



A Proposal to  
Improve the  
Administration  
of Bail and the Pretrial  
Process in Colorado's  
First Judicial District

by

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## **Disclaimer**

This paper is an updated version of a similar paper written in June of 2008 for the members of the Jefferson County Criminal Justice Strategic Planning Committee and other policy-makers in Colorado's First Judicial District. After the distribution of the original paper, we, the authors, discovered additional information that was unavailable at the time of the distribution of the original paper, and further developed our ideas, analyses, and interpretations. We also received requests for the paper from many interested persons outside of the First Judicial District. Thus, this version of the paper has been updated to include the new information and ideas, and is written for a broader audience in Colorado and nationally. Moreover, the statements made in this document reflect the opinions of the authors and not necessarily the opinions of the elected or appointed officials in Colorado's First Judicial District. The reader would need to contact these officials directly to learn their opinions on the matters discussed in this paper.

# Preface

A similar version of this paper was written to assist the members of the Jefferson County Criminal Justice Strategic Planning Committee and other policy-makers in Colorado's First Judicial District (Jefferson and Gilpin Counties) in improving the administration of bail and related pretrial release, detention, and supervision processes. The desire for improvement in these areas arose out of a broad and growing dissatisfaction with current bail bond setting and pretrial processes. Many Committee members stated that they have had an ongoing perception that the current process is flawed and that there likely is a better way to administer bail and more effectively use public resources to achieve public safety and a fair and just system, but that they could not articulate in sufficient detail the issues and possible remedies. Thus, the Committee assigned one of its subcommittees, the System Performance Subcommittee, the task of analyzing current practices and generating recommendations to improve the administration of bail.

In their capacity as staff support to the Committee and Subcommittee, the Jefferson County Criminal Justice Planning Unit was assigned the responsibility of providing Subcommittee members with the information they need to make informed recommendations for improvement. In assembling the information, staff realized that the legal, philosophical, and practical issues regarding the administration of bail and related pretrial processes are interrelated and very complicated. To sort out these issues in a coherent, logical manner, staff discovered that it was necessary to synthesize decades of literature describing definitions, history, and professional standards pertaining to bail and the pretrial process, along with Colorado's constitutional, statutory, and case law. This synthesis is included in this paper, and the paper concludes with a proposal for an improved process for administering bail and the pretrial process in the First Judicial District. Because of similarities across judicial districts in Colorado, the recommendations and proposal in this paper are applicable, with minimal or no revisions, to all Colorado judicial districts. Lastly, all recommendations can be implemented within any judicial district without any changes to existing constitutional, statutory, or case law.

A brief biography of the three authors is found at the end of this paper.

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# Introduction

It is a paradox of criminal justice that the administration of bail, created and molded over time in part to facilitate the release of defendants from custody as they await their trials, today often operates to deny that release. In almost every jurisdiction in the United States, a large number of jail inmates are incarcerated while they await their trials simply because they cannot pay the monetary amount set with their bail bonds.

According to the U.S. Bureau of Justice Statistics, approximately 38% percent of state-court defendants arrested on felony charges in the 75 most populous counties in the United States are detained until the court disposes of their cases. Of these, only 6% are denied bail – the others, about five in six, “[have] a bail amount set but [do] not post the financial bond required for release.”<sup>1</sup> Perhaps more troubling are studies that show that “many defendants serve time in jail before they are ultimately acquitted or have their cases dismissed . . . or before they are convicted and receive a non-custodial sentence,”<sup>2</sup> meaning that they serve time in jail only because of their inability to post a money bail bond. In Jefferson County, Colorado, in early 2008, the average daily population (“ADP”) of jail inmates housed in the Detention Facility because of charges filed in Jefferson County Combined Court was approximately 1,100. Approximately 480 (44%) of these inmates were housed on pretrial (i.e., not convicted or sentenced) status. Of these 480 pretrial inmates, approximately 410 (85%, or 37% of the total) inmates remained incarcerated on a daily basis because of their not having yet posted a money bail bond. This proportion of Jefferson County pretrial inmates remaining incarcerated because of their not having posted a money bail bond is consistent with the aforementioned national survey. In each of these Jefferson County cases, a judge determined that the defendant was bondable under Colorado law, and thus had made the decision that the defendant could be released, albeit with a money bail bond amount and, commonly, with the condition of pretrial supervision by the County’s professional pretrial services program. Nevertheless, despite the statutory framework guiding the judge’s *decision* to release, the defendant’s *actual* release, reliant upon the defendant’s financial means and the assessment of financial risk to a commercial money bail bondsman, was unattainable. Accordingly, each of these defendants remained incarcerated, with significant social and financial costs to the defendant and to local taxpayers.

In a purely monetary sense, these costs can be estimated. For example, “[i]n addition to the costs of jail construction and operation, tax revenue is lost when employed defendants are detained

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<sup>1</sup> Thomas H. Cohen and Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts, 1990-2004*, U.S. Dep’t of Just. Office of Just. Programs, Bureau of Just. Stats. (Nov. 2007) [hereinafter Cohen & Reaves].

<sup>2</sup> Mary T. Phillips, *Bail, Detention, & Nonfelony Case Outcomes*, Res. Brief No. 14, N.Y.C. Crim. Just. Agency (May 2007), at 7; Mary T. Phillips, *Pretrial Detention and Case Outcomes, Part 2: Felony Cases*, N.Y.C. Crim. Just. Agency (March 2008), at 61 (“More than a quarter (27%) of detainees in the felony sample were acquitted or had their cases dismissed. Added to those were another 19% who were sentenced to conditional discharge, probation, or some other noncustodial sentence. This finding is disturbing because it means that nearly half of defendants who are held on bail at arraignment serve time in jail because they are unable to post bond.”) [hereinafter *Phillips Felony Study*]. See also Cohen & Reaves, *supra* note 1, at 2 (“about 1 in 5 detained defendants eventually had their case dismissed or were acquitted”).

and welfare costs may increase to support the families of incarcerated defendants.”<sup>3</sup> Harder to estimate, however, are those societal costs associated with a system philosophy that either relies upon or tolerates secure pretrial detention for a large percentage of persons who are presumed to be innocent until proven guilty by a court of law.

In 2007, Colorado law enforcement agencies made a total of 196,768 adult arrests.<sup>4</sup> “The sheer numbers coming into the criminal justice system each year require efficient processing,” especially surrounding the critical “front-end” decision of whether an arrestee should be released or held in jail pending trial.<sup>5</sup> “[T]he actions taken in the initial stages of any criminal case – in particular, the decisions concerning the release or detention of an arrested person – can have an enormous bearing on the outcome of an individual case and, in the aggregate on the quality and effectiveness of the jurisdiction’s criminal justice processes.”<sup>6</sup> In short, efficient front-end criminal case decision-making is critical to an efficient and effective criminal justice system.

Despite its importance, however, local criminal justice systems are faced with significant hurdles to efficient case processing at the front end. As it pertains to pretrial release and bail bonds,

in most states and localities significant problems persist. The problems include continued release on financial bail and the accompanying characteristics of unbridled judicial discretion, imprecise and covert goals for judicial decision-making processes, inadequate information for judicial decision-makers, and de facto reliance on bondsmen to decide who will get released in many instances.<sup>7</sup>

Pretrial release decision-making essentially involves achieving balance between the defendant’s liberty interest and society’s interests in public safety and judicial integrity. Nevertheless, according to Clark and Henry, there are several factors, such as jail crowding, increasing failure-to-appear rates, wide variations among federal and state systems in failure to appear (FTA) rates and the proportion of jail inmates on pretrial status, and apparent discrimination against indigent and minority defendants, that indicate that jurisdictions are having a difficult time in striking that balance.<sup>8</sup>

Empirical research on bail also indicates the need to re-examine the pretrial release decision. “It is generally known that the higher the bail amount the less likely it is that a defendant will be released prior to trial.”<sup>9</sup> The latest statistics show that as many as three out of ten defendants with

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<sup>3</sup> *Standards on Pretrial Release (3<sup>rd</sup> Ed)*, Nat’l Assoc. of Pretrial Servs. Agencies (Oct. 2004), at 11-12 [hereinafter NAPSA Standards].

<sup>4</sup> Colorado Bureau of Investigation, at <http://cbi.state.co.us/>.

<sup>5</sup> John Clark and D. Alan Henry, *The Pretrial Release Decision Making Process: Goals, Current Practices, and Challenges* (Nov. 1996), at 1 [hereinafter Clark & Henry, *Goals*]. In this document, Clark and Henry also maintain that efficiencies must be achieved in the decision by the prosecutor of whether or not to pursue the charge.

<sup>6</sup> NAPSA Standards, *supra* note 3, at v.

<sup>7</sup> *American Bar Association Standards for Criminal Justice (3<sup>rd</sup> Ed.) Pretrial Release* (2007), at 32 [hereinafter ABA Standards].

<sup>8</sup> Clark & Henry, *Goals*, *supra* note 5, at 3.

<sup>9</sup> Marian R. Williams, *The Effect of Pretrial Detention on Imprisonment Decisions*, 28 *Crim. Just. Rev.* 299, 301 (2003) (citation omitted).

bail bond amounts less than \$5,000 are unable to secure their release,<sup>10</sup> raising an issue of discrimination against indigent defendants. Moreover, “[t]here is considerable evidence that pretrial custody status is associated with the ultimate outcomes of cases, with released defendants consistently faring better than defendants in detention.”<sup>11</sup> As noted in one report, “[d]efendants detained pretrial plead guilty more often . . . and are sentenced to prison more often than defendants who are released pretrial. These relationships hold true even when other relevant factors are controlled for, such as current charge, prior criminal history, family ties, and type of counsel.”<sup>12</sup>

This sort of research has emerged only recently in the long history of bail, which dates back thousands of years. Nevertheless, the research has provided the foundation for reforming a system that had remained fundamentally flawed until the middle of the Twentieth Century:

Until the early 1960s, two features characterized pretrial release decision making. First, the decision generally was made in such a haphazard fashion that what should be an informed, individualized decision is in fact a largely mechanical one in which the name of the charge, rather than all the facts about the defendant, dictates the amount of bail. The second feature was an almost exclusive reliance by judges on financial bond. As a result, defendants with the financial means to post bail secured pretrial release while indigent defendants remained in custody.<sup>13</sup>

Starting in 1961, statutory, policy, and programmatic reforms, as well as increased empirical research into the bail bond setting process, led to the creation of national standards, or “best practices” in pretrial release and bail bond decision-making. Three sets of standards, (1) the American Bar Association’s (“ABA”) *Standards for Criminal Justice*,<sup>14</sup> (2) the National Association of Pretrial Services Agencies’ (“NAPSA”) *Standards on Pretrial Release*,<sup>15</sup> and (3), the National District Attorneys Association’s (“NDAA”) *National Prosecution Standards*<sup>16</sup> contain recommended “state of the art” protocols for the pretrial release or detention decision. Each set of standards provides an aspirational framework for pretrial release decision-making, with recommendations covering virtually every issue surrounding the administration of bail. Together, they form a powerful foundation for describing the components of the ideal process for administering bail and pretrial processes. To reach the ideal, however, individual state and local jurisdictions must evaluate their laws, policies, and practices against the standards to gauge how effective they are in their attempt to “strike an appropriate balance between the societal interests in personal liberty and public safety, and do so in a fashion that is workable and that comports with fundamental principles of due process of law.”<sup>17</sup>

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<sup>10</sup> Cohen & Reaves, *supra* note 1, at 3 (“The proportion released declined as the bail amount increased, dropping to 1 in 10 when bail was \$100,000 or higher.”).

<sup>11</sup> ABA Standards, *supra* note 7, at 29.

<sup>12</sup> Clark & Henry, *Goals*, *supra* note 5, at 2.

<sup>13</sup> *Id.* at 6 (internal quotation omitted).

<sup>14</sup> ABA Standards, *supra* note 7.

<sup>15</sup> NAPSA Standards, *supra* note 3.

<sup>16</sup> *National Prosecution Standards (2d Ed.)*, Nat’l Dist. Atty’s Assoc. (1991) [hereinafter *Prosecution Standards*].

<sup>17</sup> ABA Standards, *supra* note 7, at 29-30.



In his frequently quoted concurrence in the landmark Supreme Court opinion in *Stack v. Boyle*, Justice Jackson wrote in 1951 that “the spirit of the [bail] procedure is to enable . . . [defendants] to stay out of jail until a trial has found them guilty.”<sup>18</sup> By 1965, Professor Caleb Foote observed that this quote seemed “hollow and hypocritical,” given the realities of bail administration at the time.<sup>19</sup> Nevertheless, Foote wrote, “[t]here is a value in unrealized ideals, and to close the gap between ideal and reality by abandoning the ideal is not a course lightly to be undertaken.”<sup>20</sup> Today, through the national standards, the ideals for the administration of bail in the United States are clearly articulated. It is time to recognize and embrace those ideals, and to close the current gap between ideal and reality by implementing procedural reforms that change the way that critical, front-end decisions surrounding a defendant’s release pending trial are made in the First Judicial District.

The future of bail administration and the pretrial process in Colorado’s First Judicial District necessarily involves agreement on the ideal system. That agreement, in turn, requires an examination of current practices in the First Judicial District within the context of the national standards for bail and pretrial processes. Because the issues are complex, there is also a need for definitional, historical, and legal contexts. Accordingly, we present this paper in five main parts. First, we provide overall definitions used throughout the paper. Second, we provide the historical context of bail and related pretrial processes and reforms. Third, we provide an overview of relevant Colorado constitutional language, statutes, court rules, and case law. Fourth, using the three sets of national standards on pretrial release as well as state and local statistics, we discuss relevant pretrial issues, and make general recommendations for change or improvement at most points in the course of a defendant’s case during the pretrial period. These general recommendations, though targeted for the First Judicial District, could be used by any Colorado judicial district or municipality when making improvements to how bail is administered. Fifth, and finally, we describe a proposal for a modern and effective bail and pretrial processes for the First Judicial District, and list some specific initial tasks that must be completed to implement this proposed process.

Nearly every major topic in this paper could be converted into a paper of its own. However, the authors believe that each major topic on bail administration and the pretrial process is covered sufficiently enough to inform the First Judicial District’s relevant decision-makers of the information they need to know to make long-needed improvements to bail administration. Finally, it could be argued that defendants who simultaneously experience different bail and pretrial practices because they have concurrent cases in several Colorado judicial districts may become confused about the different pretrial expectations placed upon them by the various courts. We acknowledge this possibility, and view it not as a reason for the First Judicial District not to change its bail administration, but rather as an additional reason (along with the numerous arguments presented in this paper) for other jurisdictions also to change.

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<sup>18</sup> *Stack v. Boyle*, 342 U.S. 1, 8 (1951).

<sup>19</sup> Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 Univ. Pa. L. Rev. 959, 964 (1965).

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

# I. Definitions

Many people confuse the terms bail, bond, and surety or sureties, and this confusion often leads to unnecessary quibbling and distraction from fundamental issues in the administration of bail and in the pretrial release decision-making process. Nevertheless, this confusion is understandable. In his *Dictionary of Modern Legal Usage*, Bryan Garner describes the term “bail” as “a chameleon-hued legal term,” with strikingly different meanings.<sup>21</sup> As a noun, people use the term bail to mean (1) a person who acts as a surety for a debt, (2) the security or guarantee agreed upon,<sup>22</sup> and (3) the release on surety of a person in custody. As a verb, it has been used to mean (1) to set a person free for security on the person’s own recognizance, (2) to become a surety, (3) to guarantee, and (4) to place something in someone else’s charge. The term “bail bond” is typically used to describe an obligation, with one or more sureties, conditioned on the performance of a described act of an accused, or a contract between the government, the accused, and the surety in which the surety guarantees the appearance of the accused in court.<sup>23</sup>

These key terms are inadequately defined in Colorado law. For example, bail is defined in statute as,

[t]he 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.<sup>24</sup>

This definition, combined with (a) the proliferation of commercial sureties (i.e., bail bondsmen) in Colorado, (b) the unsubstantiated assumption that the threat of the loss of money motivates defendants to appear at all court hearings and abstain from the commission of crime, and (c) the false assumption that defendants may surrender their (bail) money for violations of bond other than failure to appear (e.g., commission of a new felony), leads many people to believe that the term “bail” must be associated with money. However, this belief is misplaced. In Colorado, although a judge is required to fix “the amount” of bail,<sup>25</sup> the amount may be negligible (e.g., \$1) or possibly even zero, and the bond or agreement with the court may simply be for the defendant to return to court with or without certain conditions of release. Moreover, the goal of the bail bond contract between the defendant and the court - to assure public safety while securing the defendant’s presence at future court hearings and maintaining judicial integrity - is arguably better served when supervision by professional pretrial services agency, rather than the threat of the loss of money, is involved.

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<sup>21</sup> Bryan A. Garner, *A Dictionary of Modern Legal Usage (3d Ed)* (Oxford Univ. Press 1995), at 96 [hereinafter Garner].

<sup>22</sup> This usage is similar to usage in some publications that define bail bonds as one or more conditions of pretrial release, which could be monetary or non-monetary.

<sup>23</sup> Garner, *supra* note 21, at 96.

<sup>24</sup> Colo. Rev. Stat. § 16-1-104 (3).

<sup>25</sup> *Id.* § 16-4-103 (1) (a).

Thus, “[e]quating bail and bail decision-making with strictly financial arrangements is ... misleading,”<sup>26</sup> and complicates the search for an accurate definition of the term. The term itself derives from the French “baillier,” which means to hand over, give, entrust, or deliver. Webster’s Dictionary defines “bail” in terms of a procedure in one sense: “the temporary release of a prisoner in exchange of security given for the due appearance of the prisoner;” and as the security itself in another.<sup>27</sup> As a verb, Black’s Law Dictionary focuses more on the legal process or procedure, defining bail as, “[t]o procure release of one charged with an offense by insuring his future attendance in court and compelling him to remain within jurisdiction of court. To deliver the defendant to persons who, in the manner prescribed by law, become security for his appearance in court.”<sup>28</sup> Likewise, the federal government has used the phrase “bail process,” when referring to release or detention prior to trial,<sup>29</sup> and, as noted above, at least one Supreme Court Justice has described bail as a “procedure.”<sup>30</sup> In Colorado, the amount, if any, the type, and the conditions of the bail bond are intertwined into a system of bail administration designed to meet the primary purposes of the bail procedure itself. Accordingly, more than just a word equated with a sum of money and “a vague admonition against excessiveness in the U.S. Constitution,”<sup>31</sup> bail is perhaps more appropriately defined as “the mechanism by which a defendant’s right to freedom prior to trial is squared with society’s interest in the smooth administration of criminal justice.”<sup>32</sup>

A bond, according to Colorado statute 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 in the bond.”<sup>33</sup> Some people refer to the term “appearance bond,” but that is not a separate category. Minimally, all bail bonds are appearance bonds.

“Sureties,” in general, refers to those who undertake to pay money or to do any other act in the event that someone else fails to do something. In *Fullerton v. County Court*, a division of the Colorado Court of Appeals stated more specifically 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.”<sup>34</sup> Title 16 of the Colorado Revised Statutes authorizes both commercial and non-

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<sup>26</sup> See Evie Lotze, John Clark, D. Alan Henry, & Jolanta Juskiewicz, *The Pretrial Services Reference Book*, Pretrial Servs. Res. Ctr. (Dec. 1999), at 2, n. 2 [hereinafter Lotze, et al.] (quoting John Goldkamp, *Two Classes of Accused: A Study of Bail and Detention in American Justice* (Cambridge, MA: Ballinger, 1979), p. 6-7.

<sup>27</sup> Merriam-Webster’s Collegiate Dictionary (Springfield, MA: 11<sup>th</sup> Ed. 2003), at 92.

<sup>28</sup> Black’s Law Dictionary (St. Paul; West Publishing Co.) (Abridged 5<sup>th</sup> Ed. 1983), at 73.

<sup>29</sup> *Criminal Bail: How Bail Reform is Working in Selected District Courts*, U.S. GAO Report to the Subcomm. on Courts, Civ. Liberties, and the Admin. of Just. (1987).

<sup>30</sup> *Stack v. Boyle*, 342 U.S. 1, 8 (1951).

<sup>31</sup> Spurgeon Kennedy, D. Alan Henry, John Clark, & Jolanta Juskiewicz, *Pretrial Release and Supervision Program, Training Supplement*, Pretrial Servs. Res. Ctr. (Wash. D.C., 1997), at 10 [hereinafter Kennedy, et al.].

<sup>32</sup> *Id.* at 12 (quoting Wayne H. Thomas, Jr., *Bail Reform in America* (Univ. of CA. Press, 1976)).

<sup>33</sup> Colo. Rev. Stat. § 16-1-104 (5). This is akin to the definition of bail bond provided by Black’s, as a “written undertaking, executed by the defendant or one or more sureties, that the defendant will render himself amenable to the processes of the court, and that in the event he fails to do so, the signers of the bond will pay to the court the amount of money specified in the order fixing bail.” Black’s Law Dictionary (St. Paul; West Publ’g Co.) (Abridged 5<sup>th</sup> Ed. 1983), at 73.

<sup>34</sup> *Fullerton v. County Ct.*, 124 P.3d 866, 870 (Colo. App. 2005).

commercial “sureties” (as distinguished from a co-signor on a personal recognizance bond),<sup>35</sup> although bail bonds secured with sureties from uncompensated entities are rarely, if ever handled by the courts. “Compensated surety” is defined in Section 16-4-112(2)(c) as “any person in the business of writing bail appearance bonds who is subject to regulation by the division of insurance in the department of regulatory agencies, including bonding agents and bail insurance companies.”

For clarity, and in an effort to capture the more complete and true meaning of these terms, throughout this paper we will use the following definitions to the extent possible. The term “bail” will refer to the process in a which a defendant is taken into custody by law enforcement, is issued a summons or transported to the local detention facility, is assessed for his risk of failure to appear in court and committing additional crimes, appears before a judicial officer, is given or denied a bail bond with or without specific conditions, and is detained in jail or released into the community until the disposition of his case. The term “bond” or “bail bond” will refer to the agreement between the defendant and the court, or between the defendant, the surety (or bondsman), and the court, originally designed primarily to assure the defendant’s appearance in court and more appropriately expanded to include public safety protections. As defined, a bail bond agreement may or may not have a money component, which is solely for the purpose of securing the person’s appearance in court. (As currently defined by statute, a defendant’s appearance in court is the only condition for which, if breached, the money can be forfeited). Finally, the term “Surety,” like the definition adopted in the court of appeals’ *Fullerton* decision, will refer to the broad range of guarantees used to secure the appearance of the defendant, which would necessarily include the various types of bail bonds found in the Colorado Revised Statutes.

## ***A. Types of Bail Bonds***

Generally, there are many types of bail bonds, all of which fall under one of two categories of pretrial release: (1) those that incorporate financial conditions of release; and (2) those that do not.<sup>36</sup> The United States Department of Justice, Bureau of Justice Statistics (“BJS”), provides the following categories and explanations of financial bonds that require immediate payment or secured guarantee of payment prior to a defendant’s release from detention:

*[Compensated] Surety bond* -- A bail bond company signs a promissory note to the court for the full [money] bail [bond] amount and charges the defendant a fee for the service (usually 10% [or more] of the full [money] bail [bond] amount). If the defendant fails to appear, the bond company is liable to the court for the full [money] bail [bond] amount. Frequently the [money bail] bond company requires collateral from the defendant [or friend or relative of the defendant for the remaining amount of the bail bond] in addition to the fee.

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<sup>35</sup> Colo. Rev. Stat. § 16-4-104 (1) (III).

<sup>36</sup> Of course, there are other ways that defendants can be released from pretrial confinement, such as through an emergency release procedure in response to a court order placing limits on a jail’s population.

Deposit bond -- The defendant deposits a percentage (usually 10%) of the full [money] bail [bond] amount with the court. The percentage of the [money] bail [bond] is returned after the disposition of the case, but the court often retains a small portion for administrative costs. If the defendant fails to appear in court, he or she is liable to the court for the full [money] bail [bond] amount.

Full cash bond -- The defendant posts the full [money] bail [bond] amount in cash with the court. If the defendant makes all court appearances, the cash is returned. If the defendant fails to appear in court, the bond is forfeited.

Property bond -- Involves an agreement made by a defendant as a condition of pretrial release requiring that property valued at the full [money] bail [bond] amount be posted as an assurance of his or her appearance in court. If the defendant fails to appear in court, the property is forfeited. Also known as ‘collateral bond.’<sup>37</sup>

BJS also provides the following categories of non-financial bonds that do not require immediate payment or secured guarantee of payment prior to a defendant’s release from detention:

Release on recognizance (ROR) -- The court releases the defendant on a signed agreement that he or she will appear in court as required ... [which] includes citation releases in which arrestees are released pending their first court appearance on a written order issued by law enforcement or jail personnel. [A ROR (also known as Personal Recognizance, or PR) bond may also be an unsecured bond or it may have no money attached.]

Unsecured bond -- The defendant pays no money to the court but is liable for the full amount of [the money] bail [bond] should he or she fail to appear in court.

Conditional release -- Defendants are released under specified conditions. Monitoring or supervision, if required, is usually done by a pretrial services agency. In some cases, such as those involving a third-party custodian or drug monitoring and treatment, another agency may be involved in the supervision of the defendant. Conditional release sometimes includes an unsecured bond.<sup>38</sup>

## ***B. Colorado Bail Bonds***

In Colorado, the amount, if any, the type, and the conditions of a particular bail bond are all interrelated. Judges are required to fix “the amount of bail and type of bond,” which “shall be sufficient to assure compliance with the conditions set forth in the bail bond.”<sup>39</sup> Section 16-4-104 of the Colorado Revised Statutes authorizes specific bail bond alternatives, including (1)

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<sup>37</sup> Cohen & Reaves, *Felony Defendants in Large Urban Counties*, 2002, U.S. Dept. of Just., Bur. of Just. Stats. (February 2006), at 38.

<sup>38</sup> *Id.*

<sup>39</sup> Colo. Rev. Stat. § 16-4-103 (1) (a).

personal recognizance, or release-on-recognizance (“ROR”) bonds (with or without additional obligors), (2) cash bonds (which may be paid using certain kinds of stocks or bonds), (3) property bonds, (4) surety bonds (both commercial and non-commercial), or any combination of these cash, property, or surety bonds. To the extent that a judge may allow the release of a defendant on personal recognizance, but with a stated sum of money for which that defendant will be liable if he or she does not appear, Colorado also provides for “unsecured bonds,” as they are defined by BJS. Pretrial agency staff from most counties in the Denver metro area reported to the authors that unsecured financial conditions are almost always attached, although rarely enforced, to personal recognizance bonds. Colorado has no statutory provision allowing for deposit bonds (see discussion of Colorado case law, *infra*).

### *C. Colorado Conditions of Release*

In Colorado, defendants released from detention pending their trial must also meet certain requirements or conditions, including the important standard condition that the defendants appear at all court hearings.<sup>40</sup> Other standard conditions include not committing a felony or leaving the State of Colorado while released on a bail bond, and acknowledging relevant restraining orders.<sup>41</sup> In addition to the standard statutory conditions, “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.”<sup>42</sup> Typical pretrial release conditions include, for example, submission to drug and alcohol testing, submission to mental health assessments, requirements to periodically check-in with case managers either in-person or by telephone, requirements to participate in vocational or educational programs, and electronic monitoring. When considering the issue of conditions of release, one should remain mindful that the list above involves only non-financial conditions. Setting an amount of money for a bail bond in Colorado raises the more controversial issue of releasing a defendant on a financial condition.

When considering conditions of release, one should also be mindful of the issue of pretrial supervision. Over the years, judges and prosecutors have looked favorably upon the idea of supervising defendants in order to assure their compliance with various conditions of release. Indeed, “[s]etting conditions of release would be a futile exercise without an ability to monitor compliance with those conditions and to punish disobedience and reward compliance.”<sup>43</sup> Nevertheless, the issue of supervision within the existing framework of bail administration has become contentious for two primary reasons. First, with the exception of the condition that all defendants appear for court, judges have never required commercial money bail bondsmen to provide the sort of supervisory services necessary to assure compliance with the conditions of bond. Historically, the purpose of a money bail bond agreement has been limited solely to assuring the defendant’s appearance in court; bondsmen have always done this through

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<sup>40</sup> *Id.* § 16-4-103 (2) (a).

<sup>41</sup> *See id.*; *see also Your Guide to Bail Bonds in Colorado*, (Colo. Div. of Ins. & Colo. Jud. Dept. 1998) found at [www.courts.state.co.us](http://www.courts.state.co.us).

<sup>42</sup> Colo. Rev. Stat. § 16-4-103 (2) (f).

<sup>43</sup> *Performance Standards and Goals for Pretrial Release and Diversion: Release* (Washington, DC: Nat’l Assoc. of Pretrial Servs. Agencies, (1978)).

collateralizing bonds and sometimes tracking down absconders (although more often they rely on the nation's law enforcement officers to find these persons through normal police practices). Second, the advent of pretrial services programs, which provide pretrial supervision services for the courts, has allowed judges to impose more conditions of release that are logically and sometimes empirically tied to the defendant's risk of non-appearance or danger to the community. The controversy derives from the fact that commercial sureties serve a much more limited role than do pretrial services programs, a point that will be explained throughout the remainder of this paper. In addition, the type of "supervision" provided by the commercial money bail bond industry is fundamentally different from the supervision provided by the typical pretrial services program.

## II. The History of Bail and the Pretrial Release or Detention Decision<sup>44</sup>

### A. Introduction

While the notion of bail has been traced to ancient Rome,<sup>45</sup> the American understanding of bail is derived from 1,000-year-old English roots. A study of this “modern” history of bail reveals two fundamental themes. First, as noted in June Carbone’s comprehensive study of the topic, “[b]ail [originally] reflected the judicial officer’s prediction of trial outcome.”<sup>46</sup> In fact, bail bond decisions are all about prediction, albeit today about the prediction of a defendant’s probability of making all court appearances and not committing any new crimes. The science of accurately predicting a defendant’s pretrial conduct, and misconduct, has only emerged over the past few decades, and it continues to improve. Second, the concept of using bail bonds as a means to avoid pretrial imprisonment historically arose from a series of cases alleging abuses in the pretrial detention decision-making process. These abuses were originally often linked to the inability to predict trial outcome and later to the inability to adequately predict court appearance and the commission of new crime, and thus led to an over-reliance on judicial discretion to grant or deny a bail bond and the fixing of some money amount (or other condition of pretrial release) that presumably helped mitigate a defendant’s pretrial misconduct. Accordingly, as the following history of bail suggests, as our ability to predict a defendant’s pretrial conduct becomes more accurate, our need for reforming how bail is administered will initially be great, and then should diminish over time.

### B. Anglo-Saxon Roots

To understand the bail system in medieval England, one must first understand the system of criminal laws and penalties in place at that time. The Anglo-Saxon legal process was created to provide an alternative to blood feuds to avenge wrongs, which often led to wars. As Anglo-Saxon law developed, wrongs once settled by feuds (or by outlawry or “hue and cry,” both processes allowing the public to hunt down and deliver summary justice to offenders) were

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<sup>44</sup> While much of the text in this section is attributed to its source by footnote, any un-attributed statements were derived primarily from the following sources: F. Pollock & F. Maitland, *The History of English Law* (2d Ed. 1898) [hereinafter Pollock & Maitland]; Caleb Foote, *The Coming Constitutional Crisis in Bail: I and II*, 113 Univ. Pa. L. Rev. 959, 1125 (1965) [hereinafter Foote]; Wayne H. Thomas, Jr., *Bail Reform in America* (Univ. CA Press 1976) [hereinafter Thomas]; Gerald P. Monks, *History of Bail* (1982); June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517 (1983) [hereinafter Carbone]; Stevens H. Clarke, *Pretrial Release: Concepts, Issues, and Strategies for Improvement*, 1 Res. in Corrections, Issue 3:1; Lotze, et al., *supra* note 26; Marie VanNostrand, *Legal and Evidence Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services* (Crime & Just. Inst., Nat’l Inst. of Corrections (2007)) [hereinafter VanNostrand]; and material found on the Pretrial Justice Institute’s website, at <http://www.pretrial.org/>. Carbone, in turn, cites to E. De Haas, *Antiquities of Bail* (1940), as well as to Pollock & Maitland for additional “thorough studies on the origins of bail.”

<sup>45</sup> See Lotze, et al., *supra* note 26, at 2 n. 3.

<sup>46</sup> Carbone, *supra* note 44, at 517.



settled through a system of “bots,” or payments designed to compensate grievances.<sup>47</sup> Essentially, crimes were private affairs (unlike our current system of prosecuting in the name of the state) and suits brought by persons against other persons typically sought remuneration as the criminal penalty. In a relatively small number of cases, persons who were considered to be a danger to society (“false accusers,” “persons of evil repute,” and “habitual criminals,”) along with persons caught in the act of a crime or the process of escaping, were either mutilated or summarily executed.<sup>48</sup> All others were presumably considered to be “safe,” so the issue of a defendant’s potential danger to the community if released was not a primary concern.

Nevertheless, the Anglo-Saxons *were* concerned that the accused might flee to avoid paying the bot, or penalty, to the injured (as well as a “wite” or payment to the king). Prisons were “costly and troublesome,” so an arrestee was usually “replevied (*replegiatus*) or mainprised (*manucaptus*),” that is, “he was set free so soon as some sureties (*plegii*) undertook (*manuceperunt*) or became bound for his appearance in court.”<sup>49</sup> Thus, a system was created in which the accused was required to find a surety who would provide a pledge to guarantee both the appearance of the accused in court and payment of the bot upon conviction. The amount of that pledge, called “bail,” (akin to a modern money bail bond) was identical to the amount of the penalty. Thus, if an accused were to flee, the responsible surety would pay the entire fine to the private accuser, and the matter was done.

According to Carbone, “[t]he Anglo-Saxon bail process was perhaps the last entirely rational application of bail.”<sup>50</sup> Because the amount of the pledge was identical to the amount of the fine upon conviction, the system accounted for the seriousness of the crime and fulfilled the debt owed if the accused did not appear for trial. All prisoners facing penalties payable by fine were bondable, and the bail bond was perfectly linked to the outcome of trial – money for money.

### ***C. The Norman Conquest to 1700***

The system became significantly more complex after the Norman Conquest, beginning in 1066:

In the period following the Norman invasion, criminal justice gradually became an affair of the state. Criminal process could be initiated by the suspicions of a presentment jury as well as the sworn statements of the aggrieved. Capital and other forms of corporal punishment replaced money fines for all but the least serious offenses, and the delays between accusation and trial lengthened as itinerant royal justices administered local justice.<sup>51</sup>

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<sup>47</sup> *Id.* at 519-20.

<sup>48</sup> *See* Carbone, *supra* note 44, at 520-521 and accompanying notes.

<sup>49</sup> Pollock & Maitland, *supra* note 44, at 584. Indeed, even those unable to pay the “bot” were typically handed over to the victim for either execution or enslavement. Carbone, *supra* note 44, at 521 n. 18. If they fled, they were declared “outlaws,” subject to immediate justice from whoever tracked them down. Apparently, however, certain offenses were considered to be “absolutely irreplevisable,” requiring some form of prison to house the offenders. *See* Pollock & Maitland, *supra* note 44, at 584-85.

<sup>50</sup> *Id.* at 520.

<sup>51</sup> *Id.* at 521 (footnotes omitted).

Summary mutilations and executions were gradually phased out while the overall use of corporal punishment increased, giving many offenders a greater incentive to flee. System delays also caused many persons to languish in primitive jails, and the un-checked discretion given to judges and magistrates to release defendants led to instances of corruption and abuse. Moreover, as the penalties changed, ideas about which persons should be bondable also changed. The first to lose any right to bail whatsoever were persons accused of homicide, followed by persons accused of “forest offenses” (i.e., violating the royal forests), and finally a catch-all discretionary category of persons accused “of any other *retto* [wrong] for which according to English custom he is not *replevisable* [bailable].”<sup>52</sup>

In medieval England, magistrates rode a circuit from county (shire) to county to handle cases. The shire’s reeve (now known as the sheriff) was given the duty of holding individuals accused of crimes until the magistrate arrived. Because of the broad discretion given to these sheriffs to hold persons pretrial, bail administration varied from county to county, and instances of abuse became more and more frequent. Indeed, “[b]ail law developed in the twelfth and thirteenth centuries as part of an assertion of royal control over the authority of the sheriffs,” which had grown increasingly corrupt.<sup>53</sup>

Following exposure of widespread abuse in the bail bond-setting process, Parliament passed the first Statute of Westminster, which codified 51 existing laws – many originating from the Magna Carta – and which covered, among other things, bail. Importantly, the Statute departed from traditional Anglo-Saxon customs by establishing three criteria to govern bailability: (1) the nature of the offense (categorizing offenses that were and were not bailable); (2) the probability of conviction (requiring the sheriff to examine all of the evidence and to measure such variables as whether or not the accused was held on “light suspicion”); and (3) the criminal history of the accused, often referred to as the bad character or “ill fame” of the accused. According to Carbone, “[i]n defining the criteria to govern bail, the Statute of Westminster rearticulated rather than abandoned the conclusion of the Anglo-Saxons that the bail process must mirror the outcome of the trial. Despite the overlapping and conflicting concerns of the statute’s criteria, each criterion can be reduced to a simple standard: the seriousness of the offense offset by the likelihood of acquittal.”<sup>54</sup> Indeed, this standard governed English bail bond determinations for the next five centuries.

During that 500-year period, Parliament occasionally passed legislation defining the bailability of crimes not mentioned in the Statute of Westminster, but mostly Parliament focused on adding safeguards to the bail process to protect persons from political abuse and local corruption. For example, due to the vague nature of the terms “ill fame” and “light suspicion,” as applied by local justices of the peace, in 1486 Parliament required the approval of two justices, rather than one, to release a prisoner and to certify the bailment at the next judicial session. In 1554, Parliament required that the bail bond decision be made in open session, that both justices be present, and that the evidence that was weighed be recorded in writing, essentially introducing the notion of a preliminary hearing into the law.

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<sup>52</sup> *Id.* at 523 (internal quotation and footnote omitted).

<sup>53</sup> Carbone, at 522 note 29.

<sup>54</sup> *Id.* at 526.

Over time, additional abuses led to additional reforms. For example, bailability under the Statute of Westminster was initially based on a recitation of a formal charge. Nevertheless, in 1627, King Charles I successfully ordered local judges to hold five knights with no charge, circumventing the Statute, as well as provisions in the Magna Carta upon which the Statute was based. Parliament responded by passing the Petition of Right, prohibiting detention by any court without a charge. In 1676, an individual known only as Jenkes was arrested and held for two months on a charge that, by statute, required admittance to bail. Jenkes' case, and cases like it, ultimately led to Parliament's passage of the Habeas Corpus Act of 1679, which established procedures to prevent long delays before a bail bond hearing was held. This reform was only a minor hurdle for some of the stubborn and unruly judges of that time, who learned that the monetary amount of a bail bond could also be used to detain a defendant indefinitely. According to Foote, "[t]he Act of 1679 stopped the procedural runaround to which Jenkes had been subjected, but by setting impossibly high bail the judges erected another obstacle to thwart the purpose of the law on pretrial detention."<sup>55</sup> Addressing this matter, the English Bill of Rights of 1689, accepted by William and Mary as they assumed the throne, stated that "excessive bail ought not be required," a phrase similar to that found in the Eighth Amendment to the U.S. Constitution.

### *D. Bail in the United States*

Caleb Foote summarized the state of English law on bail at the time of American Independence by using a combination of statutes, writs, and cases:

[A]s the English protection against pretrial detention evolved it came to comprise three separate but essential elements. The first was the determination of whether a given defendant had the right to release on bail, answered by the Petition of Right, by a long line of statutes which spelled out which cases must and which must not be bailed by justices of the peace or (in the early period) by sheriffs, and by the discretionary power of the judges of the king's bench to bail any case not bailable by the lower judiciary. Second was the simple, effective habeas corpus procedure which was developed to convert into reality rights derived from legislation which could otherwise be thwarted. Third was the protection against judicial abuse provided by the excessive bail clause of the Bill of Rights of 1689.<sup>56</sup>

Generally, the early colonies applied English law verbatim, but differences in beliefs about criminal justice (including the belief that the English laws were unnecessarily confusing), differences in colonial customs, and even differences in crime rates between England and the colonies led to more liberal criminal penalties and, ultimately, changes in the laws surrounding the administration of bail. Even before some of England's later reforms, in 1641 Massachusetts passed its Body of Liberties, creating an unequivocal right to bail for non-capital cases, and re-writing the list of capital cases.<sup>57</sup> In 1682, "Pennsylvania adopted an even more liberal provision

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<sup>55</sup> Foote, *supra* note 44, at 967.

<sup>56</sup> *Id.* at 968.

<sup>57</sup> It is noted that the substantive criminal law of this period of time is often considered barbaric by today's standards. For example, despite the relatively liberal bail law in Massachusetts, along with homicide that Colony

in its new constitution, providing that ‘all prisoners shall beailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great.’”<sup>58</sup> The Pennsylvania language introduced consideration of the evidence for capital cases, and, “[a]t the same time, Pennsylvania limited imposition of the death penalty to ‘willful murder.’ The effect was to extend the right to bail far beyond the Massachusetts Body of Liberties and far beyond English law.”<sup>59</sup> The Pennsylvania law was quickly copied, and as the country grew “the Pennsylvania provision became the model for almost every state constitution adopted after 1776.”<sup>60</sup>

This is especially important, given that the United States Constitution itself only explicitly covers the right of habeas corpus in Article 1, Section 9, and the prohibition against “excessive bail” in the Eighth Amendment, which has been traced back to the 1776 Virginia Declaration of Rights.<sup>61</sup> There is no explicit right to bail in the U.S. Constitution, and the Constitution does not define which crimes areailable, nor which defendants can be detained.<sup>62</sup> Nevertheless, also before the first Congress in the spring and summer of 1789 was Section 33 of the Judiciary Act, which granted an absolute right to bail in non-capital federal criminal cases.<sup>63</sup> To Foote, “advancing the basic right governing pretrial practice in the form of a statute while enshrining the subsidiary protection ensuring fair implementation of that right in the Constitution itself” was an anomaly that Congress likely did not recognize.<sup>64</sup> Still, through the Judiciary Act, the federal government joined a number of states, which, through their respective state constitutions, provided an absolute right to bail. Accordingly, at least in the federal justice system, “[p]rinciples of the early American bail system – set forth in the Judiciary Acts of 1789 and the U.S. Constitution’s Eighth Amendment – were: (1) Bail should not be excessive, (2) A right to bail exists in non-capital cases, and (3) Bail is meant to assure the appearance of the accused at trial.”<sup>65</sup>

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still punished by death (and therefore made unbondable) the offenses of idolatry, witchcraft, blasphemy, cursing or smiting a parent, and stubbornness or rebelliousness on the part of a son against his parents. *See id.* at 981. Moreover, many persons were imprisoned by the Colonies for simply being impoverished: “In 1788, a year before Congress was to consider what was to become the eighth amendment, Massachusetts enacted legislation which . . . provided for compulsory work in houses of correction for, *inter alia*, ‘all rogues, vagabonds and idle persons . . . common railers or brawlers, such as neglect their callings or employment, misspend what they earn, and do not provide for themselves for the support of their families . . . and of . . . vagrant, strolling and poor people.’” *Id.* at 990. By 1830 there were as many as three times as many persons imprisoned for debt as were imprisoned for crime. *Id.* at 991.

<sup>58</sup> Carbone, *supra* note 44, at 531 (quoting 5 American Charters 3061, F. Thorpe ed. 1909) (footnotes omitted).

<sup>59</sup> *Id.* at 531-32 (footnotes omitted).

<sup>60</sup> *Id.* at 532.

<sup>61</sup> Article 1, Section 9 of the United States Constitution states that “[T]he privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.” The Eighth Amendment to the Constitution states that “[E]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.”

<sup>62</sup> Professor Foote argues that the founding fathers meant to include a right to bail provision, such as that found in the Statute of Westminster, but inadvertently left it out. *See* Foote, *supra* note 44, at 971-989.

<sup>63</sup> The Judiciary Act provided a detailed organization of the federal judiciary that the constitution had sketched in only general terms. Section 33 of that Act read: “And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law.”

<sup>64</sup> Foote, *supra* note 44, at 972.

<sup>65</sup> Kennedy, et al., *supra* note 31, at 2.

Colorado Territory did not become a State until 1876. Nevertheless, like many other states that copied Pennsylvania's Constitution, it included the following language in Article II, Section 19 of its Constitution: "That all persons shall beailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great." Article II, Section 20, states "That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

### ***E. The Practical Administration of Bail in England and America***

As American law governing release on bail bonds was being established, cultural differences between the Colonies and England also led to changes in the administration of bail. As discussed previously, under the Anglo-Saxon system of laws persons accused of committing serious offenses, persons with lengthy criminal histories, and those caught in the act of committing an offense were often summarily executed. For less serious crimes, the Anglo-Saxon system provided for pretrial release. This was partly due to the fact that the magistrates tasked with hearing these cases traveled from county to county and were often only present in a particular locality a few months of the year. Because most persons were released, jails were rarely necessary, and those that did exist were primitive.

Under the Anglo-Saxon system of pretrial release, the sheriffs relied on a surety, or some third party custodian who was usually a friend, neighbor, or family member, to agree to stand in for the accused if he absconded. As the bot system evolved, with penalties for most crimes payable by fine, sureties were allowed to pledge personal or real property in the event the accused failed to appear. Before the Norman invasion, the pledge matched the potential monetary penalty perfectly. After the invasion, however, with increased use of corporal punishment, it became frequently more difficult to assign the amount that ought to be pledged, primarily because assigning a monetary equivalent to either corporal punishment or imprisonment is largely an arbitrary act.<sup>66</sup> Moreover, the threat of corporal punishment led to increasing numbers of offenders who refused to stay put. As noted by Carbone, these changes in the substantive criminal law, as well as other factors such as procedural delays, led to complexities that required a "new equation" between pretrial release and the criminal sanctions:

The accused threatened with loss of life or limb had a greater incentive to flee than the prisoner facing a money fine, and judicial officers possessed no sure formula for equating the amount of the pledge or the number of sureties with the deterrence of flight. At the same time, the growing delays between accusation and trial increased the importance of pretrial release and the opportunities for abuse and corruption. The determination of whom to release became a far more complicated issue than calculating the amount of the bot.<sup>67</sup>

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<sup>66</sup> According to one commercial bail bondsman website, "Bonds are . . . an arbitrary number set for court appearance, and are not normally lowered over time." <http://www.austinbailbonds.net/faq/>. The arbitrary nature of bail bond amounts is typically overlooked or even ignored by actors in the criminal justice system because more meaningful alternatives have not been pursued.

<sup>67</sup> Carbone, *supra* note 44, at 522.

The Colonies faced these same complications, with some additions. As noted by author Wayne H. Thomas, Jr.:

First, unlike English law, the Judiciary Act of 1789 and the constitutions of most states provided for an absolute right to have bail set except in capital cases. Second, the absence of close friends and neighbors in frontier America would have made it very difficult for the court to find an acceptable personal custodian for many defendants, and, third, the vast unsettled American frontier provided a ready sanctuary for any defendant wanting to flee. Commercial bonds, never permitted in England, were thus a useful device in America.<sup>68</sup>

### ***F. The Rise of the Commercial Money Bail Bondsman***

Arbitrary money bond amounts, coupled with a growing number of defendants who were unable to pay them (either by themselves or with the help of friends or relatives), combined to give birth to a profession unique in the field of American criminal justice – the commercial money bail bond industry. There is some debate on when, exactly, this profession got its start. *Taylor v. Taintor*,<sup>69</sup> the U.S. Supreme Court case that is commonly cited as the authority for bail bondsmen to act as bounty hunters, was decided in 1872, but it is not clear that the sureties in that case were acting in a commercial capacity. It is commonly believed that the first true commercial money bail bondsmen, persons acting as sureties by pledging money or property to fulfill money bail bond conditions for a criminal defendant in court, were Peter and Thomas McDonough in San Francisco, who began underwriting bonds as favors to lawyers who drank in their father’s bar. When these brothers learned that the lawyers were charging their clients fees for these bonds, the brothers began to charge as well. By 1898, the firm of McDonough Brothers, established as a saloon, found its business niche by underwriting bonds for defendants who faced charges in the nearby Hall of Justice, or police court. The company, which became known as “The Old Lady of Kearny Street,” rose and fell in only fifty years, leaving a legacy prototypical of the growing commercial surety industry. In an account of the firm’s demise, Time Magazine reported the following:

The Old Lady helped San Francisco be what many a citizen wanted it to be – a wide open town. She furnished bail by the gross to bookmakers and prostitutes, kept a taxi waiting at the door to whisk them out of jail and back to work. But she was also a catalyst that brought underworld and police department into an inevitably corrupt amalgam. At her retirement the San Francisco Chronicle waxed nostalgic: ‘The Old Lady . . . will take to her rocking chair, draw her shawl about her . . . .’ But many a citizen thought simply: ‘Good riddance.’<sup>70</sup>

With a growing number of defendants facing increasingly higher money bond amounts, the professional bail bond industry flourished in America. If anyone ever saw these businesses as

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<sup>68</sup> Thomas, *supra* note 44, at 11-12.

<sup>69</sup> 83 U.S. 366 (1872).

<sup>70</sup> *The Old Lady Moves On* (Aug. 18, 1941), found, at <http://www.time.com/time/printout/0,8816,802159,00.html>.

problematic, however, it was rarely reported. Nevertheless, by the 1920s Arthur L. Beeley studied records of the Municipal and Criminal Court of Cook County, Illinois, and in 1927 published his landmark study, *The Bail System in Chicago*, “which publicized the inequities of the bail system and explored the possibility of using alternatives to surety bail to effectuate pretrial release.”<sup>71</sup> As Thomas recounts:

Beeley found that bail amounts were based solely on the alleged offense and that about 20 percent of the defendants were unable to post bail. He also noted that professional bondsmen played too important a role in the administration of the criminal justice system and reported a number of abuses by bondsmen, including their failure to pay off on forfeited bonds. Beeley concluded that ‘in too many instances, the present system . . . neither guarantees security to society nor safeguards the right of the accused.’ It is ‘lax with those with whom it should be stringent, and stringent with those with whom it could safely be less severe.’ Among Beeley’s recommendations were a greater uses of summons to avoid unnecessary arrests and the inauguration of fact-finding investigations so that bail determinations could be tailored to the individual.<sup>72</sup>

### ***G. Stack v. Boyle and Carlson v. Landon***

Little happened in the history of bail and the pretrial process between 1927 and 1951, the year the Supreme Court decided *Stack v. Boyle*, the first major Supreme Court case concerning issues in the administration of bail.<sup>73</sup> In that case, a number of federal defendants moved the trial court to reduce their money bail bond amounts on the ground that they were excessive under the Eighth Amendment. In support of their motion, the defendants submitted proof of their financial resources, family ties, health, and prior criminal records. It was undisputed that the money bail bonds set for each of the defendants was fixed in a sum much higher than that usually imposed for offenses with like penalties. The government produced no evidence relating to these four defendants, and rested its case on the fact that four other persons previously convicted of the same crimes had forfeited their bail bonds. The defendants’ motions were denied, and the case was ultimately reviewed by the United States Supreme Court.

In its opinion, the Court found that the government’s actions were unconstitutional, stating that “[t]o infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act.”<sup>74</sup> Specifically, the Court wrote that,

the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as an additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’ under the Eighth Amendment. Since the function of

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<sup>71</sup> Thomas, *supra* note 44, at 13, citing Arthur L. Beeley, *The Bail System in Chicago* (Chicago: Univ. of Chicago Press, 1927; reprinted 1966).

<sup>72</sup> *Id.* at 13-14.

<sup>73</sup> *Stack v. Boyle*, 342 U.S. 1 (1951).

<sup>74</sup> *Id.* at 6.

bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.<sup>75</sup>

Because the government produced no evidence to justify why the money bail bond amount for each of the defendants was higher than that usually fixed for similar crimes, the Court remanded the case to the trial court for a new bail bond hearing.

Being the first expression of the Supreme Court's views on bail, the case is known for more than just its holding. In addition to Justice Jackson's memorable concurring statement, quoted in the introduction to this paper, the Court articulated the reasons for a federal right to bail:

[f]rom the passage of the Judiciary Act of 1789, to the present Federal Rules of Criminal Procedure, Rule 46 (a)(1),<sup>76</sup> federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.<sup>77</sup>

Four months later, however, the Supreme Court clarified that the traditional right to freedom before conviction in the federal system was not, in fact, absolute. In *Carlson v. Landon*, the Court wrote the following:

[t]he bail clause was lifted, with slight changes, from the English Bill of Rights Act. In England, that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes or cases in which bail shall be allowed in the country. Thus, in criminal cases, bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrestees must be bailable.<sup>78</sup>

With these two cases, the Supreme Court established that while a right to bail is a fundamental precept of the law, it is not absolute, and its parameters must be determined by federal and state legislatures. Where a bail bond is permitted, however, there must be an individualized determination designed to set the bail bond at "an amount reasonably calculated" to assure the defendant's return to court; when the purpose of a money bail bond is only to prevent flight, the monetary amount must be set at a sum designed to meet that goal, and no more.

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<sup>75</sup> *Id.* at 5 (internal citation omitted).

<sup>76</sup> In addition to granting a right to bail, at that time Rule 46 also required the bail bond to be set to "insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant." *Id.* at 6 n. 3.

<sup>77</sup> *Id.* at 4 (internal citations omitted).

<sup>78</sup> *Carlson v. Landon*, 342 U.S. 524, 545-46 (1952) (footnotes omitted).



## ***H. Empirical Studies and the Manhattan Bail Project***

Empirical studies on the administration of bail, akin to Arthur Beeley's 1927 study, continued after *Stack* and *Carlson*. In 1954, Caleb Foote examined the Philadelphia bail system and demonstrated fundamental inequities in the bail bond setting practice.<sup>79</sup> At the time, Foote observed that for minor offenses, bail bonds were generally based solely on police evidence. For major offenses, a bail bond was set based on the District Attorney's recommendation approximately 95% of the time. Moreover, Foote observed that those who remained in detention pretrial were mostly poor and unable to raise the bond amount. Finally, Foote found that those defendants who were unable to pay their money bail bond amounts were more likely to be convicted and to receive higher sentences than those defendants who were able to pay their money bail bond amounts. Other studies in the 1950s and early 1960s showed similar outcomes, and laid the foundation for the bail reform movement of the 1960s:

[these] studies had shown the dominating role played by bondsmen in the administration of bail, the lack of any meaningful consideration to the issue of bail by the courts, and the detention of large numbers of defendants who could and should have been released but were not because bail, even in modest amounts, was beyond their means. The studies also revealed that bail was often used to 'punish' defendants prior to a determination of guilt or to 'protect' society from anticipated future conduct, neither of which is a permissible purpose of bail; that defendants detained prior to trial often spent months in jail only to be acquitted or to receive a suspended sentence after conviction; and that jails were severely overcrowded with pretrial detainees housed in conditions far worse than those of convicted criminals.<sup>80</sup>

Perhaps the most notable of these studies, and one of the first to explore alternatives to release on financial conditions (money bail bonds), was conducted by the Vera Foundation (now the Vera Institute of Justice) and the New York University Law School beginning in October of 1961. That study, named the Manhattan Bail Project, was designed "to provide information to the court about a defendant's ties to the community and thereby hope that the court would release the defendant without requiring a bail bond [i.e., release on the defendant's own recognizance]."<sup>81</sup> The success of the program quickly became evident:

In its first months the Project recommended only 27 percent of their interviews for release. After almost a year of successful operation, with the growing confidence of judges, the Project recommended nearly 45 percent of arrestees for release. After three years of operation, the percentage grew to 65 percent with the Project reporting that less than one percent of releases failed to appear for trial.<sup>82</sup>

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<sup>79</sup> Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 *Univ. of Pa. L. Rev.* 1031-1079 (1954).

<sup>80</sup> Thomas, *supra* note 44, at 15.

<sup>81</sup> *Id.* at 4.

<sup>82</sup> Lotze, et al., *supra* note 26, at 4; *see also* Thomas, *supra* note 44, at 4-6.

The project generated national interest in bail reform, and within two years programs modeled after the Manhattan Bail Project were launched in St. Louis, Chicago, Tulsa, Washington D.C., Des Moines, and Los Angeles.

## ***I. Rising Dissatisfaction with Compensated Sureties***

In Illinois, dissatisfaction with the commercial money bail bond system in Chicago also led to state legislation in 1963 known as the Illinois Ten Percent Deposit Plan. Under this plan, Illinois retained the use of money bail bonds as the predominant form of release, but eliminated the need for commercial money bail bondsman:

Under this legislation, the 10 percent bonding fee that had previously been paid to the bondsman was to be paid to the court, which was now required to release the defendant on less than full bond. Moreover, the fee paid to the court, unlike the fee paid to a bondsman, is refunded to the defendant upon completion of the case, less a small service fee.<sup>83</sup>

By 1963 the courts, too, were also questioning the desirability of a system that was based on secured bond and dominated by commercial money bail bondsmen, who had, in turn, become the focus of numerous inquiries into their often-abusive and corrupt practices.<sup>84</sup> As one court explained:

The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety – who, in their judgment, is a good risk. The bad risks, in the bondsmen’s judgment, and the ones who are unable to pay the bondsmen’s fees, remain in jail. The Court and the Commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.<sup>85</sup>

## ***J. The National Conference on Bail and Criminal Justice***

Statements such as the one quoted above got the attention of U.S. Attorney General Robert Kennedy, who in March of 1963 instructed all United States Attorneys to recommend the release of defendants on their own recognizance “in every practicable case.”<sup>86</sup> He then convened the National Conference on Bail and Criminal Justice in May of 1964, bringing together over 400 judges, prosecutors, defense lawyers, police, bondsmen, and prison officials to present “for analysis and discussion specific and workable alternatives to [money] bail based on the

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<sup>83</sup> *Id.* at 7 (footnote omitted); *see also Id.* at 183-89. For a more detailed description of the Illinois plan, *see The National Conference on Bail and Criminal Justice, Proceedings and Interim Report*, at 240-246 (Washington, D.C. April 1965); *see also* Thomas, *supra* note 44, at 183-199. The Illinois system was upheld as constitutional against Due Process and Equal Protection challenges in *Schilb v. Kuebel*, 404 U.S. 357 (1971).

<sup>84</sup> *See* Thomas, *supra* note 44, at 15-16.

<sup>85</sup> *Pannell v. U.S.*, 320 F.2d 698, 699 (D.C. Cir. 1963) (concurring opinion).

<sup>86</sup> *National Conference on Bail and Criminal Justice, Proceedings and Interim Report* (Washington, D.C. Apr. 1965), at 297.

experience of the Manhattan Bail Project and some others which followed in its wake.”<sup>87</sup> Opened with statements by Kennedy and Chief Justice Earl Warren, the Conference analyzed topics involving release on recognizance, release on police summons, setting high money bail bonds to prevent pretrial release for public safety purposes (so-called “preventative detention”), pretrial release based on money or other conditions generally, and pretrial release of juveniles. Attorney General Kennedy closed the conference with the following statement:

For 175 years, the right to bail has not been a right to release, it has been a right merely to put up money for release, and 1964 can hardly be described as the year in which the defects in the bail system were discovered.

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What has been made clear today, in the last two days, is that our present attitudes toward bail are not only cruel, but really completely illogical. What has been demonstrated here is that usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money. How much money does the defendant have?<sup>88</sup>

### ***K. 1960s Bail Reform***

Also in 1964, on the eve of the National Bail Conference, Senator Sam Ervin introduced a series of bills designed to reform bail practices in the federal courts. Hearings on the bills ultimately led to passage, in 1966, of the Federal Bail Reform Act. This Act, the first major reform of the federal bail system since the Judiciary Act of 1789, contained the following provisions: (1) a presumption in favor of releasing non-capital defendants on their own recognizance; (2) conditional pretrial release with conditions imposed to reduce the risk of failure to appear; (3) restrictions on money bail bonds, which the court could impose only if non-financial release options were not enough to assure a defendant’s appearance; (4) a deposit money bail bond option, allowing defendants to post a 10% deposit of the money bail bond amount with the court in lieu of the full monetary amount of a surety bond; and (5) review of bail bonds for defendants detained for 24 hours or more.<sup>89</sup> Generally, the Act provided that non-capital defendants were to be released pending trial on their personal recognizance or on personal bonds unless the judicial officer determined that these incentives would not adequately assure their appearance at trial. In those cases, the judge was to choose the least restrictive alternatives from a list of conditions designed to secure appearance. Those charged with a capital offense, or who were convicted and were awaiting sentencing or appeal, were given a different standard: they were to be released unless the judge had reason to believe that they might flee or be a danger to the community.

After passage of the Federal Bail Reform Act of 1966, many states passed similar statutes. By 1971, at least 36 states had enacted statutes authorizing the release of defendants on their own

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<sup>87</sup> *Id.* at XIV.

<sup>88</sup> *Id.* at 296.

<sup>89</sup> *See* Lotze, et al, *supra* note 26, at 5. The Act was codified at 18 U.S.C. §§ 3141-3151.

recognizance. By 1999, “virtually every state [had] established by statute or case law the practice of pretrial supervised release.”<sup>90</sup>

Moreover, by 1965, fifty-six jurisdictions reported operational bail projects modeled after the Manhattan Bail Project, and two statewide projects were reported to be operating in New Jersey and Connecticut. According to Thomas,

[t]he procedure adopted for the release of defendants prior to trial in each of these jurisdictions was the written promise to appear. No money was required to secure such release. Although in limited use prior to the Vera experiment, written promises to appear became much more widely used as a result of the Manhattan Bail Project. The terminology varied from one jurisdiction to another, but whether it was known as own recognizance (O.R.), personal recognizance, pretrial parole, nominal bond, personal bond, or unsecured appearance bond, the result was the same. The defendant was released without posting money bail. In theory, the mechanisms differed; for example, nominal bond required the defendant to post one dollar. In practice, however, this was usually never posted. Also, unsecured appearance bonds, in theory, required the defendant to pay the full bond amount should he fail to appear, but this was rarely more than an idle threat. Likewise, most own recognizance releases involved criminal penalties for failure to appear, but these too were rarely enforced. The result was that defendants were released on their personal promises to appear, and this alone proved a sufficient guarantee of their appearance in court. Defendants released on O.R. appeared as well as or better than those on money bail. The Manhattan Bail Project reported a failure to appear rate of less than seven-tenths of 1 percent.<sup>91</sup>

The gradual change from bail projects fashioned after the Manhattan Bail Project to contemporary pretrial services programs began in the District of Columbia. Although the Bail Reform Act of 1966 specified factors to be considered in releasing defendants pretrial, it left unclear who should gather the necessary information. Pretrial services agencies, beginning with the District of Columbia Bail Agency, evolved to fill in this gap. In 1968, “[t]he D.C. Bail Agency expanded and assumed much greater responsibility in seeing that bail practices mandated, were carried out. In addition to interviewing, collecting background information, producing reports and recommendations to the court, the Pretrial Services programs would now also supervise defendants on various release conditions. The determination of what conditions to impose is a major part of the expansion of the agency.”<sup>92</sup>

## ***L. Professional Standards***

With interest growing in bail reform and more attention being given to the pretrial release decision, professional organizations began issuing standards designed to address relevant bail and pretrial release, detention, and supervision issues at a national level. The American Bar

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<sup>90</sup> *The Supervised Pretrial Release Primer*, Pretrial Servs. Res. Ctr. (BJA, August 1999).

<sup>91</sup> Thomas, *supra* note 44, at 25.

<sup>92</sup> *History of Pretrial Services Programs*, at [www.pretrial.org/html/pretrial.htm](http://www.pretrial.org/html/pretrial.htm).

Association (ABA) was first, with its *Standards Relating to the Administration of Criminal Justice* in 1968,<sup>93</sup> followed by the National Advisory Commission on Criminal Justice Standards and Goals,<sup>94</sup> the National District Attorneys Association (NDAA), with its *National Prosecution Standards*,<sup>95</sup> and the National Association of Pretrial Services Agencies (NAPSA), with its *Performance Standards and Goals for Pretrial Release*.<sup>96</sup> Initially, each of these sets of professional standards were based on reforms codified in the 1966 federal act, and each reflected the view that the current bail system was flawed, primarily due to its emphasis on money bail bonds and commercial sureties. In its first expression on the topic, the ABA stated:

[t]he bail system as it now generally exists is unsatisfactory from either the public's or the defendant's point of view. Its very nature requires the practically impossible task of transmitting risk of flight into dollars and cents and even its basic premise – that risk of financial loss is necessary to prevent defendants from fleeing prosecution – is itself of doubtful validity. The requirement that virtually every defendant must post bail causes discrimination against defendants and imposes personal hardship on them, their families, and on the public which must bear the cost of their detention and frequently support their dependents on welfare.<sup>97</sup>

Though virtually identical to the 1966 Bail Reform Act, these standards added input on two important issues: “[F]irst, the standards introduced the issue of potential danger to the community as a factor that should be considered by the judicial officer in making his decision; and second, the standards called for the abolition of surety bail for profit as an option, citing the long history of abuses associated with the practice.”<sup>98</sup>

## **(i) Preventative Detention**

The first of these issues, often referred to as the issue of “preventative detention” of arrestees who are considered threats to society, had been recognized as a common, albeit secretive practice for some time. Addressing the National Conference on Bail and Criminal Justice in 1964, one commenter noted:

[w]hile we lack a statistical statement of the problem, it is apparent: (1) that many factors other than those which indicate the likelihood of flight are considered in the setting of bail; and (2) that bail is used, in current practice, to detain individuals in custody – not for assuring their appearance at trial – but rather

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<sup>93</sup> ABA Standards, *supra* note 7.

<sup>94</sup> *National Advisory Commission on Criminal Justice Standards and Goals (Corrections, Courts)* (1973).

<sup>95</sup> Prosecution Standards, *supra* note 16.

<sup>96</sup> NAPSA Standards, *supra* note 3.

<sup>97</sup> American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Pretrial Release – Approved Draft, 1967* (New York: American Bar Association, 1968), at 1 (reprinted in ABA Standards, *supra* note 7, at 31).

<sup>98</sup> *Overview of Bail Reform*, found at [www.pretrial.org/html/reform.htm](http://www.pretrial.org/html/reform.htm).

because of the belief that the defendant, if allowed to go free, is likely to commit additional crimes or is apt to intimidate witnesses or victims.<sup>99</sup>

The elusive nature of this issue is apparent in the following statement, written in 1967: “[a]lthough it has never been proven, there have been repeated suggestions that the bail setter often sets bail with the intention of keeping a defendant in jail to protect society or a certain individual. That this manipulation of the bail system takes place is practically unprovable, since the bail setter has such wide discretion.”<sup>100</sup> In the literature, persons often describe this practice as furthering a “sub rosa” purpose of bail, since the purpose of bail bonds until this time had always been only to assure the appearance of a defendant at trial.

Indeed, deterring flight was so ingrained as the sole purpose of bail that Congress left appearance of the defendant at trial as the sole standard for weighing the bail bond decision in the Federal Bail Reform Act. Thus, in non-capital cases the 1966 law did not expressly permit a judge to consider the defendant’s future dangerousness or community safety during the release decision. The District of Columbia was particularly critical of this aspect of the Bail Reform Act, which allowed the release of potentially dangerous non-capital suspects. Moreover, this criticism found an audience with the Nixon administration, an administration that had campaigned on a law-and-order platform. A proposed amendment to the Bail Reform Act to allow for preventative detention was voted down. Nevertheless, as a compromise in 1970, Congress changed the 1966 Act as it applied to persons charged with crimes in the District of Columbia to allow judges to consider dangerousness to the community, along with risk of flight, in setting bail bonds in non-capital cases.<sup>101</sup>

This was the beginning of a vigorous debate over whether or not community safety should be formally recognized as a factor for judges to weigh in setting bail bonds. This particular debate, the debate over preventative detention, would continue until passage of the Comprehensive Crime Control Act of 1984, which is discussed later in this paper.

## **(ii) Compensated Sureties**

The second issue raised in the newly adopted professional standards concerned abolition of compensated sureties. Increased use of non-financial release options during the period of bail reform in the 1960s reduced the courts’ reliance on commercial money bail bondsmen. Over time, the courts and others realized that the administration of bail using commercial sureties was fundamentally flawed, and began to openly oppose the compensated surety system. The 2007 edition of the ABA standards provides the rationale for its long-standing position against compensated sureties:

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<sup>99</sup> *National Conference on Bail and Criminal Justice, Proceedings and Interim Report* (Washington, D.C. Apr. 1965), at 151 (statement of Herman Goldstein, Executive Director to the Superintendent of Police – Chicago, Ill.).

<sup>100</sup> John V. Ryan, *The Last Days of Bail*, 58 J. of Crim. Law, Criminology, and Police Sci., 542, at 548 (1967) (footnote omitted).

<sup>101</sup> District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970).

There are at least four strong reasons for recommending abolition of compensated sureties. First, under the conventional money bail system, the defendant's ability to post money bail through a compensated surety is completely unrelated to possible risks to public safety. A commercial bail bondsman is under no obligation to try to prevent criminal behavior by the defendant. Second, in a system relying on compensated sureties, decisions regarding which defendants will actually be released move from the court to the bondsmen. It is the bondsmen who decide which defendants will be acceptable risks – based to a large extent on the defendant's ability to pay the required fee and post the necessary collateral. Third, decisions of bondsmen – including what fee to set, what collateral to require, what other conditions the defendant (or the person posting the fee and collateral) is expected to meet, and whether to even post the bond – are made in secret, without any record of the reasons for these decisions. Fourth, the compensated surety system discriminates against poor and middle-class defendants, who often cannot afford the non-refundable fees required as a condition of posting bond or do not have assets to pledge as collateral. If they cannot afford the bondsmen's fees and are unable to pledge the collateral required, these defendants remain in jail even though they may pose no risk of failure to appear in court or risk of danger to the community.<sup>102</sup>

Today, the call for abolition of compensated sureties is uniform among the three major organizations issuing standards on pretrial release -- the American Bar Association (“their role is neither appropriate nor necessary and the recommendation that they be abolished is without qualification”),<sup>103</sup> the National Association of Pretrial Services Agencies (“Consistent with the processes provided in these Standards, compensated sureties should be abolished”),<sup>104</sup> and the National District Attorney's Association (“Compensated sureties should be abolished and, in those cases in which money bail is required, the defendant should ordinarily be released upon the deposit of cash securities equal to ten percent of the amount of the bail.”).<sup>105</sup>

### ***M. Bail Reform through the 1970s***

“Despite its impressive beginning, however, the bail reform movement waned considerably in the late 1960s. Many of the early own-recognition release programs ceased operating, and those that remained often had tenuous financial and official support.”<sup>106</sup> A good example is found in the creation of the Harris County, Texas, Pre-Trial Release Agency, which became a focus of attention when a federal court acted to remedy “severe and inhumane overcrowding of inmates” at the Harris County jail.<sup>107</sup> The federal court, recognizing the Agency's strong fundamental premise and great expectations at its creation in 1972, nevertheless found it to be “foundering,” “deficient,” and “ineffective” in 1975. The reasons for this were many, including harassment and sabotage by the money bail bondsmen, the Agency's inefficient physical

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<sup>102</sup> ABA Standards, *supra* note 7, at 45 (footnote omitted).

<sup>103</sup> *Id.* at 46.

<sup>104</sup> NAPSA Standards, *supra* note 3, at 16.

<sup>105</sup> Prosecution Standards, *supra* note 16, at 140.

<sup>106</sup> Thomas, *supra* note 44, at 8.

<sup>107</sup> *See Alberti v. Sheriff of Harris County*, 406 F. Supp. 649 (S.D. Tex. 1975).

placement, its lack of effective internal practices, and its lack of an adequate budget, personnel, training, and supervision. One of the biggest barriers to the Agency's success, however, was its reliance on methods that were largely subjective and often arbitrary. As the court noted, "[t]he largest impediment to prompt, efficacious operation of pretrial release is the agency's use of, and total reliance upon, a subjective standard of evaluation of each interviewee. That is, the 'gut' reaction of the interviewer is used to determine whether a defendant is a good risk for release on recognizance."<sup>108</sup> To remedy this particular situation, the court ordered the Agency to adopt an objective point system for evaluating release on recognizance, "designed with a view towards reducing to a minimum the refusing of 'PR' bonds on 'hunches.'"<sup>109</sup>

The movement toward more and increasingly efficient pretrial services agencies has continued through the 1970s to the present. By 2003, the Bureau of Justice Assistance estimated that pretrial services agencies were operational in over 300 jurisdictions in the United States.<sup>110</sup> Moreover, the federal system showed substantial progress toward bail reform in the 1970s. Because the 1966 Bail Reform Act contained no mechanism for gathering background information on defendants, in 1974 Congress created 10 pilot pretrial agencies within the federal courts to provide judges with the information necessary to make release decisions.<sup>111</sup> "[These] agencies, following and expanding on approaches initially developed by pretrial services projects in State court systems, developed strong support from judges and magistrates in the pilot districts."<sup>112</sup> Ultimately, after testimony from federal magistrates that neither defense counsel nor prosecutors were able to provide them with the information necessary to make an informed bail bond decision, Congress passed the Pretrial Services Act of 1982, which expanded the pilot program by establishing pretrial service agencies in virtually all of the federal district courts.<sup>113</sup>

## ***N. The Bail Reform Act of 1984***

While pretrial services programs found their footing in the wake of the 1966 Act, a new debate over the administration of bail began to emerge. "The 1970s ushered in a new era for the bail reform movement, one characterized by heightened public concern over crime, including crimes committed by persons released on a bail bond. Highly publicized violent crimes committed by defendants while released pretrial prompted calls for more restrictive bail policies and led to growing dissatisfaction with laws that did not permit judges to consider danger to the community in setting release conditions."<sup>114</sup> The Bail Reform Act of 1966 had only narrowly addressed public safety. Under the Act, persons charged with *capital* offenses or awaiting sentence or appeal could be detained if the court found that "no one condition or combination of conditions

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<sup>108</sup> *Id.* at 665.

<sup>109</sup> *Id.* at 683.

<sup>110</sup> See John Clark and D. Alan Henry, *Pretrial Services Programming at the Start of the 21<sup>st</sup> Century: A Survey of Pretrial Services Programs* (Washington D.C.: BJA, 2003), at 2 [hereinafter Clark & Henry, *Programming*].

<sup>111</sup> The pilot agencies were created in Title II of the Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076, 18 U.S.C. § 3161-74,

<sup>112</sup> Barry Mahoney, Bruce D. Beaudin, John A. Carver III, Daniel B. Ryan, and Richard B. Hoffman, *Pretrial Services Programs: Responsibilities and Potential*, Nat'l Inst. of Just. (Washington D.C. 2001), at 6 [hereinafter, Mahoney, et al.].

<sup>113</sup> Pretrial Services Act of 1982, Pub. L. No. 97-267, Sect. 2, 96 Stat. 1136 (codified at 18 U.S.C. § 3152. For articles reflecting on the 25<sup>th</sup> anniversary of the Act, see Federal Probation (Admin. Office U.S. Courts, Sept. 2007).

<sup>114</sup> *The Supervised Pretrial Release Primer*, Pretrial Servs. Res. Ctr. (BJA, August 1999), at 5.



will reasonably assure that the person will not flee or pose a danger to any other person or the community.”<sup>115</sup> Nevertheless, judges were not authorized to consider danger to the community for any other bailable defendants.

After Congress passed the District of Columbia Court Reform and Criminal Procedure Act of 1970, the first bail law in the country to make community safety an equal consideration to future court appearance in bail bond setting, many states drafted bail laws that also addressed future dangerousness and preventative detention. In 1984, Congress addressed the issue in the federal courts with its passage of the Comprehensive Crime Control Act of 1984.<sup>116</sup> Chapter I contained the Bail Reform Act of 1984, codified at 18 U.S.C. Sections 3141-3156, which amended the 1966 Act to include consideration of danger in order to address “the alarming problem of crimes committed by persons on release.”<sup>117</sup> The 1984 Act mandates “pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court . . . unless the judicial officer determines 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.”<sup>118</sup> The Act further provides that if, after a hearing, “the judicial officer finds that 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, such judicial officer shall order the detention of the person before trial.”<sup>119</sup> The Act creates a rebuttable presumption toward confinement when the person has committed certain delineated offenses, such as crimes of violence or serious drug crimes.<sup>120</sup>

In *United States v. Salerno*, the United States Supreme Court upheld the 1984 Act’s preventative detention language against facial due process and eighth amendment challenges. After reviewing the Act’s procedures by which a judicial officer evaluates the likelihood of future dangerousness, the Court stated, “[w]e think these extensive safeguards suffice to repel a facial challenge.” Specifically, the Court wrote, “[g]iven the legitimate and compelling regulatory purpose of the Act and the procedural protections it offers, we conclude that the Act is not facially invalid under the Due Process Clause of the Fifth Amendment.”<sup>121</sup> Responding to the argument that the Act violated the Eighth Amendment, the Court concluded:

Nothing in the text of the Bail Clause limits permissible Governmental considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the Government’s proposed conditions of release or detention not be ‘excessive’ in light of the perceived evil. Of course, to determine whether the Government’s response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. We believe that, when Congress has mandated detention on the

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<sup>115</sup> Former 18 U.S.C. § 3148.

<sup>116</sup> Pub. L. No. 98-473, 98 Stat. 1976 (1984).

<sup>117</sup> *U.S. v. Salerno*, 481 U.S. 739, 742 (1987) (quoting S. Rep. 98-225, p. 3, 1983).

<sup>118</sup> 18 U.S.C. § 3142 (b).

<sup>119</sup> *Id.* § 3142 (e).

<sup>120</sup> *See Id.*

<sup>121</sup> *Salerno*, 481 U.S., at 752.

basis of a compelling interest other than prevention of flight, as it has here, the Eight Amendment does not require release on bail.<sup>122</sup>

Prior to *Salerno*, the ABA had endorsed limited preventative detention in its revised Standards. After *Salerno*, both the NAPSA and the Prosecution Standards were revised to include public safety as a legitimate purpose of the pretrial release decision. By 1999, it was reported that at least 44 states and the District of Columbia had statutes that included public safety, as well as risk of failure to appear, as an appropriate consideration in the pretrial release decision.<sup>123</sup> Nevertheless, the need for improvement in this area is still evident. As noted in the ABA's current version of its *Standards for Criminal Justice*,

although many states have revised their bail statutes to allow consideration of risk to public safety, no states have yet adopted a system that calls for the type of careful scrutiny of information about the defendant's background and financial circumstances that was recommended in the [previous] Standards. On the contrary, it is common in many jurisdictions – especially ones that have no pretrial services program – for decisions about pretrial detention or release to be made with little or no information about the financial circumstances of the defendant or other factors relevant to assessing the nature of any risk presented by the defendant's release. Often, the decisions are made in hurried initial appearance proceedings in which the defendant is without counsel.

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Major improvements in pretrial processes are needed and are clearly feasible. A number of jurisdictions have established systems for gathering relevant and objective information about defendants' backgrounds and about the appropriateness of particular conditions for individual defendants, making release decisions based on such information, and successfully managing defendants on release through comprehensive pretrial services. In four states and the District of Columbia, bail bonding for profit has been completely or substantially eliminated.<sup>124</sup>

Specifically, Cohen & Reaves report that Illinois, Kentucky, Oregon, and Wisconsin do not allow commercial bail bonds, and the District of Columbia, Maine, and Nebraska allow these bonds but rarely use them. In 1987, the Government Accounting Office studied the impact of the Bail Reform Act of 1984, as compared to the previous Act of 1966. In its report, the GAO found:

(1) a larger percentage of defendants were detained during their pretrial period under the new law; (2) under the old law defendants were detained because they did not pay the set bail, while under the new law 51 percent were detained for

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<sup>122</sup> *Id.* at 754-55.

<sup>123</sup> *See Lotze, e. al., supra* note 26, at 12.

<sup>124</sup> ABA Standards, *supra* note 7, at 32-33.

lack of bail money and 49 percent were detained because they were considered a danger risk; (3) the new law left open to interpretation whether the money bail could be set at an amount that the defendant was unable to pay; (4) most of the defendants qualified for the rebuttable-presumption-of-danger provision were indicted for drug offenses that had imprisonment terms of 10 years or more; (5) the new law did not require federal prosecutors to seek pretrial detention of all defendants who met the rebuttable presumption criteria; (6) defendants released on bail who failed to appear for judicial proceedings totaled 2.1 percent under the old law and 1.8 percent under the new law; (7) defendants who were arrested for committing new crimes totaled 1.8 percent under the old law and 0.8 percent under the new law; and (8) although most court officials felt that the new bail law was more direct and honest because it allowed the system to label defendants as dangerous, they were concerned about the amount of time involved in attending detention hearings.<sup>125</sup>

These findings are enlightening to the federal system, as well as to the various state systems of bail administration.

## ***O. Jail Crowding***

The most significant development affecting the administration of bail in the last 20 years is undoubtedly jail crowding. As noted by the Pretrial Justice Institute (formerly the Pretrial Services Resource Center),

[j]ail is one of the most expensive investments made by local government. Intended to protect the community from dangerous individuals and/or punish those sentenced for minor crimes, the inappropriate use of jail space frequently results in the detention of more individuals than the facility was designed or staffed to house.

This often leads to unnecessary danger to the staff as well as unsafe conditions of confinement. A common remedy has been litigation against those responsible, often resulting in the release of detainees and expensive jail expansion projects.<sup>126</sup>

This view is echoed by the ABA, which states that, in addition to any negative consequences to the defendant that are caused by unnecessary pretrial detention (e.g., loss of job, strained family relations), “such detention, often very lengthy, leads directly to overcrowded jails and ultimately to large expenditures of scarce public resources for construction and operation of new jail facilities.”<sup>127</sup>

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<sup>125</sup> *Criminal Bail: How Bail Reform is Working in Selected District Courts*, GAO Report No. GGD-88-6 (Oct. 23, 1987) (press release), at 1.

<sup>126</sup> See *Jail Crowding Overview*, at <http://www.pretrial.org/html/jail%20crowding.htm>.

<sup>127</sup> ABA Standards, *supra* note 7, at 33.

In 1984, officials responding to a National Institute of Justice survey described jail crowding as “the most pressing problem facing criminal justice systems in the United States.”<sup>128</sup> In 2000, a Bureau of Justice Assistance monograph reported that “jail crowding continues to be a nationwide problem. This is somewhat surprising because in the intervening years [between 1985 and 1999] there was a boom in the construction of correctional facilities in many parts of the country and a decline in crime through the entire United States.”<sup>129</sup> By 2006, the nation’s jail population totaled over 750,000 inmates, and local jail facilities operated at about 94% of their rated capacity.<sup>130</sup> Moreover, “[s]ince 2000, the number of unconvicted inmates held in local jails has been increasing. As of June 30, 2006, 62 percent of inmates held in local jails were awaiting court action on their current charge, up from 56 percent in 2000.”<sup>131</sup> Another study of felony defendants in 75 of the most populous counties in the U.S. found that 38% of all defendants charged with a felony were held in confinement until the disposition of their court case.<sup>132</sup>

The cost of housing these pretrial inmates has become prohibitive (as much as \$65 to \$75 per inmate per day, or nearly \$24,000 to \$27,000 per inmate per year), and the cost to build new facilities is also high (as much as \$75,000 per bed).<sup>133</sup> With only three realistic alternatives for alleviating a crowded jail facility (reduce bookings, reduce inmate lengths of stay, or build a new facility with more beds), many jurisdictions simply cannot continue to tolerate inefficient bail administration practices that exacerbate the crowding problem. Accordingly, in recent years jurisdictions have been investigating innovative bail practices and pretrial services programs as rational and cost-effective solutions to jail crowding issues. Recent studies have also focused on “re-inventing” pretrial release by implementing innovative release and supervision strategies specifically designed to avoid emergency jail crowding reduction measures.<sup>134</sup>

## ***P. Money Bail Bondsmen v. Pretrial Services Agencies***

Increased judicial reliance on pretrial services agencies for supervision of released inmates has generated friction between these agencies and members of the commercial surety industry. During the mid-1990s, money bail bond organizations, including the National Association of Bail Insurance Companies (“NABIC”) and various state bail organizations, worked with the American Legislative Exchange Council (“ALEC,” an organization consisting of “state legislators and conservative policy advocates,” including corporations and trade associations such as NABIC and the American Bail Coalition) to create an initiative titled “Strike Back!” Strike Back was an aggressive and concerted effort to eliminate pretrial services agencies

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<sup>128</sup> *National Assessment Program: Assessing Needs in the Criminal Justice System* (Washington, DC: Abt Assoc. for the Nat’l Inst. of Just., Jan. 1984), at 4.

<sup>129</sup> *A Second Look at Alleviating Jail Crowding; A Systems Perspective* (BJA, 2000), at 1.

<sup>130</sup> See William J. Sabol, Todd D. Minton, and Paige M. Harrison, *Prison and Jail Inmates at Midyear 2006* (BJS 2007), at 5, 7 [hereinafter Sabol].

<sup>131</sup> *Largest Increase in Prison and Jail Inmate Populations Since Midyear 2000*, (BJS Press Release, June 28, 2007); See also Sabol, *supra* note 130, at 6

<sup>132</sup> See Cohen & Reaves, *supra* note 1, at 2.

<sup>133</sup> Of course, construction and management costs to build new jail facilities can vary widely based on a number of factors, and calculation of an accurate average jail bed cost can be elusive. See Alan R. Beck, *Misleading Jail Bed Costs*, at <http://www.justiceconcepts.com/cost.htm>.

<sup>134</sup> See Goldkamp and White, *Restoring Accountability in Pretrial Release: The Philadelphia Release Supervision Experiments* (Crime and Just. Res. Inst. (1998)).

(termed “free bail” agencies in the commercial surety industry literature) and release on personal recognizance bond (termed “criminal welfare programs”) in order to promote the interests of the commercial surety industry. These efforts were opposed in the mid 1990s by organizations such as the Pretrial Services Resource Center (now known as the Pretrial Justice Institute),<sup>135</sup> and have been countered since by pretrial services and other justice organizations, which continue to call for the abolition of compensated sureties. More recently, money bail bondsmen have promoted their interests somewhat more passively through repeated reference to two studies, one examining failure to appear rates, fugitive rates, and capture rates for felony defendants released on cash bond, deposit bond, own recognizance, and surety bond,<sup>136</sup> and the other a comparison of pretrial release options in large California counties.<sup>137</sup> However, these studies have little bearing on how bail and the pretrial process is administered in the First Judicial District, and in Colorado more generally, because of the critical role that the local professional pretrial service agency plays in providing the court with statutorily consistent recommendations for individual defendants’ conditions of bond and with community-based supervision to assure defendants’ appearance in court and public safety.

## ***Q. Conclusion***

Overall, the history of bail and pretrial services programs shows steady but slow progress toward the realization of an ideal system of bail administration based on accurate predictions of court appearance and the commission of new crime. To many, however, the history of bail shows only that true bail reform has not been completely attained. Knowing how we got to where we are now is crucial to making further progress in this area. Nevertheless, to adequately assess any particular jurisdiction’s progression toward an ideal system of bail administration – a system that truly reflects the type of bail reform intended since the 1960s – it is important to know that jurisdiction’s legal framework within which bail and pretrial release decisions are made. The next section of this paper summarizes Colorado’s legal framework.

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<sup>135</sup> See, e.g., Spurgeon Kennedy & D. Alan Henry, *Commercial Surety Bail: Assessing Its Role in the Pretrial Release and Detention Decision*, Pretrial Servs. Res. Ctr. (July 1994, edited and reprinted in 1996) [hereinafter Kennedy & Henry]. The 1996 reprint is available online through the Pretrial Justice Institute, at <http://www.pretrial.org/Docs/Documents/commsuretybail.doc>.

<sup>136</sup> Eric Helland & Alexander Tabarrok, *Public versus Private Law Enforcement: Evidence from Bail Jumping*, 47 J. of L. and Econ. 93 (2004).

<sup>137</sup> Michael K. Block, *The Effectiveness and Cost of Secured and Unsecured Pretrial Release in California’s Large Urban Counties: 1990-2000*, found online, at [http://www.lexingtonnational.com/Agent\\_Resources/Bail\\_Bond\\_Studies.aspx](http://www.lexingtonnational.com/Agent_Resources/Bail_Bond_Studies.aspx).

### III. Colorado Law<sup>138</sup>

#### A. *The Colorado Constitution*

As in many other areas of jurisprudence, state laws vary regarding the administration of bail.<sup>139</sup> As noted previously, Colorado's Constitution provides a right to pretrial bail with certain limited exceptions. Section 19 of the Constitution reads:

Article II, (1) All persons shall be bailable by sufficient sureties pending disposition of charges 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 proof is evident or 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, as may be defined by the general assembly, alleged to have been committed while on probation or parole resulting from the conviction of a crime of violence;

(II) A crime of violence, as may be defined by the general assembly, 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, as may be defined by the general assembly, 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

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<sup>138</sup> For a more detailed annotated legal analysis of the constitutional and statutory provisions concerning pretrial release and the bail bond decision, see Dieter & Lichtenstien, *Colorado Criminal Practice and Procedure*, Chapt. 6 – Pretrial Release (Thomson/West 2004).

<sup>139</sup> For example, at least forty-four states and the District of Columbia have statutes explicitly listing public safety as well as risk of failure to appear as being appropriate considerations in the pretrial release decision. See ABA Standards, *supra* note 7, at 37, n. 9, citing Lotze, *et al.*, *supra* note 26, at 7. Moreover, “[a]t least twelve states have established a statutory presumption that defendants charged with bondable categories of offenses should be released on their own recognizance or on unsecured bond, unless the judicial officer determines that the defendant presents a risk that calls for more restrictive conditions or for detention.” *Id.* at 40, n. 14. For a collection of relevant state cases and statutes dealing with this presumption, see Lynn Considine Cobb, *Application of State Statutes Establishing Pretrial Release of Accused on Personal Recognizance as Presumptive Form of Release*, 78 A.L.R. 3d 780 (Bancroft-Whitney Co. 1977, West Group 2007). Kentucky and Wisconsin have prohibited the use of compensated sureties, and in Illinois and Oregon the statutes do not authorize release on surety bond. ABA Standards, *supra* note 7, at 46, n. 19. States differ, as well, on statutory authority for police officers to issue citations in lieu of arrest, *see id.* at 63-64 n. 25, on court authority to issue summonses in lieu of arrest warrants, *see id.* at 73 n. 32, on whether to mandate fixed periods of time within which a defendant must be brought before a judicial officer following arrest, *see id.* at 79 n. 34, and on whether or not a defendant has a right to counsel at first appearance, *see id.* at 96-97 n. 55, 58.

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.<sup>140</sup>

Except for capital offenses, any person denied a bail bond under this provision must be ordinarily brought to trial or have a bail bond set within ninety days after the date that a bail bond is denied.

<sup>141</sup> Article II, Section 19 (2.5) provides standards for setting bail bonds after conviction, and, unlike its pretrial counterpart, specifically authorizes general consideration of preventative detention for determinations of appeal bonds. Section 2.5(b) states that “[t]he court shall not set bail that is otherwise allowed pursuant to this subsection (2.5) unless the court finds that: (I) The person is unlikely to flee and does not pose a danger to the safety of any person or the community.”<sup>142</sup> Section 20 of Article II is identical to the U.S. Constitution’s Eighth Amendment: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>143</sup>

## ***B. Relevant Colorado Statutes***

### **(i) Title 16 Article 4 Provisions**

Bail in Colorado is administered through Article 4 of Title 16 of the Colorado Revised Statutes. Section 16-4-101 mirrors the language of Article II Section 19 of the Colorado Constitution in recognizing a right to bail, and by enumerating certain non-bailable offenses. Subsection (1) is virtually identical to the constitutional language quoted above, except that it adds “possession of a weapon by a previous offender” to non-capital crimes in which defendants may be denied a bail bond where “proof is evident or the presumption is great . . . [and where] the public would be placed in significant peril if the accused were released.”<sup>144</sup> Section 16-4-101 also adds a subsection allowing the denial of a bail bond for an accused who is awaiting appeal of a conviction of a crime of violence or possession of a weapon.<sup>145</sup> In addition, in the 90-day speedy trial provision also found in the Constitution, subsections two through five of that Section define

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<sup>140</sup> Colo. Const. Article II, § 19 (1). Concerning constitutional limitations to Colorado’s right to bail, the Colorado Supreme Court has quoted the following statement from the Eighth Circuit with approval:

“Neither the Eighth Amendment nor the Fourteenth Amendment requires that everyone charged with a state offense must be given his liberty on bail pending trial. While it is inherent in our American concept of liberty that a right to bail shall generally exist, this has never been held to mean that a state must make every criminal offense subject to such a right or that the right provided as to offenses made subject to bail must be so administered that every accused will always be able to secure his liberty pending trial. Traditionally and acceptedly, there are offenses of a nature as to which a state properly may refuse to make provision for a right to bail.”

*People v. District Court*, 529 P.2d 1335, 1336 (Colo. 1974) (quoting *Mastrian v. Hedman*, 326 F.2d 708, 710 (8th Cir. 1964)). In 1981, in *L.O.W. v. District Court*, the Court quoted language from *Stack v. Boyle*, 342 U.S. 1, 4 (1951), quoted *supra*, at footnote 77, observing the importance of the right to bail to the presumption of innocence. See *L.O.W. v. District Court*, 623 P.2d 1253, 1256 (Colo. 1981).

<sup>141</sup> Colo. Const. Article II, § 19 (2).

<sup>142</sup> *Id.* § 19 (2.5).

<sup>143</sup> *Id.* § 20. It has not yet been expressly determined whether the U.S. Constitution’s Eight Amendment creates a right to bail (versus whether it prohibits excessive money bail bonds where the right to bail exists) and whether it is binding on the states.

<sup>144</sup> Colo. Rev. Stat. § 16-4-101 (1) (b) (IV).

<sup>145</sup> *Id.* § 16-4-101 (1) (c).

“crime of violence,” and articulate procedures for capital cases and cases in which the accused is arrested while on parole.

Section 16-4-102 provides the procedure by which an inmate may petition the court to set a bail bond, if it has not already been set pursuant to the applicable rule of criminal procedure.<sup>146</sup>

Section 16-4-103 provides the detailed procedure to be followed in fixing the monetary amount (if any) and other conditions of a bail bond “at the first appearance of a person in custody before a judge of a court of record.” Pursuant to this section, “the amount of bail and type of bail bond shall be fixed by the judge,” and “shall be sufficient to assure compliance with the conditions set forth in the bail bond.”<sup>147</sup>

Except in three specific instances, the monetary amount of the bail bond is not enumerated in statute, appropriately so, for persons arrested for any of the hundreds of offenses in the Colorado statutes (or for persons who present a certain level of risk of failure to appear or danger to the public). The monetary amount of the bail bond is presumptive in two of those instances, and in the third instance, a fixed amount is mandated. Subsection (1) (b) of Section 16-4-103 statutorily sets the money bail bond amount at \$10,000 or other amount set at a bail hearing for persons arrested for driving while their license is restrained due to a conviction for driving under the influence of alcohol or drugs. Subsection (1) (b.5) of Section 16-4-103 statutorily sets the money bail bond amount at \$50,000 or other amount set by the court for persons arrested for vehicular eluding and driving under the influence arising out of the same incident. For the only statutorily mandated money bail bond amount in Colorado’s criminal code, subsection (1) (d) (I) of Section 16-4-103 sets the amount at \$50,000 for persons arrested for distribution of a schedule I or schedule II controlled substance. This amount can be changed, but only after a motion by the district attorney or defendant and a showing of good cause.<sup>148</sup>

Section 16-4-103, subsection (2), sets forth certain mandatory conditions for every bail bond, including that the released person appear for court and that he or she not commit any felony while on bond. Subsection (2) (f) provides that “[i]n 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.”<sup>149</sup> The only condition which, if

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<sup>146</sup> *Id.* § 16-4-102.

<sup>147</sup> *Id.* § 16-4-103 (1) (a).

<sup>148</sup> The authors believe that these laws are at least in conflict with other statutory requirements, and at most unlawful. The statutory setting, whether presumptive or mandated, of monetary bail bond amounts based solely on the defendant’s charges clearly conflict with the statute requiring that a judge consider many factors *in addition to* the present charges when fixing any monetary amount of the bail bond and the type of bond (see § 16-4-105). Moreover, given the Supreme Court’s language in *Stack v. Boyle* that “to infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act” and “the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as an additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’ under the Eighth Amendment. Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant,” the sections arguably violate the United States Constitution.

<sup>149</sup> *Id.* § 16-4-103 (2) (f). In 2008, the Colorado Supreme Court decided *State v. Rickman*, 178 P.3d 1202, 1207 (Colo. 2008), stating, “in short, bond conditions are either mandated by statute or may be imposed by the



breached, subjects a surety on the bail bond 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.”<sup>150</sup>

Section 16-4-104 lists the various bail bond alternatives, stating that “when the amount of bail is fixed by the judge of a court of record, the judge shall also determine which . . . kinds of bond shall be required for the pretrial release of the defendant.”<sup>151</sup> Pursuant to that Section, a defendant may be released from custody “upon execution by him of a personal recognizance,”<sup>152</sup> or “upon execution of a bond in the full amount of the bail to be secured in any one or more, or any combination of” cash (including certain stocks and bonds), property, or “sureties worth at least one and one-half the amount of bail set in the bond or by a bail bonding agent or a cash bonding agent qualified to write bail bonds pursuant to article 7 of title 12, C.R.S.”<sup>153</sup> That Section also contains detailed requirements for the execution of a bond using more complex securities such as stocks, bonds, or real estate.

Section 16-4-105 contains factors that judges shall consider when selecting the amount and type of bail bond. That section states:

(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 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 which is accessible to the public, or within any private dwelling which 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 bus engaged in the transportation of persons who are students at any public or private

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judge...however, the statute does not anticipate or permit a judge to delegate the judge's authority to set conditions of bond to a pretrial services program.”

<sup>150</sup> Colo. Rev. Stat. § 16-4-103 (2) (a).

<sup>151</sup> *Id.* § 16-4-104 (1).

<sup>152</sup> *Id.* § 16-4-104 (1) (a).

<sup>153</sup> *Id.* § 16-4-104 (1) (b).

elementary, middle, or secondary school; (k.7) The fact that the defendant is accused of soliciting, inducing, encouraging, intimidating, 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.<sup>154</sup>

Subsections (m) through (p.5) provide restrictions on the release of certain defendants on their own recognizance. For example, subsection (m) provides that a defendant currently on a bond for any felony or class 1 misdemeanor may not be released on personal recognizance unless the district attorney consents.<sup>155</sup>

Pursuant to Section 16-4-105 (2), “[i]f 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 bond in the first instance.”<sup>156</sup>

Section 16-4-105 (1) (q) states that if a pretrial services program exists in the relevant judicial district, a judge fixing the amount and type of bond may use the services of that program. Section 16-4-105 (3) provides the overall parameters of such a pretrial services program, which “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 risk of failure to appear for court.”<sup>157</sup> Pursuant to the same subsection, a pretrial services program may be established by any county or city and county in Colorado pursuant to a plan formulated by a community advisory board appointed by the chief judge of the judicial district (in Jefferson County, this board is known as the Court Services Advisory Board). If established, the pretrial services program must implement a procedure to screen detainees and to provide information to the judge setting the monetary amount and type of bond.<sup>158</sup>

Pursuant to statute, a pretrial services program may also include different methods and levels of community-based supervision as a condition of pretrial release. Specifically, “[t]he program may use established supervision methods for defendants who are released prior to trial in order to

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<sup>154</sup> *Id.* § 16-4-105 (1) (a) – (l).

<sup>155</sup> *Id.* § 16-4-105 (1) (m); As another example, § 16-4-105 (1) (p) states that “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.” While there are relatively few Colorado cases construing these particular statutory limitations, the Colorado Supreme Court has held subsection (1) (m) constitutional against separation of powers arguments. *See People v. Sanders*, 522 P.2d 735, 737 (Colo. 1974). In construing subsection (1) (p), a division of the Colorado Court of Appeals stated that “the plain language of this statute . . . and the entire bonding scheme indicates that it is meant to apply to a person for whom bail has not yet been fixed, and who is on release under a surety bond on a pending charge different from the charge which he is seeking release on personal recognizance.” *People v. Anderson*, 789 P.2d 1115, 1116 (Colo. App. 1990).

<sup>156</sup> Colo. Rev. Stat. § 16-4-105 (2).

<sup>157</sup> *Id.* § 16-4-105 (3) (c) (I).

<sup>158</sup> *Id.* § 16-4-105 (3) (b), (c).

decrease unnecessary pretrial incarceration.”<sup>159</sup> The statute enumerates several authorized methods of supervision, such as phone contacts, home visits, drug testing, mental health and substance abuse treatment, counseling, pretrial work release, and electronic monitoring.<sup>160</sup> Programs established under this section are required to make annual reports to the state judicial department that include the number and nature of recommendations made and the failure to appear rate of defendants on pretrial release.<sup>161</sup>

Section 16-4-106 covers situations in which a bond must be continued when, for example, a charge is dismissed in the county court and re-filed or appealed in the district court. The section specifically says that in such cases, bonds shall continue in effect “until final disposition of the case.” The Colorado Supreme Court has said that this Section and Section 16-4-201, concerning bail after conviction, must be read together and reconciled, if possible.<sup>162</sup> The latter section explicitly states that continuance of any bond after conviction is within the trial court’s discretion, although such a bond may not be continued without the consent of the sureties.<sup>163</sup>

Section 16-4-107 provides the procedure to change the condition of a bail bond or change the type of a bail bond. Upon proper motion,<sup>164</sup> the court hearing the case “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.”<sup>165</sup>

Section 16-4-108 sets forth the general procedure for exonerating a principal or surety on a bail bond from liability. Sections 16-4-109 and 16-104-110 provide procedures for the court to declare a forfeiture or termination of a defendant’s bond that is not secured by a compensated surety. Bonds secured by compensated sureties are subject to the more detailed forfeiture provisions set forth in Section 16-4-112.<sup>166</sup>

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<sup>159</sup> *Id.* § 16-4-105 (3) (d).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* § 16-4-105 (3) (e).

<sup>162</sup> *Rodriguez v. People*, 554 P.2d 291, 293 (Colo. 1976) (construing previous version of statute).

<sup>163</sup> § 16-4-201 (1) (c). Connected to the issue of obtaining consent from sureties to continue a bail bond after conviction is a body of Colorado case law addressing when a surety may be released from its obligation on a bond based on events (such as the filing of a habitual criminal charge) that materially increase the risk that a defendant will appear for trial. *See, e.g., People v. Nishikawa*, 32 P.3d 630, 631-32 (Colo. App. 2001); *People v. Soto-Gallegos*, 953 P.2d 946, 947-948 (Colo. App. 1997); *People v. Jones*, 873 P.2d 36 (Colo. App. 1994) (and cases cited therein).

<sup>164</sup> The statute requires a motion by either the district attorney or the defendant, with reasonable notice to each other. “The statute makes no provision for a trial court, *sua sponte*, to modify a defendant’s bond once that bond has been executed.” *Stephenson v. Dist. Ct.*, 629 P.2d 1078, 1080 (Colo. 1981).

<sup>165</sup> Colo. Rev. Stat. § 16-4-107 (1).

<sup>166</sup> The following summary of the forfeiture procedure for compensated sureties is provided by the Colorado Judicial Branch website: “A bond judgment is entered if a defendant fails to appear for the court date. When the defendant fails to appear the professional surety is responsible to pay the bond amount. Once the professional surety fails to pay the bond amount, a judgment is ordered by the court to be entered against the professional surety. When the judgment is not paid the professional surety is put on the board [“on the board” refers to the public posting of the compensated surety’s name by the court. The “On the Board” report is a statewide listing of professional sureties and insurance companies that have outstanding bond judgments]. Once on the board the professional surety can no longer post bonds in the State of Colorado. After the professional surety fails to pay the judgment the insurance company becomes liable for the bond judgment. If the insurance company fails to pay this judgment the insurance company is put on the board also. Once the insurance company is on the board they can no longer write bonds in the State of Colorado. This report includes the following information: professional surety name or insurance company;

Section 16-4-111 states that “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 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 (1) the accused fails to identify himself, (2) the accused refuses to sign a personal recognizance, (3) detention or a surety bond is necessary to prevent “imminent bodily harm,” (4) the accused has no ties to the community and it is likely he will fail to appear, (5) the accused has failed to appear for court in the past, or (6) the accused has outstanding warrants or pending charges for suspension or revocation of parole or probation.<sup>167</sup>

## **(ii) Other Statutory Provisions**

Section 16-2-111, which is contained in the simplified statutory procedures for criminal cases in the county courts, provides that persons charged with misdemeanor or petty offenses are to be admitted to bail pursuant to article 4. In these cases, however, “when the county judge or judges are not immediately available for purposes of admission to bail or pretrial release of persons arrested and brought to the county court or jail, on charges of committing a misdemeanor or petty offense, such persons may be admitted to bail or be given a pretrial release by an appropriate officer designated by court rule.”<sup>168</sup> Moreover, that section states that “[u]nless otherwise provided by statute or supreme court rule, the county court shall provide by rule for the conditions and circumstances under which an admission to bail or pretrial release will be granted pending appearance before the judge, but in no event shall any such rule require conditions or impose liabilities in excess of those required by this code for cases filed in the district court.”<sup>169</sup>

Under Colorado law, victims of certain crimes have the right to be present and heard (when relevant) at all “critical stages” of the criminal justice process.<sup>170</sup> Pursuant to Statute, “[a]ny bond reduction or modification hearing in which the request is made: (I) for a bond lower than the scheduled or customary amount for the specific charge; (II) for a change in the type or condition of a bond; (III) for an alternative to a bond; or (IV) to appear without posting a bond” is defined as a “critical stage.”<sup>171</sup> Likewise, Section 24-4.1-302.5 (1) (d) affords victims the right “to be heard at any court proceeding that involves a bond reduction or modification.”

Of course, municipal courts also have the power to grant a bail bond to defendants who have committed a municipal offense. Provisions governing the municipal courts concerning bail are found in rule 246 of the Colorado Municipal Court Rules of Procedure.<sup>172</sup>

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court location; the case number with the existing bond judgment. Once the bond judgment is satisfied the professional surety and/or insurance company status is removed from on the board. When this status has been updated the professional surety/insurance company will be able to post bonds.” See this description and the full report at <http://www.courts.state.co.us/iis/ontheboardindex.htm>.

<sup>167</sup> Colo. Rev. Stat. § 16-4-111 (1) (a) – (f).

<sup>168</sup> *Id.* § 16-2-111.

<sup>169</sup> *Id.*

<sup>170</sup> Colo. Const. Article II, § 16a; Colo. Rev. Stat. § 24-4.1-302.5

<sup>171</sup> Colo. Rev. Stat. § 24-4.1-302 (2) (c).

<sup>172</sup> Colorado Court Rules, Book 2, Chapter 30.

Article 7 of Title 12, C.R.S., provides the regulatory scheme for compensated sureties. The profession is regulated by the Department of Regulatory Agencies through the Division of Insurance. Among other things, this scheme requires licensed bail bonding agents to provide reports to the Division of Insurance that include the names of the persons for whom the agent has become a surety, a description of any bond activity, and “the names of persons for whom such bail bonding agent has become surety and who have failed to appear.”<sup>173</sup>

### ***C. Colorado Rules of Criminal Procedure***

Rule 5 of the Colorado Rules of Criminal Procedure provides that arrestees be taken “without unnecessary delay” to the nearest available judge, and that, at the first appearance of the defendant in court, the judge advise him or her of “[t]he right to bail, if the offense is bailable, and the amount of bail that has been set by the court.”<sup>174</sup> Subsection (b) states that “if no county judge is immediately available to set bond in the case of a person in custody for the commission of a bailable felony, any available district judge may set bond, or such person may be admitted to bail pursuant to Rule 46.”<sup>175</sup> Rule 46, in turn, only states that “[i]n considering the question of bail, the Court shall be governed by the statutes and the Constitution of the State of Colorado and the United States Constitution.”

### ***D. Colorado Case Law***

The Colorado Supreme Court has heard very few cases recently concerning either constitutional bail provision or the various bail statutes,<sup>176</sup> and overall, there are relatively few opinions from either the Colorado Supreme Court or the Colorado Court of Appeals on the subject of bail. Nevertheless, a fundamental issue that is prominently revealed through analysis of the Colorado case law -- one that requires initial treatment in this paper -- concerns the very purpose of bail and the pretrial release decision itself, and its relationship, if any, to the primary purpose of the traditional money bail bond contract.

#### **(i) The Purposes of Bail and the Pretrial Release Decision**

The purpose of bail is often hard to discern due to imprecise language in court opinions, as well as continued reliance upon language that does not necessarily reflect the current statutory scheme. For example, in *People v. Sanders*, the Colorado Supreme Court stated that “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.”<sup>177</sup> This seminal statement

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<sup>173</sup> See § 12-7-105 C.R.S.

<sup>174</sup> Colo. R. Crim. P. 5 (a) (felonies), (c) (misdemeanor and petty offenses).

<sup>175</sup> *Id.* R. 5 (b).

<sup>176</sup> On March 3, 2008, the Colorado Supreme Court issued its opinion in *People v. Rickman*, 178 P.3d 1202 (Colo. 2008), which primarily discusses a court’s power to delegate its authority to impose bail bond conditions.

Nevertheless, prior to *Rickman* the case law has been sparse; for example, the last statement by the Colorado Supreme Court concerning the purpose of bail appears to be in *Hafelfinger v. Dist. Ct.*, 674 P.2d. 375 (Colo. 1984).

<sup>177</sup> *People v. Sanders*, 522 P.2d 735, 736 (Colo. 1974). In *Lucero v. Dist. Ct.*, 532 P.2d 955, 957 (Colo. 1975), the court stated essentially the same thing: “[t]he purpose of bail is to insure the defendant’s presence at the time of trial, and not to punish a defendant before he has been convicted.” It appears the Colorado Supreme Court ended using this particular statement of the purpose of bail in 1984, with its opinion in *Hafelfinger v. Dist. Ct.*, 674 P.2d. 375, 377 (Colo. 1984), wherein the court also added the qualifier word “primary” (“We have stated that the primary

of purpose, however, was uttered before the 1984 Bail Reform Act, before the United States Supreme Court's decision in *Salerno*, and before state legislation was enacted that specifically concerned danger to the community or public safety. The statement was based, instead, on the philosophy originally reflected in the 1968 ABA Standards that the primary purpose of bail was to prevent flight, as well as language in *Stack v. Boyle* that “[b]ail set at a figure higher than an amount reasonably calculated [to ensure the defendant’s presence at trial] is ‘excessive’ under the Eighth Amendment.”<sup>178</sup>

The Bail Reform Act of 1984 made community safety an equal consideration to future court appearance in setting bail bonds in the federal courts, and the Supreme Court’s opinion in *Salerno* made it clear that other valid governmental purposes, such as preventative detention, could pass federal constitutional muster. In that opinion, the Court stated: “[w]hile we agree that a primary function of bail is to safeguard the courts’ role in adjudicating the guilt or innocence of defendants, we reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release.”<sup>179</sup>

Long before *Salerno*, however, the Colorado Supreme Court had articulated the role of reasonable statutory regulations that might attach to the common law power to grant bail. In 1917, the Colorado Supreme Court wrote the following:

[t]he power to take bail is incident to the power to hear and determine, or to commit, and hence it may be stated as a general rule that any court or magistrate that has jurisdiction to try a prisoner in any case has jurisdiction to discharge him, and, a fortiori, to admit him to bail, *subject, however, to such regulations or limitations as may be imposed by statute.*<sup>180</sup>

Relying on this quoted language, the *Sanders* court concluded that “[t]he legislature may designate the kind and character of the security that is to be provided for release on bail, provided such is not unreasonable. The legislature may also restrict or impose conditions under which persons accused of a crime may be released on their personal recognizance.”<sup>181</sup>

In Colorado, the legislature has passed numerous laws regulating the administration of bail, including regulations that clearly point to a broader purpose than merely assuring the presence of the accused. For example, the legislature has added the crime of “possession of a weapon by a previous offender” to those crimes for which a bail bond may be denied if, after a hearing, “the court finds that the proof is evident or the presumption is great . . . and . . . that the public would be placed in significant peril if the accused were released on bail.”<sup>182</sup> The legislature also has added a standard condition to all bail bonds that the defendant not commit any felony while

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purpose of bail is to assure the presence of the accused at trial.”). Various divisions of the Colorado Court of Appeals have continued to describe the “primary” purpose of bail, albeit citing *Sanders* as authority, *see, e.g., Fullerton v. County Court*, 124 P.3d 866 (Colo. App. 2005).

<sup>178</sup> *See id.* (citing ABA Standards (1968) and *Stack*, 342 U.S. 1, 3).

<sup>179</sup> *Salerno*, 481 U.S. at 753.

<sup>180</sup> *Bottom v. People*, 164 P. 697, 698 (1917) (emphasis added); *see also People v. Rickman*, 178 P.3d 1202, 1206-07 (Colo. 2008).

<sup>181</sup> *Sanders*, 522 P.2d at 736-37.

<sup>182</sup> Colo. Rev. Stat. § 16-4-101 (1) (b) (IV). These provisions mirror the constitutional provisions found in Art. II, Section 19.

released pretrial,<sup>183</sup> and has bolstered this condition with language that permits judges to impose any “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.”<sup>184</sup>

In addition, the legislature has enacted numerous criteria that judges must consider in setting the type and conditions of bail bond that necessarily implicate public safety, such as (1) the defendant’s character and reputation,<sup>185</sup> (2) the nature of the charge and likelihood of conviction,<sup>186</sup> (3) the defendant’s criminal record,<sup>187</sup> (4) “[a]ny facts indicating the possibility of violations of law if the defendant is released without restrictions,”<sup>188</sup> and (5) “[a]ny facts indicating a likelihood that there will be an intimidation or harassment of possible witnesses by the defendant.”<sup>189</sup> Moreover, the legislature has passed numerous restrictions on the allowance of personal recognizance bonds based on defendants’ criminal histories,<sup>190</sup> and has passed specific instructions to pretrial services programs to provide information to enable the court “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.”<sup>191</sup>

Through these laws, the legislature has made it clear that the purpose of bail has expanded beyond merely assuring the presence of the accused. Recent Colorado Court of Appeals decisions that mechanically cite *Sanders* to articulate the purpose of bail fail to acknowledge these statutory provisions.<sup>192</sup> Indeed, if the Colorado Supreme Court were to decide to articulate the purpose of bail and the pretrial release decision today, it would likely resemble the ABA’s current position: “The purposes of the pretrial release decision include providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses, and the community from threats, danger, or interference.”<sup>193</sup>

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<sup>183</sup> *Id.* § 16-4-103 (2) (c).

<sup>184</sup> *Id.* § 16-4-103 (2) (f).

<sup>185</sup> *Id.* § 16-4-105 (1) (f).

<sup>186</sup> *Id.* § 16-4-105 (1) (h).

<sup>187</sup> *Id.* § 16-4-105 (1) (i).

<sup>188</sup> *Id.* § 16-4-105 (1) (j).

<sup>189</sup> *Id.* § 16-4-105 (1) (k).

<sup>190</sup> *See id.* § 16-4-105 (1) (m) – (p.5).

<sup>191</sup> *Id.* § 16-4-105 (3) (c) (1).

<sup>192</sup> *See, e.g., Fullerton v. County Ct.*, 124 P.3d 866, 870 (Colo. App. 2005); *People v. Rickman*, 155 P.3d 399, 401 (Colo. App. 2006) (*aff’d in part, rev’d in part, People v. Rickman*, 178 P.3d 1202 (Colo. 2008)).

<sup>193</sup> ABA Standards, *supra* note 7, Std. 10-1.1, at 36; *see also* NAPSA Standards, *supra* note 3, Std. 1.1, at 9 (“The purposes of the pretrial release decision include providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, minimizing the unnecessary use of secure detention, and protecting victims, witnesses, and the community from threat, danger or interference”). In addition to considerations of due process (which include fundamental fairness arguments that high money bail bonds lead to innocent defendants being unfairly punished, as well as concerns that high money bonds and detention affects the fairness of a defendant’s trial and the ultimate disposition of the case, many scholars have argued that equal protection considerations should serve as an equally compelling purpose of bail, especially when considering the disparate impact of money bail bonds based on a particular defendant’s level of income. *See, e.g. Soland, Constitutional Law – Equal Protection – Imposing Money Bail*, 46 Tenn. L. Rev. 203 (1978). Over the years, this argument has been bolstered by language in Supreme Court opinions in cases like *Griffin v. Illinois*, 351 U.S. 12, 19 (1956), which dealt with a defendant’s ability to purchase a transcript required for appellate review. In that case, Justice Black stated that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”). Moreover, sitting as circuit justice to decide a prisoner’s release in two cases, Justice Douglas

## (ii) The Purpose of a Money Bail Bond Contract

The purpose of a money bail bond contract, on the other hand, *is* limited to assuring the defendant appears for trial. Indeed, the condition that a defendant answer the charge at a time and place certain is “the only condition for a breach of which a surety or security on a bail bond may be subjected to forfeiture.”<sup>194</sup> According to the Colorado Supreme Court:

[t]he very purpose of a bail bond contract is so that, through the device of a monetary bond, a third party can guarantee the continued appearance of the defendant at all proceedings in a particular action. By shifting the risk of nonappearance to the surety, the court to a large extent lessens its need to be constantly vigilant that a particular defendant does not seek to escape the court’s jurisdiction. The object of putting at risk the financial assets of a third party is that the party will see to it that the defendant appears.<sup>195</sup>

A commercial money bail bond agreement is a contract, subject to the rules of construction applicable to contracts. In such an agreement, “the bail bondsman is the surety. The ‘principal’ is the defendant whose appearance is being guaranteed by the surety on pain of payment of the money in the amount of the bail bond. The creditor, in this instance, is the court to which the surety guarantees that the defendant will appear at the time, place, and manner specified in the bail bond contract.”<sup>196</sup> For instances in which the defendant contracts directly with the court and without the use of a commercial bail bondsman, the Colorado Supreme Court has also said that “[t]he purpose of a recognizance is not to enrich the treasury, but to serve the convenience of the party accused, but not convicted, without interfering with or defeating the administration of justice.”<sup>197</sup>

In sum, the purpose of the bail bond decision itself involves consideration of at least three factors: (1) due process; (2) public safety; and (3) integrity of the judicial process (i.e., assuring

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uttered dicta frequently cited as support for equal protection analysis. *See Bandy v. United States*, 81 S. Ct. 197, 198 (1960) (“Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?”); *Bandy v. United States*, 82 S. Ct. 11, 13 (1961) (“[N]o man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on ‘personal recognizance’ where other relevant factors make it reasonable to believe that he will comply with the orders of the Court”). Despite scholarly arguments to invoke Equal Protection Clause analysis to the issue of bail, the federal courts have not been inclined to do so. Nevertheless, it is noted that Colorado’s bail statute mandates that the court consider the defendant’s financial condition in setting a bail bond. *See Colo. Rev. Stat. § 16-4-105* (1) (c).

<sup>194</sup> Colo. Rev. Stat. § 16-4-103 (2) (a). This is true, as well, for bonds secured by private individuals. *See Colo. Rev. Stat. § 16-4-109* (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”).

<sup>195</sup> *People v. Tyler*, 797 P.2d 22, 25-26 (Colo. 1990) (internal citation omitted); *see also Moreno v. People*, 775 P.2d 1184, 1185 (“the purpose of the bond is to ensure that the defendant appears”) (Colo. 1989); *People v. Caro*, 753 P.2d 196, 201 (Colo. 1988) (“the primary purpose of a bail bond is to assure that the defendant appears for trial”).

<sup>196</sup> *Tyler*, 797 P.2d at 24-25.

<sup>197</sup> *Allison v. People*, 286 P.2d 1102, 1104 (Colo. 1955) (quoting *People v. Pollock*, 176 P. 329, 330 (Colo. 1918)).



the defendant's presence in court). In Colorado, those considerations become part of the judge's decision when determining the type of bail bond and the monetary amount, if any, of the bond. A money bail bond contract between a defendant, a third-party surety, and the court is simply one way that defendants are able to secure their release. However, as stated previously, its purpose is solely limited to assuring that the defendant appears for court. Money bail bond contracts do not include any consideration of safeguarding victims, witnesses, and the community from threats, danger, or interference, despite these considerations being a statutorily required part of the judge's bail bond decision.

### **(a) *Furthering the Purpose of Bail Bonds***

An ongoing debate in the literature concerns how well current practices used to set bail bonds actually serve to promote the underlying purposes of bail. Under substantive due process analysis, bail administration must be reasonable, "striking an appropriate balance between the societal interest in personal liberty and public safety."<sup>198</sup> Consideration of public safety under current methods of bail administration, however, can appear unreasonable. Release on financial conditions, it is argued, "is not an appropriate response to concerns that the defendant will pose a danger if released. . . . Money bail should not be used for any reasons other than to respond to a risk of flight."<sup>199</sup> Moreover, the ABA, NAPSA, and the NDAA all recommend that defendants be released on financial conditions only when no other conditions provide reasonable assurance that the defendant will appear for court.

In the past, scholars and practitioners argued that using money bail bonds to protect the public's safety was inherently wrong because the original purpose of bail was intended solely to reduce the risk of flight.<sup>200</sup> Given that the purpose of bail has expanded to include consideration of public safety, critics of money bail bonds now also argue that release on financial conditions cannot adequately meet the purpose of bail because one's financial means cannot possibly predict future dangerousness. Moreover, money bail bonds, evolving historically as a convenient way to protect only the integrity of the court process, have grown archaic with the advent of pretrial supervision, which is specifically designed to assure the defendant's appearance *and* to protect the public.<sup>201</sup>

In Colorado, one purpose of creating a pretrial services program is to "decrease unnecessary pretrial detention."<sup>202</sup> To the extent that the courts share that goal,<sup>203</sup> then the use of money bail

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<sup>198</sup> ABA Standards, *supra* note 7, at 30. It is noted here that substantive due process arguments concerning the fundamental fairness of pretrial detention as it relates to the presumption of innocence have been rejected in *Bell v. Wolfish*, 441 U.S. 520, 533 (doctrine of presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun"). Procedural due process arguments typically address how pretrial confinement affects defendants' rights to fair trials or the ultimate disposition of their cases.

<sup>199</sup> ABA Standard, *supra* note 7, Std. 10-1.4 (d) (commentary), at 44; *see also* NAPSA Standards, *supra* note 3, Std. 1.4 (d), at 16; Prosecution Standards, *supra* note 16, Std. 45.6, at 145.

<sup>200</sup> *See National Conference on Bail and Criminal Justice, Proceedings and Interim Report*, (Washington D.C. Apr. 1965), at 151-52.

<sup>201</sup> Supervision has become increasingly necessary to assure court appearances, given the myriad of court hearings or events associated with a particular defendant's case or cases within multiple jurisdictions.

<sup>202</sup> Colo. Rev. Stat. § 16-4-105 (3) (c) (II) (d).

bonds has not been particularly successful. As noted previously, a fourteen-year study of felony defendants in state courts in the 75 most populous counties showed that of those defendants detained until the final disposition of their cases, only one in six had been denied a bail bond – “5 in 6 had a bail amount set but did not post the financial bond required for release.”<sup>204</sup> This means that judges in most of those cases, taking into account factors relating to the defendants’ potential to flee and possibly their danger to the public, had made the decision to release those defendants back into society while awaiting their trials, subject only to the defendants’ ability to pay money. The fact that these defendants were unable to obtain this money, either by themselves, through friends or relatives, or even through commercial bail bondsmen, demonstrates a fundamental flaw in the money bail bond system. Yet another flaw is revealed when the courts, or jails, through the use of a money bail bond schedule, admittedly set bail bonds with a monetary condition that is likely unattainable by the defendant, for the purpose of detaining the defendant until his or her trial. This use of money bail bonds appears to contradict Article II, Section 19 of the Colorado Constitution, as well as Colo. Rev. Stat. Section 16-4-101, which states that all defendants shall be bailable unless the court authorizes pretrial detention through the denial of a bail bond after a hearing held within 96 hours of arrest, in which 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.”

Finally, acknowledging that one of the purposes of bail is to maintain the integrity of the judicial process requires questioning the transference of the decision to release from the court to a private, for-profit business. For jurisdictions that rely heavily on compensated sureties, consideration of this issue is critical:

The emphasis on a financial criterion for pretrial release also illustrates perhaps the most disturbing aspect of commercial surety bail. When the court sets a surety, the actual release decision passes from an official accountable to the public to an entrepreneur accountable to no one: the court can neither guarantee release nor detention. A judge may set a small bail intending the defendant to be released quickly or a large bail to make release unlikely. But a bondsman may focus on the higher bond since he will make the most profit there. In either case, the judicial intent is negated, resulting in either unnecessary pretrial detention or the release of a high risk defendant.<sup>205</sup>

Developments in law and social science have given judges the authority and better “tools” to adequately assess a defendant’s danger to the community and risk of nonappearance. Used as they are intended, these tools allow judges to make bail bond decisions in ways that further the underlying purposes of bail itself. Jurisdictions that are unable or unwilling to avail themselves of these tools are unable to make effective decisions that promote the goals of public safety, judicial integrity, and due process.

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<sup>203</sup> See *Salerno*, 481 U.S. at 755 (“In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”).

<sup>204</sup> Cohen & Reaves, *supra* note 1, at 2.

<sup>205</sup> Kennedy & Henry, *supra* note 135 (1994 edition), at 4.

### ***(b) Furthering the Purpose of the Money Bail Bond Contract***

There is similar debate over whether the money bail bond contract serves to meet *its* intended purpose of assuring a defendant's presence in court.<sup>206</sup> In the past, bondsmen have argued that they have been successful at getting defendants to court, or at least more successful than others, including the defendants themselves. The bondsmen's arguments, for the most part, have used numbers generated from ongoing studies of state courts in the 75 most populous United States counties between 1990 and 2004.<sup>207</sup> According to those studies, defendants released on surety bond have a lower failure to appear rate (18%) than defendants released on emergency release (45%), unsecured bond (30%), release on recognizance (26%), conditional release (22%), deposit bond (22%), or full cash bond (20%). According to these data, only defendants released on property bond have a lower FTA rate (14%) than those released through a surety.<sup>208</sup> The same data indicate that defendants released on surety bond have a lower fugitive rate (percentage of defendants still at large one year after failing to appear for court) than all other types of release alternatives. While it is not the purpose of the money bail bond contract to provide public safety, re-arrest data show that 16% of defendants released on surety bond are newly arrested while on pretrial status, slightly below defendants released on recognizance (17%), property bond (17%), and emergency release (17%), but slightly above defendants released on conditional release (15%), deposit bond (14%), and unsecured bond (14%).<sup>209</sup>

These national statistics showing the apparent benefits of surety releases can be misleading for several reasons. First, no Colorado counties are included in these studies, so the generalizability of these studies' findings to Colorado counties, whether urban, suburban, or rural, are unknown. It is possible that the way bail is administered in Colorado's First judicial District, and the other judicial districts, contributes to a different pattern of court appearance and new arrest rates for defendants released on the various types of bail bonds. Second, the group of defendants actually released on surety bonds is self-selected (either by a commercial bail bondsman or by the defendants themselves or defendants' friends/relatives), weeding out defendants who may be more likely to abscond. Only defendants who are able to pay the bondsman's fee and provide collateral for the full monetary amount of the bail bond are released; as mentioned previously, the remaining defendants who cannot pay the fee and/or provide collateral remain in jail. Third, by the nature of their business, commercial bondsmen only bond out defendants who appear to them to be at lower risk of absconding, or for whom they can readily collect the remainder of the value of the money bail bond if the court decided to hold the bondsman accountable for the full amount of the money bail bond.. Fourth, fugitive rates may reflect the fact that bondsmen are good at apprehending fugitives, or they may simply reflect elements of the criminal justice system that combine to make the population easier to catch, such as (1) an increased amount of defendant personal information given to the bondsmen, (2) the fact that two entities, the

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<sup>206</sup> The fact that the only purpose of the monetary bail bond contract is to assure appearance of defendants in court has itself been criticized: "As one federal judge wrote, when the court 'allow[s] purchase of a bail bond, society's interest in avoiding the risk of further criminal acts receives no additional consideration when the defendant pays the premium. The bondsman's only concern is risk of flight, not community safety.'" Clark and Henry, *Goals*, *supra* note 5, at 21 (quoting James G. Carr, *Bail Bondsmen and the Federal Courts*, Vol. LVII Federal Probation No. 1, at 11 (March 1993)).

<sup>207</sup> See Cohen & Reaves, *supra* note 1, and previous studies cited therein.

<sup>208</sup> *Id.* at 8-9.

<sup>209</sup> *Id.* at 9.

bondsmen and local law enforcement, are equally pursuing the absconders, or (3) the fact that those people “selected” for release by the bondsmen are, in other ways, more likely to turn themselves in or otherwise be apprehended.<sup>210</sup> Fifth, in addition to any confounding variables, these data are far too general to make any meaningful comparisons. For example, there is no indication of which jurisdictions combine surety or money bonds or other release types with pretrial supervision, a practice that undoubtedly reduces the failure-to-appear rate. As observed in a study by the National Institute of Justice,

the [national] data on FTA rates do not identify defendants who have been interviewed by a pretrial services program, have been the subject of a program recommendation, or have been under the supervision of a program. Many defendants on nonfinancial release may have been placed there by the court without any involvement of a pretrial services program and without any provision for supervision.<sup>211</sup>

Moreover, there is no explanation in the national studies of how each pretrial service entity actually tracks its FTA rates, which can vary widely among jurisdictions.<sup>212</sup> As noted in one report, variations among pretrial services programs that calculate FTA rates “make efforts to compare rates between jurisdictions a meaningless exercise unless the variances are taken into account.”<sup>213</sup> Likewise, reports from bail bondsmen about FTA rates may be equally unreliable. In Colorado, where bail bondsmen are required to provide written reports to the Division of Insurance, only 337 (54%) of 628 licensed bondsmen filed complete reports from July 2004 to June 2005. The reports that were filed, moreover, were problematic. According to a summary prepared by the El Paso County Department of Justice Services, “[m]any agents did not report ‘FTA’ and ‘Defendant Jailed’ data or appeared to report it incorrectly.”<sup>214</sup>

Given these issues, meaningful discussion of whether or not the money bail bond contract furthers its purpose of assuring that defendants appear for court, and meaningful comparison of FTA rates between defendants released on a money bail bond posted by a commercial surety with defendants released through other means (e.g., personal recognizance or low cash bond with pretrial supervision), must be done locally, using the same variable definitions and calculations.<sup>215</sup>

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<sup>210</sup> The literature on this subject is mixed, with arguments for and against the use of commercial surety bonds and bondsmen as an efficient means to apprehend those defendants who fail to appear for court. Compare Eric Helland and Alexander Tabarrok, *Public versus Private Law Enforcement: Evidence from Bail Jumping*, 47 J. of L. & Econ. 93, (“These finding[s] indicate that bond dealers and bail enforcement agents (‘bounty hunters’) are effective at discouraging flight and at recapturing defendants”), with Kennedy & Henry, who argue that the current nationwide systems for exchange of information between law enforcement agencies make it difficult for defendants to remain on fugitive status for long, *supra* note 135.

<sup>211</sup> Mahoney, *et al.*, *supra* note 112, at 64.

<sup>212</sup> For example, some pretrial services agencies count FTA’s per court event, while others count them per defendant. Moreover, 45% of all pretrial programs report that they do not calculate FTA rates at all. See Clark & Henry, *Programming*, *supra* note 110, at 24.

<sup>213</sup> *Id.* at 25.

<sup>214</sup> Henry Sontheimer and Judy Horose, *Summary of Bail Bond Agent Reports* (April 18, 2006).

<sup>215</sup> *Id.* For example, looking at Colorado money bail bondsmen, the surety bond FTA rate, calculated from bail bondsmen who chose to report their failure to appear rate to the State, was 14%. This 14% refers to the percentage of defendants who had one or more failures to appear, and not to the percentage of court appearances that were

### **(iii) Compensated Sureties and Money Bail Bonds**

Prior to *Sanders*, the Colorado Supreme Court recognized problems with the existent bail system (i.e., the compensated surety and money bail bond system). In the 1971 case of *People v. Jones*, the court confronted the issue of whether confinement in jail because of financial inability to pay the amount of a bail bond was unconstitutional. In that case, the defendant claimed that he should receive sentencing credit for time served in county jail because he was unable to make his bail bond. Addressing his claim, the court stated: “The attack which has been made goes to the heart of our bail system and condemns time-worn practices that admittedly require change, but which have withstood constitutional attacks in the past. Bail has been tolerated by our courts because it serves to assure the presence of the accused at all times required by the court.”<sup>216</sup>

Quoting the ABA’s position at that time that the “bail system as it now generally exists is unsatisfactory,” the court nonetheless observed that,

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missed. For Jefferson County Pretrial Services, the percentage of defendants who had one or more failures to appear for cases closed during 2007 was lower than that of commercial bondsmen, at 10%. More importantly, because the court is less interested in the percentage of defendants who fail to appear than it is in the appearance of each defendant at each court event, Jefferson County Pretrial Services additionally calculates its failure to appear rate in this manner: The failure to appear rate for persons whose supervision ended in 2007 was 3.4% (This rate excludes court appearances that occurred when the defendant was still in detention). Commercial bail bondsmen operating in the First judicial District have not reported their failure to appear rate in this manner, leaving the performance of defendants for whom they are serving as the surety unknown to the court. Until commercial bail bondsmen calculate their failure to appear rate in this latter manner, more meaningful comparisons of failure to appear rates between commercial bail bondsmen and pretrial services programs are not possible.

Jefferson County Pretrial Services reports two more outcomes important to the court, neither of which is reported by commercial bail bondsmen. For cases closed during 2007, 95% of supervised defendants did not have any motions filed with the court to revoke their bond due to new arrests (i.e., a 5% new-arrest rate), and 2.4% of supervised defendants had a motions filed with the court to revoke their bond due to bail bond violation other than non-appearance in court or being arrested for a new crime, such as violation of a restraining order, or continued use of alcohol or drugs (i.e., a 97.6 % compliance rate with most court-ordered bond conditions). Statutorily, commercial bail bondsmen have neither responsibility nor incentive for facilitating a defendant’s compliance with bail bond conditions other than appearance in court.

Furthermore, conclusions about any incremental court appearance benefit of a surety bond over and beyond supervision by a professional pretrial services agency can be drawn by comparing court appearance rates between judicial districts that have different practices. For example, in the First Judicial District (a jurisdiction that often couples pretrial supervision with commercial surety bonds) defendants released with the condition of pretrial supervision have a court appearance rate of approximately 97%. A nearly identical court appearance rate has also been reported to the state by professional pretrial service programs in the Fourth (El Paso County) and Eighth (Larimer County) Judicial Districts. In these two judicial districts, pretrial supervision is rarely coupled with commercial surety bonds. This cross-jurisdictional comparison indicates that the involvement of a commercial surety for defendants who are under pretrial supervision by a pretrial services agency does not have any effect on the very high court appearance rate of defendants under professional pretrial supervision. Moreover, the use of commercial sureties for defendants under pretrial supervision clearly violates the “least restrictive” principle underlying the Federal Bail Reform Act of 1966 and the ABA’s and NAPSA’s pretrial release standards. Finally, the in-progress Colorado Improving Supervised Pretrial Release (“CISPR”) study, discussed later in this paper, will be able to provide data that illuminate this issue (and hence facilitate meaningful comparisons of FTA rates based on type of release and conditions of bond) for defendants in 10 of Colorado’s most populous counties. See Michael R. Jones and Sue Ferrere, *Improving Pretrial Assessment and Supervision in Colorado*, Topics in Community Corrections (U.S. Dept. of Just., Nat’l Inst. of Corr. 2008), at 13.

<sup>216</sup> *People v. Jones*, 489 P.2d 596, 598 (Colo. 1971).

[t]he United States Constitution and the Colorado Constitution both prohibit excessive bail but recognize that monetary bail is constitutionally permissible, and that bail need not be a matter of right in every case. The right to bail does not amount to a guarantee that every defendant who is charged with a crime will be released without bail if he is indigent. The denial of bail in the instant case was not arbitrary and was not based solely upon the defendant's financial condition.<sup>217</sup>

#### **(iv) Legal Standards on Bail and Pretrial Release**

Colorado's current Code of Criminal Procedure was enacted in 1972, and initially contained sections concerning release from custody pending final adjudication that were heavily influenced by the ABA's 1968 *Standards for Criminal Justice Relating to Pretrial Release*.<sup>218</sup> Since the enactment of that code, the courts have decided a number of cases that articulate standards to be used in making a pretrial release decision. Those standards, were they to be gathered by a court and articulated in one opinion, could be summarized as follows:

The Colorado Constitution states that "[a]ll persons shall be bailable by sufficient sureties except for capital offenses, when the proof is evident or the presumption great." Colo. Const. Art II, §19. "This court has held that the quoted constitutional provision confers an absolute right to bail in all cases, except for capital offenses, where the proof is evident and the presumption is great that the accused committed the crime." *Gladney v. Dist. Ct.*, 535 P.2d 190, 191 (Colo. 1975) (citing *Orona v. Dist. Ct.*, 518 P.2d 839, 840 (Colo. 1974)).<sup>219</sup> "The mandate of the constitutional provision is that persons charged with offenses are bailable with the one exception mentioned. The mention of the one exception excludes other exceptions." *Palmer v. Dist. Ct.*, 398 P.2d 435, 437 (1965) (internal citations omitted). Nevertheless, "[n]either the Eighth Amendment nor the Fourteenth Amendment requires that everyone charged with a state offense must be given his liberty on bail pending trial." *People v. District Court*, 529 P.2d

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<sup>217</sup> *Id.* at 599 (internal citations omitted).

<sup>218</sup> See *Dunbar v. Dist. Ct.*, 500 P.2d 358, 359 (1972) ("[T]he Legislature, in our new Code of Criminal Procedure, has offered criteria to determine the type and amount of bail which should be permitted. Our legislative standards are substantially equivalent to [ABA Standards] §§ 4.5, 5.1, 5.3.") (citation omitted); *People v. Sanders*, 522 P.2d 735, 736 (1974) ("This portion of the [bail] statute must be read in *Pari materia* with the host of provisions adopted along with it. These provisions follow, in the main, the *ABA Standards Relating to Pretrial Release* (Approved Draft 1968). They reflect the philosophy, articulated in *Stack v. Boyle*, and in the *Standards*, that 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 on the accused.") (citations omitted).

<sup>219</sup> However, access to bail by a defendant pending extradition is allowed by statute, but not required by the Colorado constitution. See *Johnson v. Dist. Court*, 610 P.2d 1064, 1065-66 (constitutional right to bail afforded a criminal defendant is inapplicable to a defendant pending extradition). Moreover, the Colorado Supreme Court has stated that "because delinquency proceedings are fundamentally different from adult criminal proceedings, not all constitutional protections afforded to adult criminals have been extended to juveniles. In *L.O.W.*, we considered whether the Eighth Amendment to the United States Constitution or article II, section 20, of the Colorado Constitution provide a juvenile with an unqualified right to release on bail. After weighing the adverse impact of the availability of bail on informal pre-adjudication juvenile proceedings against the benefits to be anticipated from extending the constitutional rights of adults to bail to affected juveniles, we held that 'a child does not have an absolute constitutional or statutory right to bail pending adjudication of the charges filed against him in juvenile court.'" *Colorado v. Juv. Ct.*, 893 P.2d 81, 91-92 (1995) (quoting *L.O.W. v. Dist. Ct.*, 623 P.2d 1235, 1255 (Colo. 1981)) (further citations omitted).

1335, 1336 (Colo. 1974) (quoting *Mastrian v. Hedman*, 326 F.2d 708, 710 (8th Cir. 1964)). Hence, further exceptions to, or limitations on this general right to bail, such as those found in Article II, Section 19 of the Colorado Constitution or Section 16-4-101, C.R.S. 2008, may be constitutionally permissible. *See* Colo. Const. Art. II, § 19(1); 16-4-101(1), C.R.S. 2008. Still, The Supreme Court has warned that “[u]nless this right to bail is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.” *L.O.W. v. Dist. Ct.*, 623 P.2d 1253, 1256 (Colo. 1981) (quoting *Stack v. Boyle*, 342 U.S. 1, 4 (1951)).

“The right to bail does not amount to a guarantee that every defendant who is charged with a crime will be released without bail if he is indigent.” *People v. Jones*, 489 P.2d 596, 599 (Colo. 1971).

“The burden of proof, of course, rests with those opposing bail.” *Orona*, 518 P.2d at 840; *accord Gladney*, 535 P.2d at 191 (“[T]he burden is upon the prosecution to show that the constitutional exception to the right to bail is applicable; and only with that showing can the conditional freedom secured by bail properly be denied.”). “The mere fact that an information has been filed – or for that matter that the defendant has been bound over for trial – is not equivalent to a determination that the proof of guilt is evident or the presumption great.” *Orona*, 518 P.2d at 840; *see also Goodwin v. Dist. Ct.*, 586 P.2d 2, 3 (Colo. 1978) (“[T]he fact that charges may have been made that the offense allegedly committed by defendant is a capital offense which meets the constitutional standard for denial of bail does not satisfy the prosecution’s burden.”) (citing *Shanks v. Dist. Ct.*, 385 P.2d 990 (1963)); *Lucero v. Dist. Ct.*, 532 P.2d 955, 957 (1975)) (“The mere filing of an information or the production of evidence which would establish probable cause that the crimes charged were committed will not meet our constitutional standard.”). “By definition, the standard which the constitution requires before bail may be denied is greater than probable cause – though less than that required for a conviction.” *Orona*, 518 P.2d at 840 (citing *In Re Losasso*, 24 P. 1080 (1890)). “In a bail hearing, guilt or innocence of the accused is not the issue.” *Gladney*, 535 P.2d at 191.<sup>220</sup> Nevertheless, pursuant to Statute, the “likelihood of a conviction and the possible sentence” is a proper factor for the court to consider (see Colo. Rev. Stat. 16-4-105(1)(h)). At least in capital cases, “when the proof is evident or the presumption great, denial of bail is mandatory.” *Goodwin*, 586 P.2d at 3 (Colo. 1978) (quoting *People v. Dist. Ct.*, 529 P.2d 1335, 1336 (Colo. 1974)).

“If evidence of the proper nature and kind is not presented by the district attorney, ‘it is incumbent upon the court, looking to the guidelines laid down in our new statute and in the case of *Stack v. Boyle*, to set reasonable bail in compliance with

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<sup>220</sup> While not definitively relying on it, the Colorado Supreme Court has also quoted the following language from the New Jersey Supreme Court: “bail should be denied when the circumstances disclosed indicate a fair likelihood that the defendant is in danger of a jury verdict of first degree murder.” *Gladney*, 535 P.2d at 191 (quoting *People v. Konigsburg*, 164 A.2d 740 (1960)).

our Constitution and the Eighth Amendment of the Constitution of the United States.” *Lucero*, 532 P.2d at 957 (quoting *Dunbar v. Dist. Ct.*, 500 P.2d 358, 359 (Colo. 1972)) (internal citations omitted). “A trial court may revoke or modify bail, but in doing so, it must comply with the provisions of [the bail statutes].” *Stephenson v. Dist. Ct.*, 629 P.2d 1078, 1079 (Colo. 1981).

## (v) Excessive Money Bail Bonds

The Colorado Supreme Court has stated that “[t]he trial court has the authority to make bail bond decisions, subject to limitations imposed by statute.”<sup>221</sup> While setting the amount of a particular bail bond may be within the discretion of the trial court,<sup>222</sup> for over one-hundred years, the Colorado Supreme Court has also mandated that the amount of bail be “reasonable.”<sup>223</sup> In one case, the court held that a \$100,000 bond, fixed after the defendant failed to appear under a \$4,000 bond, was “grossly excessive,” and thus “tantamount to a denial of the right of petitioner to be admitted to bail in a reasonable amount.”<sup>224</sup>

## (vi) Deposit Bonds

After Illinois’ creation of a statewide, ten-percent deposit bond system in 1963, other jurisdictions began experimenting with the concept. In 1968, the ABA advocated use of a deposit bond system as one option for those cases in which financial conditions of pretrial release are warranted. The current version of the ABA Standards continues to recommend it as one of three options for release on financial conditions, which include (1) the execution of an unsecured bond, with or without the signatures of co-signors, (2) the execution of a bond secured by the full amount in cash or other property or by the obligation of uncompensated sureties; or (3) “the execution of an unsecured bond in the amount specified by the judicial officer, accompanied by the deposit of cash or securities equal to ten percent of the face amount of the bond. The full deposit should be returned at the conclusion of the proceedings, provided that the defendant has not defaulted in the performance of the conditions of the bond.”<sup>225</sup> Since 1963, deposit bond has grown in popularity; in a recent study of pretrial release of felony defendants in the 75 most populous counties in the U.S., persons released on deposit bond reportedly accounted for over 18% of the total number of defendants who were released on financial conditions before case disposition.<sup>226</sup>

In 1978, the Colorado Supreme Court addressed the issue of “deposit bond” in *People v. District Court*.<sup>227</sup> In that case, a district court judge, apparently influenced by the ABA’s recommendation,<sup>228</sup> authorized the pretrial release of a defendant upon the deposit of cash equal

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<sup>221</sup> *People v. Rickman*, 178 P.3d 1202, 1206 (Colo. 2008).

<sup>222</sup> *See Martel v. Cty. Ct.* 854 P.2d 1327, 1329 (Colo. App. 1992).

<sup>223</sup> *See In Re Losasso*, 24 P. 1080, 1082 (Colo. 1890) (bail must be “reasonably sufficient to secure the prisoner’s presence at the trial”); *People v. Lanzieri*, 25 P.3d 1170, 1175 (Colo. 2001) (“The right to reasonable bail . . . following arrest lessen[s] the impact of an unlawful arrest.”).

<sup>224</sup> *Altobella v. Dist. Ct.*, 385 P.2d 663, 664 (Colo. 1963).

<sup>225</sup> ABA Standards, *supra* note 7, Std. 10-5.3, at 110.

<sup>226</sup> Cohen & Reaves, *supra* note 1, at 2.

<sup>227</sup> *People v. Dist. Ct.*, 581 P.2d 300 (1978).

<sup>228</sup> While not explicitly saying so, the Supreme Court cited the ABA Standards in its description of the facts, implying that they had some influence on the trial judge’s decision.



to 10% of the money bail bond amount.<sup>229</sup> The district attorney appealed to the Supreme Court, arguing that the trial court exceeded its jurisdiction by authorizing the 10% deposit. The Supreme Court agreed. Relying on the clear language of Section 16-4-104 C. R. S., which provides for the pretrial release of a defendant by either a personal recognizance or “upon execution of a bond in the *full amount of the bail*,”<sup>230</sup> the court ruled that the district court exceeded its jurisdiction, stating that “[t]he statute does not expressly or impliedly authorize courts to permit 10% Cash bail deposits. Moreover, 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>231</sup>

### **(vii) Cash-Only-Bonds**

The use of cash-only pretrial bonds, too, has drawn the attention of courts across the country, including the Colorado Court of Appeals. A cash-only, or full cash bond, is a type of financial release that requires the defendant to post the full amount of the money bail bond in cash with the court. If the defendant makes all of his or her court appearances, the cash is returned. High cash-only bonds can virtually assure that a defendant will remain incarcerated. A \$1,000 cash-only bond, for example, may be the equivalent to a \$10,000 surety bond, since the surety in such a case may charge the defendant \$1,000 for the surety to guarantee the remaining amount of the money bail bond. Many courts use cash-only bonds on failure-to-appear or failure-to-comply warrants. Much of the case law and literature nationally involves the constitutionality of cash-only bonds, especially when a constitution provides for all persons to be bondable by “sufficient sureties.”<sup>232</sup>

While *Fullerton v. County Court*<sup>233</sup> involved a money bail bond for a defendant awaiting extradition, a division of the Colorado Court of Appeals remarked on the constitutional propriety of cash-only pretrial bonds under the sufficient sureties clause of the state constitution. After surveying other states’ relevant case law on the issue, the court concluded: “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.”<sup>234</sup>

### **(viii) Conditions of Bail Bond**

On March 3, 2008, the Colorado Supreme Court handed down its decision in *People v. Rickman*, a case involving the trial court’s power to delegate to a county pretrial services program the authority to impose certain bond conditions on a defendant.<sup>235</sup> In its opinion, the Supreme Court stated that,

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<sup>229</sup> 581 P.2d at 300-01.

<sup>230</sup> *Id.* (quoting Colo. Rev. Stat. § 16-4-104 (1)) (emphasis in court opinion).

<sup>231</sup> 581 P.2d at 302.

<sup>232</sup> *See, e.g., Joseph Buro, Bail—The Constitutionality of Cash-Only Bail, State v. Briggs*, 35 Rutgers L.J. 1407 (2004).

<sup>233</sup> *Fullerton v. County Ct.*, 124 P.3d 866 (Colo. App. 2005).

<sup>234</sup> *Id.* at 870.

<sup>235</sup> *People v. Rickman*, 178 P.3d 1202 (Colo. 2008).

bond conditions are either mandated by statute or may be imposed by the judge. The judge may utilize a pretrial services program in making bail bond decisions, but the program's role is limited to assisting the judge before he or she sets bail and imposes conditions of bond and to supervising defendants where the judge ordered supervision. To carry out court-ordered pretrial supervision, a pretrial services program may require that the defendant submit to any of the methods of pretrial supervision listed in [the bail statute]. However, the statute does not anticipate or permit a judge to delegate the judge's authority to set conditions of bond to a pretrial services program. Absent statutory authority, a court may not delegate its authority to set bond conditions.<sup>236</sup>

Because judges cannot delegate the setting of bond conditions to another entity, the court ruled that the judge in this case exceeded his authority by relying on the pretrial services program to choose non-standard bond conditions using a pre-approved list of conditions that had not been signed or otherwise been made an order of the court for this particular defendant.<sup>237</sup>

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<sup>236</sup> *Id.* at 1207 (internal citations omitted).

<sup>237</sup> *Id.* at 1208-09.

## **IV. The Future of the Administration of Bail and the Pretrial Process in Colorado's First Judicial District**

The future of bail administration and the pretrial process in Colorado's First Judicial District depends on how individual criminal justice decision-makers resolve a number of key issues associated with bail and related pretrial processes and services. Resolution of these issues necessarily involves articulating a jurisdictional philosophy on bail and the pretrial process. By reaching consensus on an overall philosophy, criminal justice officials in the local justice system will be better equipped to address a number of issues associated with bail and the pretrial process, including: (1) arrest versus citation or summons issues; (2) money bail bond schedules; (3) compensated sureties; (4) pretrial services programs; (5) delegated release authority; (6) the timeliness and nature of the defendant's first court appearance; (7) the release-from-custody decision; (8) pretrial status checks; and (9) allocating resources. Part A in the following section addresses the need to articulate an overall pretrial philosophy. Part B discusses the most pressing issues in the area of bail and the pretrial process, making general recommendations for improvement based on existing Colorado law and the three major sets of national standards.

### ***A. Articulating a Jurisdictional Philosophy for Bail and the Pretrial Process***

Among other things, the ABA Standards were created, at a minimum, "to minimize unnecessary pretrial detention in a variety of ways including encouraging the use of citations and summonses in cases involving minor offenses, articulating a presumption in favor of release on personal recognizance, and – in cases where personal recognizance is inappropriate -- providing for the use of the least restrictive conditions necessary to assure the defendant's appearance for scheduled court proceedings and minimize the risk of danger to public safety."<sup>238</sup> The Standards articulate additional principles that shape a fundamental philosophy concerning bail and pretrial decisions, including: (1) the need for the release decision to be made in an open, informed, and accountable fashion, (2) the need to use non-financial conditions of release, to minimize financial conditions, and to eliminate commercial sureties, (3) the need to create pretrial services agencies, (4) the need to develop reliable risk assessment instruments and evidence-based procedures, and (5) the need to reallocate resources to effectively monitor and supervise a large population of defendants released into the community. The ABA's overall philosophy is one that is tied to a number of legal principles,<sup>239</sup> but particularly to the presumption of innocence ("[t]he strong presumption in favor of pretrial release is tied, in a philosophical if not a technical sense, to the presumption of innocence.")<sup>240</sup> It also recognizes the need for research to illuminate the societal costs of maintaining fundamentally flawed practices such as the traditional money bail bond system, as well as to develop alternatives to inefficient, outdated, or unfair bail bond-setting practices. More than anything, however, its philosophy mirrors Chief Justice

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<sup>238</sup> ABA Standards, *supra* note 7, at 30.

<sup>239</sup> For a discussion of how many of these key legal principles are tied to the pretrial release decision, *see* VanNostrand, *supra* note 44, at 3-8.

<sup>240</sup> ABA Standards, *supra* note 7, at 36.

Rehnquist's statement in *U.S. v. Salerno* that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>241</sup>

Likewise, the NAPSA Standards articulate certain key principles that, in turn, form the basis of a governing philosophy of bail. Those principles include: (1) a presumption in favor of release on recognizance; (2) when release on recognizance is not appropriate, the use of the least restrictive conditions of release that will assure the defendant's presence in court and the public's safety; (3) the use of secure detention only in “very limited circumstances”; (4) the establishment of a pretrial services agency or program in every jurisdiction; (5) the use of release on financial conditions “only when no other conditions will reasonably assure the defendant's appearance, and at an amount that is within the ability of the defendant to post”; (6) the elimination of compensated sureties; (7) the provision of resources necessary to supervise larger numbers of defendants in the community; and (8) creation and use of procedures for victims of crime to keep informed about release decisions.<sup>242</sup> Together, these principles create a philosophy of pretrial release that is nearly identical to that articulated in the ABA Standards. This similarity is not accidental. NAPSA specifically borrowed the organizational format and much of the language of the ABA Standards in drafting its most recent edition of pretrial release standards in 2004 because NAPSA believed (1) that the ABA Standards were “fundamentally sound,” and (2) that “consistency across the two sets of Standards will strengthen the likelihood that they will help shape policy and practice in constructive ways.”<sup>243</sup>

Finally, while not as detailed as either the ABA or NAPSA Standards, the National Prosecution Standards also weigh-in on many of the significant issues associated with pretrial release. For example, those Standards include: (1) a policy favoring pretrial release over detention, including release on personal recognizance “whenever possible,” (2) policies favoring the issuance of citations and summonses in lieu of arrests and arrest warrants, (3) a policy favoring release on non-financial conditions, with a call to abolish compensated sureties, and (4) a policy favoring use of the “least onerous condition reasonably likely to assure the defendant's appearance in court.”<sup>244</sup>

Many jurisdictions have not taken the first step toward improving their bail and pretrial processes by attempting to articulate either their own philosophy of bail and pretrial release and detention, or a philosophy borrowed from one or more of the national standards. Indeed, many persons working in local criminal justice systems are unaware that these standards even exist. It is no surprise, then, that most jurisdictions would need to make several changes to their current policies and practices in order to reach the aspirational standards. As noted by the ABA, “further improvements are unquestionably needed, because in most states and localities significant problems persist.”<sup>245</sup>

Mahoney, *et al.*, state that “developing viable policies in this area will require taking a *system* perspective, rather than focusing solely on decision-making in individual cases.”<sup>246</sup> These

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<sup>241</sup> 481 U.S. at 755 (1987).

<sup>242</sup> NAPSA Standards, *supra* note 3, at 4.

<sup>243</sup> *Id.* at 3-4.

<sup>244</sup> Prosecution Standards, *supra* note 16, at 144.

<sup>245</sup> ABA Standards, *supra* note 7, at 32.

<sup>246</sup> Mahoney, *et al.*, *supra* note 112, at 66 (emphasis in original).

authors give jurisdictions an important framework for creating an overarching system philosophy:

Broadly stated, it is important to develop goals for an effective pretrial release/decisionmaking process in six main areas: Maximizing personal liberty; providing for consistent decisionmaking in cases involving similarly situated defendants; ensuring community safety; ensuring that released defendants appear for scheduled court dates; avoiding jail crowding; avoiding [unnecessary] new jail construction and related costs.<sup>247</sup>

Whether they know it or not, state and local criminal justice systems have “apparent” philosophies, that is, philosophies that appear to others in the system or community to be the guiding principles of the criminal justice system. They are typically created piecemeal over time, through thousands or hundreds of thousands of separate decisions in individual cases, and frequently they are at odds with the actual intentions of the justice system. When asked for a personal philosophy on pretrial detention, for example, local judges may answer that they believe in the presumption of innocence along with public safety, and hence espouse a liberal pretrial release policy that conserves public resources and protects the public when necessary. But at the local jail, pretrial defendants may occupy over 60% of the beds. Thus, contrary to the hypothetical judges’ personal intentions, the apparent system philosophy is one of attempting to maximize public safety with a presumption of guilt demonstrated by the preference for detention, and with little regard to finite public resources.

Both state and local governments must examine their current policies and practices in order to articulate a purposeful philosophy on bail and the pretrial process. To do so, they must ask hard questions such as, “How do we collectively best achieve a balance between the societal interests in personal liberty and public safety?” and, “Given how we choose to use the local jail for other types of inmates (e.g., sentenced), when should we choose secure detention over other forms of community supervision for pretrial defendants?”

At the state level, Colorado has already begun discussing some of its core criminal justice philosophies. Because of high recidivism rates, coupled with projections of increasing numbers of persons being sentenced to the State Department of Corrections, in 2007 Colorado established the Commission on Criminal and Juvenile Justice. This body of experts is tasked with engaging in “a comprehensive evidence-based analysis of the circumstances and characteristics of the offenders being sentenced to the Department of Corrections, the alternatives to incarceration, the effectiveness of prevention programs, and the effectiveness of the criminal code and sentencing laws in securing public safety.”<sup>248</sup> The mission of this Commission is “to enhance public safety, to ensure justice, and to ensure protection of the rights of victims through the cost-effective use of public resources. The work of the Commission will focus on evidence-based recidivism reduction initiatives and the cost-effective expenditure of limited criminal justice funds.”<sup>249</sup>

Even though its focus is arguably centered on better managing its state prison inmates, research conducted over the years suggests that the State Commission should also focus on policies

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<sup>247</sup> *Id.*

<sup>248</sup> H.B. 07-1358 (codified at Colo. Rev. Stat. § 16-11.3-101-104).

<sup>249</sup> *Id.*

related to the decision to release or detain a defendant pretrial. While results from studies examining the impact of pretrial release on questions of guilt and innocence are arguably mixed,<sup>250</sup> the research has mostly shown that pretrial detention is a significant predictor of post-conviction incarceration – that is, defendants who are detained pretrial are more likely to be incarcerated in jail or prison and have longer sentences of incarceration after the disposition of their cases than defendants who are released pretrial, even when other relevant factors are considered (e.g., type of charges, criminal history).<sup>251</sup> The State has already begun to support initiatives to improve the administration of bail and the pretrial process by awarding two Edward Byrne/Justice Assistance Grants to the ten-county Colorado Improving Supervised Pretrial Release (CISPR) project. As an issue with a direct link to the state prison population, the administration of bail and related pretrial services is an important topic that should be directly addressed at the state level.<sup>252</sup>

At the local level, city and county governments, courts, and other criminal justice agencies must also determine where their priorities lie, as the decision to release or detain a defendant pretrial has a direct and significant impact on local criminal justice and human service resources.

### **General Recommendations:**

**In a modern and effective bail and pretrial services system, state and local governments have clear, articulated philosophies and goals, and state statutes, court rules, and local policies and procedures reflect those philosophies and goals. To that end, all jurisdictions should articulate and memorialize their guiding principles or philosophies for the administration of bail and the pretrial process. Such statements of local principles will**

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<sup>250</sup> In 1980, Goldkamp reported that when variables such as the seriousness of the charge and the number or prior arrests were controlled for, pretrial detention had no effect on whether a defendant was convicted or acquitted. John S. Goldkamp, *The Effects of Detention on Judicial Decisions: A Closer Look*, 5 Just. Sys. J. 234, (1980). Nevertheless, a more recent study of felony defendants in the 75 most populous U.S. counties from 1990 to 2004 by Cohen and Reaves found that defendants who had been detained prior to their case disposition were convicted almost 80% of the time, as compared to 60% of defendants who had been released. Cohen & Reaves, *supra* note 1, at 7. In a very recent study of bail, detention and non-felony case outcomes, Mary Phillips showed that cases with a defendant who was detained until disposition had a conviction rate of 92%, compared to a 50% conviction rate for defendants released pretrial. See Mary T. Phillips, *Bail, Detention, & Nonfelony Case Outcomes*, NYC Crim. Just. Agency, Res. Brief No. 14 (May 2007). For felony cases, “[d]efendants who were detained continuously to disposition were much more likely to be convicted (84%) than defendants who were not detained at all between arraignment and disposition (57%).” *Phillips Felony Study*, *supra* note 2, at 58 (2008). As reported by Phillips, felony defendants detained at arraignment were also less likely to be offered a charge reduction to a nonfelony level, a statistically significant negative relationship that was confirmed in multivariate analysis. Accordingly, “[t]his suggests that pretrial detention actually has a stronger and more severe effect on probability of conviction than is apparent when the outcome variable is merely conviction on any charge.” *Id.*

<sup>251</sup> See *Phillips Felony Study*, *supra* note 2, at 58-59 (2008) (“[t]her current research provides strong evidence in support of the hypothesis that there is a causal connection between pretrial detention and unfavorable case outcomes”); Marian R. Williams, *The Effect of Pretrial Detention on Imprisonment Decisions*, 28 Crim. Just. Rev. 299, at 302-303 and studies cited therein (2003). See also ABA Standards, *supra* note 7, at 29, n.1, and studies cited therein; NAPSA Standards, *supra* note 3, at 9, n.1, and studies cited therein. The Vera Institute’s Manhattan Bail Project was perhaps the first study, finding that defendants who were detained were more likely to be sentenced to incarceration and have longer sentences than those who had been released.

<sup>252</sup> Colorado has an interest in passing legislation on any topic of statewide concern, including the pretrial release or detention of jail inmates throughout the state. Colorado could, as other states have done, pass legislation to abolish the practice of compensated sureties, or create a statutory presumption in favor of release on recognizance.

serve as a reminder to all criminal justice agencies of the core principles and values that should guide day-to-day, case-by-case decisions.

At a minimum, these guiding principles or philosophies should address each of the overarching principles articulated by the ABA, NAPSA, and the NDAA, including, for example, (1) guidelines for using release on recognizance, including summons, (2) guidelines for using secure detention, (3) guidelines for using non-financial conditions of release to protect the public safety, (4) guidelines for using financial conditions of release to assure a defendant's appearance in court, (5) guidelines for using or ceasing to use commercial sureties, (6) guidelines for using pretrial services agencies or programs, as well as research-based risk assessment and supervision methods, (7) guidelines for facilitating victim participation, and (8) guidelines for allocating system resources to support the changing needs of pretrial services agencies and secure detention facilities. Additionally, the principles should reflect each community's and local justice system's values for balancing competing principles underlying the presumption of innocence, public safety, and the integrity of the judicial process.

At the state level, the Commission on Criminal and Juvenile Justice should articulate the state's guiding principles of bail administration and pretrial release and detention, and then work with the General Assembly to rewrite the bail statutes in clear, non-contradictory language that reflects these guiding principles, case law, and the three sets of professional standards. For example, if the state articulates a philosophy preferring release on personal recognizance, the General Assembly could enact a statutory presumption in favor of that option.<sup>253</sup>

At the local level, articulating statements of philosophy concerning bail administration in light of local resource issues is an ideal task of the local criminal justice coordinating committee. The term criminal justice coordinating committee "is an inclusive term applied to informal and formal committees that provide a forum where many key justice system agency officials and other officials of general government may discuss justice system issues."<sup>254</sup>

As a part of coordinating local justice systems, jurisdictions should also make a commitment to collecting data and measuring outcomes of all criminal justice initiatives created pursuant to the work of the coordinating committee, including changes to the local bail administration process.

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<sup>253</sup> Other legislative initiatives will similarly be guided by the state's articulated philosophy of pretrial release on an issue by issue basis. For example, if there is general agreement on a preference for police citations for certain low level felonies, for tighter time limits for first advisements, or for increasing the number of bail bond options available to judges, legislation can be introduced that address each of these issues. Moreover, if state consensus points to a philosophy against setting money bail bond amounts on the basis of the charge alone, existing statutes, such as § 16-4-103 (1) (b), (1) (b.5), and (1) (d) (I) (setting statutorily specified money bail bond amounts) should be repealed.

<sup>254</sup> Cushman, *Guidelines for Developing a Criminal Justice Coordinating Committee*, U.S. Dept. of Just., Nat'l Inst. of Corr. Accession Number 017232 (January 2002), at ix.

## ***B. Issues in the Field of Bail Administration and the Pretrial Process***

While it is advisable for criminal justice systems to develop and articulate overall philosophies on bail administration, it is nonetheless understandable if some decision-makers view the task of creating such a coordinated philosophy and strategy as a formidable one. Often, it is the combination of a series of individual strategic and coordinated decisions about particular criminal justice practices that leads a local jurisdiction to the realization of its broader philosophical stance on relevant issues. Accordingly, the following discussion is designed to assist local jurisdictions with these decisions. In the pages that follow, each issue associated with events in the life of a defendant's pretrial experience in Colorado will be discussed and compared to the three major national standards that have addressed bail and the pretrial process. To the extent possible, data will be used to provide information on national, state, and local practices, as well as to demonstrate the ramifications of changing those practices. Each section also contains general recommendations based on the best practices discussed in those standards.

### **(i) Arrest v. Citation – Summons v. Warrant**

Each year, law enforcement agencies make approximately 14 million arrests in the United States.<sup>255</sup> In 2006, Colorado law enforcement agencies made 203,358 adult arrests.<sup>256</sup> In Jefferson County, there are approximately 15 law enforcement agencies, each with their own unique policies and procedures, making approximately 23,000 arrests per year.<sup>257</sup> Each time a person is arrested, a decision must be made whether or not to detain that person or to release him or her back into the community prior to trial. Despite the fact that pretrial release has not been historically viewed as a police function, through their discretionary decision-making ability to issue citations in lieu of arrests in certain cases, "the police are often in the best position to provide for the speedy release of criminal defendants."<sup>258</sup> Pretrial literature now typically discusses citation release under the topic of "delegated release authority," which includes release of defendants prior to their first appearance by field officers and jail staff, in addition to pretrial services program staff. The primary pretrial release issues at arrest concern whether police should issue citations in lieu of taking persons to a secure facility, and whether judicial officers should issue summonses in lieu of arrest warrants.

There are pros and cons to citation release, which must be weighed before deciding whether to increase or decrease its use. As noted in one report,

[t]he cost savings are greatest when field citations are used, but there are some disadvantages to the field citation procedure. In particular, because it has often been difficult to identify the defendant reliably (and, therefore, difficult to obtain information on the defendant's prior record at the point of arrest), police officers

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<sup>255</sup> Federal Bureau of Investigation, *Crime in the United States, 2006* (Washington D.C.: U.S. Dept. of Just.) found at [www.fbi.gov/ucr/](http://www.fbi.gov/ucr/). The Uniform Crime Reporting (UCR) Program counts one arrest for each separate instance in which a person is arrested, cited, or summoned for an offense.

<sup>256</sup> *Id.*

<sup>257</sup> This number was derived from UCR reporting agencies compiled by the Colorado Bureau of Investigation, found at <http://cbi.state.co.us/dr/cic2k6/>.

<sup>258</sup> Thomas, *supra* note 44, at 200.



cannot be confident that the individual is not wanted on a warrant and has no history of previous arrests that would suggest a need for further investigation.

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Citation release . . . has been criticized for resulting in unacceptably high rates of failure to appear (FTA) and a consequent loss of justice system credibility in the eyes of the defendants and the general public.<sup>259</sup>

Nevertheless, following the principle of releasing defendants under the least restrictive conditions, the ABA “favors use of citations by police . . . in lieu of arrest at stages prior to the first judicial appearance in cases involving minor offenses.”<sup>260</sup> In Part II of the ABA Standards, “Release by Law Enforcement Officer Acting Without an Arrest Warrant, Standard 10-2.1 states that “[i]t should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. This policy should be implemented by statutes of statewide applicability.”<sup>261</sup> Commentary to that standard explains that “emphasis on citation release (as well as ‘stationhouse’ release) was a logical extension of bail reform presumptions favoring pretrial release and release under least restrictive alternatives as well as encouraging diversion from the justice system altogether.”<sup>262</sup> ABA Standard 10-2.2 recommends mandatory issuance of citation for minor offenses, and would require law enforcement agencies to document in writing the reasons for which an officer chooses to take a suspect into custody [at a secure facility] on a minor offense.<sup>263</sup> Moreover, Standard 10-2.3 recommends that,

[e]ach law enforcement agency should promulgate regulations designed to increase the use of citations to the greatest degree consistent with public safety. Except when arrest or continued custody is necessary, the regulations should require such inquiry as is practicable into the accused’s place and length of residence, family relationships, references, present and past employment, criminal record, and any other facts relevant to appearance in response to a citation.<sup>264</sup>

In Part III of its Standards, the ABA recommends that “[a]ll judicial officers should be given statutory authority to issue a summons rather than an arrest warrant,” and that “[j]udicial officers should liberally utilize this authority unless a warrant is necessary to prevent flight, to ensure the safety of the defendant, any other person or the community, to prevent commission of future crimes or to subject a defendant to the jurisdiction of the court when the defendant’s

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<sup>259</sup> Mahoney, *et al.*, *supra* note 112, at 62. This report notes, however, that FTA rates vary among jurisdictions and that “[o]ne reason for high rates in many jurisdictions is the lack of systematic follow-up to remind defendants of court dates and to take prompt action when those who receive citations do not appear.” *Id.*

<sup>260</sup> ABA Standards, *supra* note 7, Std. 10-1.3, at 41. The term “minor offenses” is used rather than “misdemeanors” because the latter term is often defined differently among jurisdictions across the United States. Generally, according to the commentary to Standard 10-1.3, “‘minor offenses’ are the equivalent to lower-level misdemeanors. However, when the alleged offense involves danger or weapons – as, for example, is often the case in domestic violence misdemeanors – the Standard allows jurisdictions to determine that the offense is not ‘minor,’ regardless of its statutory designation.” *Id.*

<sup>261</sup> *Id.* Std. 10-2.1, at 63.

<sup>262</sup> *Id.* at 63-64.

<sup>263</sup> *Id.* Std. 10-2.2, at 65.

<sup>264</sup> *Id.* Std. 10-2.3, at 69.

whereabouts is unknown.”<sup>265</sup> Like the standard on citations, Standard 10-3.2 recommends mandatory issuance of summonses for minor offenses under certain circumstances.

Generally, the Prosecution Standards also contain policies favoring release, discouraging detention except in “very special circumstances,” favoring the issuance of citations in certain circumstances, and favoring the issuance of summonses by judicial officers with exceptions.<sup>266</sup> More specifically, those Standards state that “[i]t should be the policy of law enforcement agencies to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law and public safety.”<sup>267</sup> Similar to the ABA, the NDAA recommends that “[l]aw enforcement agencies should promulgate regulations designed to increase the use of citations to the greatest degree consistent with public safety.”<sup>268</sup> The Prosecution Standards further state that “[l]egislation should be developed to allow law enforcement authorities to issue citations in lieu of arrests,” but that the procedure should be limited to “traffic violations, health and safety codes violations, and certain misdemeanors involving crimes against property.”<sup>269</sup> The Standards suggest that the legislature or the courts enact regulations specifically enumerating offenses for which citations may be issued.

Like its ABA Standard counterpart, the Prosecution Standard concerning summonses states that “[a]ll judicial officers should be given statutory authority to issue a summons rather than an arrest warrant,”<sup>270</sup> but it does not encourage the liberal use of the procedure. While the ABA Standards recommend that a judge “ordinarily should issue a summons in lieu of an arrest warrant when the prosecutor so requests,”<sup>271</sup> Prosecution Standard 45.3 recommends that judges “should be required” to do so.<sup>272</sup>

Like the ABA Standards, the NAPSAs Standards similarly favor a presumption of release under least restrictive conditions and other alternative release options,<sup>273</sup> as well as a principle that secure detention be used in only limited circumstances.<sup>274</sup> While the NAPSAs Standards do not formally address the use of citations or summonses by law enforcement officers, the Standards comment that “there are strong arguments to be made for the use of citations in lieu of arrest in cases involving minor offenses”.<sup>275</sup>

Under Colorado law, a police officer may arrest a person when “(a) [h]e has a warrant commanding that such a person be arrested; or (b) [a]ny crime has been or is being committed by such person in his presence; or (c) [h]e has probable cause to believe that an offense was committed and has probable cause to believe that the offense was committed by the person to be

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<sup>265</sup> *Id.* Std. 10-3.1, at 71.

<sup>266</sup> *See* Prosecution Standards, *supra* note 16, Std. 45.1, at 138-39; 45.3, at 141-42.

<sup>267</sup> *Id.* Std. 45.2 (a), at 140.

<sup>268</sup> *Id.* Std. 45.2 (c), at 141.

<sup>269</sup> *Id.* Std. 45.1 (c) (1), at 139.

<sup>270</sup> *Id.* Std. 45.3 (a), at 141.

<sup>271</sup> ABA Standards, *supra* note 7, Std. 10-3.3 (b), at 74.

<sup>272</sup> Prosecution Standards, *supra* note 16, Std. 45.3 (b) (3), at 141.

<sup>273</sup> *See* NAPSAs Standards, *supra* note 3, Std. 1.2, at 11.

<sup>274</sup> *See Id.* Std. 1.5 (commentary), at 19-20.

<sup>275</sup> NAPSAs Standard 1.9 covers delegated authority to release defendants before first appearance. *See id.* Std. 1.9 (commentary), at 24.

arrested.”<sup>276</sup> Once arrested, that person may be released “by the arresting authority on its own authority” only when (a) the officer is satisfied that there are no adequate grounds for a criminal complaint, or (b) “the offense for which the person was arrested and is being held is a misdemeanor or petty offense and the arresting officer or a responsible command officer of the arresting authority is satisfied that the person arrested will obey a summons commanding his appearance at a later date.”<sup>277</sup> By statute, persons arrested for acts of domestic violence may not be released pursuant to this Section.

Regarding the issuance of judicial summonses, Colorado Revised Statute Section 16-5-205 requires the prosecuting attorney to request either a warrant or a summons upon the return of an indictment by a grand jury, the filing of an information, or the filing of a felony complaint in the county court. According to that Section, if a warrant is issued and the offense is bondable, the judge is to set a bail bond; if a summons is issued instead of a warrant, “no bail shall be fixed.”<sup>278</sup> Section 16-5-206 gives judges, with the consent of the prosecuting attorney, the authority to issue a summons in lieu of a warrant for an arrest for certain lower level offenses after indictment, information, or complaint. Section 16-5-207 mandates the issuance of a summons “in all petty offenses, class 3 misdemeanors, and all unclassified offenses which are punishable by a maximum penalty of six months’ imprisonment or less,” with certain exceptions. Subsection (2) of that Section states that “[e]xcept in class 1, class 2, and class 3 felonies, the general policy shall favor issuance of a summons instead of a warrant for the arrest of the defendant except where there is reasonable ground to believe that, unless taken into custody, the defendant will flee to avoid prosecution or will fail to respond to a summons. The court shall issue a summons instead of an arrest warrant when the prosecuting attorney so requests.”<sup>279</sup>

In Colorado’s First Judicial District (Jefferson and Gilpin Counties), the District Attorney’s Office has issued “General Arrest Standards,” synthesizing that office’s philosophy and preferences for law enforcement officers who must decide between issuing a citation, release pending issuance of a summons, and formally arresting or incarcerating defendants. The Guidelines do not diminish officers’ discretion in any way, although they make clear the factors that the District Attorney’s Office believes are appropriate for officers to consider while making their decision to release or incarcerate. Significantly, the Arrest Standards make it clear that the District Attorney’s Office does not believe it necessary to jail all persons facing felony charges.<sup>280</sup>

Law enforcement agencies in the First Judicial District have also issued their own arrest standards, which tend to be designed to work in harmony with common objectives of the

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<sup>276</sup> Colo. Rev. Stat. § 16-3-102. For several reasons, including resource management, many Colorado law enforcement agencies point to the discretionary language of this section to support a decision not to automatically arrest on certain arrest warrants (e.g., failure to appear warrants set at \$500 or below), despite whatever mandatory arrest language those particular warrants, state statutes, or court rules may contain.

<sup>277</sup> *Id.* § 16-3-105.

<sup>278</sup> *Id.* § 16-5-205.

<sup>279</sup> *Id.* § 16-5-207; *see also* Colo. R. of Crim. P. 4, 4.1.

<sup>280</sup> *General Arrest Standards, Memorandum to First Judicial Law Enforcement* (April 6, 2005). For example, the Arrest Standards state that “many Class 3 felonies are appropriate for jailing.” More specifically, the Arrest Standards state, “[o]bviously, jailing would be most appropriate for the more serious offenses. However, all felony offenses need not be jailed,” and “certain property offenses (theft/shoplifting, criminal trespass, etc.) may allow a release pending felony charges.” *Id.* at 2.

judiciary, the prosecution, and other law enforcement agencies. For the most part, the individual guidelines reviewed for this paper demonstrate those agencies' recognition of their ability to issue citations and to release suspects pending a formal summons, but do not articulate any particular preference for these practices. One set of arrest standards from outside of the First Judicial District, however, does include language articulating such a preference for field citations. The El Paso County Sheriff's Office Policy and Procedure Manual includes the following language:

The citation (summons and complaint) offers several advantages over physical arrest: (a) Citations save the deputy considerable time in processing an arrest; (b) Physical arrests are an unnecessary indignity to those who are not serious criminals; (c) Citations enhance the public image of law enforcement and reduce antagonism between the public and police; (d) Citations avoid the high cost of custody.<sup>281</sup>

Despite individual agency recognition of (1) the procedure for releasing a suspect pending a felony summons, and (2) a statutory preference for court ordered summonses for lower level felonies, felony summonses appear to be relatively rare. For example, in Jefferson County the Court Clerk reports that the First Judicial District Duty Division handles only 20 to 25 such cases per week out of a docket of over 400 cases per week. Moreover, according to at least one judge, the practice is underutilized; in a hand-count of cases handled during that judge's duty week,<sup>282</sup> the judge identified 10 of 27 felony cases involving incarcerated defendants who arguably could have been processed through the issuance of a felony summons.<sup>283</sup> If there are 10 summonable cases per week, then approximately 500 defendants with low-level felony charges could be summoned per year. Commensurately, the workload and costs associated with 500 bookings into the Jefferson County Detention Facility could be avoided.

Of course, decisions to release a defendant upon issuance of a citation or summons must be made with an understanding of the need to protect the public's safety and to assure the presence of the accused at their court hearing. In a recent analysis of the Flagstaff, Arizona, Police Department's cite and release policies, a researcher found that an effective cite-and-release policy should include mechanisms designed to determine a suspect's FTA history in the field, as well as a court date notification system for those who are cited into court.<sup>284</sup> Very few counties in Colorado have implemented procedures to gather verifiable defendant information in the field or to call and remind defendants given citations or summonses to appear for court.

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<sup>281</sup> *El Paso Sheriff's Office Policy and Procedure Manual* (June 16, 2005), at 4. Like other arrest standards, the El Paso County standards do not articulate a preference for felony summonses, but only mention them as alternatives to incarceration for Class 4, 5, and 6 felonies. *See id.* at 5.

<sup>282</sup> In the First Judicial District, county court judges rotate through a "duty week," during which a county court judge staffs the court's Duty Division. During that week, the duty judge handles, among other things, cases initiated by issuance of a felony summons.

<sup>283</sup> The cases identified as appropriate for felony summonses involved lower level felony cases that were not labeled as domestic violence cases, that had no victims, and in which the defendant had no other warrants and appeared to have a negligible criminal history.

<sup>284</sup> *See Wendy White, Analysis of Flagstaff Police Department Cite and Release Policy and Practices; Impact on Local Jail Population*, Coconino County Criminal Justice Coordinating Council (Aug. 2007).

While there are no comparable First Judicial District numbers from which to estimate the costs and/or benefits of issuing field citations in lieu of formally booking persons accused of a crime, the Arizona study found that even when additional costs associated with defendants' failure to appear were taken into account, the Flagstaff Police Department's policy of issuing field citations was saving approximately \$220,000 per year in jail bed expenses alone.<sup>285</sup>

### **General Recommendations:**

**All law enforcement agencies should draft arrest/citation policies that reflect the local criminal justice system's articulated philosophies on pretrial release. Jurisdictions with multiple law enforcement agencies feeding into a single jail should collaborate on policies for consistency and other public policy concerns, such as community safety or efficient use of resources. At a minimum, these arrest/citation policies should articulate agency preferences for citations/summonses versus incarceration, and encourage the use of field citations to the maximum extent possible and consistent with public safety. Agencies should also specifically consider policies for the use of citations or summonses for lower level felony offenses. In articulating their own preferences, sheriffs should encourage all agencies to incorporate consideration of limited jail resources into discretionary decisions to either cite a defendant into court or incarcerate them in the local jail.**

**When officers cite defendants into court, they should collect sufficient verifiable defendant information to facilitate contacting the defendant in the future regarding his or her court date. All jurisdictions should implement court date notification procedures to reduce the number of defendants failing to appear for court on a citation or summons.**

### **(ii) Money Bail Bond Schedules**

If suspects are not released at the scene by field officers, they are typically transported to a secure detention facility for processing, or booking. In Colorado, most, if not all judicial districts have fixed money bail bond schedules that include predetermined amounts of money to be used for determining a bail bond based on the defendant's highest charge. Money bail bond schedules are common throughout the country, the result of a "long history of courts setting money bail on the basis of the charge alone."<sup>286</sup> Unfortunately, the practice of using money bail bond schedules for anything more than the least serious of offenses is completely contrary to laws and policies promulgated to ensure that bail bond setting is individualized to each particular defendant.<sup>287</sup>

In *Stack v. Boyle*, the Supreme Court stated:

Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards as expressed in the Federal Rules of Criminal Procedure [the nature and circumstances of the offense charged, the

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<sup>285</sup> *Id.* at 24.

<sup>286</sup> ABA Standards, *supra* note 7, Std. 10-1.7 (commentary), at 51.

<sup>287</sup> Moreover, while there is statutory authority for granting a pretrial release bail bond pending appearance before a judge for cases involving misdemeanor and petty offenses, *see* Colo. Rev. Stat. § 16-2-111, there is no comparable section governing cases involving felony offenses.

weight of the evidence, the financial security of the defendant, and the character of the defendant] are to be applied in each case to each defendant.<sup>288</sup>

In a concurring opinion in *Stack*, Justice Jackson opined that, at a minimum, fixing a blanket bail bond by consideration of the charge alone violated former Federal Rule of Criminal Procedure 46, which provided the federal judges with individualized factors (charge, evidence, character, etc.,) to be considered in setting a bail bond. As noted by Justice Jackson, “[e]ach defendant stands before the bar of justice as an individual.”<sup>289</sup>

According to Lafave, the ruling and language of *Stack v. Boyle* “would indicate that use of a bail schedule, wherein amounts are set solely on the basis of the offense charged, violates the Eighth Amendment except when resorted to as a temporary measure pending prompt judicial appearance for a particularized bail setting.”<sup>290</sup> Nevertheless, constitutional attacks against money bail bond schedules have been extremely rare. Faced with an attack on the El Paso County (Texas) money bail bond schedule, the judge in *Terrell v. District Court* stated that “[t]he Court has conducted an exhaustive research regarding the constitutionality of bond schedules in §1983 cases. It has found only one case where a federal court found the use of a bond schedule to be unconstitutional.”<sup>291</sup> The particular case found by the judge in *Terrell* was the class action case of *Ackies v. Purdy*, wherein the plaintiffs alleged that use of a money bail bond schedule in the Dade County Jail was unconstitutional because it led to defendants being incarcerated for periods of up to three weeks before they were allowed to see a judge. Given those particular facts, the court in *Ackies* had ruled that the use of a predetermined money bail bond schedule violated the Due Process Clause for lacking a hearing when one’s liberty was at stake, as well as the Equal Protection Clause because “the bond schedule created two groups of defendants, those who could afford to pay the bond and gain instant release and those who could not and remained detained for extended periods.”<sup>292</sup> While noting the *Ackies* holding, the judge in *Terrell* declined to follow it, reasoning as follows:

[f]irst, despite the broad use of bond schedules across the county, the Court has not been able to ad [sic] any opinions since *Ackies* finding the use of bond schedules unconstitutional. In addition, the *Ackies* holding was decided more than thirty-five years ago and has not been further developed by any court. In addition, *Ackies* was handed down before the Supreme Court’s holding in *Gerstein [v. Pugh]*, 420 U.S. 103 (1975) at a very different time in the history of constitutional criminal procedure. Clearly, there are greater procedural safeguards in place since the time of the *Ackies* holding to protect against extended detention without judicial review, the court’s chief concern in *Ackies*. Thus, the concerns that the *Ackies* court voiced regarding the procedures in place in Florida in 1970 have subsequently been addressed. For these reasons, the *Ackies* holding is anomalous and outdated.<sup>293</sup>

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<sup>288</sup> *Stack*, 342 U.S. at 4.

<sup>289</sup> *Id.* at 9.

<sup>290</sup> Wayne R. Lafave, Jerold H. Israel, Nancy J. King, & Orin S. Kerr, *Criminal Procedure* (3d Ed., West Pub. Co. 2007), Vol. 4, § 12.2 (a), at 28.

<sup>291</sup> *Terrell v. District Court*, 481 F. Supp. 2d 757 (W.D. Tex. 2007).

<sup>292</sup> *Id.* at 766 (citing *Ackies v. Purdy*, 322 F. Supp. 38, 41-42 (D.C. Fla. 1970)).

<sup>293</sup> *Id.* at 767.

Beyond the context of § 1983 cases, at least three states with bail statutes emphasizing individualization in determining the amount and type of bail bond have found money bail bond schedules improper and, in some cases, unconstitutional. In *Demmith v. Wisconsin Judicial Conference*, the Wisconsin Supreme Court concluded that the state court's Uniform Misdemeanor Bail Schedule failed to comply with state statutes requiring that cash money bail bond guidelines for persons accused of misdemeanors "relate primarily to individuals."<sup>294</sup> That court concluded:

[t]he Bail Schedule . . . requires cash bail from all defendants and sets the amount of cash bail required from all defendants solely according to the offense charged. The Bail Schedule thus seems to meet the standard [of an earlier version of a section of the bail statute] which focused on the offense charged. The Bail Schedule does not meet the standard expressed in the current section . . . which includes the requirement that the guidelines relate primarily to individuals. Because the Uniform Misdemeanor Bail Schedule requires cash bail according to the offense allegedly committed and does not consider factors which are directly related to an individual's likelihood to appear in court (the very purpose of cash bail), we conclude that the Uniform Misdemeanor Bail Schedule fails to satisfy the requirement in the [statute] that bail guidelines 'relate primarily to individuals.'<sup>295</sup>

In Texas, Attorneys General have separately declared that "bail amounts must be determined on a case-by-case basis, not pursuant to a pre-set schedule of amounts,"<sup>296</sup> and that "[t]he amount of bond must be determined by the Constitution and rules set out in [the statute], rather than any arbitrary 'schedule of bond amounts.'"<sup>297</sup> Likewise, in 2001, the Oklahoma Attorney General issued an opinion answering the question of whether judges have the authority "to establish a pre-set bail schedule which sets bail amounts in accordance with the crime for which the person has been arrested,"<sup>298</sup> commonly referred to in Oklahoma as a "jail bail schedule." In declaring that judges do not have such authority, the Oklahoma Attorney General wrote:

[u]nder the Jail Bail system, since it is the crime, as opposed to the individual circumstances of an arrestee, that determines the amount of bail the important constitutional rights of an arrestee cannot be adequately protected. Under this system all arrestees are treated the same depending on the crime committed, Bail set in such a fashion clearly undermines the constitutional mandates of *Stack*, [and state cases] *Humphrey, and Brill*, which all require individual bail determinations. Under the jail bail system, it does not matter where the defendant resides, works,

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<sup>294</sup> *Demmith v. Wisc. Jud. Conf.*, 480 N.W. 2d. 502, (Wis. 1992).

<sup>295</sup> *Id.* at 507; accord *Pelekai v. White*, 861 P.2d. 1205, 1210 (HI 1993) ("the trial judge in the instant case had the discretion to reset bail for Petitioner when he appeared before her. By rigidly following the Bail Statute, the trial judge substituted the Bail Schedule for the discretion vested in her by statute and, in doing so, abused her discretion").

<sup>296</sup> Op. Tx. Att'y Gen No. DM-57 (1991), at 2-3.

<sup>297</sup> Op. Tx. Att'y Gen No. H-856 (1976), at 4.

<sup>298</sup> Op. Ok. Att'y Gen No. 61 (2001).

or how many times he or she has been arrested; he or she may be admitted to bail in the amount determined for that particular crime in the bail schedule.<sup>299</sup>

There are no reported Colorado cases or Attorney General Opinions discussing the use of money bail bond schedules. There are, however, cases warning courts about the unlawful delegation of judicial duties, such as setting bail bonds. In *People v. Rickman*, the Colorado Supreme Court recently re-emphasized its long-held position that a “court may not delegate its power to set bail.”<sup>300</sup> Because there is no explicit statutory authority providing for the release of felony defendants on a bail bond pending appearance before a judicial officer, an argument could be made that delegation to others of the authority to release felony defendants through a money bail bond schedule is unlawful. The fact that Colorado law requires judges to consider individualized criteria about the defendants (including family ties, employment, character and reputation, etc.) only bolsters the argument that using a money bail bond schedule (which only considers the seriousness of the charge) exceeds judicial authority.

Moreover, a review of a sample of Colorado money bail bond schedules reveals that facially they suffer from many of the legal shortcomings discussed above. Out of eight money bail bond schedules,<sup>301</sup> none provided any range of amounts (indicating discretion within the range), and none made any reference to the individualized bail selection criteria found in Colorado Revised Statute Section 16-4-105. Only three of the schedules had language speaking to judicial discretion, or language indicating that the schedule should be used only as a “guideline” for making bail bond determinations. Although the schedules presumably reflect certain criminal justice system philosophies concerning the pretrial release or detention decision, only one money bail bond schedule had an articulated philosophical preference concerning the administration of bail.<sup>302</sup>

In addition to these deficiencies, the sample of schedules revealed that they were neither uniform in specificity – they ranged in size from two to twenty-seven pages,<sup>303</sup> nor in substance – for those schedules that list general default amounts for Class 1 misdemeanors, the money bail bond amounts ranged from \$750 to \$1,500; for Class 5 felonies, the amounts ranged from \$2,000 to \$5,000. Moreover, bail bond amounts listed for particular offenses also differed among jurisdictions. For example, the First Judicial District’s bond schedule set the money bond amount at \$25,000 for 1<sup>st</sup> degree arson. The Second Judicial District set the amount for the same offense at \$50,000. Finally, the schedules differed by which offenses required a defendant to see

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<sup>299</sup> *Id.* at Par. 16 (internal citations omitted).

<sup>300</sup> *People v. Rickman*, 178 P.3d 1202, 1207 (Colo. 2008) (“The allowance of bail and fixing the amount thereof are judicial acts, and, in the absence of [a] statute [providing] otherwise, the court or judicial officer vested with such power cannot delegate it to another.”) (quoting *Bottom*, 164 P. at 697).

<sup>301</sup> For this paper, the authors reviewed monetary bail bond schedules from the First, Second, Fourth, Fourteenth, Eighteenth, Nineteenth (misdemeanor, traffic, and petty), Twentieth, and Twenty-First Judicial Districts.

<sup>302</sup> It states: “This bond schedule is not binding on the judges or bond magistrates, although it may be used as a guide. Judges and bond magistrates are encouraged to consider whether a lower bond amount or a personal recognizance bond, in conjunction with special bond conditions such as the use of a global positioning system device, electronic home monitoring, pretrial services supervision, day reporting, drug or alcohol testing or treatment, or other special conditions will be adequate to secure the defendant’s attendance in court and to protect the public.” Admin. Order 06-06, 21<sup>st</sup> Jud. Dist., Mesa County, Colorado.

<sup>303</sup> The size of the schedules are determined by the extent to which they attempt to address individual crimes or statute numbers. Of course, jurisdictions with schedules that have great specificity by listing numerous statutes by section or even subsection must be vigilant for changes in the law that affect those particular sections or subsections.



a judge before a bail bond is set. Thus, a defendant in one Colorado judicial district will be held to appear before a judge (ironically to receive an individualized bail bond determination), while a similarly situated defendant in another Colorado judicial district will be released simply by paying the posted bail bond amount.

Differences between money bail bond schedules may be explained by viewing them as reflections of the local community's beliefs about the seriousness of particular offenses. But there is no explanation for the arbitrariness of the bail bond amounts themselves. Jurisdictions in Colorado and other states typically have no answer for the question of why a particular bail bond amount is, for example, \$10,000, versus \$5,000.<sup>304</sup> What is known, however, is that the monetary amounts are not tied to the assurance of each individual defendant's appearance in court, as has been required since the Supreme Court's ruling in *Stack v. Boyle*. Indeed, determination of this monetary amount would likely be impossible, from both a case-by-case method and an objective, standardized research approach. The most practical option may be for a judicial officer to ask each defendant what monetary amount he or she can afford. Indeed, some judicial officers already do this. Finally, illustrating the arbitrary nature of the numbers themselves, jurisdictions have made both blanket increases<sup>305</sup> and decreases<sup>306</sup> to their schedules.

In practice, courts using money bail bond schedules as a reference guide only do so after defendants have failed to post their bond when initially booked. For example, in the First Judicial District, if arrestees are charged with crimes that do not have a "no bond hold," or that do not otherwise require them to see a judge, they are typically told their monetary amount or amounts<sup>307</sup> by jail staff and are asked whether or not they believe they can pay it within a few hours. If the answer is yes, the arrestees typically are not interviewed by the local pretrial services staff, or by the Medical or Counseling Units for purposes of classification. Instead, they remain in the Jefferson County Detention facility's booking area and soon proceed to the Inmate Services Unit, where they are processed for release. After the bond or bonds are posted (through whatever means available, including a commercial surety) arrestees are given "appearance bonds," along with a return date based on a fixed calendar schedule provided by the courts.<sup>308</sup> Arrestees are then released without investigation into any of the required, individualized

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<sup>304</sup> Some jurisdictions are able to point to a particular time when the initial amounts were picked. See, e.g., *Lowered Bail Bonds Make System More Equitable*, Quad City Times (Aug. 31, 2007) (noting that a previous schedule had been based on maximum fines plus a thirty percent surcharge). Colorado law specifies that "when a person is charged with an offense punishable by fine only, the amount of bail shall not exceed the maximum penalty," §16-4-105 (b), but there appear to be no explicit statutory upper limits to monetary bail bond amounts for offenses punishable by imprisonment.

<sup>305</sup> See *Fewer to Get Out of Jail Cheap*, Colorado Springs Gazette (May 27, 2007) (reporting that the 4<sup>th</sup> Judicial District was raising the bond amounts for all crimes so that they would be more aligned with those in other judicial districts throughout the state).

<sup>306</sup> See *Supreme Court Lowers Amount Iowans Need to Get Out of Jail*, Des Moines Register (August 16, 2007) (reporting blanket bond reductions for non-violent felonies and misdemeanors with no explanation for the reductions); see also *Lowered Bail Bonds Make System More Equitable*, Quad City Times (Aug. 31, 2007).

<sup>307</sup> In Jefferson County, a defendant charged with multiple offenses must only pay the bond amount for the most serious offense per court case. Employees in the Jefferson County Detention Center's Inmate Services Unit know of no Colorado county that "stacks" bonds for multiple offenses, although it is done elsewhere in the United States. See e.g., *New Bond Law Adds Costs & Inmates to Counties*, article reprint from Mkt. Intel. Digest, No. 195, found at <http://www.appf.org/main.htm>.

<sup>308</sup> For example, pursuant to the return date schedule, defendants arrested on new felony warrants are set to return to the County Court Duty Division in 10 days at 10:00 a.m.

statutory criteria to be used in setting a bail bond, and no entity is supervising them to assure their compliance with all conditions of their bail bond.

In 2006, approximately 1,950 (8%) of the 23,789 inmates released from the Jefferson County Detention Facility left the jail without a judicial officer setting an individualized bail bond. Thirty-six percent of these defendants were charged with a felony offense (i.e., person, property, weapons, or drug), and 43% of the defendants were charged with a misdemeanor offense (i.e., person, property, driving, or drug). The remainder was charged with traffic (16%), petty (2%), civil (1%) or unknown classification (1%) offenses. Jefferson County Pretrial Services reports instances in which they complete individualized pretrial risk assessments and make recommendations for bond conditions that would likely lessen that risk. However, because these defendants posted the scheduled money bond amount, a judicial officer did not have the opportunity to include any of the recommendations as conditions of bond prior to the defendants' release. Additionally, when the defendants did appear before a judicial officer within a few weeks of release, judicial officers almost never consider Pretrial Service's recommendations nor order pretrial supervision at that time. Thus, per year in the First Judicial District Combined Court, there are approximately 2,000 arrestees who, after being booked into the Detention Facility, are released without any judicial investigation into their risk to public safety and failure to appear, and these defendants are not supervised by a professional pretrial services agency.

Arrestees who cannot bond out shortly after book-in are interviewed by Pretrial Services Staff, as well as by the Medical and Counseling Units for purposes of classification. Those arrestees remain in custody and are brought before a judge for advisement and a bail bond hearing through a video conference at 10:00 a.m. the next business day (of course, the "next business day" may mean that a defendant must wait up to four days to see a judge if he or she is arrested on a Friday before a holiday on Monday). At that advisement, judges typically rely on the money bail bond schedule, the recommendation of the Pretrial Services Unit, arguments from the District Attorney, and any statements from the defendant to make an individualized bail bond determination, which may, or may not, reflect an amount on the money schedule.<sup>309</sup>

Despite the good intentions of those persons who create these documents, the consequences of using a money bail bond schedule can lead to absurd results. In many cases, between two detainees with equivalent current charges, criminal histories, and residential, familial, and employment factors, the one with access to adequate financial resources will be released, while the one without such access will be detained. Moreover, arrestees able to post their bonds before an investigation into their individualized case and defendant criteria may ultimately prove to be extremely high risk for missing court and for endangering the public. Concomitantly, arrestees unable to post even a low bond may ultimately prove to be low risk on both of these factors.<sup>310</sup>

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<sup>309</sup> An analysis of inmates booked into the Jefferson County Detention Facility during 2007 was performed to determine the number of defendants who would be eligible for their first advisement on a Saturday, Sunday, or holiday Monday because they had a new case filed into Jefferson County Combined Court. Analyses revealed that, if all of these defendants were to see a judicial officer for advisement on a Saturday, Sunday, or holiday Monday, an average of 44, 22, and 21 defendants would have been present at the Saturday, Sunday, and holiday Monday advisements, respectively. Because advisements were not held on these days during 2007, these defendants either posted a monetary bond to leave the Detention Center prior to their advisement, or they waited until the next business day (i.e., a Monday or a Tuesday following a holiday Monday) for advisement.

<sup>310</sup> The ABA Standards note at least one additional problem found with using monetary bail bond schedules: "Empirically, there is some evidence that the risk of non-appearance for criminal behavior may actually be greater

It is no surprise, then, that all three sets of national standards advocate elimination of money bail bond schedules, except for only the lowest level offenses. ABA Standard 10-1.7 cautions judicial officers against giving “inordinate weight to the nature of the present charge” in making the bail bond determination.<sup>311</sup> In recommending a presumption in favor of personal recognizance bonds, the ABA criticizes the “traditional practice” of judges relying solely on the seriousness of the charge during the bail bond setting process and “rejects a flat correlation between charge seriousness and a determination concerning release.”<sup>312</sup> Standard 10-5.3 (e) specifically rejects the use of money bail bond schedules for anything except minor offenses: “Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant’s ability to meet the financial conditions and the defendant’s flight risk, and should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge.”<sup>313</sup> Commentary to that Standard explains the ABA’s position:

This Standard emphasizes the importance of setting financial conditions through a process that takes account of the circumstances of the individual defendant and the risk that the individual may not appear for scheduled court proceedings. It flatly rejects the practice of setting bail amounts according to a fixed bail schedule based on charge. Bail schedules are arbitrary and inflexible; they exclude consideration of factors other than the charge that may be far more relevant to the likelihood that the defendant will appear for court dates. The practice of using bail schedules leads inevitably to the detention of some persons who would be good risks but are simply too poor to post the amount of bail required by the bail schedule. They also enable the unsupervised release of more affluent defendants who may present real risks of flight or dangerousness, who may be able to post the required amount easily and for whom the posting of bail may be simply a cost of doing ‘business as usual.’<sup>314</sup>

The NAPSA Standards mirror the ABA’s caution against giving “inordinate weight” to the nature of the present charge in setting a bail bond,<sup>315</sup> and against the traditional practice of using the charge as the sole determinant of a bail bond.<sup>316</sup> Both the NAPSA Standards and the

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for persons charged with relatively minor non-violent offenses . . . than for some persons charged with more serious crimes.” ABA Standards, *supra* note 7, Std. 10-5.1 (b) (commentary), at 104 (citing Goldkamp, *Two Classes of Accused: A Study of Bail and Detention in American Justice* (Cambridge, MA: Ballinger 1979). Nevertheless, recognizing the high costs to society when a person charged with a serious offense commits a similar offense while on release, the ABA underscores the need to “avoid general reliance on the seriousness of the charge and instead focus attention on what conditions (if any) are appropriate in the specific case of the individual before the court.” *Id.*

<sup>311</sup> *Id.* Std. 10-1.7, at 50.

<sup>312</sup> *Id.* Std. 10-5.1 (b), at 104. The use of schedules is closely tied with the use of commercial sureties, a practice the ABA also rejects.

<sup>313</sup> *Id.* Std. 10-5.3 (e), at 110.

<sup>314</sup> *Id.* Std. 10-5.3 (e) (commentary), at 113.

<sup>315</sup> NAPSA Standards, *supra* note 3, Std. 1.6, at 20; *see also* commentary, at 21: “The main thrust of this Standard is to encourage judicial officers to move beyond consideration of the charge alone and give consideration to a broad range of factors affecting possible risks of nonappearance and dangerousness in making the release/detention decision.”

<sup>316</sup> *See id.*, Std. 2.3 (commentary), at 34. NAPSA elaborates somewhat on the ABA commentary: “Making bail amounts or release conditions dependant only upon the seriousness of the charges makes it impossible for judicial officers to make individualized decisions that take account of the host of potentially relevant factors . . . and – since

Prosecution Standards also explicitly reject the use of money bail bond schedules for anything but minor offenses. NAPSA Standard 2.5 (f) is virtually identical to the ABA language in Standard 10-5.3(e), quoted above, and states in commentary that “[t]his Standard is emphatic in rejecting the setting of bail amounts simply on the basis of charge seriousness.”<sup>317</sup>

Finally, Prosecution Standard 45.6 (e) states succinctly that “[m]oney bail in felony cases should not be set solely by reference to a pre-determined schedule of amounts fixed according to the nature of the charge, but should take into account the special circumstances of the defendant.”<sup>318</sup>

### **General Recommendations:**

**To the extent that other reforms are made to the bail administration process (such as screening all arrestees for an individualized bail bond determination, having prompt bail bond hearings, using a professional pretrial services agency to supervise defendants, etc.), jurisdictions will likely find that money bail bond schedules are unnecessary for the reasons set forth in this paper. If a jurisdiction chooses to use such a schedule, they should be used only: (a) for cases involving the least serious offenses, for which the court has determined that the individual charged with this type of offense is not a danger to the public; (b) when financial conditions of release is directly linked to assuring an individual defendant’s presence in court; and (c) where a money bail bond amount has been mandated by statute (but only until such a statute has been repealed: Because statutorily mandated bail bond amounts suffer from the same deficiencies as money bail bond schedules, local jurisdictions should seek their repeal).**

### **(iii) Compensated Sureties**

A brief overview of the compensated surety process in Colorado is provided on the website of a Colorado defense attorney:

[t]his process involves a contractual undertaking guaranteed by an admitted insurance company having adequate assets to satisfy the face value of the bond. The bail agent guarantees to the court that they will pay the bond forfeiture if a defendant fails to appear for their scheduled court appearances. The bail agent’s guarantee is made through a surety company and/or by pledging property owned by the bail agent.

For this service, the defendant is charged a premium (typically 10% of the bail amount in Colorado). For example, if the bail amount [is] \$10,000.00, the premium charged is \$1,000.00. Prior to the posting of the surety bond, the defendant, friend, or relative must contact a licensed bail agent. Once a bail agent is contacted, an interview or appointment will be immediately scheduled.

By involving the family and friends of a defendant, as well as through the acceptance of collateral, the bail agent can be reasonably assured that the

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charges can be changed greatly during the adjudication process – can contribute to over-charging and unnecessary detention.”

<sup>317</sup> See *Id.* Std. 2.5 (f), and commentary, at 40.

<sup>318</sup> Prosecution Standard s, *supra* note 16, Std. 45.6 (e), at 146.

defendant released on a surety bond will appear to all of his/her court appearances.

After this procedure is completed, the bail agent will post a bond for the full bail amount, financially guaranteeing the defendant's return to court is as scheduled.

With money on the line, the bail agent has a financial interest in supervising bailees, and ensuring that they appear in court each and every time the court orders them to appear. If the defendant does not appear in court (skips), the bail agent has the time and the financial incentive to find the defendant to bring him/her to court.<sup>319</sup>

Beyond mere descriptions of the process, however, the literature contains little that is flattering to the compensated surety industry. Since the creation of this industry in the late 1800s, it has faced mostly harsh criticism, with only an occasional study or report advocating this uniquely American method of bail administration.<sup>320</sup> Indeed, as author F.E. Devine observed, except for the United States and the Philippines, "the rest of the common law heritage countries not only reject [commercial bail], but many take steps to defend against its emergence. Whether they employ criminal or only civil remedies to obstruct its development, the underlying view is the same. Bail that is compensated in whole or in part is seen as perverting the course of justice."<sup>321</sup> Authors John Clark and D. Alan Henry summed up several of the common critiques of the commercial money bail bond industry:

Obtaining the services of a commercial bail bonding agent can be beyond the reach of indigent defendants, leaving them detained until trial. There have been repeated examples of commercial bail bonding agents exerting a corrupting influence on the pretrial release process. Another problem is that the industry is

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<sup>319</sup> *How Bail Works*, found at <http://www.hmichaelsteinberg.com/bail.htm>.

<sup>320</sup> As the American Bar Association notes:

[t]here have been numerous critiques of the compensated surety system, dating back to at least the 1920's. See, e.g., Roscoe Pound and Felix Frankfurter, eds., *Criminal Justice in Cleveland: Reports of the Cleveland Foundation Survey of the Administration of Criminal Justice in Cleveland, Ohio* (Cleveland: The Cleveland Foundation, 1922; reprinted, Montclair, NJ: Patterson Smith, 1968), pp 290-92; Arthur L. Beeley, *The Bail System in Chicago* (Chicago: University of Chicago Press, 1927); Caleb Foote, "Compelling Appearance in Court: Administration of Bail in Philadelphia," 102 *University of Pennsylvania Law Review* 1031 (1954); Note, "A Study of the Administration of Bail in New York City," 106 *University of Pennsylvania Law Review* 693 (1958); Daniel J. Freed and Patricia M. Wald, *Bail in the United States: 1964* (Washington, D.C.: U.S. Department of Justice and the Vera Foundation, Inc., 1964); Ronald Goldfarb, *Ransom: A Critique of the American Bail System* (New York: John Wiley & Sons, 1968); Paul Wice, *Freedom for Sale: A National Study of Pretrial Release* (Lexington, MA: D.C. Heath & Co., 1974); John S. Goldkamp, *Two Classes of Accused: A Study of Bail and Detention in American Justice* (Cambridge, MA: Ballinger, 1979); M.L. Kaufman, "An Analysis of the Powers of Bail Bondsmen and Possible Routes to Reform," 15 *New York Law School Journal of Human Rights* 287 (1999).

ABA Standards, *supra* note 7, at 46, n. 18; See also NAPSAs Standards, *supra* note 3, at 18, n. 16. To this list can be added Kennedy & Henry, *supra* note 135, 1994 version at 3 (listing "common points made about the worth of commercial surety bail – in the context they usually appear – and the opposing facts"). But see Eric Helland & Alexander Tabarrok, *Public versus Private Law Enforcement: Evidence from Bail Jumping*, 47 *J. of L. and Econ.* 93 (2004); Michael K. Block, *The Effectiveness and Cost of Secured and Unsecured Pretrial Release in California's Large Urban Counties: 1990-2000*.

<sup>321</sup> F.E. Devine, *Commercial Bail Bonding: A Comparison of Common Law Alternatives* (New York, Praeger, 1991), at 201; See also *Illegal Globally, Bail for Profit Remains in U.S.*, *New York Times* (January 29, 2008).

designed only to assure appearance of defendants in court, leaving no consideration for community safety risks. Finally, and most important, the goal of the commercial bail bonding agent – to maximize profits – provides no reconciliation of the two conflicting goals of the pretrial release decision making process [i.e., to allow pretrial release to the maximum extent possible, and to assure that the accused appears in court and will not pose a threat to the public’s safety].<sup>322</sup>

As noted previously, Kentucky and Wisconsin have prohibited the use of compensated sureties.<sup>323</sup> In 1963, Illinois became the first state to enact a ten-percent deposit bail statute, a law which, by design, effectively eliminated the commercial money bail bond industry in that state.<sup>324</sup> Likewise, in Oregon there is no statutory authorization for release on surety bond; a defendant can only be released from custody on conditional release, deposit bond, or on his own recognizance.<sup>325</sup> Even in those states in which the industry thrives, there have been attempts to “bypass” the need for commercial money bail bondsmen. A review of state cases reveals both judges and sheriffs who have withstood attacks from the bail bond industry for adopting policies that have eroded the commercial surety business.<sup>326</sup>

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<sup>322</sup> Clark & Henry, *Goals*, *supra* note 5, at 21 (footnotes omitted).

<sup>323</sup> Kentucky Rev. Stat. § 431.510 states “[i]t shall be unlawful for any person to engage in the business of bail bondsman . . . or to otherwise for compensation or other consideration: (a) Furnish bail or funds or property to serve as bail; or (b) Make bonds or enter into undertakings as surety; for the appearance of persons charged with any criminal offense or violation of law or ordinance punishable by fine, imprisonment or death, before any of the courts of this state, including city courts, or to secure the payment of fines imposed and of costs assessed by such courts upon a final disposition.” Kentucky also has a statutory presumption favoring pretrial release on recognizance (§ 431.520), as well as a 10% deposit bond option (§ 431.530). The Kentucky law was upheld in *Stephens v. Bonding Ass’n of Ky.*, 538 S.W. 2d 580 (Ky. 1976); *see also Johnson Bonding Co. v. Ky.* 420 F. Supp. 331 (E.D. Ky. 1976) (finding statute did not violate the Eight Amendment or Due Process Clauses of the U.S. Constitution). Wisconsin Statutes state that “no surety acting under [the chapter on bail and other conditions of release] shall be compensated for acting as such a surety.” Wis. Stat. § 969.12 (2). Wisconsin does not have a statutory presumption of release on recognizance, but it does allow release upon deposit of cash in lieu of sureties (§ 969.02 (2)), and allows acceptance of credit and debit cards to be substituted for cash (§ 969.02 (2m)). The Wisconsin Statute restricting monetary bail bondsmen was upheld in *Kahn v. McCormack*, 299 N.W. 2d. 279 (Wisc. App. 1980).

<sup>324</sup> *See* Ill. Stat. Ch. 725 §§ 5/110-7, 8. As reported in the proceedings from the National Conference on Bail and Criminal Justice, Professor Charles Bowman stated that “as originally submitted to the legislature, we intended the 10 per cent deposit provisions to put the bail bondsman out of business, and restore the control of pre-trial detention to the courts, where it belongs.” Nat’l Conf. on Bail and Crim. Just. (Washington, D.C. 1965), at 245. Unlike other states that have enacted deposit monetary bail bonds as options, as enacted in Illinois the law made the 10 percent cash deposit and a deposit of the full amount of the monetary bond in cash or securities the exclusive methods of posting a monetary bail bond. The law was part of a twenty-point program to address issues associated with bail bonds and pretrial detention. *Id.* at 241-244. The United States Supreme Court upheld Illinois’ law in *Schilb v. Kuebel*, 404 U.S. 357 (1971), including the state’s imposition of an additional processing fee on top of the ten-percent deposit. After Illinois, a number of states passed laws creating some form of a deposit monetary bail bond system. By 1988, the Pretrial Services Resource Center reported that 28 states, the District of Columbia, and the federal system allowed percentage deposit of a monetary bail bond. *See* D. Alan Henry, *Ten Percent Deposit Bail* (Pretrial Servs. Res. Ctr., 1980 and 1988 update). For more information about the Illinois, Kentucky, and Wisconsin statutes, *see* Vitauts M. Gulbis, *Validity of Statute Abolishing Commercial Bail Bond Business*, 19 A.L.R. 4<sup>th</sup> 355, (Lawyer’s Co-operative Pub. Co., 1983, West Group, 2007).

<sup>325</sup> Or. Rev. Stat. §§ 135.255, 260, 265.

<sup>326</sup> In Indiana, a suit arguing that a city court judge’s policy of setting ten-percent deposit for monetary bail bonds had deprived the commercial bail bondsmen of equal access to defendants was dismissed on immunity grounds. *Smith v. City of Hammond*, 848 N.E. 2d. 333 (Ind. Ct. App. 2006). In Mississippi, a federal district court held that a

Despite attempts to eliminate what has been called the “odorous” business of commercial sureties,<sup>327</sup> the use of commercial surety bonds nationally is increasing. In a 2007 report for the Bureau of Justice Statistics covering pretrial release of felony defendants in the 75 most populous U.S. counties from 1990-2004, Cohen and Reaves observed an overall trend away from non-financial releases to financial releases, “accompanied by an increase in the use of surety bonds and a decrease in the use of release on recognizance (ROR).”<sup>328</sup> According to that report, “surety bond surpassed release on recognizance in 1998 as the most common type of pretrial release.” Specifically, “[f]rom 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.”<sup>329</sup>

Continued reliance on commercial money bail bonds in spite of relentless criticism toward the compensated surety industry is puzzling. According to Clark and Henry,

[a] number of theories have been advanced as to why the commercial bail bonding industry continues to survive despite so many calls for its elimination. One is that, despite these numerous calls and the presentation of alternative methods, there is still a lack of awareness in many jurisdictions of these alternatives. Similar to this theory is one that holds that judicial officers fall easily into making decisions ‘on the basis of local custom and practice’ in which commercial bail bonding has always been the prevalent pretrial release mechanism.

Another author has posited that judicial officers prefer having an all-purpose decision option that has the appearance of an actual decision, but in reality takes responsibility for whether the defendant obtains release out of their hands. Still another theory postulates that pretrial services programs that make recommendations for release on money bail prefer to have the ability to avoid a more direct decision.<sup>330</sup>

In Colorado, the commercial money bail bond industry is also flourishing. Colorado law does not authorize a “deposit bond” option, and the Colorado Supreme Court has barred the practice of allowing defendants to pay a percentage of their set money bail bond amounts without such statutory authority in *People v. District Court (1978)*, discussed previously.<sup>331</sup> Moreover, Colorado law does not contain a statutory presumption for release on personal recognizance; instead, personal recognizance bonds are only one option, requiring the district attorney’s consent in many cases. As a result, relatively few of these personal recognizance bonds, with or without accompanying supervision by a professional pretrial services agency, are actually set.<sup>332</sup>

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sheriff who revised his bail bonding policy and dropped a particular bondsman from an approved list did not violate that bondsman’s constitutional rights. See *Baldwin v. Daniels*, 250 F.3d 943 (N.D. Miss. 2001).

<sup>327</sup> *Schilb*, 404 U.S. at 359.

<sup>328</sup> Cohen & Reaves, *supra* note 1, at 2.

<sup>329</sup> *Id.*

<sup>330</sup> Clark & Henry, *Goals*, *supra* note 5, at 21-22 (footnotes and internal quotation omitted).

<sup>331</sup> See discussion at Section III., D., (vi) of this document.

<sup>332</sup> According to Jefferson County Detention Facility data, of all inmates released by posting a bail bond in October 2007, only 16.7% left on a personal recognizance bond.



Both the ABA and NAPSA Standards recommend three general options for release when a court finds that release on financial conditions is absolutely necessary: (1) unsecured bond, where the defendant is released upon his promise to pay the full amount of a money bail bond; (2) ten-percent deposit bond; or (3) a bond secured by deposit of the full amount of money in cash or property, or by “the obligation of qualified, *uncompensated* sureties.”<sup>333</sup> In Colorado, however, release on financial conditions requires “execution of the bond in the full amount of the bail” to be secured by cash (or stocks and bonds), property, or “by sureties worth at least one and one-half the amount of bail set in the bond or by a bail bonding agent or a cash bonding agent qualified to write bail bonds.”<sup>334</sup> Because (a) property bonds are complicated and rarely used,<sup>335</sup> (b) cash bonds can be difficult for many defendants to pay, and (c) non-commercial surety bonds must be secured at one and one-half of the amount of a money bail bond,<sup>336</sup> for many defendants a commercial bail bondsman is often the only viable option. Data obtained from the Jefferson County Detention Facility show that in any given month, 50% of persons released on bond from the Facility use a compensated surety, compared to 27% who pay cash to secure their release, and 17% who are released on personal recognizance (with or without co-signors).<sup>337</sup>

The large population of persons who are forced to rely on commercial money bondsmen find themselves in a flawed process. Indeed, the commercial surety process today retains the same fundamental flaws that prompted previous editions of the ABA Standards to conclude that “[t]he professional bondsman is an anachronism in the criminal process. Close analysis of his role indicates he serves no major purpose that could not be better served by public officials,”<sup>338</sup> and that “the commercial bond business has been one of the most tawdry parts in the criminal justice system. . . . Even if bonding agents were effective in returning absconding defendants, however, it is questionable policy for the criminal justice system to rely heavily on them.”<sup>339</sup>

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<sup>333</sup> ABA Standards, *supra* note 7, Std. 10-5.3, at 110; NAPSA Standards, *supra* note 3, Std. 2.5, at 38 (emphasis added).

<sup>334</sup> Colo. Rev. Stat. § 16-4-104 (1) (b).

<sup>335</sup> Some jurisdictions in Colorado do not allow property bonds. See *Your Guide to Bail Bonds in Colorado*, Colo. Div. of Ins. & Office of the State Ct. Admin., at <http://www.courts.state.co.us/> (June 1998). Securing a property bond initially requires that either the defendant or someone willing to post the bond actually own real property located in the State of Colorado. To obtain a property bond in the First Judicial District, defendants must provide warranty or quit claim deeds, current tax receipts, county assessor valuations, notarized mortgage documents, and evidence of title from a title insurance company. Equity in the property must be one and one-half times the amount of the bond, and all parties on the deed as owners must be present with identification.

<sup>336</sup> An informal survey of Colorado jurisdictions reveals that non-commercial surety bonds are rarely, if ever, processed.

<sup>337</sup> Of inmates released by posting a bail bond in October 2007, the breakdowns are as follows: 49.9% were released through a commercial surety, 27.3% were released by another person paying cash, 15.4% were released on personal recognizance, 4.6% were released after paying a municipal fine, 1.3% were released on personal recognizance with a co-signor, .5% were released on a property bond, and .3% were released by inmates paying cash themselves. This latter category of inmates could be proportionately increased. While still a relatively new and somewhat controversial practice, sheriffs in other United States jurisdictions have allowed payment of monetary bail bond amounts by credit or debit cards, which increases the number of inmates able to bond themselves out, thereby reducing the jail population and county costs. See *Bail Yourself Out of Jail – With a Credit Card*, at <http://www.creditcards.com/jail-bail-credit-card.php>; *Get Out of Jail, Flee? Firms Warn Bond ATM Risky*, at <http://aboutbail-bailbonds.blogspot.com/2007/08/get-out-of-jail-flee-firms-warn-bond.html>.

<sup>338</sup> ABA Standards (1<sup>st</sup> Edition) 10-5.4 (commentary), *quoted in* ABA Standards, *supra* note 7, Std. 10-1.4 (f) (commentary), at n. 17.

<sup>339</sup> ABA Standards (2d Ed. Revised) 10-5.4 (commentary), *quoted in* ABA Standards, *supra* note 7, Std. 10-1.4 (f) (commentary), at n. 17.



Despite the compensated surety industry's contentions, it appears that "reliance on private business persons does not improve defendant appearance in court nor safeguard public safety."<sup>340</sup> And, indeed, the authors could not locate any defendant failure-to-appear outcome data published by any Colorado commercial bail bondsmen.<sup>341</sup> Moreover, as discussed previously, the purpose of a money bail bond contract is statutorily limited to assuring the defendant appears in court. Thus, money bail bondsmen are under no obligation to deter criminal behavior, and therefore do not offer supervision to assure that a defendant does not commit another offense while on pretrial release.<sup>342</sup> Apart from this logical argument, however, "there are no definitive research findings on the relative effectiveness, in terms of minimizing pretrial crime, of release on commercial surety bail compared with release on the recommendation of a professional pretrial services program."<sup>343</sup>

Moreover, far from being an industry with the time and the financial incentive to find the defendant to bring him/her to court, money bail bondsmen rarely take the time to track down defendants on their own (primarily relying instead upon the nation's law enforcement officers for this task), and they often do not pay even when the bonds are forfeited.<sup>344</sup>

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<sup>340</sup> Kennedy & Henry, *supra* note 135 (1996 Ed.), at 20.

<sup>341</sup> Such data would only be relevant for defendants who (a) are released on a surety bond posted by a money bail bondsman and (b) are not simultaneously supervised by a professional pretrial services agency, so that any confounding effects from the defendant's supervision are not included in the outcomes attributed to the bail bondsman.

<sup>342</sup> In Colorado, public safety is addressed in many sections of the bail statutes. As noted previously, Colorado has a statutory procedure to deny a bail bond for certain defendants when "the court finds that the proof is evident and the presumption is great as to the crime alleged to have been committed and finds that the public would be placed in significant peril of the accused were released on bail" for certain crimes of violence. Colo. Rev. Stat. § 16-4-101 (1) (b). If a defendant is not denied bail under this section, a judge will consider several criteria related to public safety, *see id.*, § 16-4-105 (1), in order to select the amount and type of the bail bond, with whatever conditions the judge feels are necessary to protect the public, *see id.*, § 16-4-105 (3) (d). Nevertheless, because Colorado law mandates that "the amount of bail and type of bond shall be sufficient to assure the conditions set forth in the bail bond," judges are somewhat limited by their jurisdiction's resources when it comes to setting bail bonds. Jurisdictions with pretrial services programs employing a number of supervisory practices that lessen the likelihood of a defendant's new arrest, for example, will have advantages over jurisdictions that do not have such programs when it comes to adequately assuring the public safety.

<sup>343</sup> Mahoney, *et al.*, *supra* note 112, at 64; *see also* Kennedy & Henry, *supra* note 135, at 16 ("research shows no real difference in rearrest rates between defendants the courts release conditionally and those who post sureties. [National Pretrial Reporting Program] results for 1992 show that surety releases had a nine percent rearrest rate while conditional releases had a 10 percent rate. A 1992 study of pretrial release in Connecticut found that 10 percent of conditional releases were rearrested compared to 17 percent of financial releases"). The most recent multi-jurisdictional study also reports little difference between re-arrest rates for defendants released conditionally (15%) and defendants released on surety bonds (16%). Cohen & Reaves, *supra* note 1, at 9, Table 7.

<sup>344</sup> *See* Kennedy & Henry, *supra* note 135 (1996 Ed.), at 9 ("The West Memphis, Arkansas, *Evening Times* reported that uncollected bond forfeitures in the Crittenden County Quorum Court dating back to January 1995 totaled \$2,142,400. The *Houston Chronicle* reported 20,000 outstanding bond forfeitures filed in Harris County, Texas between 1985 and 1991 and as much as \$100 million in unpaid forfeitures dating from the 1960s. The *Valley Morning Star* (Harlingen, Texas) reported that court officials in Cameron County, Texas collected \$42,085 in bond forfeitures from 1990 to 1992, just over five percent of the total owed by bondsmen.") Data from the Colorado State Court Administrator's Office show that, as of March 1, 2008, there were approximately 90 (15% of "active status" agents) commercial sureties "On The Board" for having failed to pay on bonds that had gone to judgment.

Furthermore, state statutes appear to contain contradictory information regarding bail bond forfeiture. Colo. Rev. Stat. § 16-1-104 (3) states, "'Bail' means an amount of money ...to assure that he will appear before the court ...or that he will comply with other conditions set forth in a bond." However, Statue allows money bonds to be

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forfeited only when a defendant fails to appear. Thus, a defendant's release on bond may be revoked if the defendant fails to comply with any condition of the bond, however, the monetary amount can only be forfeited if the defendant fails to appear for scheduled court appearances.

There are two forfeiture statutes. One is applicable to bonds written by a compensated surety (Colo. Rev. Stat. § 16-4-112), and the second applies to all other bonds (Colo. Rev. Stat. § 16-4-109). Colo. Rev. Stat. § 16-4-112 states, "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." Additionally, Colo. Rev. Stat. § 16-4-109 (2) states, "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." There is no forfeiture language indicating a money bail bond can be forfeited for failing to comply with bond conditions other than failure to appear, such as committing a felony, violating a restraining order, or being non-compliant with electronic position monitoring or drug testing. And, interestingly, whereas statutes applying to all types of money bonds allow the court to declare forfeiture if the defendant fails to appear, only Colo. Rev. Stat. § 16-4-109, which applies to all types of money bail bonds except those written by compensated sureties, requires it. However, Colo. Rev. Stat. § 16-4-109 (3) does allow the court to set aside a forfeiture.

The Jefferson County Clerk of Court reports that the court typically declares all bail bonds forfeited if the defendant fails to appear for his or her scheduled court hearing. When the court declares a bond forfeited, a warrant is issued for the defendant's arrest, with a new (often higher) monetary amount set by the court. In some cases, the warrant orders that the defendant be held with no bond until he or she appears before the court. Juvenile warrants routinely carry no bond and contain the instruction "bond to be set at detention hearing."

Statute requires that a Notice of Bond Forfeiture be mailed within ten days to the entity who posted the bail bond (e.g., defendant, co-signor, commercial surety, bail insurance company). In the First Judicial District, forfeiture notices are not usually sent to defendants who posted cash or PR bonds. Because cash bonds are already posted in full, the court typically enters judgment the same day as the order to forfeit and the money is paid to the state treasury. PR bonds in the First Judicial District always have an unsecured monetary amount attached to them as a promise to pay if the defendant fails to appear, and/or may have a co-signer. However, while PR bonds are forfeited by courts upon failure to appear, the courts typically do not follow through with sending notice to the appropriate parties to start the collection process. Thus, the payment of the money associated with the PR bond is almost always an unenforced condition of bail bond, raising the question of the utility, and appropriateness, of the court's use of this condition or, at the least, its failure to enforce the condition.

Compensated sureties have the right to request a show cause hearing upon receiving notice of forfeiture; however, the Jefferson County Clerk of Court reported that this is very rare. Defendants with a compensated surety bond generally have 30 days from date of forfeiture to appear and surrender to the court or otherwise satisfy the court that this is impossible through no fault of the defendant. If the defendant does not appear in the 30 days and the court is not satisfied by the circumstances of the defendant's absence, judgment is entered for the full amount of the bail bond. Execution of this judgment without a show cause hearing is automatically stayed for an additional 90 days. The bond forfeiture must be paid by the 120<sup>th</sup> day following the failure to appear unless the defendant appears in court or is in custody, or the court grants an additional stay of execution or vacates the judgment. If the forfeited bond is not paid, the name of the commercial bonding agent is placed on Colorado Judicial Branch's On The Board Report, which lists bonding agents who are prohibited from executing any further bonds in the state until the forfeiture judgment is satisfied or discharged by the court. If the forfeiture judgment remains unpaid for 30 days after the bonding agent's name is placed On The Board, notice is sent to the underwriting insurance company, and if the judgment is still not paid within 15 days of this notice, the name of the insurance company will be placed On The Board and will thus be prohibited from executing any further bail bonds in the state until the forfeiture judgment is satisfied or discharged. A complaint may be sent to the State Division of Insurance for such forfeiture violations.

The Jefferson County Clerk of Court reports that relatively few compensated sureties get placed On The Board. She notes that the status of "On The Board" for a bondsman has become a serious issue since enhancements to the statewide court computer system over the past seven years. Previously, the On The Board report was administered manually. A court clerk would place a commercial bail bondsman On The Board and send a notice only to the local jail. Because of non-communication among the On The Board reports within each county, a commercial bail bondsman On The Board in one county would still be allowed to post bonds in any other county. This limitation has been fixed, and currently the On The Board report is automatically updated and is available statewide through the Judicial Branch's web site. As a result, very few bond judgments remain unpaid after 120 days.

In Jefferson County, commercial money bail bondsmen rarely locate or apprehend a defendant who has failed to appear. Four major law enforcement agencies in Jefferson County (i.e., Jefferson County Sheriff's Office, police departments from the cities of Lakewood, Arvada, and Wheat Ridge) have jurisdiction over 87% of the county's population. These agencies report that commercial money bondsmen notify them of the defendants' whereabouts for less than 1% of their adult arrests. In addition, of all inmates released from the Jefferson County Detention Facility in 2006, bondsmen transported defendants for booking into the Facility for less than one-half of 1% of all bookings. Thus, almost all defendants with warrants for failure to appear are located, arrested, and booked into the Jefferson County Detention Facility by one of the sixteen law enforcement agencies operating within the county.

A discussion of compensated sureties would not be complete without reference to the industry's documented history of abuse and corruption, and its primary reliance on political influence rather than performance to sustain itself. In 1985, the year that the ABA labeled the commercial money bail bond business "tawdry," it also wrote that the bail bond industry was "always vulnerable to predatory and illegal practices."<sup>345</sup> This statement is still true today; recent Colorado examples of the kind of abuse and corruption reported in the press include criminal prosecutions against bondsmen for waiving fees or collateral in exchange for defendants committing criminal acts, such as manufacturing methamphetamine, or in exchange for sex.<sup>346</sup>

For their continued existence, commercial bail bondsmen appear primarily to rely on their political connections with members of the legislative and executive branches of state and local government rather than on their documented effectiveness of providing service to the courts. The Colorado Department of Regulatory Agencies' Division of Insurance maintains a list of all authorized bail bond agents and a list of all insurance companies authorized to sell bail bonds in Colorado. A search on the Division's Campaign Finance Database reveals that Colorado bail bondsmen and insurance agencies have made political contributions over at least the past 10

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For all bond types not involving compensated sureties, Colo. Rev. Stat. § 16-4-109 (2) states that the court may enter judgment for the amount of bail and court costs if the defendant does not appear or otherwise satisfy the court within 30 days from the date of forfeiture, however, Colo. Rev. Stat. § 16-4-110 requires the court to issue a citation, served personally or by certified mail, to the obligor and hold a show cause hearing. At the conclusion of this hearing, the court may enter a judgment. There is no statutory mandate for a stay of execution on this judgment as there is for those with a compensated surety. However, as noted above, the process described in statute is not typically followed in all cases in Jefferson County. Cash bonds posted by the defendant typically have a judgment entered on the same date as the forfeiture, and PR bonds are not pursued because of the large workload demand that would be placed on the court clerks

Colo. Rev. Stat. section 16-4-109 (3) states that for all bonds except those written by compensated sureties, the court has broad discretion to set aside a forfeiture order, but not a judgment on a forfeiture, "if it appears that justice so requires." For bonds written by compensated sureties, Colo. Rev. Stat. section 16-4-112 (5) (h) states that the court may order that a forfeiture judgment be vacated and set aside or stay the execution, "if it appears that justice so requires."

Because of the way the court's database is structured and the impracticality of going through individual paper files, we were unable to obtain data on the percentage of bonds posted that were later forfeited with judgments entered and payments made. We were also unable to determine how often and for what reason a forfeited bond does not have a judgment entered or the forfeiture or judgment is set aside.

<sup>345</sup> *American Bar Association Standards for Criminal Justice (1985 Ed.)*, Std. 10-5.5 (1985), at 114, 115.

<sup>346</sup> See Attorney General Salazar, District Attorney VanMeveren, and Larimer County Sheriff Alderden Announce Indictments in Bail Bonds for Sex Scheme (1/29/03), at [http://www.ago.state.co.us/press\\_detail.cfm?pressID=273](http://www.ago.state.co.us/press_detail.cfm?pressID=273); Attorney General Suthers Announces Sentencing of Loveland Bail Bondsman (3/28/06), at [http://www.ago.state.co.us/press\\_detail.cfm?pressID=768](http://www.ago.state.co.us/press_detail.cfm?pressID=768).

years to candidates for the Colorado General Assembly Senate and House, Governor, Attorney General, District Attorney, and County Commissioner, as well as to political campaign committees. These political contributions have been made to candidates and campaigns (a) associated with both major political parties and (b) that won or lost the election. Many of the larger contribution amounts were made to the Colorado Surety Coalition, which in turn, made some smaller contributions to candidates or campaigns. Additionally, at the local level (including in Colorado), commercial bail bondsmen have historically approached county commissioners, the district attorney, or the sheriff in an attempt to persuade these officials that commercial bail bondsmen can provide the same services as the county-funded professional pretrial services agency, but at no cost to the County.<sup>347</sup> In addition, commercial bail bondsmen's arguments are most often supported by propaganda rather than appropriately measured outcome data.<sup>348</sup> Thus, the argument that commercial bail bondsmen provide the same service as the local pretrial services agency is without merit, of course, for the reasons articulated throughout this paper.

Given the history of abuse and corruption, the political nature of the industry, and failure to produce outcomes important to the court, understandably, all three major national standards on pretrial release advocate elimination of compensated sureties. Specifically, the ABA Standards recommend:

[c]onsistent with the processes provided in these Standards, compensated sureties should be abolished. When financial bail is imposed, the defendant should be released on the deposit of cash or securities with the court of not more than ten percent of the amount of the bail, to be returned at the conclusion of the case.<sup>349</sup>

Likewise, the Prosecution Standards recommend abolition of compensated sureties with a preference for a ten percent deposit release process,<sup>350</sup> and NAPSA describes its relevant recommendation as a "flat statement that compensated sureties should be abolished."<sup>351</sup>

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<sup>347</sup> One of this paper's authors telephoned a commercial bail bondsman to obtain more information on the process of using a commercial surety in Colorado. During the conversation, the bail bondsman stated that he often advises family members to wait for the court to lower the monetary amount of a defendant's bail bond, so that their nonrefundable payment to the bail bondsmen is substantially less. This advice contradicts, for example, bail bondsmen's contention that they save counties money, because county taxpayers (through the county government) can spend upwards of \$70 to \$100 per day to keep a defendant incarcerated. In contrast, that same defendant could be released on non-financial conditions and under the supervision by the county's professional pretrial services agency, which costs county taxpayers only a few dollars, or less, per defendant per day, and achieves better outcomes.

<sup>348</sup> Two examples of the literature that commercial bail bondsmen use to support their contentions are: (1) "10% Deposit Bail: A Failed System," created by Alleghany Casualty International Fidelity Associated Bond, a bail bond underwriting company. The document contains false statements and a misinterpretation of national court statistics. The document was distributed in the spring of 2008 at the time of the Colorado General Assembly's consideration of House Bill 08-1382, which would have created a 10% deposit-to-the-court bail bond option for defendants. (2) "Surety Companies and Bail Agents Rally to Successfully Amend H.B. 1382," created by or for the HCC Surety Group. This document describes the efforts of and expenses incurred by bail bondsmen, a team of lobbyists, and a public relations firm to remove House Bill 08-1382's deposit-to-the-court language.

<sup>349</sup> ABA Standard, *supra* note 7, Std. 10-1.4 (f), at 42.

<sup>350</sup> Prosecution Standards, *supra* note 16, Std. 45.1 (c) (3), at 140.

<sup>351</sup> NAPSA Standards, *supra* note 3, Std. 1.4 (f), at 18.

Nevertheless, because “bail bonding for profit is deeply embedded in the laws, cultures, and practices of many jurisdictions,”<sup>352</sup> there is still some debate about what jurisdictions should do pending the abolition or disuse of compensated sureties. In some Colorado jurisdictions, courts impose financial conditions (typically provided by a compensated surety) along with conditions that include supervision of the defendant by a pretrial services agency. Indeed, of 10 larger Colorado counties with professional pretrial services agencies, eight follow this practice.<sup>353</sup> “The effect is to make the pretrial services agency a kind of guarantor for the bail bondsman, in effect subsidizing the commercial bail industry by helping to reduce the risk that a defendant released on money bail will not return for scheduled court appearances.”<sup>354</sup> However, the NAPSA Standards recommend against this practice of “doubling-up ‘:

[p]ending abolition of compensated sureties, jurisdictions should ensure that responsibility for supervision of defendants released on bond posted by a compensated surety lies with the surety. A judicial officer should not direct a pretrial services agency to provide supervision or other services for a defendant released on surety bond. No defendant released under conditions providing for supervision by the pretrial services agency should be required to have bail posted by a compensated surety.<sup>355</sup>

Commentary to that Standard provides the following reasoning:

[o]ther provisions of the Standards emphasize that financial bail should be used only if other conditions are insufficient to minimize the risk of nonappearance, and that, if financial conditions are imposed, the bail amount should be posted with the court under procedures that allow for the return of the amount of the bond if the defendant makes required court appearances. There is no reason to require defendants to support bail bondsmen in order to obtain release (and to pay the bondsman a fee that is not refundable even if they are ultimately cleared of the charges), and the practice of providing for supervision by the pretrial services agency simply encourages perpetuation of the undesirable practices associated with commercial bail bonding. It also drains supervisory resources from often understaffed and overworked pretrial services agencies, making it more difficult to supervise the defendants for whom they properly have responsibility.<sup>356</sup>

Although both the Prosecution Standards and the current ABA Standards recommend elimination of compensated sureties, they contain no recommendation for what jurisdictions should do pending their abolition. Nevertheless, commentary to the relevant ABA Standard indicates that the issue was previously addressed by that organization. Now, the commentary simply states that “additional language in those earlier [ABA] editions concerning regulation of

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<sup>352</sup> *Id.*

<sup>353</sup> El Paso County reports that it never “double-supervises” defendants; Adams County reports that it “rarely” does so.

<sup>354</sup> NAPSA Standards, *supra* note 3, Std. 1.4 (g) (commentary), at 19.

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

sureties ‘pending abolition’ has been deleted so as to leave no doubt as to the imperative nature of the recommendation that they be abolished.”<sup>357</sup>

### **General Recommendations:**

**For decades, criminal justice officials have questioned the utility and efficacy of compensated sureties. The industry as it exists today is an anachronism to the present justice system, in which public safety is as (or more) important as court appearance for pretrial defendants. The foundational bases for releasing almost all defendants on financial conditions have been eroded by research findings. The supervision of defendants by a professional pretrial services agency to monitor that defendants’ conditions of bail bond are followed is a logical means for assuring public safety and increasing court appearances.**

**The authors of this paper agree with the three sets of national pretrial standards that the use of commercial bail bonding agents does not further the purpose of bail. However, we also believe that the discussion of the utility of commercial sureties is a secondary issue, and that the primary issue for consideration in the administration of bail for the First Judicial District is its heavy reliance on a money bail bond system, whether commercial or not. A money bail bond system, for the reasons discussed heretofore, is inadequate for preserving the integrity of the judicial process, and is irrelevant to the promotion of public safety.**

**We believe judges should articulate their expectations for entities that claim to supervise defendants in the community, and only those entities willing and able to meet these expectations should be allowed to participate in this important court responsibility. Judges should set their tolerable levels for specific, measurable pretrial indicators for, at a minimum, public safety (e.g., new arrest rate) and judicial integrity (e.g., court appearance rate). Entities (such as a county-funded professional pretrial services program, a private pretrial service contractor, or former commercial bail bondsman) that can meet all of the judges’ expectations should supervise defendants on a fee-for-service basis, eliminating the need for lump sum money bail bond amounts. The fee-for-service scheme<sup>358</sup> allows defendants to pay reasonable amounts for the individualized services necessary to assure their appearance at court and the public’s safety, and will coincide with, as recommended in this paper, a dramatically reduced use of financial conditions of release and money bail bond schedules. Jurisdictions currently without entities that can meet the court’s expectations should either create their own professional pretrial services program function within the county or contract with a private provider that provides the same services. Courts should avoid the redundant use of two entities (such as a pretrial services agency and commercial bail bondsmen) to monitor or supervise the same defendants.**

**Finally, courts should require all of their approved supervising entities to provide to the court regular (i.e., monthly, yearly) reports containing that entity’s summary data for measurable outcomes related to public safety and court appearance.**

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<sup>357</sup> ABA Standards, *supra* note 7, Std. 10-1.4 (f) (commentary), at 45.

<sup>358</sup> The court probably should not revoke a defendant’s bail bond, or incarcerate a defendant, solely on the basis of the defendant’s failure to pay any pretrial service fee.

#### (iv) Pretrial Services Programs

The Pretrial Justice Institute's Pretrial Release and Supervision Training Supplement states that,

[b]alancing the rights of the accused with public safety and system integrity concerns at bail setting requires appropriate information on community ties, prior criminal history, record of court appearance, and compliance with previous court-imposed release. Bail decisions are enhanced further when a release option exists for defendants who cannot be released safely on their own recognizance but who may not warrant pretrial detention.<sup>359</sup>

In short, in order to make appropriate decisions about the type of bail bond and conditions of bond, judges, magistrates, or their designees must have “specific, relevant, timely, and accurate information,” as well as “a range of relevant options from which to choose when making a decision.”<sup>360</sup> Without this information or range of options (as well as the ability to monitor defendants placed on those options), courts are hampered in their ability to safely release defendants into the community pretrial, frustrating several basic and foundational principles of American criminal jurisprudence, including due process, equal protection, and the presumption of innocence.<sup>361</sup> In countless United States jurisdictions, pretrial services agencies are the only entities that ensure that adherence to these important principles is maintained.

As explained previously, pretrial services programs have been in operation in the United States since the original Manhattan Bail Project in 1961. While practices vary across jurisdictions, United States pretrial services programs have evolved to “improve bail setting by providing complete, accurate, and neutral information to the court, [i]dentify those for whom alternatives to pretrial incarceration are appropriate, [and] [m]onitor released arrestees to ensure compliance with court-ordered conditions set to reduce the likelihood of failure to appear or pretrial arrest.”<sup>362</sup>

While pretrial services agencies and programs vary in their organizational structure,<sup>363</sup> these agencies and programs “perform functions that are critical to the effective operation of local

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<sup>359</sup> Kennedy, et al., *supra* note 31, at 13.

<sup>360</sup> Clark & Henry, *Goals*, *supra* note 5, at 7.

<sup>361</sup> *See generally*, VanNostrand, *supra* note 44.

<sup>362</sup> Kennedy, et al., *supra* note 31, at 13. The NAPSA Standards define a pretrial services agency or program “to be any organization or individual whose purposes include providing information to the court to assist in pretrial release/detention decision making and/or monitoring and supervising defendants released on nonfinancial conditions.” NAPSA Standards, *supra* note 3, Std. 1.3 (commentary), at n. 11. More broadly, VanNostrand states that “the field of pretrial release contains two primary sub-fields; pretrial release and pretrial diversion.” Unlike pretrial release, pretrial diversion “is a dispositional alternative for pretrial defendants. Defendants voluntarily enter into a diversion program in lieu of standard prosecution and court proceedings.” VanNostrand, *supra* n. 44, at 3. Diversion is often undertaken by prosecutors’ offices, *see* Prosecution Standards, *supra* note 16, Stds. 44.1-44.8, and, while it overlaps with traditional pretrial release, it presents its own unique challenges. *See also* Clark, *The Role of Traditional Pretrial Diversion in the Age of Specialty Courts* “Expanding the Range of Problem-Solving Options at the Pretrial Stage” (Pretrial Just. Inst., Oct. 2007).

<sup>363</sup> *See* Clark & Henry, *Programming*, *supra* note 110, at 5-8; NAPSA Standards, *supra* note 3, Std. 1.3 (commentary) at 14.

criminal justice systems by assisting the court in making prompt, fair and effective release/detention decisions.”<sup>364</sup> According to commentary to NAPSA Standard 1.3,

[p]retrial services agencies and programs function under a variety of different organizational arrangements. They may, for example, operate as an arm of the court, as a unit of the local corrections or probation department, or as an independent non-profit organization. Importantly, these Standards contemplate that, regardless of the organizational arrangements, the pretrial services agency or program will help support the release/detention decision-making process. Thus, for example, although a pretrial services program may be organizationally housed within a probation department, sheriff’s office, or local corrections department, it should function as an independent entity in providing information to the court and in monitoring and supervising defendants released on nonfinancial conditions. The host agency should recognize and support the unique mission and role of pretrial services, which in some instances may not be congruent of the host entity [which is often the case when the pretrial services function is embedded within the sheriff’s office, for example]. The leadership and staff of the pretrial services agency or program should be committed to minimizing unnecessary detention, assisting judicial officers in making fair and effective decisions concerning the release of defendants, and providing essential monitoring and supervisory services. Their role in obtaining information about the backgrounds, community ties, and other characteristics of arrested defendants is especially important. Lack of reliable information about defendants can lead to either of two undesirable outcomes: the unnecessary detention of defendants who pose no significant risk of nonappearance or dangerousness or, conversely, the release – without appropriate conditions – of defendants who do pose such risks.<sup>365</sup>

The importance of a professional pretrial services function, no matter where it is housed, and no matter how large or small it may be, cannot be overstated. “Pretrial programs are a vitally important part of [criminal justice systems] because they perform functions that, in their absence, are often performed inadequately or not at all.”<sup>366</sup> When these functions are performed well, however, the benefits are significant: “jurisdictions can minimize unnecessary pretrial detention, reduce jail crowding, increase public safety, ensure that released defendants appear for scheduled court events, and lessen the invidious discrimination between rich and poor in the pretrial process.”<sup>367</sup>

Given the variety among pretrial services programs nationally, there have been occasional calls for standardization among programs. In 1979 and 1989, the Pretrial Services Resource Center (now PJI) and the Bureau of Justice Assistance, respectively, surveyed pretrial programs to show “pretrial program administrators how their services and practices compare to those of other programs around the country,” and to “provid[e] guidance for programmatic growth.”<sup>368</sup> In 2003, a report summarizing the results of a third survey were released, describ[ing] the general

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<sup>364</sup> NAPSA Standards, *supra* note 3, Std. 3.1, at 53.

<sup>365</sup> *Id.* Std. 1.3 (commentary), at 14-15 (footnote omitted).

<sup>366</sup> *Id.* Std. 1.3 (commentary), at 15.

<sup>367</sup> Mahoney, *et al.*, *supra* note 112, at 1.

<sup>368</sup> Clark & Henry, *Programming*, *supra* note 110, at vii.



characteristics of pretrial services programs across the county, and “describ[ing] where pretrial services programs stand in relation to one another, where they stand in relation to where they were in 1979 and 1989, and where they stand in relation to the standards set by the American Bar Association and the National Association of Pretrial Services Agencies for services provided by pretrial services programs.”<sup>369</sup> Noting the importance of adhering to national standards, that report identified several important areas “in which improvements are needed to standardize the practices of pretrial services programs,” including (1) conducting investigations on *all* persons accused of a criminal offense, (2) compiling a complete criminal record, (3) assessing risk using objective criteria, (4) regularly reviewing the status of detained defendants, and (5) assessing the program effectiveness by validating their risk assessment instruments, and by calculating accurate failure-to-appear and re-arrest rates.<sup>370</sup>

The three major professional standards on pretrial release stress the importance of jurisdictions having some entity in the criminal justice system to provide an information collection and analysis function, a release recommendation function, and a monitoring or supervisory function (if, in fact, a defendant is released). Prosecution Standard 45.4 states that,

[i]n all cases in which the defendant is in custody and the maximum penalty exceeds one year, an inquiry into the facts relevant to pre-trial release should be conducted by the prosecutor or an agency acting under the authority of the court contemporaneous with the defendant’s first appearance. . . . [and] [w]here appropriate, the inquiring agency should make recommendations to the judicial officer concerning the conditions, if any, which should be imposed on the defendant’s release.<sup>371</sup>

Those Standards also stress a supervision function, especially when a defendant is released on personal recognizance. As to staffing these functions, Prosecution Standard 45.5 (3) states that “[s]upervision of defendants released without bail should be conducted by employees of the court. Adequate funds should be provided to ensure a staff of qualified persons to perform this task.”<sup>372</sup>

The ABA Standards provide a more detailed recommendation:

Every jurisdiction should establish a pretrial services agency or program to collect and present the necessary information, present risk assessments, and, consistent with court policy, make release recommendations required by the judicial officer in making release decisions, including the defendant’s eligibility for diversion, treatment, or other alternative adjudication programs, such as drug or other treatment courts. Pretrial services should also monitor, supervise, and assist defendants released prior to trial, and review the status and release eligibility of detained defendants for the court on an ongoing basis.<sup>373</sup>

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<sup>369</sup> *Id.*

<sup>370</sup> *Id.* at 49-50.

<sup>371</sup> Prosecution Standards, *supra* note 16, Std. 45.4 (b) (1), (4), at 142-43.

<sup>372</sup> *Id.* Std. 45.5 (b) (3), at 145.

<sup>373</sup> ABA Standards, *supra* note 7, Std. 10-1.10, at 54. According to Clark, “Standard 10-1.10 of the Pretrial Release Standards of the American Bar Association lays out the tasks that pretrial services programs should conduct. This standard can be viewed as the objectives for pretrial programs for achieving the goals of maximizing release

The ABA Standards list the functions that a pretrial services agency should perform, including, among other things, (1) making pre-first appearance fact inquiries,<sup>374</sup> (2) administering risk assessments and making recommendations corresponding to those risk assessments to the judge,<sup>375</sup> (3) providing “appropriate and effective supervision” for defendants released pretrial,<sup>376</sup> (4) creating policies for operating (or contracting for) appropriate facilities for the custody, care, and supervision of persons using a range of release options, (5) monitoring defendant compliance with conditions of release, and (6) performing ongoing status checks on detained defendants “for

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while minimizing misconduct.” John Clark, *A Framework for Implementing Evidence-Based Practices in Pretrial Services*, Topics in Community Corrections (U.S. Dept. of Just., Nat’l Inst. of Corr. 2008), at 5.

<sup>374</sup> *Id.* 10-1.10 (b) (i). “Relevant information may be derived from a variety of sources . . . [but] the scope of the inquiry . . . must be limited to the risks of flight or danger posed by the defendant and to release conditions responsive to such risks. To the extent possible, it should include attributes of the defendant relevant to factors that have been determined empirically to be related to flight or crime during the pretrial period and information the court believes is relevant based on its experience in assessing risk and choosing release options.” *Id.* (commentary), at 56-57 (footnote omitted).

<sup>375</sup> As stated by one author, “[t]he role that research can play in addressing issues related to effectiveness, efficiency and equitable treatment cannot be overstated.” John Clark, *A Framework for Implementing Evidence-Based Practices in Pretrial Services*, Topics in Community Corrections (U.S. Dept. of Just., Nat’l Inst. of Corrections 2008), at 9. The relevant ABA Standard notes the ongoing efforts among researchers to identify predictors of defendant performance during pretrial release. *See Id.* at 57, n. 22. To this list may be added recent research on domestic violence defendants in Washington D.C. and New York City. *See Spurgeon Kennedy, Charge Specialty and Revictimization by Defendants Charged With Domestic Violence Offense*, Topics in Community Corrections (U.S. Dept. of Just., Nat’l Inst. of Corrections 2008), at 23; Richard R. Peterson, *Pretrial Rearrests Among Domestic Violence Defendants in New York City*, Topics in Community Corrections (U.S. Dept. of Just., Nat’l Inst. of Corrections 2008), at 33. More locally, ten counties representing roughly 80% of the population in Colorado are currently working to develop research-based policies and practices for pretrial service programs, including a validated pretrial risk assessment instrument to replace the various, more subjectively derived risk assessment instruments currently used in each county. That project, the Colorado Improving Supervised Pretrial Release, or “CISPR” project, is partially funded by an Edward Byrne Memorial Justice Assistance Grant from the U.S. Department of Justice. *See Michael R. Jones and Sue Ferrere, Improving Pretrial Assessment and Supervision in Colorado*, Topics in Community Corrections (U.S. Dept. of Just., Nat’l Inst. of Corr. 2008), at 13. Until recently, researchers were unsure whether a risk assessment instrument developed for one jurisdiction could be used in a differing jurisdiction. In 2007, the Virginia Pretrial Risk Assessment Instrument, developed by Marie VanNostrand, was implemented in Summit County, Ohio, and validated for that population. *See VanNostrand, supra* note 44, at 17-18; *see also Marie VanNostrand, Assessing Risk Among Pretrial Defendants in Virginia: The Virginia Pretrial Risk Assessment Instrument* (Richmond, VA: Department of Criminal Justice Services, 2003); Christopher T. Lowenkamp and Kristin Bechtel, *A Validation of the Summit County Pretrial Risk Assessment Instrument* (Cincinnati, OH: University of Cincinnati, 2007). While the ABA Standards note the usefulness of statistical information about the effectiveness of particular forms of pretrial release, they also caution against relying solely on predictive estimates of release, and emphasize the importance of the court obtaining information from prosecuting and defense attorneys before making the release/detention decision. *See ABA Standard, supra* note 7, Std. 10-1.10(b) (ii) (commentary), at 58. “The Standard also recognizes that pretrial services agencies are in an excellent position to recommend release options that address specific risk factors. . . . Information about risk should be tailored to individual defendants and include both defendant-specific information . . . and case-specific information. . . . Recommendations should match these risk factors with appropriate release options.” *Id.* Std. 10-1.10 (b) (ii) (commentary), at 57-58. The second part of the Colorado CISPR study, noted above, will develop research-based supervision protocols that match pretrial release supervisory techniques to each defendant’s specific risk profile so as to lessen that risk.

<sup>376</sup> “The Standard does not specify the elements of supervision, but rather leaves it up to individual jurisdictions to experiment and develop effective strategies.” *Id.* Std. 10-1.10 (b) (iii) (commentary), at 59.

any changes in eligibility for release options and [to] facilitate their release as soon as feasible and appropriate.”<sup>377</sup>

Similarly, NAPSA Standard 1.3 states that,

[e]very jurisdiction should have the services of a pretrial services agency or program to help ensure equal, timely, and just administration of the laws governing pretrial release. The pretrial services agency or program should provide information to assist the court in making release/detention decisions, provide monitoring and supervisory services in cases involving released defendants, and perform other functions as set forth in these Standards.<sup>378</sup>

Part III of the NAPSA Standards provides even more detailed recommendations that describe “the full range of functions performed by pretrial services agencies and programs, and also addresses issues involving their organization and governance.”<sup>379</sup> Part IV of those Standards discusses the management and oversight of pretrial processes following the release/detention decision, including status reports.

Colorado law permits the establishment of pretrial services programs and sets forth criteria for those programs, which include information gathering, recommendation, and supervisory functions.<sup>380</sup> The First Judicial District provides an example of an established pretrial services program. It consists of two units, the Bond Commissioner/Pretrial Officer Unit (consisting of one supervisor and six pretrial officers, who are sworn bond commissioners), and the Pretrial Services Supervision Unit (consisting of one supervisor and four pretrial case managers). The former Unit interviews defendants who have been booked into the Jefferson County Detention Facility and provides information to the court, the prosecutor, and defense counsel to assist the court with the bail bond-setting process. In 2007, this unit interviewed approximately 4,600 persons booked into the Detention Facility.

The Pretrial Services Supervision Unit provides supervision for defendants who are released from custody before trial “to decrease any unnecessary pretrial incarceration, to ensure that they will appear and answer before the court and to reduce any future criminal acts.”<sup>381</sup> The case managers use a variety of supervision methods to assure compliance with various bond conditions, including global positioning system monitoring, drug and alcohol testing, and frequent (e.g., weekly) face-to-face meetings with defendants. In 2007, the Unit supervised an average daily population of 1,432 defendants who had 12,199 court appearances. For defendants whose supervision was closed during 2007 and who were not still in custody, 96.6% of all court appearances were made, and 92.2% of defendants did not commit a serious enough violation of bond conditions (includes the 5.1% of defendants who were arrested for committing a new crime) to result in Pretrial Services filing a motion to revoke bond with the court.

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<sup>377</sup> *Id.* Std. 10-1.10 (b) (viii), at 55. Commentary to this Standard states that “[p]retrial services agencies should play a proactive role in monitoring detainees’ circumstances and should bring changed circumstances to the attention of the court if it appears that they could affect the individual’s custody status.” *Id.* (commentary), at 61.

<sup>378</sup> NAPSA Standards, *supra* note 3, Std. 1.3 (a), at 13.

<sup>379</sup> *Id.* Std. 1.3 (a) (commentary), at 14.

<sup>380</sup> *See* Colo. Rev. Stat. § 16-4-105 (3). Nevertheless, there are currently only 11 pretrial services programs in Colorado to cover 22 judicial districts, leaving at least 47 counties without professional pretrial services programs.

<sup>381</sup> *See* Jefferson County Pretrial Services Supervision Unit mission at [http://jeffco.us/js/js\\_T117\\_R3.htm](http://jeffco.us/js/js_T117_R3.htm).

Counties without established pretrial services programs must do whatever they can to provide the same essential functions for the court. Pitkin County, for example, does not have a pretrial services program; accordingly, defendants are not interviewed by a neutral third party prior to advisement to assess them on the statutorily mandated criteria for setting a bail bond. Limited information, such as criminal histories and past failures-to-appear, are provided by the District Attorney, but information on a defendant's employment, family ties, character, residences, etc., must be determined at first advisement either through the defendants themselves or through their defense counsel. Because there is no pretrial supervision function in that county, the court also has limited options for imposing conditions on the bail bond. While there is no data currently available to support the assumption, it is logical to assume that courts in smaller jurisdictions would set personal recognizance bonds with few or no conditions for lower risk defendants, and cash, property, or surety bonds with financial conditions for release for higher risk defendants, relying primarily on the compensated surety system presumably to provide the incentive for these defendants to appear for court, and with no entity supervising defendants for public safety concerns.

The above discussion highlights a critical difference between professional pretrial services programs and commercial bail bonding agents. A professional pretrial services program performs (and if it does not, it should) all four important functions for the court: (1) collect and analyze information relevant to each defendant's individualized pretrial risk; (2) make recommendations to the court on the type of bond and conditions of bond that would most likely minimize the risk posed by each individual defendant; (3) supervise defendants while they are in the community by monitoring and encouraging each defendant's compliance with all conditions of bond set by the court, and responding accordingly to a defendant's compliance, as well as to every instance of non-compliance with any bail bond condition; and (4) report to the sentencing judge the defendant's performance while out of custody and in the community – the specific bond conditions with which the defendant complied, all instances of non-compliance with specific bond conditions, and the defendant's response to the pretrial agency's attempts to bring the defendant back into compliance.

In contrast, commercial bail bondsmen only perform a very limited version of the third function (i.e., supervision) listed above. Commercial bail bondsmen neither assess for the court a defendant's risk to public safety or failure to appear, nor do they recommend to the court the type and conditions of bond that would most likely lessen that risk. They simply await the court's bail bond setting, and then make their own assessment of whether they would like to serve as the defendant's for-hire surety. Commercial bail bondsmen's role in supervising defendants, because of statute, is necessarily limited only to assuring the defendant's appearance in court. They statutorily can ignore defendant's non-compliance with all other bond conditions, especially those that were ordered by the court to minimize defendants' risk of harm to victims, witnesses, or the general public. Furthermore, they do not report to the sentencing judge information about the defendant's performance on the various court-ordered conditions of bond while the defendant was out of custody and in the community. Such information is vital to the judge's decision to continue the defendant's release until the sentencing hearing, and about the sentencing decision itself. Finally, most commercial bail bondsmen are currently limited in their (a) training and experience to render effective community-based supervision, such as that provided by a

professional staff from pretrial services, diversion, probation, parole, or community corrections agencies, and (b) ability, or minimally practice, to track their own pretrial outcomes that are appropriately measured and are meaningful to the court. In light of these key differences, it is easy to understand why the statement that “commercial bail bondsmen provide the same service as a government-funded professional pretrial services agency, at no cost to taxpayers,” is plainly false.

Regarding costs, the funds paid to commercial sureties could be redirected to a county funded pretrial services agency. For example, in the First Judicial District in 2008, defendants or family members of defendants made approximately \$2,160,000 in nonrefundable payments to commercial bail bondsmen. This money, or a smaller portion of this money, could be redirected to the county’s pretrial services agency, such that the agency could be all or partially self-funded.

### **General Recommendations:**

**Jurisdictions without professional pretrial services programs are encouraged to implement pretrial service program functions (information collection and analysis, release recommendation, and monitoring or supervision functions) for their judicial districts, either through existing government agencies or through private contractors. Jurisdictions with professional pretrial services programs are encouraged to ensure that these programs are capable of assessing and supervising larger populations of defendants released back into the community, consistent with the remainder of these recommendations.**

**Recognizing that it would be wasteful, if not unethical, to perform these pretrial services functions without using methods that have been measurably demonstrated to be effective, jurisdictions should strive to (1) implement a risk assessment instrument that has been “proven through research to predict risk of failure to appear and danger to the community pending trial,” (2) ensure that the bail bond recommendation is guided by fundamental pretrial legal principles and evidence-based practices, and (3) implement supervision strategies that are effective at meeting the intended outcomes of “provid[ing] reasonable assurance of court appearance and community safety pending trial.”<sup>382</sup>**

### **(v) Delegated Release Authority**

“One of the principal tools used to minimize unnecessary detention in many jurisdictions is the delegation – to law enforcement agencies or, in some places, to a pretrial services program – of authority to release arrested persons before their first court appearance.”<sup>383</sup> This paper has already discussed this delegation to police officers using citations or summonses in lieu of formal arrest and incarceration. Another form of delegated release authority takes place inside of the jail, typically by either jail staff (formed as a pretrial services or release-on-recognizance unit) or through a professional pretrial services program. In jurisdictions that allow it, delegated release authority is usually authorized by statute and then granted by court order, which typically limits

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<sup>382</sup> VanNostrand, *supra* note 44, at 11, 15-17.

<sup>383</sup> Mahoney, *et al.*, *supra* note 112, at 61.

that authority to minor cases.<sup>384</sup> Mahoney, *et. al.*, describe the advantages of delegated release authority:

[p]roponents of delegated release authority cite a number of significant advantages to these procedures, including cost savings, alleviation of pressure on already over-crowded jail facilities, and less reliance on money bail as a means of obtaining pretrial release.

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All of these types of release save public agencies money and intrude less in the lives of defendants than booking the individual into jail and bringing him or her before a judicial officer for a decision about release or detention.<sup>385</sup>

Across the United States, however, authorizing delegated release authority to pretrial services programs may be waning. Comparing a 2001 survey of United States pretrial services programs to two previous surveys, the Bureau of Justice Assistance concluded that,

the percentage of [pretrial services] programs that have such authority in the 2001 survey is half what participants in the two earlier surveys reported. In 1979, 42 percent of programs reported having delegated release authority. The total was 41 percent in the 1989 survey. Only 21 percent reported having delegated release authority in the 2001 survey.<sup>386</sup>

Unlike release pursuant to a citation or summons, the ABA and Prosecution Standards have no detailed recommendations on judicial officers delegating their release authority. Prosecution Standard 45.4 alludes to delegated release authority through language in its recommendation for first appearances: “[e]xcept where the defendant is released on citation *or by some other lawful manner*, it is recommended that every arrested person be taken before a judicial officer without unnecessary delay.”<sup>387</sup> The ABA Standard likewise uses the language “or in some other lawful manner,”<sup>388</sup> but in commentary specifically mentions the “fairly common” use of magistrates or commissioners to make release decisions for the court in jurisdictions across the United States.<sup>389</sup>

The NAPSA Standards address the issue more directly. Standard 1.9, “Delegated authority to release defendants prior to first appearance,” states the following:

[t]he authority to release a defendant who has been arrested and charged with a crime resides with the court. The court should not delegate authority to a pretrial services agency, program, or officer without specific guidelines, consistent with

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<sup>384</sup> Nevertheless, as noted by Mahoney, *et al.*, some programs are also authorized to release defendants charged with non-capital felonies. *Id.* at 62.

<sup>385</sup> *Id.*

<sup>386</sup> Clark & Henry, *Programming*, *supra* note 110, at 8. While the percentage number of programs having delegated release authority has decreased, the overall number of pretrial services programs has increased dramatically, with almost half of the programs in the 2001 survey established after 1990.

<sup>387</sup> Prosecution Standards, *supra* note 16, Std. 45.4 (a), at 142.

<sup>388</sup> ABA Standards, *supra* note 7, Std. 10-4.1 (b), at 77.

<sup>389</sup> *Id.* (commentary), at 81. The ABA recommends that “the decisions of commissioners should be reviewable *de novo* by a judge as soon as one is available.” *Id.*, (citing Std. 10-5.10 (h)).

the laws and rules concerning judicial authority in the jurisdiction that govern the exercise of delegated authority. Such guidelines should at a minimum: (a) limit the delegated authority to cases involving relatively minor charges; and (b) require that the defendant produce satisfactory identification, have no outstanding warrants, have no pending cases, pose no obvious threat to the community or any person, and pose no obvious risk of a failure to appear.<sup>390</sup>

In Colorado, apart from citation release by field officers, delegated release authority primarily takes the form of money bail bond schedules (discussed previously) and the use of designated bond commissioners who may implement those schedules and release persons on their personal recognizance. The authority for this latter form of release derives from a combination of statutory provisions. Pursuant to Colorado Revised Statutes Section 16-4-104, anyone who is bondable pursuant to the Colorado Constitution or Section 16-4-101, “may be released from custody upon execution by him of a personal recognizance.”<sup>391</sup> Nevertheless, Section 16-4-105 (1) (o) states that “[n]o person shall be released on personal recognizance until and unless the judge ordering release has before him reliable information concerning the accused.”<sup>392</sup> That section allows for two methods of obtaining this information: (1) it may be “prepared or verified by a person designated by the court,” or (2) it may be “substantiated by sworn testimony at a hearing before the judge.”<sup>393</sup> Moreover, subsections (m) through (p.5) provide additional restrictions on the release of certain defendants on their own recognizance. For example, subsection (m) provides that a defendant currently on a bond for any felony or class 1 misdemeanor may not be released on personal recognizance unless the District Attorney consents. The Colorado Supreme Court has specifically upheld limitations on personal recognizance that require the District Attorney’s consent as “reasonable and not in violation of the doctrine of separation of powers.”<sup>394</sup>

Concomitantly, there are statutory provisions *requiring* release on personal recognizance in certain cases. Section 16-4-111 states that,

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.<sup>395</sup>

That release is mandatory unless (1) the accused fails to identify himself, (2) the accused refuses to sign a personal recognizance, (3) detention or a surety bond is necessary to prevent “imminent bodily harm,” (4) the accused has no ties to the community and it is likely he will fail to appear, (5) the accused has failed to appear for court in the past, or (6) the accused has outstanding warrants or pending charges for suspension or revocation of parole or probation.<sup>396</sup> Likewise,

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<sup>390</sup> NAPSA Standards, *supra* note 3, Std. 1.9, at 23.

<sup>391</sup> Colo. Rev. Stat. § 16-4-104.

<sup>392</sup> *Id.* § 16-4-105 (1) (o).

<sup>393</sup> *Id.*

<sup>394</sup> *People v. Sanders*, 522 P. 2d 735, 737 (Colo. 1974).

<sup>395</sup> Colo. Rev. Stat. § 16-4-111.

<sup>396</sup> *Id.*

Section 16-2-111, contained in the simplified statutory procedures for criminal cases in the county courts, states that “[a]ny person charged with a misdemeanor or petty offense by complaint filed in the county court shall be admitted to bail or pretrial release as provided in article 4 of this code.” Section 16-2-111 further states:

[w]hen the county judge or judges are not immediately available for purposes of admission to bail or pretrial release of persons arrested and brought to the county court or jail, on charges of committing a misdemeanor or petty offense, such persons may be admitted to bail or be given a pretrial release by an appropriate officer designated by court rule. Unless otherwise provided by statute or supreme court rule, the county court shall provide by rule for the conditions and circumstances under which an admission to bail or pretrial release will be granted pending appearance before the judge, but in no event shall any such rule require conditions or impose liabilities in excess of those required by this code for cases filed in the district court.<sup>397</sup>

Currently there are five judicial districts in Colorado employing the use of bond commissioners, but a good example of how delegated release authority has been implemented pursuant to the statutes is found in Colorado’s First Judicial District. In 1989, the Chief Judge appointed the Jefferson County Pretrial Services Counselors “as preparers and verifiers of information prior to release of an individual for a personal recognizance bond,” and “as Bond Commissioners to implement the Bond Schedule of the First Judicial District.”<sup>398</sup> In 1993, the First Judicial District’s Court Services Advisory Board, the board authorized by statute to establish a pretrial services plan,<sup>399</sup> passed the following policy titled, “Bond Commissioners’ Authority to Release Arrestees on Personal Recognizance:”

[u]pon interview, verification and evaluation, Bond Commissioners are authorized to issue a release from custody on a Personal Recognizance Bond for arrestees scoring FOUR (4) or more points on the Jefferson County Bond Evaluation Scale and not violating any of the conditions of the exclusion list. The Pretrial Services’ officers will require conditions of release consistent with those identified in the Release Agreement and may assign additional Special Conditions they deem appropriate to insure appearance at scheduled court hearings.<sup>400</sup>

The “bond evaluation scale” referenced above uses a system that adds or subtracts points for residence, family ties, employment, prior record, and history of failures-to-appear from an overall total designed to assess the defendant’s suitability for release on personal recognizance. The “exclusion list” is a list of charges for which no personal recognizance bond may be authorized, either by statute or by the Colorado Constitution. Theoretically, such an exclusion list could contain additional charges believed to be excludable for public policy reasons.

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<sup>397</sup> § 16-2-111.

<sup>398</sup> First Judicial District Chief Judge Directive 89-6 (December 6, 1989).

<sup>399</sup> See Colo. Rev. Stat. § 16-4-105 (3) (b).

<sup>400</sup> First Judicial District Court Services Advisory Board (1993). In *People v. Rickman*, 178 P.3d 1202, 1207 (Colo. 2008), the Colorado Supreme Court stated that “[a]bsent statutory authority, a court may not delegate its authority to set bond conditions.” . . . “Likewise, a pretrial services program may not assume authority not granted to it by statute.” This language calls into question any language in the Court Services Advisory Board policy that appears to pass discretion to impose bond conditions to the bond commissioners.



Pursuant to this authority, the Jefferson County Pretrial Services Bond Commissioners can act on behalf of the court to release certain low-risk individuals prior to their first court appearance. In practice, however, the number of persons released through the bond commissioners in the First Judicial District appears low. In 2007 this Unit authorized an average of only six personal recognizance bonds per month. This number is down from 1995, when the Unit released an average of 19 persons per month. There are many hypotheses for this relatively low rate of releases, ranging from factors attributable to staff (e.g., hesitancy), to the statutory requirements for district attorney consent before releasing an individual on a personal recognizance bond if that person has a record of conviction of a class 1 misdemeanor within two years, a felony within five years, or a failure-to-appear on a felony or class 1 misdemeanor within five years of the arrest.

Creating a policy to release certain arrestees pretrial on a personal recognizance bond is not unlike creating a money bail bond schedule that requires, for example, an arrestee to pay \$10,000 in order to be released pretrial, because the defendant's appearance before a judicial officer prior to release from custody is avoided. However, unlike a money bail bond schedule, which allows for the release of arrestees based solely on the nature of the charge, a policy that delegates authority to release based on an individualized assessment of an arrestee can actually further the overall statutory purpose of bail, while minimizing resource demand on the court.

### **General Recommendations:**

**Like money bail bond schedules, the need for delegated release authority through the use of jail staff or pretrial bond commissioners will likely diminish as other bail reforms are implemented (i.e., increased use of citations and summonses, quicker individualized bond hearings, ceasing to primarily rely on financial means of release, etc.). To the extent that delegated release authority is still necessary, it should follow NAPSA's recommendations that delegated release be consistent with the relevant laws and rules and be used only for defendants with relatively minor charges who "pose no obvious threat to the community or any person and pose no obvious risk of a failure to appear."**

### **(vi) First Court Appearance**

"The defendant's first appearance in court following arrest is the start of a judicial process that is important for both the individual and society."<sup>401</sup> Decisions made at this stage are "crucially important,"<sup>402</sup> and have "serious implications for the quality and circumstances of the defendant's life prior to trial as well as for the defendant's ability to defend against criminal charges."<sup>403</sup> These decisions are made while balancing immensely important, but often conflicting societal goals of public safety, individual liberty, and judicial integrity.<sup>404</sup> Given the

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<sup>401</sup> NAPSA Standards, *supra* note 3, Std. 2.2 (commentary), at 28.

<sup>402</sup> *Id.*

<sup>403</sup> ABA Standards, *supra* note 7, Std. 10-4.3 (commentary), at 94.

<sup>404</sup> When jurisdictions have adequately defined their goals and philosophies of pretrial release and detention, the decisions made at first appearance will better reflect those societal definitions. Unfortunately, many jurisdictions allow decisions at this stage to be made without a common purpose or strategy. When that happens, the consequences of the individual decisions themselves ultimately become the justice system's unarticulated, de facto philosophy on pretrial release and detention. Such philosophies rarely coincide with how society thinks a justice system should run. In a 1999 survey by the National Center for State Courts and the Hearst Corporation, results

importance of decisions made at the bail stage of the judicial process, the three sets of national standards address three key areas regarding a defendant's first appearance: (1) promptness; (2) the nature of the first appearance; and (3) the release decision itself.

### ***(a) Prompt First Appearance***

The Prosecution Standards are somewhat sparse on this topic, recommending only “that every arrested person be taken before a judicial officer without unnecessary delay,”<sup>405</sup> and noting that “[t]he intent of the standards is to define ‘unnecessary delay’ within the framework of whatever the courts may define as the constitutional limits of such delay.”<sup>406</sup>

The ABA and NAPSA Standards provide significantly more detail to their recommendations concerning a prompt first appearance. In addition to recommending that defendants “should be taken before a judicial officer without unnecessary delay,” ABA Standard 10-4.1 states that,

[t]he defendant should be presented at the next judicial session within [six hours] after arrest. In jurisdictions where this is not possible, the defendant should in no instance be held by police longer than 24 hours without appearing before a judicial officer. Judicial officers should be readily available to conduct first appearances within the time limits established by this Standard.<sup>407</sup>

For crimes of violence, the ABA Standards recommend that a risk assessment be prepared prior to first appearance, “but a defendant’s first appearance should not ordinarily be delayed in order to conduct in-custody interrogation or other in-custody investigation.”<sup>408</sup> Moreover, “a defendant who is not properly presented should be entitled to immediate release under appropriate conditions unless pretrial detention is ordered as provided in Standards 10-5.8 through 10-5.10.”<sup>409</sup>

For the most part, the NAPSA Standards mirror the ABA Standards, but make no recommendation for crimes of violence and provide a slight variation in wording, recommending

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showed that while 53% of respondents reported some personal involvement with the courts, only 10% of respondents felt that the courts in their communities handled cases in an “excellent” manner; 43% believed that courts are “out of touch” with what is going on in their communities. *See How the Public Views the State Courts, a 1999 National Survey* (Nat’l Ctr. for State Court and The Hearst Corporation, 1999).

<sup>405</sup> Prosecution Standards, *supra* note 16, Std. 45.4 (a), at 142.

<sup>406</sup> *Id.* (commentary), at 149. In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the United States Supreme Court rejected a proposed thirty-six-hour rule for making a probable cause determination in conjunction with a defendant’s first appearance. As noted in the ABA Standards, the opinion in this case “did not address the timing of the initial appearance other than to note that the practice in Riverside County was to conduct the probable cause proceeding in conjunction with the defendant’s first appearance.” ABA Standards, *supra* note 7, Std. 10-4.1 (a) (commentary), at 80, n. 36. Other organizations besides the three primarily discussed in this paper have made recommendations concerning the promptness of the first appearance. *See id.* at n. 35 (ALI Model Code of Pre-Arrestment Procedure recommended bringing defendants before a court within 24 hours; in 1973, the National Advisory Commission on Criminal Justice Standards and Goals recommended that defendants be presented before a judge within six hours of arrest).

<sup>407</sup> ABA Standards, *supra* note 7, Std. 10-4.1 (b), at 77.

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

that a defendant should be taken before a judicial officer “as expeditiously as possible and should in no instance be held in custody longer than 24 hours.”<sup>410</sup>

These fixed time limits have been recommended primarily because many states only require that a defendant be presented “promptly,” or “without unreasonable delay,” which are ambiguous terms that make enforcement of the right to prompt presentment “problematic.”<sup>411</sup> While both the ABA and NAPSA Standards recognize that the U.S. Supreme Court has accepted a 48 hour period as constitutionally acceptable for making probable cause determinations, both sets of Standards recommend the shorter time periods (no more than 24 hours and optimally closer to the ABA’s 6 hours) as “desirable.”<sup>412</sup> Both the ABA and NAPSA Standards contemplate that the shorter time limits “would mean that court hours – or at least the hours that judicial officers are available – would have to change from the typical pattern of functioning only during daytime hours on Mondays through Fridays.”<sup>413</sup> Moreover, the Standards presume that jurisdictions will make the resources available to ensure that the shorter time limits can be met. According to the relevant ABA Standard commentary,

[t]he requirement of prompt presentment is meaningless if judicial officers are not available to conduct initial proceedings within the prescribed period. The Standard contemplates that sufficient means exist to ensure such availability. Such means may include utilizing ‘on-call’ or ‘back-up’ judges, commissioners or magistrates; may involve flexible scheduling of the time of judicial officers, and may make use of recent technology such as interactive video or computer-assisted pretrial services interviews and background investigations.<sup>414</sup>

In Colorado, persons arrested either with or without a warrant must be taken to the nearest available county or district court judge “without unnecessary delay.”<sup>415</sup> For felonies, “[t]hereafter, a felony complaint, information, or indictment shall be filed, if it has not already been filed without unnecessary delay in the proper court and a copy thereof given to the defendant.”<sup>416</sup> For misdemeanors and petty offenses, “[t]hereafter a complaint or summons and complaint shall be filed, if it has not already been filed, immediately in the proper court and a copy thereof given to the defendant at or before arraignment.”<sup>417</sup> By policy in the First Judicial District, prosecutors are given three business days to file formal felony charges.

The “unnecessary delay” language of the statute, coupled with the fact that judges in Colorado typically do not work on weekends, can lead to prisoners being held well beyond the time limits suggested by the ABA and NAPSA standards. For example, in the First Judicial District, a person arrested mid-morning or later on the Friday before a three-day weekend because of a

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<sup>410</sup> NAPSA Standards, *supra* note 3, Std. 2.1, at 25.

<sup>411</sup> ABA Standards, *supra* note 7, Std. 10-4.1 (commentary), at 79.

<sup>412</sup> *Id.* (commentary), at 80.

<sup>413</sup> NAPSA Standards, *supra* note 3, Std. 2.1 (commentary), at 25; *see also* ABA Standards, *supra* note 7, Std. 10-4.1 (commentary), at 80 (“[t]he Standard contemplates that judicial officers will be available for a sufficient number of hours on weekends and legal holidays”).

<sup>414</sup> *Id.* Std. 10-4.1 (commentary), at 81.

<sup>415</sup> *See* Colo. R. Crim. P. 5 (a) (1), (c) (1). There is substantial case law discussing the boundaries of “necessary” and “unnecessary” delay, but the issue is beyond the scope of this paper.

<sup>416</sup> *Id.* Rule 5(a) (1).

<sup>417</sup> *Id.* Rule 5 (c) (1).

Monday holiday must wait until Tuesday at 10:00 a.m. for his or her first court appearance. While some courts use facsimile copies to review warrantless arrest affidavits for probable cause, thus satisfying federal constitutional requirements for probable cause determinations,<sup>418</sup> most courts have not implemented practices to shorten the timeframes between arrest and first appearance. Accordingly, detainees may be held for as many as four days for the setting of a bail bond and for the setting of the court date for the filing of charges.

During 2007, there were 3,633 defendants who (1) had a case filed into the Jefferson County Combined Court and (2) were booked over the weekend or holiday and subsequently stayed at least one extra day in jail to see a judge. If judicial officers were to hold advisements every day, they would hold advisements for an average of 44 defendants on Saturdays, 22 defendants on Sundays, and 21 defendants on Monday holidays.

### **General Recommendations:**

**Jurisdictions should reduce the time limits on first appearances to reflect the national standards, ensuring that arrestees are screened and seen by a judicial officer for an individualized bail bond hearing no later than 24 hours after arrest. Courts should re-allocate their existing resources to carry out this recommendation.**

#### ***(b) Nature of the First Appearance***

The consequences of the decisions made during a defendant's first appearance have been described as "enormous."<sup>419</sup> Nevertheless, those decisions are routinely made under less than ideal circumstances. As noted by the ABA,

proceedings to determine pretrial release often are conducted under circumstances that would not be tolerated at trial. Courtrooms may be noisy and overcrowded, and cases may be treated hurriedly in order to dispose of a large volume of cases in a short period of time. . . . [F]irst appearances should not be conducted in a perfunctory manner. Rather, reflecting the importance of the decisions made at this stage, the proceedings should be held in physical facilities that are appropriate for the administration of justice and conducted with the dignity and decorum to be expected of a court proceeding. Each case should be treated individually, with attention to the information about the case that has been developed by the prosecutor, defense counsel, and pretrial services.<sup>420</sup>

Accordingly, both the ABA and NAPSA standards provide detailed frameworks describing the form and substance of a defendant's first appearance before a judicial officer.<sup>421</sup>

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<sup>418</sup> See David R. Juarez, *The Use of "No Bond" Holds in Colorado*, 32 Colo. Law. 81 (2003); see also *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

<sup>419</sup> VanNostrand, *supra* note 44, at 1.

<sup>420</sup> ABA Standards, *supra* note 7, Std. 10-4.3 (a) (commentary), at 94-95 (footnote omitted).

<sup>421</sup> The Prosecution Standards cover the first appearance in less detail in Standard 45.4 (recommending a pre-first appearance fact inquiry for in-custody defendants facing a penalty of at least one year of incarceration) and 46.1 (describing the purposes of the first appearance such to advise the accused of charges and constitutional rights, to appoint counsel, when necessary, to make a pretrial release determination, to take a plea, and to docket further proceedings).

For the most part, these two sets of Standards are virtually identical. Both call for the first appearance to take place in “appropriate surroundings.” Both call for each case to receive individual treatment. And both call for decisions to be “based on the particular facts of the case and information relevant to the purposes of the pretrial release decision as established by law and court procedure.”<sup>422</sup> Both sets of Standards also recommend that the judge present defendants with the charging document and advise them of their constitutional rights. Moreover, both sets recommend that judges determine whether there is probable cause to believe that the defendant committed the crime charged and to decide release and detention decisions in accordance with the remainder of the standards.<sup>423</sup> And finally, both the ABA and NAPSA Standards re-emphasize the important role of a pretrial services program risk assessment as “one of the essential components of an effective first appearance proceeding.”<sup>424</sup>

The two sets of standards differ slightly in form, though not necessarily in substance, on the somewhat misunderstood issue of lawyer representation during the first appearance. NAPSA Standard 2.2(d) states that “[a]t the defendant’s first appearance, he or she should be represented by counsel. If the defendant does not have his or her own counsel at this stage, the judicial officer should appoint counsel for purposes of the first appearance proceedings, and should ensure that counsel has adequate opportunity to consult with the defendant prior to the first appearance.”<sup>425</sup> Comments to that standard explain that organization’s position:

[t]he presence of counsel at this stage, while not required by U.S. Supreme Court decisions, was an integral part of NAPSA’s 1978 Standards . . . .

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The committee that drafted the Standards recognizes that, as of the time of their adoption in 2004, many jurisdictions do not routinely provide for the appointment of counsel to represent defendants at first appearance. However, if the first appearance is to be fair and meaningful, it is vitally important to ensure that defendants are represented effectively at this proceeding. Attorneys who understand the importance of the decisions made at first appearance, are familiar with the contents of pretrial services reports and with available release options, and are able to advocate effectively for their clients – on the basis of consultation with the defendant and even very brief contact with family members or friends of the defendant – can make the difference between liberty and confinement for defendants during the pretrial period.<sup>426</sup>

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<sup>422</sup> ABA Standards, *supra* note 7, Std. 10-4.3 (a), at 92; NAPSA Standards, *supra* note 3, Std. 2.2 (c), at 26.

<sup>423</sup> ABA Standards, *supra* note 7, Std. 10-4.3 (b), (e), (f), (g), at 92-93; NAPSA Standards, *supra* note 3, Std. 2.2 (d), (e), (f), (g), at 27-28.

<sup>424</sup> NAPSA Standards, *supra* note 3, Std. 2.2 (a) and commentary, at 28; *see generally* ABA Standards, *supra* note 7, Std. 10-4.2, at 83-85.

<sup>425</sup> NAPSA Standards, *supra* note 3, Std. 2.2 (d), at 27. Supreme Court precedent on this issue was never conspicuous. Nevertheless, on June 23, 2008, the Court announced its opinion in *Rothgery v. Gillespie County*, 128 S.Ct. 2578, 2592, in which the Court “reaffirm[ed]” what it has held and what “an overwhelming majority of American jurisdictions” have understood in practice: “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”

<sup>426</sup> *Id.* Std. 2.2 (d) (commentary), at 30 (footnote omitted).

The relevant ABA Standard itself only recommends that “[i]f the defendant is not released at the first appearance and is not represented, counsel should be appointed immediately. The next judicial proceeding should occur promptly, but not until the defendant and defense counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived the right to be represented by counsel.”<sup>427</sup> Commentary to the Standard, however, better reflects the ABA’s position on the issue:

[i]n some jurisdictions, defendants are represented by counsel, at least provisionally, at their first appearance, but this is not a universal practice. ABA policy, however, clearly recommends that provision of counsel at first appearance should be standard in every court. Thus, the *Providing Defense Services Standards* call for counsel to be provided to the accused ‘as soon as feasible, and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs first.’

Provision of counsel at the first appearance is especially important if consideration is going to be given to detention or to release on conditions that involve a significant restraint on the defendant’s liberty.<sup>428</sup>

Recent data support the recommendations contained in the ABA and NAPSA Standards. Noting that previous attempts to provide legal counsel in the bail process have been neglected, in 1998 the Baltimore, Maryland, Lawyers at Bail Project was created to demonstrate empirically whether or not lawyers matter during bail bond setting hearings. Using a controlled experiment (with some defendants receiving representation at the bail bond review hearing and others not receiving representation) the Project found that defendants with lawyers: (1) were over two and one-half times more likely to be released on their own recognizance; (2) were over four times more likely to have their initially-set bail bond reduced at the hearing; (3) had their money bail bond reduced by a greater amount; (4) were more likely to have the money bond reduced to a more affordable level (\$500 or under); (5) spent less time in jail (an average of two days versus nine days for unrepresented defendants); and (6) had longer bail bond review hearings than defendants without lawyers at first appearance.<sup>429</sup> In a paper reporting the results of this study, Colbert et al. concluded:

[L]awyers do make a difference. The randomized controlled experiment conducted by the Lawyers at Bail Project in Baltimore supports the conclusion that having a lawyer present at a bail hearing to provide more accurate and complete information has far-reaching consequences. The accused is considerably more likely to be released, to respect the system and comply with orders, to keep his job and his home, and to help prepare a meaningful defense.

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<sup>427</sup> ABA Standards, *supra* note 7, Std. 10-4.3 (c), at 92.

<sup>428</sup> *Id.* (commentary), at 96 (footnotes omitted).

<sup>429</sup> See Douglas L. Colbert, Ray Paternoster, and Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail*, 32 *Cardozo L. Rev.* 1719 (2002). It is noted that, at the time of the study, the court had the services of a neutral, pretrial services representative, who made a recommendation regarding a bail bond.

The public at large benefits, too, from the unclogging of congested court systems and overcrowded jails and the resulting savings in taxpayer dollars.<sup>430</sup>

Colbert et al. noted that sixteen states refuse to provide lawyers at this initial proceeding altogether, and twenty-six states decline to provide representation at bail bond settings in all but a few counties. According to the authors, only eight states and the District of Columbia provide a right to counsel at first appearance.

In Colorado, first appearances or advisements are governed by Section 16-7-207 and Colorado Rule of Criminal Procedure 5, which requires the judge to inform the accused about his rights as a criminal defendant, including the right to bail, if the offense is bailable, and the right to counsel and, if the defendant is indigent, “the right to request the appointment of counsel or consult with the public defender before any further proceedings are held.”<sup>431</sup> In Colorado, there is no statutory right to legal representation at this first hearing, and the decision to provide representation to defendants at the bail bond setting stage is left to the individual local offices of the State Public Defender. In the First Judicial District, for example, while public defenders previously staffed first advisements to advocate for in-custody defendants, that practice was discontinued in 2006. It is believed that the practice was discontinued because the public defenders perceived it had little effect on the court’s bail bond setting, which appeared to them to be largely determined by the published money bail bond schedule. Currently, for most hearings, only deputy district attorneys and pretrial services staff are present during first advisements.

### **General Recommendations:**

**Jurisdictions are encouraged to follow the nearly identical ABA and NAPSA standards on this issue. Jurisdictions should persuade public defenders to provide representation at the first appearance, but if they cannot, the courts should explore finding alternative sources for advocacy at the bail bond setting hearing, including alternative defense counsel, pro bono private counsel, or law students. This will become more critical as jurisdictions cease to rely on a predetermined money bail bond schedule.**

### **(vii) The Decision to Release from Secure Detention**

The release/detention decision itself is the focal point of a defendant’s first appearance. Judges understand the seriousness of the decision, and recognize the necessity of taking the time to do it right: “[T]wo kinds of mistakes can easily be made at this stage: a defendant who could safely be released may be detained or a defendant who requires confinement may be released. Thus, the stakes for both the defendant and the community are high.”<sup>432</sup> Over the years, statutes and professional standards have been instrumental in shaping the release/detention decision so that these mistakes can be avoided. As described by authors Clark and Henry,

[t]aken together, the standards and statutes have set forth a number of changes to the pretrial release decision making process that can be categorized in terms of a three-fold objective to improve the pretrial release decision making process by:

- (1) having pretrial release decisions be made only by a qualified decision maker;

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<sup>430</sup> *Id.* at 1783.

<sup>431</sup> Colo. R. Crim. P. Rule 5 (II), (III).

<sup>432</sup> ABA Standards, *supra* note 7, at 35.

(2) basing such decisions on specific, relevant, timely, and accurate information; and (3) making available to the decision maker a range of relevant options from which to choose when making a decision.<sup>433</sup>

Both the ABA and NAPSA Standards emphasize in commentary the importance of the release/detention decision by articulating foundational principles upon which each set of standards is based. The ABA summarizes the principles underlying its standards as follows:

these Standards view the decision to release or detain as one that should be made in an open, informed, and accountable fashion, beginning with a presumption (which can be rebutted) that the defendant should be released on personal recognizance pending trial. The decision-making process should have defined goals, clear criteria, adequate and reliable information, and fair procedures. When conditional release is appropriate, the conditions should be tailored to the types of risks that a defendant poses, as ascertained through the best feasible risk assessment methods. A decision to detain should be made only upon a clear showing of evidence that the defendant poses a danger to public safety or a risk of non-appearance that requires secure detention. Pretrial incarceration should not be brought about indirectly through the covert device of monetary bail.

The strong presumption in favor of pretrial release is tied, in a philosophical if not a technical sense, to the presumption of innocence. It also reflects a view that any unnecessary detention is costly to both the individual and the community, and should be minimized. However, the Standards make it clear that under certain circumstances the presumption of release can be overcome by showing that no conditions of release can appropriately and reasonably assure attendance in court or protect the safety of victims, witnesses, or the general public.<sup>434</sup>

While the language differs among the three sets of national standards, all three recommend that jurisdictions adopt a presumption that the defendant is entitled to be released on personal recognizance,<sup>435</sup> which may be rebutted by evidence that (1) there is a substantial risk of nonappearance or the need for additional release conditions, or (2) that the defendant should be detained pursuant to standards providing for pretrial detention when “no condition or combination of conditions of release will reasonably ensure the defendant’s appearance in court or protect the safety of the community or any person.”<sup>436</sup> The Prosecution Standards recommend that release on personal recognizance “should require no bail, but will be on condition of supervision as deemed necessary by the court,” and that “in determining the type of supervision for each defendant, the judicial officer should impose the least onerous restriction reasonably likely to assure the defendant’s appearance in court.”<sup>437</sup> The ABA and NAPSA standards also

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<sup>433</sup> Clark & Henry, *Goals*, *supra* note 5, at 7.

<sup>434</sup> ABA Standards, *supra* note 7, at 35-36; *see also* NAPSA Standards, *supra* note 3, Std. 1.1 (commentary), at 8-10.

<sup>435</sup> Prosecution Standards, *supra* note 16, Std. 45.5 (a) (1), at 143; ABA Standards, *supra* note 7, Std. 10-5.1 (a), at 101; NAPSA Standards, *supra* note 3, Std. 2.3 (a), at 32.

<sup>436</sup> *See id.*; *see also* Prosecution Standards, *supra* note 16, Std. 45.8 (pre-trial detention), at 147-48; ABA Standards, *supra* note 7, Std. 10-5.8, 5.9, 5.10 (grounds, eligibility, and procedures for pre-trial detention), at 124-38; NAPSA Standards, *supra* note 3, Std. 2.8, 2.9, 2.10 (same), at 43-52.

<sup>437</sup> Prosecution Standards, *supra* note 16, Std. 45.5 (a) (1), (b) (1), at 143-44.



recommend imposing the least onerous or least restrictive conditions, but differ slightly in their language from each other.<sup>438</sup> All three sets of standards make recommendations about the types of conditions (or “types of supervision,” pursuant to the Prosecution Standards) that courts should use when they decide that conditions of release are necessary. Commentary to the ABA Standards summarizes the ABA’s rationale behind its recommendations on conditional release:

[s]ubsections (i) through (ix) of this Standard set out a number of types of conditions that the judicial officer may consider imposing (alone or in combination) on the defendant. This enumeration of conditions is drawn from existing statutes addressing the use of conditional release and reflects practices used in a number of jurisdictions. Subsection (i) and (ii) provide a basic structure for the monitoring and supervision of defendants on pretrial release, by authorizing release either to the supervision of a pretrial services agency [Subsection (i)] or to some other ‘qualified agency or person’ who will be responsible for supervising the defendant [Subsection ii]. The types of conditions enumerated in subsections (iii) through (viii) are intended to provide a ‘menu’ of possible release options, use of which should be tailored to the needs and risks posed by an individual defendant. For example, prohibitions against possessing dangerous weapons . . . may be appropriate in cases in which there is a concern about a threat to the public, a victim, or a witness. Treatment conditions . . . are to be used as means of assisting the defendant in returning to court and protecting the community, and may be appropriate for use in minimizing specific risks brought to the attention of the court. The financial conditions . . . are to be imposed only to ensure appearance . . . . The amount of bond should take into account the assets of the defendant and financial conditions imposed by the court should not exceed the ability of the defendant to pay.<sup>439</sup>

This rationale makes clear an often misunderstood principle contained in all three sets of national standards. That is, a perceived risk of non-appearance or to the public’s safety can usually be addressed through conditions of release designed to address that risk. Pretrial detention should only be ordered when it is shown that *no* condition or combination of conditions of release will reasonably assure the defendant’s appearance in court or the public’s safety.<sup>440</sup>

### **(a) *Pretrial Detention***

As noted previously, all three sets of professional standards recommend explicit procedures for detaining a defendant pretrial. Basically, there are

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<sup>438</sup> NAPSA Standards, *supra* note 3, Std. 2.4, at 34-35 (“the court should impose the least restrictive release conditions reasonably necessary to assure the defendant’s appearance in court, to protect the safety of the community or any person, and to prevent intimidation of witnesses of interference with the orderly administration of justice”); ABA Standards, *supra* note 7, Std. 10-5.2, at 106 (“the court should impose the least restrictive of release conditions necessary reasonably to ensure the defendant’s appearance in court, protect the safety of the community or any person, and safeguard the integrity of the judicial process”).

<sup>439</sup> ABA Standards, *supra* note 7, Std. 10-5.2 (commentary), at 109; *see also* NAPSA Standards, *supra* note 3, Std. 2.4 and commentary, at 34-37.

<sup>440</sup> *See* Prosecution Standards, *supra* note 16, Std. 45.7, at 146-47; NAPSA Standards, *supra* note 3, Std. 2.4, at 34-35; ABA Standards, *supra* note 7, Std. 10-5.2, at 106-07.

three ways defendants may be detained prior to trial: (1) in cases where there has been a violation of conditions of release, through proceedings to consider revocation of release, followed by a detention hearing; (2) in cases involving an arrest for a new offense of a defendant already on release in another case through judicial findings warranting temporary detention so that release on the previous charges can be reviewed; and (3) through pretrial detention hearings initiated at the time of the first appearance proceeding.<sup>441</sup>

Provisions regarding the first two ways warrant little discussion, as they provide straightforward responses to more severe violations of bond conditions and of defendants arrested while released in other cases. Provisions regarding pretrial detention hearings at the first appearance warrant more discussion, though, because they provide an important alternative to the long-criticized practice of courts setting high money bail bond amounts for defendants believed to be a threat to public safety.

Prosecution Standard 45.8 states that “[b]ail may be denied and the defendant detained when charged with a serious crime and there is either no reasonable assurance that the defendant will appear for trial or it appears that release will endanger the safety of any person.”<sup>442</sup> That standard recommends an evidentiary hearing, with the court’s finding based on clear and convincing evidence. Likewise the NAPSA and ABA standards provide recommended procedures for pretrial detention, albeit with more detail.<sup>443</sup> The intent behind those procedures is summarized by the ABA as follows:

[t]ogether, [the standards] provide a comprehensive scheme for open and explicit decision-making concerning pretrial detention of defendants who pose significant risks of flight or danger to the community. The scheme is very similar (though not identical) to the statutory scheme established by the Federal Bail Reform Act and the parallel District of Columbia statute. The federal scheme’s provisions concerning detention on grounds of danger to the community were upheld by the Supreme Court in *United States v. Salerno*, a 1987 decision in which Chief Justice Rehnquist’s opinion for the Court noted that the Government’s interest in community safety can in ‘appropriate circumstances’ outweigh an individual’s liberty interest. The opinion emphasized that the federal statute limits the cases in which detention may be sought to the most serious crimes; provides for a prompt detention hearing; provides for specific procedures and criteria by which a judicial officer is to evaluate the risk of ‘dangerousness’; and (via the provisions of the Federal Speedy Trial Act) imposes stringent time limits on the duration of the detention. These Standards take a similar approach, though modified to leave the definition of precisely what offense should be designated as ‘serious’ to each jurisdiction to determine.<sup>444</sup>

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<sup>441</sup> ABA Standards, *supra* note 7, Std. 10-5.8 (commentary), at 125 (internal citations omitted).

<sup>442</sup> Prosecution Standards, *supra* note 16, Std. 45.8 (a), at 147.

<sup>443</sup> See NAPSA Standards, *supra* note 3, Std. 2.2, at 26-27; Std 2.8, 2.9, 2.10, at 43-52; ABA Standards, *supra* note 7, Std. 10-4.3, at 92; Std. 10-5.8, 10-5.9, 10-5.10, at 124-38.

<sup>444</sup> ABA Standards, *supra* note 7, Std. 10-5.8 (commentary), at 126 (footnotes omitted).

To detain a defendant pretrial, the ABA standard recommends that the government must prove “by clear and convincing evidence that no condition or combination of conditions of release will reasonably ensure the defendant’s appearance in court or protect the safety of the community or any person.”<sup>445</sup> The NAPSA standard is nearly identical, recommending that the prosecutor prove “by clear and convincing evidence that no condition or combination of conditions of release will provide reasonable assurance of the defendant’s appearance in court and will protect the safety of the community or any person.”<sup>446</sup>

Perhaps understandably, the Prosecution Standards stress public safety over other considerations, including personal liberty. Thus, those standards technically speak of imposing the “least onerous condition” only with respect to assuring the defendant’s appearance in court. Moreover, while those standards contemplate the conditional release of certain defendants who pose some risk to the public safety,<sup>447</sup> they also recommend the use of money bail bonds to protect the public, stating that money bail bonds “may be set to prevent reasonably anticipated future conduct.”<sup>448</sup> This is contrary to the NAPSA and ABA Standards concerning money bail bonds, both of which state that “financial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person.”<sup>449</sup> By recommending the use of money bail bonds to be set to prevent future criminal conduct, the Prosecution Standards also disregard the rationale for employing conditions to lessen a particular risk to public safety, or for creating a separate procedure for pretrial detention in the first place; that is, there is no relationship between the ability of a defendant to post a financial bond and the risk that a defendant may pose to public safety, no matter how high that bond may be. As the ABA Standards state,

[t]his Standard explicitly prohibits the setting of financial conditions of release in order to prevent future criminal conduct or protect public safety. The prohibition is based on a fundamental principle of these Standards: concerns about risks of pretrial crime should be addressed specifically through non-financial release conditions or, if necessary, through pretrial detention ordered after a hearing – not covertly through the setting of bail so high that defendants cannot pay it.<sup>450</sup>

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<sup>445</sup> *Id.* 10-5.8 (a), at 124. According to the ABA, “[t]he requirement that the government show the need for detention by ‘clear and convincing evidence’ is intended to emphasize the deliberately limited scope for using secure detention. It places a significant burden on the prosecution to present facts demonstrating why such detention is essential and why the risks of flight or dangerousness cannot be met through some type of conditional release.” *Id.* (commentary), at 127.

<sup>446</sup> NAPSA Standards, *supra* note 3, Std. 2.10 (f), at 48. Despite use of the word “and” (versus “or” in the ABA Standards) this Standard appears to have the same intent as ABA Standard 10-5.8. NAPSA Standard 2.9 clearly contemplates cases in which a defendant should be detained because of a substantial risk of non-appearance, but with little or no risk to community safety.

<sup>447</sup> *See* Prosecution Standards, *supra* note 16, Std. 45.7, at 146-47 (recommending release restrictions rather than detention for certain defendants shown to present a risk of danger to the community).

<sup>448</sup> *Id.* Std. 45.6 (b), at 145.

<sup>449</sup> ABA Standards, *supra* note 7, Std. 10-5.3 (b), at 110; NAPSA Standards, *supra* note 3, Std. 2.5 (c), at 38. The Prosecution Standards (1991) are older than both the NAPSA Standards (2004) and the ABA Standards (2007). The National Prosecution Standards were last updated in 1991. It is possible that a future edition of the Prosecution Standards may mirror the other two sets on this point.

<sup>450</sup> ABA Standards, *supra* note 7, Std. 10-5.3 (commentary), at 112.

As stated by NAPSA,

[r]ead together, these provisions reinforce the basic approach of these Standards: concerns about possible dangerousness of a defendant should be dealt with through special release conditions, or, if necessary, through detention ordered after a hearing with fair procedures, and not *sub rosa* through the setting of high money bail that is beyond the ability of the defendant to post.<sup>451</sup>

As previously discussed, Colorado provides a right to bail, albeit with exceptions governed by constitutional and statutory provisions dealing with preventative detention. Both the Colorado Constitution and Section 16-4-101 of the Colorado Revised Statutes authorize pretrial detention through the denial of a bail bond after a hearing held within 96 hours of arrest, in which 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” for certain enumerated cases.<sup>452</sup> Colorado law has no provision requiring the prosecutor to prove that no condition or combination of conditions or release will reasonably assure public safety or court appearance. Instead, Colorado’s constitutional and statutory provisions authorizing pretrial detention direct the court’s attention to public safety generally (without mentioning the risk of non-appearance), and not necessarily to whether or not there are conditions of release that may be sufficient to assure the defendant’s appearance and protect the public.

### **(b) Release on Financial Conditions**

The ABA and NAPSA Standards differ only slightly with the Prosecution Standards in their recommendations of alternatives to be used when requiring financial conditions. The ABA and NAPSA Standards each recommend three alternatives for those cases in which a financial condition is appropriate: (1) the execution of an unsecured bail bond (with or without co-signers) in an amount specified by the court; (2) the execution of an unsecured bail bond in an amount specified by the court, accompanied by a deposit of cash or securities equal to ten percent of the face amount of the bond; or (3) the execution of a bail bond secured by the deposit of the full amount in cash or property or by uncompensated third parties, which include family members, church or civic groups, etc.<sup>453</sup> The Prosecution Standards are virtually the same, except that they use the word “secured” for “unsecured” in alternative number two.<sup>454</sup> Because all three sets of standards recommend abolishing compensated sureties, “the posting of a bond through a commercial bail bond agency is not included as an option.”<sup>455</sup>

The NAPSA Standards provide interesting commentary concerning the rationale behind the three listed options:

[a]ll three of the options for use of financial conditions outlined in this Standard contain incentives that should motivate the defendant to return for court dates. Although the defendant can gain release on unsecured bond without having to pay

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<sup>451</sup> NAPSA Standards, *supra* note 3, Std. 2.5 (a) (commentary), at 39.

<sup>452</sup> Colo. Const. Article II, § 19; Colo. Rev. Stat. § 16-4-101.

<sup>453</sup> ABA Standards, *supra* note 7, Std. 10-5.3 (d), at 110; NAPSA Standards, *supra* note 3, Std. 2.5 (d), at 38.

<sup>454</sup> See Prosecution Standards, *supra* note 16, Std. 45.6 (c), at 145.

<sup>455</sup> ABA Standards, *supra* note 7, Std. 10-5.3 (commentary), at 113.

anything, failure to appear may result in having to pay the full amount of the bond. The ten percent deposit option carries the risk of being liable for the full amount as well as losing the deposit in the event of failure to appear. It also, however, carries the incentive of a return of the deposit (possibly reduced by the amount of a service charge) for defendants who make required court dates. The full cash bail option exposes the defendant (or the ‘qualified uncompensated surety’) to possible loss of the full amount that is posted in the event of nonappearance, but provides for return of the full amount (possibly reduced by the amount of a service charge) if court appearances are made as scheduled.<sup>456</sup>

In Colorado, the rules regarding the selection criteria for judges to use in determining the type of bail bond and any associated monetary amount are found in Sections 16-4-101 through 105. Notably, Colorado law does not have a statutory presumption favoring release on recognizance, and the statutory scheme demonstrates a continued reliance on a commercial money bail bond system. Moreover, there are no statutory provisions explicitly stating that courts should use the least restrictive release conditions necessary to ensure the defendant’s appearance, that financial conditions should only be used when no other less-restrictive alternative will ensure the defendant’s appearance, that financial conditions should not be used to prevent future criminal conduct, and that financial conditions should only be imposed as a result of an individualized decision, taking into account the defendant’s ability to pay as well as his or her risk of non-appearance.

While the statutes provide broad discretion for the imposition of a variety of release conditions,<sup>457</sup> they do not mandate any pretrial services program function to supervise defendants released under those conditions. Accordingly, only larger counties with professional pretrial services functions can realistically avail themselves of the full “menu” of options envisioned by the standards.

Finally, bail bond alternatives in Colorado are limited to either (1) releasing a defendant from custody “upon execution by him of a personal recognizance,” or (2) releasing a defendant 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” cash, property, or commercial and noncommercial sureties.<sup>458</sup> As previously noted, the Colorado Supreme Court has rejected the use of “ten percent deposit bond,” as recommended by the ABA, NAPSA, and Prosecution Standards, due to the particular wording of the Colorado statute.<sup>459</sup> In addition, although a deposit-to-the-court bail bonding option may appear attractive to some government officials as a way to increase revenue for the state, especially during times of declining state revenues, a deposit-to-the-court option is not an ideal way to enrich the state treasury (see *Allison v. People*), in part because the state treasury

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<sup>456</sup> NAPSA Standards, *supra* note 3, Std. 2.5 (e) (commentary), at 39-40 (footnote omitted).

<sup>457</sup> Section 16-4-103 lists a number of “standard” conditions for every bail bond. Subsection (2) (f) states that in addition to these standard conditions, “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.” Section 16-4-105 (3) (d) permits any pretrial services program established pursuant to that section to “include different methods and levels of community-based supervision as a condition of pretrial release,” and lists a number of conditions/methods of supervision that are similar to many of the example release conditions listed by the ABA and NAPSA Standards.

<sup>458</sup> Colo. Rev. Stat. § 16-4-104.

<sup>459</sup> *People v. District Court*, 581 P.2d 300, 301 (1978).

could only grow if defendants surrender bail bond amounts because of their failures to appear, which in turn create additional work and expense for the courts, law enforcement who arrest defendants with warrants, and county jails that incarcerate defendants until the next court appearance. Moreover, it is not an ideal way to reform current deficiencies in the bail system because it does not further the purpose of bail (i.e., it addresses only court appearance and neglects public safety, and when combined with pretrial supervision, violates the bail/pretrial principle of least restrictiveness).

### ***(c) The Release Decision in Practice***

In practice, the release decision at first appearance in Colorado's First Judicial District is unlike that envisioned by all three sets of national standards. As previously discussed, Colorado courts still rely heavily on money bail bond schedules, as well as on the compensated surety industry in their administration of bail. Moreover, due to Colorado law requiring execution of the "full amount of the bail," defendants who have a set money bail bond amount and who are not given a personal recognizance bond are typically forced to rely on commercial sureties for release. Thus, even though a judge has determined that a particular defendant may be appropriately released into the community pending trial, the actual release of that defendant is decided by a bondsman, whose interests do not necessarily mirror those of the justice system. Additionally, defendants who are told to provide a "cash/property/surety" (or "CPS" bond), are also often given pretrial supervision as a condition of that bond, resulting in the pretrial services program's subsidizing the surety function of the commercial bail bondsmen and creating redundant constraints on defendants, which, in turn, violates the principle of release under the least restrictive conditions.<sup>460</sup> Moreover, the pretrial detention procedure found in Section 16-4-101, which requires an evidentiary hearing before detaining a prisoner pretrial who is found to be danger to the community, appears to be rarely used; courts appear primarily to rely upon high money bond amounts as a means (albeit illusory) to protect the public safety. Finally, many counties may perceive that they lack the resources to provide the type of pretrial assessment and supervision services envisioned by the standards. Overall, counties that have (1) an accurate risk assessment tool, and (2) a pretrial release services program function, combined with (3) a full "menu" of conditional release options and supervisory practices, have at least the potential to allow the release of defendants pretrial without compromising the goals of public safety, individual liberty, or judicial integrity. Counties lacking any of these three elements must work to develop or improve their pretrial services programming so the court no longer perceives that it must rely on the commercial money bail bondsmen or the jail to achieve those same goals.

### **General Recommendations:**

**The release decision is where pretrial philosophy is revealed through practical implementation. Jurisdictions that have stated a preference for release on recognizance will likely use that type of bail bond more frequently. Likewise, jurisdictions favoring the use of the least restrictive conditions to assure public safety and defendant appearance should, at a minimum, stop using surety or property bonds that require involvement of a commercial surety for defendants to whom it is ordering pretrial supervision. Despite whatever other philosophies any given jurisdiction might adopt, however, it is imperative**

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<sup>460</sup> In a survey of ten large Colorado counties, only two refrained from requiring supervision by a pretrial services program when a defendant was released by posting a commercial surety bond.

that jurisdictions change the way they think about the use of money in the administration of bail.

Because there is no logical or empirical link between the amount of money that a defendant has and his or her risk to public safety, courts should discontinue viewing the bail process as one primarily dealing with amounts of money. Instead, courts should view the administration of bail in terms of a continuum of release and conditions of release. Release with no conditions is often an effective and efficient way of handling a criminal case. Non-financial conditions of release, with supervision by a professional pretrial services agency to assure compliance with those conditions, should be used to mitigate any risks to public safety or of non-appearance. Financial conditions (i.e., money bail bonds) should only be used when no other condition will reasonably assure the risk that a defendant will not appear for court, and the amount should be tempered by statutory and constitutional considerations of reasonableness or excessiveness, as well as by the defendant's financial condition. When "the proof is evident or the presumption great as to the crime alleged to have been committed" and no condition or combination of any conditions of release will mitigate the risk "that the public would be placed in significant peril if the accused were released on bail" for the crimes enumerated in Section 16-4-101, the defendant should be detained.

### **(viii) Monitoring Pretrial Detainee Status**

All three sets of national standards on pretrial release recommend a procedure for monitoring or reviewing the status of detained defendants (either because they are detained by court order or because they cannot pay their money bail bond) to further the purpose of minimizing unnecessary detention. The Prosecution Standards recommend that "[p]eriodic reports should be made to the court about each defendant who has failed to secure release within one month of arrest. The prosecutor should advise the court of the status of the case and reasons defendant has not been released or tried."<sup>461</sup> In Standard 10-1.10 (b), the ABA recommends that pretrial services agencies should "review the status of detained defendants on an ongoing basis for any changes in eligibility for release options and facilitate their release as soon as feasible or appropriate."<sup>462</sup> Moreover, in Standard 10-5.12, the ABA recommends additional procedures for alerting the court to circumstances warranting a change in the pretrial release decision. Notably, the standard recommends that pretrial services or other appropriate justice agencies be required to "report to the court as to each defendant, other than one detained under Standards 5.8, 5.9, and 5.10 [concerning preventative detention after a hearing], who has failed to obtain the release within [24 hours] after entry of a release order . . . and to advise the court of the status of the case and the reasons why a defendant has not been released."<sup>463</sup> The ABA also recommends that reports on inmate status be filed for any inmate held more than 90 days without a court order.<sup>464</sup>

The NAPSA Standards contain similar provisions in Standard 3.6. Commentary to that Standard addresses the fairly common issue of pretrial detainees who are given conditional release order,

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<sup>461</sup> Prosecution Standards, *supra* note 16, Std. 45.9 (a) (2), at 148.

<sup>462</sup> ABA Standards, *supra* note 7, Std. 10-1.10 (b) (viii), at 55.

<sup>463</sup> *Id.* Std. 10-5.12 (b), at 141.

<sup>464</sup> *Id.* Std. 10-5.12 (c), at 141.

but who are somehow unable to meet those conditions, especially financial conditions. It states that,

[w]hen a judicial officer sets financial conditions for a defendant's release or orders that a defendant be released subject to conditions such as participation in an appropriate treatment program, the pretrial services agency has a continuing responsibility to make sure that the defendant is in fact released. In particular, as emphasized in Standards 1.4 (c) and 2.5, if financial conditions are set by the court, they should be achievable. If the defendant cannot meet them, the pretrial services program should inform the court and should seek to craft recommendations for conditions that would meet concerns about nonappearance.

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The continued detention of defendants who remain in custody after a financial bond has been set should be a particular focus of attention for pretrial services programs, since – under these Standards – the sole purpose of financial conditions is to assure the defendant's appearance at scheduled court proceedings, and financial conditions are supposed to be set at an amount that is within the financial reach of the defendant.<sup>465</sup>

There appears to be nothing in Colorado law mandating status reports on inmates who are in custody, either because they have been denied a bail bond pursuant to the provisions of Section 16-4-101, or because they cannot otherwise pay their money bail bond amount.

### **General Recommendations:**

**As mentioned previously, courts should require all approved supervising entities to give monthly reports containing summary data for measurable outcomes related to public safety and court appearance. Courts should also require entities tasked with supervising defendants during the pretrial period to make periodic status reports (e.g., every three to ten days) on defendants who have been ordered released but who have not yet been released for any reason. Moreover, courts should require some entity or individual to make periodic status reports to the court about any new facts or circumstances that would warrant a review and possible revision to a defendant's initial bail bond type or bond conditions. The most logical choice for this entity would be the persons who assess defendants' pretrial risk and make bond recommendations to the court.**

### **(ix) Allocating Resources**

Both the NAPSA and ABA Standards recognize that all jurisdictions face resource management issues when they discuss or implement justice policies. "With limited resources available for detention or community-based supervision of defendants during the pretrial period, hard decisions must be made about whether to simply invest in building and operating ever-larger jails

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<sup>465</sup> NAPSA Standards, *supra* note 3, Std. 3.6 (commentary), at 70 and n. 48 (citation omitted).



or to shift resources toward the development and use of effective community supervision strategies.”<sup>466</sup> Accordingly, both sets of standards explicitly recommend allocating sufficient resources to the proper stage of the court process in order to carry out the other recommendations concerning pretrial release.<sup>467</sup> As noted by the ABA (a point echoed by NAPSA),

[t]he thrust of these Standards is toward limited and focused use of pretrial detention, with defendants who pose no significant risk of flight or dangerousness released on their own recognizance or under appropriate conditions that provide for some type of supervision. For such an approach to work, however, many jurisdictions will have to either reallocate existing resources (away from sole or near-exclusive reliance on jails and toward non-incarcerative alternatives to detention) or find new resources to support viable community-based supervision of released defendants.<sup>468</sup>

The result, according to NAPSA, “should be to reduce the use of pretrial confinement, greatly alleviate problems of jail crowding, and reserve secure detention for defendants who pose serious risks of dangerousness or nonappearance that cannot be met through community supervision.”<sup>469</sup> As noted by the ABA, a shift toward a philosophy focused on the front-end of the justice system “will require funding outlays in new areas. However, the savings that will result from reducing jail construction and operation eventually should substantially outweigh the costs of pretrial services.”<sup>470</sup>

An example of one jurisdiction’s reallocation of resources to accommodate a philosophical shift toward more appropriate pretrial release occurred recently in Broward County, Florida. In December of 2007, the County’s jail population was at 92% of total bed capacity (and therefore beyond its operational capacity), and the County faced the possibility of emergency releases pursuant to a pre-existing federal consent decree. However, instead of building a new jail to handle the increasing jail population (at an estimated initial cost of \$90 million -- \$60 million to build, \$30 million annually to operate), the County chose to spend \$1.4 million to expand its pretrial release program and to expedite the release of arrestees pretrial. While the compensated surety industry objected to these choices, Broward County was apparently moved to action primarily by one stark financial reality – “the county spends \$90 a day to house inmates in jail whereas pretrial release costs between \$4 and \$11 per day.”<sup>471</sup>

### **General Recommendations:**

**The recommendations contained in this paper will likely require significant negotiations about resource allocation. Jurisdictions that choose to follow the national standards may find the need to allocate more resources to the “front end” of the justice system. For those**

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<sup>466</sup> ABA Standards, *supra* note 7, Std. 10-1.9 (commentary), at 52.

<sup>467</sup> *Id.* 10-1.9, at 52; NAPSA Standards, *supra* note 3, Std. 1.7, at 21.

<sup>468</sup> ABA Standards, *supra* note 7, Std. 10-1.9, at 52-53; *see also* NAPSA Standards, *supra* note 3, Std. 1.7 (commentary), at 22.

<sup>469</sup> *Id.* Std. 1.7, at 22.

<sup>470</sup> ABA Standard 10-1.9 (commentary) at 53.

<sup>471</sup> *Broward to Free More Suspects From Jail as Cost-Cutting Move*, South Florida Sun-Sentinel, (January 16, 2008).

**jurisdictions with established professional pretrial services programs, this may mean adding more pretrial assessment and supervision staff, as well as providing some funding for the tools necessary for effectively supervising certain defendants in the community (e.g., payment assistance for electronic position or drug/alcohol monitoring). It may also mean re-allocating or adding more judges or magistrates to handle additional and potentially longer bail bond hearings. Concomitantly, it may mean needing fewer jail resources, including fewer detention deputies.**

## V. Proposal for a Modern and Effective Bail Administration and Pretrial Process for Colorado's First Judicial District

In D. Alan Henry's *Pretrial Programs: Describing the Ideal*, the author argues that ideal pretrial programs "must change, and change regularly," to keep up with a constantly changing community, and to "ensure that their procedures and those of other system actors do not inadvertently continue practices that are outdated and unfair – becoming apologists for what is, rather than positive forces of change in local criminal justice systems."<sup>472</sup> The same holds true for all aspects of bail administration and the pretrial release and supervision decision-making process. To attain a modern, effective, and efficient bail administration and pretrial process in the First Judicial District, several improvements need to occur. Changes in state law are unnecessary at this time, but would expedite these improvements; however, statutory changes are unlikely to happen quickly. Therefore, policy-makers in the First Judicial District can and should make multiple improvements to criminal justice policies and practices relating to bail and the pretrial process.

The purpose of this section is to propose a new, more effective, and more efficient pretrial release process that the policy-makers in Colorado's First Judicial District can implement in a relatively short time. This new process integrates Colorado law, the pretrial standards of the American Bar Association, National Association of Pretrial Services Agencies, and National District Attorneys Association, social sciences research from the criminal justice field, and the best features of the existing process of bail administration in the First Judicial District.<sup>473</sup> Moreover, the proposed process is consistent with existing policy in the First Judicial District, specifically with Principle and Rationale 5 of the 2009 Jefferson County Detention Facility Use Plan, which states as follows:

Principle: All nonconvicted individuals who are booked into the Detention Facility may or may not bond out of the Detention Facility as defined by Colorado Revised Statutes. A judge will determine the most appropriate bond for each individual, and may place some individuals released on bond on supervised pretrial release to help assure public safety and their appearance in court.

Rationale: The Detention Facility is a limited purpose facility, and thus cannot house all individuals who are booked until their case is adjudicated. The release of individuals on bond helps to limit the number of incarcerated individuals who do not pose an apparent threat to public safety and who are likely to make all court appearances until the disposition of their case.

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<sup>472</sup> D. Alan Henry, *Pretrial Programs: Describing the Ideal*, 57 Federal Probation 23, at 26 (1993).

<sup>473</sup> Because the pretrial release processes in Colorado's large judicial districts are similar in their structure, policies, procedures, and programming, the proposal in this paper for the First Judicial District could be adapted for the other large judicial districts.

Whenever possible, practices that are outdated, inefficient, ineffective, or of questionable legality are avoided in this bail proposal.

The following bail and pretrial process proposal consists of two main components: (1) a narrative description of a new, modern and effective bail administration and pretrial process for the First Judicial District,<sup>474</sup> and (2) a list of some of the specific tasks that need to be completed (and by whom) for the new process to be implemented.

## ***A. The Proposed Bail and Pretrial Process***

Police officers contact individuals on the street. Although Colorado law does not yet contain an explicit preference for citations or summonses for low level felonies, the officers in the First Judicial District have arrest policies from their own agencies (which mirror the policies of other agencies, the District Attorney's Office, the Sheriff's Office, and the criminal justice system as a whole), articulating preferences for citations and summonses for these cases, and explicitly stating that detention is an option to be used only in special circumstances. The officers have the ability to collect and verify defendant information relevant to a release decision in the field, and the officers know that each person released through a citation or summons will be contacted through a court date notification function to help assure that person's appearance at court.<sup>475</sup>

Persons who are ineligible for release through a citation or summons are transported for booking into the Jefferson County Detention Facility. After booking into the Detention Facility, Jefferson County Pretrial Services immediately makes an individualized assessment of the risk of failure to appear and the commission of new crime for each defendant for whom the court will be setting a bail bond.<sup>476</sup> Jefferson County Pretrial Services documents its recommendation for the type of bond and the conditions of bond that will most likely mitigate the defendant's risks.<sup>477</sup> For purposes of promoting public safety and mitigating court non-appearance, no defendant may bond out of jail until he or she appears before a judicial officer (except perhaps defendants whom the bond commissioner can release because the defendant poses minimally apparent risk).

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<sup>474</sup> The process described in this section is not intended to be an end-product for immediate implementation, but rather as a foundation upon which local policy-makers can create a sustainable, practical, efficient, and effective pretrial process for the First Judicial District.

<sup>475</sup> The Jefferson County Sheriff's Court Date Notification Program, which began in April 2006, attempts to contact every defendant who is summoned into the Jefferson County Combined Court to remind the defendants of their required presence at the upcoming court hearing and to provide defendants with information on the location of the courtroom and what documentation to bring. The program has reduced the failure to appear rate in the cases it has targeted from 23% to 9%. It appears that no municipal government within Jefferson County has a similar court date notification function. To avoid most jail bookings resulting from a failure to appear in municipal court, municipal governments would need to implement a similar reminder function for defendants summonsed into municipal court.

<sup>476</sup> Another option is for a private vendor to perform the pretrial assessment and bond commissioner functions currently performed by Jefferson County Pretrial Services. Whether performed by Jefferson County Pretrial Services or a private vendor, however, the service provider should consistently meet or exceed all expectations and standards of pretrial assessment articulated by the judges of the First Judicial District.

<sup>477</sup> Currently, Jefferson County Pretrial Services staff is collaborating with pretrial staff in nine other large Colorado counties to improve the predictive validity of their pretrial assessment and the cost-effectiveness of their supervisory practices. See Michael R. Jones and Sue Ferrere, *Improving Pretrial Assessment and Supervision in Colorado*, Topics in Community Corrections (U.S. Dept. of Just., Nat'l Inst. of Corr. 2008), at 13.

Pursuant to Chief Judge Directive 89-6 and permission from the municipal courts within Jefferson County, the Jefferson County Pretrial Services Bond Commissioners authorize the pretrial release on personal recognizance all defendants who have relatively minor charges (e.g., petty, municipal, and some misdemeanor)<sup>478</sup> and who are not excluded pursuant to sections of the Colorado Statutes requiring District Attorney consent prior to release on personal recognizance or other sections limiting such release.<sup>479</sup>

For all defendants who are not released on personal recognizance, Jefferson County Pretrial Services transmits the pretrial risk assessment to the Court, the District Attorney's Office, and the Public Defender's Office (or the defendant's private defense attorney, if known) prior to the first appearance. Due to the importance of this first appearance, a representative from the District Attorney's Office and the Public Defender's Office (or some other advocacy entity) is present to propose modifications to the conditions of bond (e.g., more or less restrictions) recommended by Pretrial Services. If Pretrial Services staff believes that no condition or combination of conditions of supervised pretrial release will likely protect the safety of the community or assure the defendant's appearance in court, they communicate this to the court.

The first appearance hearings occur before a judge or magistrate once per day, every day of the week, so that no defendant has to wait more than 24 hours to appear before a judicial officer.<sup>480</sup> The judicial officer considers the information in Pretrial Service's assessment, as well as any arguments made by the representatives from the District Attorney's Office and the Public Defender's Office (or other advocacy entity). In most cases, the judicial officer sets a personal recognizance bond (with District Attorney consent, if statutorily required), or if a personal recognizance bond is not possible, a nominal cash bond based, in part, on the defendant's ability to pay, and orders the conditions of bond that will most likely minimize the defendant's risk of commission of a new crime or failure to appear. These conditions may include, but are not limited to, supervision by Jefferson County Pretrial Services (or other supervising entity approved by the court), drug and alcohol monitoring, electronic location monitoring, no-contact or protection orders, no possession of weapons, and restrictions on driving or travel. All of these

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<sup>478</sup> A personal recognizance bond requiring the signature of a co-signor may also be used. This component of the process assumes that Jefferson County Pretrial Services has obtained prior approval for the Bond Commissioners to release on personal recognizance inmates booked on municipal court charges.

<sup>479</sup> See Colo. Rev. Stat. §§ 16-4-105 (m) – (p.5). Another option for defendants who are excluded pursuant to those sections requiring District Attorney consent may be for the Pretrial Services Bond Commissioners to contact an authorized representative of the District Attorney's Office to briefly discuss a defendant's risk on a case-by-case basis. At that time, the District Attorney's Office's representative will determine whether to permit the Pretrial Services Bond Commissioner to release the defendant on personal recognizance.

<sup>480</sup> If a judicial officer cannot be available on each weekend day or holiday, another option is to hold first appearance hearings on Sunday mornings only, during which time defendants who were booked into jail between 10 a.m. Friday and 6 a.m. Sunday appear before the judicial officer, and thus do not have to remain unnecessarily in jail until Monday morning or Tuesday morning when Monday is a holiday. The addition of two judicial officers in the First Judicial District in July 2008, and the addition of three judicial officers in July 2009, create the opportunity to avail judicial officer time for this part-time weekend and holiday duty.

bond conditions are directly associated with the risk factors presented by each individual defendant.<sup>481</sup>

Upon proper motion, a hearing will be held pursuant to Art. II, Section 19 of the Colorado Constitution and Colo. Rev. Stat. Section 16-4-101 to determine whether the defendant should be deemed ineligible for a bail bond and detained pretrial. If, after reviewing the results of the Pretrial Services pretrial risk assessment and arguments presented by the District Attorney's Office and Public Defender's Office (or other advocacy entity), the judicial officer 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" for the statutorily enumerated cases, the defendant is remanded to jail until the disposition of his/her case. The finding concerning "peril" to the public includes consideration of whether there is "no condition or combination of conditions of [supervised pretrial release] that will . . . protect the safety of the community or any person."<sup>482</sup>

With this process, the relatively low number of defendants actually detained prior to their trials better reflects the court's and community's philosophies on public safety<sup>483</sup> and judicial integrity, and aligns with several key principles of American jurisprudence, including due process, equal protection, and the presumption of innocence.

All defendants for whom pretrial supervision is a condition of bond meet in person with Jefferson County Pretrial Services staff immediately prior to or after release from the Detention Facility.<sup>484</sup> At this time, Pretrial Services performs an intake session, during which Pretrial Services staff reviews with the defendant the bond conditions, the nature of the defendant's supervision, and the defendant's plan for compliance. The conditions of bond set by the judge and supervision techniques used by Pretrial Services are individualized to each defendant to minimize each defendant's risk of the commission of a new crime and failure to appear.

All defendants pay for the services they receive (e.g., on a monthly basis). Defendants may incur fees for the pretrial risk assessment performed in the jail, as well as for the amount and type of supervision they receive until the disposition of their case. Because defendants will not have paid a commercial bail bondsman a non-refundable fee (frequently totaling in the thousands of

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<sup>481</sup> Not all defendants require supervision by Jefferson County Pretrial Services. For these defendants, Pretrial Services should maintain a "notification" caseload in which the defendants are reminded by telephone of all upcoming court appearances.

<sup>482</sup> ABA Standards, *supra* note 7, Std. 10-5.8, at 124.

<sup>483</sup> How the courts view public safety can be gleaned from the fact that persons who are given a monetary bail bond have actually been found by a judicial officer to be nominally threatening to society; if they remain securely confined, it is only because of their inability to pay the amount of their monetary bail bond. There are many surveys documenting the public's views on jail and public safety. The latest, by the PEW Center on the States, notes that "Americans . . . want serious, violent, and chronic criminals put in prison. At the same time, a majority of Americans support cost-effective strategies for dealing with offenders who pose less risk to the community." See PEW study, at <http://www.pewcenteronthestates.org>.

<sup>484</sup> Another option is for a private vendor, which may include entities currently or previously operating as commercial sureties, to perform the same pretrial supervision function. Whether performed by Jefferson County Pretrial Services or a private vendor, the service provider should consistently meet or exceed all expectations and standards of pretrial supervision articulated by the judges in the First Judicial District.

dollars, and sometimes in the tens of thousands of dollars), nearly all defendants will likely have adequate funds to pay for the services they receive from Pretrial Services. Nonetheless, the amount of the supervision fee will be determined by the defendant's ability to pay and the number and type of supervisory services provided to the defendant (i.e., defendants with lower levels of supervision and ability to pay will incur lower fees, and defendants with higher levels of supervision and ability to pay will incur higher fees). Defendants who are released pretrial and who commit new crimes, fail to appear, or violate any other condition of their bail bond are brought to justice swiftly, and are held accountable for these breaches of the public's trust. Jefferson County Pretrial Services also transmits a summary of each defendant's performance under supervised pretrial release to either (a) the judge who will be sentencing the defendant, or (b) to the Probation Department's Pre-Sentence Investigation Unit, which will be making sentencing recommendations to the court for certain cases (e.g., most felonies).

On a daily basis, Jefferson County Pretrial Services reviews the roster of pretrial inmates who have remained in detention for three days or more after their first appearance, and every three days thereafter or as needed. Pretrial Services assesses whether there have been any changes in the defendant's risk of failure to appear or the commission of new crime. Pretrial Services transmits the results of the pretrial assessment to the court, the District Attorney's Office, and the Public Defender's Office (or the defendant's private defense attorney, if known). If necessary, a bond modification hearing is held pursuant to Colo. Rev. Stat. Section 16-4-107.

With the process described above, the use of the current First Judicial District's money bail bond schedule, and the use of any commercialized, for-profit money bail bonding entity to post a surety bond for a defendant, is almost always unnecessary.

## ***B. Specific Initial Tasks***

The authors recommend that criminal justice system policy-makers complete the following tasks to begin implementation of the proposed bail and pretrial process.

1. The Jefferson County Criminal Justice Strategic Planning Committee ("CJSPC") is the criminal justice coordinating entity ideally suited to the task of creating statements of vision and purpose, as well as community philosophies concerning pretrial detention and release. Through its System Performance Subcommittee, this Committee has already begun discussions regarding many of the issues set forth in this paper. The purpose of the System Performance Subcommittee is to analyze the functioning of the criminal justice system at the seven major decision points (one of which is pretrial release from detention) and make recommendations to the Committee about system-wide policy, programmatic, and operational improvements. One of the current Subcommittee goals for 2007-2009 is to review and modify, if necessary, pretrial release/bonding practices. An important task of the Subcommittee and the larger CJSPC is to produce a written document articulating the First Judicial District's philosophies on the administration of bail and the pretrial process. To ensure full judicial district participation, representatives from Gilpin County as well as members of the Court Services Advisory Board should be invited to these discussions.

There are two approaches to completing such a document. First, the group could discuss and memorialize written philosophies and then discuss how those philosophies play out with the various specific pretrial release/detention issues raised in this paper. Second, and more likely, the group could make decisions or recommendations for decisions concerning the specific issues first, and then articulate a judicial district bail philosophy based upon the sum of those decisions. To promote professional and productive discussion, if any CJSPC members differ on philosophical or procedural grounds from any or all three sets of national pretrial standards, then they should articulate specifically how their position differs, and use appropriate law, data, and evidence instead of anecdotal accounts or presuppositions to support their position.

To the extent that ideas for legislative reforms are raised, the group should formulate a plan for advancing its ideas to the Colorado General Assembly. For example, the group may decide that statutory revisions that expand the number of reasons that a defendant can be denied bail (e.g., for exceptional risk of failure to appear, for public safety concerns due to a high objective risk rating rather than a specific top charge) would further promote the purposes of bail and the pretrial process. Finally, the group should also request that the Criminal Justice Planning Unit, as staff to the Criminal Justice Strategic Planning Committee, measure the impact of all changes to the bail and pretrial process.

2. The CJSPC should also work with municipalities to formulate uniform policies regarding citations/summonses in lieu of formal arrest. Currently, there is no formal forum for discussing criminal justice issues with the twelve incorporated municipalities in Jefferson County. Such a forum, more fully described in Criminal Justice Planning's document titled *Municipal Assistance with County Fiscal Issues*, should be created, and the issue of citations versus arrest and detention should be discussed. Given the number of municipalities in Jefferson County, and the impact that the policies and practices of these municipalities have on Jefferson County government resources, County-city collaboration is very important.

Arrest policies (whether authored by the District Attorney, the Sheriff, or individual police agencies) should specifically articulate preferences for citations and summonses for cases deemed appropriate, and the issue of finite county resources (i.e., the jail) should be specifically considered as a relevant factor during the creation of these policies.

The Sheriff's Office should expand its Court Date Notification Program to call all individuals cited or summonsed into court, including those summonsed on felony charges and lower level misdemeanor and traffic charges. Additionally, other jurisdictions should be encouraged (possibly through the municipal forum, mentioned above) to create their own court date notification programs to reduce defendant failures to appear and unnecessary failure to appear warrants, which typically result in the booking of a defendant into the county jail. To facilitate the work of these court date notification programs, police agencies should be encouraged to collect verifiable defendant contact information, including multiple telephone numbers from all persons cited or summonsed into court.

3. Assuming that the articulated goals and philosophies created by the Criminal Justice Strategic Planning Committee are consistent with the new bail and pretrial process outlined above, the relevant stakeholders should begin discussions about particular steps that must be taken to



implement the plan. Judges, in particular, will be placed in a leadership role as their decisions (for example, a decision to cease using financial conditions except as a measure of last resort) will necessarily require other agencies to change. Judges, too, will be required to create a document articulating the court's expectations for pretrial supervision and outcome reporting, which will guide any entity expected to supervise defendants in the community. Other criminal justice agencies must make a commitment to embrace the changes required by important judicial decisions.

4. Relevant stakeholders should also begin discussions about how criminal justice system resources can be re-allocated to implement the plan. Judges or magistrates may need to provide coverage for more frequent and extensive bond hearings. The Pretrial Services Unit of the Justice Services Division may have to plan for more employees to assess more defendants, as well as to supervise an increased number of individuals placed on pretrial supervision. That Unit may also have to plan on how to manage whatever fees are generated from the proposed process. The District Attorney's and Public Defender's offices may need to assess how their resources will be allocated at first advisement or at formal detention hearings, when these are necessary. The Sheriff's Office, in turn, may need to adjust its booking and inmate movement processes to allow for the increased number of defendants who will be admitted, assessed by Pretrial Services, and released on bail bond within a short period of time (e.g., 24 hours).

5. Jefferson County's Pretrial Services Program will be required to make a number of changes as greater reliance upon front-end resources is realized. The relevant stakeholders should continue to support the CISPR study, which will provide research-based information for the Program's risk assessment, bond recommendation, and supervision functions. Additionally, the increased importance of employees working in pretrial assessment and supervisory positions may demand new human resource practices to improve quality employee recruitment, training, and retention.

6. After its first year of existence, the Colorado Commission on Criminal and Juvenile Justice (CCJJ) made at least 66 recommendations that are intended to improve the statewide criminal justice system. Five of these recommendations pertain to bail administration, and cover the issues of the expanding bond commissioners' authority, authorizing a money bail bond deposit to the court, and possibly creating a statewide money bail bond schedule.

We recommend that the members of the Jefferson County Criminal Justice Strategic Planning Committee and other principal decision-makers in the First Judicial District assist the members and staff of the CCJJ and any other policy-makers or entities (e.g., criminal defense bar, criminal justice advocacy groups) interested in improving statewide bail administration. Persons outside of the First Judicial District could benefit from the information in this paper, as well as from the products and agreements that resulted from the many discussions that have already occurred within the First Judicial District. We believe that, after referring to the information in this document and discussing ideas with their colleagues in the First Judicial District, CCJJ members would be in a better position to improve the CCJJ's five bail-related recommendations. We furthermore believe that any legislative action, in the absence of such discussions among CCJJ policy-makers (which, based on our experience, would probably require multiple meetings and discussions over several months), runs too high of a risk of (a) inconsistency with the CCJJ's

mission to be evidence-based and cost-effective in its pursuit of enhancing public safety and ensuring justice, and (b) further complicating already contradictory or deficient language in the current bail statutes. Thus, we respectfully recommend that any new attempt to modify the bail statutes be comprehensive, and consist of a total re-write, using the language and principles in from the ABA's pretrial standards as a template.

## Author Biographies

### **Michael R. Jones**

Mike Jones is the Criminal Justice Planning Manager for Jefferson County, Colorado, where he supervises six criminal justice planning/analytic or project management staff. His major responsibility is to facilitate the systemic, strategic planning and coordination initiatives of the county's policy-level criminal justice coordinating committee. Specifically, he and staff provide the committee with information and data about countywide trends and forecasts, jail use, criminal case processing, and new legislation and local policies, as well as ideas about and plans for improving the efficiency, effectiveness, and coordination of the local criminal justice system (e.g., using evidence-based practices). He and staff manage systemwide improvement projects that criminal justice agencies do not have the resources or expertise to do.

Mike Jones also serves as a part-time consultant for the National Institute of Corrections. He performs Justice System Assessments, assists local jurisdictions in developing or improving a criminal justice coordinating committee, and is authoring a guidebook that describes how jurisdictions can staff their criminal justice coordinating committee.

Mike Jones received his Ph.D. in Clinical Psychology from the University of Missouri-Columbia. His main areas of interest include criminal justice strategic planning, coordination, and analysis; forensic psychology; assessment and treatment of juvenile delinquency; and evidence-based practices. He has published several articles in peer-reviewed journals.

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Claire Brooker is a Criminal Justice Planner/Analyst for Jefferson County, Colorado where she supports the strategic planning process through policy research and data analysis. Prior to working for Jefferson County, she worked as a Legislative Auditor for the State of Colorado conducting program evaluations of state agencies with a focus on increasing the quality and efficiency of services. Claire received her Masters Degree in Political Science, Public Policy from the University of Colorado at Boulder.

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Tim Schnacke is currently Staff Attorney for the Colorado Court of Appeals, where he specializes in criminal appeals. Prior to working for the court, he served as a Planner/Analyst for Jefferson County, Colorado, and was staff to the Jefferson County Criminal Justice Strategic Planning Committee, the county's policy-level criminal justice coordinating committee. While working for the county, Tim also served as a part-time consultant for the National Institute of Corrections within the United States Department of Justice.

Tim's legal career includes private practice in Washington, D.C., and work with the City of Aspen, Colorado, and the United States Court of Appeals for the Tenth Circuit as both a Law Clerk and as Staff Counsel.

Tim received his Juris Doctor degree from the University of Tulsa College of Law, his Masters of Laws degree from the George Washington University's National Law Center, and his Master of Criminal Justice degree from the University of Colorado.