENSURE THE APPEARANCE OF THE PERSON IN COURT OR THE SAFETY OF ANY PERSON OR PERSONS OR THE COMMUNITY. FOR A BOND SECURED BY REAL ESTATE, THE BOND SHALL NOT BE ACCEPTED BY THE CLERK OF THE COURT UNLESS THE RECORD OWNER OF SUCH PROPERTY PRESENTS TO THE CLERK OF THE COURT THE ORIGINAL DEED OF TRUST AS SET FORTH IN SUBPARAGRAPH (IV) OF THIS PARAGRAPH (d) AND THE APPLICABLE RECORDING FEE. UPON RECEIPT OF THE DEED OF TRUST AND FEE, THE CLERK OF THE COURT SHALL RECORD THE DEED OF TRUST WITH THE CLERK AND RECORDER FOR THE COUNTY IN WHICH THE PROPERTY IS LOCATED. FOR A BOND SECURED BY REAL ESTATE, THE AMOUNT OF THE OWNER'S UNENCUMBERED EQUITY SHALL BE DETERMINED BY DEDUCTING THE AMOUNT OF ALL ENCUMBRANCES LISTED IN THE OWNER AND ENCUMBRANCES CERTIFICATE FROM THE ACTUAL VALUE OF SUCH REAL ESTATE AS SHOWN ON THE CURRENT NOTICE OF VALUATION. THE OWNER OF THE REAL ESTATE SHALL FILE WITH THE BOND THE FOLLOWING, WHICH SHALL CONSTITUTE A MATERIAL PART OF THE BOND:

(I) THE CURRENT NOTICE OF VALUATION FOR SUCH REAL ESTATE PREPARED BY THE COUNTY ASSESSOR PURSUANT TO SECTION 39-5-121, C.R.S.; AND

(II) EVIDENCE OF TITLE ISSUED BY A TITLE INSURANCE COMPANY OR AGENT LICENSED PURSUANT TO ARTICLE 11 OF TITLE 10, C.R.S., WITHIN THIRTY-FIVE DAYS AFTER THE DATE UPON WHICH THE BOND IS FILED; AND

(III) A SWORN STATEMENT BY THE OWNER OF THE REAL ESTATE THAT THE REAL ESTATE IS SECURITY FOR THE COMPLIANCE BY THE ACCUSED WITH THE PRIMARY CONDITION OF THE BOND; AND

(IV) A DEED OF TRUST TO THE PUBLIC TRUSTEE OF THE COUNTY IN WHICH THE REAL ESTATE IS LOCATED THAT IS EXECUTED AND ACKNOWLEDGED BY ALL RECORD OWNERS OF THE REAL ESTATE. THE DEED OF TRUST SHALL NAME THE CLERK OF THE COURT APPROVING THE BOND AS BENEFICIARY. THE DEED OF TRUST SHALL SECURE AN AMOUNT EQUAL TO ONE AND ONE-HALF TIMES THE AMOUNT OF THE BOND.

(2) UNLESS THE DISTRICT ATTORNEY CONSENTS OR UNLESS THE COURT IMPOSES CERTAIN ADDITIONAL INDIVIDUALIZED CONDITIONS OF

RELEASE AS DESCRIBED IN SECTION 16-4-105, A PERSON MUST NOT BE RELEASED ON AN UNSECURED PERSONAL RECOGNIZANCE BOND PURSUANT TO PARAGRAPH (a) OF SUBSECTION (1) OF THIS SECTION UNDER THE FOLLOWING CIRCUMSTANCES:

(a) THE PERSON IS PRESENTLY FREE ON ANOTHER BOND OF ANY KIND IN ANOTHER CRIMINAL ACTION INVOLVING A FELONY OR A CLASS 1 MISDEMEANOR;

(b) THE PERSON HAS A RECORD OF CONVICTION OF A CLASS 1 MISDEMEANOR WITHIN TWO YEARS OR A FELONY WITHIN FIVE YEARS, PRIOR TO THE BAIL HEARING; OR

(c) THE PERSON HAS WILLFULLY FAILED TO APPEAR ON BOND IN ANY CASE INVOLVING A FELONY OR A CLASS 1 MISDEMEANOR CHARGE IN THE PRECEDING FIVE YEARS.

(3) A PERSON MAY NOT BE RELEASED ON AN UNSECURED PERSONAL RECOGNIZANCE BOND IF, AT THE TIME OF SUCH APPLICATION, THE PERSON IS PRESENTLY ON RELEASE UNDER A SURETY BOND FOR FELONY OR CLASS 1 MISDEMEANOR CHARGES UNLESS THE SURETY THEREON IS NOTIFIED AND AFFORDED AN OPPORTUNITY TO SURRENDER THE PERSON INTO CUSTODY ON SUCH TERMS AS THE COURT DEEMS JUST UNDER THE PROVISIONS OF SECTION 16-4-108.

(4) BECAUSE OF THE DANGER POSED TO ANY PERSON AND THE COMMUNITY, A PERSON WHO IS ARRESTED FOR AN OFFENSE UNDER SECTION 42-4-1301 (1) OR (2) (a), C.R.S., MAY NOT ATTEND A BAIL HEARING UNTIL THE PERSON IS NO LONGER INTOXICATED OR UNDER THE INFLUENCE OF DRUGS. THE PERSON SHALL BE HELD IN CUSTODY UNTIL THE PERSON MAY SAFELY ATTEND SUCH HEARING.

**16-4-105. Conditions of release on bond.** (1) FOR EACH BOND, THE COURT SHALL REQUIRE THAT THE RELEASED PERSON APPEAR TO ANSWER THE CHARGE AGAINST THE PERSON AT A PLACE AND UPON A DATE CERTAIN AND AT ANY PLACE OR UPON ANY DATE TO WHICH THE PROCEEDING IS TRANSFERRED OR CONTINUED. THIS CONDITION IS THE ONLY CONDITION FOR WHICH A BREACH OF SURETY OR SECURITY ON THE BAIL BOND MAY BE SUBJECT TO FORFEITURE.

(2) FOR A PERSON WHO HAS BEEN ARRESTED FOR A FELONY OFFENSE, THE COURT SHALL REQUIRE AS A CONDITION OF A BOND THAT THE PERSON EXECUTE A WAIVER OF EXTRADITION STATING THE PERSON CONSENTS TO EXTRADITION TO THIS STATE AND WAIVES ALL FORMAL PROCEDURES INCIDENTAL TO EXTRADITION PROCEEDINGS IN THE EVENT THAT HE OR SHE IS ARRESTED IN ANOTHER STATE WHILE AT LIBERTY ON SUCH BAIL BOND AND ACKNOWLEDGING THAT HE OR SHE SHALL NOT BE ADMITTED TO BAIL IN ANY OTHER STATE PENDING EXTRADITION TO THIS STATE.

(3) ADDITIONAL CONDITIONS OF EVERY BOND IS THAT THE RELEASED PERSON SHALL NOT COMMIT ANY FELONY WHILE FREE ON SUCH A BAIL BOND, AND THE COURT IN WHICH THE ACTION IS PENDING HAS THE POWER TO REVOKE THE RELEASE OF THE PERSON, TO CHANGE ANY BOND CONDITION, INCLUDING THE AMOUNT OF ANY MONETARY CONDITION IF IT IS SHOWN THAT A COMPETENT COURT HAS FOUND PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT HAS COMMITTED A FELONY WHILE RELEASED, PENDING THE RESOLUTION OF A PRIOR FELONY CHARGE.

(4) AN ADDITIONAL CONDITION OF EVERY BOND IN CASES OF DOMESTIC VIOLENCE AS DEFINED IN SECTION 18-6-800.3 (1), C.R.S., IS THAT THE RELEASED PERSON ACKNOWLEDGE THE PROTECTION ORDER AS PROVIDED IN SECTION 18-1-1001 (5), C.R.S.

(5) AN ADDITIONAL CONDITION OF EVERY BOND IN A CASE OF AN OFFENSE UNDER SECTION 42-2-138 (1) (d) (I), C.R.S., OF DRIVING WHILE SUCH PERSON'S DRIVER'S LICENSE OR PRIVILEGE TO DRIVE, EITHER AS A RESIDENT OR NONRESIDENT, IS RESTRAINED SOLELY OR PARTIALLY BECAUSE OF A CONVICTION OF A DRIVING OFFENSE PURSUANT TO SECTION 42-4-1301 (1) OR (2) (a), C.R.S., IS THAT SUCH PERSON NOT DRIVE ANY MOTOR VEHICLE DURING THE PERIOD OF SUCH DRIVING RESTRAINT.

(6) (a) IF A PERSON IS ARRESTED FOR DRIVING UNDER THE INFLUENCE OR DRIVING WHILE ABILITY IMPAIRED, PURSUANT TO SECTION 42-4-1301, C.R.S., AND THE PERSON HAS ONE OR MORE PREVIOUS CONVICTIONS FOR AN OFFENSE IN SECTION 42-4-1301, C.R.S., OR ONE OR MORE CONVICTIONS IN ANY OTHER JURISDICTION THAT WOULD CONSTITUTE A VIOLATION OF SECTION 42-4-1301, C.R.S., AS A CONDITION OF ANY BOND, THE COURT SHALL ORDER THAT THE PERSON ABSTAIN FROM THE USE OF ALCOHOL OR ILLEGAL DRUGS, AND SUCH ABSTINENCE SHALL BE MONITORED.

(b) A PERSON SEEKING RELIEF FROM ANY OF THE CONDITIONS IMPOSED PURSUANT TO PARAGRAPH (a) OF THIS SUBSECTION (6) SHALL FILE A MOTION WITH THE COURT, AND THE COURT SHALL CONDUCT A HEARING UPON THE MOTION. THE COURT SHALL CONSIDER WHETHER THE CONDITION FROM WHICH THE PERSON IS SEEKING RELIEF IS IN THE INTEREST OF JUSTICE AND WHETHER PUBLIC SAFETY WOULD BE ENDANGERED IF THE CONDITION WERE NOT ENFORCED. WHEN DETERMINING WHETHER TO GRANT RELIEF PURSUANT TO THIS PARAGRAPH (b), THE COURT SHALL CONSIDER WHETHER THE PERSON HAS VOLUNTARILY ENROLLED AND IS PARTICIPATING IN AN APPROPRIATE SUBSTANCE ABUSE TREATMENT PROGRAM.

(7) A PERSON MAY BE RELEASED ON A BOND WITH MONETARY CONDITION OF BOND, WHEN APPROPRIATE, AS DESCRIBED IN SECTION 16-4-104 (1) (c).

(8) IN ADDITION TO THE CONDITIONS SPECIFIED IN THIS SECTION, THE COURT MAY IMPOSE ANY ADDITIONAL CONDITIONS ON THE CONDUCT OF THE PERSON RELEASED THAT WILL ASSIST IN OBTAINING THE APPEARANCE OF THE PERSON IN COURT AND THE SAFETY OF ANY PERSON OR PERSONS AND THE COMMUNITY. THESE CONDITIONS MAY INCLUDE, BUT ARE NOT LIMITED TO, SUPERVISION BY A QUALIFIED PERSON OR ORGANIZATION OR SUPERVISION BY A PRETRIAL SERVICES PROGRAM ESTABLISHED PURSUANT TO SECTION 16-4-106. WHILE UNDER THE SUPERVISION OF A QUALIFIED ORGANIZATION OR PRETRIAL SERVICES PROGRAM, THE CONDITIONS OF RELEASE IMPOSED BY THE COURT MAY INCLUDE, BUT ARE NOT LIMITED TO:

(a) PERIODIC TELEPHONE CONTACT WITH THE PROGRAM;

(b) PERIODIC OFFICE VISITS BY THE PERSON TO THE PRETRIAL SERVICES PROGRAM OR ORGANIZATION;

(c) PERIODIC VISITS TO THE PERSON'S HOME BY THE PROGRAM OR ORGANIZATION;

(d) MENTAL HEALTH OR SUBSTANCE ABUSE TREATMENT FOR THE PERSON, INCLUDING RESIDENTIAL TREATMENT IF THE DEFENDANT CONSENTS TO THE TREATMENT;

(e) PERIODIC ALCOHOL OR DRUG TESTING OF THE PERSON;

(f) DOMESTIC VIOLENCE COUNSELING FOR THE DEFENDANT IF THE DEFENDANT CONSENTS TO THE COUNSELING;

(g) ELECTRONIC OR GLOBAL POSITION MONITORING OF THE PERSON;

(h) PRETRIAL WORK RELEASE FOR THE PERSON; AND

(i) OTHER SUPERVISION TECHNIQUES SHOWN BY RESEARCH TO INCREASE COURT APPEARANCE AND PUBLIC SAFETY RATES FOR PERSONS RELEASED ON BOND.

**16-4-106. Pretrial services programs.** (1) THE CHIEF JUDGE OF ANY JUDICIAL DISTRICT MAY ORDER A PERSON WHO IS ELIGIBLE FOR BOND OR OTHER PRETRIAL RELEASE TO BE EVALUATED BY A PRETRIAL SERVICES PROGRAM ESTABLISHED PURSUANT TO THIS SECTION, WHICH PROGRAM MAY ADVISE THE COURT IF THE PERSON IS BOND ELIGIBLE, MAY PROVIDE INFORMATION THAT ENABLES THE COURT TO MAKE AN APPROPRIATE DECISION ON BOND AND CONDITIONS OF RELEASE, AND MAY RECOMMEND CONDITIONS OF RELEASE CONSISTENT WITH THIS SECTION. THE CHIEF JUDGE MAY MAKE SUCH ORDER IN ANY OR ALL OF THE COUNTIES OF THE CHIEF JUDGE'S JUDICIAL DISTRICT.

(2) THE CHIEF JUDGE OF ANY JUDICIAL DISTRICT SHALL ENDEAVOR TO CONSULT, ON AN ANNUAL BASIS, WITH THE COUNTY OR COUNTIES WITHIN THE JUDICIAL DISTRICT IN AN EFFORT TO SUPPORT AND ENCOURAGE THE DEVELOPMENT BY THE COUNTY OR COUNTIES, TO THE EXTENT PRACTICABLE AND WITHIN AVAILABLE RESOURCES, OF PRETRIAL SERVICES PROGRAMS THAT SUPPORT THE WORK OF THE COURT AND EVIDENCE-BASED DECISION-MAKING IN DETERMINING THE TYPE OF BOND AND CONDITIONS OF RELEASE.

(3) TO REDUCE BARRIERS TO THE PRETRIAL RELEASE OF PERSONS IN CUSTODY WHOSE RELEASE ON BOND WITH APPROPRIATE CONDITIONS REASONABLY ASSURES COURT APPEARANCE AND PUBLIC SAFETY, ALL COUNTIES AND CITIES AND COUNTIES ARE ENCOURAGED TO DEVELOP A PRETRIAL SERVICES PROGRAM IN CONSULTATION WITH THE CHIEF JUDGE OF THE JUDICIAL DISTRICT IN AN EFFORT TO ESTABLISH A PRETRIAL SERVICES PROGRAM THAT MAY BE UTILIZED BY THE DISTRICT COURT OF SUCH COUNTY OR CITY AND COUNTY. ANY PRETRIAL SERVICES PROGRAM MUST BE ESTABLISHED PURSUANT TO A PLAN FORMULATED BY A COMMUNITY

ADVISORY BOARD CREATED FOR SUCH PURPOSE AND APPOINTED BY THE CHIEF JUDGE OF THE JUDICIAL DISTRICT. MEMBERSHIP ON SUCH COMMUNITY ADVISORY BOARD MUST INCLUDE, AT A MINIMUM, A REPRESENTATIVE OF A LOCAL LAW ENFORCEMENT AGENCY, A REPRESENTATIVE OF THE DISTRICT ATTORNEY, A REPRESENTATIVE OF THE PUBLIC DEFENDER, AND A REPRESENTATIVE OF THE CITIZENS AT LARGE. THE CHIEF JUDGE IS ENCOURAGED TO APPOINT TO THE COMMUNITY ADVISORY BOARD AT LEAST ONE REPRESENTATIVE OF THE BAIL BOND INDUSTRY WHO CONDUCTS BUSINESS IN THE JUDICIAL DISTRICT, WHICH MAY INCLUDE A BAIL BONDSMAN, A BAIL SURETY, OR OTHER DESIGNATED BAIL INDUSTRY REPRESENTATIVE. THE PLAN FORMULATED BY SUCH COMMUNITY ADVISORY BOARD MUST BE APPROVED BY THE CHIEF JUDGE OF THE JUDICIAL DISTRICT PRIOR TO THE ESTABLISHMENT AND UTILIZATION OF THE PRETRIAL SERVICES PROGRAM. THE OPTION CONTAINED IN THIS SECTION THAT A PRETRIAL SERVICES PROGRAM BE ESTABLISHED PURSUANT TO A PLAN FORMULATED BY THE COMMUNITY ADVISORY BOARD DOES NOT APPLY TO ANY PRETRIAL SERVICES PROGRAM THAT EXISTED BEFORE MAY 31, 1991.

(4) ANY PRETRIAL SERVICES PROGRAM APPROVED PURSUANT TO THIS SECTION MUST MEET THE FOLLOWING CRITERIA:

(a) THE PROGRAM MUST ESTABLISH A PROCEDURE FOR THE SCREENING OF PERSONS WHO ARE DETAINED DUE TO AN ARREST FOR THE ALLEGED COMMISSION OF A CRIME SO THAT SUCH INFORMATION MAY BE PROVIDED TO THE JUDGE WHO IS SETTING THE BOND AND CONDITIONS OF RELEASE. THE PROGRAM MUST PROVIDE INFORMATION THAT PROVIDES THE COURT WITH THE ABILITY TO MAKE AN APPROPRIATE INITIAL BOND DECISION THAT IS BASED UPON FACTS RELATING TO THE PERSON'S RISK OF FAILURE TO APPEAR FOR COURT AND RISK OF DANGER TO THE COMMUNITY.

(b) THE PROGRAM MUST MAKE ALL REASONABLE ATTEMPTS TO PROVIDE THE COURT WITH SUCH INFORMATION DELINEATED IN THIS SECTION AS IS APPROPRIATE TO EACH INDIVIDUAL PERSON SEEKING RELEASE FROM CUSTODY;

(c) THE PROGRAM, IN CONJUNCTION WITH THE COMMUNITY ADVISORY BOARD, MUST MAKE ALL REASONABLE EFFORTS TO IMPLEMENT AN EMPIRICALLY DEVELOPED PRETRIAL RISK ASSESSMENT TOOL AND A STRUCTURED DECISION-MAKING DESIGN BASED UPON THE PERSON'S CHARGE AND THE RISK ASSESSMENT SCORE;

(d) THE PROGRAM MUST WORK WITH ALL APPROPRIATE AGENCIES AND ASSIST WITH ALL EFFORTS TO COMPLY WITH SECTIONS 24-4.1-302.5 AND 24-4.1-303, C.R.S.

(5) ANY PRETRIAL SERVICES PROGRAM MAY ALSO INCLUDE DIFFERENT METHODS AND LEVELS OF COMMUNITY-BASED SUPERVISION AS A CONDITION OF RELEASE, AND THE PROGRAM MUST USE ESTABLISHED METHODS FOR PERSONS WHO ARE RELEASED PRIOR TO TRIAL IN ORDER TO DECREASE UNNECESSARY PRETRIAL DETENTION. THE PROGRAM MAY INCLUDE, BUT IS NOT LIMITED TO, ANY OF THE CRITERIA AS OUTLINED IN SECTION 16-4-105 (8) AS CONDITIONS FOR PRETRIAL RELEASE.

(6) COMMENCING JULY 1, 2012, EACH PRETRIAL SERVICES PROGRAM ESTABLISHED PURSUANT TO THIS SECTION SHALL PROVIDE AN ANNUAL REPORT TO THE JUDICIAL DEPARTMENT NO LATER THAN NOVEMBER 1 OF EACH YEAR, REGARDLESS OF WHETHER THE PROGRAM EXISTED PRIOR TO MAY 31, 1991. THE JUDICIAL DEPARTMENT SHALL PRESENT AN ANNUAL COMBINED REPORT TO THE HOUSE AND SENATE JUDICIARY COMMITTEES OF THE HOUSE OF REPRESENTATIVES AND THE SENATE, OR ANY SUCCESSOR COMMITTEES, OF THE GENERAL ASSEMBLY. THE REPORT TO THE JUDICIAL DEPARTMENT MUST INCLUDE, BUT IS NOT LIMITED TO, THE FOLLOWING INFORMATION:

(a) THE TOTAL NUMBER OF PRETRIAL ASSESSMENTS PERFORMED BY THE PROGRAM AND SUBMITTED TO THE COURT;

(b) THE TOTAL NUMBER OF CLOSED CASES BY THE PROGRAM IN WHICH THE PERSON WAS RELEASED FROM CUSTODY AND SUPERVISED BY THE PROGRAM;

(c) THE TOTAL NUMBER OF CLOSED CASES IN WHICH THE PERSON WAS RELEASED FROM CUSTODY, WAS SUPERVISED BY THE PROGRAM, AND, WHILE UNDER SUPERVISION, APPEARED FOR ALL SCHEDULED COURT APPEARANCES ON THE CASE;

(d) THE TOTAL NUMBER OF CLOSED CASES IN WHICH THE PERSON WAS RELEASED FROM CUSTODY, WAS SUPERVISED BY THE PROGRAM, AND WAS NOT CHARGED WITH A NEW CRIMINAL OFFENSE THAT WAS ALLEGED TO HAVE OCCURRED WHILE UNDER SUPERVISION AND THAT CARRIED THE POSSIBILITY OF A SENTENCE TO JAIL OR IMPRISONMENT;

(e) THE TOTAL NUMBER OF CLOSED CASES IN WHICH THE PERSON WAS RELEASED FROM CUSTODY AND WAS SUPERVISED BY THE PROGRAM, AND THE PERSON'S BOND WAS NOT REVOKED BY THE COURT DUE TO A VIOLATION OF ANY OTHER TERMS AND CONDITIONS OF SUPERVISION; AND

(f) ANY ADDITIONAL INFORMATION THE JUDICIAL DEPARTMENT MAY REQUEST.

(7) FOR THE REPORTS REQUIRED IN SUBSECTION (6) OF THIS SECTION, THE PRETRIAL SERVICES PROGRAM SHALL INCLUDE INFORMATION DETAILING THE NUMBER OF PERSONS RELEASED ON A COMMERCIAL SURETY BOND IN ADDITION TO PRETRIAL SUPERVISION, THE NUMBER OF PERSONS RELEASED ON A CASH, PRIVATE SURETY, OR PROPERTY BOND IN ADDITION TO PRETRIAL SUPERVISION, AND THE NUMBER OF PERSONS RELEASED ON ANY FORM OF A PERSONAL RECOGNIZANCE BOND IN ADDITION TO PRETRIAL SUPERVISION.

**16-4-107. Hearing after setting of monetary conditions of bond.**

IF A PERSON IS IN CUSTODY AND THE COURT IMPOSED A MONETARY BOND FOR RELEASE, AND THE PERSON, AFTER SEVEN DAYS FROM THE SETTING OF THE MONETARY BOND, IS UNABLE TO MEET THE MONETARY OBLIGATIONS OF THE BOND, THE PERSON MAY FILE A WRITTEN MOTION FOR RECONSIDERATION OF THE MONETARY CONDITIONS OF THE BOND. THE PERSON MAY ONLY FILE THE WRITTEN MOTION IF HE OR SHE BELIEVES THAT, UPON PRESENTATION OF EVIDENCE NOT FULLY CONSIDERED BY THE COURT, HE OR SHE IS ENTITLED TO A PERSONAL RECOGNIZANCE BOND OR AN UNSECURED BOND WITH CONDITIONS OF RELEASE OR A CHANGE IN THE MONETARY CONDITIONS OF BOND. THE COURT SHALL PROMPTLY CONDUCT A HEARING ON THIS MOTION FOR RECONSIDERATION, BUT THE HEARING MUST BE HELD WITHIN FOURTEEN DAYS AFTER THE FILING OF THE MOTION. HOWEVER, THE COURT MAY SUMMARILY DENY THE MOTION IF THE COURT FINDS THAT THERE IS NO ADDITIONAL EVIDENCE NOT FULLY CONSIDERED BY THE COURT PRESENTED IN THE WRITTEN MOTION. IN CONSIDERING THE MOTION, THE COURT SHALL CONSIDER THE RESULTS OF ANY EMPIRICALLY DEVELOPED RISK ASSESSMENT INSTRUMENT.

**16-4-108. When original bond continued.** ONCE A BOND HAS BEEN EXECUTED AND THE PERSON RELEASED FROM CUSTODY THEREON, WHETHER A CHARGE IS THEN PENDING OR IS THEREAFTER FILED OR TRANSFERRED TO A COURT OF COMPETENT JURISDICTION, THE ORIGINAL BOND SHALL CONTINUE IN EFFECT UNTIL FINAL DISPOSITION OF THE CASE IN THE TRIAL

COURT. IF A CHARGE FILED IN THE COUNTY COURT IS DISMISSED AND THE DISTRICT ATTORNEY STATES ON THE RECORD THAT THE CHARGE WILL BE REFILED IN THE DISTRICT COURT OR THAT THE DISMISSAL BY THE COUNTY COURT WILL BE APPEALED TO THE DISTRICT COURT, THE COUNTY COURT BEFORE ENTERING THE DISMISSAL SHALL FIX A RETURN DATE, NOT LATER THAN SIXTY-THREE DAYS THEREAFTER, UPON WHICH THE DEFENDANT MUST APPEAR IN THE DISTRICT COURT AND CONTINUE THE BOND. ANY BOND CONTINUED PURSUANT TO THIS SECTION IS SUBJECT TO THE PROVISIONS OF SECTION 16-4-109.

**16-4-109. Reduction or increase of monetary conditions of bond - change in type of bond or conditions of bond - definitions.** (1) UPON APPLICATION BY THE DISTRICT ATTORNEY OR THE DEFENDANT, THE COURT BEFORE WHICH THE PROCEEDING IS PENDING MAY INCREASE OR DECREASE THE FINANCIAL CONDITIONS OF BOND, MAY REQUIRE ADDITIONAL SECURITY FOR A BOND, MAY DISPENSE WITH SECURITY THERETOFORE PROVIDED, OR MAY ALTER ANY OTHER CONDITION OF THE BOND.

(2) REASONABLE NOTICE OF AN APPLICATION FOR MODIFICATION OF A BOND BY THE DEFENDANT SHALL BE GIVEN TO THE DISTRICT ATTORNEY.

(3) REASONABLE NOTICE OF APPLICATION FOR MODIFICATION OF A BOND BY THE DISTRICT ATTORNEY SHALL BE GIVEN TO THE DEFENDANT, EXCEPT AS PROVIDED IN SUBSECTION (4) OF THIS SECTION.

(4) (a) UPON VERIFIED APPLICATION BY THE DISTRICT ATTORNEY OR A BONDING COMMISSIONER STATING FACTS OR CIRCUMSTANCES CONSTITUTING A BREACH OR A THREATENED BREACH OF ANY OF THE CONDITIONS OF THE BOND, THE COURT MAY ISSUE A WARRANT COMMANDING ANY PEACE OFFICER TO BRING THE DEFENDANT WITHOUT UNNECESSARY DELAY BEFORE THE COURT FOR A HEARING ON THE MATTERS SET FORTH IN THE APPLICATION. UPON ISSUANCE OF THE WARRANT, THE BONDING COMMISSIONER SHALL NOTIFY THE BAIL BOND AGENT OF RECORD BY ELECTRONIC MAIL TO THE AGENT IF AVAILABLE WITHIN TWENTY-FOUR HOURS OR BY CERTIFIED MAIL NOT MORE THAN FOURTEEN DAYS AFTER THE WARRANT IS ISSUED. AT THE CONCLUSION OF THE HEARING, THE COURT MAY ENTER AN ORDER AUTHORIZED BY SUBSECTION (1) OF THIS SECTION. IF A BONDING COMMISSIONER FILES AN APPLICATION FOR A HEARING PURSUANT TO THIS SUBSECTION (4), THE BONDING COMMISSIONER SHALL NOTIFY THE DISTRICT ATTORNEY, FOR THE JURISDICTION IN WHICH THE APPLICATION IS

MADE, OF THE APPLICATION WITHIN TWENTY-FOUR HOURS FOLLOWING THE FILING OF THE APPLICATION.

(b) AS USED IN THIS SUBSECTION (4), "BONDING COMMISSIONER" MEANS A PERSON EMPLOYED BY A PRETRIAL SERVICES PROGRAM AS DESCRIBED IN SECTION 16-4-106 (3), AND SO DESIGNATED AS A BONDING COMMISSIONER BY THE CHIEF OR PRESIDING JUDGE OF THE JUDICIAL DISTRICT.

(5) THE DISTRICT ATTORNEY HAS THE RIGHT TO APPEAR AT ALL HEARINGS SEEKING MODIFICATION OF THE TERMS AND CONDITIONS OF BOND AND MAY ADVISE THE COURT ON ALL PERTINENT MATTERS DURING THE HEARING.

**16-4-110. Exoneration from bond liability.** (1) ANY PERSON EXECUTING A BAIL BOND AS PRINCIPAL OR AS SURETY SHALL BE EXONERATED AS FOLLOWS:

(a) WHEN THE CONDITION OF THE BOND HAS BEEN SATISFIED; OR

(b) WHEN THE AMOUNT OF THE FORFEITURE HAS BEEN PAID; OR

(c) (I) WHEN THE SURETY APPEARS AND PROVIDES SATISFACTORY EVIDENCE TO THE COURT THAT THE DEFENDANT IS UNABLE TO APPEAR BEFORE THE COURT DUE TO SUCH DEFENDANT'S DEATH OR THE DETENTION OR INCARCERATION OF SUCH DEFENDANT IN A FOREIGN JURISDICTION IF THE DEFENDANT IS INCARCERATED FOR A PERIOD IN EXCESS OF NINETY-ONE DAYS AND THE STATE OF COLORADO HAS REFUSED TO EXTRADITE SUCH DEFENDANT; EXCEPT THAT, IF THE STATE EXTRADITES SUCH DEFENDANT, ALL COSTS ASSOCIATED WITH SUCH EXTRADITION SHALL BE BORNE BY THE SURETY UP TO THE AMOUNT OF THE BOND.

(II) FOR THE PURPOSES OF THIS PARAGRAPH (c), "COSTS ASSOCIATED WITH EXTRADITION" SHALL BE CALCULATED AS AND LIMITED TO THE ROUND-TRIP MILEAGE BETWEEN THE COLORADO COURT OF JURISDICTION AND THE LOCATION OF THE DEFENDANT'S INCARCERATION AT THE RATE ALLOWED FOR REIMBURSEMENT PURSUANT TO SECTION 24-9-104, C.R.S., UP TO THE AMOUNT OF THE BOND.

(d) UPON SURRENDER OF THE DEFENDANT INTO CUSTODY AT ANY

TIME BEFORE A JUDGMENT HAS BEEN ENTERED AGAINST THE SURETIES FOR FORFEITURE OF THE BOND, UPON PAYMENT OF ALL COSTS OCCASIONED THEREBY. A SURETY MAY SEIZE AND SURRENDER THE DEFENDANT TO THE SHERIFF OF THE COUNTY WHEREIN THE BOND IS TAKEN, AND IT IS THE DUTY OF THE SHERIFF, ON SUCH SURRENDER AND DELIVERY TO HIM OR HER OF A CERTIFIED COPY OF THE BOND BY WHICH THE SURETY IS BOUND, TO TAKE THE PERSON INTO CUSTODY AND, BY WRITING, ACKNOWLEDGE THE SURRENDER. IF A COMPENSATED SURETY IS EXONERATED BY SURRENDERING A DEFENDANT PRIOR TO THE INITIAL APPEARANCE DATE FIXED IN THE BOND, THE COURT, AFTER A HEARING, MAY REQUIRE THE SURETY TO REFUND PART OR ALL OF THE BOND PREMIUM PAID BY THE DEFENDANT IF NECESSARY TO PREVENT UNJUST ENRICHMENT.

(e) AFTER THREE YEARS HAVE ELAPSED FROM THE POSTING OF THE BOND, UNLESS A JUDGMENT HAS BEEN ENTERED AGAINST THE SURETY OR THE PRINCIPAL FOR THE FORFEITURE OF THE BOND, OR UNLESS THE COURT GRANTS AN EXTENSION OF THE THREE-YEAR TIME PERIOD FOR GOOD CAUSE SHOWN, UPON MOTION BY THE PROSECUTING ATTORNEY AND NOTICE TO SURETY OF RECORD.

(2) IF, WITHIN FOURTEEN DAYS AFTER THE POSTING OF A BOND BY A DEFENDANT, THE TERMS AND CONDITIONS OF SAID BOND ARE CHANGED OR ALTERED EITHER BY ORDER OF COURT OR UPON THE MOTION OF THE DISTRICT ATTORNEY OR THE DEFENDANT, THE COURT, AFTER A HEARING, MAY ORDER A COMPENSATED SURETY TO REFUND A PORTION OF THE PREMIUM PAID BY THE DEFENDANT, IF NECESSARY, TO PREVENT UNJUST ENRICHMENT. IF MORE THAN FOURTEEN DAYS HAVE ELAPSED AFTER POSTING OF A BOND BY A DEFENDANT, THE COURT SHALL NOT ORDER THE REFUND OF ANY PREMIUM.

(3) UPON ENTRY OF AN ORDER FOR DEFERRED PROSECUTION OR DEFERRED JUDGMENT AS AUTHORIZED IN SECTIONS 18-1.3-101 AND 18-1.3-102, C.R.S., SURETIES UPON ANY BOND GIVEN FOR THE APPEARANCE OF THE DEFENDANT SHALL BE RELEASED FROM LIABILITY ON SUCH BOND.

**16-4-111. Disposition of security deposits upon forfeiture or termination of bond.** (1) (a) IF A DEFENDANT IS RELEASED UPON DEPOSIT OF CASH IN ANY AMOUNT OR UPON DEPOSIT OF ANY STOCKS OR BONDS AND THE DEFENDANT IS LATER DISCHARGED FROM ALL LIABILITY UNDER THE TERMS OF THE BOND, THE CLERK OF THE COURT SHALL RETURN THE DEPOSIT TO THE PERSON WHO MADE THE DEPOSIT.

(b) (I) NOTWITHSTANDING THE PROVISIONS OF PARAGRAPH (a) OF THIS SUBSECTION (1), IF THE DEPOSITOR OF THE CASH BOND IS THE DEFENDANT AND THE DEFENDANT OWES COURT COSTS, FEES, FINES, RESTITUTION, OR SURCHARGES AT THE TIME THE DEFENDANT IS DISCHARGED FROM ALL LIABILITY UNDER THE TERMS OF THE BOND, THE COURT MAY APPLY THE DEPOSIT TOWARD ANY AMOUNT OWED BY THE DEFENDANT IN COURT COSTS, FEES, FINES, RESTITUTION, OR SURCHARGES. IF ANY AMOUNT OF THE DEPOSIT REMAINS AFTER PAYING THE DEFENDANT'S OUTSTANDING COURT COSTS, FEES, FINES, RESTITUTION, OR SURCHARGES, THE COURT SHALL RETURN THE REMAINDER OF THE DEPOSIT TO THE DEFENDANT.

(II) NOTWITHSTANDING THE PROVISIONS OF PARAGRAPH (a) OF THIS SUBSECTION (1), IF THE DEPOSITOR OF THE CASH BOND IS NOT THE DEFENDANT, BUT THE DEFENDANT OWES COURT COSTS, FEES, FINES, RESTITUTION, OR SURCHARGES AT THE TIME THE DEFENDANT IS DISCHARGED FROM ALL LIABILITY UNDER THE TERMS OF THE BOND, THE COURT MAY APPLY THE DEPOSIT TOWARD THE AMOUNT OWED BY THE DEFENDANT IN COURT COSTS, FEES, FINES, RESTITUTION, OR SURCHARGES IF THE DEPOSITOR AGREES IN WRITING TO THE USE OF THE DEPOSIT FOR SUCH PURPOSE. IF ANY AMOUNT OF THE DEPOSIT REMAINS AFTER PAYING THE DEFENDANT'S OUTSTANDING COURT COSTS, FEES, FINES, RESTITUTION, OR SURCHARGES, THE COURT SHALL RETURN THE REMAINDER OF THE DEPOSIT TO THE DEPOSITOR.

(2) (a) UPON SATISFACTION OF THE TERMS OF THE BOND, THE CLERK OF THE COURT SHALL EXECUTE, WITHIN FOURTEEN DAYS AFTER SUCH SATISFACTION, A RELEASE OF ANY DEED OF TRUST GIVEN TO SECURE THE BOND AND AN AFFIDAVIT THAT STATES THAT THE OBLIGATION FOR WHICH THE DEED OF TRUST HAD BEEN RECORDED HAS BEEN SATISFIED, EITHER FULLY OR PARTIALLY, AND THAT THE RELEASE OF SUCH DEED OF TRUST MAY BE RECORDED AT THE EXPENSE OF THE RECORD OWNER OF THE PROPERTY DESCRIBED IN SUCH DEED OF TRUST.

(b) IF THERE IS A FORFEITURE OF THE BOND PURSUANT TO THIS SECTION, AND IF THE FORFEITURE IS NOT SET ASIDE PURSUANT TO SUBSECTION (4) OF THIS SECTION, THE DEED OF TRUST MAY BE FORECLOSED AS PROVIDED BY LAW.

(c) IF THERE IS A FORFEITURE OF THE BOND PURSUANT TO THIS SECTION, BUT THE FORFEITURE IS SET ASIDE PURSUANT TO SUBSECTION (3)

OF THIS SECTION, THE CLERK OF THE COURT SHALL EXECUTE A RELEASE OF ANY DEED OF TRUST GIVEN TO SECURE THE BOND AND AN AFFIDAVIT THAT STATES THAT THE OBLIGATION FOR WHICH THE DEED OF TRUST HAD BEEN RECORDED HAS BEEN SATISFIED, EITHER FULLY OR PARTIALLY, AND THAT THE RELEASE OF SUCH DEED OF TRUST MAY BE RECORDED AT THE EXPENSE OF THE RECORD OWNER OF THE REAL ESTATE DESCRIBED IN SUCH DEED OF TRUST.

(3) WHERE THE DEFENDANT HAS BEEN RELEASED UPON DEPOSIT OF CASH, STOCKS, BONDS, OR PROPERTY OR UPON A SURETY BOND SECURED BY PROPERTY, IF THE DEFENDANT FAILS TO APPEAR IN ACCORDANCE WITH THE PRIMARY CONDITION OF THE BOND, THE COURT SHALL DECLARE A FORFEITURE. NOTICE OF THE ORDER OF FORFEITURE SHALL BE MAILED BY THE COURT TO THE DEFENDANT, ALL SURETIES, AND ALL DEPOSITORS OR ASSIGNEES OF ANY DEPOSITS OF CASH OR PROPERTY IF SUCH SURETIES, DEPOSITORS, OR ASSIGNEES HAVE DIRECT CONTACT WITH THE COURT, AT THEIR LAST-KNOWN ADDRESSES. SUCH NOTICE SHALL BE SENT WITHIN FOURTEEN DAYS AFTER THE ENTRY OF THE ORDER OF FORFEITURE. IF THE DEFENDANT DOES NOT APPEAR AND SURRENDER TO THE COURT HAVING JURISDICTION WITHIN THIRTY-FIVE DAYS FROM THE DATE OF THE FORFEITURE OR WITHIN THAT PERIOD SATISFY THE COURT THAT APPEARANCE AND SURRENDER BY THE DEFENDANT IS IMPOSSIBLE AND WITHOUT FAULT BY SUCH DEFENDANT, THE COURT MAY ENTER JUDGMENT FOR THE STATE AGAINST THE DEFENDANT FOR THE AMOUNT OF THE BOND AND COSTS OF THE COURT PROCEEDINGS. ANY CASH DEPOSITS MADE WITH THE CLERK OF THE COURT SHALL BE APPLIED TO THE PAYMENT OF COSTS. IF ANY AMOUNT OF SUCH CASH DEPOSIT REMAINS AFTER THE PAYMENT OF COSTS, IT SHALL BE APPLIED TO PAYMENT OF THE JUDGMENT.

(4) THE COURT MAY ORDER THAT A FORFEITURE BE SET ASIDE, UPON SUCH CONDITIONS AS THE COURT MAY IMPOSE, IF IT APPEARS THAT JUSTICE SO REQUIRES.

(5) IF, WITHIN ONE YEAR AFTER JUDGMENT, THE PERSON WHO EXECUTED THE FORFEITED BOND AS PRINCIPAL OR AS SURETY EFFECTS THE APPREHENSION OR SURRENDER OF THE DEFENDANT TO THE SHERIFF OF THE COUNTY FROM WHICH THE BOND WAS TAKEN OR TO THE COURT WHICH GRANTED THE BOND, THE COURT MAY VACATE THE JUDGMENT AND ORDER A REMISSION LESS NECESSARY AND ACTUAL COSTS OF THE COURT.

(6) THE PROVISIONS OF THIS SECTION SHALL NOT APPLY TO APPEARANCE BONDS WRITTEN BY COMPENSATED SURETIES, AS DEFINED IN SECTION 16-4-114 (2) (c), WHICH BONDS SHALL BE SUBJECT TO THE PROVISIONS OF SECTION 16-4-114.

(7) ON AND AFTER JULY 1, 2008, ALL MONEYS COLLECTED FROM PAYMENT TOWARD A JUDGMENT ENTERED FOR THE STATE PURSUANT TO PARAGRAPH (b) OF SUBSECTION (1) OF THIS SECTION SHALL BE TRANSMITTED TO THE STATE TREASURER FOR DEPOSIT IN THE JUDICIAL STABILIZATION CASH FUND CREATED IN SECTION 13-32-101 (6), C.R.S.

**16-4-112. Enforcement when forfeiture not set aside.** BY ENTERING INTO A BOND, EACH OBLIGOR, WHETHER HE OR SHE IS THE PRINCIPAL OR A SURETY, SUBMITS TO THE JURISDICTION OF THE COURT. HIS OR HER LIABILITY UNDER THE BOND MAY BE ENFORCED, WITHOUT THE NECESSITY OF AN INDEPENDENT ACTION, AS FOLLOWS: THE COURT SHALL ORDER THE ISSUANCE OF A CITATION DIRECTED TO THE OBLIGOR TO SHOW CAUSE, IF ANY THERE BE, WHY JUDGMENT SHOULD NOT BE ENTERED AGAINST HIM OR HER FORTHWITH AND EXECUTION ISSUE THEREON. SAID CITATION MAY BE SERVED PERSONALLY OR BY CERTIFIED MAIL UPON THE OBLIGOR DIRECTED TO THE ADDRESS GIVEN IN THE BOND. HEARING ON THE CITATION SHALL BE HELD NOT LESS THAN TWENTY-ONE DAYS AFTER SERVICE. THE DEFENDANT'S ATTORNEY AND THE PROSECUTING ATTORNEY SHALL BE GIVEN NOTICE OF THE HEARING. AT THE CONCLUSION OF THE HEARING, THE COURT MAY ENTER A JUDGMENT FOR THE STATE AND AGAINST THE OBLIGOR, AND EXECUTION SHALL ISSUE THEREON AS ON OTHER JUDGMENTS. THE DISTRICT ATTORNEY SHALL HAVE EXECUTION ISSUED FORTHWITH UPON THE JUDGMENT AND DELIVER IT TO THE SHERIFF TO BE EXECUTED BY LEVY UPON THE STOCKS, BOND, OR REAL ESTATE WHICH HAS BEEN ACCEPTED AS SECURITY FOR THE BOND.

**16-4-113. Type of bond in certain misdemeanor cases.** (1) IN EXERCISING THE DISCRETION MENTIONED IN SECTION 16-4-104, THE JUDGE SHALL RELEASE THE ACCUSED PERSON UPON PERSONAL RECOGNIZANCE IF THE CHARGE IS A CLASS 3 MISDEMEANOR OR A PETTY OFFENSE, OR ANY UNCLASSIFIED OFFENSE FOR A VIOLATION OF WHICH THE MAXIMUM PENALTY DOES NOT EXCEED SIX MONTHS' IMPRISONMENT, AND HE OR SHE SHALL NOT BE REQUIRED TO SUPPLY A SURETY BOND, OR GIVE SECURITY OF ANY KIND FOR HIS OR HER APPEARANCE FOR TRIAL OTHER THAN HIS OR HER PERSONAL RECOGNIZANCE, UNLESS ONE OR MORE OF THE FOLLOWING FACTS ARE FOUND

TO BE PRESENT:

(a) THE ARRESTED PERSON FAILS TO SUFFICIENTLY IDENTIFY HIMSELF OR HERSELF; OR

(b) THE ARRESTED PERSON REFUSES TO SIGN A PERSONAL RECOGNIZANCE; OR

(c) THE CONTINUED DETENTION OR POSTING OF A SURETY BOND IS NECESSARY TO PREVENT IMMINENT BODILY HARM TO THE ACCUSED OR TO ANOTHER; OR

(d) THE ARRESTED PERSON HAS NO TIES TO THE JURISDICTION OF THE COURT REASONABLY SUFFICIENT TO ASSURE HIS OR HER APPEARANCE, AND THERE IS SUBSTANTIAL LIKELIHOOD THAT HE OR SHE WILL FAIL TO APPEAR FOR TRIAL IF RELEASED UPON HIS OR HER PERSONAL RECOGNIZANCE; OR

(e) THE ARRESTED PERSON HAS PREVIOUSLY FAILED TO APPEAR FOR TRIAL FOR AN OFFENSE CONCERNING WHICH HE OR SHE HAD GIVEN HIS WRITTEN PROMISE TO APPEAR; OR

(f) THERE IS OUTSTANDING A WARRANT FOR HIS OR HER ARREST ON ANY OTHER CHARGE OR THERE ARE PENDING PROCEEDINGS AGAINST HIM OR HER FOR SUSPENSION OR REVOCATION OF PAROLE OR PROBATION.

**16-4-114. Enforcement procedures for compensated sureties - definitions.** (1) (a) THE GENERAL ASSEMBLY HEREBY FINDS, DETERMINES, AND DECLARES THAT THE SIMPLICITY, EFFECTIVENESS, AND UNIFORMITY OF BAIL FORFEITURE PROCEDURES APPLICABLE TO COMPENSATED SURETIES WHO ARE SUBJECT TO THE REGULATORY AUTHORITY OF THE COLORADO DIVISION OF INSURANCE ARE MATTERS OF STATEWIDE CONCERN.

(b) IT IS THE INTENT OF THE GENERAL ASSEMBLY IN ADOPTING THIS SECTION TO:

(I) ADOPT A BOARD SYSTEM THAT WILL SIMPLIFY AND EXPEDITE BAIL FORFEITURE PROCEDURES BY AUTHORIZING COURTS TO BAR COMPENSATED SURETIES WHO FAIL TO PAY FORFEITURE JUDGMENTS FROM WRITING FURTHER BONDS;

(II) MINIMIZE THE NEED FOR DAY-TO-DAY INVOLVEMENT OF THE DIVISION OF INSURANCE IN ROUTINE FORFEITURE ENFORCEMENT; AND

(III) REDUCE COURT ADMINISTRATIVE WORKLOAD.

(2) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "BAIL INSURANCE COMPANY" MEANS AN INSURER AS DEFINED IN SECTION 10-1-102 (13), C.R.S., ENGAGED IN THE BUSINESS OF WRITING APPEARANCE BONDS THROUGH BONDING AGENTS, WHICH COMPANY IS SUBJECT TO REGULATION BY THE DIVISION OF INSURANCE IN THE DEPARTMENT OF REGULATORY AGENCIES.

(b) "BOARD SYSTEM" MEANS ANY REASONABLE METHOD ESTABLISHED BY A COURT TO PUBLICLY POST OR DISSEMINATE THE NAME OF ANY COMPENSATED SURETY WHO IS PROHIBITED FROM POSTING BAIL BONDS.

(c) "COMPENSATED SURETY" MEANS ANY PERSON WHO IS IN THE BUSINESS OF WRITING APPEARANCE BONDS AND WHO IS SUBJECT TO REGULATION BY THE DIVISION OF INSURANCE IN THE DEPARTMENT OF REGULATORY AGENCIES, INCLUDING BONDING AGENTS AND BAIL INSURANCE COMPANIES. NOTHING IN THIS PARAGRAPH (c) AUTHORIZES BAIL INSURANCE COMPANIES TO WRITE APPEARANCE BONDS EXCEPT THROUGH BAIL BONDING AGENTS.

(d) "ON THE BOARD" MEANS THAT THE NAME OF A COMPENSATED SURETY HAS BEEN PUBLICLY POSTED OR DISSEMINATED BY A COURT AS BEING INELIGIBLE TO WRITE BAIL BONDS PURSUANT TO PARAGRAPH (e) OR (f) OF SUBSECTION (5) OF THIS SECTION.

(3) EACH COURT OF RECORD IN THIS STATE SHALL IMPLEMENT A BOARD SYSTEM FOR THE RECORDING AND DISSEMINATION OF THE NAMES OF THOSE COMPENSATED SURETIES WHO ARE PROHIBITED FROM POSTING BAIL BONDS IN THE STATE DUE TO AN UNPAID JUDGMENT AS SET FORTH IN THIS SECTION.

(4) BY ENTERING INTO A BOND, EACH OBLIGOR, INCLUDING THE BOND PRINCIPAL AND COMPENSATED SURETY, SUBMITS TO THE JURISDICTION OF THE COURT AND ACKNOWLEDGES THE APPLICABILITY OF THE FORFEITURE

PROCEDURES SET FORTH IN THIS SECTION.

(5) LIABILITY OF BOND OBLIGORS ON BONDS ISSUED BY COMPENSATED SURETIES MAY BE ENFORCED, WITHOUT THE NECESSITY OF AN INDEPENDENT ACTION, AS FOLLOWS:

(a) IN THE EVENT A DEFENDANT DOES NOT APPEAR BEFORE THE COURT AND IS IN VIOLATION OF THE PRIMARY CONDITION OF AN APPEARANCE BOND, THE COURT MAY DECLARE THE BOND FORFEITED.

(b) (I) IF A BOND IS DECLARED FORFEITED BY THE COURT, NOTICE OF THE BAIL FORFEITURE ORDER SHALL BE SERVED ON THE BONDING AGENT BY CERTIFIED MAIL AND ON THE BAIL INSURANCE COMPANY BY REGULAR MAIL WITHIN FOURTEEN DAYS AFTER THE ENTRY OF SAID FORFEITURE. IF THE COMPENSATED SURETY ON THE BOND IS A CASH BONDING AGENT, ONLY THE CASH BONDING AGENT SHALL BE NOTIFIED OF THE FORFEITURE. SERVICE OF NOTICE OF THE BAIL FORFEITURE ON THE DEFENDANT IS NOT REQUIRED.

(II) THE NOTICE DESCRIBED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH (b) SHALL INCLUDE, BUT NEED NOT BE LIMITED TO:

(A) A STATEMENT INTENDED TO INFORM THE COMPENSATED SURETY OF THE ENTRY OF FORFEITURE;

(B) AN ADVISEMENT THAT THE COMPENSATED SURETY HAS THE RIGHT TO REQUEST A SHOW CAUSE HEARING PURSUANT TO SUBPARAGRAPH (III) OF THIS PARAGRAPH (b) WITHIN FOURTEEN DAYS AFTER RECEIPT OF NOTICE OF FORFEITURE, BY PROCEDURES SET BY THE COURT; AND

(C) AN ADVISEMENT THAT IF THE COMPENSATED SURETY DOES NOT REQUEST A SHOW CAUSE HEARING PURSUANT TO SUBPARAGRAPH (III) OF THIS PARAGRAPH (b), JUDGMENT SHALL BE ENTERED UPON EXPIRATION OF THIRTY-FIVE DAYS FOLLOWING THE ENTRY OF FORFEITURE.

(III) A COMPENSATED SURETY, UPON WHOM NOTICE OF A BAIL FORFEITURE ORDER HAS BEEN SERVED, SHALL HAVE FOURTEEN DAYS AFTER RECEIPT OF NOTICE OF SUCH FORFEITURE TO REQUEST A HEARING TO SHOW CAUSE WHY JUDGMENT ON THE FORFEITURE SHOULD NOT BE ENTERED FOR THE STATE AGAINST THE COMPENSATED SURETY. SUCH REQUEST SHALL BE GRANTED BY THE COURT AND A HEARING SHALL BE SET WITHIN THIRTY-FIVE

DAYS AFTER ENTRY OF FORFEITURE OR AT THE COURT'S EARLIEST CONVENIENCE. AT THE CONCLUSION OF THE HEARING REQUESTED BY THE COMPENSATED SURETY, IF ANY, THE COURT MAY ENTER JUDGMENT FOR THE STATE AGAINST THE COMPENSATED SURETY, OR THE COURT MAY IN ITS DISCRETION ORDER FURTHER HEARINGS. UPON EXPIRATION OF THIRTY-FIVE DAYS AFTER THE ENTRY OF FORFEITURE, THE COURT SHALL ENTER JUDGMENT FOR THE STATE AGAINST THE COMPENSATED SURETY IF THE COMPENSATED SURETY DID NOT REQUEST WITHIN FOURTEEN DAYS AFTER RECEIPT OF NOTICE OF SUCH FORFEITURE A HEARING TO SHOW CAUSE.

(IV) IF SUCH A SHOW CAUSE HEARING WAS TIMELY SET BUT THE HEARING DID NOT OCCUR WITHIN THIRTY-FIVE DAYS AFTER THE ENTRY OF FORFEITURE, ANY ENTRY OF JUDGMENT AT THE CONCLUSION OF THE HEARING AGAINST THE COMPENSATED SURETY SHALL NOT BE VACATED ON THE GROUNDS THAT THE MATTER WAS NOT TIMELY HEARD. IF JUDGMENT IS ENTERED AGAINST A COMPENSATED SURETY UPON THE CONCLUSION OF A REQUESTED SHOW CAUSE HEARING, AND SUCH HEARING DID NOT OCCUR WITHIN THIRTY-FIVE DAYS AFTER THE ENTRY OF FORFEITURE, EXECUTION UPON SAID JUDGMENT SHALL BE AUTOMATICALLY STAYED FOR NO MORE THAN ONE HUNDRED TWENTY-SIX DAYS AFTER ENTRY OF FORFEITURE.

(V) (A) IF AT ANY TIME PRIOR TO THE ENTRY OF JUDGMENT, THE DEFENDANT APPEARS IN COURT, EITHER VOLUNTARILY OR IN CUSTODY AFTER SURRENDER OR ARREST, THE COURT SHALL ON ITS OWN MOTION DIRECT THAT THE BAIL FORFEITURE BE SET ASIDE AND THE BOND EXONERATED AT THE TIME THE DEFENDANT FIRST APPEARS IN COURT; EXCEPT THAT, IF THE STATE EXTRADITES SUCH DEFENDANT, ALL NECESSARY AND ACTUAL COSTS ASSOCIATED WITH SUCH EXTRADITION SHALL BE BORNE BY THE SURETY UP TO THE AMOUNT OF THE BOND.

(B) IF, AT A TIME PRIOR TO THE ENTRY OF JUDGMENT, THE SURETY PROVIDES PROOF TO THE COURT THAT THE DEFENDANT IS IN CUSTODY IN ANY OTHER JURISDICTION WITHIN THE STATE, THE COURT SHALL ON ITS OWN MOTION DIRECT THAT THE BAIL FORFEITURE BE SET ASIDE AND THE BOND EXONERATED; EXCEPT THAT, IF THE COURT EXTRADITES THE DEFENDANT, ALL NECESSARY AND ACTUAL COSTS ASSOCIATED WITH THE EXTRADITION SHALL BE BORNE BY THE SURETY UP TO THE AMOUNT OF THE BOND. IF THE COURT ELECTS TO EXTRADITE THE DEFENDANT, ANY FORFEITURE WILL BE STAYED UNTIL SUCH TIME THE DEFENDANT APPEARS IN THE COURT WHERE THE BOND RETURNS.

(C) A COMPENSATED SURETY SHALL BE EXONERATED FROM LIABILITY UPON THE BOND BY SATISFACTION OF THE BAIL FORFEITURE JUDGMENT, SURRENDER OF THE DEFENDANT, OR ORDER OF THE COURT. IF THE SURETY PROVIDES PROOF TO THE COURT THAT THE DEFENDANT IS IN CUSTODY IN ANY OTHER JURISDICTION WITHIN THE STATE, WITHIN NINETY-ONE DAYS AFTER THE ENTRY OF JUDGMENT, THE COURT SHALL ON ITS OWN MOTION DIRECT THAT THE BAIL FORFEITURE JUDGMENT BE VACATED AND THE BOND EXONERATED; EXCEPT THAT, IF THE COURT EXTRADITES THE DEFENDANT, ALL NECESSARY AND ACTUAL COSTS ASSOCIATED WITH THE EXTRADITION SHALL BE BORNE BY THE SURETY UP TO THE AMOUNT OF THE BOND. IF THE COURT ELECTS TO EXTRADITE THE DEFENDANT, ANY JUDGMENT WILL BE STAYED UNTIL THE TIME THE DEFENDANT APPEARS IN THE COURT WHERE THE BOND RETURNS.

(c) EXECUTION UPON SAID BAIL FORFEITURE JUDGMENT SHALL BE AUTOMATICALLY STAYED FOR NINETY-ONE DAYS FROM THE DATE OF ENTRY OF JUDGMENT; EXCEPT THAT, IF JUDGMENT IS ENTERED AGAINST A COMPENSATED SURETY UPON THE CONCLUSION OF A REQUESTED SHOW CAUSE HEARING, AND SUCH HEARING DID NOT OCCUR WITHIN THIRTY-FIVE DAYS AFTER THE ENTRY OF FORFEITURE, THE JUDGMENT SHALL BE AUTOMATICALLY STAYED AS SET FORTH IN SUBPARAGRAPH (IV) OF PARAGRAPH (b) OF THIS SUBSECTION (5).

(d) UPON THE EXPIRATION OF THE STAY OF EXECUTION DESCRIBED IN PARAGRAPH (c) OF THIS SUBSECTION (5), THE BAIL FORFEITURE JUDGMENT SHALL BE PAID FORTHWITH BY THE COMPENSATED SURETY, IF NOT PREVIOUSLY PAID, UNLESS THE DEFENDANT APPEARS IN COURT, EITHER VOLUNTARILY OR IN CUSTODY AFTER SURRENDER OR ARREST, OR THE COURT ENTERS AN ORDER GRANTING AN ADDITIONAL STAY OF EXECUTION OR OTHERWISE VACATES THE JUDGMENT.

(e) IF A BAIL FORFEITURE JUDGMENT IS NOT PAID ON OR BEFORE THE EXPIRATION DATE OF THE STAY OF EXECUTION DESCRIBED IN PARAGRAPH (c) OF THIS SUBSECTION (5), THE NAME OF THE BONDING AGENT SHALL BE PLACED ON THE BOARD OF THE COURT THAT ENTERED THE JUDGMENT. THE BONDING AGENT SHALL BE PROHIBITED FROM EXECUTING ANY FURTHER BAIL BONDS IN THIS STATE UNTIL THE JUDGMENT GIVING RISE TO PLACEMENT ON THE BOARD IS SATISFIED, VACATED, OR OTHERWISE DISCHARGED BY ORDER OF THE COURT.

(f) IF A BAIL FORFEITURE JUDGMENT REMAINS UNPAID FOR THIRTY-FIVE DAYS AFTER THE NAME OF THE BONDING AGENT IS PLACED ON THE BOARD, THE COURT SHALL SEND NOTICE BY CERTIFIED MAIL TO THE BAIL INSURANCE COMPANY FOR WHOM THE BONDING AGENT HAS EXECUTED THE BOND THAT IF SAID JUDGMENT IS NOT PAID WITHIN FOURTEEN DAYS AFTER THE DATE OF MAILING OF SAID NOTICE, THE NAME OF THE BAIL INSURANCE COMPANY SHALL BE PLACED ON THE BOARD AND SUCH COMPANY SHALL BE PROHIBITED FROM EXECUTING ANY FURTHER BAIL BONDS IN THIS STATE UNTIL THE JUDGMENT GIVING RISE TO PLACEMENT ON THE BOARD IS SATISFIED, VACATED, OR OTHERWISE DISCHARGED BY ORDER OF THE COURT.

(g) A COMPENSATED SURETY SHALL BE REMOVED FORTHWITH FROM THE BOARD ONLY AFTER EVERY JUDGMENT FOR WHICH THE COMPENSATED SURETY WAS PLACED ON THE BOARD IS SATISFIED, VACATED, OR DISCHARGED OR STAYED BY ENTRY OF AN ADDITIONAL STAY OF EXECUTION. NO COMPENSATED SURETY SHALL BE PLACED ON THE BOARD IN THE ABSENCE OF THE NOTICE REQUIRED BY PARAGRAPH (b) OR (f) OF THIS SUBSECTION (5).

(h) THE COURT MAY ORDER THAT A BAIL FORFEITURE JUDGMENT BE VACATED AND SET ASIDE OR THAT EXECUTION THEREON BE STAYED UPON SUCH CONDITIONS AS THE COURT MAY IMPOSE, IF IT APPEARS THAT JUSTICE SO REQUIRES.

(i) A COMPENSATED SURETY SHALL BE EXONERATED FROM LIABILITY UPON THE BOND BY SATISFACTION OF THE BAIL FORFEITURE JUDGMENT, SURRENDER OF THE DEFENDANT, OR BY ORDER OF THE COURT. IF THE DEFENDANT APPEARS IN COURT, EITHER VOLUNTARILY OR IN CUSTODY AFTER SURRENDER OR ARREST, WITHIN NINETY-ONE DAYS AFTER THE ENTRY OF JUDGMENT, THE COURT, AT THE TIME THE DEFENDANT FIRST APPEARS IN COURT, SHALL ON ITS OWN MOTION DIRECT THAT THE BAIL FORFEITURE JUDGMENT BE VACATED AND THE BOND EXONERATED; EXCEPT THAT, IF THE STATE EXTRADITES SUCH DEFENDANT, ALL NECESSARY AND ACTUAL COSTS ASSOCIATED WITH SUCH EXTRADITION SHALL BE BORNE BY THE SURETY UP TO THE AMOUNT OF THE BOND.

(j) IF, WITHIN ONE YEAR AFTER PAYMENT OF THE BAIL FORFEITURE JUDGMENT, THE COMPENSATED SURETY EFFECTS THE APPREHENSION OR SURRENDER OF THE DEFENDANT AND PROVIDES REASONABLE NOTICE TO THE COURT TO WHICH THE BOND RETURNS THAT THE DEFENDANT IS AVAILABLE

FOR EXTRADITION, THE COURT SHALL VACATE THE JUDGMENT AND ORDER A REMISSION OF THE AMOUNT PAID ON THE BOND LESS ANY NECESSARY AND ACTUAL COSTS INCURRED BY THE STATE AND THE SHERIFF WHO HAS ACTUALLY EXTRADITED THE DEFENDANT.

(k) BAIL BONDS SHALL BE DEEMED VALID NOTWITHSTANDING THE FACT THAT A BOND MAY HAVE BEEN WRITTEN BY A COMPENSATED SURETY WHO HAS BEEN PLACED ON THE BOARD PURSUANT TO PARAGRAPH (e) OR (f) OF THIS SUBSECTION (5) AND IS OTHERWISE PROHIBITED FROM WRITING BAIL BONDS. THE INELIGIBILITY OF A COMPENSATED SURETY TO WRITE BONDS BECAUSE THE NAME OF THE COMPENSATED SURETY HAS BEEN PLACED ON THE BOARD PURSUANT TO PARAGRAPH (e) OR (f) OF THIS SUBSECTION (5) SHALL NOT BE A DEFENSE TO LIABILITY ON ANY APPEARANCE BOND ACCEPTED BY A COURT.

(l) THE AUTOMATIC STAY OF EXECUTION UPON A BAIL FORFEITURE JUDGMENT AS DESCRIBED IN PARAGRAPH (c) OF THIS SUBSECTION (5) SHALL EXPIRE PURSUANT TO ITS TERMS UNLESS THE DEFENDANT APPEARS AND SURRENDERS TO THE COURT HAVING JURISDICTION OR SATISFIES THE COURT THAT APPEARANCE AND SURRENDER BY THE DEFENDANT WAS IMPOSSIBLE AND WITHOUT FAULT BY SUCH DEFENDANT. THE COURT MAY ORDER THAT A FORFEITURE BE SET ASIDE AND JUDGMENT VACATED AS SET FORTH IN PARAGRAPH (h) OF THIS SUBSECTION (5).

(6) A BAIL INSURANCE COMPANY SHALL NOT WRITE BAIL BONDS UNLESS THROUGH A LICENSED BAIL BONDING AGENT.

**16-4-115. Severability.** IF ANY PROVISION OF THIS PART 1 OR THE APPLICATION THEREOF TO ANY PERSON OR CIRCUMSTANCE IS HELD INVALID, SUCH INVALIDITY DOES NOT AFFECT OTHER PROVISIONS OR APPLICATIONS OF THIS PART 1 THAT CAN BE GIVEN EFFECT WITHOUT THE INVALID PROVISION OR APPLICATION, AND TO THIS END THE PROVISIONS OF THIS PART 1 ARE DECLARED TO BE SEVERABLE.

**SECTION 3.** In Colorado Revised Statutes, 16-4-201, **amend** (1) (a) as follows:

**16-4-201. Bail after conviction.** (1) (a) After conviction, either before or after sentencing, the defendant may orally, or in writing, move for release on bail pending determination of a motion for a new trial or motion

in arrest of judgment or during any stay of execution or pending review by an appellate court, and, except in cases where the defendant has been convicted of a capital offense, the trial court, in its discretion, may continue the bond given for pretrial release, or may release the defendant on ~~increased bail~~ BOND WITH ADDITIONAL CONDITIONS INCLUDING MONETARY CONDITIONS, or require bond under one or more of the alternatives set forth in section 16-4-104.

**SECTION 4.** In Colorado Revised Statutes, 16-4-202, **amend** (1) introductory portion as follows:

**16-4-202. Appeal bond hearing - factors to be considered.**  
(1) The court shall consider the following factors in deciding whether or not an appeal bond should be granted and determining ~~the amount of bail~~ and the type of bond ~~to be~~ AND CONDITIONS OF RELEASE required:

**SECTION 5.** In Colorado Revised Statutes, 10-1-211, **amend** (6) as follows:

**10-1-211. Protocols for market conduct actions.** (6) Subject to section ~~16-4-108~~ 16-4-110 (1) (c) and (2), C.R.S., a bail premium is earned in its entirety by a compensated surety upon the defendant's release from custody.

**SECTION 6.** In Colorado Revised Statutes, 10-2-705, **add** (3.5) as follows:

**10-2-705. Bail bond documents - requirements - rules.**  
(3.5) (a) IF THE BOND IS TO BE SECURED BY REAL ESTATE, THE BAIL BONDING AGENT SHALL PROVIDE THE PROPERTY OWNER WITH A WRITTEN DISCLOSURE STATEMENT IN THE FOLLOWING FORM AT THE TIME AN INITIAL APPLICATION IS FILED:

**DISCLOSURE OF LIEN AGAINST REAL PROPERTY**

**DO NOT SIGN THIS DOCUMENT UNTIL YOU READ AND UNDERSTAND IT! THIS BAIL BOND WILL BE SECURED BY REAL PROPERTY YOU OWN OR IN WHICH YOU HAVE AN INTEREST. FAILURE TO PAY THE BAIL BOND PREMIUMS WHEN DUE OR THE DEFENDANT'S FAILURE TO COMPLY**

**WITH THE CONDITIONS OF BAIL COULD RESULT IN THE LOSS  
OF YOUR PROPERTY!**

(b) THE DISCLOSURE REQUIRED IN PARAGRAPH (a) OF THIS SUBSECTION (3.5) SHALL BE PRINTED IN FOURTEEN-POINT, BOLD-FACED TYPE EITHER:

(I) ON A SEPARATE AND SPECIFIC DOCUMENT ATTACHED TO OR ACCOMPANYING THE APPLICATION; OR

(II) IN A CLEAR AND CONSPICUOUS STATEMENT ON THE FACE OF THE APPLICATION.

(c) BEFORE A PROPERTY OWNER EXECUTES ANY INSTRUMENT CREATING A LIEN AGAINST REAL PROPERTY, THE BAIL BONDING AGENT SHALL PROVIDE THE PROPERTY OWNER WITH A COMPLETED COPY OF THE INSTRUMENT CREATING THE LIEN AGAINST REAL PROPERTY AND THE DISCLOSURE STATEMENT DESCRIBED IN PARAGRAPH (a) OF THIS SUBSECTION (3.5). IF A BAIL BONDING AGENT FAILS TO COMPLY FULLY WITH THE REQUIREMENTS OF PARAGRAPHS (a) AND (b) OF THIS SUBSECTION (3.5) AND THIS PARAGRAPH (c), ANY INSTRUMENT CREATING A LIEN AGAINST REAL PROPERTY SHALL BE VOIDABLE.

(d) THE BONDING AGENT SHALL DELIVER TO THE PROPERTY OWNER A FULLY EXECUTED AND NOTARIZED RECONVEYANCE OF TITLE, A CERTIFICATE OF DISCHARGE, OR A FULL RELEASE OF ANY LIEN AGAINST REAL PROPERTY THAT SECURES PERFORMANCE OF THE CONDITIONS OF A BAIL BOND WITHIN THIRTY-FIVE DAYS AFTER RECEIVING NOTICE THAT THE TIME FOR APPEALING AN ORDER THAT EXONERATED THE BAIL BOND HAS EXPIRED. THE BONDING AGENT SHALL ALSO DELIVER TO THE PROPERTY OWNER THE ORIGINAL CANCELLED NOTE AS EVIDENCE THAT THE INDEBTEDNESS SECURED BY ANY LIEN INSTRUMENT HAS BEEN PAID OR THAT THE PURPOSES OF SAID INSTRUMENT HAVE BEEN FULLY SATISFIED AND THE ORIGINAL DEED OF TRUST, SECURITY AGREEMENT, OR OTHER INSTRUMENT THAT SECURED THE BAIL BOND OBLIGATION. IF A TIMELY NOTICE OF APPEAL IS FILED, THE THIRTY-FIVE-DAY PERIOD SHALL BEGIN ON THE DAY THE APPELLATE COURT'S AFFIRMATION OF THE ORDER BECOMES FINAL. IF THE BONDING AGENT FAILS TO COMPLY WITH THE REQUIREMENTS OF THIS PARAGRAPH (d), THE PROPERTY OWNER MAY PETITION THE DISTRICT COURT TO ISSUE AN ORDER DIRECTING THE CLERK OF SUCH COURT TO EXECUTE A FULL RECONVEYANCE

OF TITLE, A CERTIFICATE OF DISCHARGE, OR A FULL RELEASE OF ANY LIEN AGAINST REAL PROPERTY CREATED TO SECURE PERFORMANCE OF THE CONDITIONS OF THE BAIL BOND. THE PETITION SHALL BE VERIFIED AND SHALL ALLEGE FACTS SHOWING THAT THE BONDING AGENT HAS FAILED TO COMPLY WITH THE PROVISIONS OF THIS PARAGRAPH (d).

(e) ANY BAIL BONDING AGENT WHO VIOLATES THIS SUBSECTION (3.5) IS LIABLE TO THE PROPERTY OWNER FOR ALL DAMAGES THAT MAY BE SUSTAINED BY REASON OF THE VIOLATION, PLUS STATUTORY DAMAGES IN THE SUM OF THREE HUNDRED DOLLARS. THE PROPERTY OWNER SHALL BE ENTITLED TO RECOVER COURT COSTS AND REASONABLE ATTORNEY FEES, AS DETERMINED BY THE COURT, UPON PREVAILING IN ANY ACTION BROUGHT TO ENFORCE THE PROVISIONS OF THIS SUBSECTION (3.5).

**SECTION 7.** In Colorado Revised Statutes, 10-23-101, **amend** (2) as follows:

**10-23-101. Definitions.** As used in this article, unless the context otherwise requires:

(2) "On the board" means that the name of the person has been publicly posted or disseminated by a court as being ineligible to write bail bonds under section ~~16-4-112~~ 16-4-114 (5) (e) or (5) (f), C.R.S.

**SECTION 8.** In Colorado Revised Statutes, 10-23-105, **amend** (1) and (2) as follows:

**10-23-105. Qualification bond - forfeiture.** (1) Each cash-bonding agent shall post a cash qualification bond of fifty thousand dollars with the division. The bond must be to the people of the state of Colorado in favor of any court in this state, whether municipal, county, district, or other court, and to the division for the purposes of this section. In the event of a forfeiture of a cash-bonding agent's qualification bond, the division has priority over all other claimants. To comply with this subsection (1), the bond must be conditioned upon full and prompt payment into the court ordering the bond forfeited. Cash-bonding agents shall not issue bonds except in accordance with section ~~16-4-104 (1) (b) (II)~~ 16-4-104 (1) (c) (III), C.R.S. In the event of a qualification bond forfeiture, a cash-bonding agent shall not write new bail bonds until the qualification bond is restored to fifty thousand dollars.

(2) Each professional cash-bail agent shall post a cash qualification bond of no less than fifty thousand dollars with the division. The bond shall be to the people of the state of Colorado in favor of any court in this state, whether municipal, county, district, or other court, and to the division for the purposes of this section. A professional cash-bail agent shall not furnish a single bail greater than twice the amount of the bond posted with the division. In the event of a forfeiture of a professional cash-bail agent's qualification bond, the division has priority over all other claimants to the bond. To comply with this subsection (2), the bond must be conditioned upon full and prompt payment into the court ordering the bond forfeited. Professional cash-bail agents shall not issue bonds except in accordance with section ~~16-4-104(1)(b)(II)~~ 16-4-104 (1) (c) (III), C.R.S. In the event of a qualification bond forfeiture, a professional cash-bail agent shall not write new bail bonds until the qualification bond is restored to at least fifty thousand dollars.

**SECTION 9.** In Colorado Revised Statutes, 10-23-108, **add** (3.5) as follows:

**10-23-108. Bail bond documents - requirements - rules.**

(3.5) (a) IF THE BOND IS TO BE SECURED BY REAL ESTATE, THE BAIL BONDING AGENT SHALL PROVIDE THE PROPERTY OWNER WITH A WRITTEN DISCLOSURE STATEMENT IN THE FOLLOWING FORM AT THE TIME AN INITIAL APPLICATION IS FILED:

**DISCLOSURE OF LIEN AGAINST REAL PROPERTY**

**DO NOT SIGN THIS DOCUMENT UNTIL YOU READ AND UNDERSTAND IT! THIS BAIL BOND WILL BE SECURED BY REAL PROPERTY YOU OWN OR IN WHICH YOU HAVE AN INTEREST. FAILURE TO PAY THE BAIL BOND PREMIUMS WHEN DUE OR THE DEFENDANT'S FAILURE TO COMPLY WITH THE CONDITIONS OF BAIL COULD RESULT IN THE LOSS OF YOUR PROPERTY!**

(b) THE DISCLOSURE REQUIRED IN PARAGRAPH (a) OF THIS SUBSECTION (3.5) SHALL BE PRINTED IN FOURTEEN-POINT, BOLD-FACED TYPE EITHER:

(I) ON A SEPARATE AND SPECIFIC DOCUMENT ATTACHED TO OR

ACCOMPANYING THE APPLICATION; OR

(II) IN A CLEAR AND CONSPICUOUS STATEMENT ON THE FACE OF THE APPLICATION.

(c) BEFORE A PROPERTY OWNER EXECUTES ANY INSTRUMENT CREATING A LIEN AGAINST REAL PROPERTY, THE BAIL BONDING AGENT SHALL PROVIDE THE PROPERTY OWNER WITH A COMPLETED COPY OF THE INSTRUMENT CREATING THE LIEN AGAINST REAL PROPERTY AND THE DISCLOSURE STATEMENT DESCRIBED IN PARAGRAPH (a) OF THIS SUBSECTION (3.5). IF A BAIL BONDING AGENT FAILS TO COMPLY FULLY WITH THE REQUIREMENTS OF PARAGRAPHS (a) AND (b) OF THIS SUBSECTION (3.5) AND THIS PARAGRAPH (c), ANY INSTRUMENT CREATING A LIEN AGAINST REAL PROPERTY SHALL BE VOIDABLE.

(d) THE BONDING AGENT SHALL DELIVER TO THE PROPERTY OWNER A FULLY EXECUTED AND NOTARIZED RECONVEYANCE OF TITLE, A CERTIFICATE OF DISCHARGE, OR A FULL RELEASE OF ANY LIEN AGAINST REAL PROPERTY THAT SECURES PERFORMANCE OF THE CONDITIONS OF A BAIL BOND WITHIN THIRTY-FIVE DAYS AFTER RECEIVING NOTICE THAT THE TIME FOR APPEALING AN ORDER THAT EXONERATED THE BAIL BOND HAS EXPIRED. THE BONDING AGENT SHALL ALSO DELIVER TO THE PROPERTY OWNER THE ORIGINAL CANCELLED NOTE AS EVIDENCE THAT THE INDEBTEDNESS SECURED BY ANY LIEN INSTRUMENT HAS BEEN PAID OR THAT THE PURPOSES OF SAID INSTRUMENT HAVE BEEN FULLY SATISFIED AND THE ORIGINAL DEED OF TRUST, SECURITY AGREEMENT, OR OTHER INSTRUMENT THAT SECURED THE BAIL BOND OBLIGATION. IF A TIMELY NOTICE OF APPEAL IS FILED, THE THIRTY-FIVE-DAY PERIOD SHALL BEGIN ON THE DAY THE APPELLATE COURT'S AFFIRMATION OF THE ORDER BECOMES FINAL. IF THE BONDING AGENT FAILS TO COMPLY WITH THE REQUIREMENTS OF THIS PARAGRAPH (d), THE PROPERTY OWNER MAY PETITION THE DISTRICT COURT TO ISSUE AN ORDER DIRECTING THE CLERK OF SUCH COURT TO EXECUTE A FULL RECONVEYANCE OF TITLE, A CERTIFICATE OF DISCHARGE, OR A FULL RELEASE OF ANY LIEN AGAINST REAL PROPERTY CREATED TO SECURE PERFORMANCE OF THE CONDITIONS OF THE BAIL BOND. THE PETITION SHALL BE VERIFIED AND SHALL ALLEGE FACTS SHOWING THAT THE BONDING AGENT HAS FAILED TO COMPLY WITH THE PROVISIONS OF THIS PARAGRAPH (d).

(e) ANY BAIL BONDING AGENT WHO VIOLATES THIS SUBSECTION (3.5) SHALL BE LIABLE TO THE PROPERTY OWNER FOR ALL DAMAGES THAT MAY BE

SUSTAINED BY REASON OF THE VIOLATION, PLUS STATUTORY DAMAGES IN THE SUM OF THREE HUNDRED DOLLARS. THE PROPERTY OWNER SHALL BE ENTITLED TO RECOVER COURT COSTS AND REASONABLE ATTORNEY FEES, AS DETERMINED BY THE COURT, UPON PREVAILING IN ANY ACTION BROUGHT TO ENFORCE THE PROVISIONS OF THIS SUBSECTION (3.5).

**SECTION 10.** In Colorado Revised Statutes, 18-13-130, **amend** (1) (g) as follows:

**18-13-130. Bail bond - prohibited activities - penalties.** (1) It is unlawful for any person who engages in the business of writing bail bonds to engage in any of the following activities related to a bail bond transaction:

(g) Post a bail bond in any court of record in this state while the name of the person is on the board under section ~~16-4-112~~ 16-4-114 (5) (e), C.R.S., or under any circumstance where the person has failed to pay a bail forfeiture judgment after all applicable stays of execution have expired and the bond has not been exonerated or discharged;

**SECTION 11.** In Colorado Revised Statutes, 19-2-509, **amend** (4) (a) as follows:

**19-2-509. Bail.** (4) (a) In determining ~~the amount of bail and the type of bond to be furnished by~~ AND CONDITIONS OF RELEASE FOR the juvenile, the judge or magistrate fixing the same shall consider the criteria set forth in section ~~16-4-105 (1)~~ 16-4-103, C.R.S.

**SECTION 12. Safety clause.** The general assembly hereby finds,

determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

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Mark Ferrandino  
SPEAKER OF THE HOUSE  
OF REPRESENTATIVES

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John P. Morse  
PRESIDENT OF  
THE SENATE

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Marilyn Eddins  
CHIEF CLERK OF THE HOUSE  
OF REPRESENTATIVES

---

Cindi L. Markwell  
SECRETARY OF  
THE SENATE

APPROVED \_\_\_\_\_

---

John W. Hickenlooper  
GOVERNOR OF THE STATE OF COLORADO

NOTE: The governor signed this measure on 6/6/2014.

# An Act

SENATE BILL 14-212

BY SENATOR(S) Ulibarri;  
also REPRESENTATIVE(S) Lee, Kagan, Labuda.

CONCERNING CLARIFYING CHANGES TO THE PROVISIONS RELATED TO BEST  
PRACTICES IN BOND SETTING.

*Be it enacted by the General Assembly of the State of Colorado:*

**SECTION 1.** In Colorado Revised Statutes, 16-4-103, **amend** (1) as follows:

**16-4-103. Setting and selection type of bond - criteria.** (1) At the first appearance of a person in custody before ~~a court of record~~ ANY COURT OR ANY PERSON DESIGNATED BY THE COURT TO SET BOND, the court OR PERSON shall determine the type of bond and conditions of release unless the person is subject to the provisions of section 16-4-101.

**SECTION 2.** In Colorado Revised Statutes, 16-4-104, **amend** (1) (c) introductory portion as follows:

**16-4-104. Types of bond set by the court.** (1) The court shall determine, after consideration of all relevant criteria, which of the following types of bond is appropriate for the pretrial release of a person

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*Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.*

in custody, subject to the relevant statutory conditions of release listed in section 16-4-105. The person may be released upon execution of:

(c) A bond with secured monetary conditions when reasonable and necessary to ensure the appearance of the person in court or the safety of any person or persons or the community. The financial conditions shall state an amount of money that the person must post with the court in order for the person to be released. The person may be released from custody upon execution of bond in the full amount of money to be secured ~~in~~ BY any one of the following ~~ways~~ METHODS, AS SELECTED BY THE PERSON TO BE RELEASED, UNLESS THE COURT MAKES FACTUAL FINDINGS ON THE RECORD WITH RESPECT TO THE PERSON TO BE RELEASED THAT A CERTAIN METHOD OF BOND, AS SELECTED BY THE COURT, IS NECESSARY TO ENSURE THE APPEARANCE OF THE PERSON IN COURT OR THE SAFETY OF ANY PERSON, PERSONS, OR THE COMMUNITY:

**SECTION 3.** In Colorado Revised Statutes, 16-4-105, **amend** (4) as follows:

**16-4-105. Conditions of release on bond.** (4) An additional condition of every bond in cases of domestic violence as defined in section 18-6-800.3 (1), C.R.S., OR IN CASES OF STALKING UNDER SECTION 18-3-602, C.R.S., is that the released person acknowledge the protection order as provided in section 18-1-1001 (5), C.R.S.

**SECTION 4.** In Colorado Revised Statutes, 16-4-106, **amend** (4) (c) as follows:

**16-4-106. Pretrial services programs.** (4) Any pretrial services program approved pursuant to this section must meet the following criteria:

(c) The program, in conjunction with the community advisory board, must make all reasonable efforts to implement an empirically developed pretrial risk assessment tool, TO BE USED BY THE PROGRAM, THE COURT, AND THE PARTIES TO THE CASE SOLELY FOR THE PURPOSE OF ASSESSING PRETRIAL RISK, and a structured decision-making design based upon the person's charge and the risk assessment score; AND

**SECTION 5.** In Colorado Revised Statutes, **amend** 16-4-107 as follows:

**16-4-107. Hearing after setting of monetary conditions of bond.**

(1) (a) If a person is in custody and the court imposed a monetary CONDITION OF bond for release, and the person, after seven days from the setting of the monetary CONDITION OF bond, is unable to meet the monetary obligations of the bond, the person may file a written motion for reconsideration of the monetary conditions of the bond. The person may only file the written motion PURSUANT TO THIS SECTION ONE TIME DURING THE PENDENCY OF THE CASE AND MAY ONLY FILE THE WRITTEN MOTION if he or she believes that, upon presentation of evidence not fully considered by the court, he or she is entitled to a personal recognizance bond or an unsecured bond with conditions of release or a change in the monetary conditions of bond. The court shall promptly conduct a hearing on this motion for reconsideration, but the hearing must be held within fourteen days after the filing of the motion. However, the court may summarily deny the motion if the court finds that there is no additional evidence not fully considered by the court presented in the written motion. In considering the motion, the court shall consider the results of any empirically developed risk assessment instrument.

(b) NOTHING IN THIS SECTION SHALL PRECLUDE A PERSON FROM FILING A MOTION FOR RELIEF FROM A MONETARY CONDITION OF BOND PURSUANT TO SECTION 16-4-109 AT ANY TIME DURING THE PENDENCY OF THE CASE.

**SECTION 6.** In Colorado Revised Statutes, 16-4-110, **amend** (2) as follows:

**16-4-110. Exoneration from bond liability.** (2) If, within fourteen days after the posting of a bond by a defendant, the terms and conditions of ~~said~~ THE bond are changed or altered either by order of court or upon the motion of the district attorney or the defendant, the court, after a hearing, may order a compensated surety to refund a portion of the premium paid by the defendant, if necessary AND SUPPORTED BY FACTUAL FINDINGS, to prevent unjust enrichment. If more than fourteen days have elapsed after posting of a bond by a defendant, the court shall not order the refund of any premium.

**SECTION 7.** In Colorado Revised Statutes, 16-4-111, **amend** (3) as follows:

**16-4-111. Disposition of security deposits upon forfeiture or termination of bond.** (3) ~~Where~~ WHEN the defendant has been released upon deposit of cash ~~stocks, bonds,~~ or property, UPON AN UNSECURED PERSONAL RECOGNIZANCE BOND WITH A MONETARY CONDITION PURSUANT TO SECTION 16-4-104 (1) (a) OR (1) (b), or upon a surety bond secured by property, if the defendant fails to appear in accordance with the primary condition of the bond, the court shall declare a forfeiture. Notice of the order of forfeiture shall be mailed by the court to the defendant, all sureties, and all depositors or assignees of any deposits of cash or property if such sureties, depositors, or assignees have direct contact with the court, at their last-known addresses. Such notice shall be sent within fourteen days after the entry of the order of forfeiture. If the defendant does not appear and surrender to the court having jurisdiction within thirty-five days from the date of the forfeiture or within that period satisfy the court that appearance and surrender by the defendant is impossible and without fault by such defendant, the court may enter judgment for the state against the defendant for the amount of the bond and costs of the court proceedings. Any cash deposits made with the clerk of the court shall be applied to the payment of costs. If any amount of such cash deposit remains after the payment of costs, it shall be applied to payment of the judgment.

**SECTION 8.** In Colorado Revised Statutes, 18-3-602, **amend** (8) (a) as follows:

**18-3-602. Stalking - penalty - definitions - Vonnie's law.** (8) (a) When a person is arrested for an alleged violation of this section, the fixing of bail for the crime of stalking shall be done in accordance with section ~~16-4-103(2)(d)~~, 16-4-105 (4), C.R.S., and a protection order shall issue in accordance with section 18-1-1001(5).

**SECTION 9. Effective date.** This act takes effect July 1, 2014.

**SECTION 10. Safety clause.** The general assembly hereby finds,

determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

\_\_\_\_\_  
Morgan Carroll  
PRESIDENT OF  
THE SENATE

\_\_\_\_\_  
Mark Ferrandino  
SPEAKER OF THE HOUSE  
OF REPRESENTATIVES

\_\_\_\_\_  
Cindi L. Markwell  
SECRETARY OF  
THE SENATE

\_\_\_\_\_  
Marilyn Eddins  
CHIEF CLERK OF THE HOUSE  
OF REPRESENTATIVES

APPROVED \_\_\_\_\_

\_\_\_\_\_  
John W. Hickenlooper  
GOVERNOR OF THE STATE OF COLORADO

## APPENDIX E: SAMPLE BOND SCHEDULES UNDER THE NEW LAW

detainees, reduce failure to appear rates, reduce recidivism, and reduce jail crowding. Nationally, 60% of local jail populations are pretrial detainees, a figure that has remained relatively stable over time.<sup>20</sup> According to the Pretrial Justice Institute, "the pretrial decision affects how limited jail space is allocated and how the risks of non-appearance and pretrial crime by released defendants are managed. The pretrial decision also affects defendants' abilities to assert their innocence, negotiate a disposition, and mitigate the severity of a sentence."<sup>26</sup> Use of empirically developed risk assessment instruments can improve decision making by classifying defendants based on their predicted level of pretrial failure. Those with very high risk scores or high-violence index crimes may be held in jail pretrial but must be afforded a due process hearing.

Research undertaken on pretrial defendants in ten Colorado judicial districts found that the majority of individuals appear in court and remain crime-free during the pretrial period.<sup>21</sup> This research resulted in the development of the Colorado Pretrial Assessment Tool (CPAT), a four-category risk instrument that identifies the relative risk of pretrial defendants. This instrument is currently being implemented in at least four Colorado judicial districts. Pretrial program staff in these districts have begun working with local stakeholders to identify recommended/suggested release decisions, alternatives to incarceration, and **individualized** conditions of release based on a defendant's characteristics such as offense charge and risk assessment score. An example of a risk-focused, structured decision making matrix is provided in Table 4.10. This matrix can serve as a starting point for stakeholders in local jurisdictions to modify according to local needs.

Table 4.10. Release decision guidelines matrix

		Top charge																	
		F1		F2		F3		F4		F5		F6		M		Petty	T	DUI	DV
		Person	Person	Prop	Prop	Non-DUI Traffic													
Risk assessment score	4	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
	3	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
	2	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
	1	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■

■ Detention until trial (pretrial detention) (Majors/Arrests/Charges/F5 only/20% of the Colorado Sheriff's Association (C.S.A.) 16-1-10)  
 ■ Recommended AND/OR Release  
 ■ Recommended AND/OR Release  
 ■ Recommended to question/arraign only

20. Minton, Todd D. (April 2012). "Detainees at Midyear 2011—Statistical Tables Bureau of Justice Statistics, Washington, D.C. Available at <http://nces.ed.gov/ipeds/data/ipedsdatatool.asp>.

21. Mathison, Cynthia A. (March 2014). *State of the Science of Pretrial Risk Assessment*. Jointly published by the Pretrial Justice Institute and the District of Columbia Assn. of Judges. Washington, D.C. Page 4. <http://www.pji.org/Portals/0/Research/StateoftheScienceofPretrialRiskAssessment.pdf>.

22. Pretrial Justice Institute & U.S. Institute of Justice (2014). *The Colorado Pretrial Assessment Tool (CPAT): A Joint Re-working among Ten Colorado Counties, the Pretrial Justice Institute, and the U.S. Institute of Justice*. Pretrial Justice Institute, Washington, D.C. See also Pretrial Justice Institute (August 2012). *Revised Risk Categories for the Colorado Pretrial Assessment Tool (CPAT)*. Pretrial Justice Institute, Washington, D.C.

# MESA COUNTY BOND PRACTICE SUMMARY

See back for further explanations

COLORADO PRETRIAL ASSESSMENT TOOL (CPAT) RISK CATEGORIES				
Risk Category	Risk Score	Public Safety Rate	Court Appearance Rate	Overall Success Rate
1	0-17	91%	95%	87%
2	18-37	80%	85%	71%
3	38-50	69%	77%	58%
4	51-82	58%	51%	33%

PRETRIAL SUPERVISION GUIDELINES (FROM SMART PRAXIS)							
CPAT Risk Category	1	2	3	4	5	6	7
↓	Felony VRA Crimes (C.R.S. 24-4.1-302)	Drug Distribution & Aggravated DARP	Domestic Violence DVSI 11 or Greater	Domestic Violence DVSI 10 or Less	Other Felony Crimes	Misdemeanor VRA Crimes (C.R.S. 24-4.1-302)	Misdemeanor & Traffic
1	Enhanced	Enhanced	Basic	Reminder Calls	Reminder Calls	Reminder Calls	Reminder Calls
2	Enhanced	Enhanced	Enhanced	Basic	Reminder Calls	Reminder Calls	Reminder Calls
3	Intensive	Intensive	Intensive	Enhanced	Basic	Basic	Reminder Calls
4	Intensive	Intensive	Intensive	Intensive	Enhanced	Enhanced	Basic

BOND GUIDELINES							
The type and amount of bond indicated by the guidelines are presumptions, and the parties should consider the factors enumerated in CRS 16-4-105, the facts of the case, and the specific circumstances of the individual defendant.							
See the Crime Column Appendix for details regarding the specific crimes included in each column							
CPAT Risk Category	1	2	3	4	5	6	7
↓	Felony VRA Crimes (C.R.S. 24-4.1-302)	Drug Distribution & Aggravated DARP	Domestic Violence DVSI 11 or Greater	Domestic Violence DVSI 10 or Less	Other Felony Crimes	Misdemeanor VRA Crimes (C.R.S. 24-4.1-302)	Misdemeanor & Traffic
1	Cautionary Bond w/PTS	PR with PTS	PR with PTS	PR No Supervision	*PR No Supervision	PR No Supervision	*PR No Supervision
2	Cautionary Bond w/PTS	Cautionary Bond w/PTS	PR with PTS	PR with PTS	PR No Supervision	PR No Supervision	*PR No Supervision
3	Cautionary Bond w/PTS	Cautionary Bond w/PTS	Cautionary Bond w/PTS	PR with PTS	PR with PTS	PR with PTS	*PR No Supervision
4	Cautionary Bond w/PTS	Cautionary Bond w/PTS	Cautionary Bond w/PTS	Cautionary Bond w/PTS	Cautionary Bond w/PTS	Cautionary Bond w/PTS	PR with PTS
Cash Only Range	\$100 - \$100,000	\$100 - \$50,000	\$100 - \$10,000	\$100 - \$1,000	\$100 - \$10,000	\$100 - \$1,000	\$0
Secured Bond Range	\$1,000 - \$1,000,000	\$1,000 - \$500,000	\$1,000 - \$100,000	\$1,000 - \$10,000	\$1,000 - \$100,000	\$1,000 - \$10,000	\$0

# Arapahoe County Pretrial Supervision SMART Praxis

## (Supervision Matrix Assessment & Recommendation Tool)

<b>Pretrial Supervision &amp; Recommendation Matrix</b>							
CPAT Categories	Pretrial Supervision Level Determination with CPAT and Primary Charge Consideration <b>0 = No Supervision Recommended</b> <i>(If supervision ordered in "0" category, CM will use discretion in assigning supervision level)</i>						
	Domestic Violence	Statutory Sex Charges	Statutory Felony Violent	DUI (HB11-1189)	Felony Non- Violent	Misd. Crimes Against Person	Misd. Non-Violent & Traffic (Excluding DUI)
Cat 1	Basic	Basic	Enh	Admin	Admin	Admin	Admin
Cat 2	Enh	Enh	Enh	Basic	Admin	Admin	Admin
Cat 3	Enh	Int	Int	Enh	Basic	Basic	Admin
Cat 4	Int	Int	Int	Int	Enh	Enh	Basic

*If a crime falls outside of the above listed categories, then use discretion and recommend accordingly. If aggravating circumstances exist that pose a potential serious danger to the community, Pretrial Services will notify the court that no set of conditions can reasonably assure community safety.*

<b>PRETRIAL SUPERVISION LEVELS</b>				
<i>(Determined by CPAT, Charge and Performance While Under Supervision)</i>				
General Supervision Provided by Pretrial Services <i>(See below for court-ordered specific monitoring)</i>	Administrative (Admin)	Basic (Basic)	Enhanced (Enh)	Intensive (Int)
Associated Fees to the Client <i>Fee waivers are available based on client needs</i>	\$40 Intake + Agency fees (if applicable)	\$40 Intake + Agency fees (if applicable)	\$40 Intake + Agency fees (if applicable)	\$40 Intake + Agency fees (if applicable)
Intake within 24 hours of release from jail	✓	✓	✓	✓
Risk Assessment with Intake Officer	✓	✓	✓	✓
Criminal History Checks	✓	✓	✓	✓
Court Reminders	✓	✓	✓	✓
Residence Verification	✓	✓	✓	✓
Clerical Check-in as ordered by the court	✓	✓	✓	✓
Clerical/On-line Check-in – Weekly (compliance based)			✓ 1x/Week	✓ 2-3x/Week
Clerical/On-line Check-in Monthly	✓ 1 <sup>st</sup> Day of Month	✓ 1 <sup>st</sup> & 15 <sup>th</sup> Day of Month		
Office Visit with PTO – Weekly or 2x/month				
Office Visit with PTO - min 1x in a 4 week period (compliance based)				
Office Visit with PTO - as ordered by court or as directed by PTO	✓	✓	✓	✓
Required to Check In After Court				✓
<b>Court Ordered Specific Conditions</b>				
**Substance Testing (Urine Screens, Breathalyzers, SCRAM, Smart Start)	✓	✓	✓	✓
*Mental Health/Substance Abuse Treatment/Evaluations	✓	✓	✓	✓
*** GPS Monitoring	✓	✓	✓	✓
***EHM, Passive GPS	✓	✓	✓	✓
***Home Curfew Monitoring (If Ordered by Court)	✓	✓	✓	✓

**IN THE MIDDLE DISTRICT COURT OF THE UNITED STATES  
MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION**

**CHRISTY DAWN VARDEN** )  
 )  
 **Plaintiff,** )  
 )  
 **v.** ) **Case No.: 2:15-cv-34-MHT**  
 )  
 **THE CITY OF CLANTON,** )  
 )  
 **Defendant.** )

**DEFENDANT'S RESPONSE TO PLAINTIFF'S  
MOTION FOR A PRELIMINARY INJUNCTION**

**Factual Background**

Plaintiff, Christy Dawn Varden, was arrested on January 13, 2015 at 11:30 p.m. when Officer Justin Beane of the City of Clanton Police Department witnessed her leaving a Wal-Mart store while being pursued by a Wal-Mart employee who was attempting to get Ms. Varden to stop. The Wal-Mart employee told Officer Beane that Ms. Varden, who had entered a vehicle waiting for her, had stolen the items she currently had in her hand. Ms. Varden failed to comply with Officer Beane's instructions that she exit the vehicle. Officer Beane called for "backup," and was met by Chilton County Sheriff's deputies in response to his call. After physically removing Ms. Varden from the vehicle, she was arrested by the Chilton County Sheriff's deputies. Ms. Varden was booked at the Chilton County jail at 12:00 a.m. January 14, 2015. She filed her Class Action Complaint, Motion for a Preliminary Injunction, and Motion for Class Certification on January 15, 2015. Docs. 1, 2, & 4. The Defendant City of Clanton was served with a Summons on January 16, 2015.

The City of Clanton has charged Plaintiff Christy Varden with the following violations of the Alabama Code: (1) Theft of Property Third, § 13A-8-5, a Class A misdemeanor; (2)

Resisting Arrest, § 13A-10-41, a Class B misdemeanor; (3) Disorderly Conduct, § 13A-11-7, a Class C misdemeanor; and (4) Possession of Drug Paraphernalia (a crack cocaine pipe), § 13A-12-260, a Class A misdemeanor. **Exhibit 1** (Affidavit of Municipal Court Magistrate Velma Tinsley). Chilton County also charged Ms. Varden with two counts of Assault 3<sup>rd</sup> (Ala. Code § 13A-6-22) at the time of her release from jail on the municipal charges. **Exhibit 2** (Affidavit of Ann Davis, Asst. Warden of the Chilton County Jail).

Pursuant to the Clanton Municipal Court bond schedule, bail was set at \$500 for each of the City's charges made against Ms. Varden. Her total bail for each of her charges amounted to \$2,000. Contrary to Plaintiff's assertions, the City of Clanton's bail schedule does not require cash bail<sup>1</sup>; in addition to posting cash, Mr. Varden also could have hired a commercial bonding company or had a friend or relative pledge property in lieu of a money bond. The latter could have been done at no expense to herself or her friend or relative. On at least one prior occasion, she obtained release pending Clanton Municipal Court charges by having someone pledge property and sign as a surety. **Exhibit 1, Attachment 2**. On that occasion, she was released on the day of her arrest.

The Alabama Rules of Criminal Procedure contain recommended ranges for money bail amounts for misdemeanor offenses. *See* Ala. R. Crim. P. 7.2. The recommended range for Class

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<sup>1</sup> Plaintiff Varden states that the "majority of Clanton's arrestees are freed almost immediately when they post these small amounts of money without difficulty. The rest are left to languish in jail until the City's next court date or until their families produce enough money at some point in the intervening period." Doc 2, p. 4. While it is true that the majority of defendants do post bond, this claim is otherwise incorrect; Ms. Varden has previously obtained her release "almost immediately" on charges pending against her in the Clanton Municipal Court without posting any money at all. As she did regarding the charges pending against her in the Chilton County District Court related to the same incident giving rise to this case, Ms. Varden has previously had a property owner sign for her release. **Exhibit 1, Attach. 2**.

A misdemeanors is \$300 to \$6,000. Ala. R. Crim. P. 7.2(b).<sup>2</sup> According to the schedule, Ms. Varden's bail amount could have been set as high as \$16,000. The Clanton Municipal Court has established the bond schedule applied to Ms. Varden in this case. **Exhibit 1.** It sets all misdemeanor charges at the low end of this range at \$500.00 with the exception of DUI's, which are set at \$1,000.00. The municipal court judge has this authority by virtue of state law to set bail. *See, e.g.*, Ala. Code Sec. 12-14-5.

Attorneys Bill Dawson and J. Mitch McGuire, who represent Ms. Varden before this Court, entered appearances on Ms. Varden's behalf in the Clanton Municipal Court on January 16, 2015, a day after filing this lawsuit. Her attorneys waived her right to an arraignment and entered a plea of "not guilty." Ms. Varden's appearance before the Court was entered on this date as well and she was released from the Chilton County jail on the charges pending in the Clanton Municipal Court, less than seventy-two (72) hours after being arrested. Ms. Varden was given a trial date of January 27, 2015. On that day, Ms. Varden's attorney requested a continuance of her trial until February 24, 2015, which was granted by the Court.

As noted above, at the time of her release on the municipal charges at issue here, Ms. Varden was charged with two counts of Assault 3<sup>rd</sup> (Ala. Code § 13A-6-22) by Chilton County, and those charges are currently pending in the Chilton County District Court. Her total bail for those two charges was \$1,500 based on the County's bond schedule. Someone listed as having the same address as Ms. Varden pledged personal property as collateral in lieu of cash bail, and Ms. Varden was released on January 16, 2015 at 3:34 p.m. from the Chilton County Jail.

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<sup>2</sup> \$300 was set as the lower limit on the Bail Schedule's recommended ranges in order to comply with Ala. Code § 15-13-105, which establishes that "in violation and misdemeanor cases the minimum amount of bail shall be \$300 for each offense charged."

At the time of Ms. Varden's arrest, hearings for defendants who had not obtained release were held once a week in Clanton and at that hearing alternatives to bond were provided. At this time, the Municipal Court is making individualized detention determination for those who do not post bond at least every two days or forty-eight hours, and the Municipal Court judge is in the process of formalizing procedures along those lines. **Exhibit 2.**

## ARGUMENT

### I. INTRODUCTION

Ms. Varden's Class Action Complaint seeks an "order and judgment preliminarily and permanently enjoining Defendant City of Clanton from enforcing the unconstitutional post-arrest money-based detention policies and practices against the Plaintiff and the Class of similarly situated people that she represents." Doc 1, p. 13. Ms. Varden has made it clear that what she wants is an injunction prohibiting the use of the municipal court's bond schedule and for all "arrestees to sign *unsecured* bonds in the same monetary amounts that [the Clanton Municipal Court] currently uses or by releasing them on their own recognizance under penalty of a new charge for failure to appear." Doc 2, p. 12. This is also consistent with the representations of her counsel regarding the relief sought in this case.

Taking her position to its logical conclusions would result in the mandatory and immediate release of every defendant on his or her own recognizance or by unsecured bond and discontinuation of the current court-mandated bond schedule. It would also remove from the Clanton Municipal Court judge the authority to make individualized determinations regarding the conditions of release. In short, Ms. Varden seeks an Order from this Court declaring that money bail, whether determined according to a bond schedule or otherwise, is unconstitutional *per se*, but this is simply not the law.

By removing from the Court discretion regarding the conditions upon which a defendant may be released, the Court will no longer be able to take into account situations in which defendants have a prior history of failing to appear in court or where other information presented to the judge suggests that it is unlikely the defendant will fulfill his promise to appear. In addition, under the Plaintiff's proposed remedy, when those individuals – or anyone else – fails to appear, the City's only remedy would be to arrest them for failing to appear, but upon arrest, immediately to release them again on their own recognizance. While the Municipal Court judge might choose to exercise this discretion to release many defendants who do not post bond on their own recognizance, the Court has an interest in retaining the authority to make those determinations on a case-by-case basis.

Moreover, the vast majority of defendants who appear before the Court *are* able to make bond pursuant to the bond schedule, as Plaintiff acknowledges. Doc. 1 Pars. 21-22 (“many” are released soon after arrest) & Doc. 2, p. 4. (“majority” are released almost immediately). Plaintiff's proposed relief would require the Court to treat those individuals as though they were indigent and to forego bail altogether even for those who can afford it. Ms. Varden seeks this relief notwithstanding the fact that bond schedules, with a single exception from forty-five years ago, have never been deemed unconstitutional.<sup>3</sup>

Finally, to the extent that the Plaintiffs have a cognizable claim as to the timeliness of the detention/bail proceedings (one is not pled), the Clanton Municipal Court Judge is now considering alternatives to bail such that no defendant will be incarcerated for more than forty-eight hours and is in the process of creating judicial procedures and standing orders formalizing

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<sup>3</sup> See, e.g., *Terrel v. City of El Paso*, 481 F.Supp.2d 757, 767 (W.D. Tex. 2007) (upholding the use of a bond schedule and finding only one case declaring a bond schedule unconstitutional, a Florida case from 1970 which based its conclusions on factors that predated other changes in criminal procedure, rendering it no longer relevant).

these more frequent proceedings. *See Exhibit 2*. Thus, any such claim as to timeliness would be moot.

## II. VARDEN CANNOT ESTABLISH THE PREREQUISITES FOR A PRELIMINARY INJUNCTION

### A. THE PREREQUISITES FOR A PRELIMINARY INJUNCTION

A preliminary injunction is "an extraordinary and drastic remedy" that cannot be granted unless the moving party clearly establishes the following four prerequisites: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc), *reh'g denied*, 234 F.3d 1218 (11th Cir. 2000).

If the moving party cannot clearly establish any one of the four required elements, then a preliminary injunction should not be granted. *Bethel v. City of Montgomery*, No. 2:04cv743-MEF, 2010 U.S. Dist. LEXIS 24949, \*11-12 (M.D. Ala. Mar. 2, 2010) ("A preliminary injunction is an extraordinary and drastic remedy which should not be granted unless the movant clearly carries the burden of persuasion as to all prerequisites.") (citations omitted); *see also Church v. City of Huntsville*, 30 F.3d 1332, 1342 (11th Cir. 1994) (holding that the moving party's failure to demonstrate a substantial likelihood of success on the merits defeated the party's motion for a preliminary injunction, regardless of the party's ability to establish any of the other elements).

The purpose of a typical preliminary injunction is prohibitive in nature in that it is "merely to preserve the relative positions of the parties until a trial on the merits can be held." *United States v. Lambert*, 695 F.2d 536, 539 (11th Cir. 1983) (quoting *Univ. of Tex. v.*

*Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981)); *see also Mercedes-Benz U.S. Int'l, Inc. v. Cobasys, LLC*, 605 F. Supp. 2d 1189, 1196 (N.D. Ala. 2009) ("Typically, a preliminary injunction is prohibitory and generally seeks only to maintain the status quo pending a trial on the merits.") (citations omitted).

The burden on the party seeking a typical, prohibitive preliminary injunction is particularly high. *All Care Nursing Serv., Inc. v. Bethesda Mem. Hosp., Inc.*, 887 F.2d 1535, 1537 (11th Cir. 1989) ("Preliminary injunctions are issued when drastic relief is necessary to preserve the status quo.") (citing *Cate v. Oldham*, 707 F.2d 1176 (11th Cir. 1983); *Bannum, Inc. v. City of Fort Lauderdale, Fla.*, 657 F. Supp. 735 (S.D. Fla. 1986)), *cert. denied*, *Quality Profl Nursing, Inc. v. Bethesda Mem'l Hosp., Inc.*, 526 U.S. 1016, 119 S. Ct. 1250, 143 L. Ed. 2d 347 (1999); *see also Lambert*, 695 F.2d at 539 ("[A preliminary injunction's] grant is the exception rather than the rule, and plaintiff must clearly carry the burden of persuasion.").

Where, as here, "a preliminary injunction goes beyond the status quo and seeks to force one party to act, it becomes a mandatory or affirmative injunction and the burden placed on the moving party is increased." *Mercedes-Benz*, 605 F. Supp. 2d at 1196 (citing *Exhibitors Poster Exchange, Inc. v. Nat'l Screen Serv. Corp.*, 441 F.2d 560, 561 (5th Cir. 1971), *reh'g denied*, 520 F.2d 943 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054, 96 S. Ct. 784, 46 L. Ed. 2d 643 (1976)). For such mandatory injunctions, relief should be granted "[o]nly in rare instances." *Harris v. Wilters*, 596 F.2d 678, 680 (5th Cir. 1979); *see also Mercedes-Benz*, 605 F. Supp. 2d at 1196; *Boyd v. Steckel*, 753 F. Supp. 2d 1163, 1168-1169 (M.D. Ala. 2010).

Plaintiff cannot satisfy this increased burden on preliminary injunction. As explained below in more detail, the Plaintiff cannot establish a substantial likelihood of success on the merits. Moreover, Plaintiff cannot show for herself (or for future class members) that substantial

“irreparable injury” will be suffered unless the injunction issues. Alternatives to bail, all that the Constitution even arguably requires, have been provided, and, going forward, alternatives to the bail required on the schedule will be made available to defendants who have been unable to obtain release on a more frequent basis.

To the extent that additional hours of incarceration associated with waiting for an individualized detention/bail proceeding constitute a cognizable injury, that injury, particular as it will be limited in time, does not outweigh Clanton’s interest in maintaining the existing bail system. The bond schedule not only helps assure that individuals will appear in court on criminal charges when ordered to do so, it also does so in a streamlined and efficient manner. Likewise, the defendants’ individual interests do not outweigh Clanton’s (and the public’s) interests in the integrity of the municipal court system and its independence from federal oversight which will impair that independence. Also, if issued, an injunction would unnecessarily undermine mutual respect and principles of comity. It would likewise add to costs associated with police arrests for failures to appear and result in other additional costs in connection with a less efficient and orderly court system.

**B. THE PLAINTIFF CANNOT ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.**

**1. MS. VARDEN CANNOT ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE SHE LACKS STANDING TO OBTAIN THE RELIEF SHE SEEKS.**

Ms. Varden’s standing to raise these claims in the first instance is in question. Ms. Varden has been able to obtain release pursuant to the bond schedule in the past. *See Exhibit 1, Attach. 2.* This, in and of itself, would call into question her actual *inability* to obtain bond pursuant to the bond schedule as alleged in the complaint.

But more problematic for Ms. Varden is that she posted a bond in order to obtain release in connection with the County's charges against her immediately after being released on the municipal charges at issue here. See **Exhibit 2, Attach. 1**. Yet, she claims in this case that she could not post the same or similar property-based appearance bond in connection with those municipal charges.

As set out in the fact section, she was arrested at 11:30 p.m. on January 13. She was then booked at the Chilton County jail at 12:00 a.m. January 14. She filed her Class Action Complaint, Motion for a Preliminary Injunction, and Motion for Class Certification on January 15. Docs. 1 & 2. Attorneys who represent Ms. Varden before this Court entered appearances on Ms. Varden's behalf in the Clanton Municipal Court on January 16, a day after filing this lawsuit. They waived her right to an arraignment and entered a plea of "not guilty." Ms. Varden was then released from the Chilton County jail on the charges pending in the Clanton Municipal Court, less than seventy-two hours after being arrested.

This fact is one basis on which her standing is at issue. As explained in connection with Ms. Varden's due process challenge, the Alabama Supreme Court in *Alabama v. Blake*, 642 So.2d 959 (Ala. 1994), relying on United States Supreme Court precedent, ruled that a proceeding to consider alternatives to bail within three days satisfies constitutional requirements. *Id.* at 966-967. Thus, because Ms. Varden obtained release during that period of time, she was not actually injured by Clanton's bail procedures. See discussion *infra*.

Moreover, her injury (to the extent that there is one given her release occurred within seventy-two hours) did not result from the existence of the bond schedule. At the point she was released on the City charges, Chilton County filed assault charges against her. Her total bail for those two charges was \$1,500 based on the County's bond schedule. Someone listed as having

the same address as Ms. Varden signed along with Varden and pledged personal property as collateral in lieu of cash bail on the County charges; Ms. Varden was released on January 16, 2015 at 3:34 pm from the Chilton County Jail on the County charges. **Exhibit 2, Attach. 1.** Had the same personal property bond been executed on January 14<sup>th</sup> or 15<sup>th</sup> in connection with the City's charges against her, she could have obtained release on the City's charges pursuant to the Municipal Court's bond schedule. There is no reasonable basis on which to conclude that she could not have. Because she could have made bond pursuant to the schedule she challenges, which is evidenced by both her previous ability to do so and her ability to do so in connection with the County's bond schedule on the County charges, she cannot claim that she was injured by the existence of the bond schedule. If the existence of the bond schedule did not result in her injury, then she does not have standing to challenge its constitutionality here.

At the core of the standing doctrine is the requirement that a plaintiff "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984), citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982). In short, Ms. Varden's ability to obtain release pursuant to a bond schedule using a property bond on January 16 shows that her injury, if any, flowed from her failure to have the property bond document executed earlier rather than from her inability to obtain a bond. See, e.g., *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1152 (2013) (finding a plaintiff's "self-inflicted injuries" could not be fairly traceable to the government's purported activities).

**2. MS. VARDEN CANNOT ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS IN CONNECTION WITH THE CLASS-WIDE RELIEF SHE SEEKS.**

If Ms. Varden had the ability to post bond, and she obviously did as evidenced by the fact that she did post exactly the kind of bond to the County that would have permitted her release on the City charges, Ms. Varden is also not an appropriate representative for a class of people who are in fact unable to post a bond. First, before she can serve as class representative, she must actually satisfy the individual standing requirements. *See Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1307 (11th Cir. 2008).

Moreover, even if she arguably had standing to seek some relief, she does not have standing to seek the broad relief she is seeking on behalf of people who cannot post bond. “To have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he represents. *Indiana Employment Division v. Burney*, 409 U.S. 540 (1973); *Bailey v. Patterson*, 369 U.S. 31 (1962).” *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (U.S. 1974). Ms. Varden does not because she had the ability to post a bond and obtain her release, whereas the members of the class she seeks to represents do not. (In addition, Ms. Varden was also released within the presumptively reasonable three-day period.)

While the class that Ms. Varden says that she seeks to represent are all people who are currently, or who will be, in the custody of the City of Clanton, *see* Doc. 4 at p. 2, only those who cannot obtain immediate release pursuant to the bond schedule actually incur the injury alleged in the Complaint. *See* Doc. 1 at Par. 18 (“an arrestee too poor to buy out of jail could spend more than six days in jail prior to a first appearance). As even the Motion for Class Certification recognizes, the schedule permits the immediate release of some (resulting in no identifiable injury) and allegedly results in the further detention of others “solely because they are very poor.” Doc. 4 at p. 2. Thus, the sole injury alleged is the extended detention of some

who cannot take advantage of the immediate release provided by the bond schedule. At most, the class that could even arguably be certified would therefore be the class of those who are unable to obtain release. Ms. Varden cannot represent such a class.

**3. THE PLAINTIFF CANNOT ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE SHE HAS NOT SUED THE PROPER PARTY.**

In addition to the other grounds for denying the preliminary injunction set out herein, Plaintiff is not likely to prevail on the merits of the claims pled because she has filed this lawsuit against the wrong entity. The policy she seeks to attack is not one over which the City of Clanton has control. The Clanton Municipal Court judge is the person charged by law with setting bail and pretrial terms, not the City, and the Court created the bond schedule at issue here. *See* Ala. Code Sec. 12-14-5. The City has no control over the bond schedule or its application to pretrial detainees.

The municipal courts of the State of Alabama are courts of the unified judicial system of Alabama. While municipalities can choose to fund a municipal court (as opposed to sending their cases to the local district court judges) and can appoint judges, once that choice is made and those judges are appointed, the municipality and its officials have no control, nor should they have, over the actions of those judges. Municipal judges must be independent. They must follow state law and comply with state procedural and court administrative rules. They fall under the auspices of State Administrative Office of Courts and are subject to the requirements set out in the Alabama Canons of Judicial Ethics. These principles of law are set out further detail in the margin.<sup>4</sup> In fact, it would be patently inappropriate for a city mayor or prosecutor,

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<sup>4</sup> The municipal courts of Alabama operate as an independent judicial branch of government governed by state law. The Alabama Code establishes that “the judicial power of the *state* is vested exclusively in a unified judicial system” and that the municipal courts of Alabama are part of that “unified judicial system” which also includes the Supreme Court, both of the

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state's appellate courts, the state circuit courts, and the state district courts. Ala. Code Sec. 12-1-2 (emphasis added).

The operations of the municipal courts are governed entirely by state law Under Title 12 of the Alabama Code, the Title governing all state courts. The municipal courts were created by State Law, not by the individual municipalities. *See* Ala. Code Sec. 12-14-1.

The Alabama Constitution, Art. VI, Sec. 145 prescribes the jurisdiction of the municipal courts and the minimum qualifications of its judges. The Alabama Constitution only gives the municipalities the responsibility of paying for the Courts and the power to appoint the judges thereto. The Alabama Code further defines judicial qualifications, terms and appointment procedures, including providing for the appointment of a presiding judge. *See* Ala. Code Sec. 12-14-30.

The municipal courts report to state authorities. State law requires the clerks of the circuit, district and municipal courts to prepare a monthly report to be approved by the Chief Examiner of Public Accounts of the State of Alabama and the State Comptroller showing all fines, costs, and the like collected. *See* Ala. Code Sec. 12-1-19.

State law provides that “[t]he sheriffs of the counties and law enforcement officers of the municipalities of the State of Alabama shall obey the municipal judge having legal authority in faithfully executing the warrants and processes committed to them for service according to their mandates.” Ala. Code Sec. 12-14-4.

The State Code further provides for how bail, trials, and traffic infractions are to be handled. Ala. Code Sec. 12-14-5 through 12-14-8. The State Code governs the authority the Municipal Court to continue cases, remit fines, establish work release programs and the like. Ala. Code Sec. 12-14-10. A mayor's sole power relative to a municipal court's judicial functions are akin to those of a governor relative to Alabama's circuit and district courts, *i.e.*, that of clemency. *See* Ala. Code 12-14-15.

In essence, the municipal courts relieve the district court's workload by taking cases that would, in the absence of the municipal court be handled by the county district court. *See* Ala. Code 12-14-17(b) (explaining that cases are transferred to district court where a city chooses to abolish its municipal court).

Municipal court judges, as do other judges, have the inherent authority to conduct their judicial functions and to amend their judicial processes, independent of the oversight and control of other branches of government, and to manage the conduct of court officials and all other persons connected with the judicial proceedings before the Court. *See* Ala. Code Sec. 12-1-7(4). That authority is very broad:

§ 12-1-7. Powers of courts.

Every court shall have power:

- (1) To preserve and enforce order in its immediate presence and as near thereto as is necessary to prevent interruption, disturbance or hindrance to its proceedings;
- (2) To enforce order before a person or body empowered to conduct a judicial investigation under its authority;
- (3) To compel obedience to its judgments, orders and process and to orders of a judge out of court, in an action or proceeding therein;

to have control of any kind over the nature of the Court's orders or the manner in which a municipal judge rules.

Alabama Code Sec. 12-14-5 explicitly charges these independent municipal judges with authority over setting bail and appearance bonds:

Municipal judges shall admit to bail any person charged with violation of any

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- (4) To control, in furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it in every matter appertaining thereto;
  - (5) To administer oaths in an action or proceeding pending therein and in all other cases where it may be necessary in the exercise of its powers and duties; and
  - (6) To amend and control its process and orders so as to make them conformable to law and justice.

Ala. Code § 12-1-7.

There are very specific provisions in the Alabama Code for how the states' municipal courts should function. For instance, the Code provides that a municipal court may supervise personnel and essentially authorize them to handle certain judicial functions, such as handling traffic tickets or issuing arrest warrants. *See* Ala. Code Sec. 12-14-50.

The Alabama Supreme Court has the authority to prescribe procedures for appointment of magistrates to serve as chief officers of municipal court administrative agencies, and the state code limits the magistrates' authority. *See* Ala. Code Sec. 12-14-51. The Alabama Supreme Court provides rules of administration for such an agency. *See* Ala. Code Sec. 12-14-52.

The Alabama Rules of Judicial Administration govern the municipal courts and their operation. *See*, for instance, Ala. R. Jud. Admin. 19 which provides very specific instructions for the handling of uniform traffic tickets, and Ala. R. Jud Admin. 43, which provides very specific rules governing municipal court procedures generally.

Municipal court judges are governed by the Canon of Judicial Ethics, as are all state court judges in Alabama which requires that judges exercise independence. This further illustrates that a municipal court personnel and judges should not be governed by the executive or legislative branches of the municipality.

Canon 1 states that "[a] judge should uphold the integrity and independence of the judiciary." And Canon 1 further provides that "[a]n independent honorable judiciary is indispensable to justice in our society." In other words, municipal court judges must exercise independent judgment on all judicial matters and must not exercise their judicial functions pursuant to the orders of the municipality. To do so would undermine the judges' independence and the integrity of the municipal court system itself.

Canon 2A states that "A judge should ... conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." If municipal court judges were to make judicial decisions pursuant to the dictates of the municipality, the integrity and impartiality of the judiciary would be compromised.

municipal ordinance by requiring an appearance bond, with good security, to be approved by the respective municipal judges or their designees, in an amount not to exceed \$1,000.00, and may, in their discretion, admit to bail such person on a personal recognizance bond, such bonds to be conditioned on the appearance of such person before the judge on a day named therein to answer the charges preferred against him. The municipal judge may waive an appearance bond upon satisfactory showing that the defendant is indigent or otherwise unable to make bond.

As established previously, the bail schedule in this case was the product of the municipal court judge's action. *See Exhibit 1.*

Neither the City nor its police officers should be liable for following an order of a judge who is an arm of the state court system. *See, e.g., Woods v. City of Michigan*, 940 F.2d 275, 285 et seq. (7th Cir. 1991). Likewise, it would be contrary to the dictates of Sec. 1983 for this Court to enter an injunction against the Clanton Municipal Court or the judge himself which would dictate how to set bail and when to waive bonds. Section 1983 precludes this Court from entering an injunction against a judicial officer acting in his judicial capacity. 42 U.S.C. Sec. 1983 ("in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."). It would also be contrary to due process as he is not sued in this proceeding.

Because the proper party is not before the Court and because the relief sought – control over the setting of bail by the Clanton Municipal Judge is not available from the City – Ms. Varden cannot prevail on the merits in this action and her preliminary injunction motion should be denied.

**4. MS. VARDEN CANNOT ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS AS TO HER EIGHTH AMENDMENT CLAIM.**

The Eighth Amendment to the United States Constitution states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” As a preliminary matter, the U.S. Supreme Court has held that there is no absolute right to bail. *U.S. v. Salerno*, 481 U.S. 739, 753 (1987). The Eighth Amendment only imposes a limitation on bail schedules where it has been determined that the amount of bail set for a particular criminal charge exceeds that “necessary to ensure the arrestee’s presence at trial.” *Id.* Furthermore, “a bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement.” *U.S. v. McConnell*, 842 F.2d 105, 107 (5<sup>th</sup> Cir. 1988); *U.S. v. Mantecon-Zayas*, 949 F.2d 548, 551 (1<sup>st</sup> Cir. 1991); *United States v. Jessup*, 757 F.2d 378, 388-89 (1st Cir.1985) (if defendant cannot afford bail, and must be detained pending trial, it is “not because he cannot raise the money, but because without the money the risk of flight is too great”); *see also U.S. v. Wong-Alvarez*, 779 F.2d 583, 584 (11<sup>th</sup> Cir. 1985)(rejecting detainee’s federal statutory argument that if his indigence prevented him from posting a bail bond, he was entitled to release on his own recognizance).

A “bond schedule represents an assessment of what bail amount would ensure the appearance of the average defendant facing such a charge. The schedules are therefore aimed at assuring the presence of a defendant.” *Fields v. Henry County, Tenn.* 701 F.3d 180, 184 (6<sup>th</sup> Cir. 2012). Bail bond schedules attempt to ensure that defendants charged with similar crimes are not given dissimilar bail amounts. *See Stack v. Boyle*, 342 U.S. 1, 5 (1951). Additionally, “[u]tilization of a master bond schedule provides speedy and convenient release for those who have no difficulty meeting its requirements.” *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5<sup>th</sup> Cir. 1978).

Having set bail for all misdemeanor charges at \$500, near the minimum established by the Alabama Supreme Court through its implementation of the Alabama Rules of Criminal Procedure, the bail amounts set by the Clanton Municipal Court were clearly not excessive in relation to the charges brought against Ms. Varden, two of which are Class A misdemeanors. Just because Ms. Varden claims she could not pay 10% of her bail (\$200) in order to hire a commercial bonding company does not mean that her bail was excessive. *Salerno*, 481 U.S. at 753; *McConnell*, 842 F.2d at 107. Therefore, the City of Clanton's use of a bail bond schedule in and of itself does not violate the Eighth Amendment, and any claims that it does cannot serve as a basis for entry of a preliminary injunction to the Clanton Municipal Court. (Moreover, as noted above, she could have chosen the property bond option at no cost to herself or others.)

Neither does it violate the law of the State of Alabama. Both Art. I., § 16, of the Alabama Constitution and Ala. Code § 15-13-2 provide that defendants are entitled to bail, by sufficient sureties, as a matter of right. The Plaintiff was indisputably given that right.

As noted above, the former Fifth Circuit has ruled in *Pugh v. Rainwater*, *supra*, (a case binding on the Eleventh Circuit) that the utilization of a bond schedule does not violate the Eighth Amendment. After setting forth the various requirements of the Eighth Amendment, the Court wrote the language quoted above, "Utilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting its requirements." *Id.* at 1057. The Court did immediately thereafter write – albeit in the context of due process or equal protection requirements and not the Eighth Amendment – "The incarceration of those who cannot [afford bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." *Id.* Later in the opinion, the *en banc* Court wrote: "We have no doubt that in the case of an indigent, whose appearance at trial could

reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint.” *Id.* at 1058. But the Court was unwilling to take that position further and to declare, as the initial panel had, that procedures for setting conditions of release that did not contain a presumption against money bail were unconstitutional. *Id.*

In short, under the law in this circuit, the Eighth Amendment at most requires “meaningful consideration of other possible alternatives” where defendants are not able to post money bail. *Id.* at 1057 & *see id.* at 1058. By necessary extension, the *Pugh* decision does not require absolute equal treatment of all pre-trial detainees. At most, it requires a court to undertake a “meaningful consideration of other possible alternatives.” *Id.* In *Clanton*, pretrial detainees were, and are, afforded this opportunity. The Court does permit defendants who cannot make bail to be released on personal recognizance, for example. At present, they are afforded consideration of that option at least every forty-eight hours. *See Exhibit 1.* While previously the opportunity was provided once a week, such is no longer the case. Even if Plaintiff’s claim had been based on the frequency of individualized determinations of alternatives to bail (it was not), her claim would now be moot.

Ms. Varden does not seek an injunction relative to the timing of proceedings to consider alternatives to bail. However, even if Ms. Varden had objected under the Eighth Amendment to that timing, she would not have established a substantial likelihood of success on the merits. The excessive bail clause does not address the timing of the provision of bail. “The Eighth Amendment’s protections address the amount of bail, not the timing. There is no constitutional right to speedy bail. *Cf. Collins v. Ainsworth*, 382 F.3d 529, 545 (5th Cir. 2004) (‘There is no right to post bail within 24 hours of arrest.’); *Woods v. City of Michigan City*, 940 F.2d 275, 283

(7th Cir. 1991) (Will, D.J., concurring) (“Nothing in the eighth amendment, however, guarantees instant release for misdemeanors or any other offense.”) *Fields v. Henry County*, 701 F.3d 180, 185 (6th Cir. Tenn. 2012).

*State of Alabama v. Blake*, 642 So.2d 959 (Ala. 1994), which involved a challenge to the 1993 Alabama Bail Reform Act does, unlike *Pugh*, address the timing of bail determinations, but it does not do so in the context of the Eighth Amendment. In fact, the case does not appear to mention the Amendment itself. Thus, the concerns of the Court in *Blake* are addressed below.

**5. MS. VARDEN CANNOT ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS ON HER PROCEDURAL DUE PROCESS CLAIM.**

As noted above, the former Fifth Circuit in *Pugh* held that bond schedules were not unconstitutional, and that what due process requires is, at most, consideration of alternate means for those who cannot afford money bail. Clanton Municipal Court, at the time of Ms. Varden’s arrest and after, did consider such alternate means for those who were not released on bail. The only potential due process question (but one she did not plead) is when such proceedings should be held. The Alabama Supreme Court has spoken to that. Basing its ruling on U.S. Supreme Court precedent, the Alabama Supreme Court in *Blake v. Alabama* indicated that three days is the presumptively reasonable period in which to hold such hearings. *See Blake* at 967 (“three days, the period set by the federal Act and acknowledged by the Supreme Court” is the constitutional requirement for the timing of bail hearings).<sup>5</sup>

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<sup>5</sup> No case holds that immediate detention hearings are required by due process. *See Woods v. City of Michigan*, 940 F.2d 275, 285 (7th Cir. 1991) (concurring opinion of Judge Will) (concluding that the defendant “was not entitled to an immediate bail hearing simply as a matter of constitutional principle”); *see also Tate v. Hartselle/Trousdale Co.*, 2010 U.S. Dist. LEXIS 109714 \*22-23 (M.D. Tenn. Oct. 14, 2010). In fact, to require an immediate bail hearing on arrest would make little sense given the federal case law establishing that a defendant may be detained for up to forty-eight hours on an arrest before he must be afforded a probable cause hearing. In *County of Riverside v. McLaughlin*, 500 U.S. 44, 114 L. Ed. 2d 49, 111 S. Ct. 1661

While Clanton, in the past, may not have considered alternatives to bail for all defendants within three days, it is now doing so, and is in the process of formalizing more frequent consideration of alternatives for those who do not make bail. Moreover, Ms. Varden herself was not subjected to detention of more than three days because she obtained counsel who arranged for her release within that three day period. As noted elsewhere, Ms. Varden's potential (unpled) claim (and the class's) are moot to the extent that her claim involved the length of time between pretrial detention hearings because the Court's practices have now changed. *See Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1184 (11th Cir. 2007) (recognizing that in the Eleventh Circuit, government actors are entitled to "the benefit of a rebuttable presumption that the offending behavior will not recur"); *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1283 (11th Cir. Fla. 2004).

**6. MS. VARDEN CANNOT ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON HER EQUAL PROTECTION CLAIM.**

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(1991), the Supreme Court held that a judicial probable cause determination must generally be made within forty-eight hours of a warrantless arrest. While that case is based on Fourth Amendment requirements, the rule surely complies with the requirements of procedural due process. To hold that a detention/bail hearing must be held immediately upon arrest would be the equivalent of holding that the Supreme Court precedent on probable cause determinations itself was unconstitutional. Surely it is more grievous to be held without probable cause than to be held pending a decision about bail.

*County of Riverside* is also instructive in its discussion of probable cause determinations. It points out that one reason that probable cause determinations need not be immediate is that the Court in *Gerstein v. Pugh* intended that states be able to consolidate pretrial hearings such that arraignments and *bail* hearings could be held at the same time. In fact, the complaint in that case alleged that the plaintiffs were arrested without prompt probable cause *or* bail hearings. And the Court explained that one reason that immediate probable cause hearings are not required is that *Gerstein* provided that states be able to consolidate probable cause hearings into arraignments and bail hearings, which the court concluded would be "impossible" if immediate hearings were the constitutional requirement. *See County of Riverside* at 1669. In other words, the Supreme Court itself has recognized that pretrial detention hearings cannot be, and need not under the Constitution be, immediate.

The former Fifth Circuit in *Pugh v. Rainwater*, *supra*, while concluding that bail schedules themselves are permissible further opined, as noted above, that “[t]he incarceration of those who cannot, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements.” Clanton Municipal Court has and does consider alternatives to bail and does release defendants pursuant to alternatives if they do not make bail.

Ms. Varden cites several equal protection cases in her brief that relate to imprisonment of indigents for failure to pay fines as the basis for having the bond schedule declared unconstitutional. Presumably, her argument is that these cases must be read to hold that bond schedules are *per se* unconstitutional for the mere fact that they might permit release of people who can afford bonds before those who cannot, thus resulting in some difference in time spent in pretrial detention.

The first such case on which she relies is *Williams v. Illinois*, 399 U.S. 235 (1970), in which the defendant received the maximum sentence provided for petty theft in Illinois – one year imprisonment and a \$500 fine. The defendant was also taxed \$5.00 in court costs. As permitted by statute, the judgment directed that if the fine was not satisfied at the end of the one year sentence, the defendant would remain in jail to “work off” the fine and costs at the rate of five dollars each day. *Williams*, 399 U.S. at 236. In *Williams*, the effect of the Illinois “work off” statute required the defendant to be confined for 101 days beyond the maximum period of confinement fixed by statute solely because he could not pay the fine and costs. *Id.* at 236-237. The court reasoned that “once the State has defined the outer limits of incarceration [necessary] to satisfy its penological interest and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their

indigency." *Id.* at 241-242. Thus, the judgment was vacated because the "work off" statute created an impermissible discrimination founded solely on the ability to pay. *Id.* at 241.

The *Williams* doctrine was fleshed out in the companion case of *Morris v. Schoonfield*, 399 U.S. 508 (1969). There the Court vacated and remanded a Maryland judgment for reconsideration in light of intervening state legislation and its decision in *Williams*. *Id.* Nevertheless, a four justice concurrence, penned by Justice White, shed some light on *Williams* by stating that:

[T]he same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, *whether or not the fine is accompanied by a jail term and whether or not the maximum term that may be imposed on a person willing and able to pay a fine*. In each case, the Constitution prohibits the State from imposing a fine as sentence and then *automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full*.

*Id.* at 509 (emphasis added).

Justice White's concurrence was adopted by a majority of the court in *Tate v. Short*, 401 U.S. 395, 398 (1971). There, the defendant was fined a total of \$425 for offenses which were punishable by fines only. *Id.* at 396-397. The defendant was unable to pay the fines because of his indigence and was committed to a municipal prison farm pursuant to a state statute and municipal ordinance which required him to "work off" the fines at the rate of \$4 per day. *Id.* After adopting the White concurrence, the *Tate* court stated that because the State had legislated a "fines only" policy for traffic offenses, imprisonment of an indigent defendant without the means to pay his fine did not further any penal objective of the State. *Id.* at 399.

The *Williams-Morris-Tate* authority was most recently applied by the U.S. Supreme Court in a review of an order revoking an indigent's probation for failure to pay a fine imposed as a condition of that probation. *Bearden v. Georgia*, 103 S.Ct. 2064 (1983). In reversing the

judgment of the Georgia Court of Appeals, which upheld the revocation, the Supreme Court concluded that the petitioner's probation could not be automatically revoked without a determination by the trial court that petitioner "had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist." *Id.* at 2067.

In other words, the Supreme Court cases dealing with indigence and prison terms all relate specifically to an indigent's ability to pay fines and a state court's conversion of fines into prison sentences. Obviously, that is not the situation before the Court here. Ms. Varden would have the Court conclude that this line of cases necessarily establishes that any period of *pretrial* detention which occurs while a defendant is waiting on a bond/detention hearing is unconstitutional if non-indigents are permitted earlier release pursuant to a bond schedule. As noted earlier, there may be a due process issue or equal protection issue relative to how quickly a person obtains a hearing, but the *Williams-Tate-Bearden* case law does not stand for the principle that every extra minute an indigent person is in jail constitutes an equal protection violation merely because there is a streamlined process for non-indigents to pay their bail. No court appears to have applied the *William-Tate-Bearden* holdings to the concept of pretrial detention, and certainly not in the way that Ms. Varden would have the Court do here, *i.e.*, to justify the abolition of a bond schedule as unconstitutional.

Because the *Williams-Tate-Bearden* precedent cannot be read to require that all pretrial detainees be released at the same moment, at best Ms. Varden might argue that these cases somehow created a new and separate equal protection analysis (apart from rational relation, strict scrutiny etc.) for cases touching on the incarceration of indigents. The most recent of the cases, *Bearden*, states the following, at least in connection with conversion of fines into periods of incarceration:

To determine whether this differential treatment violates the Equal Protection Clause, one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine. Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as 'the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose . . . .' *Williams v. Illinois, supra*, at 260 (Harlan, J., concurring).

*Bearden* at 2069. Assuming that the above test would apply even where fines are not being converted into jail sentences and even in connection with pretrial detention pending a bond hearing (we contend it would not), Clanton Municipal Court's use of a bond schedule would pass muster. The individual interest at issue here is the indigent's interest in being released pending trial. Where the interest is only affected because it takes some time to hold an individualized bail proceeding, particularly where that can be afforded promptly, there is a rational connection between the legislative means and the purpose. Clearly Clanton has an interest in there being an efficient means of releasing defendants whose appearance at court can be assured by posting bond, and it also has an interest in maintaining the authority and flexibility to make some determination regarding alternate means to ensure the defendant's appearance for those who cannot.

Ms. Varden, however, wishes to dictate, or have this Court dictate, to the Clanton Municipal Court an inflexible and single method for ensuring appearance at trial. The only "alternate means" that Ms. Varden would accept by way of injunctive relief is to do away with the bond schedule and any individualized determination altogether and require that all defendants be released on unsecured bonds or personal recognizance. This alternate means prevents Clanton from imposing bail even on those who can afford it, which are the majority of persons who

appear before the court. This is because law enforcement personnel who administer the bond schedule are not in a position, nor should they be, to determine who can and cannot afford bail. Ms. Varden's proposed inflexible form of relief would impose on the Municipal Court the acceptance of a potentially endless cycle of arrests for failures to appear only to be followed by immediate release on unsecured bond or personal recognizance only to be followed by more arrests and immediate release. This cycle could occur, without any repercussions, even to those who could have afforded to make bail in the first instance.

Furthermore, if, as *Bearden* suggests, the test here is really one of due process, Blake holds that a hearing within three days is constitutional based on Supreme Court precedent construing the federal bail act requirements. *Blake* at 967.

In this case, however, it actually makes more sense to apply traditional equal protection analysis because the circumstances here are so far removed from those in *Williams*, *Tate* and *Bearden*. Under that traditional analysis, one looks to whether holding an indigent longer than a non-indigent in connection with determination of bail triggers heightened scrutiny. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1975) ("equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class"). The existence of a suspect class or an infringement of a fundamental right would require strict scrutiny. *Id.* Indigence has never been held to require strict scrutiny as it is not a suspect class,<sup>6</sup>

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<sup>6</sup> *Harris v. McRae*, 448 U.S. 297, 323 (1980) (noting that poverty is not a suspect classification); *Driggers v. Cruz*, 740 F.3d 333, 337 (5<sup>th</sup> Cir. 2014) (holding that "an individual's indigence does not make that individual a member of a suspect class for equal protection purposes"); *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 317 (3<sup>rd</sup> Cir. 2001) ("Neither prisoners nor indigents are suspect classes"); *Murray v. Dosal*, 150 F.3d 814, 818 (8<sup>th</sup> Cir. 1998) (stating that "[n]either prisoners nor indigents constitute a suspect class"); *Riviera v. Allen*, 144 F.3d 719, 727 (11<sup>th</sup> Cir. 1998) ("indigents [not] suspect class"); *Chestnut v. Magnusson*, 942 F.2d 820, 824 (1<sup>st</sup> Cir. 1991) (holding that "[t]he indigence that may lead to an inability to post bail does not suffice to create a class calling for strict scrutiny"); *Tucker v. Branker*, 142 F.3d

Moreover, pretrial release on bond has not been declared a “fundamental right” and so does not trigger strict scrutiny.<sup>7</sup>

Thus, the rational basis test applies. A policy passes the rational basis test unless it is “so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [policy-maker’s] actions were irrational.” *Pennell v. City of San Jose*, 485 U.S. 1, 14, 99 L. Ed. 2d 1, 108 S. Ct. 849 (1988) (quoting *Vance v. Bradley*, 440 U.S. 93, 97, 59 L. Ed. 2d 171, 99 S. Ct. 939 (1979)). Clearly, providing indigent defendants individualized judicial determinations of alternatives to bail if they are not able to take advantage of the streamlined bond schedule process passes this test, even if doing so may mean they are released later than those who can afford to post bond pursuant to the bond schedule. Stated another way, it is certainly rational to provide: (a) a streamlined process for release where a court is reasonably satisfied that the bond schedule amounts will ensure appearance at trial; and (b) then to consider alternatives for those who cannot afford bail.<sup>8</sup>

**7. PLAINTIFF CANNOT ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE THE**

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1294, 1299 (D.C. Cir. 1998); *Roller v. Gunn*, 107 F.3d 227, 233 (4<sup>th</sup> Cir. 1997) (“Nor is indigency a suspect classification”); *Rodriguez v. Cook*, 169 F.3d 1176, 1179 (9<sup>th</sup> Cir. 1999).

<sup>7</sup> “Fundamental rights” include the right to vote, *e. g.*, *Harper v. Virginia State Board*, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966); the right of association, *e. g.*, *NAACP v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958); the right of access to the courts, *e. g.*, *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963), and assorted freedoms against state intrusion into family life and intimate personal decisions, *e. g.*, *Moore v. City of East Cleveland, supra* (right of extended family to share household); *Roe v. Wade, supra* (woman’s right to decide whether to have abortion); *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (freedom to marry person of another race); *Griswold v. Connecticut, supra* (right to use contraceptives); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (parents’ right to send children to private schools); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (parents’ right to have children instructed in foreign language). *See Sotto v. Wainwright*, 601 F.2d 184, 191 (5<sup>th</sup> Cir. Fla. 1979).

<sup>8</sup>The City of Clanton has a “compelling interest in assuring the presence at trial of persons charged with a crime.” *Pugh*, 572 F.2d at 1056. Thus, even if the use of the bond schedule were subjected to strict scrutiny, it could pass muster as it involves a compelling government interest (ensuring appearance at trial) and is narrowly tailored in that those who cannot afford the amounts set out therein are provided alternatives. *See Reno v. Flores*, 507 U.S. 292, 302 (1993) (setting out the strict scrutiny analysis).

**FEDERAL COURT SHOULD ABSTAIN FROM ISSUING AN INJUNCTION IN THIS MATTER.**

Pursuant to the reasoning of the Eleventh Circuit in *Pompey v. Broward County*, 95 F.3d 1543, 1549 (11th Cir. 1996), this Court should abstain from exercising jurisdiction in this case. While in that case the issues were different – that court’s alleged failure to appoint counsel and to inquire into defendant’s ability to pay child support– the Court’s reasoning is applicable here:

[I]t appears that what the plaintiffs really want in this regard is for the district court somehow to force the state judges to conduct a more "thorough inquiry" into each parent's ability to pay, and somehow to force the state judges to follow what plaintiffs perceive to be the state's own laws and procedures.

*Pompey v. Broward County*, 95 F.3d 1543, 1549 (11th Cir. 1996). Based on the remedy sought, the Eleventh Circuit dismissed the case on abstention grounds. *Id.* at 1555 (dismissal of equitable claims against judges, mirroring dismissal against other defendants).

In this case, while the Plaintiff might argue that all that she is seeking is an order enjoining Clanton from using the Municipal Court’s bond schedule, the injunction she seeks is actually far more intrusive than that. She seeks to prevent Clanton’s municipal court judge from requiring any sort of bail, from making any independent determinations relative to alternative measures that might ensure a defendant’s appearance at court, and from otherwise exercising his proper judicial function. The City of Clanton may be the Defendant here, but the Plaintiff seeks to have this Court usurp the authority of a judge of the Unified Judicial System of Alabama.

**CONCLUSION**

Based on the foregoing, the Plaintiff’s motion for preliminary injunction is due to be denied.

Respectfully submitted, this the 6<sup>th</sup> day of February, 2015,

s/ James W. Porter, II  
James W. Porter, II  
*Attorney for City of Clanton*

s/ R. Warren Kinney  
Richard Warren Kinney  
*Attorney for City of Clanton*  
State Bar ID: ASB5682D57K

OF COUNSEL:

**Porter, Porter & Hassinger, P.C.**  
P.O. Box 128  
Birmingham, Alabama 35201-0128  
(205) 322-1744  
jwporterii@pphlaw.net, wkinney@pphlaw.net

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing has been *electronically filed* with the Clerk of the Court using the CM/ECF system which will send notification of such filing upon the following, this the 6<sup>th</sup> day of February, 2015. If Notice of Electronic Filing indicates that Notice should be delivered by other means to any of the following, I certify that a copy will be sent via U.S. Mail, properly addressed, postage prepaid.

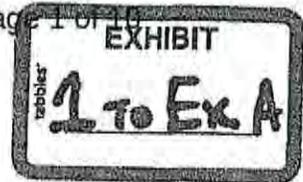
Matthew Swerdlin, Esq.  
1736 Oxmoor Road #101  
Birmingham, AL 35209

J. Mitch McGuire, Esq.  
**McGuire & Associates, LLC**  
31 Clayton Street  
Montgomery, AL 36104

William M. Dawson, Esq.  
**Dawson Law Office**  
2229 Morris Avenue  
Birmingham, AL 35203

Alec Karakatsanis, Esq.  
**Equal Justice Under Law**  
916 G Street, NW Suite 701  
Washington, DC 20001

s/ R. Warren Kinney  
OF COUNSEL



IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION

PEGGY JONES, as Administrator of the )  
Estate and Personal Representative of )  
Christy Dawn Varden, et al., )

Plaintiff, )

v. )

Case No.: 2:15-cv-34-MHT

THE CITY OF CLANTON, )

Defendant. )

SETTLEMENT AGREEMENT

Plaintiff Peggy Jones, as Administrator of the Estate and Personal Representative of Christy Dawn Varden ("Plaintiff") in the above-styled matter and the City of Clanton ("the City"), hereby enter into this Settlement Agreement ("Agreement") as a full and final settlement of all Jones' claims, with the exception of attorney's fees, and hereby agrees as follows:

1. That the City and all of its officers, employees, and agents will comply with the Order of the Municipal Court attached hereto as **Exhibit 1** for not less than three years from the effective date of this Agreement, so long as the order is in place.

2. That the City represents that it has no current expectation that said **Exhibit 1** will be altered and the Municipal Court Judge (who serves by appointment of the City for a renewable term provided by statute) has represented to the City that it is his current intention to keep **Exhibit 1** in place for the three-year period referenced in ¶1.

3. Notwithstanding the above provisions, that, to the extent that **Exhibit 1** is altered in any material respect during the three-year period referenced in ¶1, the City will, upon any agent of the City learning of said alteration, provide notice to the Plaintiff's counsel, Alec

Karakatsanis at the following telephone number and email address: (202) 681-2409, [alec@equaljusticeunderlaw.org](mailto:alec@equaljusticeunderlaw.org), within seventy-two hours of the agent learning of such event.

4. That if an event described in ¶3 above occurs, the City represents that the City will petition the Court within seven days to reinstate **Exhibit 1** or its material equivalent, or provisions otherwise agreed upon with Plaintiff's counsel.

5. That the City represents that it will ensure that the material provisions set out in **Exhibit 1** will be posted at the Chilton County Jail for the period referenced in ¶1 above such that anyone arrested by the City of Clanton Police Department and taken to jail will be able to view said posting.

6. That for the same time period referenced in ¶1 above, the City agrees to comply with the provisions set out in the Order attached hereto as **Exhibit 2** and to provide the monetary support to the Municipal Court of Clanton to ensure that the provisions set out therein are practicable.

7. That the City represents that it has no current expectation that said **Exhibit 2** will be altered, but, to the extent that it is altered in any material respect during the period referenced in ¶1 above, the City's attorney will, upon any agent of the City learning of said alteration, provide notice to Plaintiff's counsel, Alec Karakatsanis, at the following telephone number and email address: (202) 681-2409, [alec@equaljusticeunderlaw.org](mailto:alec@equaljusticeunderlaw.org), within seventy-two hours of the agent learning of such event.

8. That the City represents that should an event occur as referenced in ¶7 above, the City will petition the Court to reinstate **Exhibit 2** or its material equivalent, or provisions otherwise agreed upon with Plaintiff's counsel.

9. That Plaintiff agrees to waive, and to release the City of and from, any and all (known and unknown) complaints, and specifically that certain cause in the United States District Court for the Middle District of Alabama, Northern Division, styled as *Peggy Jones, as Administrator of the Estate and Personal Representative of Christy Dawn Varden, et al. v. The City of Clanton*; Case No.: 2:15-cv-34-MHT, and all other claims, causes of actions, actions, damages, law suits, counterclaims, dues, accounts, agents, promises, expenses, liabilities, punitive damages, compensatory damages, and any and all other claims of every kind (known and unknown) and nature specifically, but not limited to, such claims arising out of, but not limited to, the arrest and/or detention of Christy Dawn Varden, up to and including the Effective Date of this Agreement.

10. That Plaintiff agrees to the dismissal of her Motion for Class Certification and to forego her request for class certification and agrees not to file a Motion for Class Certification of any kind in the future in connection with this case or any claim that could have been brought in this case.

11. That Plaintiff and Plaintiff's counsel agree to notify counsel for the City immediately upon the discovery of any alleged material breach of the foregoing agreement. This notice shall include the specific nature of said breach and, if available, the time and date of said breach, the City, County or court personnel involved in the breach, and any other details necessary to identify the case or proceeding in which the said breach occurred to the extent the information is available. Said notice shall be conveyed both through email and telephonically to Shannon Holliday or Lee Copeland at the following telephone number and email addresses: (334) 834-1180, [holliday@copelandfranco.com](mailto:holliday@copelandfranco.com), [copeland@copelandfranco.com](mailto:copeland@copelandfranco.com) and Jim Porter at the following telephone number and email address: (205) 322-1744, [jwporterii@pphlaw.net](mailto:jwporterii@pphlaw.net)

with copies sent to the attention of the City Attorney for the City of Clanton, via the City Clerk's office, at [dorange@cityofclanton.org](mailto:dorange@cityofclanton.org). Plaintiff agrees to give the City a reasonable opportunity to remedy the alleged breach before seeking relief from the United States District Court and will only notify the United States District Court if the action constituting the alleged material breach has not been corrected within a reasonable period of time.

12. That Plaintiff agrees that her heirs, personal representatives, successors and assigns will be bound by the terms of this Agreement.

13. That the Parties agree to file a Joint Motion for Entry of Final Judgment as to all Matters Excluding Attorney's Fees within ten days of the Effective Date of this Agreement. Said Joint Motion is attached hereto as **Exhibit 3**.

14. That the Parties agree that this Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

15. That each party hereto recognizes and acknowledges that the making of payment set forth herein does not constitute any admission of liability of any sort.

16. That Plaintiff hereby recognizes that she will not be able to initiate administrative or legal proceedings against or otherwise sue those hereby released with respect to any matters herein released and that this Agreement is all compromising and is not limited by the specification of specific claims or specific injuries or damages, all of which are only partial subjects of this Agreement, which Agreement is intended to release all claims that Plaintiff has, or may have had against any of the released parties up to and including the Effective Date of this Agreement.

17. That all obligations, agreements, releases and covenants not to sue contained herein and in all documents delivered hereunder shall survive the execution of this Agreement and continue in full force and effect.

18. That this Agreement may not be amended, modified or supplemented, except in writing executed by the party or parties which is or are to be bound by such amendment, modification or supplement.

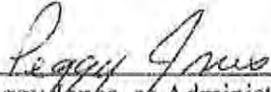
19. That each party hereto shall use its best efforts and shall take all action and do all things necessary and proper in order to consummate and make effective the transactions contemplated herein.

20. That this Agreement shall be binding upon and inure to the benefit of the parties referenced herein and their respective successors, assigns, heirs and representatives.

21. That whenever and so often as requested by a party hereto, the other parties will promptly execute and deliver, or cause to be executed and delivered, all such other and further instruments, documents or assurances, and promptly do or cause to be done all such other and further things as may be necessary and reasonably required in order to further and more fully vest in such party all rights, interest, powers, benefit, privileges and advantages conferred or intended to be conferred upon it by this Agreement.

22. That the Parties acknowledge and agree that this Agreement has been written in a manner understood by them and that they, in fact, understand this Agreement and entered into this Agreement knowingly and voluntarily.

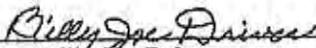
23. That the effective date of this Agreement is the date that all parties have signed this Agreement and/or a counterpart of this Agreement.

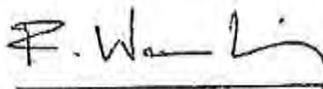
  
\_\_\_\_\_  
Peggy Jones, as Administrator of the Estate and  
Personal Representative of Christy Dawn Varden

  
\_\_\_\_\_  
J. Mitchell McGuire  
Alec Karakatsanis  
Matthew Swerdlin  
William M. Dawson

**Counsel for Plaintiff – Peggy Jones**

CITY OF CLANTON

  
By: Billy Joe Driver  
Its: Mayor

  
James W. Porter, II  
R. Warren Kinney  
Counsel for Defendant - City of Clanton

  
Lee H. Copeland  
Shannon L. Holliday  
Counsel for Defendant - City of Clanton

IN THE CITY OF CLANTON MUNICIPAL COURT

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)  
)  
)

**STANDING ORDER REGARDING BAIL AND  
INDIGENCY DETERMINATIONS**

Per the authority vested upon the Clanton Municipal Court pursuant to the Code of Alabama (1975), the Alabama Rules of Criminal Procedure, and the Alabama Rules of Judicial Administration, the Court hereby issues the following Order regarding bail for persons arrested on criminal charges to be tried within its jurisdiction:

As reflected through the previously existing schedule for setting bail for persons charged with municipal ordinance violations, all such violations, with the exception of Driving Under the Influence, shall have bail set at \$500.00. Persons charged with Driving Under the Influence shall have bail set at \$1,000.00. This dollar bail amount shall be referred to as the City of Clanton's "bail schedule." All persons charged with violations of an Ordinance of the City of Clanton, who have no outstanding warrants from the City of Clanton for failure to appear, shall be released pursuant to an unsecured appearance bond in the amount established by the bail schedule. The unsecured appearance bond form which should be used is attached hereto as Addendum A. Any individual with an outstanding failure to appear arrest warrant from the City of Clanton must post a cash bond, commercial surety bond, or the signatory bond of an owner of real property within the State of Alabama in the amount established by the bail schedule. All such bonds shall be in an amount reflecting the total bail figure for all charges pending against a particular person. It is the opinion of the Clanton Municipal Court that the bail schedule for persons charged with Ordinance violations represents the least burdensome manner in which to reasonably ensure a

criminal defendant's future appearance in court. Furthermore, utilization of such a bail schedule "provides speedy and convenient release for those who have no difficulty in meeting its requirements." *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5<sup>th</sup> Cir. 1978).

Nothing in this Order, though, shall inhibit the ability of a judicial officer to eliminate bail as an option to a person arrested for violations of Ordinances of the City of Clanton in order to obtain his or her release if that person poses a danger to himself, herself or others in the community. Furthermore, the judicial officer shall adhere to all statutory requirements governing release of persons charged with certain offenses, e.g. domestic violence or driving under the influence of alcohol, which may preclude, for instance, the arrestee's immediate release.

For those individuals who do not obtain release pursuant to the bail schedule as outlined above, the Court will, within forty-eight hours of their arrest, hold a hearing either to arraign the arrestee or otherwise hold the proceeding to which the arrestee failed to appear (unless that proceeding was a trial or other matter requiring the setting of a new court date) and to determine, if necessary, what conditions, if any, should be placed on the arrestee pending release. At this time, the arrestee will be given the opportunity to object to the bail amount set for him or her. In the unlikely event that no hearing can be held within the forty-eight hour time frame, the arrestee shall be released pursuant to an unsecured bond. The jailing authority for the City of Clanton (the Sheriff's Department of Chilton County) shall inform the Municipal Court of any such arrestees in a timely fashion and will facilitate their appearance via teleconference with the Municipal Court of the City of Clanton at the time set by the Court.

DONE, this the 15 day of May 2015.

  
MUNICIPAL COURT JUDGE  
CITY OF CLANTON

IN THE CITY OF CLANTON MUNICIPAL COURT

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)

**STANDING ORDER REGARDING ACCESS TO COURTROOM**

Per the authority vested upon the Clanton Municipal Court pursuant to the Code of Alabama (1975), the Alabama Rules of Criminal Procedure, and the Alabama Rules of Judicial Administration, the Court hereby issues the following Order regarding access to the Clanton Municipal Courtroom during court sessions:

As space is limited in the courtroom to sixty pursuant to the authority of the fire marshal, defendants whose cases are on the docket, their representatives and witnesses as well as prosecutors and their witnesses will be permitted entry into the courtroom first. To the extent that, after all such persons have taken their seats in the courtroom, there is any remaining seating available, it will made available to others. The proceedings, however, will be accessible to all others in the lobby of the courtroom by live video and audio feed.

DONE, this the 9 day of March 2015.

  
MUNICIPAL COURT JUDGE  
CITY OF CLANTON

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION

PEGGY JONES, as Administrator of the )  
Estate and Personal Representative of )  
Christy Dawn Varden, et al., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
THE CITY OF CLANTON, )  
 )  
Defendant. )

Case No.: 2:15-cv-34-MHT

JOINT MOTION FOR ENTRY OF FINAL JUDGMENT AS TO ALL MATTERS  
EXCLUDING ATTORNEY'S FEES

COME NOW the Parties and move this Court for entry of the Order attached hereto as  
**Exhibit A.** As grounds therefor, the Parties show the following:

1. The Parties have resolved all disputes in this matter, with the exception of attorney's fees, through settlement and pursuant to said settlement seek entry of the Order attached hereto as **Exhibit A.**
2. The Parties agree that the current practices of the Municipal Court of Clanton as it relates to bail and as reflected in the Settlement Agreement are constitutional.
3. The Parties have discussed the claims and relevant case law in this matter and have agreed to the entry of the following declaratory judgment, which is consistent with the current practices in the Clanton Municipal Court, and which the parties jointly request this Court to adopt:

The use of a secured bail schedule to detain a person after arrest, without a hearing that meets the requirements of the Fourteenth Amendment regarding the person's indigence and the sufficiency of the bail setting, is unconstitutional as

applied to the indigent. Without such a hearing, no person may, consistent with the Fourteenth Amendment, continue to be held in custody after an arrest because the person is too poor to deposit a monetary sum set by a bail schedule. If the government offers release from custody after an arrest upon the deposit of money pursuant to a bail schedule, it cannot deny release from custody to a person, without a hearing regarding the person's indigence and the sufficiency of the bail setting, because the person is unable to deposit the amount specified by the schedule. See *Pugh v. Rainwater*, 572 F.2d 1053 (5<sup>th</sup> Cir. 1978); *Bearden v. Georgia*, 461 U.S. 660 (1983); and *Blake v. State*, 642 So. 2d 959 (Ala. 1994).

4. The Parties have agreed to the continued jurisdiction of this Court for enforcement of the Settlement Agreement ("Agreement") for the periods set out in said Agreement attached hereto as Exhibit 1 to Exhibit A.

WHEREFORE, the Parties hereto request entry of the Order attached hereto as Exhibit A.

/s/ Alec Karakatsanis

Alec Karakatsanis (DC Bar 999294) (*pro hac vice*)  
Equal Justice Under Law  
916 G Street, NW Suite 701  
Washington, D.C. 20001  
Email: [alec@equaljusticeunderlaw.org](mailto:alec@equaljusticeunderlaw.org)

/s/Matthew Swerdlin

Matthew Swerdlin (ASB-9090-M74S)  
1736 Oxmoor Road #101  
Birmingham, AL 35209  
(205)-793-3517  
[matt@attorneyswerdlin.com](mailto:matt@attorneyswerdlin.com)

/s/ J. Mitch McGuire

J. Mitch McGuire (ASB-8317-S69M)  
McGuire & Associates, LLC  
31 Clayton Street  
Montgomery, AL 36104  
(334)-517-1000  
[jmcguire@mandabusinesslaw.com](mailto:jmcguire@mandabusinesslaw.com)

/s/ William M. Dawson

William M. Dawson (ASB-DAW002)  
2229 Morris Avenue  
Birmingham, Alabama 35203

205-307-7021

**Counsel for Plaintiff**

s/ R. Warren Kinney

James W. Porter, II

R. Warren Kinney

Porter, Porter & Hassinger, P.C.

Post Office Box 128

Birmingham, AL 35201-0128

**Counsel for Defendant - City of Clanton**

s/ Shannon L. Holliday

Lee H. Copeland

Shannon L. Holliday

Copeland, Franco, Screws & Gill, P.A.

444 S. Perry Street (36104)

Post Office Box 347

Montgomery, AL 36101-0347

**Counsel for Defendant – City of Clanton**

**CERTIFICATE OF SERVICE**

I hereby certify that I filed the foregoing document on this the 1st day of July, 2015, via the CM/ECF system which will send electronic notice of such filing to the following counsel of record:

Alec Karakatsanis  
William Dawson  
Matthew Swerdlin

*Attorneys for Plaintiff*

James W. Porter, II  
R. Warren Kinney  
Porter, Porter & Hassinger, P.C.  
Counsel for Defendant – City of Clanton

Shannon L. Holliday  
Lee H. Copeland  
Copeland, Franco, Screws & Gill, P.A.  
Counsel for Defendant – City of Clanton

/s/ J Mitch McGuire  
*Attorney for Plaintiff*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA**

CHRISTY DAWN VARDEN, et al.

Plaintiffs,

v.

THE CITY OF CLANTON,

Defendant.

Case No. 2:15-cv-34-MHT  
(Class Action)

**CLASS ACTION COMPLAINT**

**Introduction**

This case is about the City of Clanton jailing some of its poorest people because they cannot pay a small amount of money. Christy Dawn Varden is a recent arrestee who is currently imprisoned by the City because she cannot afford to pay the amount of money generically set by the "bail schedule" used by the City of Clanton and its police department. In the City of Clanton, most people arrested for minor misdemeanor offenses are released almost immediately upon payment of \$500 cash. Those arrestees who are too poor to afford \$500 remain in jail because of their poverty until at least the following Tuesday at 3:00 p.m., when they first appear via video conference from the jail at the City's only weekly court session.

On behalf of the many other arrestees subjected to the City's unlawful and ongoing post-arrest money-based detention scheme, the Plaintiff challenges in this action the use of an unlawful generic offense-based "bail schedule" that operates to detain only the most impoverished of minor misdemeanor arrestees. The City's policy has no place in modern American law.

By and through her attorneys and on behalf of herself and all others similarly situated, the Plaintiff seeks in this civil action the vindication of her fundamental rights, injunctive relief

assuring that her rights and the rights of the other Class members will not continue to be violated, and a declaration that the City's conduct is unlawful.

**Nature of the Action<sup>1</sup>**

1. It is the policy and practice of the City of Clanton to refuse to release misdemeanor arrestees from jail unless they pay a generically set "bond" amount. That amount is \$500 for every misdemeanor offense except DUI offenses, for which an arrestee is kept in jail unless she can pay \$1,000.<sup>2</sup> Because this sum is set generically by reference to the alleged offense of arrest, no individualized factors are considered, and anyone who cannot afford to pay is held in jail at least until the following Tuesday at 3:00 p.m., when the City holds its only weekly court session. Members of the public are barred from attending that court session.

2. Plaintiff seeks declaratory, injunctive, and compensatory relief.

**Jurisdiction and Venue**

3. This is a civil rights action arising under 42 U.S.C. § 1983 and 28 U.S.C. § 2201, *et seq.*, and the Fourteenth Amendment to the United States Constitution. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

4. Venue in this Court is proper pursuant to 28 U.S.C. § 1391.

**Parties**

5. Plaintiff Christy Dawn Varden is a 41-year-old resident of Clanton, Alabama. She represents herself as an individual and a Class of similarly situated people all subject to the City's post-arrest detention scheme.

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<sup>1</sup> Plaintiff makes the allegations in this Complaint based on personal knowledge as to matters in which she has had personal involvement and on information and belief as to all other matters.

<sup>2</sup> Felony arrestees are not subject to the jurisdiction of the City of Clanton and are instead processed according to policies adopted by Chilton County.

6. Defendant City of Clanton is a municipal corporation organized under the laws of the State of Alabama. The City operates the Clanton Police Department and the Clanton Municipal Court. The City also contracts with the Chilton County Jail to confine arrestees of the Clanton Police Department who cannot afford to pay the generically scheduled cash bond. The City notifies the Chilton County Jail to release arrestees as soon as the cash bond is paid to the City.

**Factual Background**

**A. The Plaintiff's Arrest**

7. Christy Dawn Varden is a 41-year-old mother of two children.

8. Ms. Varden was arrested by Clanton police on January 13, 2015, outside of a Walmart store in Clanton, Alabama. She was charged with four misdemeanor offenses, including shoplifting, resisting arrest, failure to obey a police officer, and possession of drug paraphernalia.

9. Ms. Varden was taken to jail and told that she would be released if she paid a "bond" to the City of Clanton of \$500 for *each* of her charges. She was told that she would be kept in jail unless she paid \$2,000. *See* Exhibit 1, Declaration of Christy Dawn Varden.<sup>3</sup>

10. Ms. Varden is indigent. She has no assets and is not employed. She suffers from several severe physical and mental illnesses that prevent her from working. She is prescribed several medications to deal with her physical and mental illnesses. She was most recently employed approximately two years ago, but she had to quit her job due to an extended hospital stay in the intensive care unit.

11. Ms. Varden depends on food stamps to survive. She receives less than \$200 per month in food stamps, which is her only income. She does not own any real property or a car.

12. Ms. Varden resides with her 66-year-old mother and children in Clanton.

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<sup>3</sup> Another person arrested by the City of Clanton within eight minutes of Ms. Varden and charged with multiple minor drug offenses was released from jail immediately after paying the City of Clanton the required cash payment.

13. Ms. Varden was not told when she would be brought to court and has not been brought to court for an initial appearance. Pursuant to City policy, the earliest that Ms. Varden would be brought to court for a first appearance is Tuesday, January 20, 2015, nearly a week after her arrest.

**B. The City's Policies and Practices**

14. The named Plaintiff would be released immediately by the City of Clanton if she or a family member paid the amount set by the City of Clanton.

15. The treatment of the named Plaintiff and other Class members is caused by and is representative of the City's post-arrest detention policies and practices.

16. As a matter of policy and practice, when the City of Clanton Police Department makes an arrest for a minor misdemeanor offense, officers inform the arrestee at booking that the person will be released immediately if the person pays \$500 cash.<sup>4</sup> In the case of misdemeanor DUI offenses, the person is told that the amount necessary to secure release is \$1,000. The arrestee is told that the arrestee will remain in jail if the arrestee is not able to make that payment.

17. Those arrestees unable to pay for release are eventually told that their first court appearance will be the following Tuesday at 3:00 p.m. The City of Clanton holds court only one time per week: each Tuesday at 3:00 p.m.

18. Because court is held only once per week, an arrestee too poor to buy out of jail could spend more than six days in jail prior to a first court appearance.

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<sup>4</sup> Because of the common availability of commercial bail bonds, those that remain in the custody of the City of Clanton are typically those that cannot even afford to pay a third-party bonding agent. The amount charged by a bonding agent to pay a \$500 cash bond is typically \$50, although such agents are free to refuse to pay for the release of an arrestee for any reason or for no reason. Thus, the availability of third-party agents, at least for those arrestees who can afford \$50 but not \$500, is no guarantee.

19. After an arrest, City of Clanton officials do not deviate from this "bail schedule" of \$1,000 per DUI offense and \$500 per other misdemeanor offense.<sup>5</sup>

20. Unlike many other cities, the City of Clanton does not allow post-arrest release on recognizance or with an unsecured bond (in which a person would be released by promising to pay the scheduled amount if the person later does not appear). Instead, City officials require that the payment amount be made up front.

21. The City of Clanton Police Department made 1,079 arrests for misdemeanor offenses in 2013. The Clanton police made 931 misdemeanor arrests in 2012 and 822 in 2011.

22. Many of Clanton's minor misdemeanor arrestees are released soon after arrest upon payment of the scheduled amount of cash. Some remain detained for varying lengths of time until they or their families are able to borrow sufficient amounts of money or arrange for third-party payment. Others, like the named Plaintiff, who are too poor even to find anyone to pay the cash bond for them, are kept in jail for up to six days before their first court appearance.

23. Each Tuesday afternoon, there are commonly between three and ten destitute defendants who were not able to pay enough money to secure their release. The City of Clanton forces these inmates to appear by video screen in the courtroom from the jail.

24. The City of Clanton requires that the courtroom be empty and closed to the public for all such video proceedings. No person is allowed to enter the proceedings, which often include only the City prosecutor, City judge, and the defendant on video. On occasion, an arrestee is represented by an attorney, who is allowed to be present. All other members of the public are

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<sup>5</sup> In the case of arrests on warrants for the alleged violation of probation rather than on a new arrest, the City's policy and practice is to base the amount of money necessary to secure release on the amount of debts owed by the person on their court costs and privatized probation fees. Thus, if an arrestee is unable to afford the balance of her court costs and fees, the person will be held at least until the following Tuesday by the City of Clanton. If the probationer is able to afford the balance of the fees, the arrestee is allowed to pay immediately and the person is released.

informed by uniformed City of Clanton Police Officers that they are not allowed to observe the City's judicial proceedings, which include arraignments, pleas, trials, revocation hearings, and other proceedings.

25. The video feed from the jail is broadcast in the building's waiting room, although the screen is muted so that no sound from the proceedings is audible. City officials refuse, as a matter of City policy, to allow the sound to be broadcast. According to City officials, no audio recordings or transcripts of the proceedings are available.

26. Despite the First Amendment's guarantee of open public court proceedings and binding precedent from the Supreme Court of the United States and the Eleventh Circuit requiring all such proceedings to be open to the public, it is not possible for a member of the public to observe court proceedings involving inmates in the City of Clanton.

27. Because of Clanton's unprecedented and illegal courtroom closure policies, it is difficult for the public to obtain accurate details concerning how many impoverished Clanton arrestees are unable to buy their release each week.

#### **Class Action Allegations**

28. The named Plaintiff brings this action, on behalf of herself and all others similarly situated, for the purpose of asserting the claims alleged in this Complaint on a common basis.

29. A class action is a superior means, and the only practicable means, by which the named Plaintiff and unknown Class members can challenge the City's unlawful poverty-based post-arrest detention scheme.

30. This action is brought and may properly be maintained as a Class action pursuant to Rule 23(a)(1)-(4) and Rule 23(b)(2) of the Federal Rules of Civil Procedure.

31. This action satisfies the numerosity, commonality, typicality, and adequacy

requirements of those provisions.

32. The Plaintiff proposes one Class seeking declaratory and injunctive relief. The Declaratory and Injunctive Class is defined as: All persons who are currently or who will become in the custody of the City of Clanton as a result of an arrest involving a misdemeanor offense.

**A. Numerosity. Fed. R. Civ. P. 23(a)(1)**

33. The City of Clanton Police Department made 1,079 arrests for misdemeanor offenses in 2013.<sup>6</sup> Each arrestee is presented with the City's standard cash bond choice of pay or jail. Arrestees are held in jail for varying lengths of time depending on how long it takes them to make the cash payment that the City requires for their release.

34. Some arrestees are able to pay for release immediately. Others are forced to wait a day or two days until they or family members can make the payment. Others are not able to pay or to find someone else to pay for them even after a few days.

35. Each weekly court appearance in the City's municipal court commonly includes up to ten confined inmates arrested since the previous Tuesday who are still in custody because they could not afford the cash amount set by the City's schedule. Thus, the number of future class members, even in a period of several months, numbers in the hundreds.

**B. Commonality. Fed. R. Civ. P. 23(a)(2).**

36. The relief sought is common to all members of the Class, and common questions of law and fact exist as to all members of the Class. The named Plaintiff seeks relief concerning whether the City's policies, practices, and procedures violate the rights of the Class members and relief mandating the City to change its policies, practices, and procedures so that the constitutional rights of the Class members will be protected in the future.

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<sup>6</sup> The City appears to have been on a similar pace of arrests in 2014, but final statistics are not yet publicly available.

37. These common legal and factual questions arise from one central scheme and set of policies and practices: the City's post-arrest detention schedule. The City operates this scheme openly and in materially the same manner every day. The material components of the scheme do not vary from Class member to Class member, and the resolution of these legal and factual issues will determine whether all of the members of the class are entitled to the constitutional relief that they seek.

Among the most important, but not the only, common questions of fact are:

- Whether the City of Clanton has a policy and practice of using a generic offense-based "bail schedule" to determine the amount of money necessary to secure post-arrest release;
- Whether the City of Clanton requires that scheduled amount to be paid up front in order to allow release;
- What post-arrest procedures the City of Clanton performs on misdemeanor arrestees;
- Whether the City of Clanton bars the public from attending its court proceedings.

38. Among the most important common question of law are:

- Whether a "bail schedule" setting standard amounts of cash required up front to avoid post-arrest detention violates the Fourteenth Amendment's due process and equal protection clauses.<sup>7</sup>

**C. Typicality. Fed. R. Civ. P. 23(a)(3).**

39. The named Plaintiff's claims are typical of the claims of the other members of the Class, and she has the same interests in this case as all other members of the Classes that she represents. Each of them suffers injuries from the failure of the City to comply with the basic

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<sup>7</sup> Other common questions pervade this case relating to other claims made in this Complaint. *See infra* at ¶¶ 49-52. For example, whether the City of Clanton bars the public from entering its courtroom such that the Plaintiff's and other Class members' appearances will be closed to the public and, if so, whether that policy violates the First Amendment and Supreme Court and Eleventh Circuit precedent requiring all judicial proceedings in American courts to be fully open to the public. Similarly, common questions exist as to whether non-individualized and entirely generic monetary bail requirements are arbitrary and excessive under the Eighth Amendment.

constitutional provisions: they are each confined in jail because they could not afford to pay the City's standardized cash bond amount. The answer to whether the City's scheme of policies and practices is unconstitutional will determine the claims of the named Plaintiff and every other Class member.

40. If the named Plaintiff succeeds in the claim that the City's policies and practices concerning post-arrest detention violate her constitutional rights, that ruling will likewise benefit every other member of the Class.

**D. Adequacy. Fed. R. Civ. P. 23(a)(4).**

41. The named Plaintiff is an adequate representative of the Class because her interests in the vindication of the legal claims that she raises are entirely aligned with the interests of the other Class members, who each have the same basic constitutional claims. She is a member of the Class, and her interests coincide with, and are not antagonistic to, those of the other Class members.

42. There are no known conflicts of interest among members of the proposed Class, all of whom have a similar interest in vindicating their constitutional rights in the face of their unlawful treatment by their local government.

43. The Plaintiff is represented by attorneys from Equal Justice Under Law who have experience litigating complex civil rights matters in federal court and extensive knowledge of both "bail schedule" schemes and the relevant constitutional law. Class Counsel has conducted an investigation over a period of months into the use of the generic "bail schedule," including numerous interviews with witnesses, experts, City employees, inmates, families of inmates, local attorneys, community members, statewide experts in the functioning of Alabama municipal courts, and national experts in post-arrest detention procedures and constitutional law. Class Counsel has studied the way that these systems function in other cities in order to investigate the wide array of

reasonable constitutional options in practice for municipalities like the City of Clanton. As a result, Class Counsel has devoted enormous resources to becoming familiar with the “bail schedule” scheme and with all of the relevant state and federal laws and procedures that relate to it.

44. Counsel for the Plaintiff has also been the lead attorney in a recent constitutional civil rights class action lawsuit against the City of Montgomery. *See Mitchell et al. v. City of Montgomery*, 2014-cv-186 (M.D. Ala. 2014). That case involved a major investigation and landmark litigation to end widespread injustices involving the jailing of impoverished people by the City of Montgomery over a period of years for their non-payment of debt from traffic tickets.<sup>8</sup>

45. The Plaintiff is also represented in this case by multiple local Class Counsel. Matthew Swerdlin and J. Mitch McGuire<sup>9</sup> have also devoted time and resources to investigating the City’s policies and practices, and they each have experience in the functioning of Alabama municipal police departments, including post-arrest procedures. Each also regularly represents impoverished and marginalized people in civil and criminal actions in Alabama and federal courts. Each was also local counsel in the *Mitchell* class action lawsuit before this Court. Moreover, Class counsel William Dawson is one of the most experienced criminal defense and civil rights lawyers in the State of Alabama, having worked for over 40 years on behalf of impoverished criminal defendants in the State of Alabama, tried over 500 jury trials in state and federal courts, and successfully brought dozens of class action cases. The interests of the members of the Class will

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<sup>8</sup> Counsel was also previously the lead attorney in a constitutional civil rights class action against the District of Columbia in the United States District Court for the District of Columbia. *See* 1:13-cv-00686-ESH (D.D.C. 2013). In that litigation, undersigned counsel was responsible for investigating and building the complex constitutional claims against the District of Columbia, authoring the legal filings in the class action case, and negotiating a Memorandum of Understanding with the District of Columbia Attorney General that stayed the class action litigation and began to implement sweeping changes to the city’s policies and practices governing the civil forfeiture of property by the District’s Metropolitan Police Department—procedures that affect thousands of putative class members every year.

<sup>9</sup> Matthew Swerdlin is owner of Matthew Swerdlin, Attorney at Law, in Birmingham. J. Mitchell McGuire is Managing Partner of McGuire & Associates, in Montgomery. William Dawson is the owner of the Dawson Law Office in Birmingham.

be fairly and adequately protected by the Plaintiff and her attorneys.<sup>10</sup>

**E. Rule 23(b)(2)**

46. Class action status is appropriate because the City, through the policies, practices, and procedures that make up its post-arrest detention scheme has acted in the same unconstitutional manner with respect to all class members. The City of Clanton has created and applied a simple scheme of post-arrest detention and release: it charges \$500 to every misdemeanor arrestee (and \$1,000 for every DUI arrestee). The City releases those who can pay and detains those who cannot. The detained arrestees are eventually taken to court on the following Tuesday for a first appearance, sometimes as many as six days after arrest.

47. The Class therefore seeks declaratory and injunctive relief to enjoin the City from continuing in the future to detain impoverished arrestees who cannot afford cash payments. Because the putative Class challenges the City's scheme as unconstitutional through declaratory and injunctive relief that would apply the same relief to every member of the Class, Rule 23(b)(2) is appropriate and necessary.

48. Injunctive relief compelling the City to comply with these constitutional rights will similarly protect each member of the Class from being subjected to the City's unlawful policies and practices. A declaration and injunction stating that the City cannot use a cash "bail schedule"

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<sup>10</sup> At least with respect to a Damages Class under Rule 23(b)(3) (which the Plaintiff does not seek here), courts have held that "ascertainability" is, in essence, a fifth Rule 23 prerequisite. A class must be "adequately defined and clearly ascertainable." *De Breaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970). "In other words, the class must meet a minimum standard of definiteness which will allow the trial court to determine membership in the proposed class," although "it is not necessary that the members of the class be so clearly identified that any member can be presently ascertained." *Earnest v. GMC*, 923 F. Supp. 1469, 1473 & n.4 (N.D. Ala. 1996) (quoting *Carpenter v. Davis*, 424 F.2d 257, 260 (5th Cir. 1970)).

Although it is doubtful that such a requirement should exist with respect to a purely injunctive class under Rule 23(b)(2), see, e.g., *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592-593 (3d Cir. 2012), that requirement is easily met here. The City of Clanton already has in its possession the identity of each and every person who it is keeping in its custody after an arrest because of the inability to post a cash bond. Also, by necessity, the City will come to know the identity of each person that it arrests in the future.

that jails indigent arrestees but frees arrestees with financial means would provide relief to every member of the Class. Therefore, declaratory and injunctive relief with respect to the Class as a whole is appropriate.

49. Plaintiff seeks the following relief and hereby demands a jury in this cause for all matters so appropriate.

#### **Claims for Relief**

##### **Count One: Defendant City of Clanton Violates Plaintiff's Rights By Jailing Her Because She Cannot Afford A Cash Payment Prior to a First Court Appearance.**

50. Plaintiff incorporates by reference the allegations in paragraphs 1-49.

51. The Fourteenth Amendment's due process and equal protection clauses have long prohibited imprisoning a person for the person's inability to make a monetary payment. Defendant violates Plaintiff's rights by jailing her when she cannot afford to pay the amount set by the generic "schedule" used by the City of Clanton.

##### **Count Two: Defendant City of Clanton Violates Plaintiff's Rights By Imprisoning Her After Arrest Based on a Generic Non-Individualized Monetary Bail.**

52. Plaintiff incorporates by reference the allegations in paragraphs 1-51.

53. The Defendant's use of a generic non-individualized offense-based "bail schedule" is arbitrary and excessive. By applying the same \$1,000 per charge cash bond to all DUI arrestees and the same \$500 cash bond to all other arrestees, the Defendant divorces the post-arrest, pretrial release determination from any individualized factors. The fundamental state<sup>11</sup> and federal right to an individual's liberty, therefore, is conditioned on an amount of money unrelated to any process

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<sup>11</sup> In addition to the fundamental constitutional liberty interest in freedom from physical confinement, Alabama law creates a state-law liberty interest in release after arrest and prior to trial. Alabama law defines "bail" as the "release" of a person "with or without security." Ala. Code § 15-13-102. Alabama law also provides an explicit state-law right to bail, with the liberty interest recognized both in the Alabama Constitution and in several statutes. See Ala. Code § 15-13-2 ("In all cases other than [capital cases], a defendant is, before conviction, entitled to bail as a matter of right."); see also Ala. Code § 15-13-102; Ala. Const. Art. I § 16.

or assessment of what would be required to assure that person's appearance in violation of the Fourteenth Amendment's substantive and procedural due process guarantees, the Eighth Amendment's prohibition on Excessive Bail, and the Supreme Court's holding that setting of a non-excessive and reasonable bail requires an individualized consideration of circumstances.

**Count Three: Defendant City of Clanton's Closure of the Courtroom for all Hearings, Including Arraignments, Pleas, and Trials, Violates the First Amendment.**

54. Plaintiff incorporates by reference the allegations in paragraphs 1-53 above.

55. The City of Clanton enforces a policy to bar the public from its courtroom. The City of Clanton Police Department stations officers and supervisors at the courtroom entrance and blocks the entry of any individual who is not a party to a case on the docket. During the inmate docket, which is conducted by video from the jail, no member of the public is allowed to enter the courtroom. Proceedings involving inmates are thus conducted, usually without an attorney representing the inmate, solely in the presence of the City prosecutor and City judge. These policies and practices are in flagrant violation of clearly established Supreme Court and Eleventh Circuit precedent requiring that all criminal judicial proceedings be open to the public.

**Request for Relief**

WHEREFORE, Plaintiff and the other Class members request that this Court issue the following relief:

- a. A declaratory judgment that the Defendant City violates the Plaintiff's and Class members' constitutional rights by jailing them because of their inability to pay a generically set amount of money to secure release after an arrest;
- b. A declaratory judgment that the Defendant City violates Plaintiff's and Class members' constitutional rights by forcing them to appear for criminal court proceedings that are closed to the public and an order requiring the City to ensure that its officers and officials allow proceedings in criminal cases to be open to the public;
- c. An order and judgment preliminarily and permanently enjoining Defendant City of Clanton from enforcing the unconstitutional post-arrest money-based detention policies and practices against the Plaintiff and the Class of similarly situated people that she represents;

- d. A judgment compensating the individual named Plaintiff for the damages that she previously suffered as a result of the City's unconstitutional and unlawful conduct, including damages resulting from her confinement in jail;
- e. An order and judgment granting reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988, and any other relief this Court deems just and proper.

Respectfully submitted,

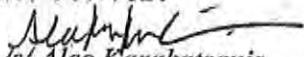
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10 November 2015

SUPREME COURT OF NEW MEXICO  
FILED

NOV 13 2015



Joey D. Moya  
Clerk of Court & Chief Counsel  
Supreme Court of New Mexico  
P.O. Box 848  
Santa Fe, NM 87504

RE: Proposed Amendments to the Rules Governing Pretrial Release

Dear Mr. Moya:

Thank you for the opportunity to comment on these changes. The Ad Hoc Pretrial Release Committee should be congratulated for its work in this important area. None of the comments below are intended to criticize those efforts – and all comments are solely my personal opinion and not the position of former employers or current groups with which I am affiliated.

**Comments on Rule 5-401:**

A.

After “not reasonably assure the appearance of the person as required”  
Add “and/or the safety of any person and the community.”

Reason: Both flight risk or danger or both are exceptions to the general presumption of release on recognizance or unsecured appearance bond. The recommended addition also is consistent with 18 U.S.C. § 3142(b).

C.

(1)  
Retain the conjunctive use of factors in C. (2) in addition to any approved pretrial risk assessment.

(2)  
After “the available information concerning”  
Add “, but not limited to,”

Reasons: In making the best possible decision, the court should not be constrained to consider only the PTRR; although the PTRR will ideally be more reliable than the factors generally adopted from 18 U.S.C. § 3142, the court should be encouraged to consider

any factor(s) – which might permit it to release the person while reasonably assuring appearance and safety.

(2)(a)

After “circumstances of the offense charged”

Delete “including whether this offense is . . . .”

Reasons: Considering certain types of crimes in 18 U.S.C. § 3142(g)(1), from which Rule 5-401 C (2) is derived, is relevant to federal courts because of the rebuttable presumptions for detention attaching to offenses listed in 18 U.S.C. §§ 3142(e)(2) & (3). Unless New Mexico’s Supreme Court is going to adopt similar presumptions, there is no need to call the trial courts’ attention to only two types of offenses; it should encourage and rely upon the trial courts to take a wide and searching approach to considering the true nature and full circumstances of the charged offense. Further, to the extent which “narcotic drugs” may indicate a flight risk or danger, that category is under inclusive and too restrictive. Non-narcotic controlled substances – or even non-controlled substances such as “spice”-- may be of far greater concern, yet are not covered.

(2)(e)

Either delete the entire factor or add “and does not pose a threat to the safety of any other person and the community.”

Reason: If the phrase “but not limited to” is added to (c)(2), as suggested above, (2)(e) is superfluous. If the court is to be reminded to consider other, unenumerated, factors, it should be reminded to consider those in relation not just to the likelihood of appearance but to the seriousness of the danger to the community that would be posed by the person’s release. See 18 U.S.C. § 3142(g) (4).

Comment: (2)(e) may have been inserted to reflect the provision in 18 U.S.C. § 3142(g)(4) incorporating case law that the court can consider the source of any property used to secure the person’s appearance. Although this certainly is important, in the rare cases where it applies the court has the inherent authority to consider whether a criminal organization intends to forfeit the property offered to secure the person’s appearance.

D. (2)(e)

Comment: An order of no contact with victims and witnesses carries the risk of unintended interference with physical, financial and emotional support by the accused for family members. It can make a bad situation worse. However, it may be essential to complying with the constitutional mandate that victims have “the right to be reasonably

protected from the accused . . . .” N.M. Const. art II, § 24 A(3). Before making no contact an absolute condition of release, it would be desirable for the court to hear from CYFD and the prosecutor’s victim-witness advocate. In the federal system, 18 U.S.C. § 3145(a) provides a framework for the parties to request amendment of conditions of release – and that the motion “shall be determined promptly. My suggested remedy, at 504 G (5) *infra*, is to clarify/provide that all conditions of release are reviewable (and appealable) upon motion of either party.

E. (3)

Correct typo in “apperance (sic) bond.”

F. Add: “The hearing shall be held immediately upon the person’s first appearance before the court unless that person or the attorney for the State seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days and a continuance for the State shall not exceed three days.”

Reasons(s): The added language parallels that of 18 U.S.C. § 3142 (f) (2), which has been in effect for decades. Unlike the more common “reactive” cases in which the State may be unaware of the person until after his/her arrest and booking, the rarer, proactive cases involving pre-arrest investigation and grand jury indictments are the ones most likely to involve persons who pose a significant risk of flight or danger. In these cases and where the State learns post-arrest in a reactive case that the person poses unusual risk, release decisions should be made only by the court – and only after sufficient time for the parties to marshal detailed and verified information. This is not feasible over weekends, especially when combined with holidays. Even in the federal system, defense counsel are often not appointed until a defendant’s first appearance and frequently require additional time to contact family members, employers, half-way houses, treatment programs, electronic monitoring providers, etc. to put together a comprehensive and convincing release “package” to present to the court.

G.

(1)

Before “The court shall issue . . . .”

Add “Unless the state has moved to detain the person without bail pending trial, and either or both parties have moved for a continuance”

Change “within (48 Hours)” to within “seventy-two (72) hours.”

Reasons: This clarifies the distinction between when there is a detention motion by the state and when there is not. As discussed, *supra*, it is not feasible for the court to

conduct a meaningful hearing within 48 hours of a Friday night arrest. For the vast majority of cases where the State does not move to detain and the only question is what conditions of release are appropriate, release from custody by a designee under Rule 5-408 or the court at an initial appearance is both feasible and desirable.

After "The court shall issue an order"

Add "denying release or"

Reason: As presently written, the plain language of the rule requires the court to set conditions of release in all cases (unless the person has already been released). That contradicts 504 F which posits detaining a person without bail before trial.

(5)

Insert "any" so that the sentence reads: "A hearing to review any conditions of release under this paragraph shall be held by the district court."

Add "upon motion of either party. Either party may file an interlocutory appeal from an order denying pretrial release or imposing conditions of release."

Reason: As discussed, *supra*, this explicitly clarifies/provides an avenue of both review and appeal of either an order denying pre-trial release or imposing/failing to impose specific conditions of release – such as a no contact condition which may unnecessarily disrupt and worsen families.

N. It is importance to retain this provision which permits the trial judge to consider all evidence, regardless of whether it conforms to the rules of evidence. Requiring the parties to comply with the rules of evidence will add delay and expense for the parties. The trial court can be relied upon to give whatever weight is appropriate to the evidence.

P. After "If secured bond is required to assure the appearance of the defendant"  
Add "or safety of the community"  
OR just delete "to assure the appearance of the defendant."

Reason: If one reason for a secured bond is to be specified, the other should also. However, the bases for imposing secured bonds is covered elsewhere in the rule, so it may be more succinct to simply eliminate a superfluous reference "to assure the appearance of the defendant."

#### Comments on Rule 5-408

B. (2)

Add: "**Exceptions.** A person for which there is an outstanding warrant for arrest from another jurisdiction or arrested for any of the following offenses . . ."

Reason(s): Although a person may be arrested for a minor offense in one jurisdiction, s/he may actually be charged with an extremely serious offense in another jurisdiction. Rather than relying on the designee using the "exceptional circumstances" provision of Rule 5-408A, Rule 5-408 B (2) should clearly exclude such persons from release before appearing before a judge. Comity with other counties, states and federal authorities – as well as common sense concerns about safety and flight risk, make it inappropriate to release such a person without having a judicial hearing. Limiting the exclusion to those persons who have an outstanding felony arrest warrant would not be sufficient to recognize that other jurisdictions may have similar offenses to the ones listed in 5-408B (2) (a) through (j) – but, because they are not literally the identical New Mexico offense listed as exception, a plain reading of the rule could result in release of a person whose conduct was the same as one of the New Mexico offense exceptions.

C. Before "A designee shall release . . ."

Add: "Unless there is an outstanding warrant for arrest from another jurisdiction"

Reasons: Same as 5-401 G (1) and 5-408 B (2), *supra*. Even if a Supreme Court approved risk assessment incorporates as one criterion, the existence and nature of any outstanding arrest warrants, common sense and comity require providing the issuing jurisdiction with notice and an opportunity to be heard by the court.

D. Change: "within forty-eight (48) hours after the person is booked" to "within seventy-two hours . . ."

Reasons: Same as 5-401 G (1), *supra*. Although a 48 hour deadline is a worthy goal, given the current financing and staffing of the judiciary, the district attorneys, and the public defenders, it makes no sense to have a rule-imposed deadline which simply cannot be met in a meaningful way.

**Comments on Rules 6-408, 7-408 and 8-408:**

See comments on 5-408 A, C & D, *supra*, regarding exceptions for outstanding arrest warrants and substituting a 72 hour limit for the proposed 48 hours.

**Comment on Rule 9-302A Order for Release:**

This form should be provided to the defendant in his/her preferred language, after the releasing authority verifies that the defendant is literate in that language. If the defendant does not read or speak English, Spanish, or Navajo, the form should be read to him/her by a court-approved interpreter and the releasing authority should make a record of the defendant's understanding of, and agreement to, the conditions of release.

Reason:

Pretrial release should be an event thoroughly understood and agreed to by the defendant (and counsel, if any). In an increasingly multi-cultural state, it is the state's responsibility to ensure the defendant understands what is expected of him/her and the full consequences of any violation.

Again, thank you for the opportunity to comment on this important topic.

Sincerely,



Peter M. Ossorio

**Proposed Rule Changes Comment Form.**

SUPREME COURT OF NEW MEXICO  
FILED

**Name:** Joseph Dario Gomez  
**Phone:** 575-993-6557  
**Email:** dariogomez**bailbonds@gmail.com**

NOV 12 2015



**Rule No:** 55

**Comments:**

I have attended every meeting that the ADHOC has had thus far. After attending, I have come to the conclusion that they as a committee have wandered off track as to why this committee was formed. My understanding was to address the bail bond/jailhouse scheduling due to the fact that you as the Supreme Court, ruled that such schedules were unconstitutional. That ruling should be questioned.

The committee was to address the matter and to come up with a solution as to setting bond for defendants being charged with misdemeanor up to federal charges. Throughout this ordeal, I have emphasized very strongly that the solution to all of this is simply clarified in the New Mexico Criminal and Traffic Law Manual, which also includes selected civil law matters and court rules. Article 4 Release Provisions starting with 6-401 which clearly states the policies, procedures and proper ways of considering and setting bond by a judge.

After reviewing these rules, I cannot see where it justifies a judge's decision to allow or determine anyone else to set bonds nor assign a designee to do his/her job which he/she was elected by the people, for the people, and to serve and follow these rules.

No pretrial services or other administrative entity should have the right to determine bond. My understanding after all of these meetings is that the committee is leaning toward pretrial services doing the judges' job. I cannot understand where these agencies become and are deemed qualified to execute these decisions.

Also, the cost of pretrial services should not be a burden on the fellow taxpayers of NM. And, just to inform those who are unaware, bail bond premiums are how the services are paid for the assurance that all defendants will appear in court and follow conditions of release set by the court. This is at no cost to NM taxpayers.

I have noticed in my ten years of being involved in the judicial system as a bail bondsman, that judges have a tendency to be off-track with the attitude of "this is my Court and my Bench," and disregarding the rules and statutes of the State. That is why the setting bond and releasing defendants has become a burden.

It is not in any way, shape, or form the bondsmen fault that people are being detained longer than they should be or their rights to be bonded violated. If the judges would only do their job using the criteria and tools they have at their disposal, no problem would exist.

Pretrial services proposes to use an "assessment tool" to better assist the judges in making their decisions on setting bond and further providing the appearance of defendants and the safety of the citizens of NM has no basis in fact or reality. The statements are hypocritical. Pretrial services, after reviewing recommendations for conditions of release, is unconstitutional by insisting that the Defendant be subjected to drug/alcohol testing, check-ins, monitoring by tracking devices, and all this at the Defendants' cost. If the Defendant cannot pay, then the taxpayers pick up the tab for these services. Although the real issue is that the Defendant's civil rights are being violated subject to release because they are treated as guilty before being tried by a jury of their peers or by a Judge. In addition, if a Defendant violates any of the conditions of release or does not appear for Court, Pretrial services does not have the authority, means, or source to apprehend and surrender the Defendant. As a bondsman, at any time, can surrender a Defendant without any delay or chance of losing the Defendant before completing his/her responsibilities.

Furthermore, something else that really upsets me (and bondsmen alike) is hearing the fact that Bail Bondsmen are the reason that Defendants, after bailing out, are repeat offenders and a danger to the safety of the community. We need to understand that there is no such assessment tool, Pretrial Service, or anything else for that matter, that will guarantee that a person will not commit another crime and/or violate the terms of their release.

That being said, I would appreciate it if the AOC and the Supreme Court refrain from publicizing that Bail Bondsmen are the reason for the failure of the judicial system in considering release and bail bond protocols. I am not opposed to trying to improve the system. What I am opposed to is changes to a system that was developed over one hundred years ago and that has worked effectively until Judges have gone off track by not following the Statutes, Rules, and Regulations.

My recommendation to resolve this issue is to mandate that all of the Judges in the State of NM follow the protocol of the NM Criminal and Traffic Law Manual and not to have the idea of "my Court," when it is not their Court, it is the peoples Court. As an example, the National Football League, or NFL; each team is required and regulated to follow ONE set of rules no matter which location a game is being held and no matter from which state the team has originated. This is why I emphasize that the problem is not within the State regulations or the bail bond industry, but within the Judges themselves.

With all this being said, save yourself time and taxpayer money and look into the real problem.

Thank you!  
Joseph Dario Gomez  
Dario Gomez Bail Bonds  
887 N. Main  
Las Cruces, NM 88001

Zimbra

**supjdm@nmcourts.gov**  
SUPREME COURT OF NEW MEXICO  
FILED**Answer to Proposed Supreme Court Rule changes**

NOV 12 2015

**From :** Gerald Madrid <gmadrid726@aol.com>Wed, Nov 11, 2015 02:33 PM **Subject :** Answer to Proposed Supreme Court Rule changes**To :** nmsupremecourtclerk@nmcourts.gov

As a member of the Supreme court's ad hoc committee, it was my initial understanding that we were to take a very close look at the current bail system in New Mexico. In particular, we were to study the legalities of "jail house bond schedules" that are currently in use in some county jails. This issue was discussed in the State v Brown case and the Court decided that the concept of pre determined bail schedule was unfair. The court felt that there needed to be more "fairness and equality" in setting bail and made reference to the Rules of Criminal Procedure ( 5-401 ). The court felt that it is unfair for one defendant to be able to post his "jail house bond" while another defendant couldn't. Jail house bail schedules are approved by Judges and have been in use across the Country for many decades. The schedule simply allows a person to meet the condition of his financial bond by posting it and ensuring future court appearances. Posting a secured bond early on doesn't mean a person is rich, it simply means a person has the resources and relationships to secure his own release without unnecessary delay. If it is unfair for a person to post a secured bond and get out of jail, is it also unfair for a person to hire a private attorney when others are forced to use the public defender?

The Supreme Court and the A.O.C. have proposed a new set of rules that would simply reinforce the rules ( 5-401 ) that already exist. The Court has very strongly insisted that local Judges release defendants on the least restrictive means , that will ensure court appearance. The Court has given 3 basic types of release for a Judge to consider, ROR, unsecured bond or a small cash deposit to the Court. The Court has reluctantly authorized a secured bond, but only as an absolute last resort. I believe this is a mistake because the Court's first three bail options are all unsecured bonds, hold no one accountable for a failure to appear and take away all incentive to appear. The only true incentive in most cases for people to perform, is a financial incentive and the Court has taken all that incentive away with their unsecured bonds that are currently being issued. If a defendant has nothing to loose by his noncompliance or FTA, then why appear?

Bail is clearly rooted in the U.S. and New Mexico Constitution and is intended to ensure the appearance in court of an accused person. The purpose of bail is not to simply release defendants on the least restrictive means and disregard future court appearances in spite of what the current practice is. Bail is a "written promise signed by a defendant and a surety to ensure that a criminal defendant appear in court at the scheduled time and date ordered by the Court". Further, the NM Constitution says " all persons shall, before conviction beailable by sufficient sureties" I believe that the unsecured bonds that are now being insisted upon and widely used are

meaningless and have no means of enforcement. A possible solution to this problem of using the words "least restrictive" is replacing those two words with "the Court may release a defendant on any means necessary that will ensure the appearance of a defendant at all future Court settings" Using these words would give a Judge full discretion on any type of release or set of conditions that he/she feels would ensure the appearance of a defendant.

The next issue is the Risk Assessment Instrument that is currently underway in Bernalillo County, NM. This RAI is modeled on the Washington D.C. program and has no relevance to New Mexico. There are cultural, educational and financial differences that are not accounted for and so this RAI has simply turned into an experiment that has not been validated. What the RAI is intended to do is basically do away with private bail and replace it with a massive government pre trial services program in every N.M. county. This program will not work and if it were implemented, at what cost ?

The final issue to be discussed is the proposed amendment change to allow a Judge to hold a defendant in custody without bond. A Judge would decide who is too dangerous to release and the rest of the criminal defendants would be released on an unsecured bond. Those backing this amendment change are selling it as "community safety" , when in fact it is the opposite. The Court has constantly talked about everyone being free because they are innocent until proven guilty, at the same time wanting to hold others in jail with no options for release. I think that section 13 of the N.M. Constitution already allows for a Judge to hold someone in custody especially when "the proof is evident or the presumption great, that a serious crime has been committed".

Some people have said that our current bail bond system is broken in N.M., but what is broken is Judges trying to make bail something that it isn't intended for. Giving unsecured and meaningless bail is the problem because it encourages crime, holds no one accountable and places the ultimate burden on the community and the tax payer.

Gerald. Madrid

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**FAXED  
ORIGINAL**

**KAREN L. TOWNSEND**  
DISTRICT JUDGE, DIVISION VIII

**State of New Mexico**  
**Eleventh Judicial District Court**  
103 South Oliver Drive • Aztec, New Mexico 87410  
November 12, 2015

(505) 334-6151  
Fax: (505) 334-1940  
SUPREME COURT OF NEW MEXICO  
FILED

NOV 12 2015

Joey D. Moya, Clerk  
New Mexico Supreme Court  
Fax: 505-827-4837

A handwritten signature in black ink, appearing to be "Joey D. Moya".

RE: Proposed amendments to the rules governing pretrial release in New Mexico Courts;  
Proposal 55

Dear Mr. Moya:

The following comments are submitted by the District Court Judges of the Eleventh Judicial District for consideration by the New Mexico Supreme Court.

Rule 5-401 and Secured bonds.

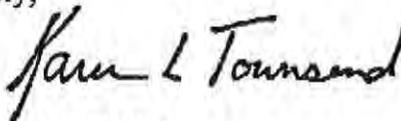
The intent of the proposed amendments to Rule 5-401 concerning secured bonds is unclear. The rule includes extensive guidance about determining the type and conditions of release, including the four types of secured bonds. However, the proposed amendments seem to suggest that regardless of the information gathered and considered and the care taken in deciding to impose a secured bond, any person who does not have the financial means to post the secured bond will be automatically released (on personal recognizance or on an unsecured appearance bond) ten days after arraignment. Is that what is intended by the amendments to this rule? If not, we would ask for greater clarity in the rule because we do not know how to interpret this rule otherwise. If so, what is the purpose of the hearing required under (G)(3) ten days after arraignment since at that point there is really nothing to be decided. It will be clear at that time that the person continues to be detained. If the purpose is to determine if the person's financial inability to post the secured bond is the SOLE reason for continued detention, will there be some guidance about what constitutes financial "inability"? Will a financial hardship establish "inability"? What could be a principled response to a person who argues: "I just don't think I should have to pay my bond when others don't have to pay their bonds"?

Another point of ambiguity is in the inclusion of (G)(1) and (G)(2) in the District Court rules. In our district, magistrate judges make the initial decision concerning conditions of release, even in cases which include felony charges that may ultimately be heard by the

District Court. The inclusion of subsection (G)(1) in the rules for the District Court could be construed to mean that District Court Judges must go to the detention center to set conditions of release. Similarly, (G)(2) appears to refer to the initial setting of conditions of release and implies that the District Court must hold a hearing if the person moves for review of the conditions of release originally set – and do so within 48 hours of the motion. It is unrealistic to expect the District Court to get a hearing set within 48 hours of receipt of a motion. We have questions about the jurisdiction of the District Court since the District Court has no jurisdiction in a criminal case until a criminal information is filed. Finally, subsection (K) seems to address how a defendant with felony charges invokes the jurisdiction of the District Court and it is difficult to harmonize subsection (K) with the (G)(1) and (G)(2) provisions.

We appreciate the work of the Ad Hoc Pretrial Release Committee as well as this opportunity to comment.

Sincerely,



Karen L. Townsend  
Chief District Judge

**COYTE LAW P.C.**  
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Albuquerque, NM 87102  
Tel: (505) 244-3030 Fax: (505) 242-4339  
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SUPREME COURT OF NEW MEXICO  
FILED

NOV 12 2015



November 12, 2015

Joey D. Moya, Clerk  
New Mexico Supreme Court  
P.O. Box 848  
Santa Fe, New Mexico 87504-0848

Via *Email: nmsupremecourtclerk@nmcourts.gov*  
*Facsimile: 505-827-4837*  
*And Regular Mail*

**RE: Proposal 55**

Dear Supreme Court,

I am writing to you in my position as President of the New Mexico Criminal Defense Lawyers Association (NMCDLA).

The NMCDLA would like you to consider the following changes to the proposed rules on pretrial release. Below we have provided language changes, (displayed in red italics) extracted from the proposed rule, followed by descriptions of why we believe the changes are necessary. We also have provided a red lined copy of the proposed rule incorporating the changes summarized below. I hope this helps in the process of drafting these new rules.

5-401 Pre Trial Release

B (1) the execution by the person of an appearance bond in the full amount specified in the release order, secured by a deposit in cash of *up to* ten percent (10%) of the amount specified. The cash deposit may be returned to the person as provided....etc.

NMCDLA believes it is important to delete the term "or secured by such greater or lesser percentage as is reasonably necessary to assure the appearance of the person as required." because it will tend to eliminate the likelihood a 10% option is ever used. NMCDLA believes there needs to be a realistic opportunity for 10% options to be posted directly to the court, and the rule needs to reinforce this concept.

D Additional Conditions; conditions to assure orderly administration of justice.

(e) a condition that the person avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense, *unless the court believes such contact would be acceptable given the specific circumstances of the case.*

NMCDLA believes this additional language is important as many cases involve situations where family members depend on each other for day to day activities unrelated to the circumstances of how they became a witness in the case or an alleged victim. Care givers to the mentally ill or the disabled are often inadvertently caught up in illogical "no contact" orders which have been created without attention to the specific facts of the case.

(h) a condition that the person refrain from possessing a firearm, destructive device or other dangerous weapon *if the charges involve allegations of violence or illegal use of a firearm, destructive device, or weapon.*

NMDCLA believes the current rule is being abused and otherwise legal conduct is being unnecessarily criminalized. The current rule allows for illogical remands into custody for conduct that is lawful and unrelated to the offense charged.

This logic also applies to the other conditions set forth in this section. For example:

(i) a condition the person refrain from excessive or any use of alcohol and any use of narcotic drug or other controlled substance without a prescription by a licensed medical practitioner, *if the charges involve allegations of excessive use of alcohol or drugs.*

(k) a condition that the person submit to a urine analysis or alcohol test upon request of a person designated by the court, *if the charges involve allegations of illegal drug use or excessive alcohol consumption.*

G. Order setting conditions of release; time of filing and review hearing.

(1) The court shall issue an order setting conditions of release *as soon as possible but in no event later than twenty four* hours of .....etc.

NMCDLA believes the time, (referenced as 48 hours in the proposed rule), should be an outer limit and not a normal default for COR to be determined. In jurisdictions where it is possible to have this occur immediately there should be no excuse not to do so. In fact, NMCDLA believes there is no reason why the outer time limit should not be 24 hours rather than 48 hours. Only extraordinary reasons should merit a longer period of delay. This will force courts to make the necessary changes to ensure a speedier release of non dangerous citizens. The concept that a rural court cannot staff weekends or holidays should not be allowed to dictate whether a non dangerous citizen remain unnecessarily incarcerated. Indeed, the savings from jail costs should be taken into consideration in reaching the goal of a 24 hour determination.

N. Evidence. Information stated in, or offered in connection with, any order entered under this rule, *with the exception of dangerousness hearings,* need not conform to the Rules of Evidence.

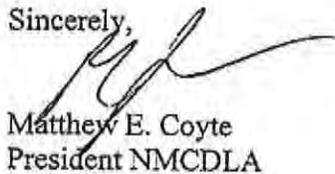
NMCDLA believes when the state seeks to preventatively detain a citizen without bond pursuant to a dangerousness hearing that the standard for such a hearing must be by clear and convincing evidence and that the Rules of Evidence must apply to make sure such a standard is meaningful.

Rule 5-408 (and 6-408, 7-408, 8-408)

B. (2). Delete all exceptions. NMCDLA is concerned the exceptions will swallow the rule, and indeed the exceptions will become the guideline for the court and not just the designee. All citizens who have no conviction history in the past 24 months and are charged with misdemeanors should be eligible for this release method. Additionally the current list of exceptions is contrary to the New Mexico Constitution and the holding of *State v. Brown*. NMCDLA believes this part of the proposed rule is contrary to current law in that it makes bail decisions, and the timing of bail decisions, based on the charges alone.

If you should have any questions or concerns, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Coyte', is written over the typed name and title.

Matthew E. Coyte  
President NMCDLA

**PROPOSED AMENDMENTS TO THE  
RULES GOVERNING PRETRIAL RELEASE  
IN NEW MEXICO COURTS**

**Commentary from the Supreme Court.** Following the decision in *State v. Brown*, 2014-NMSC-038, 338 P.3d 1276, the New Mexico Supreme Court created the Ad Hoc Pretrial Release Committee to study existing pretrial release law and practice and make recommendations to the Court regarding necessary changes to improve pretrial release procedures in New Mexico. This broad-based committee, with representation from the criminal defense bar, prosecution, judges, the bail industry, jails and detention centers, and the Legislature, has made a number of recommendations, including amendments to Rule 5-401 NMRA, governing pretrial decision-making in the district courts. Following the publication period and any resulting changes to Rule 5-401, the committee expects to recommend corresponding revisions to Rules 6-401, 7-401, and 8-401 NMRA, which govern pretrial procedures in the magistrate, metropolitan, and municipal courts.

The committee also recommends proposed new rules to govern early release procedures for defendants who are unlikely to pose a flight risk or a risk to public safety. See Rules 5-408, 6-408, 7-408, and 8-408 NMRA. The committee proposes the adoption of a new form, Form 9-302A NMRA, order for release on recognizance by designee, to implement Paragraph B of these rules.

The committee also recommended that the Court consider confidentiality provisions regarding information that an accused submits in order to exercise the right to pretrial release. The Court will refer those questions to the Rules of Evidence Committee for recommendations, and no confidentiality provisions are being circulated for comment at this time.

The recommended rule amendments are largely aimed at ensuring that pretrial release practices conform to the standards required by federal and state constitutional law and the principles that have been embodied in the pretrial release rules of New Mexico since their initial promulgation in 1972. Like the Federal Bail Reform Act of 1966, on which they were modeled, the New Mexico rules have always required that an accused who has not yet been adjudicated guilty of an offense should be released pending trial on the least restrictive conditions that would minimize flight risk and danger to the community, and have always provided that the requirement of money bonds may be imposed only if nonfinancial release conditions would be insufficient methods of release.

Key provisions of the proposed amendments are:

1. Adding to Rule 5-401(B) the clarifying statement that “[s]ecured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge.” Although the explicit language is new, the concept is not. The bail rules have always required individual assessment of an accused’s flight risk or danger to the community, and New Mexico and federal case law prohibit the use of fixed bonds based only on the nature of the accusation.

2. Adding language to Rule 5-401(C)(1) and Paragraph C of the proposed early release rules, Rules 5-408, 6-408, 7-408, and 8-408, that would explicitly permit the use of Supreme Court approved pretrial risk assessment instruments in setting individualized conditions of release. These evidence-based assessment tools, in use in a number of jurisdictions, are the result of empirical studies that determine the degree to which various factors, such as prior criminal history, have been shown to be helpful predictors of individual flight risk or danger to the community. The Second Judicial District Court currently is piloting a pretrial risk assessment instrument.

3. Adding in the proposed early release rules more guidance and regulation to the longstanding authority of a court to permit detention facilities and other designees to make the simpler release decisions for defendants who present neither a danger nor a flight risk without waiting for a court hearing.

4. Providing time guidelines for bond-setting and bond review hearings to avoid unnecessary delay.

The Court will not make its final decisions nor take action on these recommended revisions until after publication for comment and full review by both the committee and the Court of all resulting input, which is an important aspect of the rule-making process. If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://nmsupremecourt.nmcourts.gov/> or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk  
New Mexico Supreme Court  
P.O. Box 848  
Santa Fe, New Mexico 87504-0848  
[nmsupremecourtclerk@nmcourts.gov](mailto:nmsupremecourtclerk@nmcourts.gov)  
505-827-4837 (fax)

Your comments must be received by the Clerk on or before **November 12, 2015**, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

**5-401. ~~[Bail]~~ Pretrial release.**

A. **Right to bail; recognizance or unsecured appearance bond.** Pending trial, any person bailable under Article 2, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on the person's personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court, subject to any release conditions imposed [pursuant to] under Paragraph [C] D of this rule, unless the court makes a written finding that such release will not reasonably assure the appearance of the person as required.

B. **Secured bonds.** Secured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge. If the court makes a written finding that release on personal recognizance or upon execution of an unsecured appearance bond will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, in addition to any release conditions imposed [pursuant to] under Paragraph D of this rule, the court shall order the pretrial release of such person subject to the first of the following types of secured bonds [which] that will reasonably assure the appearance of the person as required and the safety of any person and the community:

(1) the execution by the person of ~~[a-bail]~~ an appearance bond in [a] the full amount specified in the release order, [amount executed by the person and] secured by a deposit [of] in cash of up to ten percent (10%) of the amount ~~[set for bail]~~ specified, or secured by such greater or lesser ~~[amount] percentage as is reasonably necessary to assure the appearance of the person as required.~~ The cash deposit may be returned to the person as provided in Paragraph J of this rule. The cash deposit may be made by or assigned to a paid surety licensed under the Bail Bondsmen Licensing

**Commented [MC1]:** NMCDLA believes it is important to delete this term because it will tend to eliminate the likelihood a 10% option is ever used. NMCDLA believes there needs to be a realistic opportunity for 10% options to be posted directly to the court, and the rule needs to reinforce this concept.

Law provided such paid surety also executes a ~~[bail]~~ surety bond for the full amount ~~[of the bail set]~~ specified;

(2) the execution of ~~[a bail]~~ a property bond by the ~~[defendant]~~ person or by unpaid sureties in the full amount ~~[of the bond]~~ specified in the release order, secured by ~~[and]~~ the pledging of real property as required by Rule 5-401A NMRA; or

(3) either the execution of a ~~[bail]~~ surety bond with licensed sureties in the full amount specified in the release order as provided in Rule 5-401B NMRA, or ~~the~~ execution by the person of an appearance bond in the specified amount, [and] secured by a deposit ~~[with the clerk of the court,]~~ in cash~~[-]~~ of one-hundred percent (100%) of the amount ~~[of the bail set]~~ specified, [such deposit to] which may be returned to the person as provided in Paragraph J of this rule.

Any ~~[bail]~~ surety, property, or appearance bond shall be substantially in the form approved by the Supreme Court.

C. **Factors to be considered in determining the type and conditions of release.** The court shall ~~[-in determining]~~ use the following information to determine the type of ~~[bail]~~ release and ~~[which]~~ conditions of release that will reasonably assure appearance of the person as required and the safety of any other person and the community~~[-]~~:

(1) the results of the pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any; and

~~(2)~~ [take into account] the available information concerning~~[-]~~:

~~[(1)]~~ (a) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;

~~[(2)]~~ (b) the weight of the evidence against the person;

~~[(3)]~~ (c) the history and characteristics of the person, including:

~~[(a)]~~ (i) the person's character and physical and mental condition;

~~[(b)]~~ (ii) the person's family ties;

~~[(c)]~~ (iii) the person's employment status, employment history, and financial resources available to secure a bond;

~~[(d)]~~ (iv) the person's past and present residences;

~~[(e)]~~ (v) the length of residence in the community;

~~[(f)]~~ (vi) any facts tending to indicate that the person has strong ties to the community;

~~[(g)]~~ (vii) any facts indicating the possibility that the person will commit new crimes if released;

~~[(h)]~~ (viii) the person's past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

~~[(i)]~~ (ix) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, or appeal ~~[or completion of an]~~ for any offense under federal, state, or local law;

~~[(4)]~~ (d) the nature and seriousness of the danger to any person or the community that would be posed by the person's release; and

~~[(5)]~~ (e) any other facts tending to indicate the person is likely to appear.

D. **Additional conditions; conditions to assure orderly administration of justice.**

The court, upon release of the defendant or any time thereafter, may enter an order, that such person's release be subject to:

(1) the condition that the person not commit a federal, state, or local crime during the period of release; and

(2) the least restrictive of, or combination of, the following conditions the court finds will reasonably assure the appearance of the person as required, the safety of any other person and the community, and the orderly administration of justice:

(a) a condition that the person remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(b) a condition that the person maintain employment, or, if unemployed, actively seek employment;

(c) a condition that the person maintain or commence an educational program;

(d) a condition that the person abide by specified restrictions on personal associations, place of abode, or travel;

(e) a condition that the person avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense, unless the court believes such contact would be acceptable given the specific circumstances of the case;

(f) a condition that the person report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

(g) a condition that the person comply with a specified curfew;

(h) a condition that the person refrain from possessing a firearm, destructive device, or other dangerous weapon, if the charges involve allegations of violence or illegal use of a firearm, destructive device, or weapon;

(i) a condition that the person refrain from excessive or any use of alcohol and any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner, if the charges involve allegations of excessive use of alcohol or drugs;

(j) a condition that the person undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(k) a condition that the person submit to a urine analysis or alcohol test upon request of a person designated by the court, if the charges involve allegations of illegal drug use or excessive alcohol consumption;

(l) a condition that the person return to custody for specified hours following release for employment, schooling, or other limited purposes;

(m) a condition that the person satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

**E. Explanation of conditions by court.** The release order of the court shall:

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct;

(2) advise the person of:

(a) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(b) the consequences for violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(c) the consequences of intimidating a witness, victim, or informant, or otherwise obstructing justice; and

**Commented [MC2]:** NMCDLA believes this additional language is important as many cases involve situations where family members depend on each other for day to day activities unrelated to the circumstances of how they became a witness in the case or an alleged victim. Care givers to the mentally ill or the disabled are often inadvertently caught up in illogical "no contact" orders which have been created without attention to the specific facts of the case.

**Commented [MC3]:** NMCDLA believes the current rule is being abused and otherwise legal conduct is being unnecessarily criminalized. The current rule allows for illogical remands into custody for conduct that is lawful and unrelated to the offense charged. This logic also applies to other conditions set forth in this section. (See subsections i and k)

(3) unless the defendant is released on personal recognizance or an unsecured appearance bond, set forth the circumstances [which] that require [that conditions of release be imposed] the imposition of a secured bond.

F. **Detention.** Upon motion by the state to detain a person without bail pending trial, the court shall hold a hearing to determine whether bail may be denied [pursuant to] under Article 2, Section 13 of the New Mexico Constitution.

G. **[Review of] Order setting conditions of release; time of filing and review hearing.**

(1) ~~The court shall issue an order setting conditions of release as soon as possible but in no event later than twenty four (24) within forty-eight (48) hours after an arrested person is booked into a detention facility, unless such person has been released from custody by a designee under Rule 5-408 NMRA and Paragraph L of this rule.~~

(2) ~~[A person for whom bail is set by the district court and who after twenty-four (24) hours from the time of transfer to a detention facility] If the court requires a secured bond for a person's release under Paragraph B of this rule, and the person continues to be detained twenty-four (24) hours after the issuance of the order imposing secured bond as a result of the person's inability to [meet the bail set] post the secured bond, the person shall, upon motion, be entitled to have a hearing to review the [amount of bail set] type of release and conditions of release set forth in the release order. The court shall hold the hearing within forty-eight (48) hours after the filing and service of the motion. Unless the release order is amended and the person is thereupon released, the court shall state in the record the reasons for [continuing the amount of bail set] declining to amend the release order. No person eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond.~~

(3) If the district court requires a secured bond for a person's release under Paragraph B of this rule, and the person continues to be detained as a result of the person's inability to post the secured bond, the court shall hold a hearing ten (10) days after the date of arraignment or waiver of arraignment to review the type of release and conditions of release set forth in the release order. The court shall schedule the hearing regardless of whether the defendant has filed a motion for review under Subparagraph (G)(2) of this rule, but the court may vacate the hearing upon stipulation of the parties. Unless the release order is amended and the person is thereupon released, the court shall state in the record the reasons for declining to amend the release order. No person eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond.

(4) A person who is ordered released on a condition [which] that requires [that] the person to return to custody after specified hours, upon [application] motion, shall be entitled to [have] a hearing to review the conditions imposed. Unless the requirement is removed and the person is thereupon released on another condition, the court shall state in the record the reason for the continuation of the requirement.

(5) A hearing to review conditions of release [pursuant to] under this paragraph shall be held by the district court.

H. **Amendment of type of release and conditions of release.** The court [ordering the release of a person on any condition specified in this rule] may at any time amend [its order at any time to increase the amount of bail set or impose additional or different conditions of release] the type of release and conditions of release set forth in the release order. If such amendment of the release order results in the detention of the person as a result of the person's inability to meet such conditions or in the release of the person on a condition requiring the person to return to custody after specified hours, the provisions of [Paragraph G] Subparagraphs (G)(2), (G)(3), or (G)(4) of this rule shall apply.

**Commented (MC4):** NMCDLA believes the time, (referenced as 48 hours in the proposed rule), should be an outer limit and not a normal default for COR to be determined. In jurisdictions where it is possible to have this occur immediately there should be no excuse not to do so. In fact, NMCDLA believes there is no reason why the outer time limit should not be 24 hours rather than 48 hours. Only extraordinary reasons should merit a longer period of delay. This will force courts to make the necessary changes to ensure a speedier release of non dangerous citizens. The concept that a rural court cannot staff weekends or holidays should not be allowed to dictate whether a non dangerous citizen remain unnecessarily incarcerated. Indeed, the savings from jail costs should be taken into consideration in reaching the goal of a 24 hour determination.

I. **Record of hearing.** A record shall be made of any hearing held by the district court ~~[pursuant to]~~ under this rule.

J. **Return of cash deposit.** If a person has been released by executing an appearance bond and ~~[depositing]~~ making a cash deposit ~~[set pursuant to]~~ under Subparagraph ~~[(1) or (3) of Paragraph B]~~ (B)(1) or Subparagraph (B)(3) of this rule, when the conditions of the appearance bond have been performed and the ~~[defendant's guilt for whom bail was required]~~ person's case has been adjudicated by the ~~[Court]~~ court, the clerk shall return the sum ~~[which]~~ that has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.

K. **Cases pending in magistrate or metropolitan court.** A person charged with an offense ~~[which]~~ that is not within magistrate or metropolitan court trial jurisdiction and who has not been bound over to the district court may file a petition in district court for release under this rule at any time after the person's arrest ~~[with the clerk of the district court for release pursuant to this rule]~~. Jurisdiction of the magistrate or metropolitan court to release the accused shall be terminated upon the filing of a petition for release in the district court. Upon the filing of the petition, the district court may:

(1) continue the ~~[bail set]~~ type of release and any condition of release imposed by the magistrate or metropolitan court;

(2) impose any ~~[bail]~~ other type of release or condition of release authorized by Paragraphs A, B, or D of this rule;

(3) continue any revocation of release imposed ~~[pursuant to Rule 5-403]~~ by the magistrate or metropolitan court under Rule 6-403 NMRA or Rule 7-403 NMRA; or

(4) after a hearing, revoke the release of ~~[a defendant pursuant to]~~ the person under Subparagraph ~~[(2) of Paragraph A]~~ (A)(2) of Rule 5-403 NMRA.

L. **Release from custody by designee.** ~~[Any or all of the provisions of this rule, except the provisions of Paragraphs F, G, and K of this rule, may be carried out by responsible persons designated in writing by the]~~ The chief judge of the district court may designate responsible persons in writing to implement the early release procedures set forth in Rule 5-408 NMRA. A designee shall release an arrested person from custody prior to the person's first appearance before a judge if the person is eligible for early release under Rule 5-408, provided that a designee may contact a judge for special consideration based on exceptional circumstances. No person shall be qualified to serve as a designee if such person or such person's spouse is:

(1) related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state; or

(2) employed by a jail or detention facility unless designated in writing by the chief judge of the judicial district in which the jail or detention facility is located.

M. **Bind over ~~[in]~~ to district court.** ~~[The]~~ upon notice to that court, any bond ~~[shall remain in the magistrate or metropolitan court, except that it]~~ shall be transferred to the district court upon the filing of an information or indictment ~~[or bind over to that]~~ in the district court.

N. **Evidence.** Information stated in, or offered in connection with, any order entered ~~[pursuant to]~~ under this rule, with the exception of dangerousness hearings, need not conform to the Rules of Evidence.

O. **Forms.** Instruments required by this rule shall be substantially in the form approved by the Supreme Court.

P. **Judicial discretion.** Action by any court on any matter relating to ~~[bail]~~ pretrial release shall not preclude the statutory or constitutional disqualification of a judge.

**Commented [MCS]:** NMCDLA believes when the state seeks to preventatively detain a citizen without bond pursuant to a dangerousness hearing that the standard for such a hearing must be by clear and convincing evidence and that the Rules of Evidence must apply to make sure such a standard is meaningful.

[As amended, effective January 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990; September 1, 2005; as amended by Supreme Court Order 07-8300-29, effective December 10, 2007; by Supreme Court Order No. 10-8300-033, effective December 10, 2010; as amended by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

~~Committee commentary. — [Under Section 13 of Article 2 of the New Mexico Constitution, every accused, except a person accused of first-degree murder where the proof is evident or the presumption great, is entitled to bail. Paragraph E was added in 1990 to recognize the amendment of Article 2, Section 13 of the New Mexico Constitution which permits the denial of bail for 60 days by an order entered within 7 days after incarceration if:~~

~~(1) — the defendant is accused of a felony and has been previously convicted of two or more felonies within the state; or~~

~~(2) — the defendant is accused of a felony involving the use of a deadly weapon and has a prior felony conviction within this state.]~~

~~This rule provides “the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution,” *State v. Brown*, 2014-NMSC-038, ¶ 37, 338 P.3d 1276. This rule was derived from the Federal Bail Reform Act of 1966, as amended. [Under the federal bail law, the right to bail is restated as the right to have conditions of release set by the court.] See 18 U.S.C. §§ 3142 et seq. [The 1990 amendments to Paragraphs B and C of this rule were taken from Subsections (g) and (e), respectively, of 18 USCA § 1342.~~

~~In 1990 this rule was amended to encourage more releases on personal recognizance. Release conditions may now be imposed in addition to the execution of a unsecured personal appearance bond or a secured bond.] Because [bail] the type of release and additional conditions of release will usually be set initially by a magistrate or metropolitan court judge, Rules 6-401 and 7-401 NMRA govern the procedure in those courts. The magistrate, municipal, and metropolitan court [bail] pretrial release rules were derived from and are substantially identical to this rule.~~

~~Under this rule, the authorized types of [bonds authorized to be posted] release are set forth in the order of priority they are to be considered by the judge [or designee]. The first priority is release upon the execution of a personal recognizance or unsecured appearance bond. If the court determines that release on personal recognizance or upon the execution of an unsecured bond will not reasonably assure the appearance of the defendant as required, the court may require a secured bond.~~

~~If a secured bond is required to assure the appearance of the defendant, the judge or designee must first consider requiring an appearance bond with a cash deposit of 10% or such other percentage of the amount of the bond. If this is inadequate, the court then must consider a property bond where the property belongs to the defendant or other unpaid surety. If the court has not authorized a cash deposit of less than 100% of the amount of bond set, the defendant may execute an appearance bond and deposit one hundred percent (100%) of the amount of the bond with the court. Last of all the defendant may purchase a bond from a paid surety. A paid surety may execute a corporate surety bond or a property bond.~~

~~A real or personal property bond may only be executed by a paid surety if the conditions of Rule 5-401B NMRA are met. Under the 1990 amendments to Rule 5-401B NMRA, a bond which has as collateral real or personal property is authorized only in those districts in which an order has been entered finding that the pledging of an irrevocable letter of credit will result in the detention of persons otherwise eligible for release.~~

~~Although [bail] pretrial release hearings are not required to be a matter of record in the magistrate, metropolitan, or municipal courts, [Form 9-302A] Paragraph A of this rule requires the~~

~~[judge or designee to set forth]~~ court to make written findings regarding the reasons why a secured bond was required rather than release on personal recognizance or unsecured bond.

The provision allowing the court to set additional conditions of release in order to assure "the orderly administration of justice" was derived from American Bar Association Standards Relating to Pretrial Release, Section 5.5 (Approved Draft 1968) and 18 USCA § 3142 and Rule 46(b) of the Federal Rules of Criminal Procedure.

~~[Pursuant to]~~ Under NMSA 1978, Section 31-3-1 ~~[NMSA-1978]~~, the court may appoint a designee to carry out the provisions of this rule. As set forth in Paragraph L of this rule, a designee [Designees] must be named in writing. A person may not be appointed as a designee if such person is related within the second degree of blood or marriage to a paid surety licensed in this state to execute bail bonds. A jailer may [not] be appointed as a designee. Rule 5-408 NMRA governs the limited circumstances under which a designee shall release an arrested person from custody prior to that person's first appearance before a judge.

Paragraph ~~[M]~~ N of this rule dovetails with ~~[Subparagraph (2) of Paragraph D of]~~ Rule ~~[11-1101]~~ 11-1101(D)(2) NMRA. Both provide that the Rules of Evidence are not applicable to proceedings in either the magistrate or district court with respect to matters of release or bail. [As amended by Supreme Court Order 07-8300-29, effective December 10, 2007; as amended by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**[NEW MATERIAL]**

**Rule 5-408. Pretrial release by designee.**

A. **Scope.** This rule shall be implemented by any person designated in writing by the chief judge of the district court under Rule 5-401(L) NMRA. A designee shall issue a written order to release a person from detention prior to the person's first appearance before a judge if the person is eligible for early release under either Paragraph B or Paragraph C of this rule, provided that a designee may contact a judge for special consideration based on exceptional circumstances. A judge may issue a pretrial order imposing a type of release and conditions of release that differ from those set forth in Paragraphs B and C of this rule.

B. **Minor offenses; release on recognizance.**

(1) **Persons eligible.** A designee shall release a person from custody on personal recognizance, subject to the condition that the person not commit a federal, state, or local crime during the period of release, if the person

(a) has been arrested and detained for a municipal code violation, game and fish offense under Chapter 17 NMSA 1978, petty misdemeanor, or misdemeanor, subject to the exceptions listed in Subparagraph (B)(2) of this rule; and

(b) is either a first-time offender with no arrest history or a person with no history of arrests in the past twenty-four (24) months.

~~(2) — Exceptions. A person arrested for any of the following offenses is not eligible for release on recognizance under this paragraph:~~

~~(a) battery under Section 30-3-4 NMSA 1978;~~

~~(b) aggravated battery under Section 30-3-5(B) NMSA 1978;~~

~~(c) assault against a household member under Section 30-3-12 NMSA 1978;~~

~~(d) battery against a household member under Section 30-3-15 NMSA 1978;~~

- ~~(e) aggravated battery against a household member under Section 30-3-16 NMSA 1978;~~
- ~~(f) criminal damage to property of a household member under Section 30-3-18 NMSA 1978;~~
- ~~(g) abandonment of a child under Section 30-6-1(B) NMSA 1978;~~
- ~~(h) negligent use of a deadly weapon under Section 30-7-4 NMSA 1978;~~
- ~~(i) stalking under Section 30-3A-3 NMSA 1978; or~~
- ~~(j) driving under the influence of intoxicating liquor or drugs in violation of Section 66-8-102 NMSA 1978 or any municipal code or ordinance.~~

C. **Early release based on risk assessment.** A designee shall release a person from custody prior to the person's first appearance before a judge if the person qualifies for early release based on a risk assessment and an early release schedule approved by the Supreme Court. The early release schedule shall provide for a specific type of release and conditions of release based on the likelihood that the person will appear in court as required, will not commit a new crime while released pending trial, and will not pose a danger to the safety of any other person or the community, as determined by a pretrial risk assessment instrument approved by the Supreme Court.

D. **Type of release and conditions of release set by judge.** A person who is not eligible for pretrial release by a designee under either Paragraph B or Paragraph C of this rule shall have the type of release and conditions of release set by a judge under Rule 5-401 NMRA within forty-eight (48) hours after the person is booked into the detention facility.

[Adopted by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**Committee commentary.** — Under NMSA 1978, Section 31-1-1 and Paragraph L of Rule 5-401, the chief judge of the district court may designate responsible persons in writing who are authorized to release certain arrested persons from detention prior to the arrested person's first appearance before a judge. The exceptions set forth in Subparagraph (B)(2) of this rule include the misdemeanors and petty misdemeanors listed in the Victims of Crime Act, NMSA 1978, §§ 31-26-1 to -16, and the Crimes Against Household Members Act, NMSA 1978, §§ 30-3-10 to -18, as well as battery and driving under the influence of intoxicating liquor or drugs.

[Adopted by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**[NEW MATERIAL]**

**Rule 6-408. Pretrial release by designee.**

A. **Scope.** This rule shall be implemented by any person designated in writing by the presiding judge of the magistrate court under Rule 6-401(K) NMRA. A designee shall issue a written order to release a person from detention prior to the person's first appearance before a judge if the person is eligible for early release under either Paragraph B or Paragraph C of this rule, provided that a designee may contact a judge for special consideration based on exceptional circumstances. A judge may issue a pretrial order imposing a type of release and conditions of release that differ from those set forth in Paragraphs B and C of this rule.

B. **Minor offenses; release on recognizance.**

(1) **Persons eligible.** A designee shall release a person from custody on personal recognizance, subject to the condition that the person not commit a federal, state, or local crime during the period of release, if the person

(a) has been arrested and detained for a municipal code violation, game and fish offense under Chapter 17 NMSA 1978, petty misdemeanor, or misdemeanor, subject to the exceptions listed in Subparagraph (B)(2) of this rule; and

**Commented [MC6]:** NMCDLA is concerned the exceptions will swallow the rule, and indeed the exceptions will become the guideline for the court and not just the designee. All citizens who have no conviction history in the past 24 months and are charged with misdemeanors should be eligible for this release method. Additionally the current list of exceptions is contrary to the New Mexico Constitution and the holding of *State v. Brown*. NMCDLA believes this part of the proposed rule is contrary to current law in that it makes bail decisions, and the timing of bail decisions, based on the charges alone.

(b) is either a first-time offender with no arrest history or a person with no history of arrests in the past twenty-four (24) months.

(2) **Exceptions.** A person arrested for any of the following offenses is not eligible for release on recognizance under this paragraph:

- (a) battery under Section 30-3-4 NMSA 1978;
- (b) aggravated battery under Section 30-3-5(B) NMSA 1978;
- (c) assault against a household member under Section 30-3-12 NMSA 1978;
- (d) battery against a household member under Section 30-3-15 NMSA 1978;
- (e) aggravated battery against a household member under Section 30-3-16 NMSA 1978;
- (f) criminal damage to property of a household member under Section 30-3-18 NMSA 1978;
- (g) abandonment of a child under Section 30-6-1(B) NMSA 1978;
- (h) negligent use of a deadly weapon under Section 30-7-4 NMSA 1978;
- (i) stalking under Section 30-3A-3 NMSA 1978; or
- (j) driving under the influence of intoxicating liquor or drugs in violation of Section 66-8-102 NMSA 1978 or any municipal code or ordinance.

C. **Early release based on risk assessment.** A designee shall release a person from custody prior to the person's first appearance before a judge if the person qualifies for early release based on a risk assessment and an early release schedule approved by the Supreme Court. The early release schedule shall provide for a specific type of release and conditions of release based on the likelihood that the person will appear in court as required, will not commit a new crime while released pending trial, and will not pose a danger to the safety of any other person or the community, as determined by a pretrial risk assessment instrument approved by the Supreme Court.

D. **Type of release and conditions of release set by judge.** A person who is not eligible for pretrial release by a designee under Paragraph B or Paragraph C of this rule shall have the type of release and conditions of release set by a judge under Rule 6-401 NMRA within forty-eight (48) hours after the person is booked into the detention facility.

**Committee commentary.** — Under NMSA 1978, Section 31-3-1 and Paragraph K of Rule 6-401, the presiding judge of the magistrate court may designate responsible persons in writing who are authorized to release certain arrested persons from detention prior to the arrested person's first appearance before a judge. The exceptions set forth in Subparagraph (B)(2) of this rule include the misdemeanors and petty misdemeanors listed in the Victims of Crime Act, NMSA 1978, §§ 31-26-1 to -16, and the Crimes Against Household Members Act, NMSA 1978, §§ 30-3-10 to -18, as well as battery and driving under the influence of intoxicating liquor or drugs.

[Adopted by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

[NEW MATERIAL]

**Rule 7-408. Pretrial release by designee.**

A. **Scope.** This rule shall be implemented by any person designated in writing by the chief judge of the metropolitan court under Rule 7-401(J) NMRA. A designee shall issue a written order to release a person from detention prior to the person's first appearance before a judge if the person is eligible for early release under either Paragraph B or Paragraph C of this rule, provided that a designee may contact a judge for special consideration based on exceptional circumstances. A judge may issue

a pretrial order imposing a type of release and conditions of release that differ from those set forth in Paragraphs B and C of this rule.

**B. Minor offenses; release on recognizance.**

(1) **Persons eligible.** A designee shall release a person from custody on personal recognizance, subject to the condition that the person not commit a federal, state, or local crime during the period of release, if the person

(a) has been arrested and detained for a municipal code violation, game and fish offense under Chapter 17 NMSA 1978, petty misdemeanor, or misdemeanor, subject to the exceptions listed in Subparagraph (B)(2) of this rule; and

(b) is either a first-time offender with no arrest history or a person with no history of arrests in the past twenty-four (24) months.

(2) **Exceptions.** A person arrested for any of the following offenses is not eligible for release on recognizance under this paragraph:

(a) battery under Section 30-3-4 NMSA 1978;

(b) aggravated battery under Section 30-3-5(B) NMSA 1978;

1978;

(c) assault against a household member under Section 30-3-12 NMSA

1978;

(d) battery against a household member under Section 30-3-15 NMSA

NMSA 1978;

(e) aggravated battery against a household member under Section 30-3-16

30-3-18 NMSA 1978;

(f) criminal damage to property of a household member under Section

(g) abandonment of a child under Section 30-6-1(B) NMSA 1978;

(h) negligent use of a deadly weapon under Section 30-7-4 NMSA 1978;

(i) stalking under Section 30-3A-3 NMSA 1978; or

(j) driving under the influence of intoxicating liquor or drugs in violation

of Section 66-8-102 NMSA 1978 or any municipal code or ordinance.

**C. Early release based on risk assessment.** A designee shall release a person from custody prior to the person's first appearance before a judge if the person qualifies for early release based on a risk assessment and an early release schedule approved by the Supreme Court. The early release schedule shall provide for a specific type of release and conditions of release based on the likelihood that the person will appear in court as required, will not commit a new crime while released pending trial, and will not pose a danger to the safety of any other person or the community, as determined by a pretrial risk assessment instrument approved by the Supreme Court.

**D. Type of release and conditions of release set by judge.** A person who is not eligible for pretrial release by a designee under Paragraph B or Paragraph C of this rule shall have the type of release and conditions of release set by a judge under Rule 7-401 NMRA within forty-eight (48) hours after the person is booked into the detention facility.

**Committee commentary.** — Under NMSA 1978, Section 31-1-1 and Paragraph K of Rule 5-401, the chief judge of the metropolitan court may designate responsible persons in writing who are authorized to release certain arrested persons from detention prior to the arrested person's first appearance before a judge. The exceptions set forth in Subparagraph (B)(2) of this rule include the misdemeanors and petty misdemeanors listed in the Victims of Crime Act, NMSA 1978, §§ 31-26-1 to -16, and the Crimes Against Household Members Act, NMSA 1978, §§ 30-3-10 to -18, as well as battery and driving under the influence of intoxicating liquor or drugs.

[Adopted by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

[NEW MATERIAL]

**Rule 8-408. Pretrial release by designee.**

A. **Scope.** This rule shall be implemented by any person designated in writing by the presiding judge of the municipal court under Rule 8-401(H) NMRA. A designee shall issue a written order to release a person from detention prior to the person's first appearance before a judge if the person is eligible for early release under either Paragraph B or Paragraph C of this rule, provided that a designee may contact a judge for special consideration based on exceptional circumstances. A judge may issue a pretrial order imposing a type of release and conditions of release that differ from those set forth in Paragraphs B and C of this rule.

B. **Minor offenses; release on recognizance.**

(1) **Persons eligible.** A designee shall release a person from custody on personal recognizance, subject to the condition that the person not commit a federal, state, or local crime during the period of release, if the person RCR No. 633 13

(a) has been arrested and detained for a municipal code violation or a petty misdemeanor, subject to the exceptions listed in Subparagraph (B)(2) of this rule; and

(b) is either a first-time offender with no arrest history or a person with no history of arrests in the past twenty-four (24) months.

(2) **Exceptions.** A person arrested for any of the following offenses is not eligible for release on recognizance under this paragraph:

(a) battery;

(b) any offense involving domestic violence or a crime against a household member;

(c) negligent use of a deadly weapon;

(d) stalking; or

(e) driving under the influence of intoxicating liquor or drugs.

C. **Early release based on risk assessment.** A designee shall release a person from custody prior to the person's first appearance before a judge if the person qualifies for early release based on a risk assessment and an early release schedule approved by the Supreme Court. The early release schedule shall provide for a specific type of release and conditions of release based on the likelihood that the person will appear in court as required, will not commit a new crime while released pending trial, and will not pose a danger to the safety of any other person or the community, as determined by a pretrial risk assessment instrument approved by the Supreme Court.

D. **Type of release and conditions of release set by judge.** A person who is not eligible for pretrial release by a designee under Paragraph B or Paragraph C of this rule shall have the type of release and conditions of release set by a judge under Rule 8-401 NMRA within forty-eight (48) hours after the person is booked into the detention facility.

**Committee commentary.** — Under NMSA 1978, Section 31-3-1 and Paragraph J of Rule 8-401, the presiding judge of the municipal court may designate responsible persons in writing who are authorized to release certain arrested persons from detention prior to the arrested person's first appearance before a judge.

[Adopted by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

[NEW MATERIAL]

**9-302A. Order for release on recognizance by designee.**

[For use with District Court Rule 5-408(B) NMRA,  
Magistrate Court Rule 6-408(B) NMRA,  
Metropolitan Court Rule 7-408(B) NMRA, and  
Municipal Court Rule 8-408(B) NMRA]

STATE OF NEW MEXICO

[COUNTY OF \_\_\_\_\_]

[CITY OF \_\_\_\_\_]

\_\_\_\_\_ COURT

RCR No. 633

[STATE OF NEW MEXICO]  
[COUNTY OF \_\_\_\_\_]  
[CITY OF \_\_\_\_\_]

v. No. \_\_\_\_\_

\_\_\_\_\_, Defendant.

**ORDER FOR RELEASE ON  
RECOGNIZANCE BY DESIGNEE**

IT IS ORDERED that the defendant be released on personal recognizance on the defendant's promise to appear and subject to the condition that the defendant not commit any federal, state, or local crime during the period of release.

**APPEARANCE BOND**

I \_\_\_\_\_, defendant in the above-entitled matter, do hereby bind myself to the following conditions of release:

I agree to appear before the above court on \_\_\_\_\_, at \_\_\_\_\_ [a.m.] [p.m.] in courtroom \_\_\_\_\_ and at such other places as I may be required to appear, in accordance with any and all orders and directions relating to my appearance in the above-entitled matter as may be given or issued by the above court or any municipal, magistrate, metropolitan, district, or appellate court to which the above entitled case may be filed, removed, or transferred.

I understand that the court may have me arrested at any time, without notice, to review and reconsider these conditions.

I understand that if I fail to appear as required, I may be prosecuted and sent to [jail] [the penitentiary] for the separate offense of failure to appear. I agree to comply fully with each of the conditions imposed on my release and to notify the court promptly in the event I change my contact information indicated below.

I understand that my conditions of release may be revoked and that I may be charged with a separate criminal offense if I intimidate or threaten a witness, the victim, or an informant, or if I otherwise obstruct justice.

I further understand that my conditions of release will be revoked if I violate a federal, state, or local criminal law.

\_\_\_\_\_  
Defendant's signature

\_\_\_\_\_  
Date of signature

RCR No. 633

\_\_\_\_\_  
Time of release

\_\_\_\_\_  
Date of release

\_\_\_\_\_  
Cell phone number

\_\_\_\_\_  
Alternate phone number

\_\_\_\_\_  
Email address

\_\_\_\_\_  
Mailing address (include city, state, and zip code)

\_\_\_\_\_  
Physical address (include city, state, and zip code)

The above conditions of release are hereby approved. The defendant shall be released from custody upon the execution of this agreement.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Designee

[Approved by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**TOVA INDRITZ**  
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**FAXED  
 ORIGINAL**

November 12, 2015 SUPREME COURT OF NEW MEXICO  
 FILED

Joey D. Moya, Clerk  
 New Mexico Supreme Court  
 P. O. Box 848  
 Santa Fe, NM 87504-0848

NOV 12 2015

by fax only (505) 827-4837



**COMMENTS ON PROPOSED AMENDMENTS TO  
 THE RULES GOVERNING PRETRIAL RELEASE IN NEW MEXICO COURTS**

Dear Mr. Moya:

I am a criminal defense lawyer who has been a member of the New Mexico bar for 40 years. I have practiced in federal court, state court, and tribal courts.

I generally support the proposed amendments to Rule 5-401 NMRA as decreasing the likelihood of holding in custody persons who are financially unable to post money bond without reducing their likelihood of appearing in court to face pending charges, and implementing the constitutional rights discussed in State v. Brown, 2014- NMSC-038, 338 P.3d 1276.

First, it should be noted that New Mexico needs to invest more funds and resources into pre-trial services programs in all counties, so that persons released on their own recognizance who need services or supervision can access those. It is far cheaper for the taxpayer to fund pre-trial services than jail beds, and far more fair to those accused, and presumed innocent, of crimes.

Second, one principle of State v. Brown is that the charge against the accused person who is presumed innocent should not be the determinant of whether that person should be detained pending trial. It is on this premise that fixed bail schedules based on the nature of the charges are no longer allowed. Therefore, how can the nature of the charge be the basis for exemptions from the presumption of release on one's own recognizance, as set forth at page 9, section (B)(2) which contains a list of charges? That list of charges should be deleted from the proposed rules.

Third, the general principles of these rules should be as follows:

- There is a presumption of release.
- The presumption is release on recognizance or unsecured bond.
- The burden is on the government to prove by clear and convincing evidence that the accused

Clerk of the Court Joey D. Moya  
 November 12, 2015  
 Page 2

is either a flight risk or a danger to the community.

--Those presumptions and burdens begin immediately upon arrest, not after a waiting period in jail.

--This applies to all felonies and misdemeanors (with constitutionally named exceptions), not just to "minor offenses" and with no exceptions according to the charge.

--A bond cannot be required based on the charge alone. (See State v. Brown).

--With respect to the timeline, a release determination should be made immediately upon arrest, either by the court or the court's designee (presumably the jail staff), with an outside limit of 24 hours, not 48 hours. Setting the 48 hours as these proposed rules do will come to be seen as the norm, rather than the rare maximum. Of course, in the rural areas in particular this will require the resources for either the court or its designee to be available on weekends and other times that they may not currently be available.

Fourth, I do have several specific suggestions for improvement in the proposed rules, as follows:

-- page 2, next to last line: Rule 5-401 B(1): I suggest adding "up to" before "ten percent (10%)" and deleting "or secured by such greater or lesser percentage as is reasonably necessary" in the next to last and last lines on that page.

--page 3: section C(2)(a): delete "or involves a narcotic drug"

--page 3: section (C)(2)(viii): after "history relating to drug or alcohol abuse" add "if the crime alleged involves drug or alcohol abuse".

--page 4: section (D)(2)(e): provide for an exception to avoiding contact with an alleged victim or potential witness if the judge examines the particular facts of the case and determines that the positive goal of keeping a family intact outweighs the likelihood of tampering with witnesses.

--page 4: section (D)(2)(h): add in "if the charges involve allegations of violence"

--page 4: section (D)(2)(i): add in "if the charges involve allegations of use of alcohol or use of a narcotic drug"

--page 4: section (D)(2)(k): either remove this sentence entirely or add in "if the charges involve allegations of substance abuse"

page 5: section (E)(3): second line "apperance" should be "appearance" and after that, after "set forth" add "in writing the reasons for"

page 5: section (G)(4): third line, after "a hearing" add "within ten (10) days"

Clerk of the Court Joey D. Moya  
November 12, 2015  
Page 3

page 8: first line: After "If a secured bond is" add "set" and delete "required to assure the appearance of the defendant"

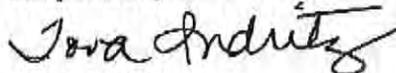
page 9: section (B)(1): delete section (a), then in what is now (b) delete "is either a first time offender with no arrest history", change "arrests" to "convictions", and add at the end "except for a person charged with a crime of violence", so that it reads "a person with no history of convictions in the past twenty-four (24) months, except for a person charged with a crime of violence." A person should not be detained based on past charges or arrests that did not result in convictions.

page 9: section (B)(2): delete the list of (a) through (j). The nature of the charge should not be the basis of the release decision, per State v. Brown. If, indeed, any charges are to be listed here, substitute a reference to the NM Constitution list of offenses at Article II, section 24A.

I suggest the same changes with regard to rules for magistrate, metropolitan, and municipal courts.

Thank you for considering my suggestions.

Respectfully submitted,



Tova Indritz  
Attorney at Law

Law Offices of  
**Michael L. Stout**

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New Mexico Board Recognized  
Trial Specialist in Criminal Law

November 12, 2015

RE: Proposed Pre-Release Rules

SUPREME COURT OF NEW MEXICO  
FILED

NOV 12 2015



Dear Mr. Moya,

I appreciate the work of the Court and its Committee in addressing pre-trial release issues. I am writing to comment on the proposed rule changes.

I have some issues of concern:

1. **The presumption of release.** The Court in *State vs. Brown* made strong statements about the principles of release and the presumption of release on recognizance or unsecured bond, the adverse effects of pretrial incarceration on justice, the purposes of bail not being for punishment and the consequent burden being on the government for confining an accused. Unfortunately, in some respects the proposed rules detract from those principles. While *Brown* speaks eloquently about the goal of release, the proposed rules often lead to more incarceration.

This is not the "fault" of the Court or its committee; it is simply continuation of the age-old mindset ingrained in the system in New Mexico. That mindset must be changed over time, beginning with these rules. To that end, the presumption of release must continually be honored.

2. **Bail Schedules.** If the presumption is to be honored bail schedules cannot simply be eliminated; they must be replaced. Bail schedules are eliminated by the rule based on the Court's reasoning in *Brown* that bonds must not be set "based on the charge alone" because they are not individualized determinations.

However, to eliminate the schedules without a replacement method for quick release makes matters worse. The principles of *Brown* are not honored and arrestees are incarcerated with no release conditions at all as they wait in jail. To eliminate a flawed method of release by allowing no release at all is a step backward.

I'm certain the Court did not intend to incarcerate more people when it issued *Brown*. But that is the effect if there is nothing to replace the bail schedules. In truth, the evil of bail schedules is not that people were released based on the charges, but that surety bonds were used as the currency of release, causing great hardship on families and defendants or causing unnecessary incarceration

for the indigent. If the Court would not allow surety bonds in a bail schedule or at least would require any money paid to be refundable, the problems of bail schedules would be greatly reduced with no ill effect on public safety. The cure for unequal or unfair incarceration is not to compensate by jailing those who would normally bail out, but is to release the indigent that could not previously afford to be released. The rules appear to take the former approach.

Absent adopting my suggestion above for changing bail schedules, the replacement for bail schedules should be a mechanism that can quickly allow release, perhaps a combination of the criminal history of the defendant, community ties and the charge. Applying risk assessment instruments is wonderful except that, as the Court no doubt has heard numerous times, most jurisdictions do not have the resources for such a practice. In the meantime the Court should not simply allow for more incarceration.

3. **Exceptions.** The exception to the presumption of release is already in law – that is flight risk or danger. The proposed rules create a new procedure with a designee for determining the “persons eligible” for recognizance release when charged with “minor offenses” and then makes “exceptions” for those charged with certain offenses. This process is wrong under the New Mexico constitution, the old rules and *State vs. Brown*, and it is internally inconsistent within the rules.

The “persons eligible” for release are all defendants bailable under the constitution, not a select group that requires any further definition. This includes those charged with major and minor offenses. In fact, the defendant in *Brown* was charged with murder.

The exception to the presumption of release is already given in the law and in the rules; it is defined as flight risk or danger. There is no need to create other exceptions. If a person is a flight risk or danger they are eligible for more onerous secured bonds, regardless of the charge..

It is especially troubling that the rules list certain crimes as the exception to recognizance release after earlier rules prohibit bond schedules “fixed according to the nature of the charge.” The effect of having both provisions is to not allow release according to the charge alone, but to allow incarceration according to the charge alone, a contradiction the Court certainly does not want to allow.

Providing exceptions to the fundamental principle of release is dangerous in the best of scenarios because it will inevitably invite more and more exceptions over time, especially as the next high profile case hits the media. In fact, even in the comments to these proposals are several suggested additions to the list of crimes that should be excepted from presumed release. Of course, each suggestion presumes that the defendant is guilty of the conduct charged. If that person is to be incarcerated it must be on some basis other than the charge alone.

4. **48 Hours is not the standard for setting conditions.** Conditions should be set immediately. Setting a time in the rules will not be seen as the exception; it will become the standard. The Court and the committee have heard much information about the ills of even short times of incarceration. The 48 hour time comes from the *Riverside* case in the United States Supreme Court, but the

Court there allowed that because of exceptional circumstances; the standard was not blessed by the Court. This court should not do so now in New Mexico. It would only allow courts to use an excuse for not dealing with release for days at a time.

5. Simplify. Go back to basics. I suggest that the Court go back to basics and simplify the process rather than complicating with additional procedural provisions. In other words:
  - a. Presume release on recognizance or unsecured bond;
  - b. Provide an exception if a defendant is a flight risk or danger;
  - c. Require the government to show that the exception is warranted by some evidence other than the charge alone.
  - d. Require this to be done immediately, not after the defendant waits in jail for several hours.
  - e. These standards will apply to all charges, not just "minor" charges. Only if a defendant is a flight risk or danger will the exception to release be triggered.

Thank you for considering my comments.

Sincerely,

*Michael L. Stout*

Michael L. Stout

by:  Lendal Harris

**Proposed Rule Changes Comment Form.**

**Name:** Gregory J. Fouratt  
**Phone:** 505-827-3370  
**Email:** gfouratt@comcast.net

**Rule No:** 5-401, 5-408, 6-408, 7-408, 8-408, 9-302

**Comments:**

Because of the length of my comments, I have faxed them to you. Thank you for considering them.

SUPREME COURT OF NEW MEXICO  
FILED

NOV 12 2015

A handwritten signature in black ink, appearing to be 'G. Fouratt', is written over the date stamp.

Gregory J. Fouratt  
P.O. Box 1121  
Albuquerque, NM 87103  
NM Bar #9209

**FAXED  
ORIGINAL**

SUPREME COURT OF NEW MEXICO  
FILED

NOV 12 2015



November 12, 2015

Joey D. Moya  
Clerk of Court & Chief Counsel  
Supreme Court of New Mexico  
P.O. Box 848  
Santa Fe, NM 87504

RE: Proposed Amendments to the Rules Governing Pretrial Release

Dear Mr. Moya:

I am in full agreement with the comments submitted to you by my longtime former colleague Peter M. Ossorio. With his permission, I am borrowing his comments en toto and restating them below. All of my comments are solely my personal opinion and not the position of current, future, or former employers.

**Comments on Rule 5-401:**

A.

After "not reasonably assure the appearance of the person as required"  
Add "and/or the safety of any person and the community."

Reason: Both flight risk or danger or both are exceptions to the general presumption of release on recognizance or unsecured appearance bond. The recommended addition also is consistent with 18 U.S.C. § 3142(b).

C.

(1)  
Retain the conjunctive use of factors in C. (2) in addition to any approve pretrial risk assessment.

(2)  
After "the available information concerning"  
Add ", but not limited to,"

Reasons: In making the best possible decision, the court should not be constrained to consider only the PTRAs; although the PTRAs will ideally be more reliable than the factors

generally adopted from 18 U.S.C. § 3142, the court should be encouraged to consider *any* factor(s) – which might permit it to release the person while reasonably assuring appearance and safety.

**(2)(a)**

After “circumstances of the offense charged”

Delete “including whether this offense is . . . .”

Reasons: Considering certain types of crimes in 18 U.S.C. § 3142(g)(1), from which Rule 5-401 C (2) is derived, is relevant to federal courts because of the rebuttable presumptions for detention attaching to offenses listed in 18 U.S.C. §§ 3142(e)(2) & (3). Unless New Mexico’s Supreme Court is going to adopt similar presumptions, there is no need to call the trial courts’ attention to only two types of offenses; it should encourage and rely upon the trial courts to take a wide and searching approach to considering the true nature and full circumstances of the charged offense. Further, to the extent which “narcotic drugs” may indicate a flight risk or danger, that category is under inclusive and too restrictive. Non-narcotic controlled substances – or even non-controlled substances such as “spice” -- may be of far greater concern, yet are not covered.

**(2)(e)**

Either delete the entire factor or add “and does not pose a threat to the safety of any other person and the community.”

Reason: If the phrase “but not limited to” is added to (c)(2), as suggested above, (2)(e) is superfluous. If the court is to be reminded to consider other, unenumerated, factors, it should be reminded to consider those in relation not just to the likelihood of appearance but to the seriousness of the danger to the community that would be posed by the person’s release. See 18 U.S.C. § 3142(g) (4).

Comment: (2)(e) may have been inserted to reflect the provision in 18 U.S.C. § 3142(g)(4) incorporating case law that the court can consider the source of any property used to secure the person’s appearance. Although this certainly is important, in the rare cases where it applies the court has the inherent authority to consider whether a criminal organization intends to forfeit the property offered to secure the person’s appearance.

**D. (2)(e)**

Comment: An order of no contact with victims and witnesses carries the risk of unintended interference with physical, financial and emotional support by the accused for family members. It can make a bad situation worse. However, it may be essential to

complying with the constitutional mandate that victims have “the right to be reasonably protected from the accused . . . .” N.M. Const. art II, § 24 A(3). Before making no contact an absolute condition of release, it would be desirable for the court to hear from CYFD and the prosecutor’s victim-witness advocate. In the federal system, 18 U.S.C. § 3145(a) provides a framework for the parties to request amendment of conditions of release – and that the motion “shall be determined promptly. My suggested remedy, at 504 G (5) *infra*, is to clarify/provide that all conditions of release are reviewable (and appealable) upon motion of either party.

E. (3)

Correct typo in “apperance (sic) bond.”

F. Add: “The hearing shall be held immediately upon the person’s first appearance before the court unless that person or the attorney for the State seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days and a continuance for the State shall not exceed three days.”

Reasons(s): The added language parallels that of 18 U.S.C. § 3142 (f) (2), which has been in effect for decades. Unlike the more common “reactive” cases in which the State may be unaware of the person until after his/her arrest and booking, the rarer, proactive cases involving pre-arrest investigation and grand jury indictments are the ones most likely to involve persons who pose a significant risk of flight or danger. In these cases and where the State learns post-arrest in a reactive case that the person poses unusual risk, release decisions should be made only by the court – and only after sufficient time for the parties to marshal detailed and verified information. This is not feasible over weekends, especially when combined with holidays. Even in the federal system, defense counsel are often not appointed until a defendant’s first appearance and frequently require additional time to contact family members, employers, half-way houses, treatment programs, electronic monitoring providers, etc. to put together a comprehensive and convincing release “package” to present to the court.

G.

(1)

Before “The court shall issue . . . .”

Add “Unless the state has moved to detain the person without bail pending trial, and either or both parties have moved for a continuance”

Change “within (48 Hours)” to within “seventy-two (72) hours.”

Reasons: This clarifies the distinction between when there is a detention motion by the state and when there is not. As discussed, *supra*, it is not feasible for the court to conduct a meaningful hearing within 48 hours of a Friday night arrest. For the vast majority of cases where the State does not move to detain and the only question is what conditions of release are appropriate, release from custody by a designee under Rule 5-408 or the court at an initial appearance is both feasible and desirable.

After "The court shall issue an order"  
Add "denying release or"

Reason: As presently written, the plain language of the rule requires the court to set conditions of release in all cases (unless the person has already been released). That contradicts 504 F which posits detaining a person without bail before trial.

(5)

Insert "any" so that the sentence reads: "A hearing to review any conditions of release under this paragraph shall be held by the district court."

Add "upon motion of either party. Either party may file an interlocutory appeal from an order denying pretrial release or imposing conditions of release."

Reason: As discussed, *supra*, this explicitly clarifies/provides an avenue of both review and appeal of either an order denying pre-trial release or imposing/failing to impose specific conditions of release – such as a no contact condition which may unnecessarily disrupt and worsen families.

- N. It is importance to retain this provision which permits the trial judge to consider all evidence, regardless of whether it conforms to the rules of evidence. Requiring the parties to comply with the rules of evidence will add delay and expense for the parties. The trial court can be relied upon to give whatever weight is appropriate to the evidence.
- P. After "If secured bond is required to assure the appearance of the defendant"  
Add "or safety of the community"  
OR just delete "to assure the appearance of the defendant."

Reason: If one reason for a secured bond is to be specified, the other should also. However, the bases for imposing secured bonds is covered elsewhere in the rule, so it may be more succinct to simply eliminate a superfluous reference "to assure the appearance of the defendant."

**Comments on Rule 5-408****B. (2)**

**Add:** *“Exceptions. A person for which there is an outstanding warrant for arrest from another jurisdiction or arrested for any of the following offenses . . . .”*

**Reason(s):** Although a person may be arrested for a minor offense in one jurisdiction, s/he may actually be charged with an extremely serious offense in another jurisdiction. Rather than relying on the designee using the “exceptional circumstances” provision of Rule 5-408A, Rule 5-408 B (2) should clearly exclude such persons from release before appearing before a judge. Comity with other counties, states and federal authorities – as well as common sense concerns about safety and flight risk, make it inappropriate to release such a person without having a judicial hearing. Limiting the exclusion to those persons who have an outstanding felony arrest warrant would not be sufficient to recognize that other jurisdictions may have similar offenses to the ones listed in 5-408B (2) (a) through (j) – but, because they are not literally the identical New Mexico offense listed as exception, a plain reading of the rule could result in release of a person whose conduct was the same as one of the New Mexico offense exceptions.

**C. Before “A designee shall release . . . .”**

**Add:** *“Unless there is an outstanding warrant for arrest from another jurisdiction”*

**Reasons:** Same as 5-401 G (1) and 5-408 B (2), *supra*. Even if a Supreme Court approved risk assessment incorporates as one criterion, the existence and nature of any outstanding arrest warrants, common sense and comity require providing the issuing jurisdiction with notice and an opportunity to be heard by the court.

**D. Change: “within forty-eight (48) hours after the person is booked” to “within seventy-two hours . . . .”**

**Reasons:** Same as 5-401 G (1), *supra*. Although a 48 hour deadline is a worthy goal, given the current financing and staffing of the judiciary, the district attorneys, and the public defenders, it makes no sense to have a rule-imposed deadline which simply cannot be met in a meaningful way.

**Comments on Rules 6-408, 7-408 and 8-408:**

See comments on 5-408 A, C & D, *supra*, regarding exceptions for outstanding arrest warrants and substituting a 72 hour limit for the proposed 48 hours.

**Comment on Rule 9-302A Order for Release:**

This form should be provided to the defendant in his/her preferred language, after the releasing authority verifies that the defendant is literate in that language. If the defendant does not read or speak English, Spanish, or Navajo, the form should be read to him/her by a court-approved interpreter and the releasing authority should make a record of the defendant's understanding of, and agreement to, the conditions of release.

**Reason:**

Pretrial release should be an event thoroughly understood and agreed to by the defendant (and counsel, if any). In an increasingly multi-cultural state, it is the state's responsibility to ensure the defendant understands what is expected of him/her and the full consequences of any violation.

Thank you for the opportunity to comment on this important topic.

Sincerely,



Gregory J. Fouratt

Zimbra

supjdm@nmcourts.gov

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**Comment to proposed rule change regarding Pretrial Release**

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**From :** Joseph Gribble <jjg@crowleygribble.com>

Thu, Nov 12, 2015 04:58 PM

**Subject :** Comment to proposed rule change regarding  
Pretrial ReleaseSUPREME COURT OF NEW MEXICO  
FILED**To :** nmsupremecourtclerk@nmcourts.gov

NOV 12 2015

Dear Mr. Moya,



I am writing to comment on two aspects of the proposed rule change regarding pretrial services which appear to conflict with the New Mexico Constitution. The first issue is the potential forty-eight (48) hour no-bond hold pending judicial review. This conflicts with the guarantee that all persons are entitled to be released pursuant to the Bill of Rights of the New Mexico Constitution. Proposed Rule 5-401(G) states "[t]he court shall issue an order setting conditions of release within forty-eight (48) hours after an arrested person is booked into a detention facility, unless such person has been released from custody by a designee under Rule 5-408..." However, proposed Rule 5-401(B), states a "[s]ecured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charges." The logical analysis of the proposed rule appears to bar a less punitive bond schedule while adopting a more restrictive no bond hold for a large portion of New Mexico crimes. The 48 hour hold is offensive to the holding in *State v. Brown*, 2014-NMSC-038 and the New Mexico Constitution than implementing a reasonable bond schedule pending review by the court.

The second issue is that reliance on unsecured or percentage bonds, as handled by most courts in New Mexico at this time, conflicts with the New Mexico Constitution. In most courts, if a paid surety posts the bond and the defendant fails to appear for a mandatory court appearance, the court generally pursues a forfeiture and collection of the bond. Thus, these private sureties are regularly faced with the financial pressure to either attempt to ascertain the location of the fugitive defendant, or pay the appearance bond from their private funds. However, if courts begin to heavily rely on unsecured or percentage bonds on a regular basis as promoted by the proposed Rule, it will place an increased tax burden on the State in order to avoid potential constitutional conflicts. As a note, it is my experience that courts generally do not pursue the forfeiture and collection of unsecured or percentage bonds as required by the New Mexico Constitution. In such cases, where the defendant fails to appear on an unsecured or percentage bond, the courts generally neglect the forfeiture and/or collection process of these bonds. However, courts have the constitutional obligation to pursue the forfeiture and collections of all types of bonds. Thus, if neglected,

which upon information and belief is the general practice of the courts, these neglected forfeitures and collections violates the New Mexico Constitution, including but not limited to Article IV, Section 32 and Article IX, Section 14 of the New Mexico Constitution. See Hem v. Toyota Motor Corp., 2015-NMSC-024; and Moses v. Skandera, 2015-NMCA-036. Otherwise, it may require courts to develop and staff a collection division for these types of bonds, which shifts the financial burden to the tax payers rather than the delinquent defendants, which could give rise to ancillary litigation such as Qui Tam or Fraud Against Taxpayers Act actions.

## Joseph J. Gribble

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**THIRTEENTH JUDICIAL DISTRICT COURT**  
CIBOLA, SANDOVAL and VALENCIA COUNTIES

November 12, 2015

Mr. Joey Moya  
New Mexico Supreme Court  
P.O. Box 848  
Santa Fe, NM 87504

SUPREME COURT OF NEW MEXICO  
FILED

NOV 12 2015

A handwritten signature in cursive script, likely of the court clerk, located below the filing stamp.

via email to: [nmsupremecourtclerk@nmcourts.gov](mailto:nmsupremecourtclerk@nmcourts.gov)

RE: Comment on Proposed Amendments to the Rules Governing Pre-Trial Release

Mr. Moya;

On behalf of all of the Thirteenth Judicial District Court's eight judges, hearing officers, attorney staff, and pre-trial services professionals we respectfully submit this comment regarding the Supreme Court's proposed amendments to the rules governing pre-trial release.

The Thirteenth has a deep commitment to pre-trial programs, and in the last two years has taken a hard look at our court's long-running pre-trial program. This analysis resulted in an overhaul of the Thirteenth's approach to pre-trial; changing from a probation-style outlook to a risk assessment based model. We currently use a risk assessment instrument from the public domain, and are actively pursuing funding to support the research necessary to produce a tool for our district's specific population. A tool specifically tailored to the Thirteenth's population will give us a scientifically valid basis for our pre-trial professionals to recommend for or against release to pre-trial services, in addition to the current practice of recommending a level of supervision should the presiding judge believe pre-trial services supervision appropriate.

The Thirteenth District Court wholeheartedly supports the amendments in general, and particularly the increased emphasis on release on recognizance or unsecured bond, and greater potential for pre-trial services to have an impact. Additionally, the formalization of the pre-trial release by designee provisions is a positive step to assure that low-level and low-risk defendants remain in custody for as short a time as possible pre-adjudication.

One overall concern is that the proposed rule 5-401(C)(1), and its metropolitan and magistrate counterparts, refers to a "pretrial risk assessment instrument approved by the Supreme Court." It appears from the structure of the rule that each jurisdiction would propose its own risk assessment instrument for Supreme Court approval, though this is not clearly spelled out. If the Court has a specific tool in mind this it wishes for all districts to use, then the Thirteenth District

would like the opportunity to assess this tool further before it is deployed. If each district is to propose its own risk assessment instrument, then knowing the criteria the Supreme Court intends to use to evaluate these instruments would be very helpful. Our goal in the Thirteenth is to use only an evidence-based, scientifically valid, and reliable tool. From a clinical standpoint, this means eventually having researchers specifically design and test a risk assessment tool in our district. We, of course, would want to ensure that any tool we have created for us is designed from its inception to meet the Supreme Court's criteria for approval.

More particularly, we have a few suggestions for the proposed language of the amendments. For the sake of brevity we are referencing only the proposed district court rule numbers, though these comments certainly encompass the proposed metropolitan and magistrate court rules as well.

1. 5-401(A) does not contain a reference to "and the safety of any person and the community" as do the current versions of paragraphs B and C. This omission seems inconsistent, and this language should be added at the end of paragraph A.
2. A strict reading of 5-401(G)(2) allows for the review hearing process to be iterative. As written, the rule suggests that any time a person is detained for 24 hours or more because of inability to post a secure bond, that person may move the court for a review, and the court is required to hold a hearing within 48 hours of service of the motion. This reading would lead to absurd results in cases of multiple motions to reconsider bonds. We propose a slight change to the current text to add the word "first" so that the new text would read: "If the court requires a secured bond for a person's release under Paragraph B of this rule, and the person continues to be detained twenty-four (24) hours after the issuance of the **first** order imposing **a** secured bond...". This addition limits the court's obligation to continue hearing requests for different conditions of release after the conditions have been reviewed once. The detained person can still file a motion and the judge can still hear it, but holding a hearing is more clearly optional under our proposed language.
3. In the proposed text of 5-408(B)(2) the qualifier "or any municipal code or ordinance" appears to only apply to subsection (j) relating to DWI offences. However, many municipalities have codes or ordinances relating to the other enumerated offences in (a) through (i), and the qualifier ought to clearly apply to the entire list of offences.

For example, the City of Rio Rancho Municipal Code (available online at: <http://www.codepublishing.com/NM/RioRancho/#!/riorancho130/RioRancho131.html#131.01>) contains the following offences:

"131.01 Assault. It is unlawful for any person to commit a battery upon the person of another, nor shall any person, by any unlawful act, threat or menacing conduct, cause another person to believe he is in danger of receiving an immediate battery, nor shall any person, by the use of insulting language toward another, impugn his honor, delicacy or reputation. *When an alleged victim and offender are household members, the offender may be arrested pursuant to this chapter*" Rio Rancho Municipal Code (*emphasis added*).

"131.02 Battery. It is unlawful for any person to beat, strike, wound, inflict violence or apply force to the person of another, nor shall a person intentionally touch or apply force to the person of another in a rude, insolent, angry or hostile manner, except in connection with an exhibition duly authorized and licensed under law, or in lawful self-defense, or in the line of duty as a duly authorized police officer as circumstances warrant. *When an alleged victim and offender are household members, the offender may be arrested pursuant to § 130.08" id (emphasis added).*

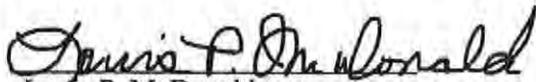
"131.03 Aggravated Battery. It is unlawful for any person to commit aggravated battery upon the person of another, nor shall any person unlawfully touch or apply force to the person of another with intent to injure that person or another, or inflict an injury to the person which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body. *When an alleged victim and offender are household members, the offender may be arrested pursuant to § 130.08" id (emphasis added).*

Additionally, section 131.21 bans the negligent use of weapons.

We propose deleting "or any municipal code or ordinance" from (j) and adding a subsection (k) stating "any municipal code or ordinance violation substantially similar to the offences set out in (a) though (j) above."

The Thirteenth Judicial District Court is pleased to support these amendments to the rules governing pre-trial release in general, and proposes the above modifications as a means to make these amendments even more workable.

Respectfully submitted,



Louis P. McDonald  
Chief District Court Judge



Karl W. Reifsteck  
Court Executive Officer &  
General Counsel



Chambers of  
Judge Henry A. Alaniz  
Chief Judge  
Metropolitan Court  
Division XVII

State of New Mexico  
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November 12, 2015

Joey D. Moya  
Chief Clerk  
New Mexico Supreme Court  
P.O. Box 848  
Santa Fe, NM 87504-0848

SUPREME COURT OF NEW MEXICO  
FILED

NOV 12 2015

Re: Proposed Amendments to the Rules Governing Pretrial Release, Rules 5-401 and 7-408

Dear Mr. Moya:

On behalf of the Metropolitan Court, we appreciate the opportunity to provide input regarding the proposed amendments to the rules regarding pretrial release in New Mexico courts. The Court anticipates certain concerns will arise if the proposed amendments to Rules 5-401 and 7-408 NMRA are implemented.

After reviewing the proposed revisions, the Court has some concerns about the proposed changes from a court procedure point of view. Some of the current practices that our Court has implemented to reduce the number of arrestees kept in pretrial custody would no longer be feasible, especially without a substantial financial investment in staff increases.

While suggested changes to Rule 5-401 would not affect our Court immediately, we do appreciate the opportunity to comment, anticipating some similar changes eventually may be made to the corresponding Rules of Criminal Procedure for Metropolitan Court. Noting the proposed amendments to Paragraph G in particular, the Court is concerned that at the present time, our systems are not equipped to automatically schedule hearings based on whether a defendant remains in custody ten (10) days after arraignment. Adding mandatory hearings certainly would increase significantly the scarce judicial resources required for our Judges and courtrooms to manage the increased number of hearings, and will require hiring more staff to process the hearings and to manage pretrial services in general.

The Court is also concerned regarding Rule 7-408. First, there has been some confusion regarding the interplay between Paragraphs B and C of Rule 7-408. The Court believes that these two paragraphs are meant to be read as wholly separate paths to pretrial release by designee, but it has been brought to our attention that some people read Paragraph B to disallow any release at all for any of the listed exceptions in Paragraph B(2). The Court believes that Paragraph C is meant to be read separately, allowing for pretrial release by designee if the risk assessment is used and allows for pretrial release, but we wanted to raise the issue of the alternative reading that others have.

The Court has worked diligently and has been successful in drastically reducing the number of defendants held in custody pretrial, and the Court of course remains committed to those constitutional principles of holding defendants by the least restrictive means available. Our current practices have allowed designees,

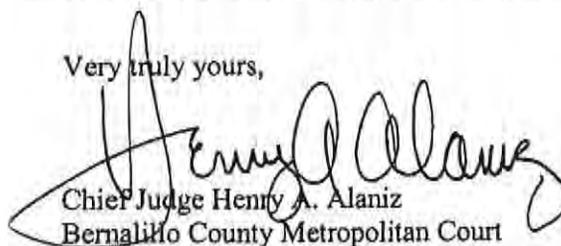
Joey D. Moya, Chief Clerk  
New Mexico Supreme Court  
November 12, 2015  
Page 2

working at the Metropolitan Detention Center, to release defendants who meet particular qualifications. Presently, Court intake officers release many defendants who are charged with the listed crimes in Paragraph B(2). In addition to those petty misdemeanors and full misdemeanors, the designees also release people charged with traffic misdemeanors, which are not mentioned specifically in proposed Rule 7-408. Proposed Rule 7-408 also appears to prohibit the Court's current practice of allowing for the release of defendants charged with non-violent third and fourth degree felonies, such as possession of a controlled substance. Furthermore, in the Court's experience, Paragraph (B)(2)(b)'s new limitation on release for people with a history of arrests within the past twenty-four (24) months unfortunately will prevent a significant number of people arrested on minor offenses from being released on their own recognizance. This outcome seems to conflict with our pretrial goal of holding defendants by the least restrictive means available.

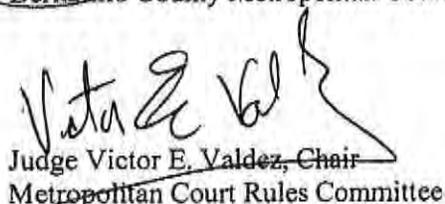
Of course, proposed Paragraph C of Rule 7-408 seems to allow for the early release of defendants pursuant to a risk assessment and early release schedule approved by the Supreme Court. That being said, as the Court's procedures and practices currently stand, employing a risk assessment for every defendant arrested would require a very substantial financial commitment. Our current Court intake officers are not able to run risk assessments, including the step of compiling the criminal history. For the round the clock processing in which our Court is engaged currently, we estimate that we may need to add a minimum of ten additional background investigators, who are trained in compiling the risk assessments.

The foregoing are the initial concerns that the Metropolitan Court has regarding the proposed revisions to Rules 5-401 and 7-408 NMRA. We appreciate the opportunity to share these concerns and our suggestions for changes to these rules. As always, please feel free to contact us if you wish to discuss these matters further.

Very truly yours,



Chief Judge Henry A. Alaniz  
Bernalillo County Metropolitan Court



Judge Victor E. Valdez, Chair  
Metropolitan Court Rules Committee

cc: Judges of the Metropolitan Court  
Robert Padilla, Court Executive Officer  
Arthur W. Pepin, Director, Administrative Office of the Courts  
Sally Paez, Senior Counsel, New Mexico Supreme Court

Zimbra

supjdm@nmcourts.gov

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**ACLU comments on bail reform rule changes**

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**From :** Peter Simonson <psimonson@aclu-nm.org>  
**Subject :** ACLU comments on bail reform rule changes  
**To :** nmsupremecourtclerk@nmcourts.gov

Thu, Nov 12, 2015 01:41 PM  
1 attachment

SUPREME COURT OF NEW MEXICO  
FILED

NOV 12 2015



Dear Mr. Moya,

On behalf of the American Civil Liberties Union of New Mexico (ACLU-NM), I am sending suggested edits to the amendments being proposed to rules governing pretrial release in New Mexico courts. As the New Mexico Supreme Court stated in its recent decision in *New Mexico v. Brown*, under our state constitution, "a person accused of a crime is entitled to retain personal freedom until adjudged guilty by the court of last resort." It is in this spirit that we offer the attached edits to the proposed amendments.

The ACLU-NM was founded in 1962 with the mission of maintaining and advancing the cause of civil liberties, civil rights and constitutional freedom in the state. We strongly believe that pretrial detention continues to be dramatically overused in New Mexico. Consequently, it presents one of the single largest obstacles to equal justice in the state. In our estimation, the attached revision of the proposed amendments strikes the correct balance between protecting public safety and preserving the liberty of defendants, and we urge you to consider it.

Please let us know if you have any questions or concerns about our submitted comments.

Thank you.

Sincerely,

Peter Simonson

Peter G. Simonson  
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 **ACLU comments on bail reform rule changes.pdf**  
463 KB

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**PROPOSED AMENDMENTS TO THE  
RULES GOVERNING PRETRIAL RELEASE  
IN NEW MEXICO COURTS**

**Commentary from the Supreme Court.** Following the decision in *State v. Brown*, 2014-NMSC-038, 338 P.3d 1276, the New Mexico Supreme Court created the Ad Hoc Pretrial Release Committee to study existing pretrial release law and practice and make recommendations to the Court regarding necessary changes to improve pretrial release procedures in New Mexico. This broad-based committee, with representation from the criminal defense bar, prosecution, judges, the bail industry, jails and detention centers, and the Legislature, has made a number of recommendations, including amendments to Rule 5-401 NMRA, governing pretrial decision-making in the district courts. Following the publication period and any resulting changes to Rule 5-401, the committee expects to recommend corresponding revisions to Rules 6-401, 7-401, and 8-401 NMRA, which govern pretrial procedures in the magistrate, metropolitan, and municipal courts.

The committee also recommends proposed new rules to govern early release procedures for defendants who are unlikely to pose a flight risk or a risk to public safety. *See* Rules 5-408, 6-408, 7-408, and 8-408 NMRA. The committee proposes the adoption of a new form, Form 9-302A NMRA, order for release on recognizance by designee, to implement Paragraph B of these rules.

The committee also recommended that the Court consider confidentiality provisions regarding information that an accused submits in order to exercise the right to pretrial release. The Court will refer those questions to the Rules of Evidence Committee for recommendations, and no confidentiality provisions are being circulated for comment at this time.

The recommended rule amendments are largely aimed at ensuring that pretrial release practices conform to the standards required by federal and state constitutional law and the principles that have been embodied in the pretrial release rules of New Mexico since their initial promulgation in 1972. Like the Federal Bail Reform Act of 1966, on which they were modeled, the New Mexico rules have always required that an accused who has not yet been adjudicated guilty of an offense should be released pending trial on the least restrictive conditions that would minimize flight risk and danger to the community, and have always provided that the requirement of money bonds may be imposed only if nonfinancial release conditions would be insufficient methods of release.

Key provisions of the proposed amendments are:

1. Adding to Rule 5-401(B) the clarifying statement that “[s]ecured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge.” Although the explicit language is new, the concept is not. The bail rules have always required individual assessment of an accused’s flight risk or danger to the community, and New Mexico and federal case law prohibit the use of fixed bonds based only on the nature of the accusation.

2. Adding language to Rule 5-401(C)(1) and Paragraph C of the proposed early release rules, Rules 5-408, 6-408, 7-408, and 8-408, that would explicitly permit the use of Supreme Court approved pretrial risk assessment instruments in setting individualized conditions of release. These evidence-based assessment tools, in use in a number of jurisdictions, are the result of empirical studies that determine the degree to which various factors, such as prior criminal history, have been shown to be helpful predictors of individual flight risk or danger to the community. The Second Judicial District Court currently is piloting a pretrial risk assessment instrument.

3. Adding in the proposed early release rules more guidance and regulation to the longstanding authority of a court to permit detention facilities and other designees to make the simpler release decisions for defendants who present neither a danger nor a flight risk without waiting for a court hearing.

4. Providing time guidelines for bond-setting and bond review hearings to avoid unnecessary delay.

The Court will not make its final decisions nor take action on these recommended revisions until after publication for comment and full review by both the committee and the Court of all resulting input, which is an important aspect of the rule-making process. If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://nmsupremecourt.nmcourts.gov/> or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk  
New Mexico Supreme Court  
P.O. Box 848  
Santa Fe, New Mexico 87504-0848  
nmsupremecourtclerk@nmcourts.gov  
505-827-4837 (fax)

Your comments must be received by the Clerk on or before **November 12, 2015**, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

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**5-401. [Bail] Pretrial release.**

A. **Right to bail; recognizance or unsecured appearance bond.** Pending trial, any person bailable under Article 2, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on the person's personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court, subject to any release conditions imposed ~~[pursuant to]~~ under Paragraph [C] D of this rule, unless the court makes a written finding that such release will not reasonably assure the appearance of the person as required.

B. **Secured bonds.** Secured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge. If the court makes a written finding that release on personal recognizance or upon execution of an unsecured appearance bond will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, in addition to any release conditions imposed ~~[pursuant to]~~ under Paragraph D of this rule, the court shall order the pretrial release of such person subject to the first of the following types of secured bonds ~~[which]~~ that will reasonably assure the appearance of the person as required and the safety of any person and the community:

(1) the execution by the person of ~~[a bail]~~ an appearance bond in ~~[a]~~ the full amount specified in the release order, ~~[amount executed by the person and]~~ secured by a deposit ~~[of]~~ in cash of up to ten percent (10%) of the amount [set for bail] specified, ~~or secured by such greater or lesser [amount] percentage as is reasonably necessary~~ to assure the appearance of the person as

required. The cash deposit may be returned to the person as provided in Paragraph J of this rule. The cash deposit may be made by or assigned to a paid surety licensed under the Bail Bondsmen Licensing Law provided such paid surety also executes a [bail] surety bond for the full amount [of the bail set] specified;

(2) the execution of ~~[a bail]~~ a property bond by the [defendant] person or by unpaid sureties in the full amount ~~[of the bond]~~ specified in the release order, secured by [and] the pledging of real property as required by Rule 5-401A NMRA; or

(3) either the execution of a [bail] surety bond with licensed sureties in the full amount specified in the release order as provided in Rule 5-401B NMRA, or the execution by the person of an appearance bond in the specified amount, [and] secured by a deposit [with the clerk of the court,] in cash[;] of one-hundred percent (100%) of the amount [of the bail set] specified, [such deposit to] which may be returned to the person as provided in Paragraph J of this rule.

Any [bail] surety, property, or appearance bond shall be substantially in the form approved by the Supreme Court.

C. **Factors to be considered in determining the type and conditions of release.** The court shall ~~[, in determining]~~ use the following information to determine the type of [bail] release and ~~[which]~~ conditions of release that will reasonably assure appearance of the person as required and the safety of any other person and the community[;];

(1) the results of the pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any; and

(2) ~~[take into account]~~ the available information concerning[;]

~~[(1)]~~ (a) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;

~~[(2)]~~ (b) the weight of the evidence against the person;

~~[(3)]~~ (c) the history and characteristics of the person, including:

~~[(a)]~~ (i) the person's character and physical and mental condition;

~~[(b)]~~ (ii) the person's family ties;

~~[(c)]~~ (iii) the person's employment status, employment history, and financial resources available to secure a bond;

~~[(d)]~~ (iv) the person's past and present residences;

~~[(e)]~~ (v) the length of residence in the community;

~~[(f)]~~ (vi) any facts tending to indicate that the person has strong ties to the community;

~~[(g)]~~ (vii) any facts indicating the possibility that the person will commit new crimes if released;

~~[(h)]~~ (viii) the person's past conduct, history relating to drug or alcohol abuse if the crime involves allegations of alcohol or drug use, criminal history, and record concerning appearance at court proceedings; and

~~[(i)]~~ (ix) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, or appeal [or completion of an] for any offense under federal, state, or local law;

~~[(4)]~~ (d) the nature and seriousness of the danger to any person or the community that would be posed by the person's release; and

~~[(5)]~~ (e) any other facts tending to indicate the person is likely to appear.

**D. Additional conditions; conditions to assure orderly administration of justice.**

The court, upon release of the defendant or any time thereafter, may enter an order, that such person's release be subject to:

(1) the condition that the person not commit a federal, state, or local crime during the period of release; and

(2) the least restrictive of, or combination of, the following conditions the court finds will reasonably assure the appearance of the person as required, the safety of any other person and the community, and the orderly administration of justice:

(a) a condition that the person remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(b) a condition that the person maintain employment, or, if unemployed, actively seek employment;

(c) a condition that the person maintain or commence an educational program;

(d) a condition that the person abide by specified restrictions on personal associations, place of abode, or travel;

(e) a condition that the person avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense, except the judge may use discretion depending on the familial or other close relationship of the victim and/or potential witness(es) to the defendant;

(f) a condition that the person report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

(g) a condition that the person comply with a specified curfew;

(h) a condition that the person refrain from possessing a firearm, destructive device, or other dangerous weapon if the charges involve allegations of violence or illegal use of a firearm;

(i) a condition that the person refrain from excessive or any use of alcohol and any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner if the charges involve allegations of alcohol or drug use;

(j) a condition that the person undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(k) a condition that the person submit to a urine analysis or alcohol test upon request of a person designated by the court if the charges involve allegations of alcohol or drug use;

(l) a condition that the person return to custody for specified hours following release for employment, schooling, or other limited purposes;

(m) a condition that the person satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

**E. Explanation of conditions by court.** The release order of the court shall:

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's

conduct;

(2) advise the person of:

(a) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(b) the consequences for violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(c) the consequences of intimidating a witness, victim, or informant, or otherwise obstructing justice; and

(3) unless the defendant is released on personal recognizance or an unsecured appearance bond, set forth the circumstances in writing ~~which~~ that require ~~that conditions of release be imposed~~ the imposition of a secured bond.

F. **Detention.** Upon motion by the state to detain a person without bail pending trial, the court shall hold a hearing to determine whether bail may be denied ~~pursuant to~~ under Article 2, Section 13 of the New Mexico Constitution.

G. **Review of Order setting conditions of release; time of filing and review hearing.**

(1) The court shall issue an order setting conditions of release within forty-eight (48) hours after an arrested person is booked into a detention facility, unless such person has been released from custody by a designee under Rule 5-408 NMRA and Paragraph L of this rule.

(2) [A person for whom bail is set by the district court and who after twenty-four (24) hours from the time of transfer to a detention facility] If the court requires a secured bond for a person's release under Paragraph B of this rule, and the person continues to be detained twenty-four (24) hours after the issuance of the order imposing secured bond as a result of the person's inability to ~~meet the bail set~~ post the secured bond, the person shall, upon motion, be entitled to have a hearing to review the ~~amount of bail set~~ type of release and conditions of release set forth in the release order. The court shall hold the hearing within forty-eight (48) hours after the filing and service of the motion. Unless the release order is amended and the person is thereupon released, the court shall state in the record the reasons for ~~continuing the amount of bail set~~ declining to amend the release order. No person eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond.

(3) If the district court requires a secured bond for a person's release under Paragraph B of this rule, and the person continues to be detained as a result of the person's inability to post the secured bond, the court shall hold a hearing ten (10) days after the date of arraignment or waiver of arraignment to review the type of release and conditions of release set forth in the release order. The court shall schedule the hearing regardless of whether the defendant has filed a motion for review under Subparagraph (G)(2) of this rule, but the court may vacate the hearing upon stipulation of the parties. Unless the release order is amended and the person is thereupon released, the court shall state in the record the reasons for declining to amend the release order. No person eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond.

(4) A person who is ordered released on a condition ~~which~~ that requires that the person to return to custody after specified hours, upon ~~application~~ motion, shall be entitled to ~~have~~ a hearing within ten (10) days to review the conditions imposed. Unless the requirement is removed and the person is thereupon released on another condition, the court shall state in the record the reason for the continuation of the requirement.

(5) A hearing to review conditions of release ~~[pursuant to]~~ under this paragraph shall be held by the district court.

H. **Amendment of type of release and conditions of release.** The court ~~[ordering the release of a person on any condition specified in this rule]~~ may at any time amend ~~[its order at any time to increase the amount of bail set or impose additional or different conditions of release]~~ the type of release and conditions of release set forth in the release order. If such amendment of the release order results in the detention of the person as a result of the person's inability to meet such conditions or in the release of the person on a condition requiring the person to return to custody after specified hours, the provisions of ~~[Paragraph G]~~ Subparagraphs (G)(2), (G)(3), or (G)(4) of this rule shall apply.

I. **Record of hearing.** A record shall be made of any hearing held by the district court ~~[pursuant to]~~ under this rule.

J. **Return of cash deposit.** If a person has been released by executing an appearance bond and ~~[depositing]~~ making a cash deposit ~~[set pursuant to]~~ under Subparagraph ~~[(1) or (3) of Paragraph B]~~ (B)(1) or Subparagraph (B)(3) of this rule, when the conditions of the appearance bond have been performed and the ~~[defendant's guilt for whom bail was required]~~ person's case has been adjudicated by the ~~[Court]~~ court, the clerk shall return the sum ~~[which]~~ that has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.

K. **Cases pending in magistrate or metropolitan court.** A person charged with an offense ~~[which]~~ that is not within magistrate or metropolitan court trial jurisdiction and who has not been bound over to the district court may file a petition in district court for release under this rule at any time after the person's arrest ~~[with the clerk of the district court for release pursuant to this rule]~~. Jurisdiction of the magistrate or metropolitan court to release the accused shall be terminated upon the filing of a petition for release in the district court. Upon the filing of the petition, the district court may:

(1) continue the ~~[bail set]~~ type of release and any condition of release imposed by the magistrate or metropolitan court;

(2) impose any ~~[bail]~~ other type of release or condition of release authorized by Paragraphs A, B, or D of this rule;

(3) continue any revocation of release imposed ~~[pursuant to Rule 5-403]~~ by the magistrate or metropolitan court under Rule 6-403 NMRA or Rule 7-403 NMRA; or

(4) after a hearing, revoke the release of ~~[a defendant pursuant to]~~ the person under Subparagraph ~~[(2) of Paragraph A]~~ (A)(2) of Rule 5-403 NMRA.

L. **Release from custody by designee.** ~~[Any or all of the provisions of this rule, except the provisions of Paragraphs F, G, and K of this rule, may be carried out by responsible persons designated in writing by the]~~ The chief judge of the district court may designate responsible persons in writing to implement the early release procedures set forth in Rule 5-408 NMRA. A designee shall release an arrested person from custody prior to the person's first appearance before a judge if the person is eligible for early release under Rule 5-408, provided that a designee may contact a judge for special consideration based on exceptional circumstances. No person shall be qualified to serve as a designee if such person or such person's spouse is:

(1) related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state; or

(2) employed by a jail or detention facility unless designated in writing by the chief judge of the judicial district in which the jail or detention facility is located.

M. **Bind over [in] to district court.** ~~For any case that is not within magistrate or metropolitan court jurisdiction, [The] upon notice to that court, any bond [shall remain in the magistrate or metropolitan court, except that it] shall be transferred to the district court upon the filing of an information or indictment [or bind over to that] in the district court.~~

N. **Evidence.** Information stated in, or offered in connection with, any order entered ~~[pursuant to]~~ under this rule need not conform to the Rules of Evidence.

O. **Forms.** Instruments required by this rule shall be substantially in the form approved by the Supreme Court.

P. **Judicial discretion.** Action by any court on any matter relating to ~~[bail]~~ pretrial release shall not preclude the statutory or constitutional disqualification of a judge.

[As amended, effective January 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990; September 1, 2005; as amended by Supreme Court Order 07-8300-29, effective December 10, 2007; by Supreme Court Order No. 10-8300-033, effective December 10, 2010; as amended by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**Committee commentary.** — ~~[Under Section 13 of Article 2 of the New Mexico Constitution, every accused, except a person accused of first degree murder where the proof is evident or the presumption great, is entitled to bail. Paragraph E was added in 1990 to recognize the amendment of Article 2, Section 13 of the New Mexico Constitution which permits the denial of bail for 60 days by an order entered within 7 days after incarceration if:~~

~~(1) — the defendant is accused of a felony and has been previously convicted of two or more felonies within the state; or~~

~~(2) — the defendant is accused of a felony involving the use of a deadly weapon and has a prior felony conviction within this state.]~~

This rule provides “the mechanism through which a person may effectuate the right to pretrial release afforded by Article 11, Section 13 of the New Mexico Constitution,” *State v. Brown*, 2014-NMSC-038, ¶ 37, 338 P.3d 1276. This rule was derived from the Federal Bail Reform Act of 1966, as amended. ~~[Under the federal bail law, the right to bail is restated as the right to have conditions of release set by the court.] See 18 U.S.C. §§ 3142 et seq. [The 1990 amendments to Paragraphs B and C of this rule were taken from Subsections (g) and (e), respectively, of 18 USCA § 1342.~~

~~— In 1990 this rule was amended to encourage more releases on personal recognizance. Release conditions may now be imposed in addition to the execution of a unsecured personal appearance bond or a secured bond.] Because [bail] the type of release and additional conditions of release will usually be set initially by a magistrate or metropolitan court judge, Rules 6-401 and 7-401 NMRA govern the procedure in those courts. The magistrate, municipal, and metropolitan court [bail] pretrial release rules were derived from and are substantially identical to this rule.~~

Under this rule, the authorized types of ~~[bonds authorized to be posted]~~ release are set forth in the order of priority they are to be considered by the judge ~~[or designee]~~. The first priority is release upon the execution of a personal recognizance or unsecured appearance bond. If the court determines that release on personal recognizance or upon the execution of an unsecured bond will not reasonably assure the appearance of the defendant as required, the court may require a secured bond.

If a secured bond is ~~set~~ required to assure the appearance of the defendant, the judge or designee must first consider requiring an appearance bond with a cash deposit of 10% or such other percentage of the amount of the bond. If this is inadequate, the court then must consider a property bond where the property belongs to the defendant or other unpaid surety. If the court has not authorized a cash deposit of less than 100% of the amount of bond set, the defendant may execute an appearance bond and deposit one hundred percent (100%) of the amount of the bond with the court. Last of all the defendant may purchase a bond from a paid surety. A paid surety may execute a corporate surety bond or a property bond.

A real or personal property bond may only be executed by a paid surety if the conditions of Rule 5-401B NMRA are met. Under the 1990 amendments to Rule 5-401B NMRA, a bond which has as collateral real or personal property is authorized only in those districts in which an order has been entered finding that the pledging of an irrevocable letter of credit will result in the detention of persons otherwise eligible for release.

Although ~~bail~~ pretrial release hearings are not required to be a matter of record in the magistrate, metropolitan, or municipal courts, ~~Form 9-302A~~ Paragraph A of this rule requires the ~~judge or designee to set forth~~ court to make written findings regarding the reasons why a secured bond was required rather than release on personal recognizance or unsecured bond.

The provision allowing the court to set additional conditions of release in order to assure "the orderly administration of justice" was derived from American Bar Association Standards Relating to Pretrial Release, Section 5.5 (Approved Draft 1968) and 18 USCA § 3142 and Rule 46(b) of the Federal Rules of Criminal Procedure.

~~Pursuant to~~ Under NMSA 1978, Section 31-3-1 [NMSA 1978], the court may appoint a designee to carry out the provisions of this rule. As set forth in Paragraph L of this rule, a designee [Designees] must be named in writing. A person may not be appointed as a designee if such person is related within the second degree of blood or marriage to a paid surety licensed in this state to execute bail bonds. A jailer may [not] be appointed as a designee. Rule 5-408 NMRA governs the limited circumstances under which a designee shall release an arrested person from custody prior to that person's first appearance before a judge.

Paragraph ~~[M] N~~ N of this rule dovetails with ~~[Subparagraph (2) of Paragraph D of]~~ Rule ~~[41-1104] 11-1101(D)(2)~~ NMRA. Both provide that the Rules of Evidence are not applicable to proceedings in either the magistrate or district court with respect to matters of release or bail. [As amended by Supreme Court Order 07-8300-29, effective December 10, 2007; as amended by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

#### **[NEW MATERIAL]**

##### **Rule 5-408. Pretrial release by designee.**

A. **Scope.** This rule shall be implemented by any person designated in writing by the chief judge of the district court under Rule 5-401(L) NMRA. A designee shall issue a written order to release a person from detention prior to the person's first appearance before a judge if the person is eligible for early release under either Paragraph B or Paragraph C of this rule, provided that a designee may contact a judge for special consideration based on exceptional circumstances. A judge may issue a pretrial order imposing a type of release and conditions of release that differ from those set forth in Paragraphs B and C of this rule.

**B. Minor offenses; release on recognizance.**

(1) **Persons eligible.** A designee shall release a person from custody on personal recognizance, subject to the condition that the person not commit a federal, state, or local crime during the period of release, if the person

~~(a) has been arrested and detained for a municipal code violation, game and fish offense under Chapter 17 NMSA 1978, petty misdemeanor, or misdemeanor, subject to the exceptions listed in Subparagraph (B)(2) of this rule; and~~

~~(ab) is either a first-time offender with no arrest history or a person with no history of arrests in the past twenty-four (24) months except:~~

~~(1) persons charged with crimes enumerated in Article II, Section 24 of the New Mexico Constitution;~~

~~(2) persons charged with crimes enumerated in the Victims of Crime Act, NMSA § 31-26-3(B);~~

~~(3) persons charged with crimes considered to be serious violent offenses as enumerated in NMSA § 33-2-34(L).~~

~~(2) **Exceptions.** A person arrested for any of the following offenses is not eligible for release on recognizance under this paragraph:~~

~~(a) battery under Section 30-3-4 NMSA 1978;~~

~~(b) aggravated battery under Section 30-3-5(B) NMSA 1978;~~

~~(c) assault against a household member under Section 30-3-12 NMSA 1978;~~

~~(d) battery against a household member under Section 30-3-15 NMSA 1978;~~

~~(e) aggravated battery against a household member under Section 30-3-16 NMSA 1978;~~

~~(f) criminal damage to property of a household member under Section 30-3-18 NMSA 1978;~~

~~(g) abandonment of a child under Section 30-6-1(B) NMSA 1978;~~

~~(h) negligent use of a deadly weapon under Section 30-7-4 NMSA 1978;~~

~~(i) stalking under Section 30-3A-3 NMSA 1978; or~~

~~(j) driving under the influence of intoxicating liquor or drugs in violation of Section 66-8-102 NMSA 1978 or any municipal code or ordinance.~~

**C. Early release based on risk assessment.** A designee shall release a person from custody prior to the person's first appearance before a judge if the person qualifies for early release based on a risk assessment and an early release schedule approved by the Supreme Court. The early release schedule shall provide for a specific type of release and conditions of release based on the likelihood that the person will appear in court as required, will not commit a new crime while released pending trial, and will not pose a danger to the safety of any other person or the community, as determined by a pretrial risk assessment instrument approved by the Supreme Court.

**D. Type of release and conditions of release set by judge.** A person who is not eligible for pretrial release by a designee under either Paragraph B or Paragraph C of this rule shall have the type of release and conditions of release set by a judge under Rule 5-401 NMRA within forty-eight (48) hours after the person is booked into the detention facility.

[Adopted by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**Committee commentary.** — Under NMSA 1978, Section 31-1-1 and Paragraph L of Rule 5-401,

the chief judge of the district court may designate responsible persons in writing who are authorized to release certain arrested persons from detention prior to the arrested person's first appearance before a judge. The exceptions set forth in Subparagraph (B)(2) of this rule include the misdemeanors and petty misdemeanors listed in the Victims of Crime Act, NMSA 1978, §§ 31-26-1

to -16, and the Crimes Against Household Members Act, NMSA 1978, §§ 30-3-10 to -18, as well as battery and driving under the influence of intoxicating liquor or drugs.  
[Adopted by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

[NEW MATERIAL]

**Rule 6-408. Pretrial release by designee.**

A. **Scope.** This rule shall be implemented by any person designated in writing by the presiding judge of the magistrate court under Rule 6-401(K) NMRA. A designee shall issue a written order to release a person from detention prior to the person's first appearance before a judge if the person is eligible for early release under either Paragraph B or Paragraph C of this rule, provided that a designee may contact a judge for special consideration based on exceptional circumstances. A judge may issue a pretrial order imposing a type of release and conditions of release that differ from those set forth in Paragraphs B and C of this rule.

B. **Minor offenses; release on recognizance.**

(1) **Persons eligible.** A designee shall release a person from custody on personal recognizance, subject to the condition that the person not commit a federal, state, or local crime during the period of release, if the person

(a) is either a first-time offender with no arrest history or a person with no history of arrests in the past twenty-four (24) months except:

(1) persons charged with crimes enumerated in Article II, Section 24 of the New Mexico Constitution;

(2) persons charged with crimes enumerated in the Victims of Crime Act, NMSA § 31-26-3(B);

(3) persons charged with crimes considered to be serious violent offenses as enumerated in NMSA § 33-2-34(L).

(a) has been arrested and detained for a municipal code violation, game and fish offense under Chapter 17 NMSA 1978, petty misdemeanor, or misdemeanor, subject to the exceptions listed in Subparagraph (B)(2) of this rule; and

(b) is either a first-time offender with no arrest history or a person with no history of arrests in the past twenty-four (24) months.

(2) **Exceptions.** A person arrested for any of the following offenses is not eligible for release on recognizance under this paragraph:

(a) battery under Section 30-3-4 NMSA 1978;

(b) aggravated battery under Section 30-3-5(B) NMSA 1978;

(c) assault against a household member under Section 30-3-12 NMSA 1978;

(d) battery against a household member under Section 30-3-15 NMSA 1978;

(e) aggravated battery against a household member under Section 30-3-16 NMSA 1978;

(f) criminal damage to property of a household member under Section 30-3-18 NMSA 1978;

(g) abandonment of a child under Section 30-6-1(B) NMSA 1978;

(h) negligent use of a deadly weapon under Section 30-7-4 NMSA 1978;

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~~(i) stalking under NMSA 1978; or  
Section 30-3A-3 (j) driving under the influence of intoxicating liquor or drugs in violation  
of Section 66-8-102 NMSA 1978 or any municipal code or ordinance.~~

C. **Early release based on risk assessment.** A designee shall release a person from custody prior to the person's first appearance before a judge if the person qualifies for early release based on a risk assessment and an early release schedule approved by the Supreme Court. The early release schedule shall provide for a specific type of release and conditions of release based on the

likelihood that the person will appear in court as required, will not commit a new crime while released pending trial, and will not pose a danger to the safety of any other person or the community, as determined by a pretrial risk assessment instrument approved by the Supreme Court.

D. **Type of release and conditions of release set by judge.** A person who is not eligible for pretrial release by a designee under Paragraph B or Paragraph C of this rule shall have the type of release and conditions of release set by a judge under Rule 6-401 NMRA within forty-eight (48) hours after the person is booked into the detention facility.

**Committee commentary.** — Under NMSA 1978, Section 31-3-1 and Paragraph K of Rule 6-401, the presiding judge of the magistrate court may designate responsible persons in writing who are authorized to release certain arrested persons from detention prior to the arrested person's first appearance before a judge. The exceptions set forth in Subparagraph (B)(2) of this rule include the misdemeanors and petty misdemeanors listed in the Victims of Crime Act, NMSA 1978, §§ 31-26-1 to -16, and the Crimes Against Household Members Act, NMSA 1978, §§ 30-3-10 to -18, as well as battery and driving under the influence of intoxicating liquor or drugs.

[Adopted by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

[NEW MATERIAL]

**Rule 7-408. Pretrial release by designee.**

A. **Scope.** This rule shall be implemented by any person designated in writing by the chief judge of the metropolitan court under Rule 7-401(J) NMRA. A designee shall issue a written order to release a person from detention prior to the person's first appearance before a judge if the person is eligible for early release under either Paragraph B or Paragraph C of this rule, provided that a designee may contact a judge for special consideration based on exceptional circumstances. A judge may issue a pretrial order imposing a type of release and conditions of release that differ from those set forth in Paragraphs B and C of this rule.

B. **Minor offenses; release on recognizance.**

(1) **Persons eligible.** A designee shall release a person from custody on personal recognizance, subject to the condition that the person not commit a federal, state, or local crime during the period of release, if the person

(a) ~~is either a first-time offender with no arrest history or a person with no history of arrests in the past twenty-four (24) months except:~~

~~\_\_\_\_\_ (1) persons charged with crimes enumerated in Article II, Section 24 of the New Mexico Constitution;~~

~~\_\_\_\_\_ (2) persons charged with crimes enumerated in the Victims of Crime Act, NMSA § 31-26-3(B);~~

~~\_\_\_\_\_ (3) persons charged with crimes considered to be serious violent offenses as enumerated in NMSA § 33-2-34(L).~~

~~(a) has been arrested and detained for a municipal code violation, game and fish offense under Chapter 17 NMSA 1978, petty misdemeanor, or misdemeanor, subject to the exceptions listed in Subparagraph (B)(2) of this rule; and~~

~~(b) is either a first-time offender with no arrest history or a person with no history of arrests in the past twenty-four (24) months.~~

(2) **Exceptions.** A person arrested for any of the following offenses is not eligible for release on recognizance under this paragraph:

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1978;

1978;

- (a) ~~battery under Section 30-3-4 NMSA 1978;~~
- (b) ~~aggravated battery under Section 30-3-5(B) NMSA 1978;~~
- (c) ~~assault against a household member under Section 30-3-12 NMSA~~
- (d) ~~battery against a household member under Section 30-3-15 NMSA~~

~~(e) — aggravated battery against a household member under Section 30-3-16-NMSA 1978;~~  
~~(f) — criminal damage to property of a household member under Section 30-3-18 NMSA 1978;~~  
~~(g) — abandonment of a child under Section 30-6-1(B) NMSA 1978;~~  
~~(h) — negligent use of a deadly weapon under Section 30-7-1 NMSA 1978;~~  
~~(i) — stalking under Section 30-3A-3 NMSA 1978; or~~  
~~(j) — driving under the influence of intoxicating liquor or drugs in violation of Section 66-8-102 NMSA 1978 or any municipal code or ordinance.~~

C. **Early release based on risk assessment.** A designee shall release a person from custody prior to the person's first appearance before a judge if the person qualifies for early release based on a risk assessment and an early release schedule approved by the Supreme Court. The early release schedule shall provide for a specific type of release and conditions of release based on the likelihood that the person will appear in court as required, will not commit a new crime while released pending trial, and will not pose a danger to the safety of any other person or the community, as determined by a pretrial risk assessment instrument approved by the Supreme Court.

D. **Type of release and conditions of release set by judge.** A person who is not eligible for pretrial release by a designee under Paragraph B or Paragraph C of this rule shall have the type of release and conditions of release set by a judge under Rule 7-401 NMRA within forty-eight (48) hours after the person is booked into the detention facility.

**Committee commentary.** — Under NMSA 1978, Section 31-1-1 and Paragraph K of Rule 5-401, the chief judge of the metropolitan court may designate responsible persons in writing who are authorized to release certain arrested persons from detention prior to the arrested person's first appearance before a judge. The exceptions set forth in Subparagraph (B)(2) of this rule include the misdemeanors and petty misdemeanors listed in the Victims of Crime Act, NMSA 1978, §§ 31-26-1 to -16, and the Crimes Against Household Members Act, NMSA 1978, §§ 30-3-10 to -18, as well as battery and driving under the influence of intoxicating liquor or drugs.

[Adopted by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

[NEW MATERIAL]

**Rule 8-408. Pretrial release by designee.**

A. **Scope.** This rule shall be implemented by any person designated in writing by the presiding judge of the municipal court under Rule 8-401(H) NMRA. A designee shall issue a written order to release a person from detention prior to the person's first appearance before a judge if the person is eligible for early release under either Paragraph B or Paragraph C of this rule, provided that a designee may contact a judge for special consideration based on exceptional circumstances. A judge may issue a pretrial order imposing a type of release and conditions of release that differ from those set forth in Paragraphs B and C of this rule.

B. **Minor offenses; release on recognizance.**

(1) **Persons eligible.** A designee shall release a person from custody on personal recognizance, subject to the condition that the person not commit a federal, state, or local crime during the period of release, if the person

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(a) \_\_\_\_\_ is either a first-time offender with no arrest history or a person with no history of arrests in the past twenty-four (24) months except:

\_\_\_\_\_ (1) persons charged with crimes enumerated in Article II, Section 24 of the New Mexico Constitution;

\_\_\_\_\_ (2) persons charged with crimes enumerated in the Victims of Crime Act, NMSA § 31-26-3(B);

\_\_\_\_\_ (3) persons charged with crimes considered to be serious violent offenses as enumerated in NMSA § 33-2-34(L).

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¶

~~(a) has been arrested and detained for a municipal code violation or a petty misdemeanor, subject to the exceptions listed in Subparagraph (B)(2) of this rule; and~~

~~(b) is either a first-time offender with no arrest history or a person with no history of arrests in the past twenty-four (24) months.~~

~~(2) Exceptions. A person arrested for any of the following offenses is not eligible for release on recognizance under this paragraph:~~

~~(a) battery;~~

~~(b) any offense involving domestic violence or a crime against a household member;~~

~~(c) negligent use of a deadly weapon;~~

~~(d) stalking; or~~

~~(e) driving under the influence of intoxicating liquor or drugs.~~

C. **Early release based on risk assessment.** A designee shall release a person from custody prior to the person's first appearance before a judge if the person qualifies for early release based on a risk assessment and an early release schedule approved by the Supreme Court. The early release schedule shall provide for a specific type of release and conditions of release based on the likelihood that the person will appear in court as required, will not commit a new crime while released pending trial, and will not pose a danger to the safety of any other person or the community, as determined by a pretrial risk assessment instrument approved by the Supreme Court.

D. **Type of release and conditions of release set by judge.** A person who is not eligible for pretrial release by a designee under Paragraph B or Paragraph C of this rule shall have the type of release and conditions of release set by a judge under Rule 8-401 NMRA within forty-eight (48) hours after the person is booked into the detention facility.

**Committee commentary.** — Under NMSA 1978, Section 31-3-1 and Paragraph J of Rule 8-401, the presiding judge of the municipal court may designate responsible persons in writing who are authorized to release certain arrested persons from detention prior to the arrested person's first appearance before a judge.

[Adopted by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**[NEW MATERIAL]**

**9-302A. Order for release on recognizance by designee.**

[For use with District Court Rule 5-408(B) NMRA,  
Magistrate Court Rule 6-408(B) NMRA,  
Metropolitan Court Rule 7-408(B) NMRA, and  
Municipal Court Rule 8-408(B) NMRA]

STATE OF NEW MEXICO

[COUNTY OF \_\_\_\_\_]

[CITY OF \_\_\_\_\_]

\_\_\_\_\_ COURT

[STATE OF NEW MEXICO]  
[COUNTY OF \_\_\_\_\_]  
[CITY OF \_\_\_\_\_]

v. \_\_\_\_\_ No. \_\_\_\_\_  
\_\_\_\_\_, Defendant.

**ORDER FOR RELEASE ON  
RECOGNIZANCE BY DESIGNEE**

IT IS ORDERED that the defendant be released on personal recognizance on the defendant's promise to appear and subject to the condition that the defendant not commit any federal, state, or local crime during the period of release.

**APPEARANCE BOND**

I \_\_\_\_\_, defendant in the above-entitled matter, do hereby bind myself to the following conditions of release:

I agree to appear before the above court on \_\_\_\_\_, at \_\_\_\_\_ [a.m.] [p.m.] in courtroom \_\_\_\_\_ and at such other places as I may be required to appear, in accordance with any and all orders and directions relating to my appearance in the above-entitled matter as may be given or issued by the above court or any municipal, magistrate, metropolitan, district, or appellate court to which the above entitled case may be filed, removed, or transferred.

I understand that the court may have me arrested at any time, without notice, to review and reconsider these conditions.

I understand that if I fail to appear as required, I may be prosecuted and sent to [jail] [the penitentiary] for the separate offense of failure to appear. I agree to comply fully with each of the conditions imposed on my release and to notify the court promptly in the event I change my contact information indicated below.

I understand that my conditions of release may be revoked and that I may be charged with a separate criminal offense if I intimidate or threaten a witness, the victim, or an informant, or if I otherwise obstruct justice.

I further understand that my conditions of release will be revoked if I violate a federal, state, or local criminal law.

\_\_\_\_\_  
Defendant's signature

\_\_\_\_\_  
Date of signature

\_\_\_\_\_  
Time of release

\_\_\_\_\_  
Date of release

\_\_\_\_\_  
Cell phone number

\_\_\_\_\_  
Alternate phone number

\_\_\_\_\_  
Email address

\_\_\_\_\_  
Mailing address (include city, state, and zip code)

\_\_\_\_\_  
Physical address (include city, state, and zip code)

The above conditions of release are hereby approved. The defendant shall be released from custody upon the execution of this agreement.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Designee

[Approved by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

NOV 12 2015



Name: Christopher Dodd  
Phone: 505.835.2225  
Email: christopher.dodd@lopdm.us  
Rule: Proposal 55 Generally

I am concerned with the general state of pretrial release in New Mexico post-*Brown*. While *Brown* clearly demands a shift away from the unspoken rule of imposing monetary conditions of release in the vast majority of cases, I am unconvinced that the status quo has been impacted by the *Brown* decision. Monetary conditions of release remain the norm. Specifically, in preparing these comments, I examined the Odyssey Public Access records for custody arraignments conducted by the Bernalillo County Metropolitan Court between November 2 and November 6, 2015. For purposes of this comment, I examined only those arraignments and first appearances that had not been preceded by any failures to appear or other procedural history which would increase the likelihood that the court would impose monetary conditions of release. During this five day period, the court conducted 41 misdemeanor custody arraignments and 69 felony first appearances that had not been preceded by other procedural history. The following chart shows the alarming rate at which secured monetary conditions of release are being imposed.

Date	Type of Case	Number of Cases In Which Monetary Conditions Were Imposed	Number of Cases In Which Monetary Conditions Were Not Imposed
11/2/2015	Misdemeanor	11	4
	Felony	16	0
11/3/2015	Misdemeanor	5	2
	Felony	9	2
11/4/2015	Misdemeanor	1	2
	Felony	13	3
11/5/2015	Misdemeanor	7	4
	Felony	6	2
11/6/2015	Misdemeanor	4	1
	Felony	13	5
<b>Totals:</b>	Misdemeanor	28	13
	Felony	57	12
	Combined	85	25

In misdemeanor cases during this period, monetary conditions of release were imposed at a rate of over 68 percent. In felony cases, monetary conditions of release were imposed at a rate of over 82 percent. Overall, monetary conditions were imposed in over 77 percent of the cases. If non-monetary conditions of release are presumed to be sufficient, we should not be seeing more monetary conditions of release than non-monetary ones. But this is exactly what is happening. I unequivocally support a shift away from monetary conditions of release, but I suggest that the Supreme Court consider establishing some form of oversight mechanism to ensure that its rules are being properly implemented. Perhaps the Court could establish a conditions of release review board, which would work with the trial courts to implement bail reform in New Mexico.

Zimbra

supjdm@nmcourts.gov

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**Fwd:**

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**From :** Gerald Madrid <gmadrid726@aol.com>

Thu, Nov 12, 2015 09:57 AM

**Subject :** Fwd:**To :** nmsupremecourtclerk@nmcourts.govSUPREME COURT OF NEW MEXICO  
FILED

NOV 12 2015

-----Original Message-----

From: Christian Madrid &lt;christian.m.madrid@gmail.com&gt;

To: Gerald &lt;gmadrid726@aol.com&gt;

Sent: Thu, Nov 12, 2015 8:43 am



My name is Christian Madrid and I am a licensed bail bondsman and member of the bail bond association of New Mexico. In my opinion, the problems with our state bail bond system did not begin until the Walter Brown opinion came out last year. A majority of Judges around the state have been utilizing unsecured bonds and ROR in order to comply with the idea of releasing defendants on the "least restrictive means". In my opinion, the cause of the major spike in violence in our state is how bail is being administered. The word is out and criminals know that they will not have to take any personal accountability for their actions and will yet again be released without any real incentive to return for court.

Setting secured bonds which must be posted through a Surety is the proven way to assure court appearance and compliance. Private bail bond companies operate at no expense to the tax payer and have the most incentive to get defendants to court no matter how serious the crime is. We have our own money/assets on the line so we guarantee each defendant's appearance otherwise we must use our own resources to locate that person and surrender them to the court. A majority of defendants who are given an unsecured bond or "promise to pay" if they do not show up in court is a perfect example of administering reckless bail. A \$2,000 unsecured bond is as useless and ineffective as the paper it's written on because most defendants can't pay even a very small portion of that and more so there is no one to collect it. When a bond is posted with a bail bond company, we get the defendants family and close personal friends involved so they understand the risk of failing to appear in court. It is my opinion that releasing defendants on unsecured bonds and ROR like most judges have been doing for the past year promotes even more criminal activity in our state. Lastly, pre trial services should be reserved for the truly indigent instead of recommended for every defendant because a PTS employee has no personal incentive to get defendants to court.

Thank you,  
Christian Madrid

***Gerald Madrid Bail Bonds***  
507 5th Street NW • Albuquerque, NM 87102

**Christian Madrid**  
Office: (505) 243-0249  
Cellular: (505) 401-4957  
Email: christian.to.madrid@gmail.com  
**24-Hour Service**





STATE OF NEW MEXICO  
SECOND JUDICIAL DISTRICT

NAN G. NASH  
CHIEF JUDGE

POST OFFICE BOX 488  
ALBUQUERQUE, NEW MEXICO 87103  
505-841-7531  
FAX: 505-841-6785

12 November 2015

SUPREME COURT OF NEW MEXICO  
FILED

Joey D. Moya, Chief Clerk  
New Mexico Supreme Court  
P.O. Box 848  
Santa Fe, NM 87504-0848

NOV 12 2015

Re: Proposed Revisions to Rules 5-401, 5-408, 6-408, 7-408, and 8-408 NMRA

Dear Mr. Moya:

The Second Judicial District Court (the "Second") appreciates the New Mexico Supreme Court's (the "Court") opportunity to provide comments on the proposed revisions to (and creation of) the Rules governing pretrial release. As a general comment, the Second applauds the Court's attempt to clarify the Rules governing pretrial release and its effort to embrace pretrial risk assessment instruments.

As the Court is aware, the Second has been operating under a pilot Case Management Order (the "CMO") since February of 2015. The CMO is designed to move cases through the court system more quickly, while also protecting the rights of defendants and victims. The CMO instituted significant procedural changes to how cases move through the Second. While the Second supports the goals of the CMO, its implementation has placed significant strain on the court system in Bernalillo County. The Second, together with Metropolitan Court, has also been piloting an objective Risk Assessment Instrument ("RAI") since September of 2015.

The Second has identified certain portions of the proposed Rule amendments which would significantly add to the burden already placed on Bernalillo County's court system, that are ambiguous, or are practically difficult to implement. It therefore offers the following comments:

1. Comment on 5-401 (G) (2). This portion of the Rule requires a hearing, upon motion, within 48 hours if defendant remains in custody because he or she is unable to post a financial bond. Specifically, the proposed language is:

...If the court requires a secured bond for a person's release under Paragraph B of this rule, and the person continues to be detained

twenty-four (24) hours after the issuance of the order imposing secured bond as a result of the person's inability to [meet the bail set] post the secured bond, the person shall, upon motion, be entitled to have a hearing to review the [amount of bail set] type of release and conditions of release set forth in the release order. The court shall hold the hearing within forty-eight (48) hours after the filing and service of the motion...

The Second suggests there are a couple of practical problems with this requirement and its wording.

a. First, from a practical perspective, setting a hearing within 48 hours from the filing of a motion is impracticable. Defense counsel often fails to deliver a copy of filed motions to the judge's chambers; the judge must therefore rely on Odyssey to know when a motion is filed. Motions do not appear in Odyssey until generally after 24 hours. This is for a variety of reasons. First, in order for the motion to be able to be viewed in Odyssey, the filed motion must be docketed and attached to the record in Odyssey. While the Second has made great strides to docket filings quickly, docketing is not instantaneous—it requires an individual to scan the document into Odyssey, attach it to the case record, and quality check this process. There are clerks assigned to docket several times a day in the Second, but docketing is not immediate. Once the document is attached to the case record and viewable in Odyssey, an e-mail is sent to the TCAA to alert the judge's office that a motion has been filed. The TCAA then looks up the record and can set up a hearing. The time for this process to happen is generally at least 24 hours.

After the record is available to the TCAA and the TCAA is aware that a hearing must be set up, he or she still must find room for it on the judge's schedule and provide notice to all parties. Setting up a hearing within 24 hours is challenging under any circumstance—doing so with multiple hearings while under the CMO would likely be impossible. In addition, the parties must then ensure defendant is placed on a transport list—which generally must happen by 3:00 the day before the hearing.

Even assuming both the DA and PD were available to appear in court with less than 24 hours notice—which is unlikely under the CMO--the CMO mandates each judge be in certain activities at certain periods of time. So, for example, hypothetical Judge A's monthly schedule is organized into trial weeks, motion week, and an administrative week where Judge A does not have a courtroom (necessary in the Second because there are not enough courtrooms for each judge to have a courtroom). Judge A will hear pleas and scheduling conferences/track assignment hearings (also required by the CMO) before and after trials during his or her trial week, but otherwise hears motions—including most conditions of release motions—during his or her motions' week. Requiring Judge A to continuously hear conditions of release motions during trial weeks would mean he or she would generally be unable to accept pleas during trial weeks thus necessitating plea hearings be postponed until that Judge's motion week. This would delay disposition of the case and may also put the plea outside of the deadline mandated in the CMO. Currently, as the Court is aware, every criminal judge in the Second is continuously in trial every week of their "trial" weeks (as well as their administrative weeks under a temporary arrangement

where the Civil Judges have been giving up their courtrooms to allow Criminal Judges to hold trials). While the Second might be able to schedule conditions of release hearings with a "coverage" judge, i.e., with another division's judge, it could not do so within 24 hours given the judges' currently overstretched dockets.

Moreover, even assuming the judges in the Second restricted setting "before and after trial" hearings to those involving conditions of release, victims would be unable to attend hearings set up on such short notice. The provision seems to prohibit providing any meaningful notice to victims on the issue of potential pretrial release.

The Second suggests the **ten-day** time period, already followed in *Segura* hearings, and found in (G) (3) is more appropriate. This would allow conditions of release hearings to be scheduled during a judge's motions' week in most cases; where that was not possible because the judge's motions' week was too far out from the request for hearing it would provide time to schedule the hearing in front of a different judge. This would also allow the State to comply with provisions found in the Victim's Right Act by providing adequate notice to victims to make arrangements to be at the release hearing. Alternatively, language could be included that would allow the hearing to take place on the regularly-scheduled arraignment calendar (held on Mondays and Fridays in the Second) in front of the arraignment judge. While still often outside of the 48-hour deadline currently included in the proposed rule, it would allow these motions to be heard within approximately four to six days, depending on when the motion was filed and whether the next arraignment calendar had closed (necessary to ensure transport of a defendant and notice to the parties). This will present a problem, however, if the number of arraignments eventually goes back to the number prior to the implementation of the CMO and other reforms—which was more than double the amount of arraignments currently being held each week.

b. Regardless of the time period, the Second suggests that Section (G) (2) be clarified to explain that these mandatory condition of release hearings are only required where the defendant's continued detention is *solely* as the result of the person's inability to post the secured bond. The Second assumes that the Court does not intend to permit a defendant to continuously trigger the mandatory hearing provision when other considerations, apart from the inability to post bond, may be keeping that defendant in custody.

2. Comment on 5-401 (G)(3). This section is proposed to read:

If the district court requires a secured bond for a person's release under Paragraph B of this rule, and the person continues to be detained as a result of the person's inability to post the secured bond, the court shall hold a hearing ten (10) days after the date of arraignment or waiver of arraignment to review the type of release and conditions of release set forth in the release order. The court shall schedule the hearing regardless of whether the defendant has filed a motion for review under Subparagraph (G)(2) of this rule, but the court may vacate the hearing upon stipulation of the parties. Unless the release order is amended and the person is thereupon released, the court shall state in the record the reasons for declining to amend the release order. No

person eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond.

a. The Second's main concern with this provision stem from the Court's assumption that judges know when defendants remain in custody after arraignment and whether the defendant remains in custody on this case or another case. They do not. While judges do receive notice of the cancellation of a warrant when a defendant is taken into custody if they were previously out of custody, they do not receive information regarding who remains in-custody once conditions of release are set.

While the Second is hopeful that an integrated database—allowing justice partners to share data—will be adopted in the future, currently judges are limited to the information contained in Odyssey. Judges rely on defense counsel to inform them when their clients remain in jail and require a hearing. Judges do not have access to jail data, including the data regarding who remains in-custody.

As there is no requirement that the jail provide in-custody information, this section appears to *require the courts to set 10-day hearing on all defendants arraigned, canceling the hearings if counsel remembered to stipulate to do so.* This would therefore require the Court to set up an additional 20-60 hearings a week (depending on the numbers of in-custody arraignments that week), and then cancel more than half of those hearings once someone informed the court that defendant had been released (assuming counsel remembered to inform the court). It is important to note that trial courts already set up many hearings that are not actually necessary; the parties wait until the day before the hearing to notify the court that the hearing can be canceled, if they notify the court at all. There is no reason to expect the same would not be true of conditions of release hearings. Given the shortage of time for judges to hold hearings in the Second, it makes little sense to require them to reserve significant amounts of time for more hearings that will never take place.

The Second urges the Court to reconsider this change and require defense counsel to submit a motion to review conditions of release to trigger the release hearing; defense counsel is in the best position, outside of the jail, to know whether their client remains incarcerated. They are also in the best position to determine whether it is the inability to make bond that is the sole reason their client remains incarcerated. This would also encourage early communication between defendants and defense counsel—something which remains a problem. It would further allow defense counsel to determine whether being out of custody is in the best interest of the client in each particular case. There are times when remaining in custody is in the best interest of the client, such as when the client is completing ATP, setting up a sufficient support system so that he or she does not return to custody, or where there is a threat of retaliation.

If the Court determines the burden should remain on judges to automatically set hearings, the Second suggests the Court add a monetary sanction provision to this section for counsels' failure to stipulate and inform the court when a hearing is no longer necessary. Alternatively, the Court could expand the time period and require a condition of release hearing at the mandatory scheduling conference/track assignment hearing conducted in the Second.

Alternatively, the Second requests the Court add a provision to this section requiring county jails to provide an accurate in-custody list to the court of those individuals, with case numbers, who remain in custody after arraignment within three days after the arraignment. The TCAAs would then have the tools with which to determine which of the defendants assigned to their division required conditions of release hearings.

b. As in 1, above, the Second suggests that Section (G)(3) be clarified to explain that mandatory conditions of release hearings are only required where the defendant's continued detention is *solely* as the result of the person's inability to post the secured bond.

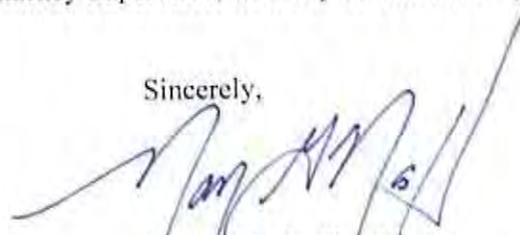
3. Comment on confidentiality of the RAI. The Second has been asked by the Ad Hoc Pretrial Release Committee to also provide comments as to whether the pretrial risk assessment should remain confidential. The Second suggests the pretrial report should be available to the public.

During its pilot program, the Second has provided the following information, which remains confidential, to both the PD and DA: the risk assessment "score" sheet, defendant's criminal history, and the interview sheet from the interview conducted at the jail. These records are kept confidential because they may contain sensitive personal information and because they contain information partially derived from the NCIC report—which is required to be kept confidential by contract. The Pretrial Report, which includes Pretrial Service's recommendation, the score number, where defendant falls in the release matrix, and the aggravating and mitigating factors, is provided to the judge, the PD, and the DA. It is also filed into Odyssey after the arraignment or conditions of release hearing.

It is the Second's position that while information contained in the Pretrial Report is not admissible at trial or for any other purpose than pretrial release, it should be available to other courts and the public. This information is openly discussed at the arraignment or condition of release hearing—both of which are public hearings. The Second believes release decisions should be open and transparent and that any information disclosed in an open hearing is already part of the public record. Including the Pretrial Report makes it easier for the public to see how a release determination was made without the need for a transcript. This therefore conserves court resources. In addition, once the Supreme Court has approved a risk assessment instrument for state-wide use, this will allow other courts and the justice partners to efficiently share information.

Thank you for your consideration. Please feel free to contact my office, Presiding Judge Brown, or Joy Willis, the Criminal Division's Attorney Supervisor, with any comments or questions.

Sincerely,



Nan G. Nash, Chief Judge  
Second Judicial District Court

**Proposed Rule Changes Comment Form.**

**Name: Randy Gomez**  
**Phone: 575-993-0290**  
**Email: randy@moosebailbonds.com**

SUPREME COURT OF NEW MEXICO  
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NOV 12 2015

**Rule No: Proposed Amendments to the Rules Governing Pretrial Release**



**Comments:**

The current rules as written and if followed by the courts were sufficient and would serve the purpose of a fair and equitable means of release. It is obvious the supreme court endorse's the use of pre-trial services state wide at a minimum 10-15 million dollar price tag. My personal opinion is the outcome of the adhoc committee was predetermined and loaded with like minded individuals to assure the outcome. Secondly, to somehow blame the bail bond industry for the so called "boomerang" criminal is highly unfair. The real issue is the way that that the courts through out the state fail to follow the rule and set ridiculously low bonds for career criminals. The fact these criminals are career criminals is largely due to the leniency they are shown time and time again. This has nothing to do with the bail bond industry. "isnt that the essence of the problem?"

**Proposed Rule Changes Comment Form.**

**Name: Jacqueline Sanchez**  
**Phone: 505-328-2085**  
**Email: jackiesanchezbailbonds@gmail.com**

SUPREME COURT OF NEW MEXICO  
FILED

NOV 1 2 2013



**Rule No: RULE 55**

**Comments:**

I appreciate the efforts of the Ad Hoc committee, and the time given to study this important issue. My concern comes not only from a bail agent, but also from a tax payer who has invested in our community. I firmly believe that WORKING TOGETHER, would allow us to better serve the citizens of New Mexico, by providing a system that not only supervises the individual, but also guarantees their appearance in court.

Allowing individuals to be released on the least restricted means should be reserved for those who have no criminal history, and ties to the community.

The concept of bail is one that has been around for centuries, even dating back to biblical times. This longevity is not just a testament to the effectiveness of bail as a mechanism for holding people accountable, but also proof of its ability to serve as a tool for ALL in the criminal justice system regardless of race, income level, etc.

**Proposed Rule Changes Comment Form.**

**Name: Denise Madrid Boyea**  
**Phone: 575.234.1404**  
**Email: boyecalaw@gmail.com**

SUPREME COURT OF NEW MEXICO  
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NOV 12 2015



**Rule No: 55 - Pre-Trial Release**

**Comments:**

I am a licensed attorney and have been practicing law in Southeast NM for 32 years. I reviewed the proposed changes to the Pre-Trial Release rules and believe the proposed changes are not necessary, not fair and not appropriate. While I wholeheartedly agree that pretrial release practices should conform to standards required by the Federal and State of NM Constitutions, the existing pretrial rules in place are already in compliance therewith. I believe Defendants who have merely been accused of a crime but not adjudicated have a fundamental right to be released due to the presumption of innocence. The release conditions should provide for methods to ensure the safety of the accused, any witnesses/victim and the public. Again, those safeguards are already in place.

With regard to the committee who is promulgating these Rule changes, it is my understanding that the purpose of the committee was to review Jail Bail Bond Schedules that allow arrestees to be released in accordance with a pre-determined bail bond amount without having to wait for arraignment. It appears to me that your proposed Rule changes go far beyond the purpose of your Committee. The system now in place whereby accused persons can post a bail bond and be released to return to their homes, family and jobs has worked well for at least the past 30 years. I see no necessity to change the existing system, especially since a secured bail bond adds a layer of protection for the Courts. A paid surety has a monetary incentive to guarantee the appearance of the Defendant and will immediately begin to locate a person who fails to appear. Under the proposed Rule changes, a person will remain incarcerated for 48 hours instead of posting bond within a few hours with a paid surety in accordance with the Bond Schedule. This will result in extreme over-crowding of detention facilities, which are already bursting at the seams with people serving sentences or with a Probation or some other type of hold. A possible remedy to over-burdening the jail population while awaiting arraignment is to have more Judges conducting arraignments on a daily basis. The funding to make Judges available every day, including week-ends and holidays, probably does not exist in the State budget, which is already cash-strapped.

Also, the rules seem to require some sort of Pre-Trial Services program, whose function would be to undertake Risk Assessments. In smaller NM communities like Carlsbad, Artesia, Roswell, Lovington and Hobbs, there are no Pre-Trial Services programs that exist to conduct a Risk Assessments.

Also, the proposed Rules appear to prioritize the type of bond required by the court by naming first appearance bonds, then 10% bonds, property bonds, then surety bonds. An appearance bond and a 10% bond provides very little incentive to the Defendant to actually show up in court since there is very little, if any "skin in the game" under those two scenarios. If a Defendant fails to appear, the court does not have a procedure to track down and return the Defendant to custody, and in my experience usually simply waits for the Defendant to get arrested on the arrest warrant some day in

the future. Property bonds and surety bonds provide the highest assurance that a Defendant will in fact appear in court.

With regard to the proposed provisions for review hearings, the requirement of a hearing within 48 hours after a Motion to Review Bond Conditions is filed is not practical and will impose a burden on the courts to schedule a hearing this quickly.

With regard to Release from custody by a designee, it is not clear what the qualifications of the designee should be. The only designation is that such designee should not be anyone closely related to a paid surety or employed by a jail/detention facility unless designated in writing by the judge in the district where the jail is located. Other than those two restrictions, there is no distinct qualifications identified for such designee. A designee would wield a tremendous amount of power over the liberty of the accused and the Rules should be more careful in determining the qualifications of a designee. The cost associated with providing for said designee needs to be taken into consideration. If a designee releases someone on an appearance bond and that person commits an offense, does this subject the designee to liability to any victim.

The proposed rules need additional consideration before they are implemented. I urge the Committee to pause to consider the issues raised by this comment as well as the comments of others above.

**Proposed Rule Changes Comment Form.**

**Name: Hon. Fred Van Soelen**  
**Phone: 575-742-7510**  
**Email: clodfvs@nmcourts.gov**

SUPREME COURT OF NEW MEXICO  
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NOV 12 2015



**Rule No: 5-401**

**Comments:**

Rule 5-401(A) states that all persons bailable under the constitution shall be released on their own recognizance or by unsecured appearance bond unless the court makes written finding that this release will not adequately assure the person's appearance at future hearings.

Then, Rule 5-401(B) states that if the court makes this finding or that this release "will endanger the safety of any other person or the community", the court may impose a variety of bonds "that will reasonably assure the appearance of

the person as required and the safety of any person and the community". The rule and case law, including the recent State v. Brown, make it clear that the safety of any particular person or the community at large is to be taken into account when the court decides whether to release a person on their own recognizance or by unsecured appearance bond.

But 5-401(A) does not clearly state this, and I think adds to confusion over this aspect of the rule. As long as we are reviewing this rule, shouldn't we amend 5-401(A) (and the concurrent rules for other courts) to state "...unless the court makes a written finding that such release will not reasonably assure the appearance of the person as required, or will endanger the safety of any other person or the community."

**Proposed Rule Changes Comment Form.**

SUPREME COURT OF NEW MEXICO  
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**Name: Jeff Rein**

**Phone: 505-369-3570**

**Email: jeff.rein@lopdnm.us**

NOV 12 2015



**Rule No: 5-401**

**Comments:**

Thank you for the opportunity for public comment on the proposed changes to the rules on pretrial release.

5-401A. Request that the rule require actual written findings, as opposed to a check box, when the court makes a finding that "such release will not reasonably assure the appearance of the person as required." The rushed nature of many conditions of release hearings often means that the judge does not make a thoughtful and informed decision when denying pretrial release. Actual written findings should impose that kind of thoughtfulness.

5-401B(1). Percentage bonds should include the option of making a cash deposit of "up to" ten percent of the amount specified, and delete the option to make the percentage lesser or greater than ten percent. Judges will tailor their decisions to require whatever amount they want. It makes no sense that the percentage goes above ten percent. The judge can just as easily raise the total amount; 10% of \$5,000.00 or 20% of \$10,000. Minimize the opportunities for confusion.

5-401F(1). Include the percentage option bond as one of the conditions that would require a hearing if the defendant cannot post the bond within 24 hours to be eligible for a motion to review the conditions of release.

5-401G(2). Make clear whether this provision is in conflict or supplements 5-401K. If a person is charged with a felony and the initial bond hearing was held in magistrate or metropolitan court, the appeal either must be filed in district court, or may be filed in district court. I suggest that the language be amended between G and K to require that an appeal of conditions of release pre-indictment be filed in district court.

5-401H. The provisions of this section should not be implemented without the requirement of a mandatory hearing if the purpose is to require the defendant to return to custody under any circumstances. The hearing requirements should include notice to defendant and attorney and a summary of the reasons for the proposed changes in conditions of release.

5-401P. Paragraph on real or personal property bonds is confusing. Should the language read ...real or personal property is authorized only in those districts in which an order has been entered finding that the pledging of an irrevocable letter of credit will result in the detention (release?) of persons otherwise eligible for release.

Thanks for your consideration.

Jeff Rein

**Proposed Rule Changes Comment Form.**

**Name: Rick Davis**

**Phone: 505242-1800**

**Email: TMADRID505@YAHOO.COM**

**Rule No: #55**

**Comments:**

As a taxpayer of New Mexico and a member of the community if the courts were to require that courts use signature bonds in stead of a cash bond or surity bond the crime rate will increase. The criminals know that a signature bond is a promise for them to pay a bond that they have not been pre-qualified to see if they can pay it. I request that you suggest to the NM courts to use a cash bond or surity bond or property bond to insure the court appearance of a person charged with a crime. I believe these suggestions will help with the fta problem and hopefully reduce crime. I look forward to discussing this further with you all. Thanks

SUPREME COURT OF NEW MEXICO  
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NOV 12 2015



**Proposed Rule Changes Comment Form.**

**Name:** Christopher Dodd  
**Phone:** 505.835.2225  
**Email:** christopher.dodd@lopdm.us

NOV 12 2015



**Rule No:** 7-408(D)

**Comments:**

Under Proposed Rule 7-408(D), the forty-eight hour rule of *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), is restated, as it is currently already incorporated into the rules in Rule 7-203(A). However, the rules, as currently enacted and as proposed, do not contain a remedy for violation of the *McLaughlin* rule. Currently in Bernalillo County Metropolitan Court, New Mexico's busiest court, there are individuals who are held longer than the constitutionally mandated maximum of forty-eight hours without a probable cause determination. For example, see case number T-4-DV-2015-004903, where an individual was booked into the Metropolitan Detention Center on October 16, 2015 at 4:15 A.M. and a probable cause determination was not made until October 19 at approximately 10:00 A.M. That is nearly seventy-eight hours between booking and the probable cause determination, a plain violation of the *McLaughlin* rule. However, the courts have been unwilling to enforce a meaningful remedy in these situations. Instead, when defense counsel raises a violation of the forty-eight hour rule, the courts often remedy the constitutional violation by proceeding to a probable cause examination. Then, if there is probable cause, the courts proceed as if there has not been a constitutional violation and impose conditions of release, as occurred in the case mentioned above. I would propose that in order to safeguard the constitutional rights of detainees, there must be a meaningful remedy when the rule is violated, as a rule without a remedy is merely a guideline. My suggestion is that where the forty-eight hour rule is violated, the individual be immediately released on personal recognizance. This is the only meaningful remedy for this clear constitutional violation. Such a rule would encourage prompt probable cause determinations, as a failure to comply with the forty-eight hour rule would result in an inability to impose conditions of release.

**Proposed Rule Changes Comment Form.**

SUPREME COURT OF NEW MEXICO  
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**Name:** Marjorie C. Jones  
**Phone:** 505-334-6151  
**Email:** aztdmcj@nmcourts.gov

NOV 12 2015



**Rule No:** Proposal 55

**Comments:**

Thank you for this opportunity to comment on proposal 55. I am a staff attorney in the 11th Judicial District Court. The following comments are my own and are not meant to represent the views or opinions of the district court judges or any other court personnel in this district.

With respect to secured bonds provided for in rule 5-401 it is proposed that "no person eligible for pretrial release . . . shall be detained solely because of financial inability to post a secured bond." The only logical consequence of this directive is that all defendants for whom a secured bond has been imposed will be released regardless of a secured bond having been imposed. Why? Because if the defendant has not posted the secured bond, with rare exception the sole reason the defendant is still detained can only be because of financial inability to post the bond. There is, therefore, no practical reason to ever require a secured bond. All the imposition of a secured bond would accomplish is to allow a defendant with financial means to pay his/her way out of jail a few days ahead of a defendant who is without financial means. Both will be released at some point; the latter presumably on the person's own recognizance or on an "unsecured appearance bond in an amount set by the court," whatever that means, under 5-401(A).

I suggest that the Committee has not actually confronted the reality of what is being proposed. It seems to me that either the provision that "no person . . . shall be detained solely because of financial inability to post a secured bond" or the provisions authorizing secured bonds must be deleted. The two are incompatible as a practical matter.

There is no requirement in New Mexico, as there is in Colorado, that all bonds include some type of financial condition. (See "Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option" by Michael R. Jones of the Pretrial Justice Institute, October 2013. Analyzing the effectiveness of bonds in Colorado requiring that money be posted prior to release versus requiring that money be paid after release should the person fail to appear.) My point is that there is no statutory impediment in New Mexico (as there would be in Colorado) for deleting the provisions in 5-401 authorizing secured bonds.

I would add lastly that New Mexico case law should be considered as amendments to rule 5-401 are contemplated. I understand, but have not confirmed, that there is precedent in New Mexico that gives a court the authority to deny bond altogether, in certain circumstances, under the "inherent authority of the court" doctrine.

I do appreciate the work of the Committee concerning this very difficult matter. Again, thank you for this opportunity to comment.

**Proposed Rule Changes Comment Form.**

**Name:** Peggy Jeffers  
**Phone:** 505-690-5396  
**Email:** peggyjeffers@yahoo.com

**Rule No:** Proposal 55

**Comments:**

I support the proposed changes to the rules relating to pre-trial release.

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NOV 12 2015

A handwritten signature in black ink, appearing to be 'P. Jeffers', is written over the date stamp.

NOV 12 2015

Commentary from the New Mexico District Attorney's Association.



1. The rules governing pretrial detention release as proposed in New Mexico in NMRA Rule 5-401 do not allow for the State to temporarily detain an individual as provided under 18 U.S.C. §3142(a). This is an important omission because the proposed rules assume that the prosecuting authority would have received the case from the Court and would be able to contact the victim in a very short timeframe. Specifically, NMRA Rule 5-401(F) provides that the State would have less than forty-eight hours to file a motion to detain a person without bail since the State mandates a court to set bail within the first forty-eight hours. Situations could easily arise where the Judge sets bail before the State's motion is filed since the Court must set bail within less than forty-eight hours without giving the prosecuting authority adequate time to respond. This is an unrealistic timeframe as the State would likely not even have the case opened or a police report in order to get victim contact information. In the State of New Mexico, we could not comply with notification of victims of enumerated crimes before a person is released.
2. NMRA Rule 5-401(G) provides a mandatory review of conditions of release within forty-eight hours. Under 18 U.S.C. §3142 (2) (B), the statute provides for a motion and a continuance if requested which the proposed pre-trial release rules have neglected to incorporate. Again, this is important to recognize the realities of the caseload encountered by the prosecution in the system. The last case study by the New Mexico Sentencing Commission based on FY 15 disposition data showed that the State is understaffed by 417.3 prosecutors, 68.2 Investigators, 77.7 Victim and Witness Advocates, and 492.4 Support Staff. The addition of all of these hearings would cause more strain on a system which is already under pressure due to a lack of resources.
3. NMRA 5-401 (C) does not consider the immigration status of a person as provided under 18 U.S.C. §3142(d). Under the Federal law regarding bail, it is included under subsection (d) Temporary Detention to Permit Revocation of Conditional Release, Deportation, or Exclusion which allows as factors for consideration that:
  - (1) such person – (A) is, and was at the time the offense was committed, on – (i) release pending trial for a felony under Federal, State, or local law; (ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offender under Federal, State or local law; or (iii) probation or parole for any offense under Federal, State, or local law; or (B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a) (20)); and (2) such person may flee or pose a danger to any other person or the community;

such judicial officer shall order the detention of such person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement

official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B) of this subsection, such person has the burden of proving to the court such person's United States citizenship or lawful admission for permanent residence. See 18 U.S.C. §3142 (a)

4. The proposed NMRA 5-401 also attempts to go beyond the decision in State v. Brown, 2014-NMSC-038, to completely disallow bond schedules fixed on a monetary amount. Although bail schedules may not always be appropriate, it at least sets something immediately for an individual and these schedules appear to still be currently permissible in New Mexico as long as the schedule can take into account the factors enumerated in State v. Brown. It is going to be cumbersome for current Judges to take phone calls all night long, as well as to hold hearings in such a short timeframe. During the last presentation in front of the Court and Criminal Justice Interim Committee, it was suggested that the Judges hold Saturday Court. Some jurisdictions already do hold criminal courts on Saturdays to try to alleviate some of the backlog so it would be difficult to make additional room in busy dockets for these hearings.
5. If the Court did hold a hearing within forty-eight hours under NMRA 5-401, the Judge would likely be making a decision in a vacuum without information since the prosecution would likely not be able to gather all of the information needed for the hearing in that timeframe. When the model rules were implemented in Albuquerque for disclosure, significant additional funds were allocated to the agencies in order to help implement the rule which have proven at this point to be insufficient leaving the offices still very short-staffed. It would make more sense to provide for a temporary detention and require the hearing within a ten day window because typically that is the same time period in which the State has to hold a preliminary hearing in the interest of judicial economy.
6. The Court would have their own employees dedicated to pre-trial release, but the proposed rules do not contain any authority to arrest similar to a bondsman who has that authority. The Court would need to allocate the funds and train the employees so that they are properly trained to deal with the situations that they might encounter. Currently, probation officers attend a minimum of a three month academy.
7. The conditions of release provision under NMRA 5-401 (D) do not contain any provisions for active GPS on the releasees which might help ensure that they do not flee and are a lower danger to certain classes of victims as the releasees can be monitored by the pretrial detention staff.

**ANALYSIS OF PROPOSED AMENDMENTS TO THE RULES GOVERNING  
PRETRIAL RELEASE IN NEW MEXICO COURTS**

The proposed amendments ensure that a defendant be released on the least restrictive conditions to minimize flight risk and dangerousness to the community. Money bonds are to be imposed only if nonfinancial conditions release conditions are insufficient methods of release. The amendments proposed are to conform to federal and state constitutional principles.

**Federal Bail Provisions**

In the federal courts, release or detention of a defendant pending trial is governed by the Bail Reform Act of 1984. 18 U.S.C. §§ 3142-3156 (1990). 18 U.S.C. § 3142, provides, in general, one of four categories in which a defendant may be designated:

Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—

- (1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;
- (2) released on a condition or combination of conditions under subsection (c) of this section;
- (3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or
- (4) detained under subsection (e) of this section.

Under (1) & (2) above, the judicial officer must consider the nature and circumstances of the offense, weight of evidence, and history and characteristics of the defendant, and the nature and seriousness of danger posed by release of the defendant. 18 USC §3142(g). If a judicial officer orders a defendant's pretrial release on personal recognizance or an unsecured appearance bond, then the judicial officer must impose the condition that the defendant not commit a new crime. 18 U.S.C. § 3142(b). If the judicial officer determines that the pretrial release on personal recognizance or an unsecured appearance bond is inadequate to reasonably assure the defendant's appearance and/or the safety of the community, then the judicial officer must follow 18 U.S.C. § 3142(c), which requires that the judicial officer order that the defendant not commit

a new crime while on release in combination with other release conditions. These release conditions can include regular reporting to a law enforcement agency, avoiding contact with the victim, maintaining employment, etc., but must be the least restrictive combination of conditions to reasonably assure the defendant's appearance and reasonably assure the safety of the community. 18 U.S.C § 3142(c)(1)(B)(i-xiv).

If the judicial officer makes a determination that the offense was committed while the defendant was release pending trial, imposition of a sentence, or while on probation or parole, OR is not a U.S. citizen AND may flee or poses a danger, then a temporary 10 day detention can be ordered.

There are 6 situations where a detention hearing can be held: (1) a crime of violence; (2) where the maximum sentence is life or death; (3) maximum imprisonment is 10+ years under the Controlled Substances Act; (4) any felony if the defendant has been convicted of 2+ specific offenses; (5) defendant is a serious flight risk; or (6) will obstruct justice or threaten a witness. 18 U.S.C. § 3142 (f).

There are also specific guidelines regarding timing of the detention hearings. The detention hearing is supposed to occur at the defendant's first appearance before the judicial officer. The defendant may lack representation this early in the proceedings, unless the judicial officer made arrangements for the defendant to be represented by counsel. 18 U.S.C. § 3142(f)(2). The government may request a 3 day delay of the hearing upon motion. The defendant may request up to a 5 day continuance for good cause.

Overall, the use of secured bonds in federal court is rare—most defendants are released on recognizance or unsecured bonds, released on conditions, or detained.

## New Mexico's Proposed Amendments Compared to the Federal Bail Provisions

The proposed rule changes in New Mexico encourage the use of recognizance and unsecured appearance bonds where the defendant does not pose a flight risk and is not a danger to the community. This mimics the federal rules to a certain degree, as the use of a money bond in federal cases is uncommon. On the other hand, the proposed amendments do not address scenarios in which a defendant may be detained.

Under Rule 5-401(C), certain factors are to be considered when a judge determines the type and conditions of release: (1) pretrial assessment results; (2) and other factors such as the nature of the offense, weight of evidence, history and characteristics of the defendant, past conduct, whether the person was on probation, parole, released on another charge, and dangerousness to the community. Although the federal rules require a judicial officer to enter an order of temporary detention in cases where the defendant was released pending trial in another case, release pending execution for a sentence of appeal, or while on probation or parole, OR where the defendant is not a US citizen or lawfully admitted in the US, the proposed rules do not. In effect, without any similar mandate in the proposed rules, it is suggestive of the idea that the courts are free to determine release for any defendant no matter what the circumstances. This is troubling. For example, if a defendant commits a domestic violence crime against a victim and is awaiting disposition of that case and is released, and again commits another domestic violence crime against the same victim, the court is not bound to hold that individual in detention, despite the defendant's violation of his pretrial release conditions. Therefore, guidance as to when a court may hold a defendant in detention is both useful and necessary.

The proposed rules also do not explicitly consider a defendant's immigration status or give guidance to the courts on how to weigh immigration status into the factors used to

determine the type and conditions of release. For example, the immigration status of a defendant who has many familial ties to the US, a steady employment history, and no criminal history, etc. may be suggestive that the defendant is not a flight risk, and therefore a good candidate for release on recognizance or an unsecured appearance bond. On the other hand, the guidance is important for the criminal prosecution of deportable aliens. Stated another way, is deportability a factor that should be considered when assessing flight risk?

The federal provisions consider and give guidance on when detention of a defendant is appropriate. The proposed amendments do not. Nor do the amendments address the proof that is required for the court or prosecutor to request and/or establish that a defendant be detained pending trial. Such guidance is both necessary and useful for the courts and the prosecutor's office to ensure the equitable administration of justice.

#### Other Considerations

Rule 5-401(F) allows for the state to file a motion to detain a person without bail pending trial. If the State files such a motion, it is unclear whether the defendant subject to release during the time it takes to have the motion hearing before the court. The rule also does not indicate when the State may file this motion. For example, as the rule reads now, can the arrest warrant be filed concurrently with a motion to hold a defendant pending trial?

Rule 5-401(G) imposes a 48 hour window on the court after the defendant has been arrested to set pretrial release conditions. If a secured bond is set, and the defendant is unable to bond out, then a motion may be filed to review the release conditions. However, the court must hold a hearing within 48 hours of filing of the motion. Such time limits are insufficient to allow for the prosecutor to submit input regarding the release conditions as the district attorney's office may not have the case opened and assigned to a prosecutor by this point in time. Accordingly,

the court is solely left to making bond determinations where it may not be privy to facts that warrant continued detention or imposition of a secured bond. Relatedly, where the federal rules for detention hearings allow for continuances, the proposed rules do not. The ability to request a continuance of a bond review hearings benefits the prosecution and the defense by allowing the parties to gather information to make meaningful suggestions regarding a defendant's bail.

Furthermore, if the defendant continues to be detained as a result of the person's inability to post the secured bond, a mandatory hearing must be held after 10 days to review the conditions of release. There are no provisions allowing for the defendant to waive or continue the 10 day period, which again, may be of use to the defense attorney to gather favorable information to present to the court.

With regard to the magistrate courts, recognizance release is mandated based solely on the nature of the crime for "minor" offenses. It takes into account domestic violence offenses, but does not consider flight risk as part of the release conditions.

The use of electronic monitoring pending release is not addressed and it is unclear how electronic monitoring fits into within the amendments. Electronic monitoring would be useful for providing an alternative to incarceration or recognizance release.

Under Rule 5-401(K), a defendant can petition their bond determination to the district court if the defendant at any time after arrest. Without any imposition regarding the time requirement, this allows multiple and repeated challenges to bond, and review by the district court, before the case has even been bound over. Such a rule can lead to a defendant shopping around for a better bond, increase the case load of district judges, and without guidance as to whether the magistrate court has jurisdiction to hold a preliminary hearing, can cause delays in the case in the magistrate court.

## Conclusion

The amendments discourage the use of secured, money bonds, but encourage use of recognizance and unsecured bonds. However, guidance should be given on grounds for denying bail entirely, and the proof that is required to do so. Detaining a defendant in some scenarios is the only way to keep the community safe and/or account for flight risk. Maybe intentionally (or not), the definition of community safety and dangerousness are not specific under these rules, and therefore, allow for broad interpretation by the courts. In any event, the proposed amendments will increase the workload of the courts and prosecutors, requiring extra resources.