No._____

In the Court of Appeal of the State of California
First Appellate District, Division __

In re Kenneth Humphrey, Petitioner, on Habeas Corpus.	No. _____ Trial Court No. 17007715

Petition for Writ of Habeas Corpus Memorandum of Points and Authorities and Application for Immediate Release

Following order denying own recognizance release and setting money bail
(Pen. Code §§ 1270, 1275; § 1318, *et seq.*)
by Hon. Joseph M. Quinn, Dept. 12

(On for Motion to Set Aside and trial calling, 09/11/17, Dept. 22: 415-551-0322)

Jeff Adachi, San Francisco Public Defender
Matt Gonzalez, Chief Attorney
Paul Myslin, SBN 215173
Deputy Public Defender
555 Seventh Street
San Francisco, California 94103
(415) 575-8835
Paul.Myslin@sfgov.org

Alec Karakatsanis
Washington D.C. Bar Number 999294
Civil Rights Corps
910 17th Street NW Suite 500
Washington, D.C. 20006
(202) 681-2409
Alec@civilrightscorps.org
(Pro Hac Vice application forthcoming)

Attorneys for Kenneth Humphrey

Issues

1. Detention resulting from bail set: equal protection and due process require consideration of ability to pay and alternative conditions of release.

No person can be kept in jail solely for inability to make a monetary payment. Here, Humphrey is entitled to release on bail as a matter of right, but the trial court required a $350,000 secured financial condition of release. An identically-situated person with enough money to pay would be released from jail immediately. The requirement of a secured financial condition that Humphrey cannot afford thus operates as a de facto order of pretrial detention entered without the required procedures and findings for that order. Does the imposition of $350,000 secured money bail as a condition of release without an inquiry into Humphrey's ability to pay, consideration of non-financial alternatives, and findings concerning the least restrictive conditions of release, violate his state and federal constitutional rights?

2. Detention order prohibited absent procedural protections: due process.

Pretrial liberty is a "fundamental" right. *United States v. Salerno* (1987) 481 U.S. 739, 750. Due process forbids the infringement on liberty interests unless narrowly tailored to serve a compelling state interest. Pretrial detention, absent clear and convincing evidence that the person poses a danger to the community or an immitigable risk of flight, and without the legal standards and procedural safeguards required for a valid order of pretrial detention, is unconstitutional. *Salerno*, *supra*, 481 U.S. at 754; Cal. Const. Art. 1, § 12 (b)-(c). Is the trial court's use of money bail as a de facto order of pretrial detention without the required procedural protections unconstitutional?

Table of Contents

List of Attached Authorities
Appendix to Petition

Exhibits

Table of Authorities

Cases

Statutes

Other Authorities

Constitutional Provisions

No._____

In the Court of Appeal of the State of California
First Appellate District, Division __

In re Kenneth Humphrey, Petitioner, on Habeas Corpus.	No. _____ Trial Court No. 17007715

Petition for Writ of Habeas Corpus

To the Honorable Presiding Justice and Associate Justices of the Court of Appeal of the State of California:

1. Statement of facts and procedure

A. Kenneth Humphrey was arrested on May 23, 2017.

Petitioner Kenneth Humphrey is a 63-year-old man, a retired shipyard laborer, and a lifelong resident of San Francisco. He was arrested and charged with first degree residential robbery (Pen. Code § 211) first degree residential burglary (Pen. Code § 459), inflicting injury (not great bodily injury) on elder and dependent adult (Pen. Code § 368(c), and theft (Pen. Code § 368(d)).

Because the charges do not involve a capital offense, and there has been no finding of clear and convincing evidence of a threat of great bodily harm to

another person has been made, Humphrey is entitled to bail as matter of right. Cal. Const. Art. 1, § 12.

B. At arraignment, defense moved for release on own recognizance; magistrate denied based on public safety.

1. Defense identified individual factors in support of release.

At arraignment, the defense requested release without financial conditions raising the following factors: (i) Humphrey's advanced age, (ii) his community ties as a lifelong resident of San Francisco, (iii) his financial condition as a retired shipyard laborer, and (iv) the unique mitigating factors in this case, including minimal property loss, the age of his prior offenses alleged (1980, 1986, 1992), and his lack of a recent criminal record—Humphrey has lived a law abiding life for over 14 years. The Reporter's Transcript of Hearing (arraignment on complaint) is attached as Exhibit A, Petition Exhibit ("PE") 1-7.

Every court appearance is documented in a print-out of the Court Management System (CMS), attached as Exhibit B, PE 9-10.

2. The court imposed a financial condition of release beyond Humphrey's means based on public safety.

The prosecutor requested $600,000 secured money bail, and a criminal protective order, emphasizing public safety concerns. See Exhibit A, PE 4:18-23. The judge denied the request for release on own recognizance, setting bail in the amount of $600,000, and agreeing to the protective order. The court emphasized

public safety concerns in setting a financial condition of release. See Exhibit A, PE 5:11-20. The court's imposition of $600,000 had the effect of detaining Humphrey pretrial solely because he did not have enough money to pay the amount required for his release.

C. Humphrey requested a formal pretrial release hearing, challenging the money bail amount under due process, equal protection, and the Eighth Amendment.

Humphrey filed a motion for a hearing and requested release on his own recognizance, a copy of which attached as Exhibit C, PE 12-52. Humphrey argued that financial bail was set beyond his means, and violated the Fourteenth Amendment's guarantees of Equal Protection and Due Process, and was excessive in violation of the Eighth Amendment's proscription against excessive bail. The Reporter's Transcript of the Bail Hearing (July 12, 2017) is attached as Exhibit D, PE 54-64.

The prosecution argued that Humphrey should not be released because of public safety and flight risk concerns. Exhibit D, PE 62:16-17. The prosecutor requested a de facto order of preventative detention. The court denied Humphrey's request, concluding that the charges raised "substantial public safety concerns." Exhibit D, PE 61:13-14. The court made no inquiry of Humphrey's financial circumstances, and did not address the possibility of release with safety conditions, such as a no-weapons condition or a stay away order. See generally

Exhibit D, PE 62:10-17. The court made no findings by clear and convincing evidence.

1. Humphrey argued that the current secured financial condition of release results in de facto detention.

At the bail hearing, Humphrey presented the court with an acceptance letter from Golden Gate for Seniors, a residential recovery facility, Exhibit C, PE 37, and asked to be released on his own recognizance to Golden Gate. In seeking release on his own recognizance, Humphrey emphasized his advanced age, his ties to the community as a lifelong resident of San Francisco, and his progress in undergoing rehabilitative treatment for his battle with addiction. Exhibit C, PE 24:9-16. Humphrey argued that, as currently set, secured money bail results in de facto detention because he is too poor to pay the cash bail amount required to buy his liberty. He argued that a detention hearing with proper and constitutional procedures and findings must be held if the court is to use secured money bail to accomplish the functional equivalent of a detention order. Exhibit C, PE 17:2-3 citing Cal. Const. Art. 1, § 12.

2. The prosecutor opposed release on public safety grounds.

The prosecutor did not file a written opposition to Humphrey's bail motion, nor did she dispute any of the assertions in Humphrey's bail motion at the bail hearing. Rather, at the hearing, the prosecutor argued that money bail should

remain the same because of public safety and flight risk concerns. Exhibit D, PE 59:6-23

3. The court reduced bail to $350,000 without a factual finding about Humphrey's ability to pay.

The court recognized that Humphrey's willingness to meaningfully participate in rehabilitative treatment was "an unusual circumstance that would justify some deviation from the bail schedule." Exhibit D, PE 62:4-9. The court denied Humphrey's motion to be released to Golden Gate for Seniors, instead reducing bail to $350,000 from the initial $600,000 set according to the bail schedule. Exhibit D, PE 62:4-17.

D. Humphrey remains in custody, unable to pay for his release.

Humphrey has remained in custody since his arrest, unable to pay the $350,000 money bail. The matter is set for September 11, 2017 for a hearing on the Motion to Set Aside and trial calling.

2. Contention

By requiring money bail without making the inquiries or findings required for an order of pretrial detention, the trial court violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Thus, petitioner requests this Court release him on his own recognizance; or in the alternative, remand the matter to the trial court to conduct an expedited hearing at which petitioner is either ordered detained prior to trial based on sufficient findings after

appropriate adversarial hearing, or after which petitioner is ordered released prior to trial on reasonable financial and/or non-financial conditions of pretrial release that do not result in his detention. Petitioner also urges that the Court issue an opinion on the merits of his case to provide guidance for trial courts concerning what is required at the remand hearing and, as a general matter, to ensure that similar daily violations of basic rights do not recur. See *In re William Peyser* (June 9, 2017) First Appellate District, Division One, No. A151372 (finding petitioner had articulated prima facie case for relief on claim that the superior court imposed money bail without following the procedures set forth in Penal Code section 1275(a)); Judicial Council of California, Letter to Assembly Member Hon. Reginald B. Jones-Sawyer, Sr. (June 30, 2017) 4 available at http://www.courts.ca.gov/documents/ga-position-letter-assembly-sb10-hertzberg.pdf (expressing concern that proposed bail reform legislation will "require[] courts to set monetary bail at the lease restrictive level necessary and consider ability to pay without substantial hardship).

3. No other petition

No other petition for a writ has been made by, or on behalf of Humphrey, relating to this matter.

4. Jurisdiction and timeliness

The parties directly affected by the instant proceeding now pending in respondent court are petitioner, by and through counsel, the Public Defender of

San Francisco County, and Civil Rights Corps; respondent, the Superior Court of the City and County of San Francisco, State of California; and the People, real party in interest, by its counsel, the District Attorney of San Francisco County. The parties have been served with a copy of this petition pursuant to Code of Civil Procedure section 1107.

All the proceedings about which this petition is concerned have occurred within the territorial jurisdiction of respondent court and of the Superior Court of the State of California in and for the City and County of San Francisco. The writ is taken within thirty days of the challenged order (July 12, 2017) and is therefore timely. *Scott v. Municipal Court* (1974) 40 Cal.App.3d 995, 996.

5. No adequate remedy

Humphrey has no other speedy or adequate remedy at law. He is presently in custody unable to post the $350,000 money bail, and habeas relief lies as to bail review. *In re McSherry* (2003) 112 Cal.App.4th 856, 859. The standard of review on questions of law is de novo. *In re Taylor* (2015) 60 Cal. 4th 1019, 1035 ("[W]hen the application of law to fact is predominantly legal, such as when it implicates constitutional rights and the exercise of judgment about the values underlying legal principles, [the appellate] court's review is de novo."). The Court may grant the writ without an evidentiary hearing if the established facts justify relief. *McSherry*, *supra*, 112 Cal.App.4th at 859.

Thus, petitioner asks that: A writ of habeas corpus be issued by this Court vacating the trial court's order, and ordering Humphrey released from custody in this case, or remanding to the lower court for an expedited hearing with instructions that the court inquire into, and make findings regarding petitioner's ability to pay and accordingly set a financial condition of release that does not operate to detain him and/or release petitioner on his own recognizance with appropriate non-financial conditions of release.

Dated: August 4, 2017

Respectfully submitted,

_____/s/_____
Paul Myslin
Deputy Public Defender
Attorney for Kenneth Humphrey

Verification

State of California

San Francisco County

I declare:

I am an attorney at law licensed to practice in all the courts of California, and I am employed as a deputy public defender for the City and County of San Francisco.

In that capacity, I am familiar with the proceedings below and have read the foregoing petition and the exhibits attached thereto or lodged with this court, and I know the contents thereof to be true based upon my office's representation of petitioner Humphrey.

I declare under penalty of perjury that the above is true and correct and that this verification was executed on August 4, 2017at San Francisco, California.

_____/s/_____
Paul Myslin
Deputy Public Defender
Attorney Kenneth Humphrey

Introduction

Kenneth Humphrey challenges his ongoing pretrial detention, his core claim being that the lower court required a financial condition of release without any inquiry into, or findings concerning, his ability to pay, or consideration of non-financial alternative conditions of release. Because Humphrey cannot pay the financial condition required, the lower court imposed a de facto order of pretrial detention absent the procedural protections, legal standards, and substantive findings that must accompany a de facto order of pretrial detention under State and Federal law. See *United States v. Mantecon-Zayas* (1st Cir. 1991) 949 F.2d 548, 550 ("[O]nce a court finds itself in this situation—insisting on terms in a "release" order that will cause the defendant to be detained pending trial—it must satisfy the procedural requirements for a valid detention order . . . ."); *ODonnell v. Harris County, Tx.* (S.D. Tex. April 28, 2017) No. H-16-1414, 2017 U.S. Dist. LEXIS 65444 at *68 citing *Bearden*, *supra*, 461 U.S. at 674 ("[P]retrial detention of indigent defendants who cannot pay a financial condition of release is permissible only if a court finds, based on evidence and in a reasoned opinion, either that the defendant is not indigent and is refusing to pay in bad faith, or that no less restrictive alternative can reasonably meet the government's compelling interest.").

Petitioner's claims flow from two lines of precedent. First, the Supreme Court and federal circuit courts have held that equal protection and due process forbid jailing a person solely because of her inability to make a payment. *Bearden v. Georgia* (1983) 461 U.S. 600, *Turner v. Rogers* (2011) 564 U.S. 431, *Pugh v. Rainwater* (5th Cir. 1978) 572 F.2d 1053. Because of that substantive right, courts subject wealth-based detention to careful scrutiny and require procedures that include an inquiry into ability to pay and consideration of alternatives to money-based detention. Second, because the right to pretrial liberty is "fundamental," *United States v. Salerno* (1987) 481 U.S. 739, 750, an order resulting in pretrial detention must meet robust safeguards, including an adversarial hearing with counsel, an opportunity to present evidence, application of specific legal and evidentiary standards, and a finding that no less restrictive condition or combination of conditions can mitigate individualized risks. *Salerno*, *supra*, 481 U.S. at 751. Each independent line of precedent requires good reasons and specific procedures before the deprivation of the vital right to pretrial liberty.

Therefore, if the government requires money as a condition of release and the amount of money is unattainable, then the government has issued the functional equivalent of an order of pretrial detention. *United States v. Leathers* (D.C. Cir. 1969) 412 F.2d 169, 171 ("[T]he setting of bond unreachable because of its amount would be tantamount to setting no conditions at all."). The

government must justify its de facto order of detention by (1) demonstrating that non-financial conditions could not serve its purposes and (2) providing the procedures required by the Supreme Court to protect against the erroneous deprivation of fundamental rights.

A secured financial condition of release beyond an individual's ability to pay—i.e., unattainable money bail—may or may not be constitutional. This petition does not seek a ruling on whether unattainable money bail is unconstitutional per se or excessive under the California Constitution. Regardless, the law is clear: before detaining a presumptively innocent person pretrial, the government must follow specific procedures and make specific findings that were not made here.

The California Constitution provides an honest and effective means of detaining arrestees that complies with the due process requirements outlined in *Salerno*. But instead of imposing transparent pretrial detention under the Constitution, the trial court subverted this process by imposing an unattainable financial condition with the apparent intention of detaining Humphrey but evading the findings and procedures necessary for an order of detention.

Authorities and Argument

1. Jailing a person by requiring unattainable financial conditions violates the Equal Protection and Due Process Clauses.

A pretrial accused who remains jailed solely by reason of her poverty is denied equal protection of the law and due process under the state and federal constitutions.

A. The Equal Protection and Due Process Clauses prohibit the government from jailing a person because he cannot afford a monetary payment.

The rule that access to money has no place in deciding whether a human being should be kept in a jail cell relies on fundamental principles in American law. See *Williams v. Illinois* (1970) 399 U.S. 235, 241 ("[T]he Court has had frequent occasion to reaffirm allegiance to the basic command that justice be applied equally to all persons."). In *Griffin v. Illinois* (1956) 351 U.S. 12, 19, the Supreme Court put it simply: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." In *Douglas v. California* (1963) 372 U.S. 353, 355, the Supreme Court applied this rule to an indigent person's appeal: "For there can be no equal justice where the kind of appeal a man enjoys depends on the amount of money he has."

These principles have been applied in a variety of contexts where the government has sought to keep a person in jail solely because of the person's inability to make a monetary payment. See, e.g., *Tate v. Short* (1971) 401 U.S. 395, 398 ("[T]he Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."). In *Bearden*,

supra, 461 U.S. at 672–73, the Supreme Court explained that to "deprive [a] probationer of his conditional freedom simply because, through no fault of his own he cannot pay [a] fine . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment." For this reason, the Court held that a necessary pre-condition for a State to jail an individual for non-payment of a monetary obligation is an inquiry into the defendant's ability to pay. *Id.* at 672.

Because of this precedent, California law holds that any kind of pay-or-jail system is unconstitutional when it operates to jail the poor. In *In re Antazo* (1970) 3 Cal.3d 100, two defendants were convicted of arson and the trial court suspended imposition of sentence upon conditions including that each pay a fine or, in lieu of payment, serve one day in jail for each $10 unpaid. *Id.*, at 106. While his co-defendant was able to pay the fine and did so, Antazo was indigent and was jailed upon his inability to pay the fine and penalty assessment. *Id.* In striking down the sentencing scheme, the California Supreme Court observed that a sentence requiring payment of a fine and imprisonment until it is paid gives an advantage to the wealthy defendant over the poor one: "The 'choice' of paying $100 fine or spending 30 days in jail is really no choice at all to the person who cannot raise $100. The resulting imprisonment is no more or no less than imprisonment for being poor . . . ." *Id.*, at 108 (citation omitted).

The California Supreme Court applied the same reasoning to indigent juveniles who were denied informal probation if they were unable to make

restitution payments. In *Charles S. v. Superior Court* (1982) 32 Cal. 3d 741, 744, Charles's probation officer and the juvenile court denied him informal probation, although it was conceded that he was a proper candidate, because his family could not pay the required restitution. Invoking *Antazo*'s reasoning that "the threat or actuality of imprisonment" could not "force a man who is without funds to pay a fine" and that there were "less intrusive means to further the . . . state interests," the Court held that a minor cannot be denied formal or informal probation solely on the grounds of his inability to pay restitution. *Id.*, at 751.

This Court has likewise held that imprisonment for inability to make a monetary payment violates constitutional protections. In *In re Young*, (Ct. App. 1973) 32 Cal. App. 3d 68, 75, Young challenged the denial of prison credit for his pre-sentence incarceration, which was solely due to his indigency because he could not post bail and therefore spent 62 days in jail prior to being sentenced. This Court found that the denial of presentence jail time was a deprivation of liberty and held: "The additional deprivation suffered only by the indigent does not meet federal standards of equal protection and does not comply with the mandate of uniform operation of all general laws contained in article I, section 11 of the California Constitution." *Id.*, at 75. See also *People v. Kay* (1973) 36 Cal. App. 3d 759, 763 (holding that "an indigent defendant cannot be imprisoned because of his inability to pay a fine, even though the fine be imposed as a condition of probation" and instructing the trial court, on remand, to take into

account the "present resources of appellants and of their prospects" when determining their restitution payments").

Under this precedent, the Equal Protection and Due Process Clauses prohibit jailing a person because she is too poor to afford a monetary payment. Any scheme that ties liberty to ability to make a monetary payment runs afoul of this fundamental principle.

If access to money has no place in determining sentencing outcomes or probation revocation, it likewise has no place in pretrial release decisions. Just as it is unlawful to put a convicted person in jail because of the inability to make a monetary payment, a presumptively innocent person cannot be kept in jail on account of poverty. The principle in *Williams*, *Tate*, *Bearden*, and *Antazo* applies equally to pretrial and post-trial jailing. The "illusory choice" and the "different consequences . . . applicable only to those without the requisite resources," *Williams*, *supra*, 399 U.S. at 242, are the same.

B. The principle that a person cannot be jailed for lack of access to money applies prior to trial.

For pretrial arrestees, the rights at stake are even more significant because the arrestees' interest in liberty is not diminished by a criminal conviction. Justice Douglas framed the basic question that applies to pretrial detainees:

> To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law. . . . 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, *supra*, 81 S. Ct. at 197–98 (Douglas, J., in chambers).

That question was answered in *Pugh v. Rainwater* (5th Cir. 1978) (*en banc*) 572 F.2d 1053, 1056: "At the outset we accept the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." The panel opinion, *Pugh v. Rainwater* (5th Cir. 1977) 557 F.2d 1189, 1190, had struck down altogether the Florida Rule of Criminal Procedure dealing with money bail on the grounds that it is unconstitutional to keep an indigent person in jail prior to trial solely because of the person's inability to pay. Although the *en banc* court did not agree that the entire rule was *facially* invalid because financial conditions of release may be perfectly affordable and less restrictive for those who can pay, it agreed as a matter of constitutional principle "that in the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint." *Pugh*, *supra*, 572 F.2d at 1057-1058. In sum, the *en banc* court held: "The incarceration of those who cannot [afford a cash payment], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." *Id.*, at 1057.

Over the past several years, federal courts across the country have condemned the practice of requiring the payment of money bail without first determining that the arrestee has the ability to pay. See, e.g., *ODonnell v. Harris County, Tx.* (S.D. Tex. April 28, 2017) No. H-16-1414, 2017 U.S. Dist. LEXIS 65444 at *68 citing *Bearden*, *supra*, 461 U.S. at 674 ("[P]retrial detention of indigent defendants who cannot pay a financial condition of release is permissible only if a court finds, based on evidence and in a reasoned opinion, either that the defendant is not indigent and is refusing to pay in bad faith, or that no less restrictive alternative can reasonably meet the government's compelling interest."); *Walker v. City of Calhoun, Georgia* (N.D. Ga. Jan. 28, 2016) No. 4:15-CV-0170-HLM, 2016 U.S. DIST. LEXIS 12305, at *11 ("Certainly, keeping individuals in jail because they cannot pay for their release, whether via fines, fees, or a cash bond is impermissible."), *vacated on other grounds*, (11th Cir. Mar. 9, 2017) No. 16-10521, 2017 U.S. App. LEXIS 4183; *Rodriguez v. Providence Cmty. Corr.* (M.D. Tenn. Dec. 17, 2015) 155 F.Supp.3d 758, 786-69 (enjoining a policy of detaining probationers who could not pay a predetermined amount of bail).

The Department of Justice—citing its commitment to the issue since Attorney General Robert Kennedy led the abolition of wealth-based detention in federal courts with the help of a consensus among federal judges, Congress, and leading academics—announced its position that the use of secured money bail without an

inquiry into ability to pay to keep indigent arrestees in jail "not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy." United States Department of Justice, Statement of Interest, *Varden et al. v. City of Clanton* (M.D. Ala. 2015) 15-cv-34, PA 2, available at https://www.justice.gov/crt/file/761266/download; *see also* Brief for the United States as *Amicus Curiae*, *Walker v. City of Calhoun, Georgia*, No. 16-10521-HH, PA 50, available at https://www.justice.gov/crt/file/887436/download ("[A] bail scheme violates the Fourteenth Amendment if, without a court's meaningful consideration of ability to pay and alternative methods of assuring appearance at trial, it results in the detention of indigent defendants pretrial.").

Since his arraignment, Humphrey has been permitted to go home, but only upon payment of $600,000—later reduced to $350,000 at his bail hearing. The trial court determined that he is eligible for immediate release, but made his freedom contingent on his access to wealth. The court neither inquired into, nor made a finding about, whether Humphrey could pay $350,000. As a result, the court issued a de facto detention order without any of the procedural requirements or findings that must attend such an order.

C. Because of the substantive right against wealth-based jailing, the government must not detain a person prior to trial using a financial condition without considering and making findings about the availability of alternative conditions of release.

Because it infringes on a vital substantive right, wealth-based detention is subject to careful scrutiny and can only be imposed after procedures that include an inquiry into ability to pay and consideration of alternatives to money-based detention. In *Bearden*, for example, in examining the constitutionality of revoking probation due to inability to pay a fine, the Court made "careful inquiry" into the state's professed "interests" and "the existence of alternative means for effecting" those interests. 461 U.S. at 666–67. See also *Pugh*, *supra*, 572 F.2d at 1058 (holding that if "appearance at trial could reasonably by assured by . . . alternate [conditions] of release, pretrial confinement for inability to post money bail" is unconstitutional); *ODonnell*, *supra*, 2017 U.S. Dist. LEXIS 65444 at *68 citing *Bearden*, *supra*, 461 U.S. at 674 ("[P]retrial detention of indigent defendants who cannot pay a financial condition of release is permissible only if a court finds, based on evidence and in a reasoned opinion, either that the defendant is not indigent and is refusing to pay in bad faith, or that no less restrictive alternative can reasonably meet the government's compelling interest.").

If the court determines that a financial condition of release is required, the inquiry into ability to pay must be rigorous. In *Turner*, *supra*, 564 U.S. at 447,

the Supreme Court explained the basic protections that a state must provide before jailing a person for non-payment of a monetary sum, including:

- notice to the defendant that his "ability to pay" is a critical issue in the . . . proceeding;
- the use of a form (or the equivalent) to elicit relevant financial information;
- an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (e.g. those triggered by his responses to the form); and
- an express finding by the court that the defendant has the ability to pay.

Id. at 2519.

The trial court here made no inquiry into Humphrey's ability to pay, let alone the rigorous inquiry *Turner* required. The court did not make a factual finding into Humphrey's ability to pay, nor did it meaningfully consider non-financial conditions of release to secure his appearance at trial. The court reduced bail, but did not inquire into Humphrey's financial circumstances when imposing the financial condition of release, and thus set bail at an amount that was still far beyond Humphrey's ability to pay. Money bail, even at the reduced amount, continued to function as a de facto order of pretrial detention because of Humphrey's inability to afford his release.

The court also did not seriously consider non-financial alternatives or make findings that less restrictive alternatives could not reasonably meet the government's interest as required by *Bearden* and *Pugh*. The court's order

requiring a secured financial condition of release beyond Humphrey's ability to pay, without a finding that no alternative conditions of release would reasonably assure his appearance, violated the Equal Protection and Due Process Clauses.

It is important to clarify that Humphrey's claim that equal protection and due process require the court to consider his ability to pay is *not* a claim that unaffordable money bail is excessive under the California Constitution. See Cal. Const. Art. I, § 12 ("Excessive bail may not be required."). This case is distinct from the line of cases in which this Court has held that money bail is not excessive under the California Constitution simply because an arrestee cannot afford it. See, e.g., *In re Smith* (1980) 112 Cal.App.3d 956, 966–67 & fn. 7 (refusing to find that inability to make bail per se constitutes denial of equal protection); *People v. Gilliam* (1974) 41 Cal.App.3d 181, 190–91 (finding "a person's inability to give bail does not of itself entitle him to be discharged from custody").

This case does not present the question of whether those cases are wrongly decided. Nonetheless, the abbreviated reasoning in those cases has never been adopted by the United States or California Supreme Courts. They pre-date *Salerno*'s articulation of pretrial liberty as a "fundamental" right and 1982 amendments to California Constitution Article I, Section 12 providing for preventive detention in certain limited circumstances. So, they do not even reflect the State's current bail regime. Furthermore, these cases are irrelevant to the

claim at issue here because this case is about the procedures and findings that must accompany an order of release that results in detention, whether that order is based on money or otherwise.

Moreover, those cases are inconsistent with the history of excessive bail jurisprudence. See U.S. Department of Justice—National Institute for Corrections, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (August 2014) p. 13, available at https://static.nicic.gov/UserShared/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf ; Brief for Amicus Curiae CATO Institute, *Walker v. City of Calhoun, Ga.* (11th Cir. 2016) No. 16-10521 at p. 3, available at https://object.cato.org/sites/cato.org/files/pubs/pdf/walker-v-city-of-calhoun.pdf (explaining that, throughout the history of bail, since the Magna Carta, bail has been a mechanism of release, and any financial condition of bail had to be imposed in an amount that the presumptively innocent person could pay); *cf. Bandy v. United States* (1960) 81 S. Ct. 197, 197–98 (Douglas, J., in chambers) ("To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law.").

Most fundamentally, because the purpose of a financial condition is to incentivize an arrestee to come back to court, it makes no sense to require a

financial incentive of *release* that results in a person's *detention* because the arrestee will therefore never be in a position for that incentive to operate.

The California Supreme Court has not weighed in, and this Court need not address that issue. The question of whether unattainably high money bail is also "excessive" under the California Constitution is different from whether imposing financial conditions of release without an ability-to-pay determination or consideration of alternatives satisfies equal protection and due process.

2. The trial court's de facto detention order violates the Due Process Clause.

The interest in pretrial liberty is a "fundamental" right. *Salerno*, *supra*, 481 U.S. at 750; *Zadvydas v. Davis* (2001) 533 U.S. 678, 690 ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."); *Lopez-Valenzuela v. Arpaio* (9th Cir. 2014) (*en banc*) 770 F.3d 772, 781 (applying strict scrutiny to law regarding bail because it implicates "the individual's strong interest in liberty"); *Van Atta v. Scott* (1980) 27 Cal.3d 424, 435, superseded on other grounds via constitutional amendment (Prop. 4) as recognized in *In re York* (1995) 9 Cal. 4th 1133, 1134 n.7 ("Th[e] decision [whether an individual will be released prior to trial] affects the detainee's liberty, a fundamental interest second only to life itself in terms of constitutional importance.").

Because it is a fundamental right, any deprivation of pretrial liberty must withstand heightened scrutiny. See, e.g., *Lopez-Valenzuela*, *supra*, 770 F.3d at 781 (applying strict scrutiny to strike down Arizona bail law that required detention after arrest for undocumented immigrants accused of certain offenses). This heightened scrutiny requires that the deprivation of pretrial liberty be evaluated based on whether it was "narrowly focused" to serve "compelling" interests. *Lopez-Valenzuela*, *supra*, 770 F.3d at 791 (citing *Salerno*, *supra*, 481 U.S. at 750-51); see also *Simpson v. Miller* (Ariz. 2017) 387 P.3d 1270, 1276 ("[I]t is clear from *Salerno* and other decisions that the constitutionality of a pretrial detention scheme turns on whether particular procedures satisfy substantive due process standards."). For this reason, the Supreme Court in *Salerno* applied exacting scrutiny when the government sought to deprive a presumptively innocent person of her pretrial liberty.

Secured money bail required in an unattainable amount is equivalent to an order of detention. See *In re Christie* (2001) 92 Cal.App.4th 1105, 1109 (for offenses that do not qualify for detention under article I, section 12 "the court may neither deny bail nor set it in a sum that is the functional equivalent of no bail"); *State v. Brown* (N.M. 2014) 338 P.3d 1276, 1292 ("Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether."); *Leathers*, *supra*, 412 F.2d at 171 ("[T]he setting of bond unreachable because of its amount would be tantamount to setting no

conditions at all."); *ODonnell*, *supra*, U.S. Dist. LEXIS 65444 at *72 (holding that secured money bail set in an amount that an arrestee cannot afford is constitutionally equivalent to an order of detention). The order setting unaffordable bail must therefore be accompanied by all of the process required for a valid order of detention.

Thus, when requiring unattainable conditions of release that result in detention, the court must provide the procedures and make the findings necessary for an order of detention. *United States v. Mantecon-Zayas* (1st Cir. 1991) 949 F.2d 548, 550 ("[O]nce a court finds itself in this situation—insisting on terms in a "release" order that will cause the defendant to be detained pending trial—it must satisfy the procedural requirements for a valid detention order . . . ."). Before detaining an arrestee pretrial, a trial court is thus required to apply all of the protections outlined by the Supreme Court in *Salerno* and California Constitution Article I, Section 12, including a full and robust adversarial hearing with (1) heightened legal and evidentiary standards, and (2) findings on the record that no alternative conditions or combination of conditions could serve the government's compelling interests. Here, the trial court did neither.

A. *Salerno* requires rigorous procedures prior to pretrial detention.

The Supreme Court has explained the procedures and protections that due process requires for a valid order of pretrial detention to be entered. In *Salerno*, *supra*, 481 U.S. 739, the Court considered a facial challenge to the federal Bail

Reform Act, which permits the government to detain people found to be dangerous after an individualized "full blown adversary hearing," *id.* at 740, only where the "Government . . . convince[s] a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community . . . ." *Id.* The Supreme Court subjected the Bail Reform Act to heightened judicial scrutiny, holding that the state may detain individuals before trial only where that detention is carefully limited to serve a "compelling" state interest. *Id.* at 746 (citing *Mathews v. Eldridge* (1976) 424 U.S. 319, 335).

In *Salerno*, the due process inquiry produced three basic requirements. First, pretrial detention of a presumptively innocent person in the federal system is allowed only in cases of "the most serious of crimes." *Id.* at 747. Only in such cases does that balance of interests allowing deprivation of an individual's "fundamental" right begins to tilt in the government's favor. This mirrors the California Constitution, which allows for preventative detention only in serious felony cases. Cal. Const. Art I, § 12.

Second, an order of detention may lie only after a rigorous adversarial hearing with counsel and heightened evidentiary burdens. *Id.* at 750. The harms are too great, both to the individual's core right to bodily freedom and to the future of the person's criminal case, to permit detention without rigorous protections.

Third, there must be detailed findings that explain why the person must be fully incapacitated prior to being found guilty of a crime, *Id.* at 752, including an

explanation of why no other condition or combination of conditions can protect against specifically-identified risks that the individual has been found to pose. Here, the trial court evaded all of these findings by ordering pretrial release, but then conditioning that release on an amount of money that Humphrey could not afford. That order is the kind of less "transparent," *Brown*, *supra*, 338 P.3d at 1292, order of de facto detention that has no place in American law.

Under *Salerno*, courts may not use money to determine freedom or detention unless that decision is made on the basis of rigorous proceedings and unless the court finds that no other alternative is sufficient. The court did not meet that standard here. Instead, the trial court made a conclusory statement that bail should be set in an unaffordable amount because of public safety and flight risk concerns. The de facto detention order was entered despite the existence of ample constitutionally permissible and practically sound alternatives that do not infringe on fundamental liberties. See Cal. Penal Code § 1318 (before being released on his or her own recognizance, defendant must promise to obey "all reasonable conditions imposed by the court or magistrate); *In re York*, *supra*, 9 Cal.4th 1133, 1145 (trial court has "broad discretion to impose reasonable conditions of OR release," even if the condition is not concerned with guaranteeing the defendant's presence at court hearings).

The court's reliance on public safety when imposing money bail was improper because a secured financial condition of release cannot be used to protect public

safety. *Salerno* made clear that that public safety was a valid consideration when determining whether and under what conditions an arrestee *can be released* pretrial. 481 U.S. at 755. But *Salerno* does not stand for the proposition that public safety is an appropriate consideration in determining whether a person should be required to *pay a secured financial condition and how much that should be*. That proposition would make no sense, because money bail does nothing to prevent the arrestee from committing another crime. Defendants do not forfeit money bail when they commit a new offense; they forfeit bail only when they do not appear at a court hearing. Pen. Code §§ 1269b(h), 1305(a); see also Pen. Code § 1278(a) (surety only guarantees appearance of defendant, *not* that defendant will be crime-free)

Under *Salerno*, any risk to public safety must be addressed by appropriate conditions of release and, in limited circumstances after proper procedural protections, pretrial detention. The trial court here actually *accepted* Humphrey's proposed non-monetary release condition—that he be released to a residential drug and alcohol recovery center for seniors, saying that a condition of his release on money bail amount would be that he participate in a residential treatment facility. PE 16:19–22. But the court made his ability to enter the residential treatment facility contingent on his ability to pay $350,000 and failed to explain how money bail would deter the conduct about which it was concerned in a way that residential treatment alone would not.

Additionally, the trial court could have considered other less-restrictive alternatives to pretrial detention that have proven effective at protecting the public and increasing court appearance. These include regular check-ins with ACM, protective orders, alcohol monitors, text message and phone call reminders of court dates, curfew, and, as a last resort, home confinement or GPS monitoring. These alternatives are note only constitutional, but they are cheaper, more effective, and far less intrusive than pretrial detention.

B. Consistent with *Salerno*, California Constitution Article I, Section 12 provides for preventive detention under limited circumstances.

Consistent with *Salerno*, state law provides for preventive detention after a hearing with a heightened evidentiary burden and findings that detention is required to prevent great bodily harm. Cal. Const. Art. I, §12. But here, at no point did the prosecution seek—nor the trial court invoke—the constitutional procedures that would allow for preventive detention. To the contrary, the judge ordered Humphrey *released*—so long as he could come up with enough money to pay for his release. By imposing unaffordable money bail, the court evaded the legal standards and procedures of a detention hearing by intentionally imposing a monetary amount that operates as a de facto detention order.

Under the state constitution, a detainee is entitled to release as a matter of right. Cal. Const. Art. I, § 12 (right to bail); Cal. Pen. Code § 1271 (bail a matter of right). There are only three express exceptions to the right to bail:

> a) Capital crimes when the facts are evidence or the presumption great;
>
> b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based upon *clear and convincing evidence* that there is *a substantial likelihood the person's release would result in great bodily harm to others*; or
>
> c) Felony offenses when the facts are evident or the presumption great and the court finds based on *clear and convincing evidence* that *the person has threatened another with great bodily harm* and there is *a substantial likelihood that the person would carry out the threat if released*.

Cal. Const. Art. 1, § 12 (italics added). Before bail is set or denied under section 12, the detainee is entitled a full evidentiary hearing, and the court must make findings based on "clear and convincing evidence" of a substantial likelihood of great bodily harm to others or a specific person.

The "clear and convincing evidence" standard is rigorous. See *In re Nordin* (1983) 143 Cal.App.3d 538, 543 (describing the clear and convincing standard as requiring "a finding of high probability," "so clear as to leave no substantial doubt," and "sufficiently strong to command the unhesitating assent of every reasonable mind"). In *Nordin*, *supra*, 143 Cal.App.3d at 546, the court of appeals found that the lower court had properly detained Nordin under Article I, Section 12 because the state had shown by clear and convincing evidence his intention to harm a sheriff's deputy. The extensive evidence presented against Nordin included: testimony that Nordin owned guns and had a drinking problem; two

witnesses who said that Nordin had made threats against the deputy and apparently intended to carry them out; and corroboration of motive since it was uncontroverted that Nordin's wife had been subject to a body search by the deputy sheriff who was the subject of the murder scheme. *Id.*, at 542, 546.

Nordin demonstrates that the standard for denial of bail under the California Constitution is high: It requires the state to present evidence that is "so clear as to leave no substantial doubt" that the arrestee poses a danger of "great bodily harm" to another person. That showing was not attempted, or made here.

The state presented no evidence that Humphrey posed any danger to another person, let alone the "clear and convincing" evidence that would be required to properly detain Humphrey. The defense, on the other hand, emphasized the non-physical nature of the alleged offenses in asking for affordable money bail. The court entered a de facto order of detention on the ground of public safety concerns absent any of the procedures or findings required by Article I, Section 12. This detention order subverted the procedures required by the California Constitution and violated Humphrey's right to due process.

The procedures outlined in California Constitution article I, section 12 are consistent with the requirements of *Salerno*, and the trial court was required to undertake those procedures before ordering Humphrey's detention. Because it violated these procedures, his detention is unlawful.

Conclusion

From the very beginning of this case, Humphrey has been eligible for immediate release. At no point did the prosecution seek—nor did the trial court invoke—the procedures that would allow for preventative detention based on danger under California law. Instead of undertaking a determination into whether public safety required Humphrey to be detained (a judgment that would have required the procedural protections and evidentiary standards of California Constitution Article I, Section 12), the trial court determined that he *was* eligible for release, but attempted to mitigate a purported risk by setting a money bail at an amount that Humphrey could not afford. This practice is unconstitutional.

Petitioner respectfully asks that the Court issue the writ of habeas corpus on an expedited basis and either order his immediate release on his own recognizance or remand the matter to the Superior Court for an expedited hearing with instructions to either: (1) conduct a detention hearing consistent with the procedural requirements of *Salerno* and California Constitution Article I, Section 12; (2) set whatever least restrictive, non-monetary conditions of release will protect public safety; or (3) if necessary to assure his appearance at future hearings, impose a financial condition of release after making inquiry into and findings concerning Humphrey's ability to pay. Petitioner also urges that the Court issue an opinion on the merits of his case to provide guidance for the trial

court concerning what is required at the remand hearing and, as a general matter, to ensure that similar daily violations of basic rights do not recur.

Dated: August 4, 2017

Respectfully submitted,

_____/s/_____
Paul Myslin
Deputy Public Defender
Attorney for Kenneth Humphrey

Word-Count Certificate

I, Paul Myslin, declare and certify under penalty of perjury that I am an attorney licensed to practice law in the State of California (SBN 215173) and employed as a Deputy Public Defender for the City and County of San Francisco. I certify that the attached petition with memorandum of points and authorities is prepared in 13-point Georgia Font and contains 8915 words, not including captions, proof of service, verification tables, or this certificate.

Dated: August 4, 2017

_____/s/_____
Paul Myslin
Deputy Public Defender

Exhibit A
May 31, 2017, Reporter's Transcript of Hearing (arraignment on complaint)

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

BEFORE THE HONORABLE VICTOR HWANG, JUDGE PRESIDING

DEPARTMENT 12

---OOO---

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, vs. KENNETH HUMPHREY, DEFENDANT.	COURT NO. 17007715 **ARRAIGNMENT**

REPORTER'S TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, MAY 31, 2017

A P P E A R A N C E S:

FOR THE PEOPLE:	**HON. GEORGE GASCÓN** DISTRICT ATTORNEY BY: **JULIA CERVANTES** ASSISTANT DISTRICT ATTORNEY
FOR THE DEFENDANT:	**HON. JEFF ADACHI** PUBLIC DEFENDER BY: **PAUL MYSLIN** DEPUTY PUBLIC DEFENDER

REPORTER: ANGIE DINER, CSR 9581

PROCEEDINGS ON WEDNESDAY, MAY 31, 2017, DEPT.12

---OOO---

THE BAILIFF: Line 35, Kenneth Humphrey.

MR. MYSLIN: Good morning, Your Honor.

MS. CERVANTES: Julia Cervantes for the People.

MR. MYSLIN: Paul Myslin for the Public Defender's Office for Mr. Humphrey. I believe our office was previously appointed and now we're here for arraignment.

MS. CERVANTES: That's correct. And prior to arraigning, there is an error on the complaint which I would like to correct as to Count 4. It was alleged as a felony having a value of $950, that's incorrect. It should have been alleged as a misdemeanor having a value of less than $950. I would ask if the parties can correct those words.

MR. MYSLIN: That's fine. We'll waive any irregularities in the oral amended process.

THE COURT: That's fine. It will be amended to reflect a misdemeanor on that count.

MR. MYSLIN: Thank you. And on the now amended complaint, we would waive formal instruction and arraignment, enter pleas of not guilty, and deny the allegations and reserve the right to demurrer.

I would ask that Mr. Humphrey be released on his own recognizance. He is 63 years old, a resident of San Francisco, actually lives in the senior home where this incident occurred, albeit not on the same floor. He has family here in San Francisco as well as other parts. He has a phone number. He's a retired shipyard laborer. His

criminal record, while there are some serious charges in the past, most of those are incredibly old. I see that what's alleged on the complaint are strikes from 1980, '86 and 1992. Mr. Humphrey has led a law-abiding life since about 2005, which is -- I think his last conviction was in '03, which is 14 years ago. He is retired, as I said, and in this particular case involves the alleged robbery of $5 and a bottle of cologne.

I have looked at the -- both the video as well as the chronology of events, and it looks like there may be some mitigation here given there's some confusion both on Mr. Humphrey's part, and it's not entirely clear what happened here. I understand that it is -- the complaining witness here is elderly, I think he's about ten years older. However, given all of these circumstances, I would ask that Mr. Humphrey be released while he's facing these charges. With an appropriate stay-away order.

MS. CERVANTES: Your Honor, the People are asking that the Court follow the PSA recommendation, which is that release is not recommended. We're requesting $600,000 on this case as well as a criminal protective order ordering the defendant to stay away from the victim Elmer J. who is 79 years old.

We're also asking for the defendant to stay away from 1239 Turk Street where the incident took place. The victim is 79 years old. He uses a walker. In the video you can actually see him getting off the elevator. The elevator doors close, the defendant then had the elevator doors open

again. He gets off the elevator. He stands by and sort of lurks at a distance as the victim opens his own door to his apartment and manages -- which it takes some time because he's using a walker -- to go into the apartment. At that point the defendant moves in to follow him. The fact that he targeted -- he's 63 years old, but I think that's part of the reason he targeted a 79-year old man using a walker. He chose a very vulnerable victim. I would note all of his priors were for the same type of conduct that are alleged. They're all 211s.

THE COURT: Okay. I have read and considered the PSA report. I appreciate the fact that Mr. Humphrey has had a lengthy history of contact here in the city and county of San Francisco. I also note counsel's argument that many of his convictions are older in nature; however, given the seriousness of this crime, the vulnerability of the victim, as well as the recommendation from pretrial services, I'm not going to grant him OR or any kind of supervised release at this time. I will set bail in the amount of $600,000 and sign the criminal protective orders to say away from --

MR. MYSLIN: Your Honor, I have an objection to the stay-away order as drafted by the district attorney here. I don't have an objection to a stay-away order from the person of Elmer J. or even the fourth floor, which is where he resides, but Mr. Humphrey also resides at that building, and the address I have is on the third floor. So I would ask that that stay-away order be modified to not serve as a de facto eviction of Mr. Humphrey from his own place. I think

it could be just perhaps to that floor or perhaps more narrowly tailored.

THE COURT: That sounds reasonable. I'll order him to stay away from the fourth floor, and if released, a minimum of ten yards from the -- from Elmer J. in this case.

MR. MYSLIN: Thank you.

MS. CERVANTES: May I approach?

THE COURT: Yes.

MS. CERVANTES: Serving copies of the protective order on defendant through counsel as well as a copy for defense counsel.

MR. MYSLIN: Thank you. And at this point this will be a no-time waiver.

THE COURT: Okay. Mr. Humphrey is asserting his right to a preliminary hearing within 10 court days, so the last day will be June 14th, 2017.

And shall we set this for prelim on June 13th?

THE CLERK: Yes.

THE COURT: So that will be set for prelim on June 13, 2017, 9:00 a.m. here in this department. Mr. Humphreys is ordered back if he's able to post bail.

MS. CERVANTES: Thank you, Judge.

MR. MYSLIN: Thank you.

THE COURT: Thank you.

-oOo-

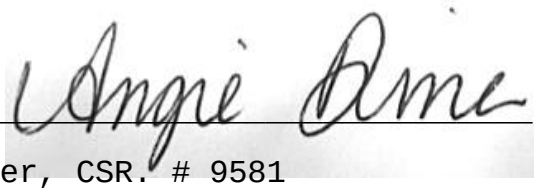
STATE OF CALIFORNIA)
) SS.
COUNTY OF SAN FRANCISCO)

I, ANGIE DINER, Certified Shorthand Reporter and Official Court Reporter of the Superior Court of the State of California, hereby certify:

That the foregoing contains a true, full and correct transcript of the proceedings given and had in the within-entitled matter, and was reported by me at the time and place mentioned, and thereafter transcribed by me into longhand typewriting, and that the same is a correct transcript of the proceedings.

DATED: July 25, 2017

San Francisco, California



Angie Diner, CSR. # 9581

Exhibit B
Court Management System (CMS) Print-Out

```
REPORT 6789        Q C X                          RUN 08/02/17 @ 15=12 PAGE    1
 HUMPHREY/KENNETH                                ) CTN 17007715 SCN  227779
 DA   CERVANTES/JULIA                            ) SFNO S268689 INCN 170423562
 PD   MYSLIN/PAUL                                ) JAIL#17667066 B/M DOB 081253
                                DEFSTATUS CUST   ) MCN      STRKS   CELL COJ5
                          JAILST COJ5       /     ) OPLIC
------------------------------ KEY DATES ------------------------------------
ARR 052317       REBOOK                          ) BRCN
COMP    /052617  INFO    /072617                 ) BW  /           PSR
PROBSTAT        -                                ) INTR                 PCD Y
SETBAIL $  600000 073117                         )
---------------------------- SCHEDULED ON CALENDAR ----------------------------
091117/0900 S22 HR1 03/TO SET JURY TRIAL, DOP
090117/0900 S23 PC                                 DOP
073117/0900 S22 AN
071217/0900 M12 HR3 30/DEF'S BAIL MOT
--------------------------------------------------------------------------------
II015573 BKD 459PC     /F NOW 459PC     /F FIRST DEG BURG RESID
 COUNT  2 PLEA NG /073117
II015574 BKD 211PC     /F NOW 211PC     /F FIRST DEGREE ROBBERY
 COUNT  1 PLEA NG /073117
II015575 BKD 368(B)1PC /F NOW 368(B)1PC /F INFLICT GREAT BODY INJ ELDER/D
 COUNT    PLEA    /                    DISM  92
 MSG WAITING
```

```
L209383  BKD              NOW 368(C)PC  /M INFL INJ ELD/D,NOT GRT BOD INJ
 COUNT    PLEA NG /053117              DISM  46
L209384  BKD              NOW 368(D)PC  /M THFT/EMB/FORG/FRD ELD/D ADULT
 COUNT    PLEA NG /053117              DISM  46
L213476  BKD              NOW 368(C)PC  /M INFL INJ ELD/D,NOT GRT BOD INJ
 COUNT  3 PLEA NG /073117
L213477  BKD              NOW 368(D)PC  /M THEFT/EMBEZZ/FORG/FRAUD DEP
 COUNT  4 PLEA NG /073117
------------------------------ LAST APPEARANCE --------------------------------
073117 S22 AN                                  DEF  P/CUST
 /CAL=ARRAIGNMENT/TEXT=DEFT ENT NG PLEA(S) & DEN OF ALLEG/PD/FAW/DEFTARR/G
 TW/CONTD= PRETRIAL CONFERENCE IN DEPT 23 AND TO SET JURY TRIAL IN DEPT 22/
 DOP/
_______________________________________________________________________________
                 * * * * *   E N D   O F   R E P O R T   * * * * *
```

Exhibit C
Defendant's Motion for Formal Bail Hearing and Order Releasing Defendant on Own Recognizance or Bail Reduction (filed July 12, 2017), with attached Exhibits

Jeff Adachi
Public Defender
City and County of San Francisco
Matt Gonzalez
Chief Attorney
Paul Myslin, SBN 215173
Marcy Diamond, SBN 286055
Deputy Public Defender
555 Seventh Street
San Francisco, CA 94103
Direct: (415) 553-9652
Main: (415) 553-1671

Attorneys for Kenneth Humphrey

Superior Court of the State of California
County of San Francisco

People of the State of California,

Plaintiff,

vs.

Kenneth Humphrey,

Defendant.

Court No: 17007715

Motion for Formal Bail Hearing and Order Releasing Defendant on Own Recognizance or Bail Reduction

Date: July 12, 2017
Time: 9:00 a.m.
Dept: 12

Defendant Kenneth Humphrey moves the court for a bail hearing and an order releasing defendant on his own-recognizance or for a bail reduction because bail, as presently set, is unreasonable and beyond the defendant's means given the charges and facts, and violates the Eighth Amendment's proscription against excessive bail.

Statement of the Case and Facts

Kenneth Humphrey is charged with the following Penal Code offenses: Count I – section 211—first degree, a felony; Count II – 459—first degree, a felony; Count III – section 368(c), a felony; and Count IV – section 368(d), a misdemeanor. The felony complaint also lists allegations pursuant to Penal Code section 667.9(a), 667.5(c)(21), 667.9(a), 1203(e)(4), 667(d), 667(e), 1170.12(b), 1170.12(c) and 667(a)(1). The incident allegedly occurred as follows:

On May 23, 2017, at approximately 5:43 p.m., SFPD Officers responded to 1239 Turk Street regarding a robbery. The complaining witness, Elmer J., told officers that he was on his way back to his apartment when an unknown male, later identified as Kenneth Humphrey, followed him into his apartment. Elmer J. stated that Humphrey asked him about money. When Elmer J. told Kenneth that he didn't have any, Humphrey took Elmer J.'s cell phone and threw it, was given $2.00, then stole $5.00 and a bottle of cologne from a night stand and left. Elmer J. stated that he did not know or recognize Humphrey.

When officers reviewed the surveillance video with the front desk workers, they were informed that the person in the video was Kenneth Humphrey and that he lived in apartment #303. When officers knocked on the door to apartment #303, Kenneth Humphrey approached officers in the hallway, identified himself and was placed under arrest without incident.

Statement of Facts about Kenneth Humphrey

Kenneth Humphrey is a sixty-three-year old African American male who has lived in the Bay Area his entire life. Kenneth's parents were Horace and Ocie Lee Humphrey; his mother was a cook for the San Francisco College for Women and his father was a constructions worker and taxi cab driver. Kenneth has two sisters, Katherine and Patricia and two brothers, Victor and Richard.

Kenneth was extremely close to his father. Kenneth was the child that spent the most time with his father, going to sporting events together, bowling, and

even hanging out at the racetrack. In 1969, Kenneth's life would change forever and a lifetime battle with drugs would begin.

1. Family.

Horace Humphrey worked two jobs to support his family. One night while he was working as a taxi driver, he was shot multiple times, execution style. No one was ever arrested for his murder. Horace's death devastated the entire family, Kenneth took the loss the hardest.

Kenneth was sixteen when his father died. Like the rest of his siblings, Kenneth started to work to help support the family. Kenneth worked at an assisted living facility, first as a cook, then as a painter. Kenneth then started to work at a shipyard. Kenneth dropped out of school and would later get his high school diploma when he was incarcerated through Five Keys charter school.

Kenneth feels like the black sheep of the family. All of his siblings have been successful, are retired and home-owners. Kenneth's siblings are very supportive of him. They have given Kenneth places to stay in the past, and will allow him to stay with them if released, under one condition, Kenneth does not use and actively addresses his substance abuse issues.

2. Kenneth's long history of substance abuse.

Immediately after his father's death, Kenneth started to use marijuana and alcohol. When Kenneth turned seventeen, he tried Heroin and started using the drug daily. By the time he was twenty, Kenneth was stealing to feed his habit. This was the beginning of more than thirty years of addiction which included involvement with the criminal justice system.

3. Kenneth has participated in numerous services to address his addiction and desire for a better life.

Kenneth's involvement with the criminal justice system has been due to his addiction. While in custody, Kenneth would get involved in programs to better

his life. When Kenneth was out of custody, he would go long periods without using by getting help from community resources.

In 2005, Kenneth would spend three years in custody in the San Francisco County jails. While at San Bruno, Kenneth participated in, and successfully completed, the Roads to Recovery Program. During this same time, Kenneth earned his diploma through the Five Keys Charter School.

In 2009, not long after his release, Kenneth enrolled at the City College of San Francisco through the Fresh Start Program and attended for nearly two years.[1] While at City College, Kenneth met Eli Crawford. Eli Crawford, in 2011, developed Raw Talk, a program created to reduce the odds of recidivism by helping recently released individuals find services to aid in their reentry into society.[2] Kenneth was one of the original members of Raw Talk. Kenneth's work was primarily going in to the communities and stressing the importance of an education to the younger generation.

After working with Raw Talk for almost seven months, Kenneth suffered a relapse and ended his participation as a mentor. Kenneth and Eli have continued to be in touch through the years. Eli Crawford has vowed his support and his program's services when Kenneth is released from custody.

Kenneth has also addressed his substance abuse by going into treatment. Near the end of 2015, Kenneth, on his own volition, went through detox in order to get acceptance into treatment. Kenneth entered 890 Men's Residential, a program of HealthRIGHT 360, on 12,21/2015 and successfully completed treatment on 5/19/2016.[3]

Kenneth still wanting to address his substance abuse issues, has filled out applications for both HealthRIGHT 360 and Golden Gate for Seniors. [4] Kenneth

---

[1] See Exhibit A: CCSF Verification of Attendance.
[2] See Exhibit B: Raw Talk Program Information.
[3] See Exhibit C: HealthRIGHT 360 Letter of Completion.
[4] See Exhibit D: Program Information for Golden Gate for Seniors.

has been accepted into Golden Gate for Seniors and has an intake date of July 13, 2017.[5]

Memorandum of Points and Authorities

Bail, as set, violates the federal and state constitutional prohibitions on excessive bail[6] and violates due process.[7]

1. Kenneth Humphrey is entitled to an evidentiary hearing to present witnesses and evidence supporting release pending trial.

"Fixing bail is a serious exercise of judicial discretion that is often done in haste – the defendant may be taken by surprise, his counsel has just been engaged, or for other reasons, the bail is fixed without that full inquiry and consideration which the matter deserves."[8] Penal Code[9] section 1270.2 provides for automatic review of bail within five days of the original bail order. At hearing, the accused is entitled to present evidence on any factors which might affect the court's decision whether to release the defendant pending trial on bail or on his own recognizance.[10]

2. The court must examine the individual circumstances in deciding whether to release Kenneth Humphrey or in setting bail.

The court may not simply presume guilt when deciding bail,[11] and must afford an individualized determination in setting bail to comport with the substantive

---

[5] See Exhibit E: Intake Letter from Golden Gate for Seniors.
[6] Cal. Const. art. I, sec. 12 (c); U.S.C.A. Const., Amend. 8 (excessive bail).
[7] Cal. Const. art. I, sec. 7 (a). sec. 15; U.S.C.A. Const., Amend. 5.
[8] *Stack v. Boyle* (1951) 342 U.S. 1, 11 (J. Jackson, concurring opn.).
[9] Further statutory references are to the Penal Code, unless otherwise stated.
[10] Pen. Code, §§ 1275, 1318.
[11] At least before indictment or preliminary hearing, as here, to be distinguished from the post-indictment situation addressed in *Ex parte Duncan* (1879) 53 Cal. 410.

due process guarantee of the Fourteenth Amendment.[12] The state constitutional and statutory language permitting denial of bail where "the facts are evident or the presumption great"[13] itself shows guilt may not be presumed in every bail setting.

Bail is "excessive" in violation of the Eighth Amendment when set higher than an amount reasonably calculated to ensure the asserted governmental interest. If the only asserted interest is to guarantee that the accused will stand trial and submit to sentence if found guilty, then "bail must be set by a court at a sum designed to ensure that goal, and no more."[14] "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."[15] Only individualized review can suffice.[16]

3. Defendant's pretrial incarceration will exacerbate this County's practice of disproportionately setting higher bails for African Americans and Latinos.

Over the last fifty years, research studies have consistently found that African American defendants receive significantly harsher bail outcomes than those imposed on white defendants.[17] Specifically, nearly every study on the impact of race in bail determinations has concluded that African Americans are subjected to pretrial detention at a higher rate and higher bail amounts than are white arrestees with similar charges and criminal histories. The adverse impact of the

---

[12] See *Lopez-Valenzuela v. Arpaio* (9th Cir. 10/15/2014) --- F.3d ---, 14 Cal. Daily Op. Serv. 11, 847 (Arizona's Proposition 100, with its presumption against bail based on immigration status, violates substantive due process).

[13] Cal. Const. art. I, sec. 12 (c); Pen. Code, §1271.

[14] *United States v. Salerno* (1987) 481 U.S. 739, 754.

[15] *Stack v. Boyle, supra,* 342 U.S. at 4. Note that in *Bell v. Wolfish* (1979) 441 U.S. 520, 533, the Court enunciated a narrower view of the presumption of innocence, describing it as "a doctrine that allocates the burden of proof in criminal trials," and denying that it has any "application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." But the Court has *not* said that guilt may be presumed when setting bail.

[16] *In re Christie* (2001) 92 Cal.App.4th 1105; accord *Lopez-Valenzuela v. Arpaio* (9th Cir. 2014) 770 F.3d 772.

[17] See Give Us Free: Addressing Racial Disparities in Bail Determinations by Cynthia E. Jones.

defendant's race on the outcome of the bail determination is not a new or recent problem, nor is it confined to specific types of cases. Over twenty-five studies document racial disparities in bail determinations in state cases,[18] federal cases,[19] and juvenile delinquency proceedings.[20] The adverse impact of race and ethnicity on bail determinations is not isolated to particular regions of the country, but is a pervasive and widely-acknowledged problem, documented in vast areas of the country,[21] and similarly affecting Latino defendants.[22]

Indeed, researchers found that white defendants with a prior felony conviction received more favorable bail outcomes than similarly-situated African American defendants.[23] The Department of Justice examined 30,000 crimes filed in forty-five counties across the country found that African Americans were sixty-six percent more likely to be in jail pretrial than were white defendants, and that Latino defendants were ninety-one percent more likely to be detained pretrial.[24]

Overall, the odds of similarly-situated African American and Latino defendants being held on bail because they were unable to pay the bond amounts imposed were *twice* that of white defendants.[25]

---

[18] Racial and Ethnic Disparity in Pretrial Criminal Processing, 22 Just. Q. 170, 187 (2005) Traci Schlesinger; Racial and Ethnic Differences in Pretrial Release and Decisions and Outcomes: A Comparison of Hispanic, Black and White Felony Arrestees, 41 Criminology 873, 880-81 (2003) Stephen DeMuth.

[19] Race, Sex, and Pretrial Detention in Federal Court; Indirect Effects and Cumulative Disadvantage, 57 U. Kan. L. Rev. 879 (2009) Cassia Spohn; Criminal Justice Decision Making as a Stratification Process: The Role of Race and Stratification Resources in Pretrial Release, 5 J. Quantitative Criminology 57 (1989), Celesta A. Albonetti et al.

[20] Reducing Racial Disparities in Juvenile Detention (2001) Eleanor Hinton Hoytt.

[21] Race and Presentencing Decisions: The Cost of Being African American, Racial Issues in Criminal Justice: The Case of African Americans 137, 140-41, (2003) Marvin D. Free (meta analysis of bail studies in 2003 between 1979 and 2000, including 18 studies all showing African Americans receiving higher bail than white, including studies controlling for all varying factors.

[22] Pretrial Release of Latino Defendants Final Report (2008) Pretrial Justice Institute; David Levin.

[23]. Race and Presentencing Decisions: The Cost of Being African American, Racial Issues in Criminal Justice: The Case of African Americans 137, 140-41, (2003) Marvin D. Free.

[24] Data Collection: State Court Processing Statistics (SCPS) Bureau of Justice Statistics; see Demuth Study, *supra*, at p. 895.

[25] Demuth Study, *supra*, at p. 897.

Another study found that "being Black increases a defendant's odds of being held in jail pretrial by 25%."[26] Even when the court imposed a money bond, African Americans "have odds of making bail that are approximately half *those of Whites* with the same bail amounts and legal characteristics. Indigent Latinos faced similar disadvantages compared to white defendants."[27]

San Francisco is no exception; a 2013 study by the San Francisco Controller's Office found that while only 6 percent of San Francisco residents are African American, 56 percent of jail inmates are black; by contrast, while approximately 42 percent of city residents are white, yet whites represent only 22 percent of jail inmates.[28] In particular, African-American women are disproportionately represented at every phase of the criminal justice system.[29] A recent probation department analysis confirms the disproportionate number of minorities who are confined pretrial.[30]

In addition, a recent study of San Francisco's criminal justice system by the Burns Institute found that: (1) There were a disproportionate number of Black adults represented at every stage of the criminal justice process; (2) In 2013, Black adults in San Francisco were more than seven times as likely as White adults to be arrested; (3) Black adults in San Francisco are 11 times as likely as White adults to be booked into County Jail – this disparity is true for both Black men (11.4 times as likely) and Black women (10.9 times as likely); (4) Booked Black adults are more likely than booked White adults to meet the criteria for pretrial release; (5) Black adults are less likely to be released at all process steps;

---

[26] See Schlesinger, *supra*, at p. 181 (2005 over 36,000 felony bail determination reviewed in state court).

[27] Schlesinger, Racial and Ethnic Disparity, *supra*, note 99 at p. 183.

[28] See San Francisco Controller's Report, County Jail Needs Assessment, August 15, 2013, at p. 11-12.

[29] Women's Community Justice Reform Blueprint A Gender-Responsive, Family-Focused Approach to Integrating Criminal and Community Justice, April 2013, Adult Probation Department and Sheriff's Department, City and County of San Francisco.

[30] See: Realignment in San Francisco: Two Years in Review, January 2014, at http://sfgov.org/adultprobation/sites/sfgov.org.adultprobation/files/migrated/FileCenter/Documents/Adult_Probation/CityofSF_Realignment_Report_web.pdf.

(6) Black adults in San Francisco (in the general population) are ten times as likely as White adults in San Francisco (in the general population) to have a conviction in court; and (7) Black adults are more likely to be sentenced to prison and county jail alone and less likely to be sentenced to Jail/Probation than White adults.[31]

With respect to the Latino population, the Burns Institute found that: (1) Latino adults are 1.5 times as likely to be booked as White adults; (2) Latino adults in San Francisco (in the general population) are nearly twice as likely as White adults in San Francisco (in the general population) to have a conviction in court; (3) For every 1 White adult convicted of a crime in San Francisco, there were nearly 2 Latino adults convicted; (4) For every 1 White adult booked into San Francisco County Jail, there were 1.5 Latinos adults booked; and (5) Booking rates for Latino adults have increased over the past three years while booking rates for White adults have decreased.[32] These are but a few of the key findings of the study conducted by the Burns Institute.

This is a longstanding and pervasive inequity in our criminal justice system, as evidenced by similar numbers gathered over a decade ago.[33] The court should keep these stark facts in mind in setting bail so as not exacerbate any unconscious, implicit or institutional bias that may exist.

---

[31] See Exhibit F: Summary of Key Findings – San Francisco Justice Reinvestment Initiative: Racial & Ethnic Disparities Analysis for Reentry Council by W. Haywood Burns Institute (June 23, 2015).

[32] *Id.*

[33] See: Report on Race & Incarceration In San Francisco: Two Years Later, by Chet Hewitt, Andrea D. Shorter, and Michael Godfrey, Center on Juvenile and Criminal Justice, October 1994 (African-American were 11 % of SF's general adult population, but made up 48% of the county's inmates; Latinos comprised 15% of the general adult population, but accounted for 29% of the jail population); see also Race & Incarceration in San Francisco: Localizing Apartheid, October 1992, Center on Juvenile and Criminal Justice, by Chet Hewitt, Ken Kubota, and Vincent Schiraldi (earlier, similar data).

4. Bail as currently set is excessive.

When a defendant is entitled to bail, it must not be excessive.[34] In fixing the amount, the court must consider the:

- seriousness of the offense charged
- defendant's previous criminal record
- probability that he or she will appear at future court proceedings.[35]

While section 1275 (a) adds that "public safety" is to be the primary consideration in setting bail, those portions of section 1275 and other statutory provisions mandating *primary* consideration of public safety or future dangerousness[36] violate the Eighth Amendment to the United States Constitution, because bail settings in excess of the amount necessary to guarantee future appearances violate the Constitution.[37] But while Penal Code section 1275 lists factors to consider in setting bail, it is hardly exhaustive.[38] Rather, the appropriate bail amount must be determined on a case-by-case basis.[39]

Under section 1275, the court's determination of "the seriousness of the offense charged" includes consideration of the alleged injury or threats to the complaining witness, threats to a witness, alleged use of a deadly weapon in committing the crime, and any allegations of use or possession of controlled substances.[40]

At a bail hearing the court *shall* consider all of the following factors:[41]

- evidence of past court appearances of the detained person;

---

[34] Cal. Const. art. I, sec. 12 (c); *People v. Standish* (2006) 38 Cal. 4th 858, 875; U.S.C.A. Const., Amend. 8 (excessive bail).
[35] Id.
[36] Pen. Code, §§ 1270, 1270.1 and 1275.
[37] *Stack v. Boyle, supra,* 342 U.S. at 5; see also *United States v. Salerno* (1987) 481 U.S. at 753 (affirming this principle, even while authorizing detentions *without* bail); see *Schilb v. Kuebel* (1971) 404 U.S.357, 365 (excessive bail clause of Eighth Amendment applies to the states); *In re Nordin* (1983) 143 Cal.App.3d 538, 543-44 (same).
[38] *In re Alberto* (2002) 102 Cal.App.4th 421, 430.
[39] Stack v. Boyle, supra, 342 U.S. at 5.
[40] Pen. Code, §1275(a).
[41] Pen. Code, § 1270.1 (c).

- the maximum potential sentence that could be imposed;
- the danger that may be posed to others if the detained person is released;[42] and
- evidence offered by the detained person regarding his or her ties to the community and the ability to post bond.

The court's discretion to consider reducing bail and to release a defendant on their own recognizance "is not . . . an arbitrary discretion to do abstract justice according to the popular meaning of that phrase, but is a discretion governed by legal rules to do justice according to law."[43] At own-recognizance release hearings, the prosecution has the burden of producing evidence on the detainee's record of appearance at prior court hearings and the severity of the sentence potentially faced.[44]

Here, bail is currently set at $600,000. Based on Kenneth Humphrey's history and current situation, the bail currently set is excessive. The facts favor own-recognizance release, or in the alternative, reduction of bail.

5. Jailing a person solely because he is too poor to post bail is incompatible with the requirements of Equal Protection and Due Process.

Poverty and wealth status have no place in the criminal justice system.[45] This principle applies where the government seeks to keep a person in jail because of

---

[42] Defendant objects that all statutory provisions mandating primary consideration of public safety or future dangerousness are unconstitutional.
[43] *In re Podesto* (1976) 15 Cal.3d 921, 933 [quotation marks and citations omitted].
[44] *Van Atta v. Scott* (1980) 27 Cal.3d 424, 438-439, superseded on other grounds via constitutional amendment (Prop. 4) as recognized *In re York* (1995) 9 Cal.4th at 1134 n.7.
[45] *See Williams v. Illinois* (1970) 399 U.S. 235, 241 ("[T]he Court has had frequent occasion to reaffirm allegiance to the basic command that justice be applied equally to all persons.").

inability to make a monetary payment.[46] In California any kind of pay-or-jail system is unconstitutional when it operates to jail the poor.[47]

This equal protection principle applies to pretrial detention.[48] In fact, the liberty interest and equal protection guarantees at stake are even *more* significant in the context of pretrial arrestees because the arrested person is presumed to be innocent.

Depriving a person liberty, a fundamental right, violates state and federal rights to substantive due process because the deprivation is not narrowly tailored to achieve a compelling governmental interest.[49] Pretrial detention of a presumptively innocent person should be allowed only in cases of "the most serious of crimes."[50] Even then, due process requires detention only be imposed after a rigorous adversarial hearing with heightened evidentiary burdens on the party seeking deprivation of liberty. Further, there must be detailed written findings explaining the reasons that the person has to be fully incapacitated prior to being found guilty of a crime. These specific findings must include why no

---

[46] *See, e.g., Tate v. Short* (1971) 401 U.S. 395, 398 ("[T]he Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."); *Bearden v. Georgia* (1983) 461 U.S. 660, 672–73 (to "deprive [a] probationer of his conditional freedom simply because, through no fault of his own he cannot pay [a] fine . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment").

[47] *See In re Antazo* (1970) 3 Cal.3d 100 ("[A] sentence to pay a fine, together with a direction that a defendant be imprisoned until the fine is satisfied, gives an advantage to the rich defendant which is in reality denied to the poor one. . . . The resulting imprisonment is no more or no less than imprisonment for being poor"). *See, e.g., In re Young*, (Ct. App. 1973) 32 Cal. App. 3d 68, 75 (pretrial jail detention due to indigence must be credited to ultimate sentence: "The additional deprivation suffered only by the indigent does not meet federal standards of equal protection and does not comply with the mandate of uniform operation of all general laws contained in article I, section 11 of the California Constitution."

[48] *See, e.g., Pugh v. Rainwater* (5th Cir. 1978) 572 F.2d 1053, 1056 (*en banc*) ("The incarceration of those who cannot [afford a cash bail payment], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements.")

[49] *Washington v. Glucksberg* (1997) 521 U.S. 702, 720 (citation omitted); *In re H.K.* (2013) 217 Cal. App. 4th 1422, 1433. The right to pretrial liberty is a "fundamental" right. *United States v. Salerno* (1987) 481 U.S. 739, 750; *Zadvydas v. Davis* (2001) 533 U.S. 678, 690 ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.").

[50] United States v. Salerno, supra, 481 U.S. at 747.

other condition or combination of conditions can protect against specifically identified risks that the individual has been found to pose. Only under these carefully limited circumstances may courts detain presumptively innocent people prior to trial.

To respect Kenneth Humphrey's rights to equal protection and due process, this court should set bail only after making an inquiry into his ability to pay and finding that they can afford bail as set.

A. Community ties.

Kenneth Humphrey has strong community ties. Kenneth has lived in the Bay Area, primarily San Francisco, his entire life. His siblings, that will give him a place to stay as long as he is not using, also live in the Bay Area. If released, Kenneth has numerous places to stay including his family, and Judith Marshall, a friend of Kenneth's for the past four years. Kenneth has strong community support through Eli Crawford and his Raw Talk program. Also, Kenneth has an intake appointment into residential treatment for the help he desperately desires so he should not be considered a flight risk.

B. Past court appearances.

The Public Safety Assessment ("PSA") Report indicates that Kenneth Humphrey has no prior failures to appear.[51]

C. Potential danger.

1. Seriousness of the offense.

Kenneth is charged with Penal code sections 211, 459 and 368, all serious offenses. However, the complaining witness told officers that Kenneth threatened to put a pillow case over his head but never followed through with his threat. Although scared, the complaining witness was not harmed physically.

---

[51] See Exhibit G: Public Safety Assessment ("PSA") Report -- Kenneth Humphrey.

2. Previous criminal record.

For information regarding Kenneth Humphrey's criminal and bench warrant history, please review the OR Workup.[52]

Conclusion

The Supreme Court has made clear that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[53]

Here, Kenneth Humphrey should be granted own-recognizance release because he is trying to get help for his substance abuse which he greatly desires. While awaiting acceptance to the programs he has applied to, we ask that the court release Kenneth in order to work on his recovery while awaiting a bed. Kenneth has strong community ties, a large support team and has no failures to appear. Also, Kenneth has long periods without involvement with the criminal justice system. Barring that, Kenneth Humphrey is entitled to bail unless the prosecution meets specific statutory conditions. Further, the amount of bail must be reasonable and designed to ensure future court appearances.

Dated: July 10, 2017

Respectfully submitted,

Mary Dwyer for Paul Myslin

Paul Myslin
Deputy Public Defender
Attorney for Kenneth Humphrey

---

[52] See Exhibit H: Email to Project OR requesting OR Workup for Kenneth Humphrey in Court Number 17007715.

[53] *Salerno, supra,* 481 U.S. at 755.

Declaration of Counsel

I, the undersigned, declare under penalty of perjury as follows:

I am a deputy public defender for the City and County of San Francisco and in that capacity I have been assigned to the defense of the defendant in the above-entitled action.

All information in the Statement of the Case and Facts of the attached motion is taken from my review of discovery provided by the state.

All information in the Statement of Facts about Kenneth Humphrey of the attached motion is taken from conversations with and documentation received from Kenneth Humphrey, Judith Marshall, Eli Crawford, Director of Raw Talk, Ivanna Chavez, Intake Coordinator from HealthRIGHT 360, Michael Taylor, Director of Golden Gate for Seniors, and the Admissions Office of CCSF.

I believe that bail, as presently set, is unreasonably great and disproportionate to the offense involved and violates the constitutional proscription against excessive bail.

I believe that the prospects of pecuniary loss and criminal penalty for failure to appear in accordance with the terms of a release on own recognizance or bail are well understood by Kenneth Humphrey and are a deterrent to flight.

I further believe Kenneth Humphrey has neither incentive nor resources to evade the court's process.

In view of the above, I respectfully request that the defendant be released on own recognizance. The foregoing is true and correct of my own knowledge, except as to those matters stated on information and belief, and as to those, I believe them to be true.

Executed on July 10, 2017, at San Francisco, California.

Mary Marshall For Paul Myslin

Paul Myslin
Deputy Public Defender
Attorney for Kenneth Humphrey

List of Exhibits

Exhibit A: CCSF Verification of Attendance.

Exhibit B: Raw Talk Program Information.

Exhibit C: HealthRIGHT 360 Letter of Completion.

Exhibit D: Program Information for Golden Gate for Seniors.

Exhibit E: Intake Letter from Golden Gate for Seniors.

Exhibit F: Summary of Key Findings – San Francisco Justice Reinvestment Initiative: Racial & Ethnic Disparities Analysis for Reentry Council by W. Haywood Burn Institute (June 23, 2015).

Exhibit G: Public Safety Assessment ("PSA") Report -- Kenneth Humphrey.

Exhibit H: Email to Project OR requesting OR Workup for Kenneth Humphrey in Court Number 17007715.

Exhibit A

Office of Admissions and Records

50 Phelan Avenue, Conlan Hall 107, San Francisco, CA 94112
Phone: (415) 239-5101 FAX (415) 239-3936

Date: June 29, 2017

SAN FRANCISCO PUBLIC DEFENDER

Marcy Diamond, Paralegal
Paul Myslin, Deputy Public Defender
Tel: (415)734-3089
Marcy.diamond@sfgov.org

RE: **Verification of Attendance for Kenneth Humphrey**
DOB: 08.12.1953 **Received date: 6/29/2017**

To Whom It May Concern:

This is to verify that Kenneth Humphrey has attended City College of San Francisco from June 15, 2009 to May 27, 2011.

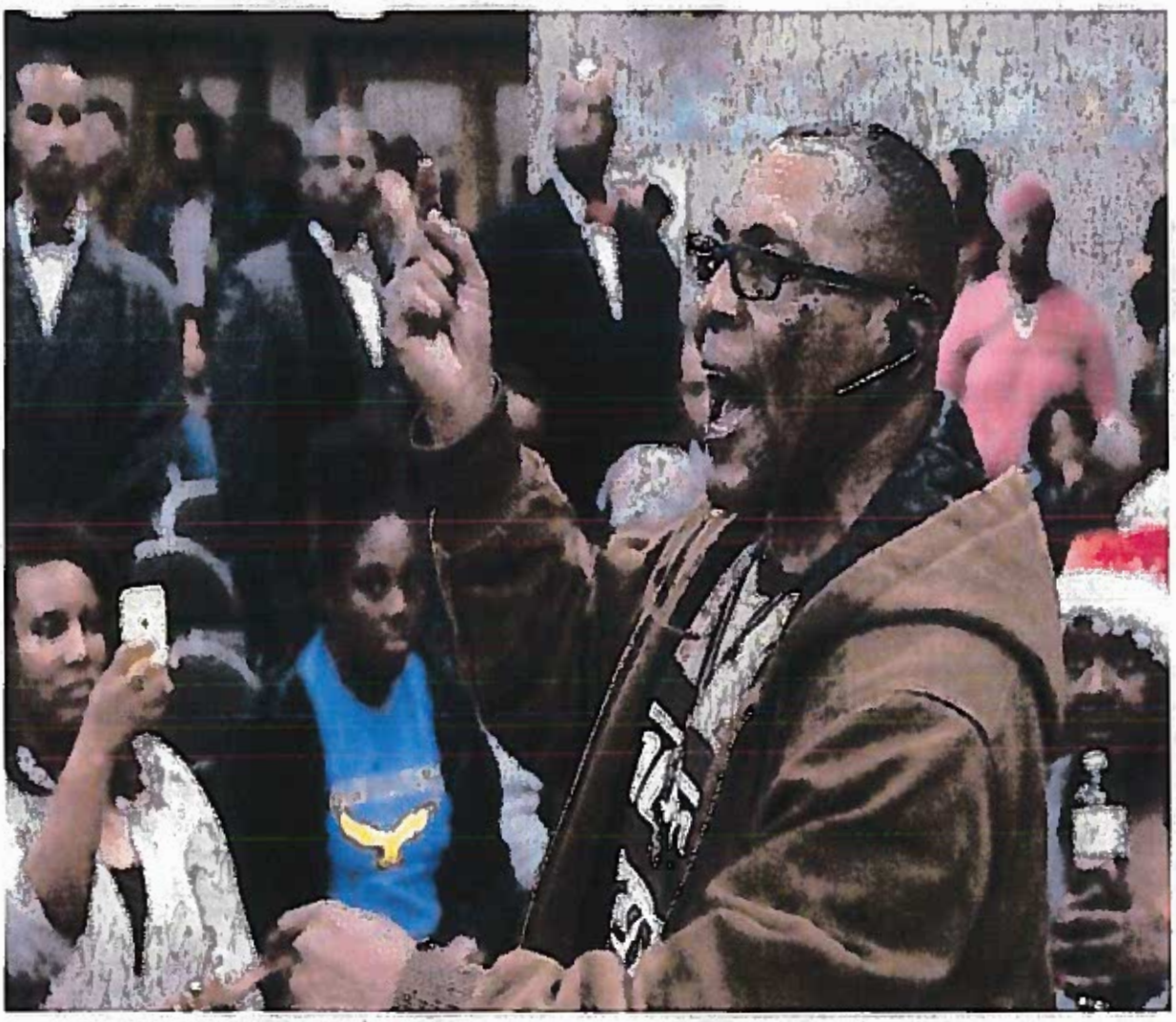
Please feel free to give us a call in case you have any questions or concerns.

Sincerely,

MaryLou Leyba
Dean of Admissions and Records

Exhibit B

RAW TALK 4 LIFE

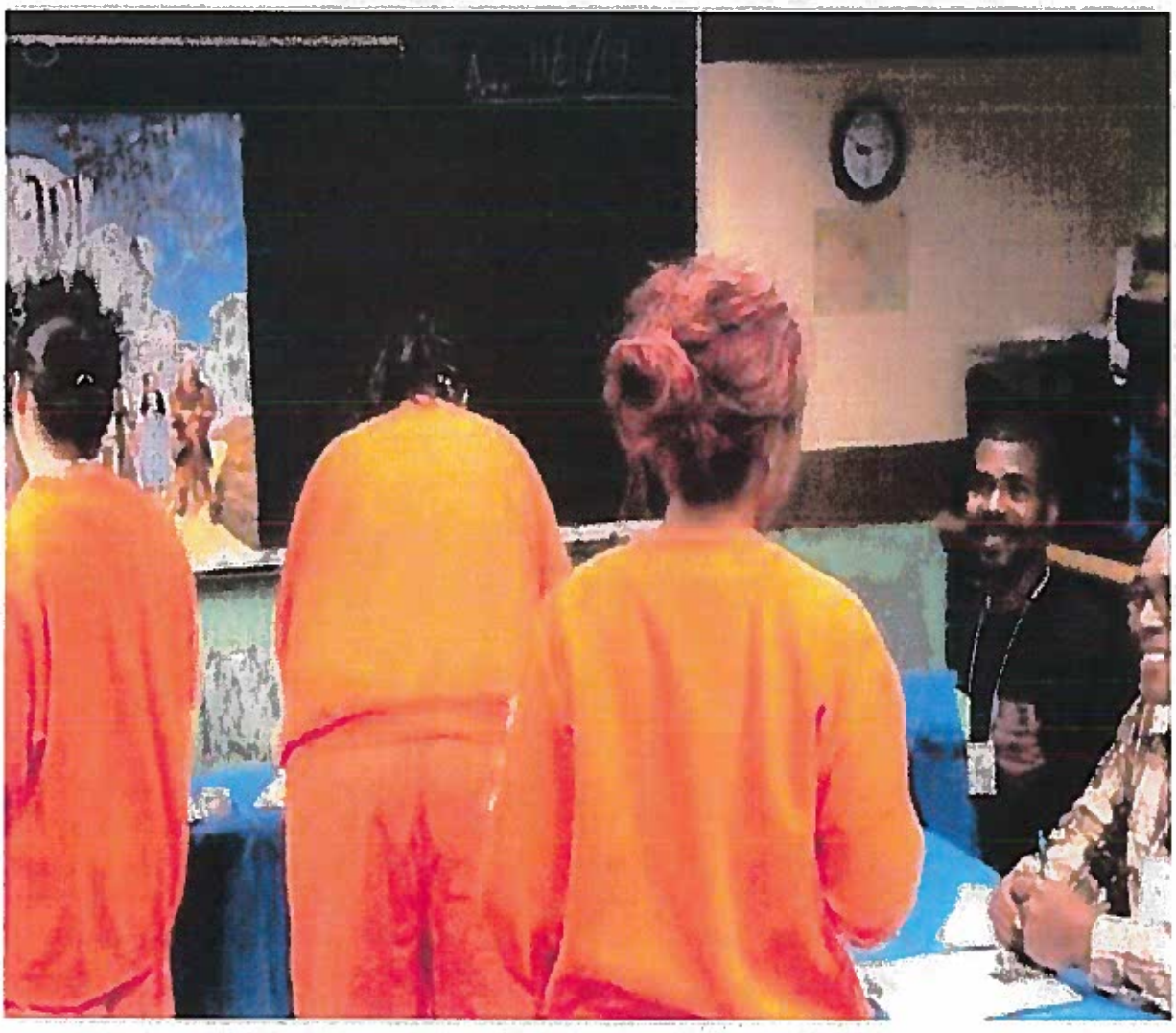


SUCCESSFUL RE-ENTRY AFTER INCARCERATION IS ESSENTIAL TO SOCIETY.

MISSION STATEMENT

The goal of RAW TALK 4 LIFE is to reduce the odds of recidivism, defined generally as a relapse into criminal behavior. RAW TALK's purpose is to reach participants while they are incarcerated and within 24 hours after their release. This is a critical time for Raw Talk to positively interact. It is

RAW TALK 4 LIFE



Staff

ABOUT US

Enter a gift voucher amount.

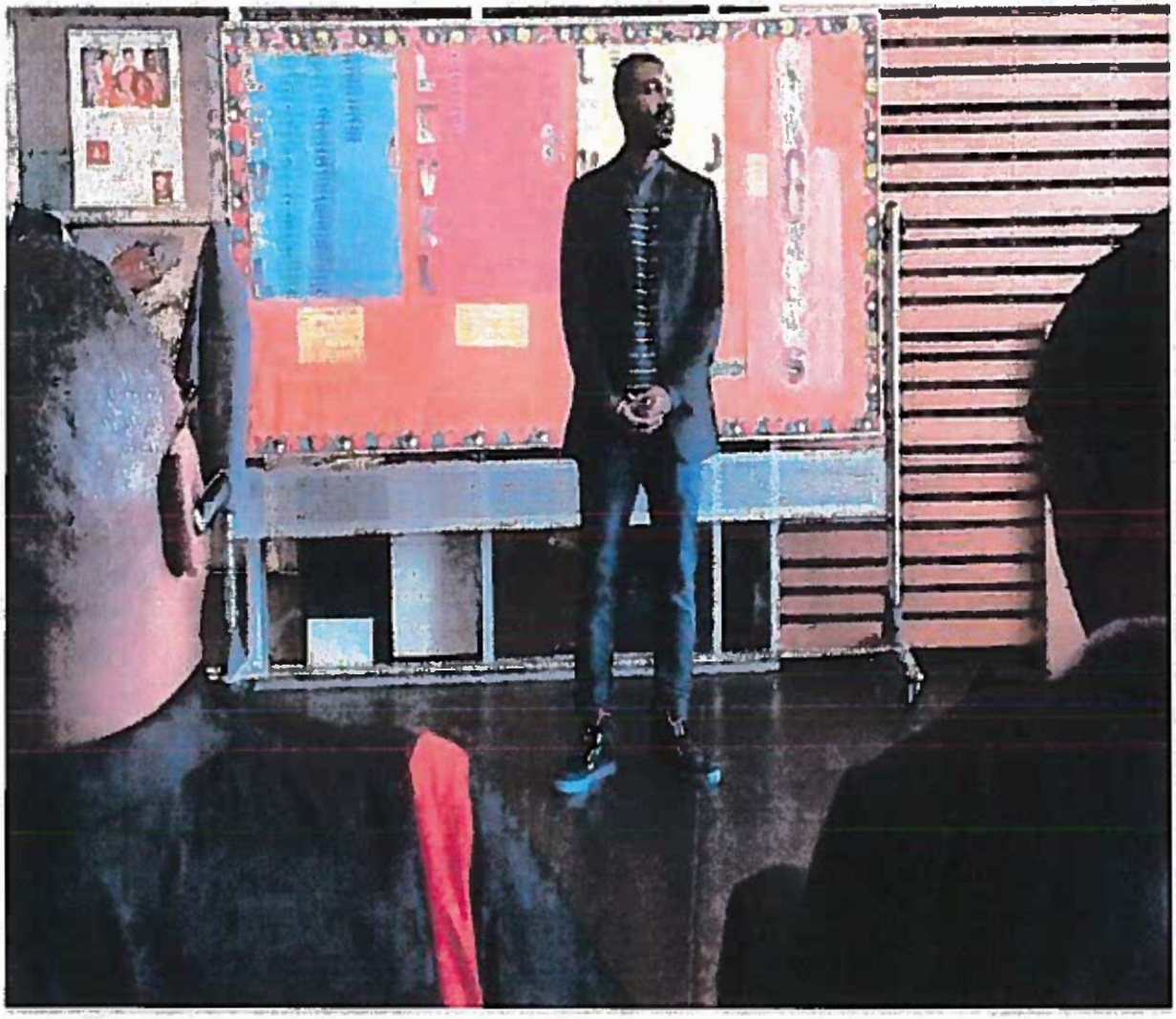
RAW TALK was developed in 2011 by Eli Crawford and Rico Hamilton. RAW TALK is a series of innovative programs addressing

RAW TALK 4 LIFE 1251 TURK ST. SUITE 401 SAN FRANCISCO, CA. 94115 PH: 415-410-6314. FAX: 415-796-2289 EMAIL:RAWTALK4LIFE@OUTLOOK.COM
CONNECT WITH US

how to overcome barriers and obstacles one faces during the pre and post-release transition back into society, the community, and family unit. RAW TALK programs are a collection of strategies for accessing services and support during pre and post release transitions in order to ultimately sustain the individual's goal of living a healthy, productive, and crime free life. Both Eli Crawford and Rico Hamilton are formally incarcerated individuals who took on the challenge in their own lives to address barriers and obstacles when they were released from custody. The tools they used and depended on to reunite with their families and live a law abiding life after their incarceration is the foundation of RAW TALK.

RAW TAlk 4 LIFE is a non-profit organization that provide assistance to Ex-offender and Community.

RAW TALK 4 LIFE



Enter a gift voucher amount.

VISION

The goal of RAW TALK 4 LIFE is to reduce the odds of recidivism, defined generally as a relapse into

RAW TALK 4 LIFE 1251 TURK ST. SUITE 401 SAN FRANCISCO, CA. 94115 PH: 415-410-6314. FAX: 415-796-2289 EMAIL:RAWTALK4LIFE@OUTLOOK.COM

CONNECT WITH US

criminal behavior. RAW TALK's purpose is to reach participants while they are incarcerated and within 24 hours after their release. This is a critical time for Raw Talk to positively interjet. It is essential to start a cycle of law-abiding behavior in an inmate's life which teaches the participant how to successfully adjust back into the economical, educational and family realities of post-incarceration.

Exhibit C

6/23/2017

Re: **Kenneth Humphrey**

Purpose: **Verification of Completion**

To: **Marcy Diamond, SF Public Defender's Office**

This letter verifies that Kenneth Humphrey entered 890 Men's Residential, a program of HealthRIGHT 360 on 12/21/2015 and successfully completed treatment on 5/19/2016.

HealthRIGHT 360 is a non-profit, behavioral health services agency that offers a streamlined continuum of comprehensive substance abuse and mental health services (residential & outpatient). Our agency's overarching mission is "to reduce the impact of substance abuse and its associated problems on the community by offering direct services to persons throughout California with services designed to lessen the social cost of addiction disorders by promoting wellness and drug-free lifestyles."

Please feel free to call, Ivanna Chavez, if you have any other questions regarding the above information at (415) 850-7951.

Sincerely,

Ivanna Chavez
Legal Community Relations Manager

1735 Mission Street San Francisco California 94103 415.762.3700 www.healthRIGHT360.org

Exhibit D

Diamond, Marcy (PDR)

From:	Michael Taylor <michael.taylor@catsinc.org>
Sent:	Thursday, June 29, 2017 2:27 PM
To:	Diamond, Marcy (PDR)
Subject:	GGS INFO & REFERRAL FORM 7-1-2016
Attachments:	3 Face Sheet.docx; 4 Health Questionnaire.docx; Client Referral Form - Jail Only.docx
Importance:	High

CATS

COMMUNITY AWARENESS & TREATMENT SERVICES, INC

Golden Gate For Seniors

CATS helps those most in need get off the street, achieve stability and establish permanent housing by providing compassionate, culturally sensitive services

637 S. Van Ness Ave., San Francisco, CA 94110
Ph. 415-626-7553 Fax. 415-626-9198

Community Awareness & Treatment Services, Inc. (*CATS*) is a private non-profit that as incorporated in 1978. Our main focus is serving chronically homeless men and women in San Francisco with multiple problems including substance abuse and mental illness. We do this through several programs (*see attached Program Sheet*) which includes Golden Gate for Seniors.

Golden Gate for Seniors is our oldest program and is one of the first in the country to recognize that seniors experience substance abuse problems and can change. We have 18 beds that serve homeless men and women who abuse alcohol and drugs in the context of a 6 month residential substance abuse treatment program. While there - clients participate in group recovery sessions, individual counseling and case management that link them with benefits, housing and other needed services.

Residents stay an average of six months in the center while following an individually tailored recovery plan. Such plan includes, but are not limited to:

- Counseling and case management
- 12-step meetings,
- Education on alcohol and other drugs
- Sound health practices
- Development of interests and
- Activities that is conducive to a sober lifestyle.

In order to be admitted to Golden Gate for Seniors for Substance Abuse Treatment, you must meet the following criteria:

1- Age 55 or older
2- Able to walk safely up and down two flights of stairs
3- Willing and able to participate in a treatment plan including group therapy and 1-on-1 sessions with a Counselor
4- Willing to address psychiatric or medical barriers to treatment
5- Not previously admitted to GGS within the last 90 days
6- Able to attend an assessment appointment unintoxicated
7- Abstinent from drugs or alcohol for 72-hours prior to admission
8- Willing to address all forms of substance abuse, including alcohol abuse, illicit drug abuse, prescription medication abuse, gambling or sex abuse, and abuse of other substances
9- All legal concerns are cleared for him to reside in the program
10- He/She continues to be available for admission (*once his intake date comes due*)
11- He/She is eligible for Governmental Assistance (GA), SSI/SSDI, or self pay (*no insurance sponsored pay accepted*)

Please note: GGS welcomes clients of any gender, ethnicity, race, religion or sexual orientation.
If a client is assessed as inappropriate for admission, the client will be provided referrals to other facilities and be encouraged to pursue them. The reason the client is not being admitted will be explained to the client and to any members of the client's care team coordinating the referral. Further, the possibility of future eligibility will be discussed with the client and other care providers. All admissions may be subject to behavioral contracts based on provider assessment.

Steps To Admission

INITIAL REFERRAL – Please complete the attached "Client Referral Form" and return it to us via email or fax (return information is listed on the document). Once this step is completed, call us for the next step (which will usually be the "Interview").

INTERVIEW – All **qualified** individuals or their referral source may contact us at 415-626-7553 to set up a face-to-face interview. Only **SOME** specific referral sources (i.e. Jail, Probation Dept, Pub Defenders, etc.) may be eligible for faxing the actual **application** to our office. Clients or prospective clients **CANNOT** mail or forward applications to us..... ONLY REFERRAL SOURCES. Clients can call and set up an appointment for an interview only. Once the interview is completed, review of the application is performed by our team and a determination as to whether the applicant is appropriate for intake is established. If appropriate, client is placed on the "waitlist". If not, applicant or referral source is notified of the outcome.

Waitlist Procedure

1- When GGS has no availability, clients will be placed on a waiting list
2- An individual's placement on the waiting list is generally relative to the day they applied for admission; however, GGS staff may prioritize some admissions for clinical reasons
3- Clients whose wait is anticipated to be greater than 14 days will be informed of the expected wait and provided referrals to other facilities. Clients will be informed that initiating care at another facility does not automatically affect their status on the GGS waitlist
4- Clients on the waitlist will be reassessed in person or over the phone every 30 days that they are on the waitlist
5- Detailed notes of all communications with clients on the wait list and their care providers are maintained
6- The waitlist is reviewed at the weekly staff meeting. The associated notes are available to all staff members.

IMPORTANT NOTE:
THIS IS NOT A HOUSING OR SHELTER PROGRAM!
THOSE SEEKING HOUSING OR SHELTER
NEED NOT APPLY!!!

In this list you will find the list of necessary items you are to bring with you the day of your admission into Golden Gate For Seniors.

1. TB Card or copy of the results
2. Driver's license or State ID card
3. MediCal Card or proof of services (*if applicable*)
4. Proof of Income
5. Documentation of special medical needs (*meals, physical activities, etc.*)
6. Documentation of special financial considerations (*you already pay rent on your apartment*)

Mailing Address:
637 So. Van Ness Ave.
San Francisco, CA 94110

Phone: 415-626-7553
Email: info@goldengateforseniors.org
Web: http://www.catsinc.org

P.S.
Please bear in mind that our focus is not on Mental Health. But rather substance abuse and only for ambulatory clients that are able to climb flights of stairs. Clients with minor to no medical health issues are welcome.

Exhibit E

COMMUNITY AWARENESS & TREATMENT SERVICES, INC.
GOLDEN GATE FOR SENIORS
CATS helps those most in need get off the street, achieve stability and establish permanent housing by providing compassionate, culturally sensitive services

637 South Van Ness Ave. ◆ San Francisco, CA 94110 ◆ 415.626.7553 ◆ FAX: 415.626.9198 ◆ Email: info@catsinc.org

July 10, 2017

Office of the Public Defender
Attn: **Marcy Diamond**
555 7th Street
San Francisco, CA 94103

RE: **MR. KENNETH HUMPHREY (***-**-4548)**

Dear Marcy:

This letter is forwarded to your office on behalf of Golden Gate For Seniors to inform you that Mr. Humphrey is acceptable for admission into our program. We do accept him with his current legal status and we understand that there may be periodic site visits from County agents (with prior notice to our staff) during his stay at GGS. His Assigned intake date is set for Thursday (*July 13, 2017*) a guaranteed open male bed is available for him at that time.

We are in receipt of his application and his admittance is contingent upon the following criterion:

1. He is ambulatory (able to climb flights of stairs with ease)
2. Does not have **medical** issues that would interfere with his ability to attend group sessions as required
3. He has a recent form of identification
4. He has a recent TB test result available (*one year or less*)
5. All legal concerns are cleared for him to reside in the program
6. He continues to be available for admission (*once his intake date comes due*)
7. He maintains a sincere desire for substance abuse education and a commitment to remaining clean

Please find attached a brief program description for your convenience.

If you have any questions or need further assistance, please feel free to contact me at **415-241-1179**.

Sincerely,

Michael A. Taylor

Michael A. Taylor
Program Director
Golden Gate For Seniors
637 So. Van Ness Ave.
S.F., CA 94110
Ph. 415-241-1179
Fax. 415-626-9198

Exhibit F

SAN FRANCISCO JUSTICE REINVESTMENT INITIATIVE:
RACIAL AND ETHNIC DISPARITIES ANALYSIS FOR THE REENTRY COUNCIL

SUMMARY OF KEY FINDINGS

The W. Haywood Burns Institute (BI) is a national non-profit organization that has worked successfully with local jurisdictions to reduce racial and ethnic disparities in the justice system by leading traditional and non-traditional stakeholders through a data-driven, consensus based process. BI was engaged by the Reentry Council of The City and County of San Francisco to conduct a decision point analysis to learn whether and to what extent racial and ethnic disparities exist at key criminal justice decision making points in San Francisco. The analysis was limited due to data limitations. For additional information regarding the key findings listed in this summary, please see the full report.

DEMOGRAPHIC SHIFTS IN SAN FRANCISCO

- Data indicate that San Francisco's demographic make-up is changing. Between 1994 and 2013, the number of Black adults decreased by 21 percent. At the same time, the number of Latino adults increased by 31 percent.

DISPROPORTIONALITY AT EVERY STAGE

- In 2013, there were a disproportionate number of Black adults represented at every stage of the criminal justice process. While Black adults represent only 6% of the adult population, they represent 40% of people arrested, 44% of people booked in County Jail, and 40% of people convicted.

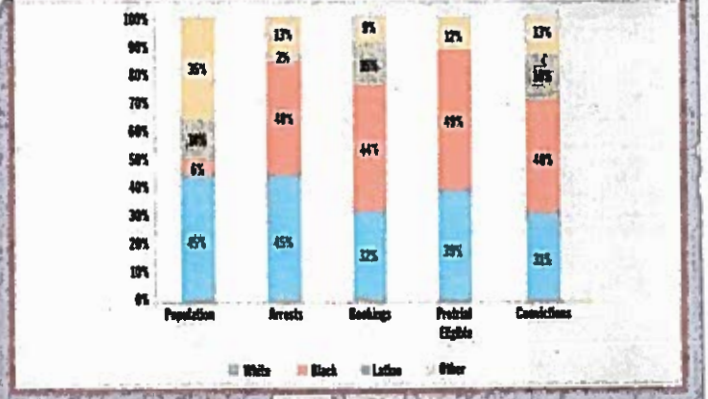
- When looking at the relative likelihood of system involvement- as opposed to the proportion of Black adults at key decision points – disparities for Black adults remain stark. Black adults are 7.1 times as likely as White adults to be arrested, 11 times as likely to be booked into County Jail, and 10.3 times as likely to be convicted of a crime in San Francisco.

FINDINGS REGARDING DATA CAPACITY

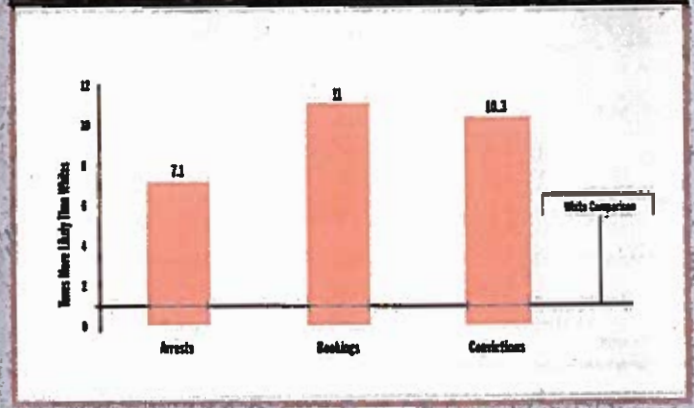
- Data required to answer several key questions regarding racial and ethnic disparities were unavailable. As stakeholders move forward to more fully understand the disparities highlighted in the repot, they will need to build capacity for a more comprehensive and system-wide approach to reporting data on racial and ethnic disparities.

- Lack of "ethnicity" data impeded a full analysis of the problem of disparities. Justice system stakeholders must improve their capacity to collect and record data on ethnicity of justice system clients. Lack of data regarding Latino adults' involvement is problematic for obvious reasons – if we do not understand the extent of the problem, we cannot craft the appropriate policy solutions. Additionally, when population data disregard ethnicity, and only focus on race, the vast majority of these "Hispanics" are counted as White. The result is a likely inflated rate of system involvement for White adults[1], and an underestimation of the disparity gap between White and Black adults.

2013 DATA: SAN FRANCISCO



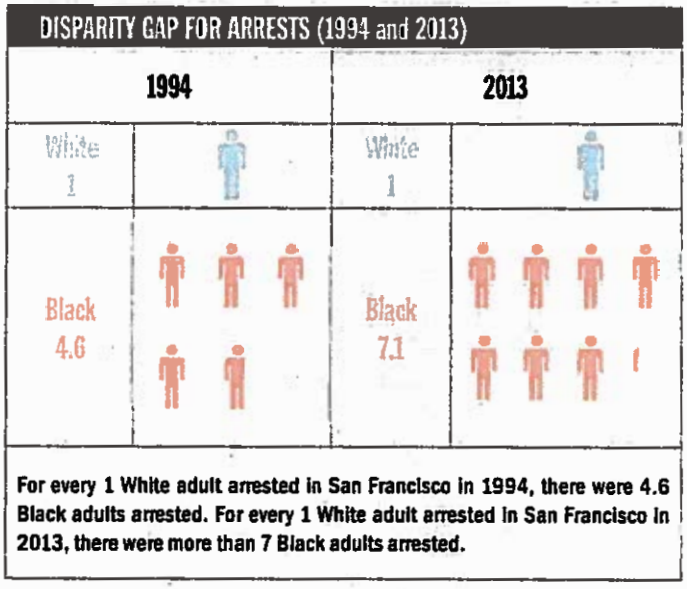
2013: DISPARITY GAP FOR BLACK ADULTS AT KEY DECISION POINTS



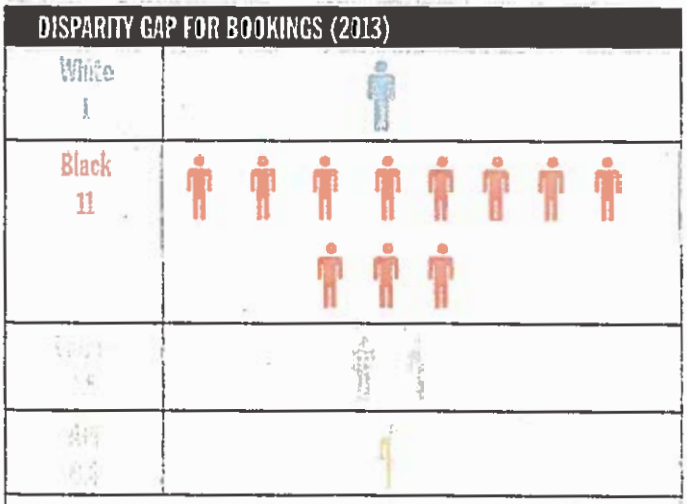
[1] Nationally, when population data disregard ethnicity, and only focus on race, the vast majority of these "Hispanics" (89%) would be identified as "White."). Puzzanchera, C., Sladky, A. and Kang, W. (2014). "Easy Access to Juvenile Populations: 1990-2013." Online. Available: http://www.ojjdp.gov/ojstatbb/ezapop/

ARRESTS

- In 2013, Black Adults in San Francisco were more than seven times as likely as White adults to be arrested.
- Despite a significant overall reduction in arrest rates in San Francisco, the disparity gap – the relative rate of arrest for Black adults compared to White adults - is increasing.
- Whereas the disparity gap in arrests statewide is decreasing, the disparity gap in San Francisco is increasing.
- Rates of arrest are higher for Black adults than White adults for every offense category.
- Despite reductions in rates of arrest for drug offenses, the Black/White disparity gap increased for every drug offense category.



For every 1 White adult arrested in San Francisco in 1994, there were 4.6 Black adults arrested. For every 1 White adult arrested in San Francisco in 2013, there were more than 7 Black adults arrested.



For every 1 White adult booked into San Francisco County Jail, there were 11 Black adults and 1.5 Latino adults booked

BOOKINGS TO JAIL (PRETRIAL)

- Black adults in San Francisco are 11 times as likely as White adults to be booked into County Jail. This disparity is true for both Black men (11.4 times as likely) and Black Women (10.9 times as likely).
- Latino adults are 1.5 times as likely to be booked as White adults.
- Booking rates for Black and Latino adults have increased over the past three years while booking rates for White adults have decreased.
- The top three residence zip codes of Black adults booked into County Jail were: 94102 (includes the Tenderloin), 94124 (Bayview-Hunters Point), and 94103 (South of Market).
- The top three residence zip codes for Latino adults booked into County Jail were: 94110 (Inner Mission/ Bernal Heights), 94102 (includes the Tenderloin), and 94112 (Ingelside-Excelsior/Crocker-Amazon).
- A vast majority (83 percent) of individuals booked into jail in San Francisco had residence zip codes within the County. Overall, only 17 percent of individuals booked into jail had residence zip codes outside of San Francisco.[2]

PRETRIAL RELEASE

- Booked Black adults are more likely than booked White adults to meet the criteria for pretrial release.[3]
- Black adults are less likely to be released at all process steps: Black adults are less likely to receive an "other" release (i.e., cited, bailed, and dismissed); less likely than White adults to be released by the duty commissioner; and less likely to be granted pretrial release at arraignment.
- Rates of pretrial releases at arraignment are higher for White adults for almost every quarter.
- Out of all adults who meet the criteria for pretrial release (the entirety of the SFPDP database):
    - 39 percent of Black adults had prior felony(ies) compared to 26 percent of White adults, however, White adults with a prior felony were almost always more likely to be released at arraignment than Black adults with a prior felony;

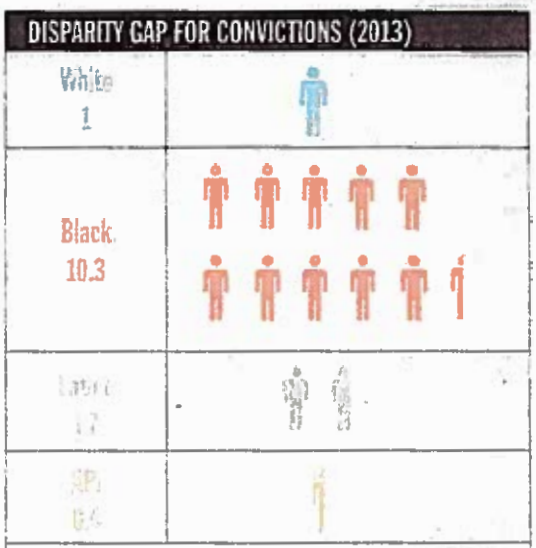
[2] Data regarding the homeless population were unavailable. Of the total 19,273 bookings in 2013, there were 3,973 (21%) that did not include a zip code. Some of these missing zip codes may be homeless adults who reside in San Francisco.

[3] Data for both Bookings and Pretrial eligible include the most recent year available (Q3 2013-Q2 2014). The data come from two distinct databases. Further analysis is needed to better understand this finding. For example, White adults may be more likely to be cited out and are therefore not included as "eligible" for pretrial release and protocol for identifying "ethnicity" in the two information systems may not be consistent.

- 44 percent of Black adults had prior misdemeanor(s) compared to 45 percent of White adults, however, White adults with a prior misdemeanor were almost always more likely to be released at arraignment than Black adults with a prior misdemeanor; and
- 62 percent of Black adults had a high school diploma or GED compared to 66 percent of White adults, however, White adults with a HSD/GED were almost always more likely to be released at arraignment than Black adults with a HSD/GED.

CONVICTIONS/SENTENCING

- For every White adult arrested and convicted in 2013, 1.4 Black adults were arrested and convicted.[4] (Due to lack of data about Latinos at arrest, no comparison of convictions to arrest was made for Latinos).
- Black adults in San Francisco (in the general population) are ten times as likely as White adults in San Francisco (in the general population) to have a conviction in court.
- Latino adults in San Francisco (in the general population) are nearly twice as likely as White adults in San Francisco (in the general population) to have a conviction in court.[5]
- The vast majority of all people convicted are sentenced to Jail/Probation. Black adults with Jail/Probation sentences are more likely to receive formal probation than White adults. Whereas 31 percent of White Adults receive formal probation, 53 percent of Black adults did.
- Black adults are more likely to be sentenced to prison and county jail alone and less likely to be sentenced to Jail/Probation sentence than White adults.
- When they receive Jail/Probation sentences, Black adults are more likely to have a longer County Jail sentence than White adults.



For every 1 White adult convicted of a crime in San Francisco, there were more than 10 Black adults and nearly 2 Latino adults convicted.

- Although more White adults are convicted on DUI charges with blood alcohol levels greater than or equal to .08 than Black adults, Black and Latino adults convicted of these charges are more likely to have a longer jail sentence (as part of a Jail/Probation sentence) than White adults.[6]
- Of all Black adults convicted, 6 percent were convicted of transporting or selling controlled substances; of all White adults convicted, only 1 percent was convicted of this charge. While the number of adults convicted of transporting or selling controlled substances has decreased substantially over the past 3 years, the proportion is consistently higher for Black adults.[7]
- Black adults convicted of transporting or selling controlled substances are more likely to stay longer in jail as part of a Jail/Probation sentence.
- Over the course of the last year, there were 288,177 bed days as the result of court sentences to jail (either though county jail alone or as a part of a Jail/Probation sentence). Black adults account for 50 percent of these sentenced bed days.

[4] When population data disregard ethnicity, the vast majority of Hispanic/Latino people are identified as White. This results in an inflated rate of system involvement for White adults; and subsequently an underestimation of the disparity gaps between White/ Black adults & White/ Latino adults.
[5] See note above. It is important to note this for all of the analyses in the conviction/ sentencing section which compare White and Latino rates.
[6] Analysis of specific charges includes the entire timeframe, in order to increase the number of cases analyzed. The criminal code referenced here is VC 23152(b)/ M.
[7] Analysis of specific charges includes the entire timeframe, in order to increase the number of cases analyzed. The criminal code referenced here is HS 11352(a)/ F.

Exhibit G

Pretrial Services

Public Safety Assessment - Court Report

DR

Name: HUMPHREY, Kenneth SF#: 268689
DOB: 8/12/1953
Arrest Date: 5/23/2017 PSA Completion Date: 5/24/2017

New Violent Criminal Activity Flag **Yes**
New Criminal Activity Scale 4
Failure to Appear Scale 2

Booked Offense(s):

459PC/F BURGLARY, 211PC/F ROBBERY:FIRST DEGREE, 368 (B)(1)PC/F CAUSE HARM/DEATH OF ELDER /DEPENDENT ADULT

Risk Factors:	Reponses:
1. Age at Current Arrest	23 or older
2. Current Violent Offense	Yes
a. Current Violent Offense & 20 Years Old or Younger	No
3. Pending Charge at Time of the Offense	No
4. Prior Misdemeanor Conviction	Yes
5. Prior Felony Conviction	Yes
a. Prior Conviction	Yes
6. Prior Violent Conviction	3 or more
7. Prior Failure to Appear in Past 2 Years	none
8. Prior Failure to Appear Older than 2 Years	No
9. Prior Sentence Incarceration	Yes

Decision Making Framework Response

	NCA 1	NCA 2	NCA 3	NCA 4	NCA 5	NCA 6
FTA 1	OR - NAS	OR - NAS				
FTA 2	OR - NAS	OR - NAS	OR - NAS	Release Not Recommended	SFPDP - ACM	
FTA 3		OR - NAS	OR - MINIMUM	SFPDP - ACM	SFPDP - ACM	Release Not Recommended
FTA 4		OR - MINIMUM	SFPDP - ACM	SFPDP - ACM	Release Not Recommended	Release Not Recommended
FTA 5		SFPDP - ACM	SFPDP - ACM	SFPDP - ACM Release Not Recommended	Release Not Recommended	Release Not Recommended
FTA 6				Release Not Recommended	Release Not Recommended	Release Not Recommended

Release Not Recommended

Is this Response based on a Step 2 exclusion?
Yes

Does this Response include a Step 4 increase?
No

Exhibit H

Diamond, Marcy (PDR)

From: Diamond, Marcy (PDR)
Sent: Wednesday, June 28, 2017 1:45 PM
To: 'orworkups@sfpretrial.org'
Subject: OR WORKUP REQUEST FOR: Kenneth Humphrey

Dear Project OR Staff/Team,

We are preparing a bail motion for the following client:

KENNETH HUMPHREY
COURT NUMBERS:17007715
DATE AND TIME: July 10, 2017 at 9:00 a.m.
DEPARTMENT 12

Please let me know if you have any questions. Thank you very much.

Marcy Diamond
Paralegal
Office of the Public Defender
555 7th Street
San Francisco, CA 94103
(415) 734-3089

Proof of Service

I say:

I am over eighteen years of age and not a party to the above action. My business address is 555 Seventh Street, San Francisco, California 94103.

I personally served copies of the attached on the following:

San Francisco District Attorney, 3rd Floor
850 Bryant Street
San Francisco, CA 94103

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 10, 2017, in San Francisco, California.

Mary Diamond / [illegible]

Exhibit D
July 12, 2017, Reporter's Transcript of Hearing (bail motion)

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

HONORABLE JOSEPH M. QUINN, JUDGE PRESIDING

DEPARTMENT 12

-o0o-

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, versus KENNETH HUMPHREY, Defendant.	CASE NUMBER 17007715

-o0o-

REPORTER'S TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, JULY 12, 2017

BAIL MOTION

-o0o-

A P P E A R A N C E S

-o0o-

FOR THE PLAINTIFF, PEOPLE OF THE STATE OF CALIFORNIA:

JULIA V. CERVANTES, ESQUIRE
Assistant District Attorney
850 Bryant Street, Room 322
San Francisco, California 94103
(415) 553-1682
Julia.cervantes@sfgov.org

FOR THE DEFENDANT, KENNETH HUMPHREY:

PAUL J. MYSLIN, ESQUIRE
Deputy Public Defender
555 Seventh Street
San Francisco, California 94103
(415) 553-9652
Paul.myslin@sfgov.org

-o0o-

WEDNESDAY, JULY 12, 2017

-o0o-

(Proceedings commenced at 10:33 a.m.)

THE BAILIFF: Your Honor, before the break I think we're ready to call one more in-custody matter.

THE COURT: Okay.

THE BAILIFF: Line 16.

THE COURT: Okay. So calling Line 16, People versus Humphrey.

MS. CERVANTES: Julia Cervantes for the People.

THE COURT: Thank you. Good morning.

MS. CERVANTES: Good morning, your Honor.

MR. MYSLIN: Good morning. Paul Myslin for the Public Defender with Mr. Humphrey, who is present in custody.

THE COURT: All right. Thank you. Good morning.

And good morning, Mr. Humphrey.

THE DEFENDANT: Good morning.

THE COURT: All right. So this matter is on calendar for a bail motion. Before we get there, because I'm likely to forget, there's a notation on the calendar that there is a date of July 17, 2017, for a prehearing. That's actually for a preliminary hearing.

MS. CERVANTES: That's correct. Both of our notes indicate that date should have been for preliminary hearing, not for prehearing conference.

THE COURT: Okay. So if we could correct our records.

And now back to the bail motion. The Court has read the bail motion. Mr. Myslin, anything to add?

MR. MYSLIN: Yes. I want to give the Court a copy of this letter which I've provided to Ms. -- I'm sorry.

THE COURT: Cervantes.

MR. MYSLIN: Cervantes. I knew it started with a "C."

MS. CERVANTES: That's okay.

MR. MYSLIN: I'm sorry. Ms. Cervantes. And I just got it this morning. It's -- if I may approach --

THE COURT: Yes, please.

MR. MYSLIN: -- an acceptance letter from Golden Gate for Seniors, which is a --

THE COURT: Thank you.

MR. MYSLIN: -- residential placement that Mr. Humphrey would be acceptable for.

I also wanted to note for the record that his longtime friend, Ms. Judy Marshall, is present here in the audience.

THE COURT: Thank you.

MR. MYSLIN: If you could just --

THE COURT: Thank you. Welcome.

MR. MYSLIN: And I think I laid out all my points in the bail motion. I would just add that Mr. Humphrey has not had any -- I don't think he's had any

criminal conduct for about 12 years. And he is elderly; he's 63. He's been battling with addiction, but he's, as the bail motion shows, made some significant strides both in rehabilitation as well as with working on the addiction. But as I'm sure the Court knows, it is a process; it's something that takes a lot of work.

This particular case does involve a small amount taken. I don't believe there was any injury sustained here.

And based on all of those factors -- I understand that this is a three-strikes case. That is how it's charged. The prior strikes, however, are very old. I think we're talking 1980 and '86, and the most recent one being from 1992, which is still, I think, 25 years ago. So I -- based on all of those, I would ask that Mr. Humphrey be given a chance to be out on his own recognizance, and failing that, that he be ORed to Golden Gate for Seniors.

THE COURT: Okay. Thank you.

Ms. Cervantes?

MS. CERVANTES: Your Honor, I would note that the 2005 conviction is for a 245(a)(1). This is before the (a)(1) and (a)(4) were split, so it -- it's a soft -- it's the (a)(4), I believe. But it's still a felony, and the defendant did do State prison time for that conviction.

The -- Penal Code Section 1275 dictates the Court must find unusual circumstances to deviate from

the scheduled bail, and the bail that's been set in this case is scheduled bail of $600,000.

I would note that the defendant has had a -- as defense counsel notes in his papers, a lifetime battle with drugs. And it seems that this incident, which was serious for various reasons, was again motivated by drug use, and I consider it a continued public safety risk that the defendant continues to use drugs and continues to feed his habit by any means necessary.

He was laying in wait in this incident. He followed a disabled senior into his home. He stole from him. He did so in a building that he had access to, that he resided in. And he committed this crime with -- with those factors, where you have an elderly man, a man who's using a walker, the defendant's waiting nearby, waiting for him to enter his house and then following him into his home, it's a great public safety risk. The defendant is a flight risk because he's facing a very long prison sentence in this case.

And for those reasons I'm asking the Court, seeing as there's been no change of circumstance, to keep the bail as it is currently set.

MR. MYSLIN: I do think it's worth noting that this is a situation that happened between two elderly people in an elder home.

Mr. Humphrey obviously is willing to abide by any stay-away orders. I believe there was one issued in

this case commanding that he stay off of the fourth floor, as well as that he not come within ten yards of the complaining witness in this case should they encounter each other if Mr. Humphrey were out in the community.

THE COURT: Okay. Thank you.

MS. CERVANTES: Your Honor, I see that this is the original bail hearing, but the prior convictions are for the same conduct; they're robberies, as well.

THE COURT: So you're withdrawing the no-changed-circumstances argument. Okay.

MS. CERVANTES: No.

THE COURT: Oh.

MS. CERVANTES: I'm sorry. I'm saying that the prior strikes are for the same conduct. So that was the argument that I made at the original hearing when --

THE COURT: Oh; you originally made that argument.

MS. CERVANTES: I'm reminding the Court of that factor. And there's about ten years' difference between the defendant and the victim. I'm sorry. Sixteen years' difference.

MR. MYSLIN: I would just note that this is -- you know, Mr. Humphrey is entitled to a bail hearing under Penal Code Section 1275. This is the first actual bail hearing.

The argument that was made at arraignment was without the benefit of all the additional information

that we've included in the bail motion, including the acceptance letter, as well as the background information on what Mr. Humphrey has accomplished both for his own betterment, as well as that of the community.

THE COURT: Okay. Thank you.

All right. So I have read and considered the bail motion, heard the arguments and representations of counsel, and reviewed the file in this matter in connection with the bail motion, and so the Court does have public safety concerns. So this was a serious crime and serious conduct involved and pretty extreme tactics employed by Mr. Humphrey, if I accept what is in the police report as true, so I think that raises substantial public safety concerns.

Further, Mr. Humphrey's criminal history -- while, you know, there was a big break, previously he had been involved, apparently, in pretty similar conduct, so that continuity is troubling to the Court.

And the exposure is very high, which basically raises an inference of flight risk.

I hear what's being said about the charges and the vulnerable victim and -- you know, it was basically a home invasion. And yes, maybe little was taken, but that's because the person whose home was invaded was poor. I'm not gonna provide less protection to the poor than to the rich. So this is an invasion; that's what it is.

And so -- but those circumstances, I think,

are captured in the scheduled bail of $600,000. And as Ms. Cervantes argued, I have to find unusual circumstances to deviate.

I do hear, Mr. Humphrey, your willingness to participate meaningfully in treatment, and I do commend that. I cannot see my way to an OR release on that basis, but I do think that is an unusual circumstance that would justify some deviation from the bail schedule.

And I do understand your community ties, your support from Ms. Marshall here, and I'm taking that into consideration, too. That, too, is -- I think qualifies in this case as unusual circumstances justifying a deviation, but it's not gonna get that far from -- it's still gonna be a high bail because of the -- largely because of public safety and flight risk concerns, and so I'm gonna modify bail to be $350,000.

MR. MYSLIN: So as to --

THE COURT: Oh. I'm sorry. I should say and a condition of that bail is -- a condition will be that Mr. Humphrey participate in a residential treatment program.

MR. MYSLIN: Right. I don't know that he's gonna be able to make even $350,000 bail. He is poor. He has a Public Defender. So I think while it's a -- I appreciate the Court's consideration. I think the end result is that Mr. Humphrey's going to remain in custody pending this case.

The next -- I think the next thing that we need to address is given that the preliminary hearing is scheduled for the 17th --

THE COURT: Yes.

MR. MYSLIN: -- is there any point in trying to arrange to meet with the committee before that, or how can we --

MS. CERVANTES: I'll make that inquiry today and get to Mr. Myslin by the end of the day.

THE COURT: Okay. Then just let the Court know --

MS. CERVANTES: Yes.

THE COURT: -- as soon as you can if the prelim is not gonna go forward.

MS. CERVANTES: Yes. Thank you, your Honor.

MR. MYSLIN: Very good. I appreciate it.

MS. CERVANTES: May we approach, your Honor?

THE COURT: Yes.

(Attorney Cervantes, Attorney Myslin, and the Court engage in an off-the-record discussion from 10:45 a.m. until 10:46 a.m. The matter of the People of the State of California, Plaintiff, versus Kenneth Humphrey, Defendant, Case Number 17007715, was adjourned at 10:46 a.m.)

-o0o-

STATE OF CALIFORNIA)
) ss:
COUNTY OF SOLANO)

I, DENISE L. DOUCETTE, CSR 5963, RDR, CMR, FAPR, an official court reporter of the Superior Court of the County of San Francisco, State of California, do hereby certify that the foregoing is a full, true, and correct transcription of the shorthand notes taken by me of the proceedings had in the above-entitled matter.

I have hereunto set my hand this 14th day of July, 2017, at Vallejo, California.

_____
DENISE L. DOUCETTE, CSR 5963

Appendices

Brief Amicus Curiae of the Cato Institute Supporting Plaintiff-Appellee and Affirmance of the Preliminary Injunction

No. 16-10521

IN THE
United States Court of Appeals for the Eleventh Circuit

MAURICE WALKER, on behalf of himself and others similarly situated,
Plaintiff-Appellee,

v.

CITY OF CALHOUN, G.A.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Georgia
No. 4:15-cv-00170-HLM

BRIEF *AMICUS CURIAE* OF THE CATO INSTITUTE SUPPORTING PLAINTIFF-APPELLEE AND AFFIRMANCE OF THE PRELIMINARY INJUNCTION

Ilya Shapiro
Counsel of Record
Randal J. Meyer
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Amicus Curiae

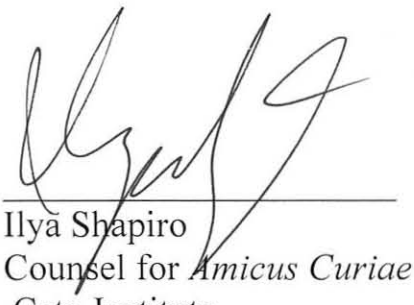
CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Cir. R. 26.1-1, the Cato Institute declares that it is a nonprofit public policy research foundation dedicated in part to the defense of constitutional liberties secured by law. Cato states that it has no parent corporation and only issues a handful of shares that are privately held by its directors. No publicly held corporation has a direct financial interest in the outcome of this litigation due to the participation of Cato.

Further, the undersigned counsel certifies that, in addition to the list of interested persons certified in the Appellants' Brief and supplemented by the certificates in the Briefs of the State Appellees-Cross-Appellants and the Private Plaintiffs-Appellees, the following persons may have an interest in the outcome of this case, and that to the best of his knowledge, the list of persons and entities in the Briefs for Appellants and Appellees are otherwise complete:

COUNSEL FOR *AMICUS CURIAE*
Ilya Shapiro
Counsel of Record
Randal J. Meyer

ASSOCIATIONS
Cato Institute



Ilya Shapiro
Counsel for *Amicus Curiae*
Cato Institute

TABLE OF CONTENTS

TABLE OF AUTHORITIES

* Authorities upon which we chiefly rely are marked with an asterisk

Page(s)

Cases

Statutes

Other Authorities

Constitutional Provisions

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan policy research foundation established in 1977 and dedicated to the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*. The present case concerns Cato because holding prisoners pursuant to non-individualized bail schemes undermines due process, the Eighth Amendment, and equal protection.

ISSUE ADDRESSED BY *AMICUS CURIAE*

This brief addresses the constitutional merits of Plaintiff Maurice Walker's claims that statutory bail schemes violate his due process rights.

SUMMARY OF ARGUMENT

The decision of the court below is supported by nearly a *millennium* of Anglo-American constitutional and common law. The Eighth Amendment protects the specific right to non-excessive pre-trial bail that takes into account defendants' indigency. That right specifically incorporates a more general right to pre-trial

[1] Pursuant to Fed. R. App. P. 29, both parties, through their respective counsel, have consented to the filing of this brief. *Amicus* certifies that no counsel for any party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

liberty protected by the Fifth and Fourteenth Amendments' Due Process Clauses. The addition of the Fourteenth Amendment to the Constitution in 1868 also protected the fundamental right to pre-trial liberty from denials of equal protection under the laws. *See generally Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956)). A predetermined, scheduled bail scheme that does not take into account individual indigency factors—like the City of Calhoun's—violates all of those rights. Accordingly, this court should affirm the court below and thus uphold the preliminary injunction.

ARGUMENT

I. THE RIGHT TO BAIL EXISTS AT CONSTITUTIONAL AND COMMON LAW FOR MISDEMEANANTS AND MOST FELONS

Anglo-American law from the Saxon tribes to the Rehnquist Court support the existence of a procedural right to bail for bailable offenses attendant to the fundamental right to pre-trial liberty.

A. The English Authorities from Before the Magna Carta to the Revolution Confirm the Right to Bail

Since time immemorial, concomitant to the general right to pre-trial liberty, bail has been a procedural right for all offenses against the Crown, except for those specifically excluded at law. *See, e.g.*, 4 William Blackstone, Commentaries *295 ("By the ancient common law, before and since the [Norman] conquest, all felonies were bailable, till murder was excepted by statute; so that persons might

be admitted to bail before conviction almost in every case." (footnotes omitted)); *accord generally* 2 William Hawkins, A Treatise on the Pleas of the Crown, bk. 2, ch. 15, at 138 (8th ed., 1716, reprnt'd 1824); 2 Co. Inst. 191; Sir Edward Coke, A Little Treatise of Baile and Maineprize (1635) (listing the offenses for which a person had a right to bail and no right to bail at common law); 2 Henri de Bracton, De Legibus et Consuetudinibus Angliae 295 (c. 1235, reprnt'd 1990). This tradition of bail rights continued through the Magna Carta, the English Revolution, the English Restoration, the Colonial Era, and into American jurisprudence.

"[T]he root idea of the modern right to bail" originates from "tribal customs on the continent of Europe," developing far earlier than parchment barrier guarantees of freedom like the Magna Carta or the Constitution. Elsa De Haas, Antiquities of Bail: Origin and Development in Criminal Cases to the Year 1275, at 128 (1966); *accord* 2 Sir Frederick William Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I, at 458-60 (2d ed. 1898, reprnt'd 1984). Those customs used a financial bond "as a device to free untried prisoners." Daniel J. Freed & Patricia M. Wald, Bail in the United States: 1964, at 1 (1964). Pre-Normal England was largely governed by the Germanic tribal custom of *wergild*[2] carried over by the Saxons—*wergild* payment is the ancient root of surety bail. De Haas, *supra*, at 3-15. *Wergild* was the payment due

[2] Also known as *wirgeld* or *wergeld.*

to a family for the slaying or assault of a relative. *Id.* at 11-13. By providing sufficient surety that the *wergild* would be paid, the blood feud between the families subsided and the perpetrator was given safe conduct. *Id.* at 12-13. The surety of the *wergild* evolved into the concept of bail thereafter. This system pervaded until William the Conqueror imported Frankish law.

As the Germanic law evolved into the classic common law of post-Norman Conquest England, the *wergeld* surety became the crown pleas of replevy and mainprize, secured by bail pledges circa 1275. *See* 2 Pollock & Maitland, *supra*, at 584; De Haas, *supra*, at 32-33, 64-65, 68, 85 (noting that the pleas are listed in the Statute of Westminster I). The writs were aimed at the "release of the alleged criminal," as "bail as a right of free men assumed greater proportions of importance." De Haas, *supra*, at 85, 129. Near the end of the Danish and Wessex Kings' rule over the British Isles in the 1000s, King Canute II (the Great) instituted the frankpledge system which subdivided the people of the realm by household into groups of ten—a tithing—that were bound for the surety of each-other to appear in criminal offenses. Timothy R. Schacke, Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform 25 (2014); 4 William Blackstone, Commentaries, *249. The frankpledge system complimented a robust private surety system. De Haas, *supra* at 49-50.

In 1215, the Magna Carta codified the fundamental right to pretrial liberty: "No free man shall be arrested or imprisoned . . . or victimized in any other way . . . except by the lawful judgment of his peers or by the law of the land." Magna Carta ch. 32 (1216); *accord* Magna Carta ch. 39 (1215); Magna Carta ch. 29 (1225); 2 Co. Inst. 190, 191 ("[t]o deny a man replevin that is replisable, and thereby to detain him in prison, is a great offense . . ."); *see also Kennedy v. Mendoza–Martinez*, 372 U.S. 144, 186 (1963) (noting the same). Thus, men were to be left at liberty until there is a verdict in their cases. Indeed, "the King's courts at Westminster" were greatly concerned with "'the liberty of the subject'" in bail cases. *Cf.* 2 Pollock & Maitland, *supra*, at 586. The 1275 Statute of Westminster laid out which crimes were bailable and those where the right to bail may be abrogated by the risk of disturbance of the peace of the community, as well as creating severe punishments for corrupt sheriffs. Statute of Westminster I, 3 Edw. III, c. 3, 15; De Haas, *supra*, at 95.

Following the Norman Conquest, it became apparent that the sheriffs (shire-reeves) responsible for groups of frankpledged tithings were corrupt in their administration of bail through writs of bail, replevy, and mainprize. *United States v. Edwards*, 430 A.2d 1321, 1326 (D.C. Cir. 1981) (en banc) (noting that sheriffs' bail "power was widely abused by sheriffs who extorted money from individuals entitled to release without charge" and "accepted bribes from those who were not

otherwise entitled to bail"); De Haas, *supra* at 90-95. In 1166, bail, mainprize, and replevy for crimes of royal "concern" were thus committed to judicial discretion as crown pleas that must be heard by a crown court. De Haas, *supra*, at 60-61. The Normans also incorporated grand juries into the justice system, and established a system of circuit-riding judges. Schacke, *supra*, at 25; De Haas, *supra* at 58-63 (discussing the 1166 Assize of Clarendon); *see also Smith v. Boucher*, 10 Geo. 2 136, 136, 27 Eng. Rep. 782, 783 (Hardwicke, J.) (K.B. 1736) ("[T]o settle the quantum of that bail . . . is still subject to the power of the Judge.").

Statutes between 1150 and the 1400s curtailed the powers of the sheriffs in bail in response to malpractice and heaped on penalties for abuses. De Haas, *supra* at 95-96 & n.277 (collecting statutes). Abuse of the right to bail by the Stuart King Charles I lead to the adoption of the Petition of Right in 1628, overruling the King's judges in *Darnel's Case* who interpreted the Magna Carta as not applying to pre-trial liberty. Petition of Right, 3 Car. I, c.1 (1628); *Darnel's Case*, 3 How. St. Tr. 1 (1627); 3 Sir Edward Coke, The Selected Writings and Speeches of Sir Edward Coke 1270 (Steve Sheppard, ed., 1st ed. 2003) (MP Sir Edward Coke's report on the framing of the Petition of Right to the Committee of the Whole Commons). In 1679, in response to further abuses of the Stuart kings and their sheriffs, Parliament passed the Habeas Corpus Act, strengthening the rights and protections of the Magna Carta and the Assize of Clarendon. Habeas Corpus Act of

1679, 31 Cha. II. c2. The Habeas Corpus Act secured judicial review of detention, including whether a person was replevable and thus entitled to bail release upon a pledging of sufficient surety. *Id.*

In 1689, Parliament underscored the importance of the right to pre-trial liberty by expressly including a right against excessive bail in the Bill of Rights, thereby legislating against a chief form of attack on the fundamental right to bail employed by the Stuart Kings—the unlawful holding of prisoners through unaffordable bail. Bill of Rights, 1 W. & M., c. 2 (1689). The common law of the right to pre-trial liberty through bail continued through to the Revolution and was carried into the federal Constitution, state constitutions and federal law. *E.g.*, 4 William Blackstone, Commentaries *295.

B. American Constitutional and Common Law Incorporates and Upholds a Right to Bail

"In crossing the Atlantic, American colonists carried concepts embedded in these documents [the Magna Carta, 1275 Statute of Westminster I, Habeas Corpus Act of 1676, and the 1689 Bill of Rights] that became the foundation for our current system of bail." *New Mexico v. Brown*, 338 P.3d 1276, 1284 (N.M. 2014).

Both the colonies that became states and later states incorporated the right to bail into their own law. "One commentator who surveyed the bail laws in each of the states found that forty-eight states have protected, by constitution or statute, a

right to bail 'by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.'" *Id.* (quoting Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 Ariz. L. Rev. 909, 916 (2013)). Pennsylvania, New York, Massachusetts, North Carolina, and Virginia all adopted right to bail clauses either before or immediately after the founding. *Caleb Foote, The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959, 974-77 (1965); *see also generally* N.Y. Charter of Liberties and Privileges (1683); Mass. Body of Liberties (1641); N.C. Const. Declaration of Rights § x (Dec. 18, 1776).

On the federal level, this right to bail has been woven into the Constitution, federal statutory law, and federal court decisions. The general right to pre-trial liberty from the time of the Magna Carta was preserved on a constitutional level in the Constitution's Due Process Clauses. *Compare* U.S. Const. amend. V ("nor shall any person . . . be deprived of . . . liberty . . . without due process of law") *and* amend. XIV § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law") *with* Magna Carta ch. 32 (1216) ("No free man shall be arrested or imprisoned . . . or victimized in any other way . . . except by the lawful judgment of his peers or by the law of the land.").

In the Judiciary Act of 1789, Congress codified bail as the procedural mechanism for preserving the right to pre-trial liberty by enacting an absolute right to bail in non-capital cases and a limited right to bail in capital cases. 1 Stat. 73,

§ 33, at 91 ("Upon all arrests in criminal cases, bail shall be admitted, except where punishment may be by 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."). The Articles of Confederation Congress also recognized the right to pre-trial liberty through bail—the Northwest Ordinance of 1787 enacted that "[a]ll persons shall be bailable, unless for capital offenses, where the proof shall be evident or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land." Northwest Ordinance of 1787, art. 2.

The Supreme Court in *Stack v. Boyle* made clear that a "right to bail" as a functionary of pre-trial liberty is the proper interpretation of the law and has continued unabated as part of American law "[f]rom the passage of the Judiciary Act of 1789 . . . to the present Federal Rules of Criminal Procedure":

> [F]ederal law has unequivocally provided that a person arrested for a noncapital 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. *See Hudson v. Parker*, 156 U.S. 277, 285 (1895). Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.
>
> The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty.

Stack v. Boyle, 342 U.S. 1, 4 (1951) (Vinson, C.J.).

Since *Stack v. Boyle*, the Supreme Court has backed away from the idea that the Eighth Amendment's Excessive Bail Clause incorporates a general right to bail. *United States v. Salerno*, 481 U.S. 739, 752-54 (1987) ("The above-quoted dictum in *Stack v. Boyle* is far too slender a reed on which to rest this argument. The Court in *Stack* had no occasion to consider whether the Excessive Bail Clause requires courts to admit all defendants to bail"). Yet *Salerno* still incorporated a fundamental right to pre-trial liberty under the Due Process Clauses. *Id.* at 746-53.

The *Salerno* Court is correct that certain crimes are not and have not been bailable at common law—"the right to bail they have discovered in the Eighth Amendment is not absolute." *Id.* at 753. That has been clear since Bracton and Coke, 2 Co. Inst. 191; Sir Edward Coke, A Little Treatise of Baile and Maineprize (1635) (listing the offenses for which a person had a right to bail and no right to bail at common law); 2 Bracton, *supra* at 295, and as the Statute of Westminster I and the 1628 Petition of Right shows, the legislature clearly has the power to make policy decisions about who is and is not bailable—at least within the bounds of reason. *See supra* Part I.A; *cf. Salerno*, 481 U.S. at 755 (upholding the Bail Reform Act of 1984).

The confusion of the *Salerno* Court as to the Eighth Amendment is understandable and easily corrected. This amendment should not be the textual

anchor for the general right to bail and pre-trial liberty—though it clearly provides support in that it presumes such a right. As the *Salerno* Court found, the general right to pre-trial liberty is preserved in the Due Process Clauses—and bail is the due process mechanism for achieving pre-trial liberty—but the Eighth Amendment affirms a different yet related right against *excessive* bail. That right is conceptually separate from the general right to pre-trial liberty via bail, but it evolved out of the same common law. *Compare* Magna Carta ch. 32 (1216) (protecting pre-trial liberty in general with the predecessor to the Due Process Clauses), *with* Bill of Rights, 1 W. & M., c. 2 (1689) (incorporating a right against excessive bail); *see infra* Part II.A (discussing the common law considerations for setting "sufficient" bail and the codification of that right in 1689).

The heavy lifting of the general right to bail and pre-trial liberty is more properly done by the Due Process Clauses, while *excessive* bail challenges arise under the Eighth Amendment. Excessive bail claims give rise to claims of denial of bail altogether, however, so the Eighth Amendment can protect against a specific type of encroachment on rights generally guaranteed by the Due Process Clauses.

Finally, a denial of bail is also actionable under the Equal Protection Clause. Denying pre-trial liberty via bail because of indigency would, *a fortiori*, be to discriminate on the basis of indigency in the criminal-procedure context. *See*

generally Douglas v. California, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956)).

In sum, American law incorporates over 950 years of English constitutional and common law in establishing a fundamental right to the process of bail in order to secure pretrial liberty.

II. THE RIGHT TO BAIL GUARANTEES NON-EXCESSIVE, INDIVIDUALIZED ASSESSMENTS NOT FIXED BY A PRE-DETERMINED SCHEME

Amici American Bail Coalition, Georgia Association of Professional Bondsmen, and Georgia Sheriffs' Association are absolutely correct that "[s]ince before the Founding, American communities have employed systems of bail to guarantee criminal defendants' appearance for prosecution while enabling the accused to secure their liberty before trial" and that "[t]he American colonies developed bail procedures based on English practices, and they retained those practices at independence." Am. Bail Coal. Br. at 4-5. But they are absolutely incorrect that those English and Colonial practices—and modern practice—would countenance non-individualized, pre-determined "systems of bail like the City of Calhoun's." *Id.* at 5. Since Norman England, bail has been supposed to be set with respect to the individual wealth circumstances of the criminal defendant.

A. Pre-Revolutionary and Post-Revolutionary Constitutional and Common Law Commits Bail to Judicial Discretion to Avoid Excessive Bail for Indigents and to Ensure Sufficient Sureties

After the Norman Conquest of England and during the changes to pre-trial liberty and bail laws contemplated in the Magna Carta and the 1275 Statute of Westminster I, it became clear that bail is to be set with respect to the individual wealth circumstances of the defendant.

Defendants were required to put up "sufficient sureties," Am. Bail Coal. Br. at 4-6, but what is "sufficient" depended on the individual wealth circumstances of the defendant. *See, e.g.*, *King v. Bowes*, 1 T.R. 696, 700, 99 Eng. Rep. 1327, 1329 (K.B. 1787) (per curiam) (noting that "[e]xcessive bail is a relative term; it depends on the nature of the charge for which bail is required, upon the situation in life of the parties, and on various other circumstances"), (Archbald, J.) (allowing for a "lessening" of bail as there may be "difficulty" in procuring the sums); 2 Hawkins, at ch. 15, at 138-39 (discussing "[w]hat is said to be sufficient bail" and noting that judges ought to "take care that every one of the bail be of ability sufficient to answer the sum in which they are bound . . . upon consideration of the ability and quality of the prisoners, and the nature of the offence."). The rule Hawkins discusses extends back to early Norman common law. *See* De Haas, *supra*, at 84 ("It is noteworthy that no fixed amount seems to have been charged for the privilege of bail release . . . . It is our conclusion that they allowed themselves

considerable leeway in writing out the order for release, and that they failed generally to abide by any set formula."); 2 Pollock & Maitland, *supra*, at 514 (noting that in applying amercements to the sureties of those who fled on bail bond, "[a]ccount can now be taken of the offender's wealth or poverty . . . . there also seem to be maximum amercements depending on the wrong-doer's rank; the baron will not have to pay more than a hundred pounds, nor the routier more than five shillings").

These common-law roots were expanded and became more solidified with the abuses of the Stuart Kings before and after the English Civil War. In *Darnel's Case* in 1627, judges of the King's Bench "proved their subservience to the King [Charles I] by denying [habeas] release" to five knights committed to prison by special royal command for unnamed offenses. Foote, *supra*, at 966; *Darnel's Case*, 3 How. St. Tr. 1 (1627). That court found that, on due process grounds, the Magna Carta did not secure pre-trial liberty. Foote, *supra*, at 966; *Darnel's Case*, 3 How. St. Tr. 1 (1627). The House of Commons, under the leadership of Sir Edward Coke, took up the case and responded with the 1628 Petition of Right, asserting the right to pre-trial liberty under the Magna Carta and overruling *Darnel's Case*—"no freeman in any such manner as is before mentioned, be imprisoned or detained." Petition of Right, 3 Car. I, c.1 (1628); 3 How. St. Tr. 1, at 224 ¶ x; 3 Coke, Selected Writings and Speeches, at 1270; Foote, *supra*, at 967.

Further abuses of loopholes by Stuart King Charles II lead to the adoption of the Habeas Corpus Act of 1679, which noted that "many of the King's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable." 31 Car. 2, c. 2 (1679). Having exhausted all of those loopholes, Charles II turned to "setting impossibly high bail" in order to "erect[] another obstacle to thwart the purpose of the law on pretrial detention." Foote, *supra*, at 967.

After William and Mary assumed the throne, Parliament responded to the Stuart high bail policy with the 1689 Bill of Rights. Bill of Rights, 1 W. & M., c. 2 (1689). Clause 10 of the Bill of Rights expressly provided that "excessive bail ought not be required." *Id.* The courts of the King's Bench bent to parliamentary supremacy after the destruction of Stuart absolutism and examined actions for excessive bail, respecting the rank and ability of the individual to post bond. *E.g.*, *Daw v. Swaine*, 1 Sid. 424, 21 Car. 2 424, 88 Eng. Rep. 1195, 1195 (C.P. 1670) (action for excessive bail); *Neal v. Spencer*, 10 Will. 3 257, 257-58, 88 Eng. Rep. 1305, 1305-06 & n.a (K.B. 1698) (collecting cases that note the diversity of bails given for the same offense in an action for excessive bail); *Parker v. Langley*, 11 Anne 145, 145-46, 88 Eng. Rep. 667, 667 (Q.B. 1712) (action for excessive bail); *Smith v. Boucher*, 10 Geo. 2 136, 136 27 Eng. Rep. 782, 783 (Hardwicke, J.) (K.B. 1736) ("[T]o settle the quantum of that bail . . . . is still subject to the power of the

Judge . . .”); *King v. Bowes*, 1 T.R. 696, 700, 99 Eng. Rep. 1327, 1329 (K.B. 1787) (Archbald, J.) (allowing for a “lessening” of bail as their may be “difficulty” in procuring the sums.”); *Bates v. Pilling*, 149 Eng. Rep. 805, 805 (K.B. 1834) (“[A] defendant might be subjected to as much inconvenience by being compelled to put in bail to an excessive amount, as if he had been actually arrested.”); *accord* 2 Hawkins, at ch. 15, at 138-39.

In the *King v. Bowes*, the per curiam King’s Bench noted that “[e]xcessive bail is a relative term; it depends on the nature of the charge for which bail is required, upon the situation in life of the parties, and on various other circumstances.” 1 T.R. at 700, 99 Eng. Rep. at 1329. Hawkins in his *Pleas of the Crown* repeated the rule that “sufficient” bond must take into account the wealth status of the defendant. 2 Hawkins, at ch. 15, at 138-39. Thus, “excessive” bail was not determined by examining a pre-determined, fixed amount, but rather by asking whether the amount was appropriate given the wealth of the defendant, for “a defendant might be subjected to as much inconvenience by being compelled to put in bail to an excessive amount, as if he had been actually arrested.” *Bates*, 149 Eng. Rep. at 805; *accord* 1 J. Chitty, A Practical Treatise on the Criminal Law *131, at 88-89 (William Brown, Philadelphia 1819) (“[S]uch bail is only to be required as the party is able to procure; for otherwise the allowance of bail would be a mere colour for imprisoning the party on the charge.”)

After the Revolution, the United States affirmed the specific right against excessive bail found in the English Bill of Rights but with stronger language. *Compare* U.S. Const. amend. VIII ("Excessive bail shall not be required"), *with* 1 W. & M., c. 2, cl. 10 (1689) ("[E]xcessive bail ought not be required."). Early American common law adopted the English understanding that setting bail includes particularization to an individual defendant's wealth circumstances, lest it be unconstitutionally "excessive" considering individual wealth circumstances. "'[T]o require larger bail than the prisoner could give would be to require excessive bail, and to deny bail in a case clearly bailable by law.'" *United States v. Brawner*, 7 Fed. 86 (W.D. Tenn. 1881) (quoting *United States v. Lawrence*, 26 Fed. Cas. 887, 888 (No. 15,557) (D.C. Cir. 1835)); *United States v. Radford*, 361 F.2d 777, 780 (4th Cir. 1966) ("[I]n a case clearly bailable by law, to require larger bail than the prisoner could give, would be to require excessive bail."); *see also, e.g.*, *Jones v. Kelly*, 17 Mass. 116, 116-17 (1821) (finding bail to be excessive when a man could not secure sufficient sureties and reducing it from $3000 to $1000); *Whiting v. Putnam*, 17 Mass. 175, 175-78 (1821); *Ex Parte Hutchings*, 11 Tex. App. 28, 29 (Tex. 1881) (whether bail is "excessive and oppressive" depends "upon the pecuniary condition of the party. If wealthy the amount would be quite insignificant compared to a term in the penitentiary; if poor, very oppressive, if not

a denial of the bail."). The Supreme Court has often reaffirmed "the Eighth Amendment's proscription against excessive bail." *Salerno*, 481 U.S. at 746.

Accordingly, the established common law of the sufficiency of bail from the Norman Conquest of England through to the modern American law requires that magistrates and judges take into account the individual wealth circumstances of the defendant in setting bail.

B. Pre-Determined, Non-Individualized Bail Schemes Violate the Right to Pre-Trial Liberty, the Right to Bail, the Right Against Excessive Bail, and the Equal Protection Clause

A pre-determined, scheduled bail scheme like the City of Calhoun's, by its very nature, does not give individualized determinations that the Fifth, Eighth and Fourteenth Amendments demand. U.S. Const. amend. V (granting a general right to pre-trial liberty and bail, see *supra* Part I); U.S. Const. amend. VIII (requires bail determinations with individualized wealth determination per common law, see *supra* Part II.A); U.S. Const. amend. XIV, § 1 (requiring the law not to abridge the fundamental right to pretrial liberty unequally on the basis of wealth, *see Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956)). There is no timely process afforded to set the bond respecting the individual wealth circumstances of the defendant.

Accordingly, the district court below properly concluded that, under the Fourteenth Amendment, "[t]he bail policy under which Plaintiff was arrested

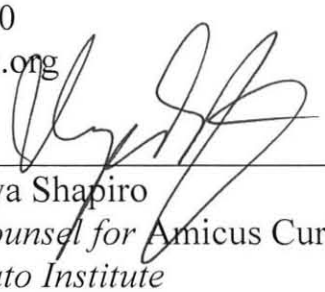
clearly is unconstitutional" and issued a preliminary injunction. *Walker v. City of Calhoun*, No. 4:15-CV-0170-HLM, 2016 U.S. Dist. Lexis 12305, *36 (N.D. Ga. Jan. 28, 2016). That decision is supported by nearly a *millennium* of Anglo-American common law on bail. *See supra* Parts I, II. While this Court has not been presented with a case where indigency is the cause of the failure of a defendant to procure bond sureties, *United States v. Wong-Alvarez*, 779 F.2d 583, 585 (11th Cir. 1985), Walker's case is exactly that. This Court should not deviate from a *long* common law tradition and should uphold the good judgment of the court below.

CONCLUSION

For the foregoing reasons, *amicus* Cato Institute urges the court to uphold the preliminary injunction and establish clearly that bail schemes may not discriminate against the indigent by pre-determining the sum of a bond.

Respectfully submitted this 12th day of August, 2016,

Ilya Shapiro
Counsel of Record
Randal J. Meyer (admission pending)
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org



Ilya Shapiro
Counsel for Amicus Curiae
Cato Institute

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,719 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, 14 point font.

Ilya Shapiro
Counsel for Amicus Curiae
Cato Institute

Dated: August 12, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on August 12, 2016, I filed the foregoing brief with this Court, by causing a copy to be electronically uploaded and by causing the original and six paper copies to be delivered by FedEx next business day delivery. I further certify that I caused this brief to be served on all participants through the CM/ECF system.

Ilya Shapiro
Counsel for Amicus Curiae
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Brief for United States as Amicus Curiae Supporting Plaintiff-Appellee and Urging Affirmance on the Issue, *Walker v. City of Calhoun, Georgia*, No. 16-10521-HH

No. 16-10521-HH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MAURICE WALKER, on behalf of himself
and others similarly situated,

Plaintiff-Appellee

v.

CITY OF CALHOUN, GEORGIA,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE ON THE ISSUE ADDRESSED HEREIN

JOHN A. HORN
United States Attorney
Northern District of Georgia

LISA FOSTER
Director, Office for Access to Justice

VANITA GUPTA
Principal Deputy Assistant
Attorney General

TOVAH R. CALDERON
CHRISTINE H. KU
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 353-9044

Case No. 16-10521-HH

Maurice Walker v. *City of Calhoun, Georgia*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, *Amicus Curiae* United States certifies that, in addition to the persons and entities identified in the briefs of defendant-appellant, plaintiff-appellee, and all of the *amici curiae*, the following persons may have an interest in the outcome of this case:

1. Calderon, Tovah R., United States Department of Justice, Civil Rights Division, counsel for *amicus curiae* United States;

2. Foster, Lisa, United States Department of Justice, Office for Access to Justice, counsel for *amicus curiae* United States;

3. Gupta, Vanita, United States Department of Justice, Civil Rights Division, counsel for *amicus curiae* United States;

4. Horn, John A., United States Attorney, Northern District of Georgia, counsel for *amicus curiae* United States;

5. Ku, Christine H., United States Department of Justice, Civil Rights Division, counsel for *amicus curiae* United States.

s/ Christine H. Ku
CHRISTINE H. KU
Attorney

Date: August 18, 2016

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued):

TABLE OF CITATIONS

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

LEGISLATIVE HISTORY:

MISCELLANEOUS:

MISCELLANEOUS (continued): **PAGE**

MISCELLANEOUS (continued): **PAGE**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-10521-HH

MAURICE WALKER, on behalf of himself
and others similarly situated,

Plaintiff-Appellee

v.

CITY OF CALHOUN, GEORGIA,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*
SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE
ON THE ISSUE ADDRESSED HEREIN

INTEREST OF THE UNITED STATES

The United States has a strong interest in ensuring that criminal justice systems, including bail practices within those systems, are fair and nondiscriminatory. In March 2010, the Department of Justice (Department or DOJ) established the Office for Access to Justice, whose mission is to help criminal and civil justice systems efficiently deliver fair and accessible outcomes, irrespective of wealth and status. The Department also has authority to investigate

unlawful criminal justice practices, including the problematic use of fines and fees and bond procedures. See, *e.g.*, Consent Decree at 1-2, 83, 86-87 (Doc. 41), *United States* v. *City of Ferguson*, No. 4:16-cv-180 (E.D. Mo. Apr. 19, 2016) (consent decree effectuated pursuant to the Department's authority under 42 U.S.C. 14141). By encouraging practices that avoid unnecessary and excessive incarceration, the Department strives to reduce the risk of unconstitutional conditions of confinement, which the Attorney General is authorized to address under the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997 *et seq.*

In the context of bail, the Department has promoted practices that do not discriminate against the poor. From the National Symposium on Pretrial Justice, which the Department's Office of Justice Programs helped convene in 2011, to the White House and DOJ Convening on the Cycle of Incarceration: Prison, Debt and Bail Practices in 2015, the Department has sought to call attention to the problem of discriminatory bail practices in state and local courts. At the White House convening, Attorney General Lynch discussed discriminatory bail practices, reiterating the Department's commitment "[t]o ensur[e] that in the United States

there is indeed no price tag on justice."[1] In addition, the Department's Bureau of Justice Assistance funds the National Task Force on Fines, Fees and Bail Practices, a joint project of the Conference of Chief Justices and the Conference of State Court Administrators, along with a $2.5 million grant program entitled *The Price of Justice: Rethinking the Consequences of Justice Fines and Fees*.[2] Both are intended to encourage state and local court reforms aimed at ending practices, including bail practices, that unfairly discriminate against the poor. These recent initiatives build upon DOJ's efforts since the 1960s to help reform bail practices. See pp. 5-6, *infra*.

In February 2015, the Department filed a statement of interest (SOI) arguing that bail practices that incarcerate indigent individuals before trial solely because of their inability to pay for their release violates the Fourteenth Amendment. See U.S. SOI, *Varden* v. *City of Clanton*, No. 2:15-cv-34, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015). And in March 2016, the Department issued a Dear Colleague

---

[1] *Attorney General Loretta E. Lynch Delivers Remarks at White House Convening on Incarceration and Poverty* (Dec. 3, 2015), available at https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-white-house-convening-incarceration-and.

[2] See *Justice Department Announces Resources to Assist State and Local Reform of Fine and Fee Practices* (Mar. 14, 2016), available at https://www.justice.gov/opa/pr/justice-department-announces-resources-assist-state-and-local-reform-fine-and-fee-practices.

Letter advising state and local courts that due process and equal protection principles require that, among other things, they "must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release."[3]

STATEMENT OF THE ISSUE

The United States will address the following question only:

Whether a bail practice that results in the incarceration of indigent individuals without meaningful consideration of their ability to pay and alternative methods of assuring their appearance at trial violates the Fourteenth Amendment.[4]

STATEMENT OF THE CASE

1. Overview Of Bail In The United States

"In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States* v. *Salerno*, 481 U.S. 739, 755 (1987). Courts have recognized that it is within this limited exception that conditions can be imposed, or in rare circumstances, release can be denied, to

[3] Letter from Vanita Gupta, Principal Deputy Assistant Attorney General, Civil Rights Div., Dep't of Justice, and Lisa Foster, Director, Office for Access to Justice, to Colleagues 2 (Mar. 14, 2016), available at https://www.justice.gov/crt/file/832461/download.

[4] The United States takes no position on the facts of this case or on any other issue raised in appellant's brief.

achieve legitimate goals like preventing the flight of defendants before trial or protecting the public from future danger. See *id.* at 754-755. Future appearance in court and public safety often can be assured through the imposition of nonmonetary conditions, such as supervised release or reasonable restrictions on activities and movements. See ABA Standards for Criminal Justice: Pretrial Release 10-1.4, 10-5.2 (3d ed. 2007).[5] Financial conditions (often referred to simply as "bail"), however, "should be used only when no other conditions will ensure appearance." *Id.* 10-1.4(c). This is because "[a] primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants." *Salerno*, 481 U.S. at 753; see also *Pugh* v. *Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc) (recognizing bail's limited function "of assuring the presence of [the] defendant").

Until the reform of the federal bail system in the 1960s, however, pretrial detention was effectively the norm rather than the exception for indigent federal defendants. Federal courts routinely set monetary bail conditions without regard for indigence, and "often the sole consideration in fixing bail [was] the nature of

[5] Available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html#10-1.1.

the crime."[6] In 1962, Attorney General Robert F. Kennedy called national attention to the "problem of bail," pointing out that pretrial detention "is directly influenced by how wealthy [a defendant] is."[7] In testifying to Congress about the problems associated with bail systems that fail to account for indigence, Attorney General Kennedy told the story of an individual who spent 54 days in jail because he could not afford the $300 bail amount for a traffic offense for which the maximum penalty was only five days in jail. See *Testimony by RFK* 3. Under Attorney General Kennedy's leadership, the Department pressed for expansive reforms that culminated in the Attorney General's National Conference on Bail and Criminal Justice in 1964 and the Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214.

The Bail Reform Act abolished the use of bail conditions that discriminate against indigent arrestees in the federal system. The Act's purpose was to revise federal bail practices "to assure that all persons, regardless of their financial status,

---

[6] *Testimony by Attorney General Robert F. Kennedy on Bail Legislation Before the Subcomms. on Constitutional Rights and Improvements in Judicial Machinery of the S. Judiciary Comm.* 2 (Aug. 4, 1964) (*Testimony by RFK*), available at http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf.

[7] Department of Justice, *Address by Attorney General Robert F. Kennedy, American Bar Association House of Delegates* (Aug. 6, 1962), available at https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-06-1962%20Pro.pdf.

shall not needlessly be detained pending their appearance * * * when detention serves neither the ends of justice nor the public interest." Bail Reform Act of 1966 § 2; see also *Allen* v. *United States*, 386 F.2d 634, 637 (D.C. Cir. 1967) (Bazelon, J., dissenting) ("It plainly appears from the language and history of the Bail Reform Act that its central purpose was to prevent pretrial detention because of indigency."). In 1984, the Act was amended to make clear that a "judicial officer may not impose a financial condition that results in the pretrial detention of the person." 18 U.S.C. 3142(c)(2); see H.R. Rep. No. 98-1121, 98th Cong., 2d Sess. 12 (1984). This express mandate helps ensure that federal courts base pretrial detention decisions on an individualized assessment of dangerousness and risk of flight and that indigent defendants are not detained without meaningful consideration of an individual's ability to pay and alternative methods of achieving the government's interests. See also 18 U.S.C. 3142(g) (listing factors that judicial officers should consider to "reasonably assure" the appearance of an individual in court and the safety of others).

Many other jurisdictions, however, still maintain bail systems that incarcerate people without regard for indigency.[8] But as noted above, the

[8] Indeed, the use of monetary bail has increased substantially since 1990. See Ram Subramaniam, *et al.*, Vera Institute of Justice, *Incarceration's Front Door: The Misuse of Jails in America* 29 (updated July 29, 2015), available at (continued…)

Department is working with state and local courts to reform their systems and promote constitutional bail practices. In *Varden*, after the Department filed its SOI, the parties reached a settlement agreeing to a bail policy that allows for release on an unsecured bond as the norm rather than the exception. See *Varden* v. *City of Clanton*, No. 2:15-cv-34, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015); see also Consent Decree, *City of Ferguson*, *supra*. Lawsuits challenging bail practices in other local jurisdictions have also been resolved by agreement or court order. See, *e.g.*, *Pierce* v. *City of Velda City*, No. 4:15-cv-570, 2015 WL 10013006 (E.D. Mo. June 3, 2015) (adopting a settlement agreeing to a new bail policy and declaring that, under the Equal Protection Clause, no defendant can be held in custody based solely on inability to post a monetary bond); *Snow* v. *Lambert*, No. 3:15-cv-567 (M.D. La. Sept. 3, 2015) (accepting a settlement prohibiting use of a secured monetary bond to hold misdemeanor arrestees in jail who cannot afford the bond).

2. Relevant Facts And Procedural History

a. Plaintiff Maurice Walker is a 54-year old man who was arrested by the Calhoun Police Department for being a pedestrian under the influence and was

---

(…continued)
http://archive.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report_02.pdf.

kept in jail for six nights without making bail. Doc. 29-2, at 1.[9] He filed this class action alleging that the City of Calhoun, Georgia, employs an unconstitutional bail practice that imprisons indigent defendants because of their inability to pay fixed bail amounts for misdemeanors, traffic offenses, and ordinance violations. Doc. 1, at 5-7, 13.

According to the complaint, Walker has a serious mental health disability and limited income with no assets. He lives with his sister, who manages his only income of $530 per month of Social Security disability benefits. Doc. 1, at 3. When Walker was arrested on September 3, 2015, he was informed that he would not be released unless he paid the $160 fixed cash bond amount set by the City for the misdemeanor of being a pedestrian under the influence. Georgia law provides that "at no time * * * shall any person charged with a misdemeanor be refused bail." Ga. Code Ann. § 17-6-1(b)(1) (West 2014). But Walker alleged that, contrary to state law, the City's policy and practice was to immediately release individuals arrested for minor traffic or misdemeanor offenses if they can pay preset bond amounts (which vary by offense), but to hold those who cannot afford the bond in jail until their first court appearance. See Doc. 1, at 2; Doc. 29-5, at 9-10, 12, 15 (Calhoun's Bail Schedule). By contrast, Walker contended that many

[9] Citations to "Doc. __, at __" are to documents on the district court docket sheet and relevant page numbers.

other cities provide for release of misdemeanor arrestees on recognizance or unsecured bonds. These forms of security involve promises to appear with penalties for failing to appear in court, such as an added criminal charge or a monetary fine. Doc. 1, at 5-6.

Walker alleged that because he is indigent, and because he could not afford the fixed bail amount, he was kept in jail for several nights to await his court appearance. Doc. 1, at 4-5. When this lawsuit was filed, the City held court only on non-holiday Mondays, and because Walker was arrested on the Thursday before Labor Day, he remained in jail for six days until his counsel could secure his release on his own recognizance. Doc. 29, at 2. During his pretrial detention, Walker claimed that he was unable to take his daily medication, and that he was allowed out of his cell for only one hour each day. Doc. 1, at 5. Walker also alleged that "[e]ach Monday [when court is held], there are commonly about four to six indigent defendants who were not able to pay * * * to secure their release." Doc. 1, at 7.

On behalf of himself and those similarly situated, Walker sued the City under 42 U.S.C. 1983, alleging that its bail practice violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. He sought damages on behalf of himself and declaratory and injunctive relief on behalf of the class. Doc. 1, at 3, 13-14.

b. On January 28, 2016, the district court granted Walker's motion for a preliminary injunction. The court ordered the City to implement constitutional post-arrest procedures and, in the interim, to release any misdemeanor arrestees on their own recognizance or on an unsecured bond. Doc. 40, at 72. The court held, among other things, that there was a substantial likelihood that Walker would succeed on the merits of his claim, because "[a]ny bail or bond scheme that mandates payment of pre-fixed amounts for different offenses to obtain pretrial release, without any consideration of indigence or other factors, violates the Equal Protection Clause." Doc. 40, at 49. In reaching this conclusion, the district court reviewed Supreme Court and circuit precedent recognizing that equal protection and due process principles prohibit punishing people for their poverty. The court then determined that this rule was "especially true" for pretrial detainees who had yet to be found guilty of a crime. Doc. 40, at 49-52; see also Doc. 40, at 52-56 (observing that other courts have reached similar conclusions).[10]

[10] The district court also determined that the City's new Standing Bail Order, which was adopted after the lawsuit was filed, neither mooted Walker's claims nor remedied the constitutional deficiencies in the prior bail policy. Doc. 40, at 56, 59-62. Again, the United States takes no position on these or any other issues in this case that is not addressed herein.

SUMMARY OF THE ARGUMENT

If this Court reaches the issue, it should affirm the district court's holding that a bail scheme that mandates payment of fixed amounts to obtain pretrial release, without meaningful consideration of an individual's indigence and alternatives that would serve the City's interests, violates the Fourteenth Amendment.

In a long line of cases beginning with *Griffin* v. *Illinois*, 351 U.S. 12 (1956), the Supreme Court has held that denying equal access to justice—including and especially through incarceration—without consideration of ability to pay and possible alternatives to achieve a legitimate governmental interest, violates the Fourteenth Amendment. In these cases, the Court has recognized that the proper analysis reflects both equal protection and due process principles, and has rejected use of the traditional equal protection inquiry. The appropriate inquiry focuses instead on "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose." *Bearden* v. *Georgia*, 461 U.S. 660, 666-667 (1983) (citation omitted; brackets in original).

As the district court recognized, the Supreme Court's holdings and analysis apply with special force in the bail context, where deprivations of liberty are at issue and defendants are presumed innocent. Under *Bearden* and other cases in

Griffin's progeny, a bail scheme that imposes financial conditions, without individualized consideration of ability to pay and whether such conditions are necessary to assure appearance at trial, violates the Fourteenth Amendment. Thus, as the former Fifth Circuit acknowledged, while the use of fixed bail schedules may provide a convenient way to administer pretrial release, incarcerating those who cannot afford to pay the bail amounts, without meaningful consideration of alternatives, infringes on equal protection and due process requirements. See *Pugh* v. *Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc).

In addition to violating the Fourteenth Amendment, such bail systems result in the unnecessary incarceration of people and impede the fair administration of justice for indigent arrestees. Thus, they are not only unconstitutional, but they also constitute bad public policy.

ARGUMENT

A BAIL PRACTICE VIOLATES THE FOURTEENTH AMENDMENT IF, WITHOUT CONSIDERATION OF ABILITY TO PAY AND ALTERNATIVE METHODS OF ASSURING APPEARANCE AT TRIAL, IT RESULTS IN THE PRETRIAL DETENTION OF INDIGENT DEFENDANTS

A. The Fourteenth Amendment Prohibits Incarcerating Individuals Without Meaningful Consideration Of Indigence And Alternative Methods Of Achieving A Legitimate Government Interest

The Supreme Court has long held that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin* v.

Illinois, 351 U.S. 12, 19 (1956) (plurality opinion); accord *Smith* v. *Bennett*, 365 U.S. 708, 710 (1961). As explained more fully below, in a long line of cases beginning with *Griffin*, the Court has repeatedly reaffirmed that denying access to equal justice, without meaningful consideration of indigence and alternative methods of achieving a legitimate government interest, violates the Fourteenth Amendment. Although a jurisdiction has discretion to determine which rights and penalties beyond what the Constitution minimally requires are appropriate to achieve its legitimate interests, the Fourteenth Amendment prohibits a jurisdiction from categorically imposing different criminal consequences—including and especially incarceration—on poor people without accounting for their indigence.

In *Griffin*, the Court first considered whether a State "may, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, * * * deny adequate appellate review [of a criminal conviction] to the poor while granting such review to all others." 351 U.S. at 13. The Court held that once a State decides to grant appellate rights, it may not "do so in a way that discriminates against some convicted defendants on account of their poverty." *Id*. at 18. The Court therefore found it unconstitutional to deny indigent criminal defendants appellate review by effectively requiring them to furnish appellate courts with a trial transcript, which cost money, before they could appeal their convictions. See *id*. at 18-19. In holding that "[d]estitute defendants must be afforded as adequate

appellate review as defendants who have money enough to buy transcripts," *id*. at 19, the Court declined to hold that the State "must purchase a stenographer's transcript in every case where a defendant cannot buy it," *id*. at 20. Instead, it held that the State "may find other means of affording adequate and effective appellate review to indigent defendants." *Ibid*.

In a line of cases building on *Griffin*, the Supreme Court has held that incarcerating individuals solely because of their inability to pay a fine or fee, without regard for indigence and a meaningful consideration of alternative methods of achieving the government's interests, effectively denies equal protection to one class of people within the criminal justice system while also offending due process principles. In *Williams* v. *Illinois*, 399 U.S. 235, 244 (1970), for example, the Court struck down a practice of incarcerating an indigent individual beyond the statutory maximum term because he could not pay the fine and court costs to which he had been sentenced. The Court held that "once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency." *Id.* at 241-242. The Court made clear, however, that "[t]he State is not powerless to enforce judgments against those financially unable to pay a fine." *Id*. at 244. On the contrary, nothing in the

Court's holding "limits the power of the sentencing judge to impose alternative sanctions" under state law." *Id*. at 245.

Similarly, in *Tate* v. *Short*, 401 U.S. 395, 398 (1971), the Court held that incarcerating an indigent individual convicted of fines-only offenses to "satisfy" his outstanding fines constituted unconstitutional discrimination because it "subjected [him] to imprisonment solely because of his indigency." *Id.* at 397-398. The Court explained that the scheme in *Tate* suffered from the same constitutional defect as that in *Williams*, and again emphasized that there "other alternatives to which the State may constitutionally resort to serve its concededly valid interest in enforcing payment of fines." *Id*. at 399.[11]

And in *Bearden* v. *Georgia*, 461 U.S. 660 (1983), the Court held that the Fourteenth Amendment prohibits a State from revoking an indigent defendant's probation for failure to pay a fine and restitution "without determining that [the defendant] had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist." *Id.* at 661-662. Such treatment of indigent defendants would amount to "little more than punishing a person for his poverty." *Id.* at 662.

[11] See also *Barnett* v. *Hopper*, 548 F.2d 550, 554 (5th Cir. 1977) (relying on *Williams* and *Tate* to hold that "[t]o imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection of the laws"), vacated as moot, 439 U.S. 1041 (1978).

The *Bearden* Court further explained that, because "[d]ue process and equal protection principles converge in the Court's analysis in these cases," 461 U.S. at 665, the traditional equal protection framework that usually requires analysis under a particular level of scrutiny does not apply. Because "indigency in this context is a relative term rather than a classification, fitting the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished." *Id.* at 666 n.8 (internal quotation marks omitted). "Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis." *Id.* at 666. Instead, the relevant analysis "requires a careful inquiry into such factors as the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose." *Id*. at 666-667 (citation and internal quotation marks omitted; brackets in original).

Although *Bearden* and other cases in *Griffin*'s progeny have arisen in the sentencing and post-conviction contexts, their holdings apply with equal, if not greater, force in the bail context. Indeed, defendants who have not been found guilty have an especially "strong interest in liberty." *United States* v. *Salerno*, 481 U.S. 739, 750, 755 (1987). Because of that liberty interest, pretrial release should be the norm, and pretrial detention "the carefully limited exception." *Ibid*. To be

sure, in certain circumstances, such as when a court finds that a defendant poses a threat to others or presents a flight risk, this fundamentally important right may be circumscribed on a case-by-case basis. See, *e.g.*, *id.* at 750-751, 754-755. If a court finds that no other conditions may reasonably assure an individual's appearance at trial, financial conditions may be constitutionally imposed—but "bail must be set by a court at a sum designed to ensure that goal, and *no more*." *Id*. at 754 (emphasis added). Although the imposition of bail in such circumstances may result in a person's incarceration, the deprivation of liberty in such circumstances is not based *solely* on inability to pay.

But fixed bail schedules that allow for the pretrial release of only those who can pay, without accounting for ability to pay and alternative methods of assuring future appearance, do not provide for such individualized determinations, and therefore unlawfully discriminate based on indigence. Under such bail schemes, arrestees who can afford to pay the fixed bail amount are promptly released whenever they are able to access sufficient funds for payment, even if they are likely to miss their assigned court date or pose a danger to others. Conversely, the use of such schedules effectively denies pretrial release to those who cannot afford to pay the fixed bail amount, even if they pose no flight risk, and even if alternative methods of assuring appearance (such as an unsecured bond or supervised release) could be imposed. Such individuals are unnecessarily kept in jail until their court

appearance often for even minor offenses, such as a traffic or ordinance violation, including violations that are not punishable by incarceration.

As the former Fifth Circuit recognized in an en banc decision, while "[u]tilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting its requirements," the "incarceration of those who cannot, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." *Pugh* v. *Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc).[12] Although the court in *Pugh* found moot plaintiffs' claim challenging the use of monetary bail to incarcerate defendants pretrial without meaningful consideration of alternatives, it acknowledged "that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Id.* at 1056 (citing *Williams*, *supra*; *Tate*, *supra*); see also *Varden*, *supra*, at *2 (concluding that "[t]he Fourteenth Amendment prohibits punishing a person for his poverty, and this includes deprivations of liberty based on the inability to pay fixed-sum bail amounts"—a principle that "applies with special force" to pretrial defendants (internal citation and quotation marks omitted)). In fact, where fixed bail

[12] Decisions of the former Fifth Circuit rendered before October 1, 1981, serve as binding precedent of the Eleventh Circuit. See *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

schedules are used without meaningful consideration of alternatives that account for inability to pay, indigent arrestees seeking bail are faced with precisely the same type of "illusory choice" that the Supreme Court has recognized "works an invidious discrimination." *Williams*, 399 U.S. at 242.

Although fixed bail schedules appear to be neutral on their face, the Supreme Court has explained that policies that impose sanctions on only indigent individuals are not neutral in their operation. Thus, contrary to the City's argument (Appellant's Br. 45-46), its policies do not fall outside the Fourteenth Amendment's prohibition of disparate treatment. The City relies on *Washington* v. *Davis*, 426 U.S. 229, 244-245 (1976), which held that, absent evidence of a discriminatory purpose, a facially neutral law with a racially discriminatory effect does not violate equal protection. But the Supreme Court has rejected this argument with respect to policies that implicate due process concerns and discriminate against the indigent in the sanctions imposed, explaining that, because such policies "expose[] *only indigents*" to an additional sanction, they are "not merely *disproportionate* in impact. Rather, they are wholly contingent on one's ability to pay, and thus 'visi[t] different consequences on two categories of persons[]'; they apply to all indigents and do not reach anyone outside that class." *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 127 (1996) (internal citation omitted; second brackets in original); see also *Bearden*, 461 U.S. at 664 (applying "*Griffin*'s

principle of 'equal justice'" post-*Washington* v. *Davis* to prohibit revocations of probation without inquiring into ability to pay and consideration of alternatives); *Williams*, 399 U.S. at 242 ("Here the Illinois statutes as applied to Williams works an invidious discrimination solely because he is unable to pay the fine.").

In sum, under *Bearden* and other cases in *Griffin*'s progeny, a jurisdiction may not use a bail system that incarcerates indigent individuals without meaningful consideration of their indigence and alternative methods of assuring their appearance at trial.

B. Bail Systems That Keep Indigent Defendants In Jail Solely Because They Cannot Pay Bail Result In Unnecessary Pretrial Detention And Impede The Fair Administration Of Justice

Bail practices that do not account for indigence result in the unnecessary incarceration of numerous individuals who are presumed innocent. Of the more than 730,000 individuals incarcerated in local jails nationwide in 2011, for example, about 60% were pretrial detainees (a rate unchanged since 2005), and most of them were accused of nonviolent offenses.[13] Unnecessary pretrial detention significantly burdens the limited resources of taxpayers and state and

[13] See Richard Williams, *Bail or Jail*, State Legislatures (May 2012), available at http://www.ncsl.org/research/civil-and-criminal-justice/bail-or-jail.aspx; see also Todd D. Minton & Zhen Zeng, United States Department of Justice, Bureau of Justice Statistics, *Jail Inmates at Midyear 2014*, NCJ 248629, at 1, 3 (2015), available at http://www.bjs.gov/content/pub/pdf/jim14.pdf.

local governments. It also creates additional problems as jails become overcrowded.

The repercussions of unnecessary pretrial detention that disproportionately affect indigent individuals can reverberate in other parts of the criminal justice process and impede the fair administration of justice. The "traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction." *Pugh*, 572 F.2d at 1056-1057 (en banc) (citing *Hudson* v. *Parker*, 156 U.S. 277, 285 (1895)). But incarceration could hinder a defendant's "ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker* v. *Wingo*, 407 U.S. 514, 533 (1972). Excessive pretrial detention could also induce the innocent to plead guilty for a speedier release or result in a detention period that exceeds the expected sentence.[14] And because "[m]ost jails offer little or no recreational or rehabilitative programs," pretrial detention is not likely to reduce recidivism. *Ibid.*

[14] See, *e.g.*, Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 Am. Crim. L. Rev. 1123, 1154 (2005); Mary T. Phillips, New York City Criminal Justice Agency, Inc., *Bail, Detention, and Felony Case Outcomes, Research Brief No. 18*, at 7 (2008), available at http://www.nycja.org/lwdcms/doc-view.php?module=reports&module_id=597&doc_name=doc; Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2492 (2004).

Pretrial incarceration also "often means loss of a job; it disrupts family life; and it enforces idleness." *Barker*, 407 U.S. at 532; see also ABA Standards for Criminal Justice: Pretrial Release 10-1.1 ("Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support.").[15] This impact may be exacerbated for indigent individuals who, as a consequence of their poverty, are already in vulnerable situations.[16]

In short, bail practices that fail to account for indigence are not only unconstitutional, but also conflict with sound public policy considerations.

---

[15] Available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html#10-1.1.

[16] See Open Society Justice Initiative, *The Socioeconomic Impact of Pretrial Detention* 27-32 (2001) (examining the costs to pretrial detainees and their families as measured by income, employment, education, incarceration-related expenses, and long-term effects), available at http://www.pretrial.org/download/research/OSI%20Socioeconomic%20Impact%20Pretrial%20Detention%202011.pdf.

CONCLUSION

If this Court reaches the issue presented herein, the Court should affirm the district court's holding that a bail scheme violates the Fourteenth Amendment if, without a court's meaningful consideration of ability to pay and alternative methods of assuring appearance at trial, it results in the detention of indigent defendants pretrial.

Respectfully submitted,

JOHN A. HORN
United States Attorney
Northern District of Georgia

LISA FOSTER
Director, Office for Access to Justice

VANITA GUPTA
Principal Deputy Assistant
Attorney General

s/ Christine H. Ku
TOVAH R. CALDERON
CHRISTINE H. KU
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 353-9044

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29 and 32(a)(7), because:

This brief contains 4491 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because:

This brief has been prepared in a proportionally spaced typeface using Word 2010 in 14-point Times New Roman font.

s/ Christine H. Ku
CHRISTINE H. KU
Attorney

Date: August 18, 2016

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2016, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE ON THE ISSUE ADDRESSED HEREIN with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I certify that all participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that on August 18, 2016, I will cause seven paper copies of this brief to be sent to the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by certified U.S. mail, postage prepaid and will cause one paper copy of the same to be mailed to the following counsel by certified U.S. mail, postage prepaid:

Bradley Williams Cornett
Ford Howard & Cornett, PC
140 S 9th ST
Gadsden, AL 35902

Lorelei Lein
Alabama League of Municipalities
535 Adams Ave
Montgomery, AL 36104-4333

s/ Christine H. Ku
CHRISTINE H. KU
Attorney

Judicial Council of California, Letter to Assembly Member Hon. Reginald B. Jones-Sawyer, Sr. (June 30, 2017)

JUDICIAL COUNCIL OF CALIFORNIA

770 L Street, Suite 1240 • Sacramento, California 95814-3368
Telephone 916-323-3121 • Fax 916-323-4347 • TDD 415-865-4272

TANI G. CANTIL-SAKAUYE
Chief Justice of California
Chair of the Judicial Council

MARTIN HOSHINO
Administrative Director

CORY T. JASPERSON
Director, Governmental Affairs

June 30, 2017

Hon. Reginald B. Jones-Sawyer, Sr., Chair
Assembly Public Safety Committee
State Capitol, Room 2117
Sacramento, California 95814

Subject: Senate Bill 10 (Hertzberg), as amended March 27, 2017 – Letter of Concern
Hearing: Assembly Public Safety Committee – July 11, 2017

Dear Assembly Member Jones-Sawyer:

The Judicial Council has a number of significant concerns about SB 10, as amended March 27, 2017. SB 10 would enact major bail/pretrial release reform. While there are some areas of conceptual agreement the Judicial Council continues to have substantial concerns about many elements of the bill including the impact on judicial discretion and independence; the creation of unrealistic or unspecified timelines; the imposition of unrealistic responsibilities and expectations on the pretrial services agencies that courts would rely on for information in making decisions, and the creation of an overly burdensome and complicated system. While expressing these concerns about SB 10, the Judicial Council acknowledges that SB 10 is a work in progress. We have been in communication with the author's office and the sponsors and we understand that the author is considering amendments.

Areas of Conceptual Agreement

While the Judicial Council has a substantial number of very significant concerns about SB 10 in its current form, in concept, the council agrees with the following:

- Providing for pretrial release, with or without conditions as appropriate, for all eligible defendants, and providing for preventive detention for defendants who pose a high risk to public safety or of fleeing the jurisdiction.

- Exploring the implications of moving from a pretrial release and detention system that is implemented primarily through the setting of money bail to a system that focuses on evidence-based risk assessment that considers the risk to public safety and victims with the risk of fleeing the jurisdiction and failure to appear, and is implemented through setting conditions of release, and preventive detention for cases in which no combination of conditions of release will be sufficient to address the risk.

- Providing pretrial services in a manner that: 1) closely coordinates with the courts; 2) delivers risk assessment information, criminal history, and other data relevant to judges' determinations of conditions of release for defendants; 3) includes monitoring and supervision of defendants released pretrial, where appropriate; and 4) is funded at a level to adequately and properly address the costs of such services.

- Use of a validated risk assessment instrument that does not give undue weight to factors that correlate with race, ethnicity, and class to obtain a risk level or score.

- Respect for the constitutional principle of judicial discretion and responsibility for pretrial release and detention decisions, and with aiding judges in their decision-making responsibility by providing risk assessment and other relevant information gathered by pretrial services.

- Improving upon the current system of pretrial detention/release to enable judges to make appropriate decisions as quickly as possible when there is adequate information on which to base such a decision, and so long as there are new and sufficient resources for the system.

Areas of Concern
Judicial discretion and independence
The Judicial Council is concerned that SB 10 would infringe on judicial discretion and independence for the following reasons:

- *Balance of system interests*: The council is concerned that SB 10 does not establish a reasonable or realistic balance between the interest in releasing all defendants who can be safely released pretrial, and a concern for public safety (including safety of victims) and the administration of justice (fleeing jurisdiction/failure to appear). Judges have

constitutional and statutory responsibility for implementing the law in ways that ensure appropriate consideration for protecting the rights of the accused, protecting the public and victim(s), and providing for the fair and efficient administration of justice. In that regard, the council is concerned that SB 10 would require the pre-arraignment release *by the pretrial services agency* of any person charged with a misdemeanor (unless the defendant is already on pretrial release), without providing an opportunity for a judge to determine whether the defendant (who may be charged with a serious misdemeanor, including domestic violence) is a risk to public safety or the safety of the victim(s), or is likely to flee. SB 10 also does not account for those defendants who fail to appear and are cited and released rather than booked.

- *Matters appropriate for Rules of Court*: The bill has a number of detailed requirements for judicial decision-making that are more appropriately addressed in Rules of Court rather than statutes, so they can be more easily revised and updated. For example, the council believes that it is more appropriate for Rules of Court to address certain factors courts must consider in making their determination, such as what the court must consider in making a release decision, what constitutes "substantial hardship" in determining ability to pay, and factors for determining whether the defendant's release would result in great bodily harm to others.

- *Information provided to the court*: The bill appears to significantly limit information provided to the judge at pre-arraignment as a basis for the release determination. As currently drafted the bill would only require information about the current offense, the law enforcement list of charges, and a risk assessment result. The bill, however, does not allow other important information to be provided to the judge such as criminal history, probable cause documentation or other background related to the risk assessment.

- *Balance between judicial authority and pretrial services authority*: Substantial burdens are imposed on judges to justify any departure from recommendations of the pretrial services agency, including requiring courts, if the release decision is inconsistent with the recommendations of the pretrial services agency, to include a statement of reasons. The bill also requires the court to annually report the rate of judicial concurrence with recommended conditions of release without requiring the provision of additional data regarding the decisions made, the conditions actually imposed initially and through the course of the case, etc. Reporting solely the rate of concurrence implies that judges are discouraged from exercising any discretion that departs from the pretrial services recommendations.

- *Judicial determination of risk*: SB 10 would allow the court to impose preventive detention only for those defendants who are charged with a violent or serious crime. The

council is concerned that this makes the bill ineffective and unfair because the determination is charge-based rather than risk-based and appears to not allow the judge to take criminal history or other factors into account. Further, the council believes that courts should have the option of imposing preventive detention for those defendants who, whatever their current charge, score in the highest risk levels and for whom no condition or combination of conditions can provide for safe pretrial release.

- *Release on bail*: The bill provides for release on bail in a manner that places judges in the untenable position of being required to release on bail defendants who are at high risk of failure to appear (FTA) or of danger to public safety. This structure undermines the legislation's goal of judicious use of preventive detention to protect public safety while releasing defendants who are appropriate for pretrial release. For example, the proposed bill would prohibit release on bail *except* when no condition or combination of conditions can assure safe pretrial release. It requires the court to set monetary bail at the least restrictive level necessary and to consider ability to pay without substantial hardship. This arrangement affords "high risk" defendants the opportunity to be released on bail *despite* their risk level, unless they have been charged with a violent or serious offense. Further, the bill appears to limit the court's ability to consider the appropriateness of preventive detention in cases where the defendant has a history of violent offenses but has a current offense for which preventive detention is not statutorily permitted.

- *Violations of release*: The proposed approach for addressing violations of pretrial release is unrealistic and impinges on judicial discretion because the sole option for addressing violations of pretrial release is through contempt of court proceedings, which is not an adequate solution. Contempt is a complex and extended process for courts to impose and implicates Penal Code section 1382 rights. Penal Code section 1382 requires the court, unless good cause is shown to the contrary, to order an action dismissed in specified cases.

Timelines/Resources

The Judicial Council is concerned that the bill would impose unrealistic (and unspecified) timelines on courts. The bill would require informed decision-making on timelines that are unrealistic for courts and criminal justice partners. For example, the bill would: (a) require pretrial services agencies to gather and courts to process a significant amount of information regarding a defendant on very tight timelines; (b) require judges to issue findings of fact and a statement of the reasons for imposing each condition that are specific to the person in each case where conditions are imposed; and (c) require up to five pre-arraignment hearings on very tight timelines. Currently, many of the timelines in SB 10 are yet undefined, to be filled in through later amendments. The council is also concerned that the limitations on hearings are unclear, so it seems they could be as extensive (and time consuming) as a preliminary hearing with

presentation of witnesses, cross-examination, and submission of other evidence. Because the proposed system is so complex, it is unclear whether there is a need for these multiple hearings in order to accomplish the legislation's stated purposes.

Pretrial Services agencies: unrealistic responsibilities and expectations

The Judicial Council is concerned that the bill would impose unrealistic responsibilities and expectations on the pretrial services agencies that courts would rely on for information when making decisions, as follows:

- *Courts' interest in effective pretrial services agencies*: The proposed system requires pretrial services agencies to undertake a variety of tasks that are integral to efficient and effective decision-making by courts. Courts have a vested interest in the effectiveness of agencies with such significant responsibilities that are intertwined with those of the court. In many counties, such agencies either do not currently exist or are relatively small. For a pretrial release and detention system to function, courts must have confidence that pretrial services agencies—whether a separate agency or a unit of an existing agency—are right-sized and well-run so that courts can rely on the agencies' assessments, recommendations, and ability to monitor and supervise defendants granted pretrial release.

- *Risk assessment instrument*: Portions of the bill that define the use of a risk assessment tool by pretrial services raise questions regarding validity, reliability and access. More specifically, the bill would mandate certain criteria for the tool and prohibit other criteria. This approach would undermine the fundamental requirement that the factors in an evidence-based tool, and the algorithm used to weight the factors, have been validated to be predictive of risk for a particular population. Further, the council is concerned that *only* the PSA-Court instrument developed by the Laura & John Arnold Foundation currently appears to meet the requirements of SB 10.

Burdensome and complicated system

Finally, the Judicial Council is concerned that SB 10 would create a non-linear and highly complex system. More specifically, the council is concerned that the operational impact on courts would be profound and, without adequate funding, unachievable. The council is also concerned that SB 10 would attempt to graft at least four different release and detention elements onto the current statutory structure for the bail system: risk-based release; unsecured bonds; ability-to-pay determinations; and preventive detention. Further, in many counties, a significant portion of the pretrial population is ineligible for release due to probation or parole holds, immigration (ICE) holds, holds for multiple failures to appear, or other legal circumstances that prevent their release. The council believes that it would be inefficient to use resources to assess defendants, process paperwork, hold hearings, etc. for defendants who will not be eligible for

release due to circumstances that arise from legal issues unrelated to the current charge. Finally, the council believes that any significant revision to the current pretrial detention and release system should be phased-in with at least a two year "sunrise" so that courts and justice system partners are able to put the necessary structures, processes and training into place, and help to ensure that the revised system will be functional and a genuine improvement.

In closing, the Judicial Council has several substantial concerns about SB 10 in its current form and looks forward to working with the author's office and your committee to address these concerns.

Should you have any questions or require additional information, please contact Sharon Reilly at 916-323-3121.

Sincerely,

Sent by mail on June 30, 2017

Cory T. Jasperson
Director, Governmental Affairs

CTJ/SR/yc-s
cc: Members, Assembly Public Safety Committee
Hon. Bob Hertzberg, Member of the Senate
Hon. Travis Allen, Member of the Senate
Hon. Joel Anderson, Member of the Senate
Hon. Toni G. Atkins, Member of the Senate
Hon. Jim Beall, Member of the Senate
Hon. Steven Bradford, Member of the Senate
Hon. Ricardo Lara, Member of the Senate
Hon. Holly J. Mitchell, Member of the Senate
Hon. William W. Monning, Member of the Senate
Hon. Bob Wieckowski, Member of the Senate
Hon. Scott D. Wiener, Member of the Senate
Hon. Rob Bonta, Principal coauthor, Member of the Assembly
Ms. Mica Doctoroff, Legislative Advocate, American Civil Liberties Union of California
Ms. Sandy Uribe, Counsel, Assembly Public Safety Committee
Mr. Gary Olson, Consultant, Assembly Republican Office of Policy
Mr. Daniel Seeman, Deputy Legislative Affairs Secretary, Office of the Governor
Mr. Martin Hoshino, Administrative Director, Judicial Council of California

Fundamentals of Bail: A Resource Guide for Pretrial Petitioners and a Framework for American Pretrial Reform

by Timothy R. Schnacke, September 2014

Fundamentals of Bail

A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform

National Institute of Corrections

Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform

Timothy R. Schnacke

September 2014

NIC Accession Number: 028360

This document was prepared under technical assistance event number 13CS02GK04 from the National Institute of Corrections, U.S. Department of Justice. Points of view or opinions stated in this guide are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

Table of Contents

Preface

Achieving pretrial justice is like sharing a book – it helps when everyone is on the same page. So this document, "Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Justice," is primarily designed to help move America forward in its quest for pretrial reform by getting those involved in that quest on the same page. Since I began studying, researching, and writing about bail I (along with others, including, thankfully, the National Institute of Corrections) have seen the need for a document that figuratively steps back and takes a broader view of the issues facing America when it comes to pretrial release and detention. The underlying premise of this document is that until we, as a field, come to a common understanding and agreement about certain broad fundamentals of bail and how they are connected, we will see only sporadic rather than widespread improvement. In my opinion, people who endeavor to learn about bail will be most effective at whatever they hope to do if their bail education covers each of the fundamentals – the history, the law, the research, the national standards, and its terms and phrases.

Timothy R. Schnacke

Executive Director

Center for Legal and Evidence-Based Practices

Acknowledgments

Many different people contributed to this paper in different ways, and it is not possible to list and thank them all by name. Nevertheless, a few entities and people warrant special mention. The first is the National Institute of Corrections, and especially Lori Eville and Katie Green, for conceiving the idea for the paper and allowing me the time to flesh it out. The NIC has been in the forefront of pretrial justice for many years, and I am honored to be able to add to their long list of helpful pretrial literature.

Cherise Fanno Burdeen and the National Association of Pretrial Services Agencies, through the helpful assistance of John Clark and Ken Rose, provided invaluable input on the draft, and Spurgeon Kennedy saved the day with his usual excellent editorial assistance. Also, I am especially grateful to my friend Dan Cordova and his staff at the Colorado Supreme Court Law Library. Their extraordinary expertise and service has been critical to everything I have written for the past seven years. Special thanks, as well, go to my friend and mentor, Judge Truman Morrison, who continues daily to teach and inspire me on issues surrounding bail and pretrial justice.

I would also like to thank my dear friend and an extraordinary criminal justice professor, Eric Poole, who patiently listened and helped me to mold the more arcane concepts from the paper. Moreover, I am also indebted to my former boss, Tom Giacinti, whose foresight and depth of experience in criminal justice allowed him to forge a path in this generation of American bail reform.

Finally, I give my deepest thanks and appreciation to Claire Brooker (Jefferson County, Colorado) and Mike Jones (Pretrial Justice Institute), who not only inspired most of the paper, but also acted (as usual) as my informal yet indispensable editors. It is impossible to list all of their contributions to my work, but the biggest is probably that Claire and Mike have either conceived or molded – through their intellectual and yet practical lenses – virtually every thought I have ever had concerning bail. If America ever achieves true pretrial justice, it will be due to the hard work of people like Claire Brooker and Mike Jones.

Executive Summary

Pretrial justice in America requires a common understanding and agreement on all of the component parts of bail. Those parts include the need for pretrial justice, the history of bail, the fundamental legal principles underlying bail, the pretrial research, the national standards on pretrial release and detention, and how we define our basic terms and phrases.

Why Do We Need Pretrial Improvements?

If we can agree on why we need pretrial improvements in America, we are halfway toward implementing those improvements. As recently as 2007, one of the most frequently heard objections to bail reform was the ubiquitous utterance, "If it ain't broke, don't fix it." That has changed. While various documents over the last 90 years have consistently pointed toward the need to improve the administration of bail, literature from this current generation of pretrial reform gives us powerful new information from which we can articulate exactly why we need to make changes, which, in turn, frames our vision of pretrial justice designed to fix what is most certainly broken.

Knowing that our understanding of pretrial risk is flawed, we can begin to educate judges and others on how to embrace risk first and mitigate risk second so that our foundational American precept of equal justice remains strong. Knowing that the traditional money-based bail system leads both to unnecessary pretrial detention of lower risk persons and the unwise release of many higher risk persons, we can begin to craft processes that are designed to correct this illogical imbalance. Knowing and agreeing on each issue of pretrial justice, from infusing risk into police officer stops and first advisements to the need for risk-based bail statutes and constitutional right-to-bail language, allows us as a field to look at each state (or even at all states) with a discerning eye to begin crafting solutions to seemingly insoluble problems.

The History of Bail

Knowing the history of bail is critical to understanding why America has gone through two generations of bail reform in the 20th century and why it is currently in a third. History provides the contextual answers to virtually every question raised at bail. Who is against pretrial reform and why are they against it? What makes this generation of pretrial reform different from previous generations? Why did America move from using unsecured bonds administered through a personal surety system to using mostly secured bonds administered through a commercial surety system and when, exactly, did that happen? In what ways are our current constitutional and statutory bail provisions flawed? What are historical solutions to the dilemmas we currently see in the pretrial field? What is bail, and what is the purpose of bail? How do we achieve pretrial justice? All of these questions, and more, are answered through knowledge of the history of bail.

For example, the history tells us that bail should be viewed as "release," just as "no bail" should be viewed as detention. It tells us that whenever (1) bailable defendants (or those whom we feel should be bailable defendants) are detained, or (2) unbailable defendants (or those whom we feel should be unbailable defendants) are released, history demands a correction to ensure that, instead, bailable defendants are released and unbailable defendants are detained. Knowledge of this historical need for correction, by itself, points to why America is currently in a third generation of pretrial reform.

The history also tells us that it is the collision of two historical threads – the movement from an unsecured bond/personal surety system to a secured bond/commercial surety system colliding with the creation and nurturing of a "bail/no bail" dichotomy, in which bailable defendants are released and unbailable defendants are detained – that has led to the acute need for bail reform in the last 100 years. Thus, the history of bail instructs us not only on relevant older practices, but also on the important lessons from more recent events, including the first two generations of bail reform in America in the 20th century. It tells us how we can change state laws, policies, and practices so that bail can be administered in a lawful and effective manner, thereby greatly diminishing, if not avoiding altogether, the need for future reform.

The Legal Foundations of Pretrial Justice

The history of bail and the law underlying the administration of bail are intertwined (with the law in most cases confirming and solidifying the history), but the law remains as the framework and boundary for all that we do in the pretrial field. Unfortunately, however, the legal principles underlying bail are uncommon in our court opinions; rarely, if ever, taught in our law schools and colleges; and have only recently been resurrected as subjects for continuing legal education. Nevertheless, in a field such as bail, which strives to follow "legal and evidence-based practices," knowledge of the fundamental legal principles and why they matter to the administration of bail is crucial to pretrial justice in America. Knowing "what works" – the essence of following the evidence in any particular field – is not enough in bail. We must also know the law and how the fundamental legal principles apply to our policies and practices.

Each fundamental principle of national applicability, from probable cause and individualization to excessiveness, due process, and equal protection, is thus a rod by which we measure our daily pretrial practices so that they further the lawful goals underlying the bail process. In many cases, the legal principles point to the need for drastic changes to those practices. Moreover, in this generation of bail reform we are beginning to learn that our current state and local laws are also in need of revision when held up to the broader legal foundations. Accordingly, as changing concepts of risk are infused into our knowledge of bail, shedding light on practices and local laws that once seemed practical but now might be considered irrational, the fundamental legal principles rise up to instruct us on how to change our state constitutions and bail statutes so that they again make sense.

Pretrial Research

The history of bail and the law intertwined with that history tell us that the three goals underlying the bail process are to maximize release while simultaneously maximizing court appearance and public safety. Pretrial social research that studies what works to effectuate all three of these goals is superior to research that does not, and as a field we must agree on the goals as well as know the difference between superior and inferior research.

Each generation of bail reform in America has had a body of literature supporting pretrial improvements, and while more research is clearly needed (in all genres, including, for example, social, historical, and legal research) this generation nonetheless has an ample supply from which pretrial practitioners can help ascertain what works to achieve our goals. Current research that is highly significant to today's pretrial justice movement includes research used to design empirical risk assessment instruments and to gauge the effectiveness of release types or specific conditions on pretrial outcomes.

The National Standards on Pretrial Release

The pretrial field benefits significantly from having sets of standards and recommendations covering virtually every aspect of the administration of bail. In particular, the American Bar Association Standards, first promulgated in 1968, are considered not only to contain rational and practical "legal and evidence-based" recommendations, but also to serve as an important source of authority and have been used by legislatures and cited by courts across the country.

As a field we must recognize the importance of the national standards and stress the benefits from jurisdictions holding up their practices against what most would consider to be "best" practices. On the other hand, we must recognize that the rapidly evolving pretrial research may ultimately lead to questioning and possibly even revising those standards.

Pretrial Terms and Phrases

A solid understanding of the history of bail, the legal foundations of bail, the pretrial research, and the national standards means, in many jurisdictions, that even such basic things as definitions of terms and phrases are in need of reform. For example, American jurisdictions often define the term "bail" in ways that are not supported by the history or the law, and these improper definitions cause undue confusion and distraction from significant issues. As a field seeking some measure of pretrial reform, we must all first agree on the proper and universally true definitions of our key terms and phrases so that we speak with a unified voice.

Guidelines for Pretrial Reform

Pretrial justice in America requires a complete cultural change from one in which we primarily associate bail with money to one in which we do not. But cultural change starts with individuals making individual decisions to act. It may seem daunting, but it is not; many persons across America have decided to follow the research and the evidence to assess whether pretrial improvements are necessary, and many of those same persons have persuaded entire jurisdictions to make improvements to the administration of bail. What these persons have in common is their knowledge of the fundamentals of bail. When they learn the fundamentals, light bulbs light, the clouds of confusion part, and what once seemed impossible becomes not only possible, but necessary and seemingly long overdue.

This document is designed to help people come to the same epiphany that has led so many to focus on pretrial reform as one of the principle criminal justice issues facing our country today. It is a resource guide written at a time when the resources are expanding exponentially and pointing in a single direction toward reform. More importantly,

however, it represents a mental framework – a slightly new and interconnected way of looking at things – so that together we can finally and fully achieve pretrial justice in America.

Introduction

It is a paradox of criminal justice that bail, created and molded over the centuries in England and America primarily to facilitate the release of criminal defendants from jail as they await their trials, today often operates to deny that release. More unfortunate, however, is the fact that many American jurisdictions do not even recognize the paradox; indeed, they have become gradually complacent with a pretrial process through which countless bailable defendants are treated as unbailable through the use of money. To be paradoxical, a statement must outwardly appear to be false or absurd, but, upon closer examination, shown to be true. In many jurisdictions, though, a statement such as, "The defendant is being held on $50,000 bail," a frequent tagline to any number of newspaper articles recounting a criminal arrest, seems to lack the requisite outward absurdity to qualify as paradoxical. After all, defendants are "held on bail" all the time. But the idea of being held or detained on bail is, in fact, absurd. An equivalent statement would be that the accused has been freed and is now at liberty to serve time in prison.

Recognizing the paradox is paramount to fully understanding the importance of bail, and the importance of bail cannot be overstated. Broadly defined, the study of bail includes examining all aspects of the non-sentence release and detention decision during a criminal defendant's case.[1] Internationally, bail is the subject of numerous treaties, conventions, rules, and standards. In America, bail has been the focus of two significant generations of reform in the 20th century, and appears now to be firmly in the middle of a third. Historically speaking, bail has existed since Roman times and has been the catalyst for such important criminal jurisprudential innovations as preliminary hearings, habeas corpus, the notion of "sufficient sureties," and, of course, prohibitions on pretrial detention without charge and on "excessive" bail as foundational to our core constitutional rights. Legally, decisions at bail trigger numerous foundational principles, including due process, the presumption of innocence, equal protection, the right to counsel, and other key elements of federal and state law. In the realm of criminal justice social science research, bail is a continual source of a rich literature, which, in turn, helps criminal justice officials as well as the society at large to decide the most effective manner in which to administer the release and detention decision. And finally, the sheer

[1] A broad definition of the study of criminal bail would thus appropriately include, and has in the past included, discussion of issues occasionally believed to be outside of the bail process, such as the use of citations in order to avoid arrest altogether or pretrial diversion as a dispositional alternative to the typical pretrial release or detention/trial/adjudication procedure. A broad definition would certainly include discussions of post-conviction bail, but because of fundamental differences between pretrial defendants and those who have been convicted, that subject is beyond the scope of this paper. For purposes of this paper, "bail" will refer to the pretrial process.

volume and resulting outcomes of the decisions themselves – decisions affecting over 12 million arrestees per year – further attest to the importance of bail as a topic that can represent either justice or injustice on a grand scale.

Getting Started – What is Bail? What is Bond?

Later in this paper we will see how the history, the law, the social science research, and the national best practice standards combine to help us understand the proper definitions of terms and phrases used in the pretrial field. For now, however, the reader should note that the terms "bail" and "bond" are used differently across America, and often inaccurately when held up to history and the law. In the 1995 edition to his Dictionary of Modern Legal Usage, Bryan Garner described the word "bail" as a "chameleon-hued" legal term, with strikingly different meanings depending on its overall use as a noun or a verb. And indeed, depending on the source, one will see "bail" defined variously as money, as a person, as a particular type of bail bond, and as a process of release. Occasionally, certain definitions will conflict with other definitions or word usage even within the same source. Accordingly, to reflect an appropriate legal and historical definition, the term "bail" will be used in this paper to describe a process of releasing a defendant from jail or other governmental custody with conditions set to provide reasonable assurance of court appearance or public safety.

The term "bond" describes an obligation or a promise, and so the term "bail bond" is used to describe the agreement between a defendant and the court, or between the defendant, a surety (commercial or noncommercial), and the court that sets out the details of the agreement. There are many types of bail bonds – secured and unsecured, with or without sureties, and with or without other conditions – that fall under this particular definition. Later we will also see how defining types of bonds primarily based on their use of money in the process (such as a "cash" bond or a "personal recognizance bond") is misleading and inaccurate.

This paper occasionally mentions the terms "money bail," and the "traditional money bail system." "Money bail" is typically used as a shorthand way to describe the bail process or a bail bond using secured financial conditions (which necessarily includes money that must be paid up-front prior to release). The two central issues concerning money bail are: (1) its tendency to cause unnecessary incarceration of defendants who cannot afford to pay secured financial conditions either immediately or even after some period of time; and (2) its tendency to allow for, and sometimes foster, the release of high-risk defendants, who should more appropriately be detained without bail.

The "traditional money bail system" typically describes the predominant American system (since about 1900) of primarily using secured financial conditions on bonds administered through commercial sureties. More broadly, however, it means any system of the administration of bail that is over-reliant on money, typically when compared to the American Bar Association's National Standards on Pretrial Release. Some of its hallmarks include monetary bail bond schedules, overuse of secured bonds, a reliance on commercial sureties (for-profit bail bondsmen), financial conditions set to protect the public from future criminal conduct, and financial conditions set without

consideration of the defendant's ability to pay, or without consideration of non-financial conditions or other less-restrictive conditions that would likely reduce risk.

Sources and Resources: Black's Law Dictionary (9th ed. 2009); Bryan A. Garner, A Dictionary of Modern Legal Usage (Oxford Univ. Press, 2nd ed. 1995); Timothy R. Schnacke, Michael R. Jones, Claire M.B. Brooker, *Glossary of Terms and Phrases Relating to Bail and the Pretrial Release or Detention Decision* (PJI 2011).

The importance of bail foreshadows the significant problems that can arise when the topic is not fully understood. Those problems, in turn, amplify the paradox. A country founded upon liberty, America leads the world in pretrial detention at three times the world average. A country premised on equal justice, America tolerates its judges often conditioning pretrial freedom based on defendant wealth – or at least on the ability to raise money – versus important and constitutionally valid factors such as the risk to public and victim safety. A country bound by the notion that liberty not be denied without due process of law, America tolerates its judges often ordering de-facto pretrial detention through brief and perfunctory bail hearings culminating with the casual utterance of an arbitrary and often irrational amount of money. A country in which the presumption of innocence is "axiomatic and elementary" [2] to its administration of criminal justice and foundational to the right to bail,[3] America, instead, often projects a presumption of guilt. These issues are exacerbated by the fact that the type of pretrial justice a person gets in this country is also determined, in large part, on where he or she is, with some jurisdictions endeavoring to follow legal and evidence-based pretrial practices but with others woefully behind. In short, the administration of bail in America is unfair and unsafe, and the primary cause for that condition appears simply to be: (1) a lack of bail education that helps to illuminate solutions to a number of well-known bail problems; and (2) a lack of the political will to change the status quo.

"It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones."

Nelson Mandela, 1995

Fortunately, better than any other time in history, we have now identified, and in many cases have actually illustrated through implementation, solutions to the most vexing problems at bail. But this knowledge is not uniform. Moreover, even where the

[2] *Coffin v. United States,* 156 U.S. 432, 453 (1895).
[3] *See Stack v. Boyle,* 342 U.S. 1, 4 (1951).

knowledge exists, we find that jurisdictions are in varying stages of fully understanding the history of bail, legal foundations of bail, national best practice recommendations, terms and phrases used at bail, and legal and evidence-based practices that fully implement the fair and transparent administration of pretrial release and detention. Pretrial justice requires that those seeking it be consistent with both their vision and with the concept of pretrial best practices, and this document is designed to help further that goal. It can be used as a resource guide, giving readers a basic understanding of the key areas of bail and the criminal pretrial process and then listing key documents and resources necessary to adopt a uniform working knowledge of legal and evidence-based practices in the field.

Hopefully, however, this document will serve as more than just a paper providing mere background information, for it is designed, instead, to also provide the intellectual framework to finally achieve pretrial justice in America. As mentioned previously, in this country we have undertaken two generations of pretrial reform, and we are currently in a third. The lessons we have learned from the first two generations are monumental, but we have not fully implemented them, leading to the need for some "grand unifying theory" to explore how this third generation can be our last. In my opinion, that theory comes from a solid consensus understanding of the fundamentals of bail, why they are important, and how they work together toward an idea of pretrial justice that all Americans can embrace.

The paper is made up of seven chapters designed to help jurisdictions across America to reach consensus on a path to pretrial justice. In the first chapter, we will briefly explore the need for pretrial improvements as well as the reasons behind the current generation of reform. In the second chapter, we will examine the evolution of bail through history, with particular emphasis on why the knowledge of certain historical themes is essential to reforming the pretrial process. In the third chapter, we will list and explain fundamental legal foundations underpinning the pretrial field. The fourth chapter will focus on the evolution of empirical pretrial research, looking primarily at research associated with each of the three generations of bail reform in America in the 20th and 21st centuries.

The fifth chapter will briefly discuss how the history, law, and research come together in the form of national pretrial standards and best practice recommendations. In the sixth chapter, we will further discuss how bail's history, law, research, and best practice standards compel us to agree on certain changes to the way we define key terms and phrases in the field. In the seventh and final chapter, we will focus on practical application – how to begin to apply the concepts contained in each of the previous sections to lawfully administer bail based on best practices. Throughout the document, through sidebars, the reader will also be introduced to other important but sometimes neglected topics relevant to a complete understanding of the basics of bail.

Direct quotes are footnoted, and other, unattributed statements are either the author's own or can be found in the "additional sources and resources" sections at the end of

most chapters. In the interest of space, footnoted sources are not necessarily listed again in those end sections, but should be considered equally important resources for pretrial practitioners. Throughout the paper, the author occasionally references information that is found only in various websites. Those websites are as follows:

The American Bar Association: http://www.americanbar.org/aba.html;

The Bureau of Justice Assistance: https://www.bja.gov/;

The Bureau of Justice Statistics: http://www.bjs.gov/;

The Carey Group: http://www.thecareygroup.com/;

The Center for Effective Public Policy: http://cepp.com/;

The Crime and Justice Institute: http://www.crj.org/cji;

The Federal Bureau of Investigation Crime Reports: http://www.fbi.gov/about-us/cjis/ucr/ucr;

Human Rights Watch: http://www.hrw.org/;

Justia: http://www.justia.com/;

The Justice Management Institute: http://www.jmijustice.org/;

The Justice Policy Institute: http://www.justicepolicy.org/index.html;

NACo Pretrial Resources, http://www.naco.org/programs/csd/Pages/PretrialJustice.aspx;

The National Association of Pretrial Services Agencies: http://napsa.org/;

The National Criminal Justice Reference Service: https://www.ncjrs.gov/;

The National Institute of Corrections, http://nicic.gov;

The National Institute of Justice: http://www.nij.gov/Pages/welcome.aspx;

The Pretrial Justice Institute: http://www.pretrial.org/;

The Pretrial Services Agency for the District of Columbia, http://www.psa.gov/;

The United States Census Bureau, http://www.census.gov/;

The Vera Institute of Justice: http://www.vera.org/;

The Washington State Institute for Public Policy: http://www.wsipp.wa.gov/.

Chapter 1: Why Do We Need Pretrial Improvements?

The Importance of Understanding Risk

Of all the reasons for studying, identifying, and correcting shortcomings with the American system of administering bail, two overarching reasons stand out as foundational to our notions of freedom and democracy. The first is the concept of risk. From the first bail setting in Medieval England to any of a multitude of bail settings today, pretrial release and detention has always been concerned with risk, typically manifested by the prediction of pretrial misbehavior based on the risk that any particular defendant will not show up for court or commit some new crime if released. But often missing from our discussions of pretrial risk are the reasons for why we allow risk to begin with. After all, pretrial court appearance rates (no failures to appear) and public safety rates (no new crimes while on pretrial release) would most certainly hover near 100% if we could simply detain 100% of defendants.

The answer is that we not only allow for risk in criminal justice and bail, we demand it from a society that is based on liberty. In his Commentaries on the Laws of England (the eighteenth century treatise on the English common law used extensively by the American Colonies and our Founding Fathers) Sir William Blackstone wrote, "It is better that ten guilty persons escape than that one innocent suffer,"[4] a seminal statement of purposeful risk designed to protect those who are governed against unchecked despotism. More specifically related to bail, in 1951, Justice Robert H. Jackson succinctly wrote, "Admission to bail always involves a risk . . . a calculated risk which the law takes as the price of our system of justice."[5] That system of justice – one of limited government powers and of fundamental human rights protected by the Constitution, of defendants cloaked with the presumption of innocence, and of increasingly arduous evidentiary hurdles designed to ensure that only the guilty suffer punishment at the hands of the state – inevitably requires us to *embrace* risk at bail as fundamental to maintaining our democracy. Our notions of equality, freedom, and the rule of law demand that we embrace risk, and embracing risk requires us to err on the side of release when considering the right to bail, and on "reasonable assurance," rather than complete assurance, when limiting pretrial freedom.

Despite the fact that risk is necessary, however, many criminal justice leaders lack the will to undertake it. To them, a 98% court appearance rate is 2% too low, one crime committed by a defendant while on pretrial release is one crime too many, and detaining some large percentage of defendants pretrial is an acceptable practice if it

[4] William Blackstone, *Commentaries on the Laws of England*, Book 4, ch. 27 (Oxford 1765-1769).
[5] *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (Jackson, J., concurring).

avoids those relatively small percentage failures. Indeed, the fears associated with even the smallest amount of pretrial failure cause those leaders to focus first and almost entirely on mitigating perceived risk, which in turn leads to unnecessary pretrial detention.

> *"All too often our current system permits the unfettered release of dangerous defendants while those who pose minimal, manageable risk are held in costly jail space."*
>
> Tim Murray, Pretrial Justice Institute, 2011

But these fears misapprehend the entire concept of bail, which requires us first to embrace the risk created by releasing defendants (for the law presumes and very nearly demands the release of bailable defendants) and then to seek to mitigate it only to reasonable levels. Indeed, while the notion may seem somewhat counterintuitive, in this one unique area of the law, everything that we stand for as Americans reminds us that when court appearance and public safety rates are high, we must at least consider taking the risk of releasing more defendants pretrial. Accordingly, one answer to the question of why pretrial improvements are necessary, and the first reason for correcting flaws in the current system, is that criminal justice leaders must continually take risks in order to uphold fundamental precepts of American justice; unfortunately, however, many criminal justice leaders, including those who administer bail today, often fail to fully understand that connection and have actually grown risk averse.

The Importance of Equal Justice

The second foundational reason for studying and correcting the administration of bail in America is epitomized by a quote from Judge Learned Hand uttered during a keynote address for the New York City Legal Aid Society in 1951. In his speech, Judge Hand stated, "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."[6] Ten years later, the statement was repeated by Attorney General Robert Kennedy when discussing the need for bail reform, and it became a foundational quote in the so-called "Allen Committee" report, the document from the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice that provided a catalyst for the first National Conference on Bail and Criminal Justice in 1964. Judge Hand's quote became a rallying cry for the first generation of American bail reform, and it remains poignant today, for in no other area of criminal procedure do we so blatantly restrict allotments of our fundamental legal principles. Like our aversion to

[6] *See* The Legal Aid Society website at http://www.legal-aid.org/en/las/thoushaltnotrationjustice.aspx.

risk, our rationing of justice at bail is something to which we have grown accustomed. And yet, if Judge Hand is correct, such rationing means that our very form of government is in jeopardy. Accordingly, another answer for why pretrial improvements are necessary, and a second reason for correcting flaws in the current system, is that allowing justice for some, but not all Americans, chips away at the founding principles of our democracy, and yet those who administer bail today have grown content with a system in which justice capriciously eludes persons based on their lack of financial resources.

Arguably, it is America's aversion to risk that has led to its complacency toward rationing pretrial justice. That is because bail, and therefore the necessary risk created by release, requires an in-or-out, release/no release decision. As we will see later in this paper, since at least 1275, bail was meant to be an in-or-out proposition, and only since about the mid to late 1800s in America have we created a process that allows judges to delegate that decision by merely setting an amount of up-front money. Unfortunately, however, setting an amount of money is typically not a release/no release decision; indeed, it can often cause both unintended releases and detentions. Setting money, instead, creates only the illusion of a decision for when money is a precondition to release, the actual release (or, indeed, detention) decision is then made by the defendant, the defendant's family, or perhaps some third party bail bondsman who has analyzed the potential for profit. This illusion of a decision, in turn, has masked our aversion to risk, for it appears to all that some decision has been made. Moreover, it has caused judges across America to be content with the negative outcomes of such a non-decision, in which pretrial justice appears arbitrarily rationed out only to those with access to money.

Negative Outcomes Associated with the Traditional Money Bail System

Those negative outcomes have been well-documented. Despite overall drops in total and violent crime rates over the last twenty years, jail incarceration rates remain high – so high, in fact, that if we were to jail persons at the 1980 incarceration rate, a rate from a time in which crime rates were actually higher than today, our national jail population would drop from roughly 750,000 inmates to roughly 250,000 inmates. Moreover, most of America's jail inmates are classified as pretrial defendants, who today account for approximately 61% of jail populations nationally (up from approximately 50% in 1996). As noted previously, the United States leads the world in numbers of pretrial detainees, and detains them at a rate that is three times the world average.

Understanding Your Jail Population

Knowing who is in your jail as well as fundamental jail population dynamics is often the first step toward pretrial justice. Many jurisdictions are simply unaware of who is in the jail, how they get into the jail, how they leave the jail, and how long they stay, and yet knowing these basic data is crucial to focusing on particular jail populations such as pretrial inmates.

A jail's population is affected not only by admissions and lengths of stay, but also by the discretionary decisionmaking by criminal justice officials who, whether on purpose or unwittingly, often determine the first two variables. For example, a local police department's policy of arresting and booking (versus release on citation) more defendants than other departments or to ask for unusually high financial conditions on warrants will likely increase a jail's number of admissions and can easily add to its overall daily population. As another example, national data has shown that secured money at bail causes pretrial detention for some defendants and delayed release for others, both increasing the lengths of stay for that population and sometimes creating jail crowding. Accordingly, a decision by one judge to order mostly secured (i.e., cash or surety) bonds will increase the jail population more than a judge who has settled on using less-restrictive means of limiting pretrial freedom while mitigating pretrial risk.

Experts on jail population analysis thus advise jurisdictions to adopt a systems perspective, create the infrastructure to collect and analyze system data, and collect and track trend data not only on inmate admissions and lengths of stay, but also on criminal justice decisionmaking for policy purposes.

Sources and Resources: David M. Bennett & Donna Lattin, *Jail Capacity Planning Guide: A Systems Approach* (NIC, Nov. 2009); Cherise Fanno Burdeen, *Jail Population Management: Elected County Officials' Guide to Pretrial Services* (NACo/BJA/PJI, 2009); Mark A. Cunniff, *Jail Crowding: Understanding Jail Population Dynamics,* (NIC, Jan. 2002); Robert C. Cushman, *Preventing Jail Crowding: A Practical Guide* (NIC, 2nd ed., May 2002); Todd D. Minton, *Jail Inmates at Midyear- 2012 Statistical Tables*, (BJS, 2013 and series). **Policy Documents Using Jail Population Analysis:** Jean Chung, *Baltimore Behind Bars, How to Reduce the Jail Population, Save Money and Improve Public Safety* (Justice Policy Institute, Jun. 2010); Marie VanNostrand, *New Jersey Jail Population Analysis: Identifying Opportunities to Safely and Responsibly Reduce the Jail Population* (Luminosity/Drug Policy Alliance, Mar. 2013).

These trends are best explained by the justice system's increasing use of secured financial conditions on a population that appears less and less able to afford them. In 2013, the Census Bureau announced that the poverty rate in America was 15%, about one in every seven persons and higher than in 2007, which was just before the most recent recession. Nevertheless, according to the Bureau of Justice Statistics, the percentage of cases for which courts have required felony defendants to post money in order to obtain release has increased approximately 65% from 1990 to 2009 (from 37% to 61% of cases overall, mostly from the large increase in use of surety bonds), and the amounts of those financial conditions have steadily risen over the same period.

Unnecessary Pretrial Detention

The problem highlighted by these data comes from the fact that secured financial conditions at bail cause unnecessary pretrial detention. In a recent and rigorous study of 2,000 Colorado cases comparing the effects between defendants ordered to be released on secured financial conditions (requiring either money or property to be paid in advance of release) and those ordered released on unsecured financial conditions (requiring the payment of either money or property only if the defendant failed to appear and not as a precondition to release), defendants with unsecured financial conditions were released in "statistically significantly higher" numbers no matter how high or low their individual risk.[7] Essentially, defendants ordered to be released but forced to pay secured financial conditions: (1) took longer to get out of jail (presumably for the time needed to gather the necessary money or to find willing sureties); and (2) in many cases did not get out at all. In short, using secured bonds leads to the detention of bailable defendants by delaying or preventing pretrial release. These findings are consistent with comparable national data; indeed, the federal government has estimated the percentage of felony defendants detained for the duration of their pretrial period nationally to be approximately 38%, and the percentage of those defendants detained simply due to the lack of money to be approximately 90% of that number.

There are numerous reasons to conclude that anytime a bailable defendant is detained for lack of money (rather than detained because of his or her high risk for pretrial misbehavior), that detention is unnecessary. First, secured money at bail is the most restrictive condition of release – it is typically the only precondition to release itself – and, in most instances, other less-restrictive alternatives are available to respond to pretrial risk without the additional financial condition. Indeed, starting in the 1960s, researchers have demonstrated that courts can use alternatives to release on money bonds that have acceptable outcomes concerning risk to public safety and court appearance. Second, the money itself cannot serve as motivation for anything until it is actually posted. Until then, the money merely detains, and does so unequally among defendants resulting in the unnecessary detention of releasable inmates. This problem is exacerbated by the fact that the financial condition of a bail bond is typically arbitrary; even when judges are capable of expressing reasons for a particular amount, there is often no rational explanation for why a second amount, either lower or higher, might not arguably serve the same purposes. Third, money set with a purpose to detain is likely unlawful under numerous theories of law, and is also unnecessary given the Supreme Court's approval of a lawful detention scheme that uses no money whatsoever. Financial conditions of release are indicators of decisions to release, not to detain; accordingly, any resulting detention due to money bonds used outside of a

[7] Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option,* 12 (PJI 2013).

lawful detention process makes that money-based detention unnecessary or potentially unlawful. Fourth, no study has ever shown that money can protect the public. Indeed, in virtually every American jurisdiction, financial conditions of bail bonds cannot even be forfeited for new crimes or other breaches in public safety, making the setting of a money bond for public safety irrational. Given that irrationality, any pretrial detention resulting from that practice is per se unnecessary.

Fifth, ever since 1968, when the American Bar Association openly questioned the basic premise that money serves as a motivator for court appearance, no valid study has been conducted to refute that uncertainty. Instead, the best research to date suggests what criminal justice leaders have long suspected: secured money does not matter when it comes to either public safety or court appearance, but it is directly related to pretrial detention. This hypothesis was supported most recently by the Colorado study, mentioned above, which compared outcomes for defendants released on secured bonds with outcomes for defendants released on unsecured bonds. In 2,000 cases of defendants from all risk categories, this research showed that while having to pay the money up-front led to statistically significantly higher detention rates, whether judges used secured or unsecured money bonds did not lead to any differences in court appearance or public safety rates.

A sixth reason for concluding that bailable defendants held on secured financial conditions constitutes unnecessary pretrial detention is that we know of at least one jurisdiction, Washington D.C., that uses virtually no money at all in its bail setting process. Instead, using an "in or out," "bail/no bail" scheme of the kind contemplated by American law, the District of Columbia releases 85-88% of all defendants – detaining the rest through rational, fair, and transparent detention procedures – and yet maintains high court appearance (no FTA) and public safety (no new crime) rates. Moreover, that jurisdiction does so day after day, with all types of defendants charged with all types of crimes, using almost no money whatsoever.

Unnecessary pretrial detention is also suggested whenever we look at the adjudicatory outcomes of defendants' cases to see if they are the sorts of individuals who must be absolutely separated from society. When we look at those outcomes, however, we see that even though we foster a culture of pretrial detention, very few persons arrested or admitted to jail are ultimately sentenced to significant incarceration post-trial. Indeed, only a small fraction of jail inmates nationally (from 3-5%, depending on the source) are sent to prison. In one statewide study, only 14% of those defendants detained for the *entire duration* of their case were sentenced to prison. Thirteen percent had their cases dismissed (or the cases were never filed), and 37% were sentenced to noncustodial sanctions, including probation, community corrections, or home detention. Accordingly, over 50% of those pretrial detainees were released into the community once their cases were done. In another study, more than 25% of felony pretrial detainees were acquitted or had their cases dismissed, and approximately 20% were ultimately sentenced to a noncustodial sentence. Clearly, another disturbing paradox at bail involves the dynamic

of releasing presumptively innocent defendants back into the community only after they have either pleaded or been found guilty of a particular crime.

In addition, and as noted by the Pretrial Justice Institute (PJI), these statistics vary greatly across the United States, and that variation itself hints at the need for reform. According to PJI:

> Looking at the counties individually shows the great disparity in pretrial release practices and outcomes. In 2006, pretrial release rates ranged from a low of 31% in one county to a high of 83% in another. Non-financial release rates ranged from lows of zero in one county, 3% in another, and 5% in a third to a high of 68%.[8]

[8] *Important Data on Pretrial Justice* (PJI 2011).

Different Laws/Different Practices

Bail laws are different among the states, often due to the extent to which those states have fully embraced the principles and practices evolving out of the two previous generations of bail reform in the 1960s and 1980s. Even in states with similar laws, however, pretrial practices can nonetheless vary widely. Indeed, local practices can vary among jurisdictions under the same state laws, and, given the great discretion often afforded at bail, even among judges within individual jurisdictions. Disparity beyond that needed to individualize bail settings can rightfully cause concerns over equal justice, through which Americans can be reasonably assured that the laws will not have widely varying application depending on their particular geographical location, court, or judge.

Normally, state and federal constitutional law would provide adequate benchmarks to maintain equal justice, but with bail we have an unfortunate scarcity of language and opinions from which to gauge particular practices or even the laws from which those practices derive. Fortunately, however, we have best practice standards on pretrial release and detention that take fundamental legal principles and marry them with research to make recommendations concerning virtually every issue surrounding pretrial justice. In this current generation of pretrial reform, we are realizing that both bail practices and the laws themselves – from court rules to constitutions – must be held up to best practices and the legal principles underlying them to create bail schemes that are fair and applied somewhat equally among the states.

The American Bar Association's (ABA's) Criminal Justice Standards on Pretrial Release can provide the benchmarks that we do not readily find in bail law. When followed, those Standards provide the framework from which pretrial practices or even laws can be measured, implemented, or improved. For example, the use of monetary bail schedules (a document assigning dollar amounts to particular charges regardless of the characteristics of any individual defendant) are illegal in some states but actually required by law in others. There is very little law on the subject, but the ABA standards (using fundamental legal principles, such as the need for individuality in bail setting as articulated by the United States Supreme Court), research (indicating that release or detention based on individual risk is a superior practice to any mechanism based solely on charge and wealth), and logic (the standards call schedules "arbitrary and inflexible") reject the use of monetary bail schedules, thus suggesting that any state that either mandates or permits their use should consider statutory amendment.

Sources and Resources: *American Bar Association Standards for Criminal Justice – Pretrial Release* (3rd ed. 2007).

Pretrial detention, whether for a few days or for the duration of the case, imposes certain costs, and unnecessary pretrial detention does so wastefully. In a purely monetary sense, these costs can be estimated, such as the comparative cost of incarceration (from $50 to as much as $150 per day) versus community supervision (from as low as $3 to $5 per day). Given the volume of defendants and their varying lengths of stays, individual jails can incur costs of millions of dollars per year simply to house lower risk defendants who are also presumed innocent by the law. Indeed, the United States Department of Justice estimates that keeping the pretrial population behind bars costs American taxpayers roughly 9 billion dollars per year. Jails that are crowded can create an even more costly scenario for taxpayers, as new jail construction can easily reach $75,000 to $100,000 per inmate bed. Added to these costs are dollars associated with lost wages, economic mobility (including intergenerational effects), possible welfare costs for defendant families, and a variety of social costs, including denying the defendant the ability to assist with his or her own defense, the possibility of imposing punishment prior to conviction, and eroding justice system credibility due to its complacency with a wealth-based system of pretrial freedom.

Perhaps more disturbing, though, is research suggesting that pretrial detention alone, all other things being equal, leads to harsher treatment and outcomes than pretrial release. Relatively recent research from both the Bureau of Justice Statistics and the New York City Criminal Justice Agency continues to confirm studies conducted over the last 60 years demonstrating that, controlling for all other factors, defendants detained pretrial are convicted and plead guilty more often, and are sentenced to prison and receive harsher sentences than those who are released. Moreover, as recently as November 2013, the Laura and John Arnold Foundation released a study of over 150,000 defendants finding that – all other things being equal – defendants detained pretrial were over four times more likely to be sentenced to jail (and with longer sentences) and three times more likely to be sentenced to prison (again with longer sentences) than defendants who were not detained.[9]

While detention for a defendant's entire pretrial period has decades of documented negative effects, the Arnold Foundation research is also beginning to demonstrate that even small amounts of pretrial detention – perhaps even the few days necessary to secure funds to pay a cash bond or fee for a surety bond – have negative effects on defendants and actually makes them more at risk for pretrial misbehavior.[10] Looking at the same 150,000 case data set, the Arnold researchers found that low- and moderate-risk defendants held only 2 to 3 days were more likely to commit crimes and fail to appear for court before trial than similar defendants held 24 hours or less. As the time

[9] *See* Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, at 10-11 (Laura & John Arnold Found. 2013).

[10] *See* Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (Laura & John Arnold Found. 2013).

in jail increased, the researchers found, the likelihood of defendant misbehavior also increased. The study also found similar correlations between pretrial detention and long-term recidivism, especially for lower risk defendants. In a field of paradoxes, the idea that a judge setting a condition of bail intending to protect public safety might be unwittingly *increasing* the danger to the public – both short and long-term – is cause for radically rethinking the way we administer bail.

Other Areas in Need of Pretrial Reform

Unnecessary pretrial detention is a deplorable byproduct of the traditional money bail system, but it is not the only part of that system in need of significant reform. In many states, the overreliance on money at bail takes the place of a transparent and due-process-laden detention scheme based on risk, which would allow for the detention of high-risk defendants with no bail. Indeed, the traditional money bail system fosters processes that allow certain high-risk defendants to effectively purchase their freedom, often without being assessed for their pretrial risk and often without supervision. These processes include using bail schedules (through which defendants are released by paying an arbitrary money amount based on charge alone), a practice of dubious legal validity and counter to any notions of public safety. They include using bail bondsmen, who operate under a business model designed to maximize profit based on getting defendants back to court but with no regard for public safety. And they include setting financial conditions to help protect the public, a practice that is both legally and empirically flawed. In short, the use of money at bail at the expense of risk-based best practices tends to create the two main reasons cited for the need for pretrial reform: (1) it needlessly and unfairly keeps lower risk defendants in jail, disproportionately affecting poor and minority defendants and at a high cost to taxpayers; and (2) it too often allows higher risk defendants out of jail at the expense of public safety and integrity of the justice system. Both of these reasons were illustrated by the Colorado study, cited above, which documented that when making bail decisions without the benefit of an empirical risk instrument, judges often set financial conditions that not only kept lower risk persons in jail, but also frequently allowed the highest risk defendants out.

While the effect of money at bail is often cited as a reason for pretrial reform, research over the last 25 years has also illuminated other issues ripe for pretrial justice improvements. They include the need for (1) bail education among all criminal justice system actors; (2) data-driven policies and infrastructure to administer bail; (3) improvements to procedures for release through citations and summonses; (4) better prosecutorial and defense attorney involvement at the front-end of the system; (5) empirically created pretrial risk assessment instruments; (6) traditional (and untraditional) pretrial services functions in jurisdictions without those functions; (7) improvements to the timing and nature of first appearances; (8) judicial release and detention decision-making to follow best practices; (9) systems to allocate resources to better effectuate best practices; and (10) changes in county ordinances, state statutes,

and even state constitutions to embrace and facilitate pretrial justice and best practices at bail.

> *"What has been made clear . . . is that our present attitudes toward bail are not only cruel, but really completely illogical. . . . '[O]nly one factor determines whether a defendant stays in jail before he comes to trial [and] that factor is, simply, money."*
>
> Attorney General Robert Kennedy, 1962
>
> *Many pretrial inmates "are forced to remain in custody . . . because they simply cannot afford to post the bail required – very often, just a few hundred dollars."*
>
> Attorney General Eric Holder, 2011

The Third Generation of Bail/Pretrial Reform

The traditional money bail system that has existed in America since the turn of the 20th century is deficient legally, economically, and socially, and virtually every neutral and objective bail study conducted over the last 90 years has called for its reform. Indeed, over the last century, America has undergone two generations of bail reform, but those generations have not sufficed to fully achieve what we know today constitutes pretrial justice. Nevertheless, we are entering a new generation of pretrial reform with the same three hallmarks seen in previous generations.

First, like previous generations, we now have an extensive body of research literature – indeed, we have more than previous generations – pointing uniformly in a single direction toward best practices at bail and toward improvements over the status quo. Second, we have the necessary meeting of minds of an impressive number of national organizations – from police chiefs and sheriffs, to county administrators and judges – embracing the research and calling for data-driven pretrial improvements. Third, and finally, we are now seeing jurisdictions actually changing their laws, policies, and practices to reflect best practice recommendations for improvements. Fortunately, through this third generation of pretrial reform, we already know the answers to most of the pressing issues at bail. We know what changes must be made to state laws, and we know how to follow the law and the research to create bail schemes in which pretrial practices are rational, fair, and transparent.

A deeper understanding of the foundations of bail makes the need for pretrial improvements even more apparent. The next three parts of this paper are designed to

summarize the evolution and importance of three of the most important foundational aspects of bail – the history, the law, and the research.

Additional Sources and Resources: American Bar Association Standards for Criminal Justice – Pretrial Release (3rd ed. 2007); Spike Bradford, *For Better or for Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice* (JPI 2012); E. Ann Carson & William J. Sabol, *Prisoners in 2011* (BJS 2012); *Case Studies: the D.C. Pretrial Services Agency: Lessons From Five Decades of Innovation and Growth* (PJI), found at http://www.pretrial.org/download/pji-reports/Case%20Study-%20DC%20Pretrial%20Services%20-%20PJI%202009.pdf; Thomas H. Cohen & Tracey Kyckelhahn, *Felony Defendants in Large Urban Counties*, 2006 (BJS 2010); Jean Chung, *Bailing on Baltimore: Voices from the Front Lines of the Justice System* (JPI 2012); Thomas H. Cohen & Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts* (BJS 2007); Jamie Fellner, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City* (Human Rights Watch 2010); *Frequently Asked Questions About Pretrial Release Decision Making* (ABA 2012); Robert F. Kennedy, *Address by Attorney General Robert F. Kennedy to the American Bar Association House of Delegates, San Francisco, Cal.*, (Aug. 6, 1962) available at http://www.justice.gov/ag/rfkspeeches/1962/08-06-1962%20Pro.pdf; Christopher T. Lowenkamp & Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes* (Laura & John Arnold Found. 2013); Barry Mahoney, Bruce D. Beaudin, John A. Carver, III, Daniel B. Ryan, & Richard B. Hoffman, *Pretrial Services Programs: Responsibilities and Potential* (NIJ 2001); Todd D. Minton, *Jail Inmates at Midyear 2012 – Statistical Tables* (BJS 2013); *National Symposium on Pretrial Justice: Summary Report of Proceedings* (PJI/BJA 2011); Melissa Neal, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail* (JPI 2012); Mary T. Phillips, *Bail, Detention, and Non-Felony Case Outcomes, Research Brief Series No. 14* (NYCCJA 2007); Mary T. Phillips, *Pretrial Detention and Case Outcomes, Part 2, Felony Cases, Final Report* (NYCCJA 2008); *Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process* (PJI/MacArthur Found. 2012); Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables* (BJS 2013); *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice* (Univ. of Mich. 2011) (1963); *Responses to Claims About Money Bail for Criminal Justice Decision Makers* (PJI 2010); Timothy R. Schnacke, Michael R. Jones, Claire M.B. Brooker, *The Third Generation of Bail Reform* (Univ. Den. L. Rev. online, 2011); Standards on Pretrial Release (NAPSA, 3rd ed. 2004); Bruce Western & Becky Pettit, *Collateral Costs: Incarceration's Effect on Economic Mobility* (The PEW Charitable Trusts 2010).

Chapter 2: The History of Bail

According to the American Historical Association, studying history is crucial to helping us understand ourselves and others in the world around us. There are countless quotes on the importance of studying history from which to draw, but perhaps most relevant to bail is one from philosopher Soren Kierkegaard, who reportedly said, "Life must be lived forward, but it can only be understood backward." Indeed, much of bail today is complex and confusing, and the only way to truly understand it is to view it through a historical lens.

The Importance of Knowing Bail's History

Understanding the history of bail is not simply an academic exercise. When the United States Supreme Court equated the right to bail to a "right to release before trial," and likened the modern practice of bail with the "ancient practice of securing the oaths of responsible persons to stand as sureties for the accused,"[11] the Court was explaining the law by drawing upon notions discernible only through knowledge of history. When the commercial bail insurance companies argue that pretrial services programs have "strayed" beyond their original purpose, their argument is not fully understood without knowledge of 20th century bail, and especially the improvements gained from the first generation of bail reform in the 1960s. Some state appellate courts have relied on sometimes detailed accounts of the history of bail in order to decide cases related to release under "sufficient sureties," a term fully known only through the lens of history.

> *"This difference [between the U.S. and the Minnesota Constitution] is critical to our analysis and to fully understand this critical difference, some knowledge of the history of bail is necessary. Therefore, it is important to examine the origin of bail and its development in Anglo-American jurisprudence."*
>
> *State v. Brooks*, 604 N.W.2d 345 (Minn. 2000)

In short, knowledge of the history of bail is necessary to pretrial reform, and therefore it is crucial that this history be shared. Indeed, the history of bail is the starting point for understanding all of pretrial justice, for that history has shaped our laws, guided our research, helped to mold our best practice standards, and forced changes to our core definitions of terms and phrases. Fundamentally, though, the history of bail answers two pressing questions surrounding pretrial justice: (1) given all that we know about the

[11] *Stack v. Boyle,* 342 U.S. 1, 4-5 (1951).

deleterious effects of money at bail, how did America, as opposed to the rest of the world, come to rely upon money so completely?; and (2) does history suggest solutions to this dilemma, which might lead to American pretrial justice?

Civil Rights, Poverty, and Bail

Anyone who has read the speeches of Robert F. Kennedy while he was Attorney General knows that civil rights, poverty, and bail were three key issues he wished to address. Addressing them together, as he often did, was no accident, as the three topics were, and continue to be, intimately related.

In 1961, philanthropist Louis Schweitzer and magazine editor Herbert Sturz took their concerns over the administration of bail in New York City (a system "that granted liberty based on income") to Robert Kennedy and Daniel Freed, Department of Justice liaison to the newly created Committee on Poverty and the Administration of Federal Criminal Justice, known as the "Allen Committee." Schweitzer's and Sturz's efforts ultimately led to the creation of the Vera Foundation (now the Vera Institute of Justice), whose pioneering work on the Manhattan Bail Project heavily influenced the first generation of bail reform by finding effective alternatives to the commercial bail system. Freed, in turn, took the Vera work and incorporated it into an entire chapter of the Allen Committee's report, leading to the first National Conference on Bail and Criminal Justice in 1964.

At the same time that these bail and poverty reformers were working to change American notions of equal justice, civil rights activists were taking on a traditionally difficult hurdle for Southern blacks – the lack of money to bail themselves and others out of jail – and using it to their advantage. Through the "jail, no bail" policy, activists refused to pay bail or fines after being arrested for sit-ins, opting instead to have the government incarcerate them, and sometimes to force them to work hard labor, to bring more attention to their cause.

The link between civil rights, poverty, and bail was probably inevitable, and Kennedy set out to rectify overlapping injustices seen in all three areas. But despite promising improvements encompassed in the war on poverty, the civil rights movement, and the first generation of bail reform in the 1960s, we remain unfortunately tolerant of a bail process inherently biased against the poor and disproportionately affecting persons of color. Studies continue to demonstrate that bail amounts are empirically related to increased (and typically needless) pretrial detention, and other studies are equally consistent in demonstrating racial disparity in the application of bail and detention.

Fortunately, however, just like those persons pursuing civil rights and equal justice in the 20th century, the current generation of pretrial reform is fueled by committed individuals urging cultural changes to a system manifested by disparate state laws, unfair practices, and irrational policies that negatively affect the basic human rights of the most vulnerable among us. The commitment of those individuals, stemming from the success of past reformers, remains the catalyst for pretrial justice across the nation.

Sources and Resources: Thomas H. Cohen and Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts, 1990-2004* (BJS Nov. 2007); Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations,* 16 N.Y.U. J. Legis. & Pub. Pol'y 919 (2013); Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient*

Pretrial Release Option (PJI Oct. 2013); Besiki Kutateladze, Vanessa Lynn, & Edward Liang, *Do Race and Ethnicity Matter in Prosecution? Review of Empirical Studies* (1st Ed.) (Vera Institute of Justice 2012) at 11-12; *National Symposium on Pretrial Justice: Summary Report of Proceedings* at 35-35 and citations therein (PJI/BJA 2011) (statement of Professor Cynthia Jones).

Origins of Bail

While bail can be traced to ancient Rome, our traditional American understanding of bail derives primarily from English roots. When the Germanic tribes the Angles, the Saxons, and the Jutes migrated to Britain after the fall of Rome in the fifth century, they brought with them the blood feud as the primary means of settling disputes. Whenever one person wronged another, the families of the accused and the victim would often pursue a private war until all persons in one or both of the families were killed. This form of "justice," however, was brutal and costly, and so these tribes quickly settled on a different legal system based on compensation (first with goods and later with money) to settle wrongs. This compensation, in turn, was based on the concept of the "wergeld," meaning "man price" or "man payment" and sometimes more generally called a "bot," which was a value placed on every person (and apparently on every person's property) according to social rank. Historians note the existence of detailed tariffs assigning full wergeld amounts to be paid for killing persons of various ranks as well as partial amounts payable for injuries, such as loss of limbs or other wrongs. As a replacement to the blood feud between families, the wergeld system was also initially based on concepts of kinship and private justice, which meant that wrongs were still settled between families, unlike today, where crimes are considered to be wrongs against all people or the state.

With the wergeld system as a backdrop, historians agree on what was likely a prototypical bail setting that we now recognize as the ancestor to America's current system of release. Author Hermine Meyer described that original bail process as follows:

> Since the [wergeld] sums involved were considerable and could rarely be paid at once, the offender, through his family, offered sureties, or *wereborh*, for the payment of the *wergeld*. If accepted, the injured party met with the offender and his surety. The offender gave a *wadia,* a *wed,* such as a stick, as a symbol or pledging or an indication of the assumption of responsibility. The creditor then gave it to the surety, indicating that he recognized the surety as the trustee for the debt. He thereby relinquished his right to use force against the debtor. The debtor's pledge constituted a pledging of person and property. Instead of finding himself

> in the hands of the creditor, the debtor found himself, up to the date when payment fell due, in the hands of the surety.[12]

This is, essentially, the "ancient practice of securing the oaths" referred to by the Supreme Court in *Stack v. Boyle,* and it has certain fundamental properties that are important to note. First, the surety (also known as the "pledge" or the "bail") was a person, and thus the system of release became known as the "personal surety system." Second, the surety was responsible for making sure the accused paid the wergeld to avoid a feud, and he did so by agreeing in early years to stand in completely for the accused upon default of his obligations ("body for body," it was reported, meaning that the surety might also suffer some physical punishment upon default), and in later years to at least pay the wergeld himself in the event of default. Thus, the personal surety system was based on the use of recognizances, which were described by Blackstone as obligations or debts that would be voided upon performance of specified acts. Though not completely the same historically, they are essentially what we might now call unsecured bonds using co-signors, with nobody required to pay any money up-front, and with the security on any particular bond coming from the sureties, or persons, who were willing to take on the role and acknowledge the amount potentially owed upon default.

Third, the surety was not allowed to be repaid or otherwise profit from this arrangement. As noted above, the wadia, or the symbol of the suretyship arrangement, was typically a stick or what historians have described as some item of trifling value. In fact, as discussed later, even reimbursing or merely promising to reimburse a surety upon default – a legal concept known as indemnification – was declared unlawful in both England and America and remained so until the 1800s.

Fourth, the surety's responsibility over the accused was great and was based on a theory of continued custody, with the sureties often being called "private jailers" or "jailers of [the accused's] own choosing."[13] Indeed, it was this great responsibility, likely coupled with the prohibition on reimbursement upon default and on profiting from the system, which led authorities to bestow great powers to sureties as jailers to produce the accused – powers that today we often associate with those possessed by bounty hunters under the common law. Fifth, the purpose of bail in this earliest of examples was to avoid a blood feud between families. As we will see, that purpose would change only once in later history. Sixth and finally, the rationale behind this original bail setting made sense because the amount of the payment upon default was identical to the amount of the punishment. Accordingly, because the amount of the promised payment

[12] Hermine Herta Meyer, *Constitutionality of Pretrial Detention,* 60 Geo. L. J. 1139, 1146 (1971-1972) (citing and summarizing Elsa de Haas, *Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275,* 3-15 (NY, AMS Press, 1966).
[13] *Reese v. United States*, 76 U.S. (9 Wall.) 13, 21 (1869).

was identical to the wergeld, for centuries there was never any questioning whether the use of that promised amount for bail was arbitrary, excessive, or otherwise unfair.

The administration of bail has changed enormously from this original bail setting, and these changes in America can be attributed largely to the intersection during the 20th century of two historical phenomena. The first was the slow evolution from the personal surety system using unsecured financial conditions to a commercial surety system (with profit and indemnification) primarily using secured financial conditions. The second was the often misunderstood creation and nurturing of a “bail/no bail” or “release/no release” dichotomy, which continues to this day.

The Evolution to Secured Bonds/Commercial Sureties

The gradual evolution from a personal surety system using unsecured bonds to the now familiar commercial surety system using secured bonds in America began with the Norman Invasion. When the Normans arrived in 1066, they soon made changes to the entire criminal justice system, which included moving from a private justice system to a more public one through three royal initiatives. First, the crown initiated the now-familiar idea of crimes against the state by making certain felonies "crimes of royal concern." Second, whereas previously the commencement of a dispute between families might start with a private summons based upon sworn certainty, the crown initiated the mechanism of the presentment jury, a group of individuals who could initiate an arrest upon mere suspicion from third parties. Third, the crown established itinerant justices, who would travel from shire to shire to exert royal control over defendants committing crimes of royal concern. These three changes ran parallel to the creation of jails to hold various arrestees, although the early jails were crude, often barbaric, and led to many escapes.

These changes to the criminal justice process also had a measurable effect on the number of cases requiring bail. In particular, the presentment jury process led to more arrests than before, and the itinerant justice system led to long delays between arrest and trial. Because the jails at the time were not meant to hold so many persons and the sheriffs were reluctant to face the severe penalties for allowing escapes, those sheriffs began to rely more frequently upon personal sureties, typically responsible (and preferably landowning) persons known to the sheriff, who were willing to take control of the accused prior to trial. The need for more personal sureties, in turn, was met through the growth of the parallel institutions of local government units known as tithings and hundreds – a part of the overall development of the frankpledge system, a system in which persons were placed in groups to engage in mutual supervision and control.

While there is disagreement on whether bail was an inherent function of frankpledge, historians have frequently documented sheriffs using sureties from within the tithings and hundreds (and sometimes using the entire group), indicating that that these larger non-family entities served as a safety valve so that sheriffs or judicial officials rarely lacked for "sufficient" sureties in any particular case. The fundamental point is that in this period of English history, sureties were individuals who were willing to take responsibility over defendants – for no money and with no expectation of indemnification upon default – and the sufficiency of the sureties behind any particular release on bail came from finding one or more of these individuals, a process that was made exceedingly simpler through the use of the collective, non-family groups.

All of this meant that the fundamental purpose of bail had changed: whereas the purpose of the original bail setting process of providing oaths and pledges was to avoid a blood feud between families while the accused met his obligations, the use of more

lengthy public processes and jails meant that the purpose of bail would henceforth be to provide a mechanism for release. As before, the purpose of conditioning that release by requiring sureties was to motivate the accused to face justice – first to pay the debt but now to appear for court – and, indeed, court appearance remained the sole purpose for limiting pretrial freedom until the 20th century.

Additional alterations to the criminal process occurred after the Norman Invasion, but the two most relevant to this discussion involve changes in the criminal penalties that a defendant might face as well as changes in the persons, or sureties, and their associated promises at bail. At the risk of being overly simplistic, punishments in Anglo-Saxon England could be summed up by saying that if a person was not summarily executed or mutilated for his crime (for that was the plight of persons with no legal standing, who had been caught in the act, or persons of "ill repute" or long criminal histories, etc.), then that person would be expected to make some payment. With the Normans, however, everything changed. Slowly doing away with the wergeld payments, the Normans introduced first afflictive punishment, in the form of ordeals and duels, and later capital and other forms of corporal punishment and prison for virtually all other offenses.

The changes in penalties had a tremendous impact on what we know today as bail. Before the Norman Invasion, the surety's pledge matched the potential monetary penalty perfectly. If the wergeld was thirty silver pieces, the surety was expected to pay exactly thirty silver pieces upon default of the primary debtor. After the Invasion, however, with increasing use of capital punishment, corporal punishment, and prison sentences, 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. Moreover, the threat of these seemingly more severe punishments led to increasing numbers of defendants who refused to stay put, which created additional complexity to the bail decision. These complexities, however, were not enough to cause society to radically change course from its use of the personal surety system. Instead, that change came when both England and America began running out of the sureties themselves.

As noted previously, the personal surety system generally had three elements: (1) a reputable person (the surety, sometimes called the "pledge" or the "bail"); (2) this person's willingness to take responsibility for the accused under a private jailer theory and with a promise to pay the required financial condition on the back-end – that is, only if the defendant forfeited his obligation; and (3) this person's willingness to take the responsibility without any initial remuneration or even the promise of any future payment if the accused were to forfeit the financial condition of bail or release. This last requirement addressed the concept of indemnification of sureties, which was declared unlawful by both England and America as being against the fundamental public policy for having sureties take responsibility in the first place. In both England and America, courts repeatedly articulated (albeit in various forms) the following rationale when declaring surety indemnification unlawful: once a surety was paid or given a promise to

be paid the amount that could potentially be forfeited, that surety lost all interest and motivation to make sure that the condition of release was performed. Thus, a prohibition on indemnifying sureties was a foundational part of the personal surety system.

And indeed, the personal surety system flourished in England and America for centuries, virtually ensuring that those deemed bailable were released with "sufficient sureties," which were designed to provide assurance of court appearance. Unfortunately, however, in the 1800s both England and America began running out of sureties. There are many reasons for this, including the demise of the frankpledge system in England, and the expansive frontier and urban areas in America that diluted the personal relationships necessary for a personal surety system. Nevertheless, for these and other reasons, the demand for personal sureties gradually outgrew supply, ultimately leading to many bailable defendants being unnecessarily detained.

It is at this point in history that England and the United States parted ways in how to resolve the dilemma of bailable defendants being detained for lack of sureties. In England (and, indeed, in the rest of the world), the laws were amended to allow judges to dispense with sureties altogether when justice so required. In America, however, courts and legislatures began chipping away at the laws against surety indemnification. This transformation differed among the states. In the end, however, across America states gradually allowed sureties to demand re-payment upon a defendant's default and ultimately to profit from the bail enterprise itself. By 1898, the first commercial surety was reportedly opened for business in America. And by 1912, the United States Supreme Court wrote, "The distinction between bail [i.e., common law bail, which forbade indemnification] and suretyship is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary."[14]

Looking at court opinions from the 1800s, we see that the evolution from a personal to a commercial surety system (in addition to the states gradually increasing defendants ability to self-pay their own financial conditions, a practice that had existed before, but that was used only rarely) was done in large part to help release bailable defendants who were incarcerated due only to their inability to find willing sureties. However, that evolution ultimately virtually assured unnecessary pretrial incarceration because bondsmen began charging money up-front (and later requiring collateral) to gain release in addition to requiring a promise of indemnification. While America may have purposefully moved toward a commercial surety system from a personal surety system to help release bailable defendants, perhaps unwittingly, and certainly more importantly, it moved to a secured money bail system (requiring money to be paid before release is granted) from an unsecured system (promising to pay money only upon default of obligations). The result has been an increase in the detention of bailable defendants over the last 100 years.

[14] *Leary v. United States,* 224 U.S. 567, 575 (1912).

The "Bail/No Bail" Dichotomy

The second major historical phenomenon involved the creation and nurturing of a "bail/no bail" dichotomy in both England and America. Between the Norman Invasion and 1275, custom gradually established which offenses were bailable and which were not. In 1166, King Henry II bolstered the concept of detention based on English custom through the Assize of Clarendon, which established a list of felonies of royal concern and allowed detention based on charges customarily considered unbailable. Around 1275, however, Parliament and the Crown discovered a number of abuses, including sheriffs detaining bailable defendants who refused or could not pay those sheriffs a fee, and sheriffs releasing unbailable defendants who were able to pay some fee. In response, Parliament enacted the Statute of Westminster in 1275, which hoped to curb abuses by establishing criteria governing bailability (largely based on a prediction of the outcome of the trial by examining the nature of the charge, the weight of the evidence, and the character of the accused) and, while doing so, officially categorized presumptively bailable and unbailable offenses.

Importantly, this statutory enactment began the legal tradition of expressly articulating a bail/no bail scheme, in which a right to bail would be given to some, but not necessarily to all defendants. Perhaps more important, however, are other elements of the Statute that ensured that bailable defendants would be released and unbailable defendants would be detained. In 1275, the sheriffs were expressly warned through the Statute that to deny the release of bailable defendants or to release unbailable defendants was against the law; all defendants were to be either released or detained (depending on their category), and without any additional payment to the sheriff. Doing otherwise was deemed a criminal act.

> *"And if the Sheriff, or any other, let any go at large by Surety, that is not replevisable . . . he shall lose his Fee and Office for ever. . . . And if any withhold Prisoners replevisable, after that they have offered sufficient Surety, he shall pay a grievous Amerciament to the King; and if he take any Reward for the Deliverance of such, he shall pay double to the Prisoner, and also shall [be in the great mercy of] the King."*
>
> Statute of Westminster 3 Edward I. c. 15, *quoted in* Elsa de Haas, Antiquities of Bail, Origin and Historical Development in Criminal Cases to the Year 1275 (NY AMS Press 1966).

Accordingly, in 1275 the right to bail was meant to equal a right to release and the denial of a right to bail was meant to equal detention, and, generally speaking, these important concepts continued through the history of bail in England. Indeed, throughout that history any interference with bailable defendants being released or

with unbailable (or those defendants whom society deemed unbailable) defendants being lawfully detained, typically led to society recognizing and then correcting that abuse. Thus, for example, when Parliament learned that justices were effectively detaining bailable defendants through procedural delays, it passed the Habeas Corpus Act of 1679, which provided procedures designed to prevent delays prior to bail hearings. Likewise, when corrupt justices were allowing the release of unbailable defendants, thus causing what many believed to be an increase in crime, it was rearticulated in 1554 that unbailable defendants could not be released, and that bail decisions be held in open session or by two or more justices sitting together. As another example, when justices began setting financial conditions for bailable defendants in prohibitively high amounts, the abuse led William and Mary to consent to the English Bill of Rights in 1689, which declared, among other things, that "excessive bail ought not to be required."[15]

"Bail" and "No Bail" in America

Both the concept of a "bail/no bail" dichotomy as well as the parallel notions that "bail" should equal release and "no bail" should equal detention followed into the American Colonies. Generally, those Colonies applied English law verbatim, but differences in beliefs about criminal justice, customs, and even crime rates led to more liberal criminal penalties and bail laws. For example, in 1641 the Massachusetts Body of Liberties created an unequivocal right to bail to all except for persons charged with capital offenses, and it also removed a number of crimes from its list of capital offenses. In 1682, Pennsylvania adopted an even more liberal law, granting bail to all persons except when charged with a capital offense "where proof is evident or the presumption great," adding an element of evidentiary fact finding so as to also allow bail even for certain capital defendants. This provision became the model for nearly every American jurisdiction afterward, virtually assuring that "bail/no bail" schemes would ultimately find firm establishment in America.

Even in the federal system – despite its lack of a right to bail clause in the United States Constitution – the Judiciary Act of 1789 established a "bail/no bail," "release/detain" scheme that survived radical expansion in 1984 and that still exists today. Essentially, any language articulating that "all persons shall be bailable . . . unless or except" is an articulation of a bail/no bail dichotomy. Whether that language is found in a constitution or a statute, it is more appropriately expressed as "release (or freedom) or detention" because the notion that bailability should lead to release was foundational in early American law.

[15] English Bill of Rights, 1 W. & M., 2nd Sess., Ch. 2 (1689).

"Bail" and "No Bail" in the Federal and District of Columbia Systems

Both the federal and the District of Columbia bail statutes are based on "bail/no bail" or "release/no release" schemes, which, in turn, are based on legal and evidence-based pretrial practices such as those found in the American Bar Association's Criminal Justice Standards on Pretrial Release. Indeed, each statute contains general legislative titles describing the process as either "release" or "detention" during the pretrial phase, and each starts the bail process by providing judges with four options: (1) release on personal recognizance or with an unsecured appearance bond; (2) release on a condition or combination of conditions; (3) temporary detention; or (4) full detention. Each statute then has provisions describing how each release or detention option should function.

Because they successfully separate bailable from unbailable defendants, thus allowing the system to lawfully and transparently detain unbailable defendants with essentially none of the conditions associated with release (including secured financial conditions), both statutes are also able to include sections forbidding financial conditions that result in the preventive detention of the defendant – an abuse seen frequently in states that have not fully incorporated notions of a release/no release system.

The "bail" or "release" sections of both statutes use certain best practice pretrial processes, such as presumptions for release on recognizance, using "least restrictive conditions" to provide reasonable assurance of public safety and court appearance, allowing supervision through pretrial services entities for both public safety and court appearance concerns, and prompt review and appeals for release and detention orders.

The "no bail" or "detention" sections of both statutes are much the same as when the United States Supreme Court upheld the federal provisions against facial due process and 8th Amendment claims in *United States v. Salerno* in 1987. The *Salerno* opinion emphasized key elements of the existing federal statute that helped it to overcome constitutional challenges by "narrowly focusing" on the issue of pretrial crime. Moreover, the Supreme Court wrote, the statute appropriately provided "extensive safeguards" to further the accuracy of the judicial determination as well as to ensure that detention remained a carefully limited exception to liberty. Those safeguards included: (1) detention was limited to only "the most serious of crimes;" (2) the arrestee was entitled to a prompt hearing and the maximum length of pretrial detention was limited by stringent speedy trial time limitations; (3) detainees were to be housed separately from those serving sentences or awaiting appeals; (4) after a finding of probable cause, a "fullblown adversary hearing" was held in which the government was required to convince a neutral decision maker by clear and convincing evidence that no condition or combination of conditions of release would reasonably assure court appearance or the safety of the community or any person; (5) detainees had a right to counsel, and could testify or present information by proffer and cross-examine witnesses who appeared at the hearing; (6) judges were guided by statutorily enumerated factors such as the nature of the charge and the characteristics of the defendant; (7) judges were to include written findings of fact and a written statement of reasons for a decision to detain; and (8) detention decisions were subject to immediate appellate review.

While advances in pretrial research are beginning to suggest the need for certain alterations to the federal and D.C. statutes, both laws are currently considered "model" bail laws, and the Summary Report to the National Symposium on Pretrial Justice specifically recommends using the federal statute as a structural template to craft meaningful and transparent preventive detention provisions.

Sources and Resources: District of Columbia Code, §§ 23-1301-09, 1321-33; Federal Statute, 18 U.S.C. §§ 3141-56; *United States v. Salerno,* 481 U.S. 739 (1987); *National Symposium on Pretrial Justice: Summary Report of Proceedings*, at 42 (PJI/BJA 2011).

Indeed, given our country's foundational principles of liberty and freedom, it is not surprising that this parallel notion of bailable defendants actually obtaining release followed from England to America. William Blackstone, whose Commentaries on the Laws of England influenced our Founding Fathers as well as the entire judicial system and legal community, reported that denying the release of a bailable defendant during the American colonial period was considered itself an offense. In examining the administration of bail in Colonial Pennsylvania, author Paul Lermack reported that few defendants had trouble finding sureties, and thus, release.

This notion is also seen in early expressions of the law derived from court opinions. Thus, in the 1891 case of *United States v. Barber*, the United States Supreme Court articulated that in criminal bail, "it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial if the government can be assured of his presence at that time."[16] Four years later, in *Hudson v. Parker,* the Supreme Court wrote that the laws of the United States "have been framed upon the theory that [the accused] shall not, until he has been finally adjudged guilty . . . be absolutely compelled to undergo imprisonment or punishment."[17] Indeed, it was *Hudson* upon which the Supreme

Court relied in *Stack v. Boyle* in 1951, when the Court wrote its memorable quote equating the right to bail with the right to release and freedom:

> From the passage of the Judiciary Act of 1789, to the present Federal Rules of Criminal Procedure, Rule 46 (a)(1), 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 before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.[18]

[16] *United States v. Barber*, 140 U.S. 164, 167 (1891).
[17] *United States v. Hudson*, 156 U.S. 277, 285 (1895).
[18] 342 U.S. 1, 4 (1951) (internal citations omitted).

In his concurring opinion, Justice Jackson elaborated on the Court's reasoning:

> The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense. To open a way of escape from this handicap and possible injustice, Congress commands allowance of bail for one under charge of any offense not punishable by death . . . providing: 'A person arrested for an offense not punishable by death shall be admitted to bail' . . . before conviction.[19]

And finally, in perhaps its best known expression of the right to bail, the Supreme Court did not explain that merely having one's bail set, whether that setting resulted in release or detention, was at the core of the right. Instead, the Court wrote that "liberty" – a state necessarily obtained from actual release – is the American "norm."[20]

Nevertheless, in the field of pretrial justice we must also recognize the equally legitimate consideration of "no bail," or detention. It is now fairly clear that the federal constitution does not guarantee an absolute right to bail, and so it is more appropriate to discuss the right as one that exists when it is authorized by a particular constitutional or legislative provision. The Court's opinion in *United States v. Salerno* is especially relevant because it instructs us that when examining a law with no constitutionally-based right-to-bail parameters (such as, arguably, the federal law), the legislature may enact statutory limits on pretrial freedom (including detention) so long as: (1) those limitations are not excessive in relation to the government's legitimate purposes; (2) they do not offend due process (either substantive or procedural); and (3) they do not result in a situation where pretrial liberty is not the norm or where detention has not been carefully limited as an exception to release.

It is not necessarily accurate to say that the Court's opinion in *Salerno* eroded its opinion in *Stack,* including *Stack's* language equating bail with release. *Salerno* purposefully explained *Stack* and another case, *Carlson v. Landon*, together to provide cohesion. And therefore, while it is true that the federal constitution does not contain an explicit right to bail, when that right is granted by the applicable statute (or in the various states' constitutions or statutes), it should be regarded as a right to pretrial freedom. The *Salerno* opinion is especially instructive in telling us how to create a fair and transparent

[19] *Id.* at 7-8.

[20] *United States v. Salerno,* 481 U.S. 739, 755 (1987) ("In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception").

"no bail" side of the dichotomy, and further reminds us of a fundamental principle of pretrial justice: both bail and no bail are lawful if we do them correctly.

Liberalizing American bail laws during our country's colonial period meant that these laws did not always include the English "factors" for initially determining bailability, such as the seriousness of the offense, the weight of the evidence, and the character of the accused. Indeed, by including an examination of the evidence into its constitutional bail provision, Pennsylvania did so primarily to allow bailability despite the defendant being charged with a capital crime. Nevertheless, the historical factors first articulated in the Statute of Westminster survived in America through the judge's use of these factors to determine *conditions* of bail.

Thus, technically speaking, bailability in England after 1275 was determined through an examination of the charge, the evidence, and the character or criminal history of the defendant, and if a defendant was deemed bailable, he or she was required to be released. In America, bailability was more freely designated, but judges would still typically look at the charge, the evidence, and the character of the defendant to set the only limitation on pretrial freedom available at that time – the amount of the financial condition. Accordingly, while bailability in America was still meant to mean release, by using those factors traditionally used to determine bailability to now set the primary condition of bail or release, judges found that those factors sometimes had a determining effect on the actual release of bailable defendants. Indeed, when America began running out of personal sureties, judges, using factors historically used to determine bailability, were finding that these same factors led to unattainable financial conditions creating, ironically, a state of unbailability for technically bailable defendants.

> *"Bail is a matter of confidence and personal relation. It should not be made a matter of contract or commercialism. . . . Why provide for a bail piece, intended to promote justice, and then destroy its effect and utility? Why open the door to barter freedom from the law for money?"*
>
> *Carr v Davis* 64 W. Va. 522, 535 (1908) (Robinson, J. dissenting).

Intersection of the Two Historical Phenomena

The history of bail in America in the 20th century represents an intersection of these two historical phenomena. Indeed, because it involved requiring defendants to pay money up-front as a prerequisite to release, the blossoming of a secured bond scheme as administered through a commercial surety system was bound to lead to perceived abuses in the bail/no bail dichotomy to such an extent that history would demand some correction. Accordingly, within only 20 years of the advent of commercial sureties, scholars began to study and critique that for-profit system.

In the first wave of research, scholars focused on the inability of bailable defendants to obtain release due to secured financial conditions and the abuses in the commercial surety industry. The first generation of bail reform, as it is now known, used research from the 1920s to the 1960s to find alternatives to the commercial surety system, including release on recognizance and nonfinancial conditional release. Its focus was on the "bail" side of the dichotomy and how to make sure bailable defendants would actually obtain release.

The second generation of bail reform (from the 1960s to the 1980s) focused on the "no bail" side, with a wave of research indicating that there were some defendants whom society believed should be detained without bail (rather than by using money) due to their perceived dangerousness through documented instances of defendants committing crime while released through the bail process. That generation culminated with the United States Supreme Court's approval of a federal detention statute, and with states across America changing their constitutions and statutes to reflect not only a new constitutional purpose for restricting pretrial liberty – public safety – but also detention provisions that followed the Supreme Court's desired formula.

Three Generations of Bail Reform: Hallmarks and Highlights

Since the evolution from a personal surety system using unsecured bonds to primarily a commercial surety system using secured bonds, America has seen two generations of bail or pretrial reform and is currently in a third. Each generation has certain elements in common, such as significant research, a meeting of minds, and changes in laws, policies, and practices.

The First Generation – 1920s to 1960s: Finding Alternatives to the Traditional Money Bail System; Reducing Unnecessary Pretrial Detention of Bailable Defendants

Significant Research – This generation's research began with Roscoe Pound and Felix Frankfurter's *Criminal Justice in Cleveland* (1922) and Arthur Beeley's *The Bail System in Chicago* (1927), continued with Caleb Foote's study of the Philadelphia process found in *Compelling Appearance in Court: Administration of Bail in Philadelphia* (1954), and reached a peak through the research done by the Vera Foundation and New York University Law School's Manhattan Bail Project (1961) as well as similar bail projects such as the one created in Washington D.C. in 1963.

Meeting of Minds – The meeting of minds for this generation culminated with the 1964 Attorney General's National Conference on Bail and Criminal Justice and the Bail Reform Act of 1966.

Changes in Laws, Policies and Practices – The Supreme Court's ruling in *Stack v. Boyle* (1951) had already guided states to better individualize bail determinations through their various bail laws. The Bail Reform Act of 1966 (and state statutes modeled after the Act) focused on alternatives to the traditional money bail system by encouraging release on least restrictive, nonfinancial conditions as well as presumptions favoring release on recognizance, which were based on information gathered concerning a defendant's community ties to help assure court appearance. The American Bar Association's Criminal Justice Standards on Pretrial Release in 1968 made legal and evidence-based recommendations for all aspects of release and detention

decisions. Across America, though, states have not fully incorporated the full panoply of laws, policies, and practices designed to reduce unnecessary pretrial detention of bailable defendants

The Second Generation – late 1960s to 1980s: Allowing Consideration of Public Safety as a Constitutionally Valid Purpose to Limit Pretrial Freedom; Defining the Nature and Scope of Preventive Detention

Significant Research – Based on discussions in the 1960s, the American Bar Association Standards on Pretrial Release first addressed preventive detention (detaining a defendant with no bail based on danger and later expressly encompassing risk for failure to appear) in 1968, a position later adopted by other organizations' best practice standards. Much of the "research" behind this wave of reform focused on: (1) philosophical debates surrounding the 1966 Act's inability to address public safety as a valid purpose for limiting pretrial freedom; and (2) judges' tendencies to use money to detain defendants due to the lack of alternative procedures for defendants who pose high risk to public safety or for failure to appear for court. The research used to support Congress's finding of "an alarming problem of crimes committed by persons on release" (noted by the U.S. Supreme Court in *United States v. Salerno)* is contained in the text and references from Senate Report 98-225 to the Bail Reform Act of 1984. Other authors, such as John Goldkamp (*see Danger and Detention: A Second Generation of Bail Reform,* 76 J. Crim. L. & Criminology 1 (1985)) and Senator Ted Kennedy (*see A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform,* 48 Fordham L. Rev. 423 (1980)), also contributed to the debate and relied on a variety of empirical research in their papers.

Meeting of Minds – Senate Report 98-225 to the Bail Reform Act of 1984 cited broad support for the idea of limiting pretrial freedom up to and including preventive detention based on public safety in addition to court appearance. This included the fact that consideration of public safety already existed in the laws of several states and the District of Columbia, the fact that the topic was addressed by the various national standards, and the fact that it also had the support from the Attorney General's Task Force on Violent Crime, the Chief Justice of the United States Supreme Court, and even the President.

Changes in Laws, Policies and Practices – Prior to 1970, court appearance was the only constitutionally valid purpose for limiting a defendant's pretrial freedom. Congress first allowed public safety to be considered equally to court appearance in the District of Columbia Court Reform and Criminal Procedure Act of 1970, and many states followed suit. In 1984, Congress passed the Bail Reform Act of 1984 (part of the Comprehensive Crime Control Act), which included public safety as a valid purpose for limiting pretrial freedom and procedures designed to allow preventive detention without bail for high-risk defendants. In 1987, the United States Supreme Court upheld the Bail Reform Act of 1984 against facial due process and excessive bail challenges in *United States v, Salerno*. However, as in the first generation of bail reform, states across America have not fully implemented the laws, policies, and practices needed to adequately and lawfully detain defendants when necessary.

The Third Generation – 1990 to present: Fixing the Holes Left by States Not Fully Implementing Improvements from the First Two Generations of Bail Reform; Using Legal and Evidence-Based Practices to Create a More Risk-Based System of Release and Detention

Significant Research – Much of the research in this generation revisits deficiencies caused by the states not fully implementing adequate "bail" and "no bail" laws, policies, and practices developed in the previous two generations. Significant legal, historical, and empirical research sponsored by the Department of Justice, the Pretrial Justice Institute, the New York City Criminal Justice Agency, the District of Columbia Pretrial Services Agency, the Administrative Office of the U.S. Courts, various universities, and numerous other public, private, and philanthropic entities across America have continued to hone the arguments for improvements as well as the solutions to discreet bail issues. Additional groundbreaking research involves the creation of empirical risk assessment instruments for local, statewide, and now national use, along with research focusing on strategies for responding to predicted risk while maximizing release.

Meeting of Minds – The meeting of minds for this generation has been highlighted so far by the Attorney General's National Symposium on Pretrial Justice in 2011, along with the numerous policy statements issued by national organizations favoring the administration of bail based on risk.

Changes in Laws, Policies and Practices – Jurisdictions are only now beginning to make changes reflecting the knowledge generated and shared by this generation of pretrial reform. Nevertheless, changes are occurring at the county level (such as in Milwaukee County, Wisconsin, which has implemented a number of legal and evidence-based pretrial practices), the state level (such as in Colorado, which passed a new bail statute based on pretrial best practices in 2013), and even the national level (such as in the federal pretrial system, which continues to examine its release and detention policies and practices).

The Current Generation of Bail/Pretrial Reform

The first two generations of bail reform used research to attain a broad meeting of the minds, which, in turn, led to changes to laws, policies, and practices. It is now clear, however, that these two generations did not go far enough. The traditional money bail system, which includes heavy reliance upon secured bonds administered primarily through commercial sureties, continues to flourish in America, thus causing the unnecessary detention of bailable defendants. Moreover, for a number of reasons, the states have not fully embraced ways to fairly and transparently detain persons without bail, choosing instead to maintain a primarily charge-and-money-based bail system to respond to threats to public safety. In short, the two previous generations of bail reform have instructed us on how to properly implement both "bail" (release) and "no bail" (detention), but many states have instead clung to an outmoded system that leads to the detention of bailable defendants (or those whom we believe should be bailable defendants) and the release of unbailable defendants (or those whom we believe should be unbailable defendants) – abuses to the "bail/no bail" dichotomy that historically demand correction.

Fortunately, the current generation of pretrial reform has a vast amount of relevant research literature from which to fashion solutions to these problems. Moreover, like previous generations, this generation also shaped a distinct meeting of minds of numerous individuals, organizations, and government agencies, all of which now believe that pretrial improvements are necessary.

At its core, the third generation of pretrial reform thus has three primary goals. First, it aims to fully implement lawful bail/no bail dichotomies so that the right persons (and in lawful proportions) are deemed bailable and unbailable. Second, using the best available research and best pretrial practices, it seeks to lawfully effectuate the release and subsequent mitigation of pretrial risk of defendants deemed bailable and the fair and transparent detention of those deemed unbailable. Third, it aims to do this primarily by replacing charge-and-money-based bail systems with systems based on empirical risk.

Generations of Reform and the Commercial Surety Industry

The first generation of bail reform in America in the 20th century focused almost exclusively on finding alternatives to the predominant release system in place at the time, which was one based primarily on secured financial conditions administered through a commercial surety system. In hindsight, however, the second generation of bail reform arguably has had more of an impact on the for-profit bail bond industry in America. That generation focused primarily on public safety, and it led to changes in federal and state laws providing ways to assess pretrial risk for public safety, to release defendants with supervision designed to mitigate the risk to public safety, and even to detain persons deemed too risky.

Despite this national focus on public safety, however, the commercial surety industry did not alter its business model of providing security for defendants solely to help provide reasonable assurance of court appearance. Today, judges concerned with public safety cannot rely on commercial bail bondsmen because in virtually every state allowing money as condition of bail, the laws have been crafted so that financial conditions cannot be forfeited for breaches in public safety such as new crimes. In those states, a defendant who commits a new crime may have his or her bond revoked, but the money is not lost. When the bond is revoked, bondsmen, when they are allowed into the justice system (for most countries, four American states, and a variety of other large and small jurisdictions have ceased allowing profit at bail), can simply walk away, even though the justice system is not yet finished with that particular defendant. Bondsmen are free to walk away and are even free re-enter the system – free to negotiate a new surety contract with the same defendant, again with the money forfeitable only upon his or her failing to appear for court. Advances in our knowledge about the ineffectiveness and deleterious effects of money at bail only exacerbate the fundamental disconnect between the commercial surety industry, which survives on the use of money for court appearance, and what our society is trying to achieve through the administration of bail.

There are currently two constitutionally valid purposes for limiting pretrial freedom – court appearance and public safety. Commercial bail agents and the insurance companies that support them are concerned with only one – court appearance – because legally money is simply not relevant to public safety. Historically speaking, America's gradual movement toward using pretrial services agencies, which, when necessary, supervise defendants both for court appearance and public safety concerns, is due, at least in part, to the commercial surety industry's purposeful decision not to take responsibility for public safety at bail.

What Does the History of Bail Tell Us?

The history of bail tells us that the pretrial release and detention system that worked effectively over the centuries was a "bail/no bail" system, in which bailable defendants (or those whom society deemed should be bailable defendants) were expected to be

released and unbailable defendants (or those whom society deemed should be unbailable defendants) were expected to be detained. Moreover, the bail side of the dichotomy functioned most effectively through an uncompensated and un-indemnified personal surety system based on unsecured financial conditions. What we in America today know as the traditional money bail system – a system relying primarily on secured financial conditions administered through commercial sureties – is, historically speaking, a relatively new system that was encouraged to solve America's dilemma of the unnecessary detention of bailable defendants in the 1800s. Unfortunately, however, the traditional money bail system has only exacerbated the two primary abuses that have typically led to historical correction: (1) the unnecessary detention of bailable defendants, whom we now often categorize as lower risk; and (2) the release of those persons whom we feel should be unbailable defendants, and whom we now often categorize as higher risk.

The history of bail also instructs us on the proper purpose of bail. Specifically, while avoiding blood feuds may have been the primary purpose for the original bail setting, once more public processes and jails were fully introduced into the administration of criminal justice, the purpose of bail changed to one of providing a mechanism of conditional release. Concomitantly, the purpose of "no bail" was and is detention. Historically speaking, the only purpose for limiting or conditioning pretrial release was to assure that the accused come to court or otherwise face justice. That changed in the 1970s and 1980s, as jurisdictions began to recognize public safety as a second constitutionally valid purpose for limiting pretrial freedom.[21]

The American history of bail further instructs us on the lessons of the first two generations of bail and pretrial reform in the 20th century. If the first generation provided us with practical methods to better effectuate the release side of the "bail/no bail" dichotomy, the second generation provided us with equally effective methods for lawful detention. Accordingly, despite our inability to fully implement what we now know are pretrial best practices, the methods gleaned from the first two generations of

[21] Occasionally, a third purpose for limiting pretrial freedom has been articulated as maintaining or protecting the integrity of the courts or judicial process. Indeed, the third edition of the ABA Standards changed "to prevent intimidation of witnesses and interference with the orderly administration of justice" to "safeguard the integrity of the judicial process" as a "third purpose of release conditions." ABA Standards *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007), Std. 10-5.2 (a) (history of the standard) at 107. The phrase "integrity of the judicial process," however, is one that has been historically misunderstood (its meaning requires a review of appellate briefs for decisions leading up to the Supreme Court's opinion in *Salerno*), and that typically begs further definition. Nevertheless, in most, if not all cases, that further definition is made unnecessary as being adequately covered by court appearance and public safety. Indeed, the ABA Standards themselves state that one of the purposes of the pretrial decision is "maintaining the integrity of the judicial process by securing defendants for trial." *Id.* Std. 10-1.1, at 36.

bail reform as well as the research currently contributing to the third generation have given us ample knowledge to correct perceived abuses and to make improvements to pretrial justice. In the next section, we will see how the evolution of the law and legal foundations of pretrial justice provide the parameters for those improvements.

Additional Sources and Resources: William Blackstone, *Commentaries on the Laws of England* (Oxford 1765-1769); June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail,* 34 Syracuse L. Rev. 517 (1983); Stevens H. Clarke, *Pretrial Release: Concepts, Issues, and Strategies for Improvement,* 1 Res. in Corr. 3:1 (1988); Comment, *Bail: An Ancient Practice Reexamined,* 70 Yale L. J. 966 (1960-61); Elsa de Haas, *Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275* (AMS Press, Inc., New York 1966); F.E. Devine, *Commercial Bail Bonding: A Comparison of Common Law Alternatives* (Praeger Pub. 1991); Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System,* 33 Hous. L. Rev. 731 (1996-97); William F. Duker, *The Right to Bail: A Historical Inquiry,* 42 Alb. L. Rev. 33 (1977-78); Caleb Foote, *The Coming Constitutional Crisis in Bail: I and II,* 113 Univ. Pa. L. Rev. 959 and 1125 (1965); Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964* (DOJ/Vera Found. 1964); Ronald Goldfarb, *Ransom: A Critique of the American Bail System* (Harper & Rowe 1965); James V. Hayes, *Contracts to Indemnify Bail in Criminal Cases,* 6 Fordham L. Rev. 387 (1937); William Searle Holdsworth, *A History of English Law* (Methuen & Co., London, 1938); Paul Lermack, *The Law of Recognizances in Colonial Pennsylvania,* 50 Temp. L. Q. 475 (1977); Evie Lotze, John Clark, D. Alan Henry, & Jolanta Juszkiewicz, *The Pretrial Services Reference Book: History, Challenges, Programming* (Pretrial Servs. Res. Ctr. 1999); Hermine Herta Meyer, *Constitutionality of Pretrial Detention,* 60 Geo. L. J. 1139 (1971-72); Gerald P. Monks, *History of Bail* (1982); Luke Owen Pike, *The History of Crime in England* (Smith, Elder, & Co. 1873); Frederick Pollock & Frederic Maitland, *The History of English Law Before the Time of Edward I* (1898); Timothy R. Schnacke, Michael R. Jones, Claire M. B. Brooker, *The History of Bail and Pretrial Release* (PJI 2010); Wayne H. Thomas, Jr. *Bail Reform in America* (Univ. CA Press 1976); Peggy M. Tobolowsky & James F. Quinn, *Pretrial Release in the 1990s: Texas Takes Another Look at Nonfinancial Release Conditions,* 19 New Eng. J. on Crim. & Civ. Confinement 267 (1993); Marie VanNostrand, *Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC 2007); Betsy Kushlan Wanger, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act,* 97 Yale L. J. 320 (1987-88). **Cases:** *United States v. Edwards,* 430 A. 2d 1321 (D.C. 1981) (en banc); *State v. Brooks,* 604 N.W. 2d 345 (Minn. 2000); *State v. Briggs,* 666 N.W. 2d 573 (Iowa 2003).

Chapter 3: Legal Foundations of Pretrial Justice

History and Law

History and the law clearly influence each other at bail. For example, in 1627, Sir Thomas Darnell and four other knights refused to pay loans forced upon them by King Charles I. When the King arrested the five knights and held them on no charge (thus circumventing the Statute of Westminster, which required a charge, and the Magna Carta, on which the Statute was based), Parliament responded by passing the Petition of Right, which prohibited detention by any court without a formal charge. Not long after, however, officials sidestepped the Petition of Right by charging individuals and then running them through numerous procedural delays to avoid release. This particular practice led to the Habeas Corpus Act of 1679. However, by expressly acknowledging discretion in setting amounts of bail, the Habeas Corpus Act also unwittingly allowed determined officials to begin setting financial conditions of bail in prohibitively high amounts. That, in turn, led to passage of the English Bill of Rights, which prohibited "excessive" bail. In America, too, we see historical events causing changes in the laws and those laws, in turn, influencing events thereafter. One need only look to events before and after the two American generations of bail reform in the 20th century to see how history and the law are intertwined.

And so it is that America, which had adopted and applied virtually every English bail reform verbatim in its early colonial period, soon began a process of liberalizing both criminal laws generally, and bail in particular, due to the country's unique position in culture and history. Essentially, America borrowed the best of English law (such as an overall right to bail, habeas corpus, and prohibition against excessiveness) and rejected the rest (such as varying levels of discretion potentially interfering with the right to bail as well as harsh criminal penalties for certain crimes). The Colonies wrote bail provisions into their charters and re-wrote them into their constitutions after independence. Among those constitutions, we see broader right-to-bail provisions, such as in the model Pennsylvania law, which granted bail to all except those facing capital offenses (limited to willful murder) and only "where proof is evident or the presumption great."[22] Nevertheless, some things remained the same. For example, continuing the long historical tradition of bail in England, the sole purpose of limiting pretrial freedom in America remained court appearance, and the only means for doing so remained setting financial conditions or amounts of money to be forfeited if a defendant missed court.

[22] June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail,* 34 Syracuse L. Rev. 517, 531 (1983) (quoting 5 American Charters 3061, F. Thorpe ed. 1909).

"The end of law is not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings capable of law, where there is no law, there is no freedom."

John Locke, 1689

In America, the ultimate expression of our shared values is contained in our founding documents, the Declaration of Independence and the Constitution. But if the Declaration can be viewed as amply supplying us with certain fundamental principles that can be interwoven into discussions of bail, such as freedom and equality, then the Constitution has unfortunately given us some measure of confusion on the topic. The confusion stems, in part, from the fact that the Constitution itself explicitly covers only the right of habeas corpus in Article 1, Section 9 and the prohibition on excessive bail in the 8th Amendment, which has been traced to the Virginia Declaration of Rights. There is no express right to bail in the U.S. Constitution, and that document provides no illumination on which persons should be bailable and which should not. Instead, the right to bail in the federal system originated from the Judiciary Act of 1789, which provided an absolute right to bail in non-capital federal criminal cases. Whether the constitutional omission was intentional is subject to debate, but the fact remains that when assessing the right to bail, it is typical for a particular state to provide superior rights to the United States Constitution. It also means that certain federal cases, such *United States v. Salerno*, must be read realizing that the Court was addressing a bail/no bail scheme derived solely from legislation. And it means that any particular bail case or dispute has the potential to involve a fairly complex mix of state and federal claims based upon any particular state's bail scheme.

The Legal "Mix"

There are numerous sources of laws surrounding bail and pretrial practices, and each state – and often a jurisdiction within a state – has a different "mix" of sources from that of all other jurisdictions. In any particular state or locality, bail practices may be dictated or guided by the United States Constitution and United States Supreme Court opinions, federal appellate court opinions, the applicable state constitution and state supreme court and other state appellate court decisions, federal and state bail statutes, municipal ordinances, court rules, and even administrative regulations. Knowing your particular mix and how the various sources of law interact is crucial to understanding and ultimately assessing your jurisdiction's pretrial practices.

The fact that we have separate and sometimes overlapping federal and state pretrial legal foundations is one aspect of the evolution of bail law that adds complexity to particular cases. The other is the fact that America has relatively little authoritative legal guidance on the subject of bail. In the federal realm, this may be due to issues of incorporation and jurisdiction, but in the state realm it may also be due to the relatively recent (historically speaking) change from unsecured to secured bonds. Until the nineteenth century, historians suggest that bail based on unsecured bonds administered through a personal surety system led to the release of virtually all bailable criminal defendants. Such a high rate of release leaves few cases posing the kind of constitutional issues that require an appellate court's attention. But even in the 20th century, we really have only two (or arguably three) significant United States Supreme Court cases discussing the important topic of the release decision at bail. It is apparently a topic that lawyers, and thus federal and state trial and appellate courts, have largely avoided. This avoidance, in turn, potentially stands in the way of jurisdictions looking for the bright line of the law to guide them through the process of improving the administration of bail.

On the other hand, what we lack in volume of decisions is made up to some extent by the importance of the few opinions that we do have. Thus, we look at *Salerno* not as merely one case among many from which we may derive guidance; instead, *Salerno* must be scrutinized and continually referenced as a foundational standard as we attempt to discern the legality of proposed improvements. The evolution of law in America, whether broadly encompassing all issues of criminal procedure, or more narrowly discussing issues related directly to bail and pretrial justice, has demonstrated conclusively the law's importance as a safeguard to implementing particular practices in the criminal process. Indeed, in other fields we speak of using evidence-based practices to achieve the particular goals of the discipline. In bail, however, we speak of "legal and

evidence-based practices,"[23] because it is the law that articulates those disciplinary goals to begin with. The phrase legal and evidence-based practices acknowledges the fact that in bail and pretrial justice, the empirical evidence, no matter how strong, is always subservient to fundamental legal foundations based on fairness and equal justice.

Fundamental Legal Principles

While all legal principles affecting the pretrial process are important, there are some that demand our particular attention as crucial to a shared knowledge base. The following list is derived from materials taught by D.C. Superior Court Judge Truman Morrison, III, in the National Institute of Corrections' Orientation for New Pretrial Executives, and occasionally supplemented by information contained in Black's Law Dictionary (9th ed.) as well as the sources footnoted or cited at the end of the chapter.

The Presumption of Innocence

Perhaps no legal principle is as simultaneously important and misunderstood as the presumption of innocence. Technically speaking, it is the principle that a person may not be convicted of a crime unless and until the government proves guilt beyond a reasonable doubt, without any burden placed on the defendant to prove his or her innocence. Its importance is emphasized in the Supreme Court's opinion in *Coffin v. United States*, in which the Court wrote: "a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[24] In *Coffin,* the Court traced the presumption's origins to various extracts of Roman law, which included language similar to the "better that ten guilty persons go free" ratio articulated by Blackstone. The importance of the presumption of innocence has not waned, and the Court has expressly quoted the "axiomatic and elementary" language in just the last few years.

Its misunderstanding comes principally from the fact that in *Bell v. Wolfish*, the Supreme Court wrote that the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun,"[25] a line that has caused many to argue, incorrectly, that the presumption of innocence has no application to bail. In fact, *Wolfish* was a "conditions of confinement" case, with inmates complaining about various conditions (such as double bunking), rules

[23] Marie VanNostrand, *Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC 2007).
[24] *Coffin v. United States,* 156 U.S. 432, 453 (1895).
[25] *Bell v. Wolfish*, 441 U.S. 520, 533 (1979).

(such as prohibitions on receiving certain books), and practices (such as procedures involving inmate searches) while being held in a detention facility. In its opinion, the Court was clear about its focus in the case: "We are not concerned with the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily entails. . . . Instead, what is at issue when an aspect of pretrial detention that is not alleged to violate any express guarantee of the Constitution is challenged, is the detainee's right to be free from punishment, and his understandable desire to be as comfortable as possible during his confinement, both of which may conceivably coalesce at some point."[26] Specifically, and as noted by the Court, the parties were not disputing whether the government could detain the prisoners, the government's purpose for detaining the prisoners, or even whether complete confinement was a legitimate means for limiting pretrial freedom, all issues that would necessarily implicate the right to bail, statements contained in *Stack v. Boyle*, and the presumption of innocence. Instead, the issue before the Court was whether, after incarceration, the prisoners' complaints could be considered punishment in violation of the Due Process Clause.

Accordingly, the presumption of innocence has everything to do with bail, at least so far as determining which classes of defendants are bailable and the constitutional and statutory rights flowing from that decision. And therefore, the language of *Wolfish* should in no way diminish the strong statements concerning the right to bail found in *Stack v. Boyle* (and other state and federal cases that have quoted *Stack*), in which the Court wrote, "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 before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[27] The idea that the right to bail (that is, the right to release when the accused is bailable) necessarily triggers serious consideration of the presumption of innocence is also clearly seen through Justice Marshall's dissent in *United States v. Salerno,* in which he wrote, albeit unconvincingly, that "the very pith and purpose of [the Bail Reform Act of 1984] is an abhorrent limitation of the presumption of innocence."[28]

As explained by the Court in *Taylor v. Kentucky*, the phrase is somewhat inaccurate in that there is no true presumption – that is, no mandatory inference to be drawn from evidence. Instead, "it is better characterized as an 'assumption' that is indulged in the absence of contrary evidence."[29] Moreover, the words "presumption of innocence" themselves are found nowhere in the United States Constitution, although the phrase is linked to the 5th, 14th, and 6th Amendments to the Constitution. *Taylor* suggests an appropriate way of looking at the presumption as "a special and additional caution" to

[26] *Id.* at 533-34 (internal citations omitted).
[27] 342 U.S. 1, 4 (1951) (internal citation omitted).
[28] *United States v. Salerno*, 481 U.S. 739, 762-63 (1987).
[29] *Taylor v Kentucky*, 436 U.S. 478, 483 n. 12 (1978).

consider beyond the notion that the government must ultimately prove guilt. It is the idea that "no surmises based on the present situation of the accused"[30] should interfere with the jury's determination. Applying this concept to bail, then, the presumption of innocence is like an aura surrounding the defendant, which prompts us to set aside our potentially negative surmises based on the current arrest and confinement as we determine the important question of release or detention.

> *"Here we deal with a right, the right to release of presumably innocent citizens. I cannot conceive that such release should not be made as widely available as it reasonably and rationally can be."*
>
> *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (Gee, J. specially concurring)

[30] *Id.* at 485 (quoting 9 J. Wigmore, Evidence § 2511 (3d ed. 1940) at 407).

The Right to Bail

When granted by federal or state law, the right to bail should be read as a right to release through the bail process. It is often technically articulated as the "right to non-excessive" bail, which goes to the reasonableness of any particular conditions or limitations on pretrial release.

The preface, "when granted by federal or state law" is crucial to understand because we now know that the "bail/no bail" dichotomy is one that legislatures or the citizenry are free to make though their statutes and constitutions. Ever since the Middle Ages, there have been certain classes of defendants (typically expressed by types of crimes, but changing now toward categories of risk) who have been refused bail – that is, denied a process of release altogether. The bail/no bail dichotomy is exemplified by the early bail provisions of Massachusetts and Pennsylvania, which granted bail to some large class of persons "except," and with the exception being the totality of the "no bail" side. These early provisions, as well as those copied by other states, were technically the genesis of what we now call "preventive detention" schemes, which allow for the detention of risky defendants – the risk at the time primarily being derived from the seriousness of the charge, such as murder or treason.

The big differences between detention schemes then and now include: (1) the old schemes were based solely on risk for failure to appear for court; we may now detain defendants based on a second constitutionally valid purpose for limiting pretrial freedom – public safety; (2) the old schemes were mostly limited to findings of "proof evident and presumption great" for the charge; today preventive detention schemes often have more stringent burdens for the various findings leading to detention; (3) overall, the states have largely widened the classes of defendants who may lawfully be detained – they have, essentially, changed the ratio of bailable to unbailable defendants to include potentially more unbailable defendants than were deemed unbailable, say, during the first part of the 20th century; and (4) in many cases, the states have added detailed provisions to the detention schemes (in addition to their release schemes). Presumably, this was to follow guidance by the United States Supreme Court from its opinion in *United States v. Salerno,* which approved the federal detention scheme based primarily on that law's inclusion of certain procedural due process elements designed to make the detention process fair and transparent.

How a particular state has defined its "bail/no bail" dichotomy is largely due to its constitution, and arguably on the state's ability to easily amend that constitution. According to legal scholars Wayne LaFave, et al., in 2009 twenty-three states had constitutions modeled after Pennsylvania's 1682 language that guaranteed a right to bail to all except those charged with capital offenses, where proof is evident or the presumption is great. It is unclear whether these states today choose to remain broad "right-to-bail" states, or whether their constitutions are simply too difficult to amend.

Nevertheless, these states' laws likely contain either no, or extremely limited, statutory pretrial preventive detention language.[31]

Nine states had constitutions mirroring the federal constitution – that is, they contain an excessive bail clause, but no clause explicitly granting a right to bail. The United States Supreme Court has determined that the federal constitution does not limit Congress' ability to craft a lawful preventive detention statute, and these nine states likewise have the same ability to craft preventive detention statutes (or court rules) with varying language.

The remaining 18 states had enacted in their constitutions relatively recent amendments describing more detailed preventive detention provisions. As LaFave, et al., correctly note, these states may be grouped in three ways: (1) states authorizing preventive detention for certain charges, combined with the requirement of a finding of danger to the community; (2) states authorizing preventive detention for certain charges, combined with some condition precedent, such as the defendant also being on probation or parole; and (3) states combining elements of the first two categories.

There are currently two fundamental issues concerning the right to bail in America today. The first is whether states have created the right ratio of bailable to unbailable defendants. The second is whether they are faithfully following best practices using the ratio that they currently have. The two issues are connected.

American law contemplates a presumption of release, and thus there are limits on the ratio of bailable to unbailable defendants. The American Bar Association Standards on Pretrial Release describes its statement, "the law favors the release of defendants pending adjudication of charges" as being "consistent with Supreme Court opinions emphasizing the limited permissible scope of pretrial detention."[32] It notes language from *Stack v. Boyle*, in which the Court equates the right to bail to "[the] traditional right to freedom before conviction,"[33] and from *United States v. Salerno*, in which the Court wrote, "In our society, liberty is the norm, and detention prior to trial or without trial is

[31] *See* Wayne R. LaFave, Jerold H. Israel, Nancy J. King and Orin S. Kerr, *Criminal Procedure* (3rd ed. 2007 & 5th ed. 2009). Readers should be vigilant for activity changing these numbers. For example, the 2010 constitutional amendment in Washington State likely adds it to the category of states having preventive detention provisions in their constitutions. Moreover, depending on how one reads the South Carolina constitution, the counts may, in fact, reveal 9 states akin to the federal scheme, 21 states with traditional right to bail provisions, and 20 states with preventive detention amendments.

[32] *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007), Std. 10-1.1 (commentary) at 38.

[33] 342 U.S. 1, 4 (1951).

the carefully limited exception."[34] Beyond these statements, however, we have little to tell us definitively and with precision how many persons should remain bailable in a lawful bail/no bail scheme.

We do know, however, that the federal "bail/no bail" scheme was examined by the Supreme Court and survived at least facial constitutional attacks based on the Due Process Clause and the 8th Amendment. Presumably, a state scheme fully incorporating the detention-limiting elements of the federal law would likely survive similar attacks. Accordingly, using the rest of the *Salerno* opinion as a guide, one can look at any particular jurisdiction's bail scheme to assess whether that scheme appears, at least on its face, to presume liberty and to restrict detention by incorporating the numerous elements from the federal statute that were approved by the Supreme Court. For example, if a particular state included a provision in either its constitution or statute opening up the possibility of detention for all defendants no matter what their charges, the scheme should be assessed for its potential to over-detain based on *Salerno's* articulated approval of provisions that limited detention to defendants "arrested for a specific category of extremely serious offenses."[35] Likewise, any jurisdiction that does not "carefully" limit detention – that is, it detains carelessly or without thought possibly through the casual use of money – is likely to be seen as running afoul of the foundational principles underlying the Court's approval of the federal law.

The second fundamental issue concerning the right to bail – whether states are faithfully following the ratio that they currently have – is connected to the first. If states have not adequately defined their bail/no bail ratio, they will often see money still being used to detain defendants whom judges feel are extreme risks, which is essentially the same practice that led to the second generation of American bail reform in the 20th century. Simply put, a proper bail/no bail dichotomy should lead naturally to an in-or-out decision by judges, with bailable defendants released pursuant to a bond with reasonable conditions and unbailable defendants held with no bond. Without belaboring the point, judges are not faithfully following any existing bail/no bail dichotomy whenever they (1) treat a bailable defendant as unbailable by setting unattainable conditions, or (2) treat an unbailable defendant as bailable in order to avoid the lawfully enacted detention provisions. When these digressions occur, then they suggest either that judges should be compelled to comply with the existing dichotomy, or that the balance of the dichotomy must be changed.

This latter point is important to repeat. Among other things, the second generation of American bail reform was, at least partially, in response to judges setting financial conditions of bail at unattainable levels to protect the public despite the fact that the constitution had not been read to allow public safety as a proper purpose for limiting pretrial freedom. Judges who did so were said to be setting bail "sub rosa," in that they

[34] 481 U.S. 739, 755 (1987).
[35] *Id.* at 750.

were working secretively toward a possibly improper purpose of bail. The Bail Reform Act of 1984, as approved by the United States Supreme Court, was designed to create a more transparent and fair process to allow the detention of high-risk defendants for the now constitutionally valid purpose of public safety. From that generation of reform, states learned that they could craft constitutional and statutory provisions that would effectively define the "bail" and "no bail" categories so as to satisfy both the Supreme Court's admonition that liberty be the "norm" and the public's concern that the proper persons be released and detained.

Unfortunately, many states have not created an appropriate balance. Those that have attempted to, but have done so inadequately, are finding that the inadequacy often lies in retaining a charge-based rather than a risk-based scheme to determine detention eligibility. Accordingly, in those states judges continue to set unattainable financial conditions at bail to detain bailable persons whom they consider too risky for release. If a proper bail/no bail balance is not crafted through a particular state's preventive detention provisions, and if money is left as an option for conditional release, history has shown that judges will use that money option to expeditiously detain otherwise bailable defendants. On the other hand, if the proper balance is created so that high-risk defendants can be detained through a fair and transparent process, money can be virtually eliminated from the bail process without negatively affecting public safety or court appearance rates.

Despite certain unfortunate divergences, the law, like the history, generally considers the right to bail to be a right to release. Thus, when a decision has been made to "bail" a particular defendant, every consideration should be given, and every best practice known should be employed, to effectuate and ensure that release. Bailable defendants detained on unattainable conditions should be considered clues that the bail process is not functioning properly. Judicial opinions justifying the detention of bailable defendants (when the bailable defendant desires release) should be considered aberrations to the historic and legal notion that the right to bail should equal the right to release.

What Can International Law and Practices Tell Us About Bail?

Unnecessary and arbitrary pretrial detention is a worldwide issue, and American pretrial practitioners can gain valuable perspective by reviewing international treaties, conventions, guidelines, and rules as well as reports documenting international practices that more closely follow international norms.

According to the American Bar Association's Rule of Law Initiative,

> "International standards strongly encourage the imposition of noncustodial measures during investigation and trial and at sentencing, and hold that deprivation of liberty should be imposed only when non-custodial measures would not suffice. The overuse of detention is often a symptom of a dysfunctional criminal justice system that may lack protection for the rights of criminal defendants and the institutional capacity to impose, implement, and monitor non-custodial measures and sanctions. It is also

often a cause of human rights violations and societal problems associated with an overtaxed detention system, such as overcrowding; mistreatment of detainees; inhumane detention conditions; failure to rehabilitate offenders leading to increased recidivism; and the imposition of the social stigma associated with having been imprisoned on an ever-increasing part of the population. Overuse of pretrial detention and incarceration at sentencing are equally problematic and both must be addressed in order to create effective and lasting criminal justice system reform."

International pretrial practices, too, can serve as templates for domestic improvement. For example, bail practitioners frequently cite to author F.E. Devine's study of international practices demonstrating various effective alternatives to America's traditional reliance on secured bonds administered by commercial bail bondsmen and large insurance companies.

Sources and Resources: David Berry & Paul English, *The Socioeconomic Impact of Pretrial Detention* (Open Society Foundation 2011); F.E. Devine, *Commercial Bail Bonding: A Comparison of Common Law Alternatives* (Greenwood Publishing Group 1991); Anita H. Kocsis, *Handbook of International Standards on Pretrial Detention Procedure* (ABA, 2010); Amanda Petteruti & Jason Fenster, *Finding Direction: Expanding Criminal Justice Options by Considering Policies of Other Nations* (Justice Policy Institute, 2011). There are also several additional documents and other resources available from the Open Society Foundation's Global Campaign for Pretrial Justice online website, found at http://www.opensocietyfoundations.org/projects/global-campaign-pretrial-justice.

Release Must Be the Norm

This concept is part of the overall consideration of the right to bail, discussed above, but it bears repeating and emphasis as its own fundamental legal principle. The Supreme Court has said, "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[36] As noted previously, in addition to suggesting the ratio of bailable to unbailable defendants, the second part of this quote cautions against a release process that results in detention as well as a detention process administered haphazardly. Given that the setting of a financial bail condition often leaves judges and others wondering whether the defendant will be able to make it – i.e., the release or detention of that particular defendant is now essentially random based on any number of factors – it is difficult to see how such a detention caused by money can ever be considered a "carefully limited" process.

Due Process

Due Process refers generally to upholding people's legal rights and protecting individuals from arbitrary or unfair federal or state action pursuant to the rights

[36] *Id.* at 755.

afforded by the Fifth and Fourteenth Amendments of the United States Constitution (and similar or equivalent state provisions). The Fifth Amendment provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law."[37] The Fourteenth Amendment places the same restrictions on the states. The concept is believed to derive from the Magna Carta, which required King John of England to accept certain limitations to his power, including the limitation that no man be imprisoned or otherwise deprived of his rights except by lawful judgment of his peers or the law of the land. Many of the original provisions of the Magna Carta were incorporated into the Statute of Westminster of 1275, which included important provisions concerning bail.

As noted by the Supreme Court in *United States v. Salerno*, due process may be further broken down into two subcategories:

> So called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.' When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as 'procedural' due process.[38]

In *Salerno,* the Court addressed both substantive and procedural fairness arguments surrounding the federal preventive detention scheme. The substantive due process argument dealt with whether detention represented punishment prior to conviction and an ends-means balancing analysis. The procedural issue dealt with how the statute operated – whether there were procedural safeguards in place so that detention could be ordered constitutionally. People who are detained pretrial without having the benefit of the particular safeguards enumerated in the *Salerno* opinion could, theoretically, raise procedural due process issues in an appeal of their bail-setting.

A shorthand way to think about due process is found in the words "fairness" or "fundamental fairness." Other words, such as "irrational," "unreasonable," and "arbitrary" tend also to lead to due process scrutiny, making the Due Process Clause a workhorse in the judicial review of bail decisions. Indeed, as more research is being conducted into the nature of secured financial conditions at bail – their arbitrariness, the irrationality of using them to provide reasonable assurance of either court appearance or public safety, and the documented negative effects of unnecessary pretrial detention – one can expect to see many more cases based on due process clause claims.

[37] U.S. Const. amend. V.
[38] 481 U.S 739, 746 (internal citations omitted).

Equal Protection

If the Due Process Clause protects against unfair, arbitrary, or irrational laws, the Equal Protection Clause of the Fourteenth Amendment (and similar or equivalent state provisions) protects against the government treating similarly situated persons differently under the law. Interestingly, "equal protection" was not mentioned in the original Constitution, despite the phrase practically embodying what we now consider to be the whole of the American justice system. Nevertheless, the Fourteenth Amendment to the United States Constitution now provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[39] While there is no counterpart to this clause that is applicable to the federal government, federal discrimination may be prohibited as violating the Due Process Clause of the Fifth Amendment.

> *"The only stable state is the one in which all men are equal before the law."*
>
> Aristotle, 350 B.C.

Over the years, scholars have argued that equal protection considerations should serve as an equally compelling basis as does due process for mandating fair treatment in the administration of bail, especially when considering the disparate effect of secured money bail bonds on defendants due only to their level of wealth. This argument has been bolstered by language from Supreme Court opinions in cases like *Griffin v. Illinois*, which dealt with a defendant's ability to purchase a transcript required for appellate review. In that case, Justice Black wrote, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[40] Moreover, sitting as circuit justice to decide a prisoner's release in two cases, Justice Douglas uttered the following dicta frequently cited as support for equal protection analysis: (1) "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?";[41] and (2) "[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."[42] Overall, despite scholarly arguments to invoke equal protection analysis to the

[39] U.S. Const. amend. XIV, § 1.
[40] 351 U.S. 12, 19 (1956).
[41] *Bandy v. United States*, 81 S. Ct. 197, 198 (1960).
[42] *Bandy v. United States*, 82 S. Ct. 11, 13 (1961).

issue of bail (including any further impact caused by the link between income and race), the courts have been largely reluctant to do so.

Excessive Bail and the Concept of Least Restrictive Conditions

Excessive bail is a legal term of art used to describe bail that is unconstitutional pursuant to the 8th Amendment to the United States Constitution (and similar or equivalent state provisions). The 8th Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[43] The Excessive Bail Clause derives from reforms made by the English Parliament in the 1600s to curb the abuse of judges setting impossibly high money bail to thwart the purpose of bail to afford a process of pretrial release. Indeed, historians note that justices began setting high amounts on purpose after King James failed to repeal the Habeas Corpus Act, and the practice represents, historically, the first time that a condition of bail rather than the actual existence of bail became a concern. The English Bill of Rights of 1689 first used the phrase, "Excessive bail ought not to be required," which was incorporated into the 1776 Virginia Declaration of rights, and ultimately found its way into the United States and most state constitutions. Excessiveness must be determined by looking both at federal and state law, but a rule of thumb is that the term relates overall to reasonableness.

"Excessive bail" is now, in fact, a misnomer, because bail more appropriately defined as a process of release does not lend itself to analysis for excessiveness. Instead, since it was first uttered, the phrase excessive bail has always applied to conditions of bail or limitations on pretrial release. The same historical factors causing jurisdictions to define bail as money are at play when one says that bail can or cannot be excessive; hundreds of years of having only one condition of release – money – have caused the inevitable but unfortunate blurring of bail and one of its conditions. Accordingly, when we speak of excessiveness, we now more appropriately speak in terms of limitations on pretrial release or freedom.

Looking at excessiveness in England in the 1600s requires us to consider its application within a personal surety system using unsecured amounts. Bail set at a prohibitively high amount meant that no surety (i.e., a person), or even group of sureties, would willingly take responsibility for the accused. Even before the prohibition, however, amounts were often beyond the means of any particular defendant, requiring sometimes several sureties to provide "sufficiency" for the bail determination. Accordingly, as is the case today, it is likely that some indicator of excessiveness at a time of relatively plentiful sureties for any particular defendant was continued detention of an otherwise bailable defendant. Nevertheless, before the abuses leading to the English Bill of Rights and Habeas Corpus Act, there was no real indication that high amounts required of sureties led to detention in England. And in America, "[a]lthough courts had broad authority to deny bail for defendants charged with capital offenses, they would generally release in a form of pretrial custody defendants who

[43] U.S. Const. amend. VIII.

were able to find willing custodians."[44] In a review of the administration of bail in Colonial Pennsylvania, author Paul Lermack concluded that "bail . . . continued to be granted routinely . . . for a wide variety of offenses . . . [and] [a]lthough the amount of bail required was very large in cash terms and a default could ruin a guarantor, few defendants had trouble finding sureties."[45]

The current test for excessiveness from the United States Supreme Court is instructive on many points. In *United States v. Salerno*, the Court wrote as follows:

> 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. *Stack v. Boyle*, *supra*. We believe that, when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the 8th Amendment does not require release on bail.[46]

Thus, as explained in *Galen v. County of Los Angeles,* to determine excessiveness, one must

> look to the valid state interests bail is intended to serve for a particular individual and judge whether bail conditions are excessive for the purpose of achieving those interests. The state may not set bail to achieve invalid interests . . . nor in an amount that is excessive in relation to the valid interests it seeks to achieve.[47]

Salerno thus tells us at least three important things. First, the law of *Stack v. Boyle* is still strong: when the state's interest is assuring the presence of the accused, "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the 8th Amendment."[48] The idea of "reasonable" calculation necessarily compels us to assess how judges are typically setting bail, which might be arbitrarily (such as through a bail schedule) or irrationally (such as through setting financial conditions to

---

[44] Betsy Kushlan Wanger, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act,* 97 Yale L. J. 323, 323-24 (1987-88) (internal citations omitted).
[45] Paul Lermack, *The Law of Recognizances in Colonial Pennsylvania,* 50 Temp. L. Q. 475 at 497, 505 (1977).
[46] 481 U.S. 739, 754-55 (1987).
[47] 477 F.3d 652, 660 (9th Cir. 2007) (internal citations omitted).
[48] 342 U.S. 1, 5 (1951).

protect the public when those conditions cannot be forfeited for breaches in public safety, or when they are otherwise not effective at achieving the lawful purposes for setting them, which recent research suggests).

Second, financial conditions (i.e., amounts of money) are not the only conditions vulnerable to an excessive bail claim. Any unreasonable condition of release, including a nonfinancial condition, that has no relationship to mitigating an identified risk, or that exceeds what is needed to reasonably assure the constitutionally valid state interest, might be deemed constitutionally excessive.

Third, the government must have a proper purpose for limiting pretrial freedom. This is especially important because scholars and courts (as well as Justice Douglas, again sitting as circuit justice) have indicated that setting bail with a purpose to detain an otherwise bailable defendant would be unconstitutional. In states where the bail/no bail dichotomy has been inadequately crafted, however, judges are doing precisely that.

While the Court in *Salerno* upheld purposeful pretrial detention pursuant to the Bail Reform Act of 1984, it did so only because the statute contained "numerous procedural safeguards" that are rarely, if ever, satisfied merely through the act of setting a high money bond. Therefore, when a state has established a lawful method for preventively detaining defendants, setting financial conditions designed to detain otherwise bailable defendants outside of that method could still be considered an unlawful purpose. Purposeful pretrial detention through a process of the type endorsed by the United States Supreme Court is entirely different from purposeful pretrial detention done through setting unattainable financial conditions of release.

When the United States Supreme Court says that conditions of bail must be set at a level designed to assure a constitutionally valid purpose for limiting pretrial freedom "and no more," as it did in *Salerno,* then we must also consider the related legal principle of "least restrictive conditions" at bail. The phrase "least restrictive conditions" is a term of art expressly contained in the federal and District of Columbia statutes, the American Bar Association best practice standards on pretrial release, and other state statutes based on those Standards (or a reading of *Salerno*). Moreover, the phrase is implicit through similar language from various state high court cases articulating, for example, that bail may be met only by means that are "the least onerous" or that impose the "least possible hardship" on the accused.

Commentary to the ABA Standard recommending release under the least restrictive conditions states as follows:

> This Standard's presumption that defendants should be released under the least restrictive conditions necessary to provide reasonable assurance they will not flee or present a danger is tied closely to the presumption favoring release generally. It has been codified in the Federal Bail Reform

> Act and the District of Columbia release and pretrial detention statute, as well as in the laws and court rules of a number of states. The presumption constitutes a policy judgment that restrictions on a defendant's freedom before trial should be limited to situations where restrictions are clearly needed, and should be tailored to the circumstances of the individual case. Additionally, the presumption reflects a practical recognition that unnecessary detention imposes financial burdens on the community as well as on the defendant.[49]

The least restrictive principle is foundational, and is expressly reiterated throughout the ABA Standards when, for example, those Standards recommend citation release or summonses versus arrest. Moreover, the Standards' overall scheme creating a presumption of release on recognizance, followed by release on nonfinancial conditions, and finally release on financial conditions is directly tied to this foundational premise. Indeed, the principle of least restrictive conditions transcends the Standards and flows from even more basic understandings of criminal justice, which begins with presumptions of innocence and freedom, and which correctly imposes increasing burdens on the government to incrementally restrict one's liberty.

More specifically, however, the ABA Standards' commentary on financial conditions makes it clear that the Standards consider secured financial conditions to be more restrictive than both unsecured financial conditions and nonfinancial conditions: "When financial conditions are warranted, the least restrictive conditions principle requires that unsecured bond be considered first."[50] Moreover, the Standards state, "Under Standard 10-5.3(a), financial conditions may be employed, but only when no less restrictive non-financial release condition will suffice to ensure the defendant's appearance in court. An exception is an unsecured bond because such a bond requires no 'up front' costs to the defendant and no costs if the defendant meets appearance requirements."[51] These principles are well founded in logic: setting aside, for now, the argument that money at bail might not be of any use at all, it at least seems reasonably clear that secured financial conditions (requiring up-front payment) are always more restrictive than unsecured ones, even to the wealthiest defendant. Moreover, in the aggregate, we know that secured financial conditions, as typically the only condition precedent to release, are highly restrictive compared to all nonfinancial conditions and unsecured financial conditions in that they tend to cause pretrial detention. Like detention itself, any condition causing detention should be considered highly restrictive. In sum, money is a highly restrictive condition, and more so (and possibly excessive) when combined with other conditions that serve the same purpose.

---

[49] *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007), Std. 10-1.2 (commentary) at 39-40 (internal citations omitted).
[50] *Id.* Std. 10-1.4 (c) (commentary) at 43-44.
[51] *Id.* Std. 10-5.3 (a) (commentary) at 112.

What Can the Juvenile Justice System Tell Us About Adult Bail?

In addition to the fact that the United States Supreme Court relied heavily on *Schall v. Martin,* a juvenile preventive detention case, in writing its opinion in *United States v. Salerno,* an adult preventive detention case, the juvenile justice system has an impressive body of knowledge and research that can be used to inform the administration of bail for adults.

Perhaps most relevant is the work being done through the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative (JDAI), an initiative to promote changes to juvenile justice policies and practices to "reduce reliance on secure confinement, improve public safety, reduce racial disparities and bias, save taxpayers' dollars, and stimulate overall juvenile justice reforms."

In remarks at the National Symposium on Pretrial Justice in 2011, Bart Lubow, Director of the Juvenile Justice Strategy Center of the Foundation, stated that JDAI used cornerstone innovations of adult bail to inform its work with juveniles, but through collaborative planning and comprehensive implementation of treatments designed to address a wider array of systemic issues, the juvenile efforts have eclipsed many adult efforts by reducing juvenile pretrial detention an average of 42% with no reductions in public safety measures.

Sources and Resources: *National Symposium on Pretrial Justice: Summary Report of Proceedings* at 23-24 (Statement of Bart Lubow) (PJI/BJA 2011); *Schall v. Martin*, 467 U.S 253 (1984); *United States v. Salerno,* 481 U.S. 739 (1987); Additional information may be found at the Annie E. Casey Foundation Website, found at http://www.aecf.org/.

Bail May Not Be Set For Punishment (Or For Any Other Invalid Purpose)

This principle is related to excessiveness, above, because analysis for excessiveness begins with looking at the government's purpose for limiting pretrial freedom. It is more directly tied to the Due Process Clause, however, and was mentioned briefly in *Salerno* when the Court was beginning its due process analysis. In *Bell v. Wolfish*, the Supreme Court had previously written, "The Court of Appeals properly relied on the Due Process Clause, rather than the 8th Amendment, in considering the claims of pretrial detainees. Due process requires that a pretrial detainee not be punished."[52] Again, there are currently only two constitutionally valid purposes for limiting pretrial freedom – court appearance and public safety. Other reasons, such as punishment or, as in some states, to enrich the treasury, are clearly unconstitutional. And still others, such as setting a financial condition to detain, are at least potentially so.

[52] 441 U.S. 520, 535 and n. 16 (1979).

The Bail Process Must Be Individualized

In *Stack v. Boyle*, the Supreme Court wrote as follows:

> 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 [at the time, the nature and circumstances of the offense, the weight of the evidence against the defendant, and the defendant's financial situation and character] are to be applied in each case to each defendant.[53]

In his concurrence, Justice Jackson observed that if the bail in *Stack* had been set in a uniform blanket amount without taking into account differences between defendants, it would be a clear violation of the federal rules. As noted by Justice Jackson, "Each defendant stands before the bar of justice as an individual."[54]

At the time, the function of bail was limited to setting conditions of pretrial freedom designed to provide reasonable assurance of court appearance. Bail is still limited today, although the purposes for conditioning pretrial freedom have been expanded to include public safety in addition to court appearance. Nevertheless, pursuant to *Stack*, there must be standards in place relevant to these purposes. After *Stack,* states across America amended their statutes to include language designed to individualize bail setting for purposes of court appearance. In the second generation of bail reform, states included individualizing factors relevant to public safety. And today, virtually every state has a list of factors that can be said to be "individualizing criteria" relevant to the proper purposes for limiting pretrial freedom. To the extent that states do not use these factors, such as when over-relying on monetary bail bond schedules that merely assign amounts of money to charges for all or average defendants, the non-individualized bail settings are vulnerable to constitutional challenge.

The concept of requiring standards to ensure that there exists a principled means for making non-arbitrary decisions in criminal justice is not without a solid basis under the U.S. Constitution. Indeed, such standards have been a fundamental precept of the Supreme Court's death penalty jurisprudence under the cruel and unusual punishment clause of the 8th Amendment.

[53] 342 U.S. 1, 5 (1951) (internal citations omitted).
[54] *Id.* at 9.

"The term [legal and evidence-based practices] is intended to reinforce the uniqueness of the field of pretrial services and ensure that criminal justice professionals remain mindful that program practices are often driven by law and when driven by research, they must be consistent with the pretrial legal foundation and the underlying legal principles."

Marie VanNostrand, Ph.D., 2007

The Right to Counsel

This principle refers to the Sixth Amendment right of the accused to assistance of counsel for his or her defense. There is also a 5th Amendment right, which deals with the right to counsel during all custodial interrogations, but the 6th Amendment right more directly affects the administration of bail as it applies to all "critical stages" of a criminal prosecution. According to the Supreme Court, the 6th Amendment right does not attach until a prosecution is commenced. Commencement, in turn, is "the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[55] In *Rothgery v. Gillespie County*, the United States Supreme 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."[56]

Both the American Bar Association's and the National Association of Pretrial Services Agencies' best practice standards on pretrial release recommend having defense counsel at first appearances in every court, and important empirical data support the recommendations contained in those Standards. Noting that previous attempts to provide legal counsel in the bail process had been neglected, in 1998 researchers from the Baltimore, Maryland, Lawyers at Bail Project sought to demonstrate empirically whether or not lawyers mattered during bail hearings. Using a controlled experiment (with some defendants receiving representation at the bail bond review hearing and others not receiving representation) those researchers 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 financial conditions reduced at the hearing; (3) had their financial conditions reduced by a greater amount; (4) were more likely to have the financial conditions reduced to a more

[55] *See United States* v. *Gouveia*, 467 U. S. 180, 188 (1984) (quoting *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (plurality opinion)).
[56] 554 U.S. 191, 198, 213 (2008).

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.

The Privilege Against Compulsory Self-Incrimination

This foundational principle refers to the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment (in addition to similar or equivalent state provisions), which says that no person "shall be compelled, in any criminal case, to be a witness against himself . . ." At bail there can be issues surrounding pretrial interviews as well as with incriminating statements the defendant makes while the court is setting conditions of release. In that sense, the principle against compulsory self-incrimination is undoubtedly linked to the right to counsel in that counsel can help a particular defendant fully understand his or her other rights.

Probable Cause

Black's Law Dictionary defines probable cause as reasonable cause, or a reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime. Probable cause sometimes refers to having more evidence for than against. It is a term of art in criminal procedure referring to the requirement that arrests be based on probable cause. Probable cause to arrest is present when "at that moment [of the arrest] the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [person] had committed or was committing an offense."[57] In *County of Riverside v. McLaughlin,* [58] the Supreme Court ruled that suspects who are arrested without a warrant must be given a probable cause hearing within 48 hours.

As the arrest or release decision is technically one under the umbrella of a broadly defined bail or pretrial process, practices surrounding probable cause or the lack of it are crucial for study. Interestingly, because a probable cause hearing is a prerequisite only to "any significant pretrial restraint of liberty,"[59] jurisdictions that employ bail practices that are speedy and result in a large number of releases using least restrictive conditions (such as the District of Columbia) may find that they need not hold probable cause hearings for every arrestee prior to setting bail.

[57] *Beck v. Ohio*, 379 U.S. 89, 91 (1964).
[58] 500 U.S. 44 (1991).
[59] *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975).

Other Legal Principles

Of course, there are other legal principles that are critically important to defendants during the pretrial phase of a criminal case, such as certain rights attending trial, evidentiary rules and burdens of proof, the right to speedy trial, and rules affecting pleas. Moreover, there are principles that arise only in certain jurisdictions; for example, depending on which state a person is in, using money to protect public safety may be expressly unlawful and thus its prohibition may rise to the level of other, more universal legal principles beyond its inferential unlawfulness due to its irrationality. Nevertheless, the legal foundations listed above are the ones most likely to arise in the administration of bail. It is thus crucial to learn them and to recognize the issues that arise within them.

What Do the Legal Foundations of Pretrial Justice Tell Us?

Pretrial legal foundations provide the framework and the boundaries within which we must work in the administration of bail. They operate uniquely in the pretrial phase of a criminal case, and together should serve as a cornerstone for all pretrial practices; they animate and inform our daily work and serve as a visible daily backdrop for our pretrial thoughts and actions.

For the most part, the legal foundations confirm and solidify the history of bail. The history of bail tells us that the purpose of bail is release, and the law has evolved to strongly favor, if not practically demand the release of bailable defendants as well as to provide us with the means for effectuating the release decision. The history tells us that "no bail" is a lawful option, and the law has evolved to instruct us on how to fairly and transparently detain unbailable defendants. History tells us that court appearance and public safety are the chief concerns of the bail determination, and the law recognizes each as constitutionally valid purposes for limiting pretrial freedom.

The importance of the law in "legal and evidence-based practices" is unquestioned. Pretrial practices, judicial decision making (for judges are sworn to uphold the law and their authority derives from it), and even state bail laws themselves must be continually held up to the fundamental principles of broad national applicability for legal legitimacy. Moreover, the law acts as a check on the evidence; a pretrial practice, no matter how effective, must always bow to the higher principles of equal justice, rationality, and fairness. Finally, the law provides us with the fundamental goals of the pretrial release and detention decision. Indeed, if evidence-based decision making is summarized as attempting to achieve the goals of a particular discipline by using best practices, research, and evidence, then the law is critically important because it tells us that the goals of bail are to maximize release while simultaneously maximizing court appearance and public safety. Accordingly, all of the research and pretrial practices must be

continually questioned as to whether they inform or further these three inter-related goals. In the next section, we will examine how the evolution of research at bail has, in fact, informed lawful and effective bail decision making.

Additional Sources and Resources: Black's Law Dictionary (9th ed. 2009); Douglas L. Colbert, Ray Paternoster, & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail,* 32 Cardozo L. Rev. 1719 (2002); *Early Appointment of Counsel: The Law, Implementation, and Benefits* (Sixth Amend. Ctr./PJI 2014); Wayne R. LaFave, Jerold H. Israel, Nancy J. King and Orin S. Kerr, *Criminal Procedure* (3rd ed. 2007 & 5th ed. 2009); Jack K. Levin & Lucan Martin, 8A American Jurisprudence 2d, *Bail and Recognizance* (West 2009); Timothy R. Schnacke, Michael R. Jones, & Claire M. B. Brooker, *Glossary of Terms and Phrases Relating to Bail and the Pretrial Release or Detention Decision* (PJI 2011); Marie VanNostrand, *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC 2007); 3B Charles Allen Wright & Peter J. Henning, Federal Practice and Procedure §§ 761-87 (Thomson Reuters 2013).

Chapter 4: Pretrial Research

The Importance of Pretrial Research

Research allows the field of bail and pretrial justice to advance. Although our concepts of proper research have certainly changed over the centuries, arguably no significant advancement in bail or pretrial justice has ever occurred without at least some minimal research, whether that research was legal, historical, empirical, opinion, or any other way of better knowing things. This was certainly true in England in the 1200s, when Edward I commissioned jurors to study bail and used their documented findings of abuse to enact the Statute of Westminster in 1275. It is especially true in America in the 20th century, when research was the catalyst for the first two generations of bail reform and has arguably sparked a third.

While other research disciplines are important, the current workhorse of the various methods in bail is social research. According to noted sociologists Earl Babbie and Lucia Benaquisto, social research is important because we often already know the answers to life's most pressing problems, but we are still unable to solve them. Social science research provides us with the solutions to these problems by telling us how to organize and run our social affairs by analyzing the forms, values, and customs that make up our lives. This is readily apparent in bail, where many of the solutions to current problems are already known; social science research provides help primarily by illuminating how we can direct our social affairs so as to fully implement those solutions. By continually testing theories and hypotheses, social science research finds incremental explanations that simplify a complex life, and thus allows us to solve confounding issues such as how to reduce or eliminate unnecessary pretrial detention.

> *"We can't solve our social problems until we understand how they come about, persist. Social science research offers a way to examine and understand the operation of human social affairs. It provides points of view and technical procedures that uncover things that would otherwise escape our awareness."*
>
> Earl Babbie & Lucia Benaquisto, 2009

Like history and the law, social science research and the law are growing more and more entwined. In the 1908 case of *Muller v. Oregon,*[60] Louis Brandeis submitted a voluminous brief dedicated almost exclusively to social science research indicating the

[60] *Muller v. Oregon,* 208 U.S. 412 (1908).

negative effects of long work hours on women. This landmark instance of the use of social research in the law, ultimately dubbed a "Brandeis brief," became the model for many legal arguments thereafter. One need only read the now famous footnote 11 of the Supreme Court's opinion in *Brown v. Board of Education*,[61] which ended racial segregation in America's schools and showed the detrimental effects of segregation on children, to understand how social science research can significantly shape our laws.

Social science research and the law are especially entwined in criminal justice and bail. Perhaps no single topic ignites as deep an emotional response as crime – how to understand it, what to do about it, and how to prevent it. And bail, for better or worse, ignites the same emotional response. Moreover, bail is deceptively complex because it superimposes notions of a defendant's freedom and the presumption of innocence on top of our societal desires to bring defendants to justice and to avoid pretrial misbehavior. Good social science research can aid us in simplifying the topic by answering questions surrounding the three legal and historical goals of bail and conditions of bail. Specifically, social science pretrial research tells us what works to simultaneously: (1) maximize release; (2) maximize public safety; and (3) maximize court appearance.

Because of the complex balance of bail, research that addresses all three of these goals is superior to research that does not. For example, studies showing only the effectiveness of release pursuant to a commercial surety bond at ultimately reducing failures to appear (whether true or not) is less helpful than also knowing how those bonds do or do not affect public safety and tend to detain otherwise bailable defendants. It is helpful to know that pretrial detention causes negative long-term effects on defendants; it is more helpful to learn how to reduce those effects while simultaneously keeping the community safe. It is helpful to know a defendant's risk empirically; it is more helpful to know how to best embrace risk so as to facilitate release and then to mitigate known risk to further the constitutionally valid purposes for limiting pretrial freedom.

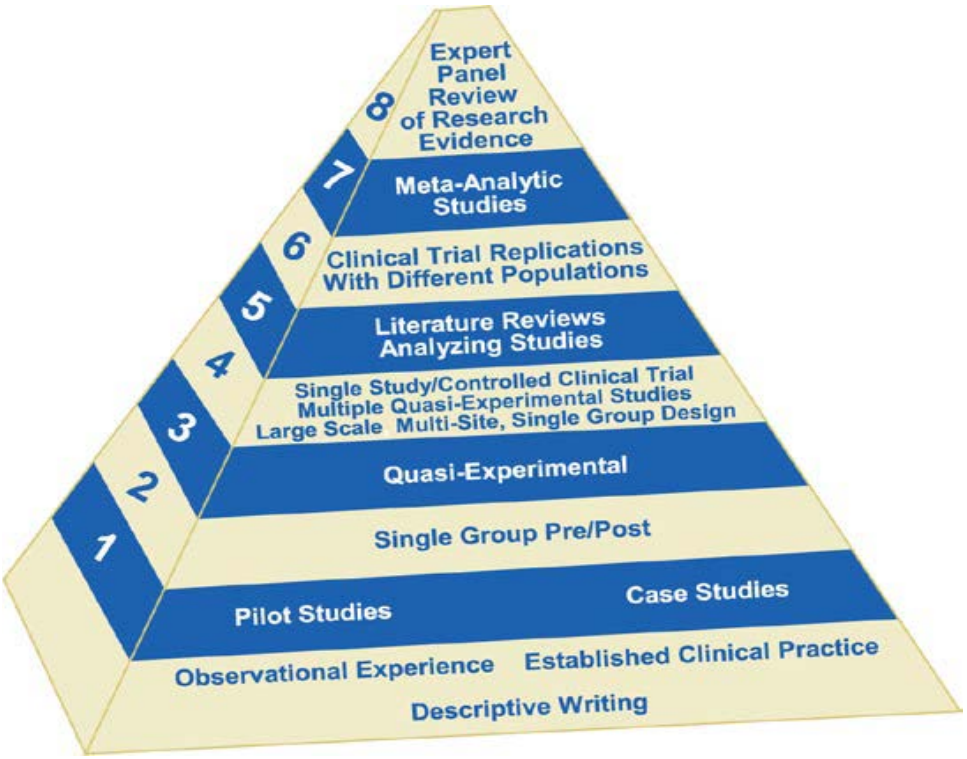
Nevertheless, some research is always better than no research, even if that research is found on the lowest levels of an evidence-based decision making hierarchy of evidence pyramid. And that is simply because we are already making decisions every day at bail, often with no research at all, and typically based on customs and habits formed over countless decades of uninformed practice. To advance our policies, practices, and laws, we must at least become informed consumers of pretrial research. We must recognize the strengths and limitations of the research, understand where it is coming from, and even who is behind creating it. Ultimately, however, we must use it to help solve what we perceive to be our most pressing problems at bail.

[61] *Brown v. Board of Education,* 347 U.S. 483 (1954).

Research in the Context of Legal and Evidence-Based Practices

The term "evidence-based practices" is common to numerous professional fields. As noted earlier, however, due to the unique nature of the pretrial period of a criminal case as well as the importance of legal foundations to pretrial decision making, Dr. Marie VanNostrand has more appropriately coined the term "legal and evidence-based practices" for the pretrial field. Legal and evidence-based practices are defined as "interventions and practices that are consistent with the pretrial legal foundation, applicable laws, and methods research has proven to be effective in decreasing failures to appear in court and danger to the community during the pretrial stage."

In addition to holding up practices and the evidence behind them to legal foundations, to fully follow an evidence-based decision making model jurisdictions must also determine how much research is needed to make a practice "evidence-based." According to the U.S. Department of Health and Human Services (HHS), this is done primarily by assessing the strength of the evidence indicating that the practice leads to the desired outcome. To help with making this assessment, many fields employ the use of graphics indicating the varying "strength of evidence" for the kinds of data or research they are likely to use. For example, the Colorado Commission on Criminal and Juvenile Justice, a statewide commission that focuses on evidence-based recidivism reduction and cost-effective criminal justice expenditures, refers to the strength of evidence pyramid, below, which was developed by HHS's Substance Abuse and Mental Health Services Administration's Co-Occurring Center for Excellence (COCE).



As one can see, the levels vary in strength from lower to higher, with higher levels more likely to illuminate research that works better to achieve the goals of a particular field.

As noted by the COCE, "Higher levels of research evidence derive from literature reviews that analyze studies selected for their scientific merit in a particular treatment area, clinical trial replications with different populations, and meta-analytic studies of a body of research literature. At the highest level of the pyramid are expert panel reviews of the research literature."

Sources and Resources: Marie VanNostrand, *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC 2007); Information gathered from the Colorado Commission on Criminal and Juvenile Justice website, found at http://www.colorado.gov/cs/Satellite/CDPS-CCJJ/CBON/1251622402893; *Understanding Evidence-Based Practices for Co-Occurring Disorders* (SAMHSA's CORE) contained in SAMHSA's website, found online at http://www.samhsa.gov/co-occurring/topics/training/OP5-Practices-8-13-07.pdf.

Research in the Last 100 Years: The First Generation

If we focus on just the last 100 years, we see that major periods of bail research in America have led naturally to more intense periods of reform resulting in new policies, practices, and laws. Although French historian Alexis de Tocqueville informally questioned America's continued use of money bail in 1835, detailed studies of bail practices in America had their genesis in the 1920s, first from Roscoe Pound and Felix Frankfurter's study of criminal justice in Cleveland, Ohio, and then from Arthur Beeley's now famous study of bail in Chicago, Illinois. Observing secured-money systems primarily administered through the use of commercial bail bondsmen (that had really only existed since 1898), both of those 1920s studies found considerable flaws in the current way of administering bail. Beeley's seminal statement of the problem in 1927, made at the end of a painstakingly detailed report, is still relevant today:

> [L]arge numbers of accused, but obviously dependable persons are needlessly committed to Jail; while many others, just as obviously undependable, are granted a conditional release and never return for trial. That is to say, the present system, in too many instances, neither guarantees security to society nor safeguards the rights of the accused. The system is lax with those with whom it should be stringent and stringent with those with whom it could safely be less severe.[62]

Pound, Frankfurter, and Beeley began a period of bail research, advanced significantly by Caleb Foote in the 1950s, that culminated in the first generation of bail reform in the 1960s. That research consisted of several types – for example, one of the most important historical accounts of bail was published in 1940 by Elsa de Haas. But the most significant literature consisted of social science studies observing and documenting the deficiencies of the current system. As noted by author Wayne H. Thomas, Jr.,

> [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

[62] Arthur L. Beeley, *The Bail System in Chicago*, at 160 (Univ. of Chicago Press, 1927).

> jails were severely overcrowded with pretrial detainees housed in conditions far worse than those of convicted criminals.[63]

Clearly, the most impactful of this period's research was so-called "action research," in which bail practices were altered and outcomes measured in pioneering "bail projects" to study alternatives to the secured bond/commercial surety system of release. Perhaps the most well-known of these endeavors was the Manhattan Bail Project, conducted by the Vera Foundation (now the Vera Institute of Justice) and the New York University Law School beginning in 1960. The Manhattan Bail Project used an experimental design to demonstrate that given the right information, judges could release more defendants without the requirement of a financial bond condition and with no measurable impact on court appearance rates. At that time in American history, bail had only two goals – to release defendants while simultaneously maximizing court appearance – because public safety had not yet been declared a constitutionally valid purpose for limiting pretrial freedom. The Manhattan Bail Project was significant because it worked to achieve both of the existing goals. Based on the information provided by Vera, release rates increased while court appearance rates remained high.

[63] Wayne H. Thomas, Jr., *Bail Reform in America* at 15 (Univ. Cal. Press 1976).

Caleb Foote's Unfulfilled Prediction Concerning Bail Research

At the National Conference on Bail and Criminal Justice in 1964, Professor of Law Caleb Foote explained to attendees that courts would likely move from their "wholly passive role" during the first generation of bail reform to a more active one, saying, "Certainly courts are not going to be immune to the sense of basic unfairness which alike has motivated scholarly research, foundation support for bail action projects, the Attorney General's Committee on Poverty, and your attendance at this Conference." Noting the lack of any definitive empirical evidence showing that pretrial detention alone adversely affected the quality of treatment given to criminal defendants, Foote nonetheless cited current studies attempting to show that very thing, and predicted:

"If it comes to be generally accepted that in the outcome of his case the jailed defendant is prejudiced compared with the defendant who has pretrial liberty, such a finding will certainly have a profound impact upon any judicial consideration of constitutional bail questions. It was such impermissible prejudicial effects, stemming from poverty, which formed the basis of the due process requirement of counsel in *Gideon v. Wainwright.*"

Since then, numerous studies have highlighted the prejudicial effects of pretrial detention, with the research consistently demonstrating that when compared to defendants who are released, defendants detained pretrial – all other things being equal – plead guilty more often, are convicted more often, get sentenced to prison more often, and receive longer sentences. And yet, despite this overwhelming research, Foote's prediction of increased judicial interest and activity in the constitutional issues of bail has not come true.

Sources and Resources: *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* at 29 n. 1 (2007) (citing studies); John Clark, *Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process*, at 2 (PJI/MacArthur Found. 2012) (same); *The National Conference on Bail and Criminal Justice, Proceedings and Interim Report,* at 224-25 (Washington, D.C. April 1965);

The Manhattan Bail Project was the center of discussion of bail reform at the 1964 National Conference on Bail and Criminal Justice, which in turn led to changes in both federal and state laws designed to facilitate the release of bailable defendants who were previously unnecessarily detained. Those changes included presumptions for release on recognizance, release on unsecured bonds (like those used for centuries in England and America prior to the 1800s), release on "least restrictive" nonfinancial conditions, and additional constraints on the use of secured money bonds. The improvements were, essentially, America's attempt to solve the early 20th century's dilemma of bailable defendants not being released – a dilemma that, historically speaking, has always demanded correction.

The Second Generation

Research flowing toward the second generation of pretrial reform in America followed the same general pattern of identifying abuses or areas in need of improvement and then gradually creating a meeting of minds on practical solutions to those abuses. In that generation, though, the identified "abuse" dealt primarily with the "no bail" side of the "bail/no bail" dichotomy – the side that determines who should not be released at all. As summarized by Senator Edward Kennedy in 1980,

> Historically, bail has been viewed as a procedure designed to ensure the defendant's appearance at trial by requiring him to post a bond or, in effect, make a promise to appear. Current findings, suggest, however, that this traditional approach, though noble in design, has one important shortcoming. It fails to deal effectively with those defendants who commit crimes while they are free on bail.[64]

Indeed, for nearly 1,500 years, the only acceptable purpose for limiting pretrial freedom was to assure that the defendant performed his or her duty to face justice, which ultimately came to mean appearing for court. Even when crafting their constitutional and statutory exceptions to any recognized right to bail, the states and the federal government had always done so with an eye toward court appearance. To some, limiting freedom based on future dangerousness was un-American, more akin to tyrannical practices of police states, and contrary to all notions of fundamental human rights. Indeed, there was considerable debate over whether it could *ever* be constitutional to do so.

Nevertheless, many judges felt compelled to respond to legitimate fears for public safety even if the law did not technically allow for it. Accordingly, those judges often followed two courses of action when faced with obviously dangerous defendants who perhaps posed virtually no risk of flight: (1) if those defendants happened to fall in the categories listed as "no bail," judges could deny their release altogether; (2) if they did not fall into a "no bail" category, judges could and would set high monetary conditions of bail to effectively detain the defendant. The practice of detaining persons for public safety, or preventive detention, was known at the time as furthering a "sub rosa" or secret purpose for limiting freedom, and it was done with little interference from the appellate courts.

The research leading to reform in this area was multifaceted. Law reviews published articles on the right to bail, the Excessive Bail Clause, and on due process concerns. Historians examined the right to bail in England and America to determine if and how it could be restricted or even denied altogether for purposes of public safety. Politicians

[64] Edward M. Kennedy, *A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform,* 48 Fordham L. Rev. 423, 423 (1980) (internal footnotes omitted).

and others looked to the experiences of states that had already changed their laws to account for public safety and danger. And social scientists documented what Congress ultimately called "the alarming problem of crimes committed by persons on release"[65] by conducting empirical studies of pretrial release and re-arrest rates in a number of American jurisdictions.

Ultimately, this research led to dramatic changes in the administration of bail. Congress passed the Bail Reform Act of 1984, which expanded the law to allow for direct, fair, and transparent detention of certain dangerous defendants after a due process hearing. In *United States v. Salerno*, the Supreme Court upheld the Act, giving constitutional validity to public safety as a limitation on pretrial freedom. If they had not already done so, many states across the country changed their statutes and constitutions to allow consideration of dangerousness in the release and detention decision and by re-defining the "no bail" side of their schemes to better reflect which defendants should be denied the right to bail altogether.

[65] S. Rep. No. 98-225, P. L. 98-473 p. 3 (1983).

The Third Generation

The previous generations of bail research have followed the pattern of identifying abuses or issues of concern and then finding consensus on solutions, and the current generation is no different. Some of the research in this generation of bail reform is merely a continuation of studies begun in previous generations. For example, a body of literature examining the effects of pretrial detention on ultimate outcomes of cases (guilty pleas, sentences, etc.) began in the 1950s and has continued to this day. As another example, after Congress passed the Bail Reform Act of 1966, pretrial services programs gradually expanded from the "bail projects" of the early 1960s to more comprehensive agencies designed to carry out the mandates of new laws requiring risk assessment and often supervision of pretrial defendants. As these programs evolved, a body of research began to develop around their practices. In 1973, the National Association of Pretrial Services Agencies (NAPSA) was founded to, among other things, promote research and development in the field. In 1976, NAPSA and the Department of Justice created the Pretrial Services Resource Center (PSRC, now the Pretrial Justice Institute), an entity also designed to, among other things, collect and disseminate research and information relevant to the pretrial field. The data collected by these entities over the years, in addition to the numerous important reports they have issued analyzing that data, have been instrumental sources of fundamental pretrial research.

A Meeting of Minds – Who is Currently In Favor of Pretrial Improvements?

The following national organizations have produced express policy statements generally supporting the use of evidence-based and best pretrial practices, which include risk assessment and fair and transparent preventive detention, at the front end of the criminal justice system:

The Conference of Chief Justices

The Conference of State Court Administrators

The National Association of Counties

The International Association of Chiefs of Police

The Association of Prosecuting Attorneys

The American Council of Chief Defenders

The National Association of Criminal Defense Lawyers

The American Jail Association

The American Bar Association

The National Judicial College

The National Sheriff's Association

The American Probation and Parole Association

The National Association of Pretrial Services Agencies

In addition, numerous other organizations and individuals are lending their support or otherwise partnering to facilitate pretrial justice in America. For a list of just those organizations participating in the Pretrial Justice Working Group, created in the wake of the National Symposium on Pretrial Justice, go to http://www.pretrial.org/infostop/pjwg/

As another example, in 1983, the PSRC – with funding from the Bureau of Justice Statistics (BJS) – initiated the National Pretrial Reporting Program, which was designed to create a national pretrial database by collecting local bail data and aggregating it at the state and national levels. In 1994, that program became BJS's State Court Processing Statistics (SCPS) program, which collected data on felony defendants in jurisdictions from the 75 most populous American counties. Research documents analyzing that data, including the *Felony Defendants from Large Urban Counties* series, and *Pretrial Release of Felony Defendants in State Courts*, have become crucial, albeit sometimes misinterpreted sources of basic pretrial data, such as defendant charges and demographics, case outcomes, types of release and release rates, financial condition amounts, and basic information on pretrial misconduct. Most recently, BJS asked the

Urban Institute to re-design and re-develop the National Pretrial Reporting Program as a replacement to SCPS.

An Unusual, But Necessary, Research Warning

Since 1988, the Bureau of Justice Statistic's (BJS) State Court Processing Statistics (SCPS) program (formerly the National Pretrial Reporting Program) has been an important source of data on criminal processing of persons charged with felonies in the 75 most populous American counties. Issues surrounding pretrial release, in particular, have been tempting topics for study due to the SCPS's inclusion of data indicating whether defendants were released pretrial, the type of release (e.g., personal recognizance, surety bond), and whether the defendant misbehaved while on pretrial release. In some cases, researchers would use the SCPS data to make "evaluative" statements, that is, statements declaring that a particular type of release was superior to another based on the data showing pretrial misbehavior associated with each type. Moreover, when these studies favored the commercial bail bonding and insurance industry, that industry would repeat the researcher's evaluative statements (as well as make their own statements based on their own reading of the SCPS data), and claim that the data demonstrated that the use of a commercial surety bond was a superior form of release.

According to Bechtel, et.al, (2012) "The bonding industry's claims based on the SCPS data became so widespread that BJS was compelled to take the unusual and unprecedented step of issuing a 'Data Advisory.'" That advisory, issued in March of 2010, listed the limitations of the SCPS data, and specifically warned that, "Any evaluative statement about the effectiveness of a particular program in preventing pretrial misconduct based on SCPS is misleading."

DATA ADVISORY

State Court Processing Statistics Data Limitations

Despite the warning, there are those who persist in citing SCPS data to convince policy makers or others about the effectiveness of one type of release over another. Both Bechtel, et al., and VanNostrand, et al., have listed flaws in the various studies using the data and have given compelling reasons for adopting a more discriminating attitude whenever persons or entities begin comparing one type of release with another.

As mentioned in the body of this paper, the best research at bail, which will undoubtedly include future efforts at comparing release types, must not only comply with the rigorous standards necessary so as not to violate the BJS Data Advisory, but should also address all three legal and evidence-based goals underlying the bail decision, which include maximizing release while maximizing public safety and court appearance.

Sources and Resources: Kristin Bechtel, John Clark, Michael R. Jones, & David J. Levin, *Dispelling the Myths, What Policy Makers Need to Know About Pretrial Research* (PJI, 2012); Thomas Cohen & Tracey Kyckelhahn, *Data Advisory: State Court Processing Statistics Data Limitations* (BJS 2010); Marie VanNostrand, Kenneth J. Rose, & Kimberly Weibrecht, *State of the Science of Pretrial Release Recommendations and Supervision* (PJI/BJA 2011).

Finally, a related body of ongoing research derives simply from pretrial services agencies and programs measuring themselves, which can be a powerful way to present and use data to affect pretrial practices. In 2011, the NIC published *Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field,* which proposed standardized definitions and uniform suggested measures consistent with established pretrial standards to "enable pretrial services agencies to gauge more accurately their programs' effectiveness in meeting agency and justice system goals."[66] Broadly speaking, standardized guidelines and definitions for documenting performance measures and outcomes enables better communication and leads to better and more coordinated research efforts overall.

Other research flowing toward this current generation of pretrial reform, akin to Arthur Beeley's report on Chicago bail practices, has been primarily observational. That research, such as some of the multifaceted analyses performed in Jefferson County, Colorado, in 2007-2010, merely examines system practices to assess whether those practices or even the current laws can be improved. Other entities, such as Human Rights Watch and the Justice Policy Institute, have created similar research documents that include varying ratios of observational and original research. On the other hand, another body of this generation's research goes far beyond observation and uses large data sets and complex statistical tests to create empirical pretrial risk instruments that provide scientific structure and meaning to current lists dictating the factors judges must consider in the release and detention decision.

In between is a body of research most easily identified by topic, but sometimes associated best with the person or entity producing it. For example, throughout the years researchers have been interested in analyzing judicial discretion and guided discretion in the decision to release, and so one finds numerous papers and studies examining that issue. In particular, though, Dr. John Goldkamp spent much of his distinguished academic career focusing on judicial discretion in the pretrial release decision, and published numerous important studies on his findings. Likewise, other local jurisdictions have delved deep into their own systems to look at a variety of issues associated with pretrial release and detention, but perhaps none have done so as consistently and thoroughly as the New York City Criminal Justice Agency, and its research continues to inspire and inform the nation.

[66] *Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field* (NIC 2011) at v.

Other topics of interest in this generation of reform include racial disparity, cost benefit analyses affecting pretrial practices, training police officers for first contacts and effects of that training on pretrial outcomes, citation release, the legality and effectiveness of monetary bail schedules, pretrial processes and outcomes measurements, re-entry from jail to the community, bail bondsmen and bounty hunters, special populations such as those with mental illness or defendants charged with domestic violence, and gender issues. Prominent organizations consistently working on publishing pretrial research literature include various agencies within the Department of Justice, including the National Institute of Corrections, the Bureau of Justice Assistance, the Bureau of Justice Statistics, and the National Institute of Justice. Other active entities include the Pretrial Justice Institute, the National Association of Counties, the United States Probation and Pretrial Services, the Pretrial Services Agency for the District of Columbia, the Vera Institute, the Urban Institute, and the Justice Policy Institute. Other organizations, such as the International Association of Chiefs of Police, the National Association of Drug Court Professionals, National Council on Crime and Delinquency, the Council of State Governments, the Pew Research Center, the American Probation and Parole Association, and various colleges and universities have also become actively involved in pretrial issues.

Along with these entities are a number of individuals who have consistently led the pretrial field by devoting much or all of their professional careers on pretrial research, such as Dr. John Goldkamp, D. Alan Henry, Dr. Marie VanNostrand, Dr. Christopher Lowenkamp, Dr. Alex Holsinger, Dr. James Austin, Dr. Mary Phillips, Dr. Brian Reaves, Dr. Thomas Cohen, Dr. Edward J. Latessa, Timothy Cadigan, Spurgeon Kennedy, John Clark, Kenneth J. Rose, Barry Mahoney, and Dr. Michael Jones. Often these individuals are sponsored by generous philanthropic foundations interested in pretrial justice, such as the Public Welfare Foundation and the Laura and John Arnold Foundation.

Public Opinion Research

An important subset of criminal justice research is survey research, which can include collecting data to learn how people feel about crime or justice policy. For example, in 2012 the PEW Center on the States published polling research by Public Opinion Strategies and the Mellman Group showing that while people desire public safety and criminal accountability, they also support sentencing and corrections reforms that reduce imprisonment, especially for non-violent offenders. In 2009, the National Institute of Corrections reported a Zogby International poll similarly showing that 87% of those contacted would support research-based alternatives to jail to reduce recidivism for non-violent persons.

Very little of this type of research had been done in the field of pretrial release and detention, but in 2013 Lake Research Partners released the results of a nationwide poll focusing on elements of the current pretrial reform movement. That research found "overwhelming support" for replacing a cash-based bonding system with risk-based screening tools. Moreover, that support was high among all demographics, including gender, age, political party identification, and region. Interestingly too, most persons polled were unaware of the current American situation, with only 36% of persons

understanding that empirical risk assessment was not currently happening in most places.

Sources and Resources: *A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems* (NIC, 2010); *Support for Risk Assessment Programs Nationwide* (Lake Research Partners 2013) found at http://www.pretrial.org/download/advocacy/Support%20for%20Risk%20Assessment%20Nationwide%20-%20Lake%20Research%20Partners.pdf. Public Opinion on Sentencing and Corrections Policy in America (Public Opinion Strategies/Mellman Group 2012) found at http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/PEW_NationalSurveyResearchPaper_FINAL.pdf;

All of this activity brings hope to a field that has recently been described as significantly limited in its research agenda and output. In 2011, the Summary Report to the National Symposium on Pretrial Justice listed four recommendations related to a national research agenda: (1) collect a comprehensive set of pretrial data needed to support analysis, research, and reform through the Bureau of Justice Statistics; (2) embark on comprehensive research that results in the identification of proven best pretrial practices through the National Institute of Justice; (3) develop and seek funding for research proposals relating to pretrial justice; and (4) prepare future practitioners and leaders to effectively address pretrial justice issues in a fair, safe, and effective manner.

In the wake of the Symposium, the Department of Justice's Office of Justice Programs (OJP) convened a Pretrial Justice Working Group, a standing, multidisciplinary group created to collaboratively address national challenges to moving toward pretrial reform. The Working Group, in turn, established a "Research Subcommittee," which was created to stimulate detailed pretrial data collection, increase quantitative and qualitative pretrial research, support existing OJP initiatives dealing with evidence-based practices in local justice systems, and develop pretrial justice courses of studies in academia. Due in part to that Subcommittee's purposeful focus, its members have begun a coordinated effort to identify pretrial research needs and to develop research projects designed specifically to meet those needs. Accordingly, across America, we are seeing great progress in both the interest and the output of pretrial research.

> *"Research is formalized curiosity. It is poking and prying with a purpose."*
>
> Zora Neale Hurston, 1942

However, there are many areas of the pretrial phase of a defendant's case that are in need of additional helpful research. For example, while Professor Doug Colbert has created groundbreaking and important research on the importance of defense attorneys at bail, and while the Kentucky Department of Public Advocacy has put that research into practice through a concentrated effort toward advancing pretrial advocacy, there is relatively little else on this very important topic. Similarly, other areas under the umbrella of pretrial reform, such as a police officer's decision to arrest or cite through a summons, the prosecutor's decision to charge, early decisions dealing with specialty courts, and diversion, suffer from a relative lack of empirical research. This is true in the legal field as well, as only a handful of scholars have recently begun to focus again on fundamental legal principles or on how state laws can help or hinder our intent to follow evidence-based pretrial practices. In sum, there are still many questions that, if answered through research, would help guide us toward creating bail systems that are the most effective in maximizing release, public safety, and court appearance. Moreover, there exists today even a need to better compile, categorize, and disseminate the research that we do have. To that end, both the National Institute of Justice and the Pretrial Justice Institute have recently created comprehensive bibliographies on their websites.

Current Research – Special Mention

One strand of current pretrial research warranting special mention, however, is research primarily focusing on one or both of the two following categories: (1) empirical risk assessment; and (2) the effect of release type on pretrial outcomes, including the more nuanced question of the effect of specific conditions of release on pretrial outcomes. The two topics are related, as often the data sets compiled to create empirical risk instruments contain the sort of data required to answer the questions concerning release type and conditions as well as the effects of conditional release or detention on risk itself. The more nuanced subset of how conditions of release affect pretrial outcomes can become quite complicated when we think about differential supervision strategies including questions of dosage, e.g., how much drug testing must we order (if any) to achieve the optimal pretrial court appearance and public safety rates?

Empirical Risk Assessment Instruments

Researchers creating empirical pretrial risk assessment instruments take large amounts of defendant data and identify which specific factors are statistically related and how strongly they are related to defendant pretrial misconduct. Ever since the mid-20th century, primarily in response to the United States Supreme Court's opinion in *Stack v. Boyle,* states have enacted into their laws factors judges are supposed to consider in making a release or detention decision. For the most part, these factors were created using logic and later some research from the 1960s showing the value of community ties to the pretrial period. Unfortunately, however, little to no research existed to demonstrate which of the many enacted factors were actually predictive of pretrial misconduct and at what strength. Often, judges relied on one particular factor – the current charge or sometimes the charge and police affidavit – to make their decisions. Over the years, single jurisdictions, such as counties, occasionally created risk instruments using generally accepted social science research methods, but their limited geographic influence and sometimes their lack of data from which to test multiple variables meant that research in this area spread slowly.

In 2003, however, Dr. Marie VanNostrand created the Virginia Pretrial Risk Assessment Instrument, most recently referred to by Dr. VanNostrand and others as simply the "Virginia Model," which was ultimately tested and validated in multiple Virginia jurisdictions and then deployed throughout the state. Soon after, other researchers developed other multi-jurisdictional risk instruments, including Kentucky, Ohio, Colorado, Florida, and the federal system, and now other American jurisdictions, including single counties, are working on similar instruments. Still others are "borrowing" existing instruments for use on local defendants while performing the process of validating them for their local population. Most recently, in November 2013, researchers sponsored by the Laura and John Arnold Foundation announced the creation of a "national" risk instrument, capable of accurately predicting pretrial risk

(including risk of violent criminal activity) in virtually any American jurisdiction due to the extremely large database used to create it.

In its 2012 issue brief titled, *Pretrial Risk Assessment 101: Science Provides Guidance on Managing Defendants,* PJI and BJA summarize the typical risk instrument as follows:

> A pretrial risk assessment instrument is typically a one-page summary of the characteristics of an individual that presents a score corresponding to his or her likelihood to fail to appear in court or be rearrested prior to the completion of their current case. Instruments typically consist of 7-10 questions about the nature of the current offense, criminal history, and other stabilizing factors such as employment, residency, drug use, and mental health.
>
> Responses to the questions are weighted, based on data that shows how strongly each item is related to the risk of flight or rearrest during pretrial release. Then the answers are tallied to produce an overall risk score or level, which can inform the judge or other decisionmaker about the best course of action.[67]

Using a pretrial risk assessment instrument is an evidence-based practice, and to the extent that it helps judges with maximizing the release of bailable defendants and identifying those who can lawfully be detained, it is a legal and evidence-based practice. Nevertheless, it is a relatively new practice – it is too new for detailed discussion in the current ABA Criminal Justice Standards on Pretrial Release – and so the fast-paced research surrounding these instruments must be scrutinized and our shared knowledge constantly updated to provide for the best application of these powerful tools. In 2011, Dr. Cynthia Mamalian authored *The State of the Science of Pretrial Risk Assessment*, and noted many of the issues (including "methodological challenges") that surround the creation and implementation of these instruments.[68]

Bail and the Aberrational Case

Social scientists primarily deal with aggregate patterns of behavior rather than with individual cases, but the latter is often what criminal justice professionals are used to. Cases that fall outside of a particular observable pattern might be called "outliers" or "aberrations" by social scientists and thus disregarded by the research that is most relevant to bail. Unfortunately, however, it is often these aberrational cases – typically those showing pretrial misbehavior – that drive public policy.

Thus, when making policy decisions about bail it is important for decision makers to embrace perspective by also studying aggregates. By looking at a problem from a

[67] *Pretrial Risk Assessment 101: Science Provides Guidance on Managing Defendants* (PJI/BJA 2012) (internal footnote omitted).
[68] *See* Cynthia A. Mamalian, *State of the Science of Pretrial Risk Assessment*, at 26 (PJI/BJA 2011).

distance, one can often see that the single episode that brought a particular case to the pretrial justice discussion table may not present the actual issue needing improvement. If the single case represents an aggregate pattern, however, or if that case illustrates some fundamental flaw in the system that demands correction, then that case may be worthy of further study.

In the aggregate, very few defendants misbehave while released pretrial (for example, the D.C. Pretrial Services Agency reports that in 2012, 89% of released defendants were arrest-free during their pretrial phase, and that only 1% of those arrested were for violent crimes; likewise, Kentucky reports a 92% public safety rate), and yet occasionally defendants will commit heinous crimes under all forms of supervision, including secured detention. In the aggregate, most people show up for court (again, D.C. Pretrial reports that 89% of defendants did not miss a single court date; likewise, Kentucky reports a 90% court appearance rate), and yet occasionally some high profile defendant will not appear, just as fifty may not show up for traffic court on the same day. In the aggregate, virtually all defendants will ultimately be released back into our communities and thus can be safety supervised within our communities while awaiting the disposition of their cases, and yet occasionally there are defendants who are so risky that they must be detained.

Sources and Resources: Tara Boh Klute & Mark Heyerly, *Report on Impact of House Bill 463: Outcomes, Challenges, and Recommendations* (KY Pretrial Servs. 2012); Michael G. Maxfield & Earl Babbie, Research Methods for Criminal Justice and Criminology (Wadsworth, 6th ed. 2008); D.C. Pretrial statistics found at http://www.psa.gov/.

Beyond those issues, however, is the somewhat under-discussed topic of what these "risk-based" instruments mean for states that currently have entire bail schemes created without pure notions of risk in mind. For example, many states have preventive detention provisions in their constitutions denying the right to bail for certain defendants, but often these provisions are tied primarily to the current charge or the charge and some criminal precondition. The ability to better recognize high-risk defendants, who perhaps should be detained but who, because of their charge, are not detainable through the available "no bail" process, has caused these states to begin re-thinking their bail schemes to better incorporate risk. The general move from primarily a charge-and-resource-based bail system to one based primarily on pretrial risk automatically raises questions as to the adequacy of existing statutory and constitutional provisions.

Effects of Release Types and Conditions on Pretrial Outcomes

The second category of current research – the effect of release type as well as the effect of individual conditions on pretrial outcomes – continues to dominate discussions about what is next in the field. Once we know a particular defendant's risk profile, it is natural to ask "what works" to then mitigate that risk. The research surrounding this topic is evolving rapidly. Indeed, during the writing of this paper, the Pretrial Justice Institute released a rigorous study indicating that release on a secured (money paid up front) bond does nothing for public safety or court appearance compared to release on an

unsecured (money promised to be paid only if the defendant fails to appear) bond, but that secured bonds have a significant impact on jail bed use through their tendency to detain defendants pretrial. Likewise, in November 2013, the Laura and John Arnold Foundation released its first of several research studies focusing on the impact of pretrial supervision. Though admittedly lacking detail in important areas, that study suggested that moderate and higher risk defendants who were supervised were significantly more likely to show up for court than non-supervised defendants.

In 2011, VanNostrand, Rose, and Weibrecht summarized the then-existing research behind a variety of release types, conditions, and differential supervision strategies, including court date notification, electronic monitoring, pretrial supervision and supervision with alternatives to detention, release types based on categories of bail bonds, and release guidelines, and that summary document, titled *State of the Science of Pretrial Release Recommendations and Supervision,* remains an important foundational resource for anyone focusing on the topic. Nevertheless, as the Pretrial Justice Institute explained in its conclusion to that report, we have far to go before we can confidently identify legal and evidence-based conditions and supervision methods:

> Great strides have been made in recent years to better inform [the pretrial release decision], both in terms of what is appropriate under the law and of what works according to the research, and to identify which supervision methods work best for which defendants.
>
> As this document demonstrates, however, there is still much that we do not know about what kinds of conditions are most effective. Moreover, as technologies advance to allow for the expansion of potential pretrial release conditions and the supervision of those conditions, we can anticipate that legislatures and courts will be called upon to define the limits of what is legally appropriate.[69]

Application and Implications

Applying the research has been a major component of jurisdictions currently participating in the National Institute of Correction's (NIC's) Evidence-Based Decision Making Initiative, a collaborative project among the Center for Effective Public Policy, the Pretrial Justice Institute, the Justice Management Institute, and the Carey Group. The seven jurisdictions piloting the NIC's collaborative "Framework," which has been described as providing a "purpose and a process" for applying evidence-based decision making to all decision points in the justice system, are actively involved in applying research and evidence to real world issues with the aim toward reducing harm and

[69] Marie VanNostrand, Kenneth J. Rose, & Kimberly Weibrecht, *State of the Science of Pretrial Release Recommendations and Supervision*, at 42 (conclusion by PJI) (PJI/BJA 2011).

victimization while maintaining certain core justice system values. Those Framework jurisdictions focusing on the pretrial release and detention decision are learning first hand which areas have sufficient research to fully inform pretrial improvements and which areas have gaps in knowledge, thus signifying the need for more research. Their work will undoubtedly inform the advancement of pretrial research in the future.

Finally, the weaving of the law with the research into pretrial application has the potential to itself raise significantly complex issues. For example, if GPS monitoring is deemed by the research to be ineffective, is it not then excessive under the 8th Amendment? If a secured money condition does nothing for public safety or court appearance, is it not then irrational, and thus also a violation of a defendant's right to due process, for a judge to set it? If certain release conditions actually increase a lower risk defendant's chance of pretrial misbehavior, can imposing them ever be considered lawful? These questions, and others, will be the sorts of questions ultimately answered by future court opinions.

What Does the Pretrial Research Tell Us?

Pretrial research is crucial for telling us what works to achieve the purposes of bail, which the law and history explain are to maximize release while simultaneously maximizing public safety and court appearance. All pretrial research informs, but the best research helps us to implement laws, policies, and practices that strive to achieve all three goals. Each generation of bail or pretrial reform has a body of research literature identifying areas in need of improvement and creating a meeting of minds surrounding potential solutions to pressing pretrial issues. This current generation is no different, as we see a growing body of literature illuminating poor laws, policies, and practices while also demonstrating evidence-based solutions that are gradually being implemented across the country.

Nevertheless, in the field of pretrial research there are still many areas requiring attention, including areas addressed in this chapter such as risk assessment, risk management, the effects of money bonds, cost/benefit analyses, impacts and effects of pretrial detention, and racial disparity as well as areas not necessarily addressed herein, such as money bail forfeitures, fugitive recovery, and basic data on misdemeanor cases.

Most of us are not research producers. We are, however, research consumers. Accordingly, to further the goal of pretrial justice we must understand how rapidly the research is evolving, continually update our knowledge base of relevant research, and yet weed out the research that is biased, flawed, or otherwise unacceptable given our fundamental legal foundations. We must strive to understand the general direction of the pretrial research and recognize that a change in direction may require changes in laws, policies, and practices to keep up. Most importantly, we must continue to support pretrial research in all its forms, for it is pretrial research that advances the field.

Additional Sources and Resources: Steve Aos, Marna Miller, & Elizabeth Drake, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* (WSIPP 2006); Earl Babbie & Lucia Benaquisto, *Fundamentals of Social Research: Second Canadian Edition* (Cengage Learning 2009); Bernard Botein, *The Manhattan Bail Project: Its Impact on Criminology and the Criminal Law Processes,* 43 Tex. L. Rev. 319 (1964-65); Kristin Bechtel, John Clark, Michael R. Jones, & David J. Levin, *Dispelling the Myths, What Policy Makers Need to Know About Pretrial Research* (PJI, 2012); John Clark, *A Framework for Implementing Evidence-Based Practices in Pretrial Services,* Topics in Cmty. Corr. (2008); Thomas H. Cohen & Tracey Kyckelhahn, *Felony Defendants in Large Urban Counties, 2006* (BJS 2010); Thomas Cohen & Tracey Kyckelhahn, *Data Advisory: State Court Processing Statistics Data Limitations* (BJS 2010); Elsa de Haas, *Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275* (AMS Press, Inc., New York 1966); *Evidence-Based Practices in the Criminal Justice System (Annotated Bibliography)* (NIC updated 2013); Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia,* 102 Univ. of Pa. L. Rev. 1031 (1954); Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964* (DOJ/Vera Found. 1964); Michael R. Jones, *Pretrial Performance Measurement: A Colorado Example of Going from the Ideal to Everyday Practice* (PJI 2013); Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (PJI Oct. 2013); *Laura and John Arnold Foundation Develops National Model for Pretrial Risk Assessments* (Nov. 2013) found at http://www.arnoldfoundation.org/laura-john-arnold-foundation-develops-national-model-pretrial-risk-assessments/; Christopher T. Lowenkamp & Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes* (Laura & John Arnold Found. 2013); Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (Laura & John Arnold Found. 2013); Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (Laura & John Arnold Found. 2013); Michael G. Maxfield & Earl Babbie, *Research Methods for Criminal Justice and Criminology* (Wadsworth, 6th ed. 2008); *National Conference on Bail and Criminal Justice, Proceedings and Interim Report* (Washington, D.C. 1965); *National Symposium on Pretrial Justice: Summary Report of Proceedings* (PJI/BJS 2011); Mary T. Phillips, *A Decade of Bail Research in New York City* (N.Y. NYCCJA 2012); Roscoe Pound & Felix Frankfurter (Eds.), *Criminal Justice in Cleveland* (Cleveland Found. 1922); Marie VanNostrand, *Assessing Risk Among Pretrial Defendants In Virginia: The Virginia Pretrial Risk Assessment Instrument* (VA Dept. Crim. Just. Servs. 2003); Marie VanNostrand, *Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC 2007).

Chapter 5: National Standards on Pretrial Release

Pretrial social science research tells us what works to further the goals of bail. History and the law tell us that the goals of bail are to maximize release while simultaneously maximizing public safety and court appearance, and the law provides a roadmap of how to constitutionally deny bail altogether through a transparent and fair detention process. If this knowledge was all that any particular jurisdiction had to use today, then its journey toward pretrial justice might be significantly more arduous than it really is. But it is not so arduous, primarily because we have national best practice standards on pretrial release and detention, which combine the research and the law (which is intertwined with history) to develop concrete recommendations on how to administer bail.

In the wake of the 1964 National Conference on Bail and Criminal Justice and the 1966 Federal Bail Reform Act, various organizations began issuing standards designed to address relevant pretrial release and detention issues at a national level. The American Bar Association (ABA) was first in 1968, followed by the National Advisory Committee on Criminal Justice, the National District Attorneys Association, and finally the National Association of Pretrial Services Agencies (NAPSA). The NAPSA Standards, in particular, provide important detailed provisions dealing with the purposes, roles, and functions of pretrial services agencies.

The ABA Standards

Among these sets of standards, however, the ABA Standards stand out. Their preeminence is based, in part, on the fact that they "reflect[] a consensus of the views of representatives of all segments of the criminal justice system,"[70] which includes prosecutors, defense attorneys, academics, and judges, as well as various groups such as the National District Attorneys Association, the National Association of Criminal Defense Lawyers, the National Association of Attorneys General, the U.S. Department of Justice, the Justice Management Institute, and other notable pretrial scholars and pretrial agency professionals.

More significant, however, is the justice system's use of the ABA Criminal Justice Standards as important sources of authority. The ABA's Standards have been either quoted or cited in more than 120 U.S. Supreme Court opinions, approximately 700 federal circuit court opinions, over 2,400 state supreme court opinions, and in more than 2,100 law journal articles. By 1979, most states had revised their statutes to implement some part of the Standards, and many courts had used the Standards to

[70] Martin Marcus, *The Making of the ABA Criminal Justice Standards, Forty Years of Excellence,* 23 Crim. Just. (Winter 2009).

implement new court rules. According to Judge Martin Marcus, Chair of the ABA Criminal Justice Standards Committee, "[t]he Standards have also been implemented in a variety of criminal justice projects and experiments. Indeed, one of the reasons for creating a second edition of the Standards was an urge to assess the first edition in terms of the feedback from such experiments as pretrial release projects."[71]

> *"The Court similarly dismisses the fact that the police deception which it sanctions quite clearly violates the American Bar Association's Standards for Criminal Justice – Standards which the Chief Justice has described as 'the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history,' and which this Court frequently finds helpful."*
>
> *Moran v. Burbine*, 475 U.S. 412 (1986) (Stevens, J. dissenting)

The ABA's process for creating and updating the Standards is "lengthy and painstaking," but the Standards finally approved by the ABA House of Delegates (to become official policy of the 400,000 member association) "are the result of the considered judgment of prosecutors, defense lawyers, judges, and academics who have been deeply involved in the process, either individually or as representatives of their respective associations, and only after the Standards have been drafted and repeatedly revised on more than a dozen occasions, over three or more years."[72]

Best practices in the field of pretrial release are based on empirically sound social science research as well as on fundamental legal principles, and the ABA Standards use both to provide rationales for its recommendations. For example, in recommending that commercial sureties be abolished, the ABA relies on numerous critiques of the money bail system going back nearly 100 years, social science experiments, law review articles, and various state statutes providing for its abolition. In recommending a presumption of release on recognizance and that money not be used to protect public safety, the ABA relies on United States Supreme Court opinions, findings from the Vera Foundation's Manhattan Bail Project, discussions from the 1964 Conference on Bail and Criminal Justice, Bureau of Justice Statistics data, as well as the *absence* of evidence, i.e., "the absence of any relationship between the ability of a defendant to post a financial bond and the risk that a defendant may pose to public safety."[73]

The ABA Standards provide recommendations spanning the entirety of the pretrial phase of the criminal case, from the decision to release on citation or summons, to

---

[71] *Id.* (internal quotation omitted).
[72] *Id.*
[73] *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007), Std. 10-5.3 (a) (commentary) at 111.

accountability through punishment for pretrial failure. They are based, correctly, on a "bail/no bail" or "release/detain" model, designed to fully effectuate the release of bailable defendants while providing those denied bail with fair and transparent due process hearing prior to detention.

Drafters of the 2011 Summary Report to the National Symposium on Pretrial Justice recognized that certain fundamental features of an ideal pretrial justice system are the same features that have been a part of the ABA Standards since they were first published in 1968. And while that Report acknowledged that simply pointing to the Standards is not enough to change the customs and habits built over 100 years of a bail system dominated by secured money, charge versus risk, and profit, the Standards remain a singularly important resource for all pretrial practitioners. Indeed, given the comprehensive nature of the ABA Standards, jurisdictions can at least use them to initially identify potential areas for improvement by merely holding up existing policies, practices, and even laws to the various recommendations contained therein.

Chapter 6: Pretrial Terms and Phrases

The Importance of a Common Vocabulary

It is only after we know the history, the law, the research, and the national standards that we can fully understand the need for a common national vocabulary associated with bail. The Greek philosopher Socrates correctly stated that, "The beginning of wisdom is a definition of terms." After all, how can you begin to discuss society's great issues when the words that you apply to those issues elude substance and meaning? But beyond whatever individual virtue you may find in defining your own terms, the undeniable merit of this ancient quote fully surfaces when applied to dialogue with others. It is one thing to have formed your own working definition of the terms "danger" or "public safety," for example, but your idea of danger and public safety can certainly muddle a conversation if another person has defined the terms differently. This potential for confusion is readily apparent in the field of bail and pretrial justice, and it is the wise pretrial practitioner who seeks to minimize it.

Minimizing confusion is necessary because, as noted previously, bail is already complex, and the historically complicated nature of various terms and phrases relating to bail and pretrial release or detention only adds to that complexity, which can sometimes lead to misuse of those terms and phrases. Misuse, in turn, leads to unnecessary quibbling and distraction from fundamental issues in the administration of bail and pretrial justice. This distraction is multiplied when the definitions originate in legislatures (for example, by defining bail statutorily as an amount of money) or court opinions (for example, by articulating an improper or incomplete purpose of bail). Given the existing potential for confusion, avoiding further complication is also a primary reason for finding consensus on bail's basic terms and phrases.

As also noted previously, bail is a field that is changing rapidly. For nearly 1,500 years, the administration of bail went essentially unchanged, with accused persons obtaining pretrial freedom by pledging property or money, which, in turn, would be forfeited if those persons did not show up to court. By the late 1800s, however, bail in America had changed from the historical personal surety system to a commercial surety system, with the unfortunate consequence of solidifying money at bail while radically transforming money's use from a condition subsequent (i.e., using unsecured bonds) to a condition precedent (i.e., using secured bonds) to release. Within a mere 20 years after the introduction of the commercial surety system in America, researchers began documenting abuses and shortcomings associated with that system based on secured financial conditions. By the 1980s, America had undergone two generations of pretrial reform by creating alternatives to the for-profit bail bonding system, recognizing a second constitutionally valid purpose for the government to impose restrictions on pretrial freedom, and allowing for the lawful denial of bail altogether based on extreme

risk. These are monumental changes in the field of pretrial justice, and they provide further justification for agreeing on basic definitions to keep up with these major developments.

Finally, bail is a topic of increasing interest to criminal justice researchers, and criminal justice research begins with conceptualizing and operationalizing terms in an effort to collect and analyze data with relevance to the field. For example, until we all agree on what "court appearance rates" mean, we will surely struggle to agree on adequate ways to measure them and, ultimately, to increase them. In the same way, as a field we must agree on the meaning and purpose of so basic a term as "bail."

More important than achieving simple consensus, however, is that we agree on meanings that reflect reality or truth. Indeed, if wisdom begins with a definition of terms, wisdom is significantly furthered when those definitions hold up to what is real. For too long, legislatures, courts, and various criminal justice practitioners have defined bail as an amount of money, but that is an error when held up to the totality of the law and practice through history. And for too long legislatures, courts, and criminal justice practitioners have said that the purpose of bail is to provide reasonable assurance of public safety and/or court appearance, but that, too, is an error when held up against the lenses of history and the law. Throughout history, the definition of "bail" has changed to reflect what we know about bail, and the time to agree on its correct meaning for this generation of pretrial reform is now upon us.

The Meaning and Purpose of "Bail"

For the legal and historical reasons articulated above, bail should never be defined as money. Instead, bail is best defined in terms of release, and most appropriately as a process of conditional release. Moreover, the purpose of bail is not to provide reasonable assurance of court appearance and public safety – that is the province and purpose of conditions of bail or limitations on pretrial freedom. The purpose of bail, rather, is to effectuate and maximize release. There is "bail" – i.e., a process of release – and there is "no bail," – a process of detention. Constitutionally speaking, "bail" should always outweigh "no bail" because, as the U.S. Supreme Court has explained, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[74]

Historically, the term bail derives from the French "baillier," which means to hand over, give, entrust, or deliver. It was a delivery, or bailment, of the accused to the surety – the jailer of the accused's own choosing – to avoid confinement in jail. Indeed, even until the 20th century, the surety himself or herself was often known as the "bail" – the person to whom the accused was delivered. Unfortunately, however, for centuries money was also a major part of the bail agreement. Because paying money was the

[74] *United States v. Salerno,* 481 U.S. 739, 755 (1987).

primary promise underlying the release agreement, the coupling of "bail" and money meant that money slowly came to be equated with the release process itself. This is unfortunate, as money at bail has never been more than a condition of bail – a limitation on pretrial freedom that must be paid upon forfeiture of the bond agreement. But the coupling became especially misleading in America after the 1960s, when the country attempted to move away from its relatively recent adoption of a secured money bond and toward other methods for releasing defendants, such as release on recognizance and release on nonfinancial conditions.

Legally, bail as a process of release is the only definition that (1) effectuates American notions of liberty from even colonial times; (2) acknowledges the rationales for state deviations from more stringent English laws in crafting their constitutions (and the federal government in crafting the Northwest Territory Ordinance of 1787); and (3) naturally follows from various statements equating bail with release from the United States Supreme Court from *United States v. Barber*[75] and *Hudson v. Parker,*[76] to *Stack v. Boyle*[77]

and *United States v. Salerno*.[78]

Bail as a process of release accords not only with history and the law, but also with scholars' definitions (in 1927, Beeley defined bail as the release of a person from custody), the federal government's usage (calling bail a process in at least one document), and use by organizations such as the American Bar Association, which has quoted Black's Law Dictionary definition of bail as a "process by which a person is released from custody."[79] States with older (and likely outdated) bail statutes often still equate bail with money, but many states with newer provisions, such as Virginia (which defines bail as "the pretrial release of a person from custody upon those terms and conditions specified by order of an appropriate judicial officer"),[80] Colorado (which defines bail as security like a pledge or a promise, which can include release without money),[81] and Florida (which defines bail to include "any and all forms of pretrial

[75] 140 U.S. 164, 167 (1891) ("[I]n criminal cases it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial if the government can be assured of his presence at that time . . . .").
[76] 156 U.S 277, 285 (1895) ("The statutes of the United States have been framed upon the theory that a person accused of a crime shall not, until he has been finally adjudged guilty . . . be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail . . . .").
[77] 342 U.S. 1, 4 (1951) ("[F]ederal 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 . . . .").
[78] 481 U.S. 739, 755 (1987) ("In our society, liberty is the norm . . . .").
[79] *Frequently Asked Questions About Pretrial Release Decision Making* (ABA 2012).
[80] Va. Code. § 19.2-119 (2013).
[81] Colo. Rev. Stat. § 16-1-104 (2013).

release"[82]) have enacted statutory definitions to recognize bail as something more than simply money. Moreover, some states, such as Alaska,[83] Florida,[84] Connecticut,[85] and Wisconsin,[86] have constitutions explicitly incorporating the word "release" into their right-to-bail provisions.

> *"In general, the term 'bail' means the release of a person from custody upon the undertaking, with or without one or more persons for him, that he will abide the judgment and orders of the court in appearing and answering the charge against him. It is essentially a delivery or bailment of a person to his sureties—the jailers of his own choosing—so that he is placed in their friendly custody instead of remaining in jail."*
>
> Arthur Beeley, 1927

A broad definition of bail, such as "release from governmental custody" versus simply release from jail, is also appropriate to account for the recognition that bail, as a process of conditional release prior to trial, includes many mechanisms – such as citation or "station house release" – that effectuate release apart from jails and that are rightfully considered in endeavors seeking to improve the bail process.

The Media's Use of Bail Terms and Phrases

Much of what the public knows about bail comes from the media's use, and often misuse, of bail terms and phrases. A sentence from a newspaper story stating that "the defendant was released without bail," meaning perhaps that the defendant was released without a secured financial condition or on his or her own recognizance, is an improper use of the term "bail" (which itself means release) and can create unnecessary confusion surrounding efforts at pretrial reform. Likewise, stating that someone is being "held on $50,000 bail" not only misses the point of bail equaling release, but also equates money with the bail process itself, reinforcing the misunderstanding of money merely as a condition of bail – a limitation of pretrial freedom which, like all such limitations, must be assessed for legality and effectiveness in any particular case. For several reasons, the media continues to equate bail with money and tends to focus singularly on the amount of the financial condition (as opposed to any number of non-financial conditions) as a sort-of barometer of the justice system's sense of severity of the crime. Some of those reasons are directly related to faulty use of terms and phrases by the various states, which define terms differently from one another, and which occasionally define the same bail term differently at various places within a single statute.

[82] Fla. Stat. § 903.011 (2013).
[83] Alaska Const. art. I, § 11.
[84] Fla. Const. art. I, § 14.
[85] Conn. Const. art. 1, § 8.
[86] Wis. Const. art. 1, § 8.

In the wake of the 2011 National Symposium on Pretrial Justice, the Pretrial Justice Working Group created a Communications Subcommittee to, among other things, create a media campaign for public education purposes. To effectively educate the public, however, the Subcommittee recognized that some measure of media education also needed to take place. Accordingly, in 2012 the John Jay College Center on Media, Crime, and Justice, with support from the Public Welfare Foundation, held a symposium designed to educate members of the media and to help them identify and accurately report on bail and pretrial justice issues. Articles written by symposium fellows are listed as they are produced, and continue to demonstrate how bail education leads to more thorough and accurate coverage of pretrial issues.

Sources and Resources: John Jay College and Public Welfare Foundation Symposium resources, found at http://www.thecrimereport.org/conferences/past/2012-05-jailed-without-conviction-john-jaypublic-welfare-sym. Pretrial Justice Working Group website and materials, found at http://www.pretrial.org/infostop/pjwg/.

To say that bail is a process of release and that the purpose of bail is to maximize release is not completely new (researchers have long described an "effective" bail decision as maximizing or fostering release) and may seem to be only a subtle shift from current articulations of meaning and purpose. Nevertheless, these ideas have not taken a firm hold in the field. Moreover, certain consequences flow from whether or not the notions are articulated correctly. In Colorado, for example, where, until recently, the legislature incorrectly defined bail as an amount of money, bail insurance companies routinely said that the sole function of bail was court appearance (which only makes sense when bail and money are equated, for legally the only purpose of money was court appearance), and that the right to bail was the right merely to have an amount of money set – both equally untenable statements of the law. Generally speaking, when states define bail as money their bail statutes typically reflect the definition by overemphasizing money over all other conditions throughout the bail process. This, in turn, drives individual misperceptions about what the bail process is intended to do.

Likewise, when persons inaccurately mix statements of purpose for bail with statements of purpose for conditions of bail, the consequences can be equally misleading. For example, when judges inaccurately state that the purpose of bail is to protect public safety (again, public safety is a constitutionally valid purpose for any particular condition of bail or limitation of pretrial freedom, not for bail itself), those judges will likely find easy justification for imposing unattainable conditions leading to pretrial detention – for many, the safest pretrial option available. When the purpose of bail is thought to be public safety, then the emphasis will be on public safety, which may skew decisionmakers toward conditions that lead to unnecessary pretrial detention. However, when the purpose focuses on release, the emphasis will be on pretrial freedom with conditions set to provide a reasonable assurance, and not absolute assurance, of court appearance and public safety.

Thus, bail defined as a process of release places an emphasis on pretrial release and bail conditions that are attainable at least in equal measure to their effect on court appearance and public safety. In a country, such as ours, where bail may be constitutionally denied, a focus on bail as release when the right to bail is granted is crucial to following *Salerno's* admonition that pretrial liberty be our nation's norm. Likewise, by correctly stating that the purpose of any particular bail condition or limitation on pretrial freedom is tied to the constitutionally valid rationales of public safety and court appearance, the focus is on the particular condition – such as GPS monitoring or drug testing – and its legality and efficacy in providing reasonable assurance of the desired outcome.

Other Terms and Phrases

There are other terms and phrases with equal need for accurate national uniformity. For example, many states define the word "bond" differently, sometimes describing it in terms of one particular type of bail release or condition, such as through a commercial

surety. A bond, however, occurs whenever the defendant forges an agreement with the court, and can include an additional surety, or not, depending on that agreement. Prior definitions – and thus categories of bail bonds – have focused primarily on whether or how those categories employ money as a limitation on pretrial freedom, thus making those definitions outdated. Future use of the term bond should recognize that money is only one of many possible conditions, and, in light of legal and evidence-based practices, should take a decidedly less important role in the agreement forged between a defendant and the court. Accordingly, instead of describing a release by using terms such as "surety bond," "ten percent bond," or "personal recognizance bond," pretrial practitioners should focus first on release or detention, and secondarily address conditions (for release is always conditional) of the release agreement.

Other misused terms include: "pretrial" and "pretrial services," which are often inaccurately used as a shorthand method to describe pretrial services agencies and/or programs instead of their more appropriate use as (1) a period of time, and (2) the actual services provided by the pretrial agency or program; "court appearance rates" (and, concomitantly, "failure to appear rates") which is defined in various ways by various jurisdictions; "the right to bail," "public safety," "sureties" or "sufficient sureties," and "integrity of the judicial process." There have been attempts at creating pretrial glossaries designed to bring national uniformity to these terms and phrases, but acceptance of the changes in usage has been fairly limited. Until that uniformity is reached, however, jurisdictions should at least recognize the extreme variations in definitions of terms and phrases, question whether their current definitions follow from a study of bail history, law, and research, and be open to at least discussing the possibility of changing those terms and phrases that are misleading or otherwise in need of reform.

Additional Sources and Resources: Black's Law Dictionary (9th ed. 2009); *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 Justice (1987); Bryan A. Garner, A Dictionary of Modern Legal Usage (Oxford Univ. Press, 3rd ed. 1995); Timothy R. Schnacke, Michael R. Jones, & Claire M. B. Brooker, *Glossary of Terms and Phrases Relating to Bail and the Pretrial Release or Detention Decision* (PJI 2011) (currently available electronically on the PJI website).

Chapter 7: Application – Guidelines for Pretrial Reform

In a recent op-ed piece for *The Crime Report,* Timothy Murray, then Executive Director of the Pretrial Justice Institute, stated that "the cash-based model [relying primarily on secured bonds] represents a tiered system of justice based on personal wealth, rather than risk, and is in desperate need of reform."[87] In fact, from what we know about the history of bail, because a system of pretrial release and detention based on secured bonds administered primarily through commercial sureties causes abuses to both the "bail" and "no bail" sides of our current dichotomy, reform is not only necessary – it is ultimately inevitable. But how should we marshal our resources to best accomplish reform? How can we facilitate reform across the entire country? What can we do to fully understand pretrial risk, and to fortify our political will to embrace it? And how can we enact and implement laws, policies, and practices aiming at reform so that the resulting cultural change will actually become firmly fixed?

Individual Action Leading to Comprehensive Cultural Change

The answers to these questions are complex because every person working in or around the pretrial field has varying job responsibilities, legal boundaries, and, presumably, influence over others. Nevertheless, pretrial reform in America requires all persons – from entry-level line officers and pretrial services case workers to chief justices and governors – to embrace and promote improvements within their spheres of influence while continually motivating others outside of those spheres to reach the common goal of achieving a meaningful top to bottom (or bottom to top) cultural change. The common goal is collaborative, comprehensive improvement toward maximizing release, public safety, and court appearance through the use of legal and evidence-based practices, but we will only reach that goal through individual action.

[87] Timothy Murray, *Why the Bail Bond System Needs Reform,* The Crime Report (Nov. 19, 2013) found at http://www.thecrimereport.org/viewpoints/2013-11-why-the-bail-bond-system-needs-reform

Individual Decisions

Individual action, in turn, starts with individual decisions. First, every person working in the field must decide whether pretrial improvements are even necessary. It is this author's impression, along with numerous national and local organizations and entities, that improvements are indeed necessary, and that the typical reasons given to keep the customary yet damaging practices based on a primarily money-based bail system are insufficient to reject the national movement toward meaningful pretrial reform. The second decision is to resolve to educate oneself thoroughly in bail and to make the necessary improvements by following the research, wherever that research goes and so long as it does not interfere with fundamental legal foundations. Essentially, the second decision is to follow a legal and evidence-based decision making model for pretrial improvement. By following that model, persons (or whole jurisdictions working collaboratively) will quickly learn (1) which particular pretrial justice issues are most pressing and in need of immediate improvement, (2) which can be addressed in the longer term, and (3) which require no action at all.

Third, each person must decide how to implement improvements designed to address the issues. This decision is naturally limited by the person's particular job and sphere of influence, but those limitations should not stop individual action altogether. Instead, the limitations should serve merely as motivation to recruit others outside of each person's sphere to join in a larger collaborative process. Fourth and finally, each person must make a decision to ensure those improvements "stick" by using proven implementation techniques designed to promote the comprehensive and lasting use of a research-based improvement.

Learning about improvements to the pretrial process also involves learning the nuances that make one's particular jurisdiction unique in terms of how much pretrial reform is needed. If, for example, in one single (and wildly hypothetical) act, the federal government enacted a provision requiring the states to assure that no amount of money could result in the pretrial detention of any particular defendant – a line that is a currently a crucial part of both the federal and District of Columbia bail statutes – some states would be thrust immediately into perceived chaos as their constitutions and statutes practically force bail practices that include setting high amounts of money to detain high-risk yet bailable defendants pretrial. Other states, however, might be only mildly inconvenienced, as their constitutions and statutes allow for a fairly robust preventive detention process that is simply unused. Still others might recognize that their preventive detention provisions are somewhat archaic because they rely primarily on charge-based versus risk-based distinctions. Knowing where one's jurisdiction fits comparatively on the continuum of pretrial reform needs can be especially helpful when crafting solutions to pretrial problems. Some states underutilize citations and summonses, but others have enacted statutory changes to encourage using them more.

Some jurisdictions rely heavily on money bond schedules, but some have eliminated them entirely. There is value in knowing all of this.

Individual Roles

The process of individual decision making and action will look different depending on the person and his or her role in the pretrial process. For a pretrial services assessment officer, for example, it will mean learning everything available about the history, fundamental legal foundations, research, national standards, and terms and phrases, and then holding up his or her current practices against that knowledge to perhaps make changes to risk assessment and supervision methods. Despite having little control over the legal parameters, it is nonetheless important for each officer to understand the fundamentals so that he or she can say, for example, "Yes, I know that bail should mean release and so I understand that our statute, which defines bail as money, has provisions that can be a hindrance to certain evidence-based pretrial practices. Nevertheless, I will continue to pursue those practices within the confines of current law while explaining to others operating in other jobs and with other spheres of influence how amending the statute can help us move forward." This type of reform effort – a bottom to top effort – is happening in numerous local jurisdictions across America.

> *"Once you make a decision, the universe conspires to make it happen."*
>
> Ralph Waldo Emerson

For governors or legislators, it will mean learning everything available about the history, legal foundations, research, national standards, and terms and phrases, and then also holding up the state's constitution and statutes against that knowledge to perhaps make changes to the laws to better promote evidence-based practices. It is particularly important for these leaders to know the fundamentals and variances across America so that each can say, for example, "I now understand that our constitutional provisions and bail statutes are somewhat outdated, and thus a hindrance to legal and evidence-based practices designed to fully effectuate the bail/no bail dichotomy that is already technically a part of our state bail system. I will therefore begin working with state leaders to pursue the knowledge necessary to make statewide improvements to bail and pretrial justice so that our laws will align with broad legal and evidence-based pretrial principles and therefore facilitate straightforward application to individual cases." This type of reform effort – a top to bottom effort – is also happening in America, in states such as New York, New Jersey, Delaware, and Kentucky.

Everyone has a role to play in pretrial justice, and every role is important to the overall effort. Police officers should question whether their jurisdiction uses objective pretrial risk assessment and whether it has and uses fair and transparent preventive detention

(as the International Chiefs of Police/PJI/Public Welfare Foundation's Pretrial Justice Reform Initiative asks them to do), but they should also question their own citation policies as well as the utility of asking for arbitrary money amounts on warrants. Prosecutors should continue to advocate support for pretrial services agencies or others using validated risk assessments (as the Association of Prosecuting Attorneys policy statement urges them to do), but they should also question their initial case screening policies as well as whether justice is served through asking for secured financial conditions for any particular bond at first appearance. Defense attorneys, jail administrators, sheriffs and sheriff's deputies, city and county officials, state legislators, researchers and academics, persons in philanthropies, and others should strive individually to actively implement the various policy statements and recommendations that are already a part of the pretrial justice literature, and to question those parts of the pretrial system seemingly neglected by others.

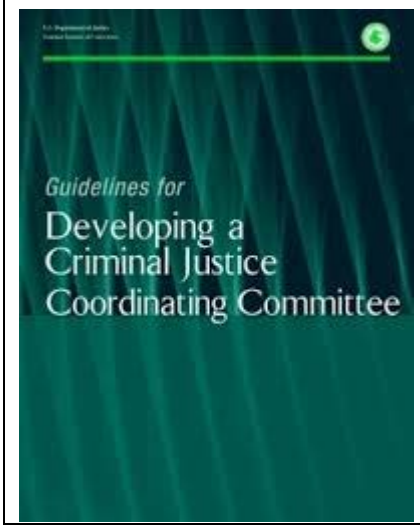
Everyone has a part to play in pretrial justice, and it means individually deciding to improve, learning what improvements are necessary, and then implementing legal and evidence-based practices to further the goals of bail. Nevertheless, while informed individual action is crucial, it is also only a means to the end of a comprehensive collaborative culture change. In this generation of pretrial reform, the most successful improvement efforts have come about when governors and legislators have sat at the same table as pretrial services officers (and everyone else) to learn about bail improvements and then to find comprehensive solutions to problems that are likely insoluble through individual effort alone.

Collaboration and Pretrial Justice

In a complicated justice system made up of multiple agencies at different levels of government, purposeful collaboration can create a powerful mechanism for discussing and implementing criminal justice system improvements. Indeed, in the National Institute of Corrections document titled *A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems,* the authors call collaboration a "key ingredient" of an evidence-based system, which uses research to achieve system goals.

Like other areas in criminal justice, bail and pretrial improvements affect many persons and entities, making collaboration between system actors and decision makers a crucial part of an effective reform strategy. Across the country, local criminal justice coordinating committees (CJCCs) are demonstrating the value of coming together with a formalized policy planning process to reach system goals, and some of the most effective pretrial justice strategies have come from jurisdictions working through these CJCCs. Collaboration allows individuals with naturally limited spheres of influence to interact and achieve group solutions to problems that are likely insoluble through individual efforts. Moreover, through staff and other resources, CJCCs often provide the best mechanisms for ensuring the uptake of research so that full implementation of legal and evidence-based practices will succeed.

The National Institute of Corrections currently publishes two documents designed to help communities create and sustain CJCCs. The first, Robert Cushman's *Guidelines for Developing a Criminal Justice Coordinating Committee* (2002), highlights the need for system coordination, explains a model for a planning and coordination framework, and describes mechanisms designed to move jurisdictions to an "ideal" CJCC. The second, Dr. Michael Jones's *Guidelines for Staffing a Criminal Justice Coordinating Committee* (2012), explains the need and advantages of CJCC staff and how that staff can help collect, digest, and synthesize research for use by criminal justice decision makers.



Judicial Leadership

Finally, while everyone has a role and a responsibility, judges must be singled out as being absolutely critical for achieving pretrial justice in America. Bail is a judicial function, and the history of bail in America has consistently demonstrated that judicial participation will likely mean the difference between pretrial improvement and pretrial stagnation. Indeed, the history of bail is replete with examples of individuals who attempted and yet failed to make pretrial improvements because those changes affected only one or two of the three goals associated with evidence-based decision making at bail, and they lacked sufficient judicial input on the three together. Judges alone are the individuals who must ensure that the balance of bail – maximizing release (through an understanding of a defendant's constitutional rights) while simultaneously maximizing public safety and court appearance (through an understanding of the constitutionally valid purposes of limiting pretrial freedom, albeit tempered by certain fundamental legal foundations such as due process, equal protection, and excessiveness, combined with evidence-based pretrial practices) – is properly maintained. Moreover, because the judicial decision to release or detain any particular defendant is the crux of the administration of bail, whatever improvements we make to other parts of the pretrial process are likely to stall if judges do not fully participate in the process of pretrial reform. Finally, judges are in the best position to understand risk, to communicate that understanding to others, and to demonstrate daily the political will to embrace the risk that is inherent in bail as a fundamental precept of our American system of justice.

Indeed, this generation of bail reform needs more than mere participation by judges; this generation needs judicial leadership. Judges should be organizing and directing pretrial conferences, not simply attending them. Judges should be educating the justice system and the public, including the media, about the right to bail, the presumption of innocence, due process, and equal protection, not the other way around.

Fortunately, American judges are currently poised to take a more active leadership role in making the necessary changes to our current system of bail. In February of 2013, the Conference of Chief Justices, made up of the highest judicial officials of the fifty states, the District of Columbia, and the various American territories, approved a resolution endorsing certain fundamental recommendations surrounding legal and evidence-based improvements to the administration of bail. Additionally, the National Judicial College has conducted focus groups with judges designed to identify opportunities for improvement. Moreover, along with the Pretrial Justice Institute and the Bureau of Justice Assistance, the College has created a teaching curriculum to train judges on legal and evidence-based pretrial decision making. Judges thus need only to avail themselves of these resources, learn the fundamentals surrounding legal and evidence-based

pretrial practice, and then ask how to effectuate the Chief Justice Resolution in their particular state.

The Chief Justice Resolution should also serve as a reminder that all types of pretrial reform include both an evidentiary and a policy/legal component – hence the term legal and evidence-based practices. Indeed, attempts to increase the use of evidence or research-based practices without engaging the criminal justice system and the general public in the legal and policy justifications and parameters for those practices may lead to failure. For example, research-based risk assessment, by itself, can be beneficial to any jurisdiction, but only if implementing it involves a parallel discussion of the legal parameters for embracing and then mitigating risk, the need to avoid other practices that undermine the benefits of assessment, and the pitfalls of attempting to fully incorporate risk into a state legal scheme that is unable to adequately accommodate it. On the other hand, increasing the use of unsecured financial conditions, coupled with a discussion of how research has shown that those conditions can increase release without significant decreases in court appearance and public safety – the three major legal purposes underlying the bail decision – can move a jurisdiction closer to model bail practices that, among other things, ensure bailable defendants who are ordered release are actually released.

Additional Sources and Resources: Association of Prosecuting Attorneys, *Policy Statement on Pretrial Justice* (2012) found at http://www.apainc.org/html/APA+Pretrial+Policy+Statement.pdf. Conference of Chief Justices Resolution 3: *Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial* Release (2013), found at http://www.pretrial.org/wp-content/uploads/2013/05/CCJ-Resolution-on-Pretrial.pdf; William F. Dressell & Barry Mahoney, *Pretrial Justice in Criminal Cases: Judges' Perspectives on Key Issues and Opportunities for Improvement* (Nat'l. Jud. College 2013); *Effective Pretrial Decision Making: A Model Curriculum for Judges* (BJA/PJI/Nat'l Jud. Coll. (2013) http://www.pretrial.org/download/infostop/Judicial%20Training.pdf; Dean L. Fixsen, Sandra F. Naoom, Karen A. Blase, Robert M. Friedman, and Frances Wallace, *Implementation Research: A Synthesis of the Literature* (Univ. S. Fla. 2005); International Chiefs of Police Pretrial Justice Reform Initiative, found at http://www.theiacp.org/Pretrial-Justice-Reform-Initiative.

Conclusion

Legal and evidence-based pretrial practices, derived from knowing the history of bail, legal foundations, and social science pretrial research, and expressed as recommendations in the national best practice standards, point overwhelmingly toward the need for pretrial improvements. Fortunately, in this third generation of American bail reform, we have amassed the knowledge necessary to implement pretrial improvements across the country, no matter how daunting or complex any particular state believes that implementation process to be. Whether the improvements are minor, such as adding an evidence-based supervision technique to an existing array of techniques, or major, such as drafting new constitutional language to allow for the fair and transparent detention of high-risk defendants without the need for money bail, the only real prerequisites to reform are education and action. This paper is designed to further the process of bail education with the hope that it will lead to informed action.

As a prerequisite to national reform, however, that bail education must be uniform. Accordingly, achieving pretrial justice in America requires everyone both inside and outside of the field to agree on certain fundamentals, such as the history of bail, the legal foundations, the importance of the research and national standards, and substantive terms and phrases. This includes agreeing on the meaning and purpose of the word "bail" itself, which has gradually evolved into a word that often is used to mean anything but its historical and legal connotation of release. Fully understanding these fundamentals of bail is paramount to overcoming our national amnesia of a system of bail that worked for centuries in England and America – an unsecured personal surety system in which bailable defendants were released, in which non-bailable defendants were detained, and in which no profit was allowed.

> *"A sound pretrial infrastructure is not just a desirable goal – it is vital to the legitimate system of government and to safer communities."*
>
> Deputy Attorney General James M. Cole (2011).

Moreover, while we have learned much from the action generated by purely local pretrial improvement projects, we must not forget the enormous need for pretrial justice across the entire country. We must thus remain mindful that meaningful American bail reform will come about only when entire American states focus on these important issues. Anything less than an entire state's complete commitment to examine all pretrial practices across jurisdictions and levels of government – by following the research from all relevant disciplines – means that any particular pretrial practitioner's foremost duty is to continue communicating the need for reform until that complete commitment is achieved. American pretrial justice ultimately depends on reaching a

tipping point among the states, which can occur only when enough states have shown that major pretrial improvements are necessary and feasible.

In 1964, Robert Kennedy stated the following:

> [O]ur present bail system inflicts hardship on defendants and it inflicts considerable financial cost on society. Such cruelty and cost should not be tolerated in any event. But when they are *needless*, then we must ask ourselves why we have not developed a remedy long ago. For it is clear that the cruelty and cost of the bail system *are* needless.[88]

Fifty years later, this stark assessment remains largely true, and yet we now have significant reason for hope that this third generation of bail reform will be America's last. For in the last 50 years, we have accumulated the knowledge necessary to replace, once and for all, this "cruel and costly" system with one that represents safe, fair, and effective administration of pretrial release and detention. We have amassed a body of research literature, of best practice standards, and of experiences from model jurisdictions that together have created both public and criminal justice system discomfort with the status quo. It is a body of knowledge that points in a single direction toward effective, evidence-based pretrial practices, and away from arbitrary, irrational, and customary practices, such as the casual use of money. We now have the information necessary to recognize and fully understand the paradox of bail. We know what to do, and how to do it. We need only to act.

[88] Attorney General Robert F. Kennedy, Testimony on Bail Legislation Before the Subcommittee on Constitutional Rights and Improvements in the Judicial Machinery of the Senate Judiciary Committee 4 (Aug. 4, 1964) (emphasis in original) *available at* http://www.justice.gov/ag/rfkspeeches/1964/08-04-1964.pdf.

Varden, et al v. City of Clanton,
(M.D. Ala. 2015) Case No. 2:15-cv-34-MHT-WC
United States Statement of Interest, February 13, 2015.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CHRISTY DAWN VARDEN, et al.

Plaintiffs,

v.

Case No. 2:15-cv-34-MHT-WC

THE CITY OF CLANTON, **(Class Action)**

Defendant.

STATEMENT OF INTEREST OF THE UNITED STATES

Incarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth Amendment. *See Tate v. Short*, 401 U.S. 395, 398 (1971); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970); *Smith v. Bennett*, 365 U.S. 708, 709 (1961). In this case, Plaintiffs allege that they are subjected to an unlawful bail scheme in Clanton, Alabama. Under this scheme, Plaintiffs are allegedly required to pay a cash "bond" in a fixed dollar amount for each misdemeanor charge faced or else remain incarcerated. Without taking a position on the factual accuracy of Plaintiff's claims, the United States files this Statement of Interest to assist the Court in evaluating the constitutionality of Clanton's bail practices. It is the position of the United States that, as courts have long recognized, any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pre-trial release, without any regard for indigence, not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy.

INTEREST OF THE UNITED STATES

The United States has authority to file this Statement of Interest pursuant to 28 U.S.C § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in a federal court. The United States can enforce the rights of the incarcerated pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997. The United States uses that statute to address unconstitutional conditions of confinement, many of which are caused by the overcrowding of prisons and jails.

The United States has a clear interest in ensuring that state and local criminal justice systems are fair, nondiscriminatory, and rest on a strong constitutional foundation.[1] Unfortunately, that is not always the case. As noted by Attorney General Eric Holder at the National Symposium on Pretrial Justice in 2011:

> As we speak, close to three quarters of a million people reside in America's jail system. . . . Across the country, nearly two thirds of all inmates who crowd our county jails—at an annual cost of roughly nine billion taxpayer dollars—are defendants awaiting trial. . . . Many of these individuals are nonviolent, non-felony offenders, charged with crimes ranging from petty theft to public drug use. And a disproportionate number of them are poor. They are forced to remain in custody—for an average of two weeks, and at a considerable expense to taxpayers—because they simply cannot afford to post the bail required . . . .[2]

For these reasons, the United States is taking an active role to provide guidance on the due process and equal protection issues facing indigent individuals charged with state and local crimes. For example, the United States filed Statements of Interest in *Wilbur v. City of Mount*

---

[1] ABA Standards for Criminal Justice, *Prosecution and Defense Function*, Standard 3-1.2(d) (1993) ("It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action.").

[2] Eric Holder, Att'y Gen. of the United States, U.S. Dep't of Justice, Speech at the National Symposium on Pretrial Justice (June 1, 2011), *available at* http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-symposium-pretrial-justice.

Vernon in 2013[3] and *Hurrell-Harring v. State of New York* in 2014.[4] Both cases involved the fundamental right to counsel for indigent criminal defendants and the role counsel plays in ensuring the fairness of our justice system.[5]

Accordingly, the United States files this Statement of Interest, reaffirming this country's commitment to the principles of fundamental fairness and to ensuring that "the scales of our legal system measure justice, not wealth."[6]

BACKGROUND

It is long established that the American criminal justice system should not work differently for the indigent and the wealthy. Indeed, as early as 1956, the Supreme Court declared that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois*, 351 U.S. 12, 19 (1956). Twenty years later, the Fifth Circuit extended that precept to incarceration: "[t]o imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal

[3] Statement of Interest of the United States, *Wilbur v. City of Mount Vernon*, Civ. Action No. 11-1100 (W.D. Wash., Aug. 8, 2013), *available at* http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf.

[4] Statement of Interest of the United States, *Hurrell-Harring v. State of New York*, Case No. 8866-07 (N.Y. Sup. Ct., Sept. 25, 2014), *available at* http://www.justice.gov/crt/about/spl/documents/hurrell_soi_9-25-14.pdf.

[5] In both Statements of Interest, the United States did not take a position on the merits of the plaintiffs' claims. In *Wilbur*, the United States provided its expertise by recommending that if the court found for the plaintiffs, it should ensure that public defender counsel have realistic workloads, sufficient resources, and are carrying out the hallmarks of minimally effective representation. In *Hurrell-Harring*, the United States provided an informed analysis of existing case law to synthesize the legal standard for constructive denial of counsel.

[6] Robert F. Kennedy, Att'y Gen. of the United States, U.S. Dep't of Justice, Address to the Criminal Law Section of the American Bar Association (Aug. 10, 1964), *available at* http://www.justice.gov/ag/rfkspeeches/1964/08-10-1964.pdf; *see also* Eric Holder, Att'y Gen. of the United States, U.S. Dep't of Justice, Speech at the National Association of Criminal Defense Lawyers 57th Annual Meeting (Aug. 1, 2014), *available at* http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140801.html (quoting Attorney General Robert F. Kennedy).

protection of the laws." *Barnett v. Hopper*, 548 F.2d 550, 554 (5th Cir. 1977)[7], *vacated as moot*, 439 U.S. 1041 (1978). Under the clear precedent of this Circuit, "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (en banc).

The sweeping reforms to the federal bail system during the 1960s were based on these same constitutional principles—that access to justice should not be predicated on financial means. In 1962, Attorney General Robert F. Kennedy called for wide-scale bail reform, noting that "[i]f justice is priced in the market place, individual liberty will be curtailed and respect for law diminished."[8] In 1964, Attorney General Kennedy convened a National Conference on Bail and Criminal Justice with the express purpose of understanding and improving both the federal and state bail systems.[9] During his closing remarks at the conference, Attorney General Kennedy declared:

> [U]sually 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?[10]

At the time, federal courts routinely employed cash bail schemes similar to the one alleged in this case: bail amounts were based on the charges for which defendants were arrested, and

---

[7] The Eleventh Circuit has adopted as precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

[8] Robert F. Kennedy, Att'y Gen. of the United States, U.S. Dep't of Justice, Address to the American Bar Association (Aug. 6, 1962), *available at* http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-06-1962%20Pro.pdf.

[9] Robert F. Kennedy, Att'y Gen. of the United States, U.S. Dep't of Justice, Welcome Address to the National Conference on Bail and Criminal Justice (May 27, 1964), *available at* http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/05-27-1964.pdf.

[10] National Criminal Justice Reference Service, *Proceedings and Interim Report from the National Conference on Bail and Criminal Justice* 297 (1965), *available at* https://www.ncjrs.gov/pdffiles1/Photocopy/355NCJRS.pdf.

judicial officers routinely set cash bail amounts that some defendants simply could not afford to pay.

Attorney General Kennedy's conference on bail reform sparked wide-scale changes to the federal pre-trial detention and bail system. Testifying before the Senate Judiciary Committee while bail reform legislation was under consideration, Attorney General Kennedy articulated the Department's growing concern that "the rich man and the poor man do not receive equal justice in our courts. And in no area is this more evident than in the matter of bail."[11] The main reason for this disparity, according to Attorney General Kennedy, was that the federal bail-setting process was "unrealistic and often arbitrary." Bail was set "without regard to a defendant's character, family ties, community roots or financial status." Instead, bail was frequently set based on the nature of the crime alone.[12]

Today, federal law expressly forbids that practice with a single sentence: "The judicial officer may not impose a financial condition that results in the pretrial detention of the person."[13] This concise but profound change was initiated as part of the Bail Reform Act of 1966, which marked a significant departure from past practices. The stated purpose of the Act was "to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest."[14]

---

[11] *See Hearings on S. 2838, S. 2839, & S. 2840 Before the Subcomm. on Constitutional Rights and Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 88th Cong. (1964) (Testimony by Robert F. Kennedy, Att'y Gen. of the United States, U.S. Dep't of Justice), *available at* http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf.

[12] *Id.*

[13] 18 U.S.C. § 3142(c)(2).

[14] Bail Reform Act of 1966, Pub. L. No. 89-465, § 2, 80 Stat. 214 (1966). *See also Allen v. United States*, 386 F.2d 634, 637 (D.C. Cir. 1967) (Bazelon, J., dissenting) ("It plainly appears from the language and

The Bail Reform Act requires federal judges and magistrates to conduct an individualized analysis of each defendant prior to ordering pretrial detention.[15] The individualized analysis requires consideration of factors such as ties to the community, employment, and prior record and precludes fixing bail based solely on the charge.[16] In weighing these factors, judges are to consider 1) the extent to which pre-trial release will endanger the safety of those in the community, and 2) what is necessary to reasonably assure that the defendant will return to court when necessary—*i.e.*, that the defendant will not flee or otherwise attempt to avoid justice.[17]

Federal judges must also consider a wide range of "conditions" to be placed upon a defendant's pre-trial release that could alleviate these concerns. These conditions include regular community reporting, establishing curfews, abstaining from drug or alcohol use, and various types of community supervision.[18] Financial conditions, including money bonds, can be among these measures and, in appropriate cases where an accused might be a flight risk, financial conditions can provide strong incentives to return to court. But the imposition of financial conditions can only be made after an individualized assessment of the particular defendant. And, importantly, the Bail Reform Act expressly precludes any federal judge or magistrate from

---

history of the Bail Reform Act that its central purpose was to prevent pretrial detention because of indigency.") (citations omitted).

[15] Federal judges must make these determinations during or following detention hearings in open court, in which defendants facing pre-trial detention are represented by counsel, either appointed or retained. 18 U.S.C. § 3142(f).

[16] The Comprehensive Crime Control Act of 1984, signed into law by President Ronald Reagan, modified several sections of the 1966 Act, but made even more explicit the requirement of an individualized determination and the prohibition against cash bail for those who could not pay.

[17] *See generally*, 18 U.S.C. § 3142(b)-(d) (outlining factors the courts must consider in determining whether or not to hold a defendant over until trial, or release him or her on his or her own recognizance or pursuant to conditions).

[18] 18 U.S.C. § 3142(c)(1)(B).

imposing money bail that an accused person cannot afford to pay and would therefore result in that person's pretrial detention.[19]

If the judge determines that no amount of conditions can reasonably secure the safety of the community and the return of the defendant, the judge may order pretrial detention. In doing so, the judge must provide a written statement of facts and the reasons for detention via a "detention order."[20] Reasons for or against pretrial detention include the nature and circumstances of the defendant's charges, the weight of the evidence against the defendant, the defendant's history and character (including family and community ties and employment), and the dangerousness or risk of flight that the defendant may pose if released.[21]

Essentially, the Bail Reform Act's provisions ensure that pretrial detention is based on an objective evaluation of dangerousness and risk of flight, rather than ability to pay. Previous critics of bail reform suggested that the Act would "create a nation of fugitives,"[22] but the Department has not found that to be the case. To the contrary, the Department has found that judicial officers are well suited to make fair, individualized determinations about the risks, if any, of releasing a particular defendant pending his or her next court date and that they are able to do so efficiently with the assistance of an able pretrial services staff and the input of both the prosecutor and defense counsel. Individualized determination and the basic elements of due

[19] 18 U.S.C. § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person.").

[20] 18 U.S.C. § 3142(i)(1).

[21] 18 U.S.C. § 3142(g).

[22] *Hearings on S. 2838, S. 2839, & S. 2840 Before the Subcomm. on Constitutional Rights and Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 88th Cong. (1964) (Testimony by George L. Will, Executive Director of the American Society of Professional Bail Bondsmen).

process help ensure that federal defendants are not detained unnecessarily or simply because they are poor.

DISCUSSION

Plaintiffs in this case seek declaratory, injunctive and compensatory relief, alleging that the mandatory imposition of a bail schedule that sets bail at a fixed amount per charge violates due process and equal protection. If Clanton's bail system indeed fixes bond amounts based solely on the arrest charge, and does not take individual circumstances into account, the Court should find this system to be unconstitutional. Not only are such schemes offensive to equal protection principles, they also constitute bad public policy.

I. Fixed-sum Bail Systems are Unconstitutional under the Equal Protection Clause of the Fourteenth Amendment

In general, the Equal Protection Clause of the Fourteenth Amendment prohibits "punishing a person for his poverty." *Bearden v. Georgia*, 461 U.S. 660, 671 (1983). This is especially true when it comes to depriving a person of his liberty. The Supreme Court has considered a variety of contexts in which the government attempted to incarcerate or continue incarceration of an individual because of his or her inability to pay a fine or fee, and in each context, the Court has held that indigency cannot be a barrier to freedom. *Tate*, 401 U.S. at 398; *Williams*, 399 U.S. at 240-41; *Smith*, 365 U.S. at 709.

Although much of the Court's jurisprudence in this area concerns sentencing or early release schemes, the Court's Fourteenth Amendment analysis applies in equal, if not greater force to individuals who are detained until trial because of inability to pay fixed-sum bail amounts. Liberty is particularly salient for defendants awaiting trial, who have not been found guilty of any crime. *See United States v. Salerno*, 481 U.S. 739, 750 (1987) (recognizing the fundamental nature of the right to pretrial liberty). To be sure, pretrial detention may be

necessary in some circumstances including if a court finds a likelihood of future danger to society or that the defendant poses a flight risk. Fixed-sum bail systems, however, such as the one allegedly used in Clanton, Alabama, do not take these considerations into account. Such systems are based solely on the criminal charge. Because such systems do not account for individual circumstances of the accused, they essentially mandate pretrial detention for anyone who is too poor to pay the predetermined fee. This amounts to mandating pretrial detention only for the indigent.

The Fifth Circuit briefly discussed fixed-sum bail systems, otherwise referred to as "bail schedules," in *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc). There, the Court held that the new bail scheme passed by the Florida legislature was not constitutionally deficient simply because it failed to articulate a presumption against imposing cash bail. The *en banc* court noted that Florida's new system allowed for six different types of pretrial release—cash bail was but one option of many. Importantly, however, the Court pointed out that the utilization of bond schedules, and only bond schedules, creates an injustice for individuals who cannot meet the financial threshold:

> Utilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting its requirements. The incarceration of those who cannot, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements.

Pugh, 572 F.2d at1057.

As correctly noted in Plaintiff's Motion for Temporary Restraining Order or in the Alternative Motion for Preliminary Injunction (ECF No. 34), courts in this Circuit have had occasion to address scenarios analogous to those alleged here. For example, in *Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972), the Fifth Circuit invalidated a sentencing scheme that offered defendants the choice of immediately paying a $17 fine or serving a 13-day jail sentence as

applied to indigent defendants who could not pay the fine. As the Court noted, "[t]he alternative fine before us creates two disparately treated classes: those who can satisfy a fine immediately upon its levy, and those who can pay only over a period of time, if then. Those with means avoid imprisonment; the indigent cannot escape imprisonment." *Id.*

Similarly, in *Tucker v. City of Montgomery*, 410 F. Supp. 494 (M.D. Ala. 1976), this Court held that the City's practice of charging a bond to exercise appellate rights denied the equal protection of the law to indigent prisoners. In so holding, the court found that "[t]he imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law." *Id.* at 502 (quoting *Burns v. Ohio*, 360 U.S. 252, 258 (1959)).

Finally, this Court's recent decision in *United States v. Flowers*, 946 F. Supp. 2d 1295 (M.D. Ala. 2013), addressed practices analytically indistinguishable from those practices Plaintiffs allege are occurring in Clanton. In *Flowers*, the defendant could avoid prison only if she paid for her home confinement, an option her poverty prevented. This Court noted correctly that "it is inequitable for indigent defendants who cannot pay for home-confinement monitoring to be imprisoned while those who can pay to be subject to the more limited monitored home confinement avoid prison." *Id.* at 1302. If Plaintiffs' allegations in this case are true, indigent defendants in Clanton face a similar problem—pay a monetary bond they cannot afford or go to jail. This determination, like the sentence in *Flowers*, would be "constitutionally infirm and [unable to] stand." *Id.* at 1300.

II. Public Policy Weighs Strongly Against Fixed Bail Systems

In addition to being unconstitutional, fixed-bail systems that do not account for a defendant's indigency are an inadequate means of securing the safety of the public or ensuring

the return of the defendant to the court – the central rationales underlying pretrial detention. Indeed, such schemes are driven by financial considerations, rather than legitimate public safety concerns. This is bad public policy, and results in negative outcomes for both defendants and the community at large.

The problems with bail systems based on financial considerations are well-documented.[23] As summarized in a recent Department of Justice publication: "The two central issues concerning money bail are: (1) its tendency to cause unnecessary incarceration of defendants who cannot afford to pay secured financial conditions either immediately or even after some period of time; and (2) its tendency to allow for, and sometimes foster, the release of high-risk defendants, who should more appropriately be detained without bail."[24]

When bail amounts are too high for indigent individuals to afford, fewer defendants will be released pretrial,[25] thereby creating a burden on local jails.[26] Today, according to a Bureau of Justice Statistics analysis, more than 60 percent of all jail inmates nationwide are in custody awaiting an adjudication of their charges, and the majority of these pretrial detainees are charged

---

[23] *See, e.g.*, Timothy R. Schnacke, United States Department of Justice, National Institute of Corrections, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (2014), *available at* http://www.pretrial.org/download/research/Fundamentals%20of%20Bail%20-%20NIC%202014.pdf.

[24] *Id.* at 15.

[25] Thomas H. Cohen & Brian A. Reaves, United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Pretrial Release of Felony Defendants in State Courts: State Court Processing Statistics, 1990-2004, Special Report*, NCJ 214994 (2007) (study of state courts in the 75 largest counties from 1990 to 2004, finding that about 7 of 10 defendants secured release when bail was set at less than $5,000, but only 1 in 10 secured release when bail was set at $10,000 or more), *available at* http://www.bjs.gov/content/pub/pdf/prfdsc.pdf.

[26] *See generally* Ram Subramaniam, et al., Vera Institute of Justice, *Incarceration's Front Door: The Misuse of Jails in America* 29-35 (Feb. 2015), *available at* http://vera.org/pubs/incarcerations-front-door-misuse-jails-america.

with nonviolent offenses.[27] Jail overcrowding, in turn, can result in significant security and life and safety risks for both inmates and staff.[28]

While there is a need for continued quantitative research on the effects of pretrial detention, it is clear that the decision to release or detain a defendant pretrial has many collateral consequences beyond the loss of liberty. As detailed by the Supreme Court:

> The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. . . Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.

Barker v. Wingo, 407 U.S. 514, 532-33 (1972). Incarceration carries weighty mental and social burdens for the accused and for those closest to them. Family obligations may go unmet while defendants are detained, and jobs may be lost, both of which can cause irreparable harm to the defendant, their families, and their communities.

In addition, for many reasons, the judicial decision to detain or release the accused pretrial may be a critical factor affecting the outcome of a case.[29] Pretrial detention can impede

---

[27] Todd D. Minton, United States Department of Justice, Bureau of Justice Statistics, *Jail Inmates at Midyear 2012 – Statistical Tables*, NCJ 241264, at 1 (2013) *available at* www.bjs.gov/content/pub/pdf/jim12st.pdf (showing that the percentage of pretrial detainees in jail has remained unchanged since 2005)*; see also* Donna Lyons, *Predicting Pretrial Success,* State Legislatures, February 2014 at 18-19, *available at* http://www.ncsl.org/Portals/1/Documents/magazine/articles/2014/SLG_0214_Pretrial_1.pdf; Arthur W. Pepin, Conference of State Court Administrators, *Policy Paper: Evidence-Based Pretrial Release* (2014), *available at* http://www.colorado.gov/ccjjdir/Resources/Resources/Ref/EBPre-TrialRelease_2012.pdf.

[28] *See generally Brown v. Plata*, 131 S. Ct. 1910 (2011) (overcrowding in California prisons created unconstitutional conditions of confinement, including inadequate medical and mental health care); *see also Hutto v. Finney*, 437 U.S. 678, 688 (1978) (upholding 30-day limit on confinement in isolation, noting that overcrowding in the isolation unit contributed to violence and vandalism of cells).

[29] Mary T. Phillips, New York City Criminal Justice Agency, Inc., *Pretrial Detention and Case Outcomes, Part 1: Nonfelony Cases* (2007), *available at* http://www.nycja.org/lwdcms/doc-view.php?module=reports&module_id=669&doc_name=doc.

the preparation of a defense, such as gathering evidence and interviewing witnesses, and pretrial detention can make it more difficult to confer with an attorney.[30] Research indicates that these barriers have practical consequences: defendants who are detained pretrial have less favorable outcomes than those who are not detained, notwithstanding other relevant factors such as the charges they face or their criminal history. One contributing factor is that detained defendants are more likely to plead guilty, if only to secure release, possibly resulting in at least some wrongful convictions.[31] In some instances, the time someone is detained pretrial can even exceed the likely sentence if the defendant were later found guilty.[32]

For these reasons, many states have moved away from bail systems that are based entirely on the criminal charge and towards systems that allow for different pretrial release options based on individualized determinations of dangerousness or risk of flight.[33] The

---

[30] Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 Am. Crim. L. Rev. 1123, 1165 (2005); *see also Barker*, 407 U.S. at 532-33 (noting that a defendant detained pretrial "is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.").

[31] *Id*. *See also* Mary T. Phillips, New York City Criminal Justice Agency, Inc., *Bail, Detention, and Felony Case Outcomes, Research Brief No. 18* (2008), *available at* http://www.nycja.org/lwdcms/doc-view.php?module=reports&module_id=597&doc_name=doc; *Barker*, 407 U.S. at 533, n.35.

[32] *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2492 (2004).

[33] States employ a variety of bail systems that satisfy constitutional concerns. The federal model, while constitutionally sufficient, is not the only adequate scheme. *See* Arizona (AR.S. Crim. Proc. Rule 7.2); Arkansas (Arkansas Rules of Criminal Procedure, Rule 9.2); Connecticut (C.G.S.A § 54-63b(b)); Illinois (725 ILCS 5/110-2); Maine (15 M.R.S.A §§ 1002, 1006); Massachusetts (MGL Ch. 276, § 58); Michigan (M.C.L.A 780.62-for misdemeanors only); Minnesota (49 M.S.A, Rules Crim. Proc. § 6.02(1)); Missouri (Missouri Supreme Court Rule 33.01); Montana (MCA 46-9-108 (2)); Nebraska (Neb. Rev. Stat. § 29-901); New Mexico (NMRA, Rule 5-401(D)(2)); North Carolina (N.C.G.S.A. § 15A-534(b)); North Dakota (N.D.R. Crim. P. 46); Oregon (ORS 135.245(3)); Rhode Island (RI ST § 12-13-1.3(e)); South Carolina (S.C. Code § 17-15-10—for non-capital cases only); South Dakota(SDCL § 23A-43-2—for non-capital cases only); Tennessee (T. C. A § 40-11-116(a)); Vermont (13 V.S.A § 7554—for misdemeanors only); Washington (WA ST SUPER CT CR CrR 3.2(b)—for non-capital cases only); Wisconsin (W.S.A 969.01(4)); Wyoming (WY RCRP Rule 46.1(c)(1)(B)—for non-capital cases only). *See generally* Cynthia E. Jones, "*Give Us Free:" Addressing Racial Disparities in Bail Determinants*, 16 N.Y.U. J. Leg. & Pub. Pol'y 919, 930 (2013).

American Bar Association's *Standards for Criminal Justice* have also evolved to reflect the importance of the presumption of pretrial release and the need for individualized determinations before imposing pretrial detention. The Standards advocate for the imposition of the least restrictive of release conditions necessary to ensure the defendant's appearance in court. The Standards also include guidelines to limit the use of financial conditions for pretrial release.[34]

The use of a more dynamic bail scheme, such as that set forth in the federal Bail Reform Act, not only ensures adherence to constitutional principles of due process and equal protection, but constitutes better public policy. Individualized determinations, rather than fixed-sum schemes that unfairly target the poor, are vital to preventing jail overcrowding, avoiding the costs attendant to incarceration,[35] and providing equal justice for all. Consequently, in light of the potential harmful consequences of prolonged confinement and the strain that unnecessary confinement puts on jail conditions, the United States urges that pretrial detention be used only when necessary, as determined by an appropriate individualized determination.

CONCLUSION

Fundamental and long-standing principles of equal protection squarely prohibit bail schemes based solely on the ability to pay. Fixed-sum bail schemes do not meet these mandates. By using a predetermined schedule for bail amounts based solely on the charges a defendant faces, these schemes do not properly account for other important factors, such as the defendant's potential dangerousness or risk of flight. For these reasons, if the bail system in Clanton is as Plaintiff describes, the system should not stand.

---

[34] ABA Standards for Criminal Justice, *Pretrial Release*, Standard 10-1.4 (3d ed. 2007).

[35] As noted by the Supreme Court, pretrial detention not only adversely impacts defendants – it also creates significant costs for taxpayers. *See Tate*, 401 U.S. at 399 (prolonged pretrial detention "saddles the State with the cost of feeding and housing [the defendant] for the period of his imprisonment.").

Respectfully submitted,

VANITA GUPTA
Acting Assistant Attorney General
Civil Rights Division
United States Department of Justice

MARK KAPPELHOFF
Deputy Assistant Attorney General
Civil Rights Division

JONATHAN M. SMITH (DC 396578)
Chief
Civil Rights Division
Special Litigation Section

GEORGE L. BECK, JR.
United States Attorney
Middle District of Alabama

Of Counsel:
Lisa Foster (CA 122178)
Director
Access to Justice Initiative
Telephone: (202) 514-7073
lisa.foster3@usdoj.gov

Jennifer Katzman (NY 4388898)
Senior Counsel
Access to Justice
Telephone: (202) 514-7086
jenni.katzman@usdoj.gov

Robert B. Bullock (CA 219942)
Senior Counsel
Access to Justice
Telephone: (202) 514-5324
bob.bullock@usdoj.gov

Andrew Stanner (DC 979839)
Senior Counsel
Access to Justice
Telephone: (202) 353-9024
andrew.stanner@usdoj.gov

/s/ Winsome G. Gayle
WINSOME G. GAYLE (DC 479887)
Special Litigation Counsel
Civil Rights Division
Special Litigation Section
Winsome.Gayle@usdoj.gov

/s/ Paul Killebrew
PAUL KILLEBREW (LA 32176)
Paul.Killebrew@usdoj.gov

/s/ Sharon Brett
SHARON BRETT (NY 5090279)
Trial Attorneys
Civil Rights Division
Special Litigation Section
Sharon.Brett@usdoj.gov

/s/Robert G. Anderson
ROBERT G. ANDERSON (MSB 1589)
Assistant United States Attorney
131 Clayton Street
Montgomery, AL 36104
(334) 223-7280
Robert.Anderson@usdoj.gov

Attorneys for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2015, a copy of the foregoing Statement of Interest was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Robert G. Anderson
Assistant United States Attorney