BOND

Policy:
Brandon Buskey
ACLU Criminal Law Reform Project
125 Broad St Fl 18
New York, New York 10004-2454
212 -284-7364
Email: bbuskey@aclu.org

Practice:
Colette Tvedt
1600 Stout St Ste 1400
Denver, Colorado 80202-3110
303-577-1633
Email: colette@tvedtlaw.com

BAIL SCHEDULES AND WEALTH-BASED DETENTION

Basic Claim: cannot detain pretrial arrestees solely because they cannot afford bail

- Relies primarily on the Supreme Court's "debtors' prisons" decisions that combine equal protection and due process principles to bar detention solely because a person cannot afford a monetary payment.[1]
- **"Strong" Version**: a court may never rationally set an unaffordable financial condition, i.e., pretrial arrestees have a right to an affordable bail.
- **"Weak" Version**: courts may set an unaffordable monetary condition, but satisfy heightened requirements of a detention order, i.e., judge determines that no other nonmonetary conditions of release would adequately mitigate the identified risk.

Edwards v. Cofield

- **Facts**
  - Predetermined bail schedule promulgated by judges
  - Sheriff fixes bail amount based on schedule
  - Bail is not reviewed in a hearing for 2-4 weeks

- **Plaintiff**:
  - Held on $7500 bail for writing $75 bad check
  - 7 months pregnant
  - Forced to sleep on floor of overcrowded cell

- **Defendants**
  - Sheriff in charge of jail
  - Judges who promulgate bail schedule

[1] *See Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (citing *Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971)) (emphasis added)).

INDEFINITE PRETRIAL DETENTION WITHOUT COUNSEL

Basic Claim: Defendants have right to counsel at first appearance bail determinations

- Sixth Amendment
- Equal Protection/Due Process

Burks v. Scott County

- **Policies at issue**
  - Local policy of no counsel until indictment
  - Lack of state law limiting detention before indictment
  - No state standards for appointment of counsel

- **Plaintiffs**:
  - Held 8 and 10 months on unaffordable bond
  - Judges set bail based on sheriff recommendation
  - Both released after we sued

- **Main Defendant**: Judge Marcus Gordon
    - In NY Times on why he waits until indictment: "The reason is, that public defender would go out and spend his time and money and cost the county money in investigating the matter," Judge Gordon said. "And then sometimes, the defendant is not indicted by the grand jury. So I wait until he's been indicted."
    - Someone who wants to challenge an arrest or lower bail before indictment: "can represent himself, or he can employ an attorney."

- **Challenge**: Practice is not clearly unconstitutional
  - *Rothgery v. Gillespie Co.* (2008): held that right to counsel "attaches" at first formal proceeding; a/f, counsel w/in reasonable time for next "critical stage"
  - Court has never held that first appearances or bail hearings are critical stages

- **Settlement Agreement [with the Counties]**
  - Establish public defender system
  - Mechanism for counsel at first appearance

- **Declaratory Judgments**
  - Counsel at or immediately after first appearance (6th and 14th Amendments)
    - No wealth-based pretrial detention (felonies)

PRIVATIZED PRETRIAL SUPERVISION

Basic Idea: As more people are subject to supervisory release conditions, more private entities will attempt to enter this growing "market." Some in the bail bonds industry are openly encouraging this pivot, even as they defend money bail.

- **Potential Claims:**
  - **Note:** Because supervision companies will likely provide their services under an agreement with the county or the court, rather than as a private surety, they open themselves to suit as state actors.[2]
  - Civil RICO: where public-private arrangement amounts to a conspiracy to extort money, which offers the possibility of treble damages.[3]
  - Right to neutral pretrial supervision: challenges profit motive.[4]
  - Debtors' Prison: if the company and/or court detains people who cannot afford company fees without a judicial ability to pay determination. Due Process: To the extent that the company, rather than the court, determines release conditions, there may also be a due process claim against the lack of an individualized, judicial hearing.
  - State and federal consumer protection law, state tort law

---

[2] *See West v. Atkins*, 487 U.S. 42, 55–56 (U.S. 1988) (physician under contract to provide medical services for state prison acted under color of state law)

[3] 18 U.S.C.A. §§ 1961 to 1968; *see generally* John J. Hamill, et al, *A Guide to Civil RICO Litigation in Federal Courts,* JENNER & BLOCK PRACTICE SERIES (2014), *available at*: https://jenner.com/system/assets/publications/12740/original/Civil_RICO_2014.pdf?1393971640

[4] *Cf. Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 ("A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.").

Ayo v. Dunn

- **Facts**
  - East Baton Rouge, LA criminal court judge assigns arrestees to pretrial supervision by Rehabilitation Home Incarceration (RHI)
  - RHI charges a $525 fee, in addition to bond, that supervisee must pay before released
  - RHI independently determines conditions of release
  - RHI charges an additional $225/mo for the duration of the case

- **Plaintiffs**: individuals held in the jail for inability to pay the fee, then forced to pay continual fees after release

- **Claims**

  - Federal and Louisiana RICO
  - Debtors' Prison
  - Louisiana consumer and tort claims

- **Still exploring**
    - Neutral supervision
    - Individualized bail determination

THE COLORADO BAIL BOOK

A Defense Practitioner's Guide to Adult Pretrial Release

September 2015

Colorado Criminal Defense Institute

Colorado State Public Defender

National Association of Criminal Defense Lawyers (NACDL)

This project was supported by Grant No. 2013-DB-BX-K015 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

ACKNOWLEDGEMENTS

The authors wish to thank the following individuals and organizations for their support in this project: Adele Bernhard of ABA-SCLAID, and Diane DePietropaolo Price, Ivan Dominguez, and Quintin Chatman of NACDL for their assistance in editing this manual; NACDL Art Director Cathy Zlomek and her staff for their expertise in preparing this manual for publication; Edward C. Monahan and B. Scott West for their groundbreaking work in developing the Kentucky Pretrial Release Manual and sharing their information with the defense bar nationwide; the Bureau of Justice Assistance for supporting this project, and in particular to Kim Ball for her unflagging commitment to indigent defense; Pretrial Justice Institute (PJI), NACDL's leadership and Board of Directors for their enduring commitment to indigent defense reform and training; and the Colorado Criminal Defense Institute and the Colorado State Public Defender Office.

The Colorado Criminal Defense Institute, the **Colorado Office of the State Public Defender**, and the **National Association of Criminal Defense Lawyers** have joined together to craft this manual, The Colorado Bail Book, in an effort to support Colorado attorneys as they work to end pretrial injustice in Colorado. It is our hope that all defenders, both public and private, use this resource to aggressively and consistently challenge the pretrial system that punishes the accused before conviction, forces guilty pleas to obtain release and incarcerates the poor simply because they cannot afford to post a money bond.

We have attempted to be as comprehensive as possible, outlining both law and research while providing practical pointers for the courtroom lawyer. We encourage all to use our work to give voice to the incarcerated accused, who deserve dedicated and robust legal representation from the moment they are deprived of their liberty.

Colette Tvedt
Indigent Defense Training and Reform Director
National Association of Criminal Defense Lawyers

Maureen Cain
Policy Director
Colorado Criminal Defense Institute

Douglas Wilson
Colorado State Public Defender

THE COLORADO BAIL BOOK:
A Defense Practitioner's Guide to Adult Pretrial Release

Table Of Contents

TABLE OF APPENDICES

“In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”

Salerno v. United States
481 U.S. 739, 755 (1987)

“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 . . . because they simply cannot afford to post the bail required.”

Former U.S. Attorney General Eric Holder
at the National Symposium on Pretrial Justice, 2011

INTRODUCTION

Pretrial detention causes lost employment and housing, disruption in education, and damage to family relationships. Defendants detained in jail awaiting trial plead guilty more often, are convicted more often, are sentenced to prison more often, and receive harsher prison sentences than those who are released during the pretrial period.[1] Avoiding unnecessary pretrial confinement should be of paramount importance to every court system. Moreover, courts must move away from reliance on money bail set through an arbitrary schedule and instead make individualized determinations about who will return to court when required. Having money to post bond is not a predictor of compliance with court requirements.

In 2013, the Colorado legislature enacted new laws designing a pretrial system that moves away from the use of money bail and favors individualized determinations and the use of evidence-based predictors. The change puts Colorado in line with national policy recently advanced by the United States Department of Justice in its statement of interest in *Varden v. City of Clanton*[2], condemning as a violation of the Equal Protection Clause of the Fourteenth Amendment the use of set bond schedules that fail to take into account individual circumstances.

Colorado defenders must use this new legislation to the advantage of their clients. Obtaining pretrial release is an essential part of the promise of *Gideon* that defense lawyers are committed to provide. This Manual is designed to give practitioners the guidance needed to achieve pretrial release for clients. It presents the new Risk Assessment tool, which courts will be using to determine whether to release the accused pretrial, reviews the research in support of the Risk Assessment tool, and discusses how best to use the tool to advantage clients. The Manual discusses how to obtain information necessary to fully utilize the Risk Assessment tool through interview and investigation. The Manual then outlines the provisions of the new bail statutes and highlights relevant case law and Constitutional provisions, before turning to a discussion of some problem areas, such as onerous conditions of release, the required use of GPS tracking devices, and victims' rights to notice of change of conditions. Finally, the Manual reviews the steps a practitioner must take to appeal an adverse bail determination, and outlines the case law and complaint process regarding bail bondsmen.

1. Pretrial Justice Institute, Effective Pretrial Justice Communication, Guidelines for Champions & Spokespeople (2014), *available at* http://www.pretrial.org/download/pji-reports/Communication%20Guidelines%20(October%202014).pdf.

2. *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC (M.D. Ala. Feb. 13, 2015).

THE COLORADO STORY

On May 11, 2013, Colorado Governor John Hickenlooper signed into law HB 13-1236, "Best Practices in Bond Setting," altering the pretrial statutory scheme in Colorado. HB 13-1236 was the first comprehensive overhaul of the Colorado bail statutes since 1972, and was brought about by multi-year efforts of the Colorado Commission on Criminal and Juvenile Justice (CCJJ), whose research and recommendations were the basis of the changes to the bail statutes.[3] The new law requires courts to assume that individuals are eligible for release on bond with the **"appropriate and least restrictive"** conditions. The law adopts the use of "evidence-based" bail decisions, **discourages the use of monetary bail bond**, and requires bail to be **individually determined and tailored to particular circumstances.**

See Timothy Schnacke, Center for Legal and Evidence-Based Practices, Best Practices in Bond Setting: Colorado's New Pretrial Bail Law (2014)*, for a more in-depth discussion of the history of Colorado's bail laws, the CCJJ process, and the 2013 legislation*. www.clebp.org.

HB 13-1236, Best Practices in Bond Setting, substantially alters the pretrial statutory scheme in Colorado. This act was the first comprehensive overhaul of the Colorado bail statutes since 1972.

The Colorado Pretrial Assessment Tool (CPAT)

The use of data, analytics, and technology has had a significant effect on the criminal justice system. Substantial research has led to the development of pretrial risk assessment instruments that assess the factors that correlate to successful pretrial release. Switching from a system based solely on instinct and experience (often referred to as "gut instinct") to one in which judges have access to scientific, objective risk assessment tools could further the criminal justice system's central goals of increasing public safety, reducing crime, and making the most effective, fair, and efficient use of public resources.[4] Defendants who do not threaten public safety and are predicted to appear for scheduled court dates should not remain in jail simply because they cannot afford bail. Jurisdictions such as Kentucky that have been successfully using risk assessment tools have seen the numbers of pretrial detainees drastically lowered while public safety and court appearances have remained constant.

Even before the legislative changes to the bail system, work was underway to develop a risk assessment tool to better inform pretrial release practices in Colorado. A joint partnership of the Pretrial Justice Institute (PJI), the JFA Institute, and ten Colorado counties participated in a study to determine what factors most accurately predict an individual's likelihood of returning to court and remaining arrest-free while out on pretrial release. The organizations studied 1,970 defendants in the ten counties over a period of 16 months. They collected defendants' demographics, residence and employment, mental health and

3. See Appendix 1 for the full text of the CCJJ Bail Subcommittee's recommendations to the full CCJJ, presented on Oct. 12, 2012. The CCJJ was aided in its mission by outside experts such as the Pretrial Justice Institute (PJI).

4. Laura and John Arnold Foundation, Developing a National Model for Pretrial Risk Assessment (2013), *available at* http://ncja.org/sites/default/files/documents/LJAF-Developing-a-National-Model.pdf.

substance use/abuse, criminal history and past criminal justice system involvement, and current charges and system involvement. Twelve factors were identified as most statistically significant in predicting an individual's success on pretrial release.

The research was used to develop the Colorado Pretrial Assessment Tool (CPAT), an empirically validated multi-jurisdiction pretrial risk assessment instrument for use in any Colorado jurisdiction and designed to replace any existing pretrial assessments in use in Colorado. The CPAT identifies which defendants are likely to be higher risk to public safety (commit new crimes) and to fail to appear for any court date during the pretrial period.

Colorado courts tested the CPAT in pilot studies. "The early decisions about release and detention, which a judge must usually make with limited and highly subjective information, are among the most critical made by the judiciary, with significant impacts on community safety and fairness to the accused," stated Judge David Prince, Deputy Chief Judge for the Fourth Judicial District of Colorado, after his county agreed to participate in a pilot project to use a risk assessment tool in pretrial release decisions. "This pilot study is a substantial step in improving the quality of these decisions by informing them with objective and meaningful data."

The CPAT, in various forms, is now being used across Colorado in judicial districts that have a pretrial services program. In Mesa County, the law enforcement community, including the prosecutors, use and embrace the evidence-based principles that guide the use of the pretrial risk assessment tool. Other jurisdictions continue to use a bond schedule and use CPAT to deviate from a bond schedule amount. Still others have not yet embraced risk assessment research and use the tool only sparingly.

For a full discussion of the methods used to develop the CPAT, see The Colorado Pretrial Assessment Tool (CPAT), Revised Report (2012), *available at* www.pretrial.org.

Defenders have the right to obtain and use a copy of the pretrial risk assessment report to be able to address any shortcomings of the report.

CPAT Items and Scoring

Current research in Colorado shows the following twelve factors — included in the CPAT — to be the most predictive in determining whether an individual is likely to return to court and/or reoffend while on release.[5] The information is gathered from defendants through a face-to-face interview as well as database searches. Defenders have the right to obtain and use a copy of the pretrial risk assessment report to be able to address any shortcomings of the report. The *Colorado Pretrial Assessment Tool Administration, Scoring, and Reporting Manual*[6] includes the below chart to explain the CPAT questions and scoring mechanism.

CPAT Item	Scoring	Points
1. Having a Home or Cell Phone	Yes	0
	No, or Unknown	5
2. Owning or Renting One's Residence	Own	0
	Rent, or Unknown	4
3. Contributing to Residential Payments	Yes	0
	No, or Unknown	9
4. Past or Current Problems with Alcohol	No	0
	Yes, or Unknown	4
5. Past or Current Mental Heath Treatment	No	0
	Yes, or Unknown	4
6. Age at First Arrest	This is first arrest	0
	35 years or older, or Unknown	0
	25-34 years	10
	20-24 years	12
	19 years or younger	15
7. Past Jail Sentence	No, or Unknown	0
	Yes	4
8. Past Prison Sentence	No, or Unknown	0
	Yes	10
9. Having Active Warrants	No	0
	Yes, or Unknown	5
10. Having Other Pending Cases	No	0
	Yes, or Unknown	13
11. Currently on Supervision	No	0
	Yes, or Unknown	5
12. History of Revoked Bond or Supervision	No	0
	Yes, or Unknown	4

Note: Items 1 through 5 refer to Stability/Community Ties.Items 6 through 12 refer to Criminal History/System Involvement.

Based on the defendant's score, the individual is assigned to one of four risk categories, corresponding to the likelihood of success on pretrial release. Individuals who are deemed low risk are those who have high court appearance rates and low incidences of reoffending while on release. Those in higher risk categories are more likely to fail to appear for court or have a new filing during their pretrial release period.

5. There is a national debate among defense lawyers and pretrial researchers regarding whether some of these factors may have a disparate racial impact, since many of the factors are impacted by socio-economic status, which may disadvantage minority communities that are, on average, poorer than white communities. These factors may change over time as research develops. Nonetheless, many pretrial risk tools have been empirically tested to ensure they do not overestimate pretrial risk based on race or ethnicity. The CPAT was found not to be biased based on race or ethnicity.

6. Colorado Association of Pretrial Services, The Colorado Pretrial Assessment Tool (CPAT) Administration, Scoring, and Reporting Manual, Version 2 (Jun. 2015), *available at* http://www.pretrial.org/download/risk-assessment/CPAT%20Manual%20-%20CAPS%202015-06.pdf.

CPAT Risk Categories

Pretrial Risk Category	Risk Score	Public Safety Rate	Court Appearance Rate	Percent of Defendants
1 (lower)	0 - 17	91%	95%	20%
2	18 - 37	80%	85%	49%
3	38 - 50	69%	77%	23%
4 (higher)	51 - 82	58%	51%	8%
Average	**30**	**78%**	**82%**	

In the sample used to validate the pretrial instrument, close to 70% of the defendants assessed were in the two lowest risk categories. The court appearance rate for those defendants was 95% for low risk and 85% for medium risk.

8

Regardless of the individual score, defenders should be prepared to argue the individual circumstances of the defendant.

The scoring of the twelve factors is just the first step in the process of securing a client's pretrial release. Regardless of the individual score, defenders should be prepared to argue the individual circumstances of the defendant. **Defense attorneys should review the report, assess its accuracy, and be prepared to rely on the instrument or distinguish the client's situation, as appropriate.** If the defendant scores as low or moderate risk (i.e., risk categories 1, 2, or 3), defenders should be prepared to argue why the score is appropriate for the client. If the defendant scores as high risk, defenders should review the factors to determine whether there are explanations for the adverse factors that would support the client's release despite the high score. Because some of these factors may correlate to unchangeable individual circumstances of a defendant, each should be studied and argued in the context of the case and also the risk category of the individual defendant. For example, a student is not usually capable of contributing to residential payments so consider that in looking at the points assessed and the ultimate risk level.

Regardless of the risk assessment score or pretrial risk category assigned, defense counsel should use the statistics regarding public safety rates and court appearance rates to the client's advantage. Explaining to a judge that an individual who falls within Category 2 has an 85% chance of returning to court and an 80% chance of staying out of trouble while out on release without any conditions is more effective than simply pointing out the score or risk category alone. For example, if your client scores as a Level 3, you should argue, "Based on Mr. Smith's CPAT score alone, he likely has a 77% court appearance rate." That sounds more persuasive than saying, "Your Honor, even though Mr. Smith has scored a Level 3, which is a moderate to high pretrial risk category, the court appearance rate for Level 3 is 77%."

Other Risk Assessment Tools

Some jurisdictions are using their own risk assessment instruments and not the CPAT (e.g. Arapahoe County). The statute at Section 16-4-103, C.R.S. requires that an "empirically-developed risk assessment instrument, as available and practicable" be used by the court to assess risk, so the instruments should be studied and evaluated to determine their reliability.

In addition, certain jurisdictions are using other offense-specific risk assessment tools for pretrial decision making. For example, Denver is using the Ontario Domestic Abuse Risk Assessment (ODARA) for domestic violence defendants while Mesa County is using the Domestic Violence Screening Instrument (DVSI). Mesa County is also using the Drug Abuse Reporting Program (DARP) for drug assessment.

While none of these tools is validated for use in the pretrial decision-making process, pretrial service programs are using them, so **it is important to become familiar with the instrument(s) used in the jurisdiction in which the case is filed**.[7] Knowing the long term risk level for a domestic violence offender based on a DV assessment tool can be very helpful in arguing for the release on personal recognizance bond for certain low level defendants.

The Level of Service Inventory (LSI) is an instrument that is used by probation to assess the needs and level of supervision that is necessary for longer term supervision of a defendant on probation. The CPAT is NOT validated for use with respect to long term supervision and should not be used for that purpose. Likewise the LSI is NOT a pretrial assessment tool. The LSI evaluates the needs of an offender for assistance in the development of an appropriate supervision and treatment plan.

As with the CPAT, defenders should become familiar with these risk assessment tools and be prepared to argue their clients' interests.[8]

Recent research using the Colorado defendants and the CPAT supports the use of unsecured personal recognizance bonds instead of money bonds and shows that SECURED MONEY DOES NOT ADD TO COURT APPEARANCE RATE OR PUBLIC SAFETY RATE. This research conclusion is consistent with all other national research addressing this use.

7. See Appendix 2 for a discussion of the background and problems with the ODARA risk assessment tool.
8. See Nat'l Legal Aid Defender Ass'n, White Paper on Risk and Needs Assessments, *available at* http://www.nlada100years.org/node/16404.

Research on Unsecured (Personal Recognizance) Bonds Compared to Secured Money Bonds

Recent research[9] using Colorado defendants and the CPAT supports the use of unsecured personal recognizance bonds instead of secured money bonds and shows that SECURED MONEY DOES NOT ADD TO COURT APPEARANCE RATE OR PUBLIC SAFETY RATE. This research conclusion is consistent with all other national research.

This Colorado Money Bail Study by PJI used the CPAT to analyze the data on secured (money) bonds v. unsecured (personal recognizance) bonds. The data showed that the public safety and court appearance rates of individuals within each risk category were not impacted by the use of a secured or monetary bond as opposed to personal recognizance. **Secured** m**onetary bonds**, even those with higher dollar amounts, **do not increase appearance rates for defendants or contribute to better public safety**. The results are summarized as follows:

Pretrial Risk Category	Public Safety Rate	
	Unsecured Recognizance Bond	Secured Surety/Cash Bond
Level 1 (lower)	93%	90%
Level 2	84%	79%
Level 3	69%	70%
Level 4 (higher)	64%	58%

Pretrial Risk Category	Court Appearance Rate	
	Unsecured Recognizance Bond	Secured Surety/Cash Bond
Level 1 (lower)	97%	93%
Level 2	87%	85%
Level 3	80%	78%
Level 4 (higher)	43%	58%

Note: All statistical comparisons were not statistically significantly different.

View Appendices 3 and 4 for the most recent information from Mesa County and Denver County regarding public safety and court appearance rates using the CPAT, which demonstrates that public safety and appearance rates in both jurisdictions are exceeding expectations.

9. Michael Jones, Pretrial Justice Institute, Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option (2013), *available at* http://www.pretrial.org/download/research/Unsecured%20Bonds,%20The%20As%20Effective%20and%20Most%20Efficient%20Pretrial%20Release%20Option%20-%20Jones%202013.pdf.

Additionally, the study showed that:

★ **Unsecured bonds are as effective as secured bonds at achieving public safety.** Whether released defendants are higher or lower risk, or somewhere in the middle, unsecured bonds offer decision makers the same likelihood of new criminal activity as do secured bonds.[10]

★ **Unsecured bonds are as effective as secured bonds at achieving court appearance.** Whether released defendants are higher or lower risk, or somewhere in the middle, unsecured bonds offer decision makers the same likelihood of court appearance as do secured bonds.[11]

Unsecured bonds are as effective as secured bonds at achieving public safety. Whether released defendants are higher or lower risk, or somewhere in the middle, unsecured bonds offer decision makers the same likelihood of new criminal activity as do secured bonds.

★ Regardless of whether defendants are higher or lower risk or somewhere in the middle, **higher bond amounts are not associated with better court appearance outcomes for released defendants.** Higher dollar amounts of cash and surety bonds were associated with increased pretrial detention but not increased court appearance rates.[12]

★ **Even after a failure to appear, unsecured bonds offer the same probability of fugitive return as surety bonds.** Bail bond agents like to argue that secured money bonds by a commercial bail agent result in more returns to the court when a defendant fails to appear. However, research shows that the at-large rate for an unsecured bond was 10% and for the secured bond, 9%. So, when released defendants fail to appear, unsecured bonds offer the same probability of fugitive return as do surety bonds.[13]

10. *Id.* at 10-11.
11. *Id.*
12. *Id.* at 14.
13. *Id.* at 16.

SECTION 1:
THE IMPORTANCE OF LITIGATING PRETRIAL RELEASE

Why Litigate Pretrial Release? Because it Affects Both Short-Term and Long-Term Outcomes for the Client

The importance of helping our clients achieve pretrial release cannot be overstated. Not only is such advocacy required by professional standards,[14] but the impact of pretrial incarceration on a client is substantial. Social science research demonstrates that persons who are released have better outcomes than those who stay in jail pending resolution of their cases.

12

Personal Recognizance bonds are as effective as secured money bonds for low and medium risk defendants in achieving high court appearance rates and public safety (no new crime) rates.

Clients who stay in jail pending trial get longer sentences.

A study, using data from state courts, found that defendants who were detained for the entire pretrial period were over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who were released at some point pending trial.[15] And their sentences were significantly longer — almost three times as long for defendants sentenced to jail, and more than twice as long for those sentenced to prison. A separate study found similar results in the federal system.[16]

Clients who stay in jail pending trial are at greater risk to recidivate in both the short term and the long term.

Jail makes people worse, even short stays. Using statewide data from Kentucky, a study conducted by the Laura and John Arnold Foundation (LJAF) uncovered strong correlations between the length of time low and moderate risk defendants were detained before trial, and the likelihood that they would re-offend in both the short term and the long term. Even for relatively short periods behind bars, low and moderate risk defendants who were detained for more days were more likely to commit additional crimes in the pretrial period — and were also more likely to do so during the two years after their cases ended.[17]

---

14. *See* Nat'l Legal Aid And Defender Ass'n (NLADA) Standards 2.1 And 2.3, ABA Defense Function Standard 4-3.6, and Colorado Rule of Prof'l Conduct 1.1.

15. *See* LJAF, *Pretrial Criminal Justice Research Summary* (2013), *available at* http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf.

16. *Id.*

17. Christopher T. Lowenkamp et. al., Laura and John Arnold Foundation, The Hidden Costs of Pretrial Detention 4 (2013), *available at* http://www.pretrial.org/download/research/The%20Hidden%20Costs%20of%20Pretrial%20Detention%20-%20LJAF%202013.pdf.

Jail makes people worse, even short stays.
A study conducted by the Laura and John Arnold Foundation (LJAF) uncovered strong correlations between the length of time low and moderate risk defendants were detained before trial, and the likelihood that they would re-offend in both the short term and the long term. Even for relatively short periods behind bars, low and moderate risk defendants who were detained for more days were more likely to commit additional crimes in the pretrial period — and were also more likely to do so during the two years after their cases ended.

13

Lawyers Make a Significant Difference at Bail Hearings

Research shows that counsel at the initial appearance before a judge or magistrate not only increases the accused's chances for release but also his or her sense of fairness about the process. A defendant with a lawyer at first appearance:

- ★ Is 2 ½ times more likely to be released on recognizance;
- ★ Is 4 ½ times more likely to have the amount of bail significantly reduced;
- ★ Serves less time in jail (median reduction from 9 days jailed to 2, saving county jail resources while preserving the clients' liberty interests); and
- ★ More likely feels that he is treated fairly by the system.[18]

18. Kentucky Department of Public Advocacy, Kentucky Pretrial Release Manual (Jun. 2013) at 6 (*citing* Douglas L. Colbert et al, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail*, 23 Cardozo L. Rev. 1719 (2002)).

SECTION 2:
TOOLS FOR LITIGATING PRETRIAL RELEASE

There are **five major tools** that every defense attorney must use when advocating for a client's pretrial release:

1. A thorough knowledge of the client gathered from a detailed initial interview;
2. Awareness of any risk assessment tools used in the specific jurisdiction;
3. An in-depth comprehension of the Colorado Bail Statutes;
4. Familiarity with United States and Colorado Constitutional provisions regarding bond; and
5. An understanding of Colorado case law regarding pretrial release.

The sections that follow contain an overview of each of these tools.

Tool #1: Initial Client Interview

A thorough knowledge of the client and his background is the most important tool that a lawyer possesses when litigating for release. Conducting a detailed initial interview gives the attorney the information needed to fully advocate and builds client confidence from the first meeting. A sample of an interview form that is easy to use and will obtain the necessary information is provided in Appendix 5.

The National Legal Aid and Defender Association (NLADA) suggests that defense counsel should get the following information during his initial interview with the client:

The LJAF report indicates that those similarly situated defendants who stay in jail pretrial get longer sentences and pose a greater risk to recidivate.

2.2 NLADA: Initial Interview

(A) Preparation: Prior to conducting the initial interview the attorney should, where possible:

(1) Be familiar with the elements of the offense and the potential punishment, where the charges against the client are already known;

(2) obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by bail agencies concerning pretrial release, and law enforcement reports that might be available;

(3) be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;

Be prepared to conduct a CPAT interview on each client and be prepared to argue for personal recognizance release for low and moderate risk defendants. Have the data available to argue probable success rates.

(4) be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release;

(5) be familiar with any procedures available for reviewing the trial judge's setting of bail.

(B) The Interview:

(1) The purpose of the initial interview is both to acquire information from the client concerning pretrial release and also to provide the client with information concerning the case. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome.

(2) Information that should be acquired includes, but is not limited to:

(a) the client's ties to the community, including the length of time he or she has lived at the current and former addresses, family relationships, immigration status (if applicable), employment record and history;

Get SPECIFIC information from the Client: names and ages of children and step children; address; telephone numbers; name and location of employer, and name and number of boss or supervisor; whether client is receiving SS benefits; housing benefits, etc.

(b) the client's physical and mental health, educational and armed services records;

Dates, names of mental health treatment facilities & doctors; Individualized Education Program; military service: branch, dates, active service, any injuries, any medication, type of discharge. Get signed releases.

If the risk score indicates the defendant is low or medium risk, use that information to argue for a personal recognizance bond.

(c) the client's immediate medical needs;

Type and dosage of medication; length of time client has been taking the medication; names and addresses of doctors, therapists, or social workers.

(d) the client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether he or she is on probation or parole and the client's past or present performance under supervision;

Ask for NCIC prior to client interview; if not available ask client detailed, specific questions about their prior criminal history including: nature of charges, disposition, FTAs, probation violations, parole violations, reason for non-compliance.

(e) the ability of the client to meet any financial conditions of release;

Child support obligations, rent, mortgage, family support, education payments.

(f) the names of individuals or other sources that counsel can contact to verify the information provided by the client; counsel should obtain the permission of the client before contacting these individuals[…];

Names, addresses, email, cell phone number. Get client's permission to talk to them and discuss what information about the criminal case can be shared before calling.

The NLADA Standards are available at http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines.

In addition to the client's social factors, attorneys should attempt to get a workable understanding of the client's version of events as early as possible in order to appropriately advocate for release. Defense counsel should always strive to conduct this initial interview with his client in a private, confidential space. Consider the *ABA Ten Principles of a Public Defense Delivery System*, Principle 4:

#4: Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

Commentary: Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.

See Appendix 6: ABA Ten Principles of a Public Defense Delivery System

Ensure that you have ample confidential time and space to meet with your client during the initial interview. It is NOT appropriate to interview the client in the courtroom or lockup area surrounded by civilians, prosecutors, law enforcement agents, or other defendants.

Tool #2: Risk Assessment Tools

Risk assessment tools were discussed in depth at the beginning of this manual. Refer back to the Introduction for a thorough discussion of the CPAT and other risk assessment tools. Defense attorneys should always be aware of their clients' scores on risk assessment tools and be prepared to address them. If the score indicates the defendant is low-risk or medium-risk, use that information as leverage to argue for a personal recognizance bail. If the score indicates that the client is high-risk, be prepared to counter those risk factors based on information gleaned in the client interview, and be ready to suggest appropriate conditions of release that address the client's specific risk factors.

Bail no longer means money.
Bail is defined as "a security, which may include a bond with or without monetary conditions, required by the court for the release of a person in custody…"

Tool #3: Colorado Statutes

The Colorado Bail Statutes — 16-4-101, C.R.S., *et seq*.

Overall intent of the new Colorado bail statutes:

- ★ Presume release under the least restrictive conditions unless the defendant can be denied bail[19] under the Colorado Constitution (16-4-103 (4)(a), C.R.S.).
- ★ Individualize all release and detention conditions (16-4-103 (3)(a), (4)(a), (4)(b), and (5), C.R.S.).
- ★ Avoid unnecessary pretrial incarceration (16-4-103(3)(a), (4)(b), and (5), C.R.S.).
- ★ Consider the defendant's pretrial risk to public safety and for failure to appear in court through an empirically developed risk assessment instrument (16-4-103 (3)(b); 16-4-106 (4)(c), C.R.S.; and 16-4-107, C.R.S.).

The following section explains the important provisions of the new bail statutes that all practitioners must know.

Section 16-1-104, C.R.S., Current Definition of Bail

Bail no longer means money. Money is now a financial condition of release. Bail is defined as "a security, which may include a bond with or without monetary conditions, required by the court for the release of a person in custody set to provide reasonable assurance of public safety and court appearance." This is an

19. Under Section 19 of Article II of the Colorado Constitution, the defendant can be denied bail because he/she is charged with a Capital offense or a crime of violence while on probation or parole resulting from a conviction of a crime of violence; or a crime of violence alleged to have been committed while on bail pending the disposition of a previous crime of violence charge for which probable cause has been found; or a crime of violence alleged to have been committed after two previous felony convictions, or one such previous felony conviction was for a crime of violence, upon charges separately brought and tried under the laws of this state or under the laws of any other state, the United States or any territory subject to the jurisdiction of the United States, or any territory subject to the jurisdiction of the United Stated which, if committed in this state, would be a felony.

important change. It mandated the change throughout Title 16, replacing the prior language of "amount of bail and type of bond" language (when bail meant money) to "type of bond and conditions of release" which *could* include money as a condition.

Section 16-4-101, C.R.S., Eligibility/Bailable Offenses

This section mirrors Article II, Section 19 of the Colorado Constitution except for one addition. A section was added in the House of Representatives that allows the court to deny bail in two categories of offenses not enumerated in the Colorado Constitution: Possession of a Weapon by a Previous Offender (POWPO) cases and Sexual Assault on a Child 14 or younger and seven or more years younger than the accused. **These added sections should be challenged as unconstitutional, and severable from the other sections enumerating crimes that are contained in the Constitution.** In legislative testimony, the Attorney General's office testified that this added language was "constitutionally suspect" and case law is clear that the enumerated exceptions to bail in the Colorado Constitution, Article II, Section 19 "exclude other exceptions." *Palmer v. District Court,* 156 Colo.284, 287, 398 P.2nd 435, 437 (1965).

Section 16-4-102, C.R.S., Right to Bail

Essentially the same as the prior law, this section mandates that the court set bail for bailable offenses and encourages the release of constitutionally bailable defendants. It also requires the court to hold "a hearing to determine bond and conditions of release."

Section 16-4-103, C.R.S., Setting and Selection Type of Bond/Criteria

This section is **substantially different from** prior law and contains most of the changes as recommended by CCJJ. The language in this section requires the court to:

- ★ Determine the type of bond and conditions of release;
- ★ Review bond and conditions upon return of an indictment or filing of an information;
- ★ Consider a presumption of release under the least-restrictive conditions unless the defendant is unbailable pursuant to the constitutional preventive detention provisions;
- ★ Individualize the conditions of release (even with bond schedules which, if used, shall consider individualized risk and circumstances);
- ★ Consider the defendant's financial condition or situation;
- ★ Set reasonable financial conditions and set non-statutory conditions to be tailored to address a specific concern;
- ★ Consider ways to avoid unnecessary pretrial detention; and
- ★ Use an empirically-developed risk assessment instrument, as available and practicable.

The section allows the court to consider all traditional bail setting criteria, as they may be appropriate (work, stable employment, ties to the community, etc.) since those factors remain in the statute.

Section 16-4-104, C.R.S., Types of Bond

The new statute now lists **four bond types**, each defined by its restrictive nature. The presumption is that the court should consider the least restrictive bond type first.

The new statute in Section 16-4-104, C.R.S., now lists four bond types, each defined by its restrictive nature. The presumption is that the court should consider the least restrictive bond type first.

- ★ Subsection (a) bonds are unsecured personal recognizance bonds with only statutorily mandated conditions.
- ★ Subsection (b) bonds are unsecured personal recognizance bonds with additional non-mandatory, tailored conditions.
- ★ Subsection (c) bonds are bonds with conditions that include secured monetary conditions when reasonable and necessary to ensure court appearance or public safety. A 2014 amendment to this section provides that when there is a monetary condition of bond, the method of posting that monetary condition shall be "selected by the person to be released unless the court makes factual findings on the record with respect to the person to be released that a certain method of bond, as selected by the court, is necessary to ensure the appearance of the person in court or the safety of any person, persons or the community." This added section was drafted to address the issues of cash only bonds.
- ★ Subsection (d) bonds are bonds with conditions that include real estate conditions.

Under prior law, district attorneys had to consent to a personal recognizance bond in certain circumstances involving prior convictions, willful failures to appear, and status on another personal recognizance bond. **The changed provision allows the court to grant another unsecured personal recognizance bond as long as additional non-mandatory conditions are placed on the unsecured bond**.

A change to section 16-4-104, C.R.S. allows the court to grant an unsecured personal recognizance bond without consent of the prosecutor in situations that previously required consent, as long as additional non-mandatory conditions are placed on the unsecured bond.

Section 16-4-105, C.R.S., Conditions of Release

Court shall consider other supervision techniques shown by research to be effective for court appearance and public safety. Court (and defense counsel) must make efforts to be educated on the research.

- ★ This section makes it clear that whatever the conditions of bond, *a bond is only forfeited for failure to appear*.
- ★ The mandatory statutory conditions from prior law (waiver of extradition, no new offenses, protection order for witnesses) remain in statute.

- ★ *Requires* the court to conduct a hearing upon motion seeking relief from bond conditions.
- ★ Allows court to decide what conditions will impact court appearance and public safety.
- ★ Makes clear that defendant cannot be ordered to treatment as condition of bond without his/her consent, but can be ordered for drug and alcohol testing.
- ★ Court shall consider other supervision techniques shown by research to be effective for court appearance and public safety. Court (and defense counsel) must make efforts to be educated on the research.

Section 16-4-106, C.R.S., Pretrial Service Programs

Pretrial programs now have their own section outlining that the purpose of pretrial is to assist with court appearance and public safety but also to decrease unnecessary detention.

Also,

- ★ There is an Advisory Board for pretrial that creates a plan for the program that is submitted to the Chief Judge.
- ★ This Board may include a bail bondsman who conducts business in the judicial district.
- ★ Chief Judge shall use evidence-based decision making and make ongoing efforts to establish a pretrial program, if there is none in the district/county.

Section 16-4-107, C.R.S., Hearing after the Setting of Bond Conditions

If the defendant cannot meet the monetary condition of bond seven days after it is set, the defendant may file a written motion for reconsideration of the monetary condition and the court shall conduct a hearing within 14 days.

This section states that, if the defendant cannot meet the monetary condition of bond *seven days* after it is set, the defendant may file a written motion for reconsideration of the monetary condition and the court *shall conduct a hearing within 14 days*. Caveat: the motion must

include additional evidence not initially considered by the court in setting bond. If there is no new evidence, the motion can be summarily denied. Language requires the court to consider the risk assessment, if administered.

Amendments to this section in the 2014 legislative session make it clear that the defendant gets only one "7 day motion" that is required to be heard within 14 days. However, **"nothing in this section shall interfere with the defendant's right to file a motion for bond reduction or change in bond conditions pursuant to 16-4-109, C.R.S."**

Section 16-4-108, C.R.S., When Original Bond Continued

This section contains the same statutory language that existed prior to 2013. The original bond in a case shall continue until final disposition of the case.

Section 16-4-109, C.R.S., Reduction or Increase of Monetary Conditions of Bond — Change in Type of Bond or Conditions of Bond

Upon motion of either party, the court may increase or decrease the monetary conditions of bond, *with reasonable notice to either party*. The court may not modify a bond *sua sponte*. This section does not require a written motion but also does not require the court to have a hearing within 14 days. The "109" motion should be made early in the process in response to the original bond setting. Counsel should make it clear on the record under what section of 16-4 the bond motion is made.

This section also outlines the authority of the pretrial service agency to seek a warrant for the arrest of a defendant who is in violation of conditions of bond. The DA and surety are notified, but there is no statutorily-required notice to defense counsel.

Section 16-4-110, C.R.S., Exoneration from Bond Liability

This section describes when and how a surety is released from bond liability. It allows the court to order a refund of part of the premium within 14 days of the posting of a bond, if the conditions of bond are changed by the court, to prevent unjust enrichment, but only after a hearing and factual findings.

The court may keep cash posted for bond for payment of fines, fees, court costs, restitution, or surcharges, if the cash bond was posted by the defendant or if the person posting it agrees.

A surety may also be exonerated from bond liability by surrendering the defendant and the court may order a refund of all or part of the premium to prevent unjust enrichment.

Section 16-4-111, C.R.S., Disposition of Security Deposits

This section allows for the court to keep cash posted for bond if the defendant posted the cash himself/herself, or if the person posting the cash agrees, for payment of fines, fees, court costs, restitution, or surcharges. The remainder of the section describes the process for release of any bond security posted with the court.

Section 16-4-112, C.R.S., Enforcement Procedures when Forfeiture not Set Aside

This section describes the forfeiture process for a surety on a secured money bond. Defense counsel is required to receive notice of the forfeiture hearing date.

Section 16-4-113, C.R.S., Bond in Certain Misdemeanor Cases

This section requires the court to grant a personal recognizance bond to persons charged with a class 3 misdemeanor or a petty offense or any offense with maximum penalty of 6 months unless:

- ★ The person fails to properly identify himself; or
- ★ The person refuses to sign a personal recognizance bond; or
- ★ Continued detention is necessary to prevent imminent bodily harm to himself or another person; or
- ★ The person has no ties to the community and there is a substantial likelihood that the person will fail to appear; or
- ★ The person has previously failed to appear after execution of a promise to appear; or
- ★ The person has a warrant or a pending probation or parole revocation.

Tool #4: Guiding US and Colorado Constitutional Provisions

It is important to remember that *the right to bail/pretrial release is a Constitutional right*, protected by both the Constitution of the United States and the Colorado State Constitution. That means that the presumption should always be that the defendant will be released pending trial, subject to appropriate conditions. The right to counsel at first appearance is also a protected Constitutional right. Defense attorneys should be familiar with the relevant Constitutional provisions and the case law interpreting them, and should refer to them in arguments for pretrial release.

"It is the position of the United States that, as courts have long recognized, any bail or bond schedule that mandates payment of pre-fixed amounts for different offenses in order to gain pretrial release, without any regard for indigence, not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy."

Statement of Interest of the United States filed in *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC.

Bail/pretrial release is a Constitutional right.

United States Constitution, Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

"This traditional right to freedom before conviction permits unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.... Unless this right to bail is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." Stack v. Boyle, 342 U.S. 1 (1951)

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

In the recent Statement of Interest of the United States filed in *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC, a case about improper bail practices in the State of Alabama, the federal government asserted that "It is the position of the United States that, as courts have long recognized, any bail or bond schedule that mandates payment of pre-fixed amounts for different offenses in order to gain pretrial release, without any regard for indigence, not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy."

Colorado Constitution, Article II, Section 20, Excessive Bail, Fines or Punishment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

Colorado Constitution, Article II, Section 19. Right to Bail-Exceptions

(1) All persons shall be bailable by sufficient sureties pending disposition of charges except:
  (a) For capital offenses when proof is evident or presumption is great; or
  (b) When, after a hearing held within ninety-six hours of arrest and upon reasonable notice, the court finds that proof is evident or presumption is great as to the crime alleged to have been committed and finds that the public would be placed in significant peril if the accused were released on bail and such person is accused in any of the following cases:
    (I) A crime of violence, as may be defined by the general assembly, alleged to have been committed while on probation or parole resulting from the conviction of a crime of violence;
    (II) A crime of violence, as may be defined by the general assembly, alleged to have been committed while on bail pending the disposition of a previous crime of violence charge for which probable cause has been found;
    (III) A crime of violence, as may be defined by the general assembly, alleged to have been committed after two previous felony convictions, or one such previous felony conviction if such conviction was for a crime of violence, upon charges separately brought and tried under the laws of this state or under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States which, if committed in this state, would be a felony; or

(2) Except in the case of a capital offense, if a person is denied bail under this section, the trial of the person shall be commenced not more than ninety days after the date on which bail is denied. If the trial is not commenced within ninety days and the delay is not attributable to the defense, the court shall immediately schedule a bail hearing and shall set the amount of the bail for the person.

(2.5) (a) The court may grant bail after a person is convicted, pending sentencing or appeal, only as provided by statute as enacted by the general assembly; except that no bail is allowed for persons convicted of:
    (I) Murder;
    (II) Any felony sexual assault involving the use of a deadly weapon;
    (III) Any felony sexual assault committed against a child who is under fifteen years of age;
    (IV) A crime of violence, as defined by statute enacted by the general assembly; or
    (V) Any felony during the commission of which the person used a firearm.
  (b) The court shall not set bail that is otherwise allowed pursuant to this subsection (2.5) unless the court finds that:

(I) The person is unlikely to flee and does not pose a danger to the safety of any person or the community; and

(II) The appeal is not frivolous or is not pursued for the purpose of delay.

(3) This section shall take effect January 1, 1995, and shall apply to offenses committed on or after said date.

The exceptions enumerated in the Colorado Constitution "exclude other exceptions." Palmer v. District Court, 398 P.2d 435, 437 (Colo. 1965).

Reasonable bail must be allowed if district attorney fails to present evidence in opposition to bail of proper nature and kind. Lucero v District Court of Twelfth Judicial Dist., 188 Colo. 67, 532 P.2d 955 (1975).

Counsel at First Appearance is a Constitutional Right

The right to counsel attaches at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty, regardless of whether a prosecutor is aware of that initial proceeding or involved in its conduct. This case involved an action under 42 U.S.C. § 1983 filed against Gillespie County, Texas, where the plaintiff/criminal defendant contended that if the county had provided a lawyer within a reasonable time after a probable cause hearing, he would not have been indicted, rearrested, or jailed for three weeks. This holding reversed a finding of summary judgment for the civil defendant county, and remanded. *Rothgery v. Gillespie County, Texas*, 554 U.S. 191 (2008).

In 2010, a federal lawsuit was initiated by the Colorado Criminal Defense Bar and the Colorado Criminal Justice Reform Coalition, with the assistance of the Colorado Lawyer's Committee, in response to Colo. Rev. Stat. § 16-7-301(4) that required indigent defendants in misdemeanor cases to consult with prosecutors about plea deals before they could receive their constitutional right to counsel.

The complaint relied extensively on two important United States Supreme Court decisions: *Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008); and *Padilla v. Kentucky*, 559 U.S. 356 (2010). In *Rothgery*, the Court made clear that a defendant's constitutional right to counsel attaches at "initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction." Further, "[o]nce attachment occurs, the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the post attachment proceedings." *Padilla* held that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel," in part because of the need for counsel to advise clients of the broad array of potential collateral consequences that may result from a criminal conviction (*e.g.*, immigration consequences, inability to join the military, loss of student loans, denial of housing; etc.).

While the Court never ruled on the substantive issues of the lawsuit, the litigation prompted the Colorado General Assembly to pass and the Governor to sign HB 13-1210, legislation that guaranteed and funded counsel at first appearance for indigent misdemeanor defendants.

Tool #5: Colorado Case Law on Bond

The right to bail is guaranteed by the Colorado and United States Constitutions, and by statute.

★ "The primary function of bail is to assure the presence of the accused, and . . . by means which impose the least possible hardship upon the accused." *People v. Sanders*, 522 P.2d 735, 736 (Colo. 1974).

"The purpose of bail is to insure the defendant's presence at the time of trial and not to punish a defendant before he has been convicted."

***Lucero v. District Court of Twelfth Judicial Dist.*, 532 P.2d 955 (Colo. 1975)**

★ "The purpose of bail is to insure the defendant's presence at the time of trial and not to punish a defendant before he has been convicted." The constitutional standard required for denying bail is different from probable cause. However, the trial court may impose conditions, modify, or revoke bail previously granted after notice is properly given to the defendant. *Lucero v. District Court of Twelfth Judicial Dist.*, 532 P.2d 955,957 (Colo. 1975).

★ There must be competent, direct evidence to support the denial of bail, however, hearsay evidence is also admissible; what weight evidence is given, and issues of credibility are for the finder of fact, and at a bail hearing the court is the finder of fact. *Gladney v. District Court In and For City and County of Denver*, 535 P.2d 190, 192 (Colo. 1975).

★ "The purpose of a recognizance is not to enrich the treasury, but to serve the convenience of the party accused, but not convicted, without interfering with or defeating the administration of justice." *People v. Pollock*, 176 P. 329, 330 (Colo. 1918).

★ Article II, Section 20 of the Colorado Constitution forbids excessive bail. A court may not set a monetary bond so high it is "tantamount to a denial of the right . . . to be admitted to bail in a reasonable amount." *Altobella v. District Court*, 385 P.2d 663, 664 (Colo. 1963).

General Bond Issues

★ The court cannot *sua sponte* modify an executed bond. *Stephenson v. District Court In and For Eighth Judicial Dist.*, 629 P.2d 1078 (Colo. 1981).

★ The court may continue the original bond to final disposition, however must obtain the consent of the surety to continue bond beyond conviction. *Rodriquez v. People*, 554 P.2d 291 (Colo. 1976)

★ The court may impose bond conditions that tend to assure the defendant's appearance, prevent new felonies, and prevent intimidation or harassment of witnesses or victims. However, the court may not require counseling as a condition in domestic violence or alcohol-related offenses. *Martell v. County Court of County of Summit*, 854 P.2d 1327 (Colo. App. 1992).

★ A court may not delegate the discretion to impose conditions of bail bond to the pretrial services program and the statute does not give the pretrial services program the authority to prohibit a defendant from possessing weapons. *People v. Rickman,* 178 P.3d 1202 (Colo.App 2008).

The judge must delineate the specific terms and conditions being imposed on the defendant as a condition of his/her release. These conditions must be based on assessed needs of the particular defendant.

★ The term "conviction" as used in § 16-4-105(2)(b) includes a guilty plea even when the court grants a deferred judgment and sentence. *Hafelfinger v. Dist. Court of Eight Judicial Dist.*, 674 P.2d 375 (Colo. 1984)

★ Generally, unless the court orders or the surety stipulates otherwise, nothing prevents a defendant on bond from leaving the jurisdiction so long as the defendant appears at all case proceedings. *People v. Rincon*, 603 P.2d 953 (Colo. App. 1979).

★ The court's decision to grant or deny an appeal bond is discretionary. *People v. Roca*, 17 P.3d 835 (Colo. App. 2000).

★ The constitutions' prohibitions of excessive bail apply to the right to pretrial bail and not to appeal bonds. *People v. Hoover*, 119 P.3d 564 (Colo. App. 2005).

★ Extradition bonds are governed by § 16-19-117. *Fullerton v. County Court*, 124 P.3d 866 (Colo.App 2005).

★ Pursuant to § 16-4-204(1), issues regarding bail can be raised by the appropriate petition, however, not through appeal after a conviction of the crime charged. *People v. Rodriguez*, 43 P.3d 641 (Colo. App. 2001). Issues regarding bail cannot be raised after conviction. *Corbett v. People*, 387 P.2d 409 (Colo. 1963).

Bail is not granted for capital offenses, when the proof is evident or the presumption is great that the defendant committed the crime.

★ The constitutional standard to deny bail is "proof evident or presumption great" that the defendant committed the crime. This is a higher standard than probable cause, but less than reasonable doubt; the defendant's guilt or innocence is not at issue. *Gladney v. District Court In and For City and County of Denver*, 535 P.2d 190 (Colo. 1975); *Orona v. District Court*, 518 P.2d 839 (Colo. 1974).

★ Colorado's Constitution has defined a class of crimes which permit the denial of bail when the prosecution has shown that the proof is evident or that the presumption is great that the defendant committed such a crime, and those crimes are unaffected by the U.S. Supreme Court's decision prohibiting the death penalty in certain circumstances (*Furman v. Georgia*). If the prosecution fails to meet its burden then the court is to set a reasonable bail in accordance with Colorado law and the Eighth Amendment of the U.S. Constitution. *People ex rel. Dunbar v. District Court of Eighteenth Judicial Dist.*, 500 P.2d 358 (Colo. 1972).

- When the proof is evident or the presumption is great that the defendant committed the charged capital offense, the court must deny bail. *People v. Dist. Court of County of Adams*, 529 P.2d 1335 (Colo. 1974).

- The "requirement [of proof evident] simply goes to the proof of guilt, not to the kind of proof needed for the imposition of the death penalty." Further, an offense does not cease to be a capital offense even when the death penalty may not be imposed. *Corbett v. Patterson*, 272 F. Supp. 602, 608 (D. Colo. 1967).

Bail can be denied for certain crimes enumerated in Article II, Section 19, but not for crimes not enumerated.

- The Colorado legislature cannot add additional exceptions to the bail statue without constitutional amendment. "The mention of the one exception excludes other exceptions." *Palmer v. District Court*, 398 P.2d 435, 437 (Colo. 1965).

Specific Law on Juvenile Matters

- A juvenile does not have a constitutional or statutory right to bail. When denying bail the court must first give weight to the presumption that a juvenile should be released pending a dispositional hearing, unless the prosecution establishes that detention is necessary to protect the juvenile from imminent harm or to protect others in the community from serious bodily harm that the juvenile is likely to inflict. The court may grant bail and set conditions of release which will be in the juvenile's best interests. *L.O.W. v. District Court of Arapahoe*, 623 P.2d 1253 (Colo. 1981).

- Bail can be denied for a capital offense, even if the death penalty may not be imposed; the fact that the defendant was 16 and therefore not subject to the death penalty, would not foreclose the denial of bail. *Lucero v. District Court of Twelfth Judicial Dist.*, 532 P.2d 955 (Colo. 1975).

Appealing the Court's Bail Order

- Colorado's statutory scheme governing release on bail entitles a defendant to an expedited review of the court's order revoking his existing bond and declining to set another pending trial under the expedited review process delineated in Section 16-4-204 C.R.S. The Court cannot revoke bond and deny the defendant's right to pretrial release altogether when a defendant violates a condition of bond, but can only modify the conditions of pretrial release. *People v. Jones*, 346 P.3d 44 (Colo. 2015).

SECTION 3:
ADVOCATING FOR THE CLIENT AT THE BOND HEARING

Making the Argument

Always remember there are only two legal and legitimate purposes of bond: (1) to secure presence in court, and (2) to maximize public safety by assessing whether the person might commit another crime while case is pending. After looking at the statutes, make sure you:

- ★ Know the CPAT score and understand its meaning;
- ★ Review the affidavit and any other police reports available;
- ★ Understand the defendant's criminal history;
- ★ Understand prior FTA(s);
- ★ Check for any prior pretrial misconduct;
- ★ Know if the defendant has family or friends in the courtroom who can support him or her;
- ★ Have any personal information about job, military history, mental health issues, drug or alcohol problems, school, family, etc., that is still relevant under the new statutes;
- ★ Consider the strength of the case. Is it a case that is not aggravated in nature? Is it a minor offense?;
- ★ Consider what the final outcome of the case likely to be. Is the defendant likely going to get probation or other community supervision? Why require a secured bond if the defendant can be adequately supervised?; and
- ★ Know your local pretrial program and what supervision services it offers.

In every bail argument, counsel should presume unsecured release on personal recognizance (unless the person is high risk or statutorily/constitutionally ineligible for a personal recognizance bond) and address the conditions that will meet any appropriate statutory concerns. Make the court aware of the research on money and its lack of connection to public safety or court appearance.

Always ask: What is the final outcome of the case likely to be? Is the defendant likely going to get probation? Why require a secured bond if the defendant can be adequately supervised?

The argument to the court should be individualized to the client. Talk about your client by name and outline the specific circumstances that make monetary conditions of bond unworkable. Highlight the support he will get from family and other persons. Describe why the services offered by your pretrial services program will adequately secure your client's appearance in court and protect public safety.

Know your judge. Learn his or her bond setting proclivities and/or biases and try to address them with factual information about your client. Avoid irritating the court, if possible, by making the record succinctly and accurately.

When appropriate, use federal and state constitutional provisions and case law to bolster your arguments for release. Whenever something is unfair, unreasonable, irrational, or arbitrary, the Due Process Clause of the Fourteenth Amendment should be invoked. For example, you may argue that pretrial detention is punishment without trial, in violation of your client's substantive due process rights. Or if your client is detained without a meaningful hearing, you may argue that this is a violation of his procedural due process rights.

The Fourteenth Amendment's Equal Protection Clause is also gaining footing in the context of right to pretrial release. The basis of the Department of Justice's Statement of Interest in the *Varden*[20] case was that the setting of secured money bail based on offense without any contemplation of the individual's circumstances is a violation of the Equal Protection Clause. Similarly, the U.S. District Court for the Eastern District of Missouri recently issued a settlement order in the case of *Donya Pierce, et al., v. The City of Velda City* (No. 4:15-cv-570-HEA) based on the Equal Protection Clause. The order states that the resulting difference in treatment between those who can afford to pay and those who cannot is a violation of the Fourteenth Amendment's Equal Protection Clause, noting that "[i]f the government generally offers prompt release from custody after arrest upon posting a bond pursuant to a schedule, it cannot deny prompt release from custody to a person because the person is financially incapable of posting such a bond."

And remember: *always try to get your client out of jail*. It will improve the outcome in most cases.

See Appendices 7 and 8 for some useful checklists to help in your bail argument.
See Appendix 9 for a motion that outlines many of the legal arguments for a personal recognizance bond.

Specific Problem Areas

Video Bond Hearings

Many jurisdictions now conduct first and/or second appearances via video conferencing. These hearings present unique problems for defense counsel. Video conferencing is a poor substitute for in-person hearings with the client standing directly before a judge. Among other problems there are deficiencies related to access to counsel and presentation of evidence. The hearings tend to be more impersonal with the client often in jail and the judge present in a courtroom miles away. If the lawyer is with the client, make sure to explain what is happening in the courtroom. Ask the client if any family members might be in the courtroom for the hearing. If so, attempt to contact the family prior to the hearing to see if they will support your argument for release. Also, make sure they do not make any statements about the factual allegations. If your client is charged with an offense that might trigger a no contact order (particularly domestic violence cases), try to determine if the victim is in the courtroom and see if you can interview

20. *Varden*, *supra* note 2.

that victim prior to the hearing to determine if the victim is favorable for your client and whether the victim will support or oppose a no contact order. Try to get any information helpful to your client's release from the victim if possible.

If you are in a jurisdiction where the lawyer is in the courtroom and the client is at a remote location, ensure that you have had enough time to interview the client prior to the hearing and insist that you have the opportunity for confidential communication with your client during the hearing if the client has any questions during the bond hearing.

Always argue against any conditions that are not relevant to the case. Conditions such as restriction of alcohol use, sobriety monitoring, SCRAM bracelets, unwanted no contact orders, weekly reporting for a low risk person, etc., should all be challenged unless they can be individually justified for your client and the case.

Over-conditioning

Remember the statute requires the "least restrictive conditions." What that specifically means is subject to argument and there is no clear case law in Colorado on the issue. So always argue against **any** conditions that are not relevant to the case. Conditions such as restriction of alcohol use, sobriety monitoring, SCRAM bracelets, unwanted no contact orders, weekly reporting for a low risk person, etc., should all be challenged unless they can be individually justified for your client and the case. Be aware of the research (and pretrial services should support you on this) that **over-supervision can make people worse** and unnecessarily wastes tax payer dollars. *See What Works, Effective Recidivism Reduction and Risk-Focused Prevention Programs*, Feb. 2008, published by Colorado Department of Public Safety, Division of Criminal Justice (*available at* https://cdpsdocs.state.co.us/ccjj/Resources/Ref/WhatWorks2008.pdf). This report contains a general comprehensive discussion of effective interventions in criminal justice but strongly supports/reports on the research about over-supervision.

The ABA Standards for Pretrial Release also give strong support to arguments against "over-conditioning" and use of least restrictive conditions of release. See *American Bar Association, Criminal Justice Standards on Pretrial Release* (*available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html).

Use of GPS

GPS has become a popular monitoring tool for courts and pretrial services because it tracks the location of the defendant and provides a certain degree of "containment" outside of a jail setting. It is a form of home detention that creates a least restrictive option in some cases where some form of restriction/detention appears necessary. GPS monitoring generally sets up exclusion zones where the defendant is not allowed to go. Practitioners should be aware of whether the monitoring is active (real time) or passive (subsequent checking to make sure compliance has occurred). This makes a difference. Passive monitoring does little to prevent criminal behavior or to provide law enforcement the opportunity to intervene to protect a victim. It only sets up the record for a violation.

Practitioners should support the use of GPS if it means that the court is more likely to allow for the release of the defendant with GPS monitoring. But there is little evidence that the GPS is necessary and effective in a criminal case where there is not a protected victim or some defined locations that are correlated to the crime charged or present some kind of risk factors. There is support for the use of GPS monitoring in domestic violence cases.[21]

It is important to consider filing a motion for relief from GPS since GPS is very costly for a defendant. When a defendant shows proper compliance with terms of pretrial supervision, many pretrial service supervisors will support a motion to remove the GPS supervision. However, this is generally only on cases where there is not a protected victim. GPS is also very costly for pretrial agencies since it demands substantial personnel and fees to track compliance. Use that to your client's advantage in trying to get support for the termination of GPS.

NOTE: Some jurisdictions keep the client in jail, often for days, until the GPS service provider comes and sets up the client on the system. Be aware of this and argue for release followed by reporting to the appropriate agency within a certain time period to get the GPS monitoring set up.

Cash Only Bonds

The type of bond to be set by the court is outlined in section 16-4-104, C.R.S. The court may choose a type of bond with unsecured monetary conditions or, alternatively, choose a type of bond with secured monetary conditions. Section 16-4-104(c), C.R.S. provides specifically:

> A bond with secured monetary conditions when reasonable and necessary to ensure the appearance of the person in court or the safety of any person or persons or the community. The financial conditions shall state an amount of money that the person must post with the court in order for the person to be released. The person may be released from custody upon execution of bond in the full amount of money to be secured by any one of the following methods, as selected by the person to be released, unless the court makes factual findings on the record with respect to the person to be released that a certain method of bond, as selected by the court, is necessary to ensure the appearance of the person in court or the safety of any person, persons, or the community.

The methods listed are: cash, surety, real estate, or professional bail agent.

The court should not be requiring cash only bonds since the legislation is clear that bonds that have financial conditions should not dictate how the defendant meets the financial conditions.

It is important that practitioners challenge the setting of cash only bonds and require the court to make the findings required by statute. However, some courts will set a higher surety bond than a cash bond, so it is important to assess the *total costs to the defendant* before making the challenge if there is any chance the client can post the bond. **And of course, the argument should be made that if the court is setting a low cash bond, then the defendant must be low risk and should be granted a personal recognizance bond.**

21. *See* Edna Erez et al., GPS Monitoring Technologies and Domestic Violence: An Evaluation Study (2012), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/238910.pdf.

Domestic Violence, Sex Assault, and Stalking Cases — Vonnie's Law

Section 18-1-1001(5), C.R.S., requires that for any person to be released on bond for a case involving domestic violence, stalking or unlawful sexual behavior, the person shall be advised by the court of the mandatory protection order required pursuant to the provisions of this section. The specific language of the statute states, as amended in 2015, that "before a person is released on bail" the defendant shall acknowledge the mandatory protection order "in court and in writing."

Specifically in misdemeanor domestic violence cases where the defendant is assessed as low or medium risk, it should be argued that any delay in pretrial release caused by this mandatory protection order statute violates the defendant's constitutional right to bail and constitutional presumption of innocence.

This language creates problems in certain jurisdictions that require an otherwise releasable person stay in jail until a judge is available, which might involve days of waiting. Challenges to this statute should be made, in appropriate cases, as violating the constitutional and statutory right to bail. Specifically in misdemeanor domestic violence cases where the defendant is assessed as low or medium risk, it should be argued that any delay in pretrial release caused by this mandatory protection order statute violates the defendant's constitutional right to bail and constitutional presumption of innocence.

Victim Rights Act (VRA)

The Victim Rights Act (VRA) provides statutorily defined victims the right to be notified of and heard at any hearing involving "a bond reduction or modification." §§ 24-4.1-302.5 (1) and (2), C.R.S., and 24-4.1-302(2)(c)(I)(A), C.R.S. *However, the initial setting of bond "shall not constitute" a bond reduction or modification*. Therefore, no VRA compliance is required at the initial bond setting.

Always argue that the failure of the prosecution to comply with the VRA is not grounds to keep your client in jail.

It is critical for the practitioner to know and understand the procedures in each jurisdiction where he or she practices. How the initial bond is set, what is considered an initial bond setting and what is considered a modification hearing is extremely important. It will dictate whether courts will hear your bond argument.

Most courts will deny a bond modification unless there has been VRA compliance. So failure of the DA, law enforcement or any party who is statutorily mandated to provide victim notification can derail a bond modification hearing and force a person to remain in custody until the notification is completed. At any opportunity, a record should be made that you will argue bond modification at the defendant's next court appearance to make clear that victim notification should be accomplished.

What constitutes notice to the victim and compliance with the VRA is not clear under the statute. Most jurisdictions seem to interpret the statute as requiring an actual conversation with the victim regarding the hearing. However, the statute does not clearly require that form of notification. Defense counsel should, on the record, inquire as to what efforts were made to notify the victim or otherwise make a record about the notice or lack of notice given to the victim. Counsel should argue that leaving a message provides the statutory notice to the victim as required by the plain language of the statute.

Defense practitioners can notify the victim of a bond hearing as well. Nothing in the statute prevents that. It is important that counsel determine whether the victim will object to a bond reduction or modification and consider providing the victim notice of any bond modification hearing. (*NOTE*: Be careful not to bring a victim into court for a hearing if the victim does not want to be ordered to appear or be subpoenaed for a future trial date. Some jurisdictions will try to accomplish service any time the victim shows up in the courtroom if it is apparent that the victim will not cooperate in appearing for future court/trial dates.)

The VRA does not state that a continuance of the bond modification hearing is proper when the prosecution fails to comply with the statute. It is fundamentally unjust for a person to remain in custody for an undetermined time period because the prosecution failed to comply with its statutory mandate. The VRA provides a civil remedy for non-compliance with the statute. Always argue that the failure of the prosecution to comply with the VRA is not grounds to keep your client in jail.

Familiarity with the bail setting process in each individual court within each jurisdiction can also be essential if the defense counsel is to be effective in managing the problems with the VRA.

See Appendices 9 — 11 for sample motions: Motion for Personal Recognizance Bond Consistent with Legislature's recent amendments to Colorado's Bond Statutes; Motion Against Excessive Monetary Condition of Bond Imposed in Violation of Defendant's Constitutional and Statutory Rights; Motion Against Cash Only Monetary Condition of Bail. NOTE: this last motion was drafted before the 2014 changes to § 16-4-104 (c), C.R.S. making the law clear that the choice of method to post bond was the defendant's. However, the constitutional arguments remain valid.

See also Appendix 13 for further arguments on the VRA.

Other Fees/Costs that Keep Clients in Jail

Colorado law allows Sheriff Departments to charge "booking fees" and "bonding fees" to inmates. Each jail will have its own policies about these fees and it is important that counsel understand these fees in order to obtain a waiver of them (at best) or to make sure the client understands what they are (at the very least). A client might be granted a personal recognizance bond but may be required to pay a "bonding fee" of $30.00 that will result in the client being kept in custody. Additionally, some jurisdictions require up-front payment for GPS monitoring or other monitoring services. Again, it is important to know what these fees are so they can be addressed at the bond hearing. No form of financial responsibility should result in a poor person's detention.

SECTION 4:
APPEALING THE COURT'S BAIL ORDER

If courts do not comply with the HB 13-1236 statutory requirements, defense counsel must appeal. The appeals procedure is essential to challenge courts which are not complying with the law. It is critical that practitioners become familiar with the process for appealing a court's bail order. It is extremely important, for purposes of review and development of more robust case law on the issues related to bail and pretrial release, that a full record be made regarding the arguments and evidence considered by the court in making bail decisions.

There are several available options for appealing a county or district court's bail order. Each defense attorney has to decide which *one is best under the circumstances of the particular case*. For felony cases headed from county court to district court, the attorney may forgo an appeal and simply file a motion for reduction of bond or change of bond conditions in the district court pursuant to §16-4-109, C.R.S. **When the priority is trying to get a client released, this is the quickest and best option. When the priority is creating legal precedent, other methods are more appropriate.**

If courts do not comply with the new statutory requirements, defense counsel must appeal.... It is critical that practitioners become familiar with the process for appealing a court's bail order.

Review on direct appeal from a conviction is not available. *See People v. Rodriguez*, 43 P.3d 641, 644 (Colo. App. 2001). The discussion below outlines the different procedures available.

There are four different methods identified in this summary to appeal a bail decision by a court:

(I) § 16-4-204, C.R.S.;
(II) Rule 21, C.A.R.;
(III) Rule 106, C.R.C.P.; and
(IV) Rule 57, C.R.C.P.

While § 16-4-204(1), C.R.S., states that "the defendant or the state" may file a "petition for review in the appellate court" after entry of an order pursuant to § 16-4-104, § 16-4-107 or § 16-4-204 and *the petition shall be the exclusive method of appellate review*." *Id.* (emphasis added). This statute is confusing. It doesn't cover all the different proceedings in which a bail question can arise. Moreover, despite the "exclusive method" language, appellate courts have reviewed bail issues by original proceedings under C.A.R. 21 and by C.R.C.P. 106 (where the bail decision was by the county court) throughout the years since 1972, when section 16-4-204 was enacted. **So arguments can be made that a case falls inside or outside the "exclusive method" provision, depending on how the attorney chooses to proceed.**

Preliminary Issue of Mootness — Applicable to All Methods of Appellate Review

In many cases, bail is moot by the time an appeal is resolved because the client's case has already been resolved. But that does not mean that an appeal should be dismissed. It is important that counsel continue with the appeal to address issues "capable of repetition yet evading review."

A court may resolve an otherwise moot case if the matter is capable of repetition yet evades review or involves an issue of great public importance.

See *Carney v. Civil Serv. Comm'n*, 30 P.3d 861, 864 (Colo. App. 2001).

In *Fullerton v. County. Court*, 124 P.3d 866, 867-68 (Colo. App. 2005), the court explained why an appeal of a C.R.C.P. 106 judgment regarding bail should not be dismissed for "mootness":

> Here, the undisputed facts show that a ruling by this court would have no practical legal effect on defendant. However, a court may resolve an otherwise moot case if the matter is capable of repetition yet evades review or involves an issue of great public importance. *See Carney v. Civil Serv. Comm'n*, 30 P.3d 861, 864 (Colo. App. 2001).
>
> Bail is imposed daily in every jurisdiction statewide, and many of these cases involve defendants awaiting extradition. Yet, despite the frequency with which such questions arise and the apparent uncertainty as to the propriety of "cash only" bonds, few such cases have been reviewed by our appellate courts. *See People v. Hoover*, 119 P.3d 564, 2005 WL 674642 (Colo. App. No. 04CA1794, Mar. 24, 2005) (denying the defendant's motion to modify a "cash only" appeal bond). There also appears to be some confusion in the trial courts as to which bail statute applies to a defendant pending extradition prior to service of a governor's warrant. Thus, we conclude the question whether a court may impose a "cash only" bond on a defendant pending extradition prior to service of a governor's warrant merits resolution here.

See also Pipkin v. Brittain, 713 P.2d 1358, 1359 (Colo. App. 1985) and *L. O. W. v. Dist. Court*, 623 P.2d 1253, 1256 (Colo. 1981)

Petitions filed pursuant to section 16-4-204, C.R.S.

This will be the most common appellate remedy for an appeal of the individual court's bail order. It is certainly the best, if not only, way to appeal most bail reconsiderations and findings, including excessive behavioral or monetary conditions, improper revocation of bond, improper increase of bail conditions, etc. *See People v. Jones*, 346 P.3d 44 (Colo. 2015); *People v. Fallis*, 2015 COA 75, No. 15CA0691, at paragraph 2. There are only a few requirements for petitions filed pursuant to § 16-4-204, C.R.S.:

Contents of petition

- ★ It "shall be in writing"
- ★ It "shall be served as provided by court rule for service of motions"
- ★ It "shall have appended thereto a transcript of the hearing held pursuant to section 16-4-107" (this again raises the "new v. old 16-4-107" question)

The statute is silent about what else one *can* attach if desired. For example, an attorney is free to attach a warrant, an affidavit for warrantless arrest, a bond schedule, a pretrial services report, an affidavit, or anything else that may be relevant and helpful. *But since the attorney is asking the appellate court to "reverse" the lower court, he or she cannot reasonably rely on a document or information that was not presented to the bail court.*

Procedure

Section 16-4-204(1) says little about the procedure for filing the petition, except that it should be "served" like a motion. This means that the attorney *does not* need to file a motion *in forma pauperis*, a notice of appeal, or designation of record. The only requirement is to file the motion and supporting materials.

The section says that "the defendant or the state may seek review of said order by filing a petition for review in the appellate court." Normally, the appeals from county court are taken to the district court. *See* Crim. P. 37. But Crim. P. 37 allows a defendant to "appeal a judgment of the county court" to the district court, and it doesn't necessarily apply to a bail "order." Therefore, there is nothing preventing counsel from filing petitions in the court of appeals — it is "the appellate court." *So counsel should decide what forum is the best.*

Procedures if filed in District Court

The procedure and contents for petition filed in District Court is governed by Crim. P. 47—Motions. A petition, according to the Rule:

- ★ "shall state the grounds upon which it is made"
- ★ "shall set forth the relief or order sought"
- ★ "may be supported by affidavit"
- ★ May include supporting documents which "shall be served with the motion"
- ★ Shall be served on the DA, county court, and district court pursuant to local rule
- ★ The district court case number is left blank; the court should assign a case number upon receipt
  - ☆ This procedure will have to be ironed out with administrative staff, the court, and the court clerks.
  - ☆ Procedure for assigning filing a notice of appeal in a county court appeal to the district court seems like a good place to start, because in both instances the document is filed in the district court without a case number

The state has seven days to file a response, but it is not required to file one. § 16-4-204(2), C.R.S. The appellate court can remand, order that the terms and conditions of bond be modified, or dismiss the petition. *See* § 16-4-204(3), C.R.S.

Procedures if filed in Court of Appeals

The procedure and contents for a motion filed in court of appeals are governed by C.A.R. 27—Motions. The petition, according to the Rule:

- ★ "shall state with particularity the grounds on which it is based"
- ★ "shall set forth the order or relief sought"
- ★ May include supporting documents which "shall be served and filed with the motion"
- ★ Original and five copies shall be filed in the court of appeals.
- ★ Serve the DA and the district court.
- ★ "shall contain proof of service on all other parties"
- ★ Must comply with C.A. R. 32. *See* C.A.R. 27(d)
  - ☆ 14 point
  - ☆ Double spaced, except for block quotes
  - ☆ The court of appeals case number is left blank; the court will assign a case number upon receipt
- ★ When using ICCES: use the "File a New Case?" option

The state has seven days to file a response, but it is not required to file one. § 16-4-204(2), C.R.S. The appellate court can remand, order that the terms and conditions of bond be modified, or dismiss the petition. *See* § 16-4-204(3), C.R.S.

There is at least one recent published case involving a defendant's § 16-4-204 petition. *See People v. Hoover*, 119 P.3d 564, 565 (Colo. App. 2005). Although *Hoover* involved a petition for review of an appeal bond, there is no reason why the court of appeals could not publish a decision regarding a petition for review of a pretrial bond.

Appeal from the District Court or Court of Appeals to the Supreme Court for a Section 16-4-204 Petition

It would appear that an attorney cannot seek certiorari in the Supreme Court from the denial of a § 16-4-204 petition. This is because C.A.R. 52 refers to a "petition for writ of certiorari to review a *judgment* of a district court on appeal from a county court" and a "petition for writ of certiorari to review a *judgment* of the Court of Appeals." Section 16-4-204 indicates that "the appellate court" issues an "order" rather than a "judgment." Moreover, § 16-4-204 specifically states that it is "the exclusive means of appellate review" in some cases.

Trying for certiorari may be an option, but it takes an extremely long time. Thus, the denial of a petition by the "appellate court" may be the end of the road for § 16-4-204 proceedings.

But there are other options: C.R.C.P. Rules 57 and 106, C.A.R. Rule 21

Petitions filed pursuant to Colorado Appellate Rule 21

Consider this type of appeal when there is something fundamentally wrong with the way bail was initially set. Relief under C.A.R. 21 can be granted only when no other adequate remedy, including relief by appeal or under C.R.C.P. 106, is available.

District court bail orders

1) *After all remedies under § 16-4-204 have been exhausted by counsel*, relief under C.A.R. 21 is clearly available because there is "no other adequate remedy."

- ★ Cannot review bail order on direct appeal of conviction. *See People v. Velasquez*, 641 P.2d 943, 945 n.5 (Colo. 1982); *People v. Rodriguez*, 43 P.3d 641, 644 (Colo. App. 2001).
- ★ C.R.C.P. 106 is not adequate remedy since C.R.C.P. 106 motions are filed in the district court. C.R.C.P. 106 (a)(2) and 106 (a)(4) allow the district court to correct the acts of a "lower judicial body," not another district court. *Pipkin v. Brittain*, 713 P.2d 1358, 1360 (Colo. App. 1985).

2) *If no appeal has been tried under the provisions of § 16-4-204*, relief may still be available under C.A.R. 21. Argue the following cases:

- ★ "The proper method of contesting the reasonableness of bail is by an original proceeding to this court, *Balltrip v. People*, 157 Colo. 108, 401 P.2d 259 (1965), or by a petition pursuant to section 16-4-304(1), C.R.S[.]" *People v. Velasquez*, 641 P.2d 943, 945 n.5 (Colo. 1982).
- ★ *Hafelfinger v. Dist. Court*, 674 P.2d 375 (Colo. 1984) ("In this original proceeding filed pursuant to C.A.R. 21, the petitioner, Robert Hafelfinger, seeks relief in the nature of mandamus and prohibition requiring Judge John A. Price and the District Court for Larimer County (respondent) to consider granting him a personal recognizance bond pursuant to section 16-4-105, C.R.S.1973 (1978 Repl.Vol. 8 & 1982 Supp.)")
- ★ *Gladney v. Dist. Court*, 188 Colo. 365, 367; 535 P.2d 190, 190 (1975) ("This is an original proceeding upon the petition of Samuel Gladney, requesting that this court issue an order to the respondent district court to set bail in an action presently pending before that court.")

Or, if possible, argue that the issue falls outside § 16-4-204 and, therefore, an appeal pursuant to that section is not an adequate remedy.

County court bail orders

After all remedies under § 16-4-204 have been exhausted, relief under C.A.R. 21 should be available because there is "no other adequate remedy."

- ★ Cannot review bail order on direct appeal of conviction. *See People v. Velasquez*, 641 P.2d 943, 945 n.5 (Colo. 1982); *People v. Rodriguez*, 43 P.3d 641, 644 (Colo. App. 2001).

- ★ Since the order was already appealed under § 16-4-204—to either the district court or the court of appeals—that remedy is not available.

- ★ Arguably C.R.C.P. 106 is not available, because the complaint involves *both* the county court's order and the appellate court's order. C.R.C.P. 106 (a)(2) and C.R.C.P. 106 (a)(4) allow the district court to correct the acts of a "lower judicial body," not another district court or an appellate court. *Pipkin v. Brittain*, 713 P.2d 1358, 1360 (Colo. App. 1985).

If the remedies under § 16-4-204 have not been exhausted, the attorney is probably confined to C.R.C.P. 106.

Complaints filed pursuant to C.R.C.P. 106

C.R.C.P. 106 is a *civil* remedy used, as relevant here, to compel or correct an action by a "lower judicial body." As explained above, it cannot be used to correct the actions of another district court. In the criminal context, it is mostly used to correct a county court judge. It will most often be used to challenge a fundamentally unfair process.

C.R.C.P. 106 is like a C.A.R. 21, but it has two distinct advantages:

- ★ The district court does not have discretion to deny review, except for certain procedural defects.

- ★ The district court's ruling in a C.R.C.P. 106 proceeding can be appealed to the court of appeals. Thus, it may be a useful way to get a published court of appeals decision on an important legal issue.

"Review of [bail] orders issued in county court is by complaint under C.R.C.P. 106 filed in the appropriate district court." 14 Colo. Prac., *Criminal Practice & Procedure* § 6.35 (2d ed.)

See Appendix 12 for sample Rule 106 complaint, Complaint for Relief pursuant to C.R.C.P. 106 (a)(4).

Complaints filed pursuant to C.R.C.P. 57

In 2015 litigation in Denver District Court challenging the Denver County Court bail setting process, the Office of the Denver City Attorney asserted that the proper remedy to challenge the county court bail schedule and the system for determination of bail in a county court case was through C.R.C.P. Rule 57. Since the complaint filed by the plaintiff in that case sought a judicial declaration that *the County Court violated the constitutional and statutory rights of the defendant rather than a specific bond determination ruling*, the District Court agreed and ruled that the proper remedy in that case, as well as another companion case, was pursuant to C.R.C.P. 57. That case is still being litigated by the Office of the State Public Defender and, on a pro bono basis, by the law firm of Reilly Pozner.

See Appendix 13 for a sample complaint pursuant to C.R.C.P. 57. This complaint has an excellent discussion of the bail statutes, the purpose of bail, and the intersection of the VRA with bail.

SECTION 5:
BAIL BOND AGENTS — THE CASE LAW AND THE COMPLAINT PROCESS

Most Colorado bonds with monetary conditions are currently written by professional bail agents. Professional bail agents charge a premium or a fee of up to 15% (the statutory maximum) of the amount of the monetary condition to assume the "risk" of a failure to appear.

In theory, if a defendant fails to appear and after notice to the bail agent, the court enters judgment for the full amount of the monetary condition of the bond against the bail agent. The bail agent can avoid responsibility for the full amount of the monetary condition if the bail agent surrenders the person to the court or law enforcement.

Section 16-4-114 describes the process the judicial department uses to sanction compensated sureties who do not pay their judgments within the allocated time period. The name of the bail agent is placed on the "Board of the Court" or, as it is called, called the "board." Once on the board, a bail agent is prohibited from writing other bonds until the judgment is paid, the defendant is surrendered to the court or law enforcement, or the court for any other reason changes the order of judgment.

There can be times when a professional bail agent does not behave in an ethical manner towards the defendant or the defendant's family. Sometimes the violations are minor and sometimes they are outright criminal. Anyone can file a complaint at the Department of Regulatory Agencies (DORA), Division of Insurance (DOI) with respect to a bail agent.

In practice, there are many delays and outside factors that make this process inefficient. More often than not, it is law enforcement or other people (including defense counsel) who return the defendant to court, not the bail agent, thereby allowing the bail agent to avoid financial responsibility.

There can be times when a professional bail agent does not behave in an ethical manner towards the defendant or the defendant's family. Sometimes the violations are minor and sometimes they are outright criminal. Anyone can file a complaint at the Department of Regulatory Agencies (DORA), Division of Insurance (DOI) with respect to a bail agent and attorneys should make sure they have all the necessary information to provide to a client if the client wishes to file a complaint against a bail agent.

According to the DOI website (https://www.colorado.gov/pacific/dora/bail-bonds):

The Colorado Division of Insurance is responsible for administering and enforcing Colorado Insurance Laws regulating the bail bonding industry and for handling complaints against bail bonding agents. Complaints are received through a variety of channels such as consumers, insurers, law enforcement, courts, and other licensees. Complaints generally address criminal convictions, inappropriate behavior, bond revocations, forfeiture violations, failure to return collateral, failure to provide written premium or collateral receipts, overcharging of premium, misappropriation of premium and collateral, other fiduciary violations and failure to provide required documents to the consumer. These types of practices have the potential to harm consumers resulting in significant economic harm to Colorado citizens.

The Division may investigate and may make rules and regulations as necessary and may take disciplinary action by denying, suspending, revoking, or refusing to renew the license of a bail bonding agent, and may impose civil penalties. The Division reports complaint and enforcement action information to the National Association of Insurance Commissioners (NAIC) for inclusion in the NAIC's national database. Colorado Insurance Law also contains criminal penalties for specific activities which are illegal for bail bonding agents. Numerous statutory changes including reforming records and record keeping requirements have occurred over the years to enhance the protection of the consumer.

Consumers should be aware of their rights when transacting bail bond business. This website provides information regarding the bail bond practice and links to other websites to assist in the education and protection of consumers.

If you have any questions relating to bail bonds please contact the Division.

The phone number for information on filing a complaint is 303-894-7490 and email is insurance@dora.state.co.us. The website also has a form for filing a complaint online.

Case Law

The Colorado courts have, in multiple cases, addressed the responsibility of a bail agent or surety and issues surrounding fees, unjust enrichment and forfeiture. A summary of major cases follows.

What is a Surety?

- ★ Sureties should be persons of sufficient financial ability and of sufficient vigilance to secure the appearance and prevent the absconding of the accused. *People v. Pollock*, 176 P. 329 (Colo. 1918).
- ★ A surety takes calculated risks, and events which materially increase that risk have the effect of terminating the obligation of the bond. *Rodriquez v. People*, 554 P.2d 291 (Colo. 1976).
- ★ The principal (or defendant) is considered within the custody of the surety. *People v. Loomis*, 152 P. 143 (Colo. 1915); *Vaughn v. District Court*, 559 P.2d 222 (Colo. 1977).

Bail Forfeiture set aside: "If it Appears that Justice So Requires" Issues

- ★ 16-4-114(5)(h) states "the court may order that a bail forfeiture judgment be vacated and set aside or that execution thereon be stayed upon such conditions as the court may impose, if it appears that justice so requires." This standard is essentially an appeal to the conscience of the court. No clear rule can be set down that will guide the trial court in every instance because the court must consider the totality of facts and circumstances in each individual case. *People v. Escalera*, 121 P. 3d 306 (Colo. App. 2005); *People v. Diaz-Garcia*, 159 P.3d 689 (Colo. App. 2006).

- ★ The trial court should consider: (1) the willfulness of the defendant's violation of bail conditions; (2) the surety's participation in locating or apprehending the defendant; (3) the cost, inconvenience, and prejudice suffered by the state as a result of the violation; (4) any intangible costs; (5) the public interest in ensuring a defendant's appearance; and (6) any mitigating factors. These factors encompass the principle that generally only acts of God, of the state, or of law will relieve a surety from liability. *People v. Bustamante-Payan*, 856 P.2d 42 (Colo. App. 1993).

- ★ In exercising its discretion, a trial court should be mindful of the policies concerning bail. These include not penalizing sureties when it appears that they are unable, by no fault of their own or of their principal, to perform the condition of the bond. *Owens v. People*, 572 P.2d 837 (Colo. 1977).

Bail Forfeiture: "Unjust Enrichment" Issues

- ★ "The enriching of the public treasury is no part of the object at which the proceeding is aimed. There is no reason for penalizing the sureties when it appears that they are unable, by no fault of their own or of their principal, to perform the condition of the bond." *Smith v. People*, 184 P. 372, 372 (Colo. 1919).

- ★ It would be "'a fickle and illogical system of jurisprudence to exonerate the surety for the nonappearance of its principal by reason of confinement due to either mental or physical illness', and to refuse to exonerate the surety for the non-appearance of its principal when he actually is confined behind prison walls." *Allison v. People*, 286 P.2d 1102, 1105 (Colo. 1955).

Bail agents challenging Pretrial Service Programs

- ★ Bonding agents lacked standing to challenge a court's decision to allow certain defendants to deposit 10% of the bail as a condition for pretrial release, because the bonding agents were only indirectly affected, and did not have a legally protected interest that was being violated. *Wimberly v. Ettenberg*, 570 P.2d 535 (Colo. 1977).

Bail Forfeiture: Notice Requirement Issues

- ★ The trial court must comply with the statutory procedures regarding forfeiture, and entry of judgment on a forfeiture; however, there is no presumption of prejudice favoring the surety when the court delays in notifying the surety. *Moreno v. People*, 775 P.2d 1184 (Colo. 1989).

- ★ Although the trial court had not provided "forthwith" notice to the surety, the surety was not prejudiced, and the trial court's entry of judgment on the order of forfeiture was affirmed. *People v. Maestas*, 748 P.2d 1351 (Colo. App. 1987) (affirmed by *Moreno*).

Refund of Premium

★ Where defendant's surety bond is later converted to a personal recognizance bond "the determination of the amount of premium refund due to the defendant is a matter within the trial court's discretion…" *People v. Anderson*, 789 P.2d 1115, 1117 (Colo. App. 1990).

Surrender to the Court and Notice

★ The surety is not required to give notice to the defendant, when the surety wants exoneration and the defendant is surrendered in open court. *Vaughn v. Dist. Court of Second Judicial Dist.*, 559 P.2d 222 (Colo. 1997)

CONCLUSION

Armed with a thorough understanding of the client, risk assessment instruments, and relevant laws, defense attorneys have the power to change the trajectory of their clients' criminal cases. Achieving pretrial release helps maintain clients' stability, increases trust in the attorney-client relationship, facilitates client participation in the defense of the case, helps preserve the presumption of innocence, and improves the likelihood of a better outcome. Increasingly compelling research supporting release for many accused persons coupled with growing budgetary concerns within the criminal justice system present defense attorneys with the perfect opportunity to sway even the most cautious judges. By using the laws, procedures, and techniques presented in this manual, defense attorneys can succeed in helping the court identify the appropriate conditions of release to the maximum benefit of both the client and the community as a whole.

APPENDIX 1:
CCJJ Bail Subcommittee Recommendations Presented to the Full CCJJ

October 12, 2012

FY13-BL #1 Implement evidence-based decision making practices and standardized bail release decision-making guidelines.

Recommendation:
Judicial districts should implement evidence based decision making practices regarding pre-release decisions, including the development and implementation of a standardized bail release decision making process.

Discussion:
The use of evidence-based practices is essential in all areas of criminal justice to maximize efficiencies and reduce recidivism, including the pretrial release decision making process. Using evidence-based practices at pretrial release is intended to increase the success rate of pretrial detainees, reduce failure to appear rates, reduce recidivism, and reduce jail crowding. Nationally, 60% of local jail populations are pretrial detainees, a figure that has remained relatively stable over time.[1] According to the Pretrial Justice Institute, "the pretrial decision affects how limited jail space is allocated and how the risks of non-appearance and pretrial crime by released defendants are managed. The pretrial decision also affects defendants' abilities to assert their innocence, negotiate a disposition, and mitigate the severity of a sentence."[2] Use of empirically developed risk assessment instruments can improve decision making by classifying defendants based on their predicted level of pretrial failure. Those with very high risk scores or high-violence index crimes may be held in jail pretrial but must be afforded a due process hearing.

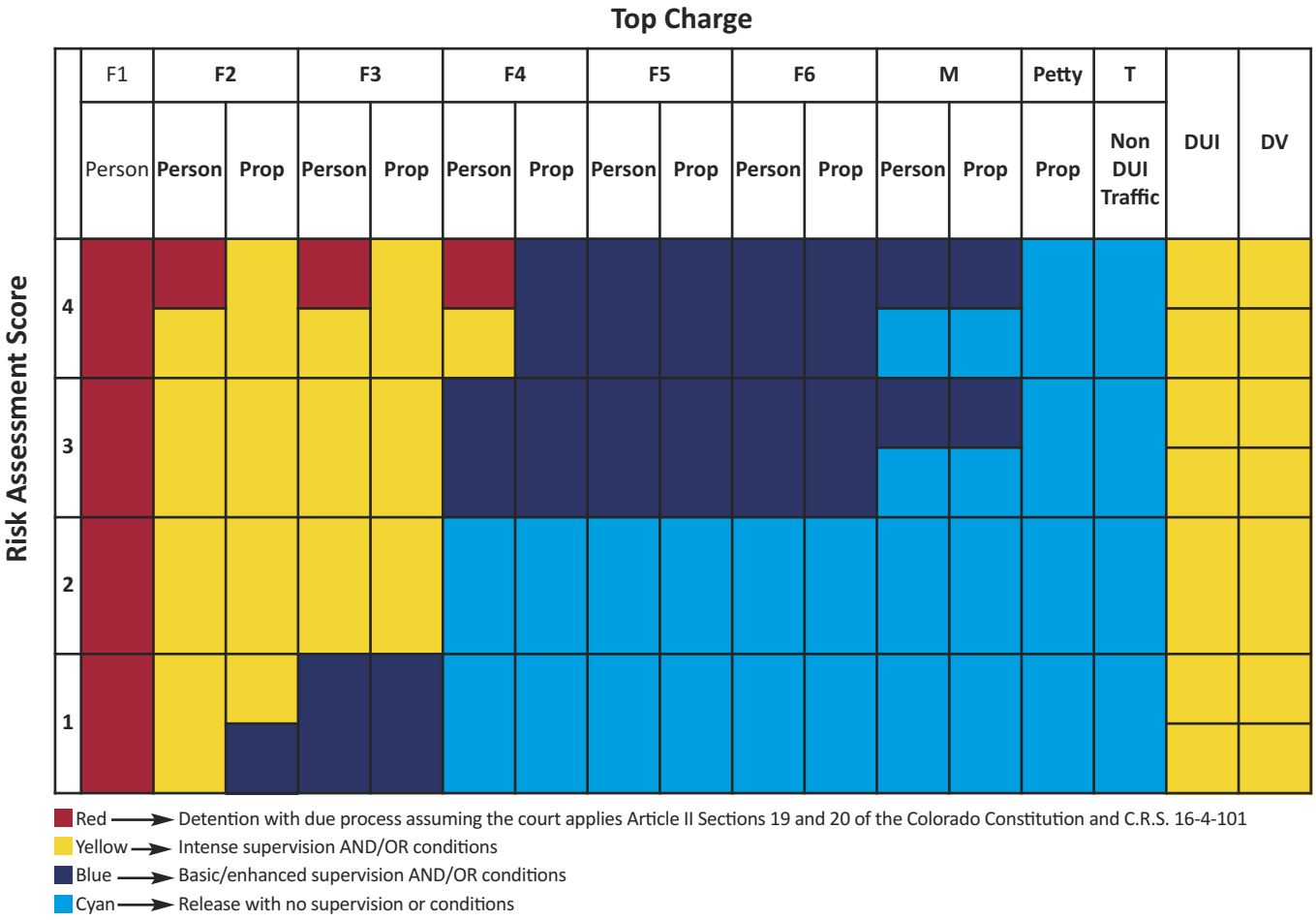
Research undertaken on pretrial defendants in ten Colorado judicial districts indicates that the vast majority of individuals appear in court and remains crime-free during the pretrial period.[3] This research resulted in the development of the Colorado Pretrial Assessment Tool (CPAT), a four-category risk instrument that identifies the relative risk of pretrial defendants. This instrument is currently being implemented in at least four Colorado judicial districts. Pretrial program staff in these districts have begun working with local stakeholders to identify recommended/suggested release decisions, alternatives to incarceration, and individualized conditions of release based on a defendant's characteristics such as charge and risk assessment score. An example of a risk-focused, structured decision making matrix is provided below. This matrix can serve as a starting point for stakeholders in local jurisdictions to modify according to local needs.

1. Minton, Todd D. (April 2012). Jail Inmates at Midyear 2011—Statistical Tables. Bureau of Justice Statistics, Washington, D.C. Available at http://bjs.ojp.usdoj.gov/content/pub/pdf/jim11st.pdf.

2. Mamalian, Cynthia. A. (March 2011). *State of the Science of Pretrial Risk Assessment.* Jointly published by the Pretrial Justice Institute and the Bureau of Justice Assistance. Washington D.C. Page 4. Citing Mahoney, Beaudin, Carver, Ryan, and Hoffman (March 2001). *Pretrial Services Programs: Responsibilities and Potential*. National Institute of Justice: Issues and Practices. Washington, D.C.

3. Pretrial Justice Institute & JFA Institute. (February 2012). *The Colorado Pretrial Assessment Tool (CPAT), A Joint Partnership among Ten Colorado Counties, the Pretrial Justice Institute, and the JFA Institute*. Pretrial Justice Institute, Washington, D.C. See also Pretrial Justice Institute. (August 2012). *Revised Risk Categories for the Colorado Pretrial Assessment Tool (CPAT)*. Pretrial Justice Institute, Washington, D.C.

Release Decision Guidelines Matrix



FY13-BL #2 Discourage the use of financial bond for pretrial detainees and reduce the use of bonding schedules.

Recommendation:

Limit the use of monetary bonds in the bail decision making process, with the presumption that all pretrial detainees are eligible for pretrial release unless due process hearing is held pursuant to Article 2 Section 19 of the Colorado Constitution and C.R.S. 16-4-101.

Discussion:

Bail is part of a larger process in which a defendant is taken into custody by law enforcement, is issued a summons or transported to the local detention facility, appears before a judicial officer, is given or denied a bail bond with or without specific conditions, and is detained in jail or released into the community until the disposition of the case.[4] The purpose of bail, according to the American Bar Association, is to provide due process to the accused; ensure the defendant's appearance at all court hearings; and protect victims, witnesses and the community from threats, danger and interference.[5] Financial bond is not necessary to meet the purposes of bail.

4. Mamalian, Cynthia A. (March 2011). State of the Science of Pretrial Risk Assessment. Joint publication by the Pretrial Justice Institute and the U.S. Bureau of Justice Assistance. Washington, D.C. Citing Jefferson County, Colorado, Criminal Justice Planning Unit. *Bail History and Reform: An Introduction* (2009).

5. *Jefferson County Bail Project and Impact Study*. Presented by the Jefferson County Criminal Justice Planning Staff to the CCJJ Bail Subcommittee, on May 4, 2012.

A prior recommendation from the Commission specified the development of a statewide monetary bond schedule (2008, BP-39).[6] However, upon further study, the research shows that monetary conditions do not ensure court appearance or improve public safety. The American Bar Association asserts the following:

> Regular use of bail schedules often unintentionally fosters the unnecessary detention of misdemeanants, indigents, and nondangerous defendants because they are unable to afford the sum mandated by the schedule. Such detentions are costly and inefficient, and subject defendants to a congeries of often devastating and avoidable consequences, including the loss of employment, residence, and community ties.[7]

Research conducted in Jefferson County, Colorado found that financial bonds as low as $50 precludes some individuals from pretrial release. This study found no negative effect on defendant outcomes when judges moved away from money bonds as compared to when judges more heavily relied on money.8 Jefferson County successfully eliminated the bond schedule in April 2011.

Other studies have found that financial conditions do not ensure public safety, ensure court appearance, or guarantee people will not reoffend while on pre-trial release, nor do they guarantee safety for victims.[9] These facts have been known for nearly 50 years, as noted by Robert F. Kennedy when, as attorney general, he addressed the American Bar Association in 1964. Kennedy stated, "Repeated recent studies demonstrate that there is little — if any — relationship between appearance at trial and the ability to post bail," citing research by the Vera Foundation in New York.[10] The Commission supports the opinion of the current United States Attorney General, who stated in the matter of individuals being detained pretrial as a result of bond they cannot afford that "(a)lmost all of these individuals could be released and supervised in their communities — and allowed to pursue and maintain employment and participate in educational opportunities and their normal family lives — without risk of endangering their fellow citizens or fleeing from justice."[11]

Further, bond schedules do not allow for consideration of actuarial risk factors or individualized conditions of release, both of which are considered evidence-based practices. Organizations that support reform include the Association of Prosecuting Attorneys, American Bar Association, the National Association of Criminal Defense Lawyers, the American Council of Chief Defenders, the U.S. Department of Justice, the National Legal Aid and Defender Association, and the National Sheriff's Association, among others.

6. Bail schedules provide judges with standardized money bail amounts based on the offense charged and typically regardless of the characteristics of an individual defendant (Carlson, 2011).

7. Carlson, Lindsay. (2011). Bail Schedules: A Violation of Judicial Discretion? American Bar Association. Available at http://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/cjsp11_bail.authcheckdam.pdf.

8. Brooker, C. M. B. (2012, May). *Analyses from the Jefferson County Bail Project: Summary Report on Outcome Data*. Presented to the CCJJ's Bail Subcommittee, Denver, CO.

9. See Carlson, 2011.

10. Address by Attorney General Robert F. Kennedy to the Criminal Law Section of the American Bar Association, Americana Hotel, New York City, August 10, 1964.

11. Eric Holder, Bureau of Justice Assistance, National Symposium on Pretrial Justice: Summary Report of Proceedings (Washington, DC, 2012), at 30.

FY13-BL #3 Expand and improve pretrial approaches and opportunities in Colorado.

Recommendation:
Expand and improve pretrial approaches and opportunities in Colorado.

Discussion:
Only 12 of 22 Colorado judicial districts have pretrial services. Even among established programs, there is a lack of consistency in services provided and a lack of information provided to crime victims, according to a brief survey undertaken by the Commission's Bail Subcommittee. Many jurisdictions continue to use a bond schedule that assigns a dollar amount based upon the criminal charge, without consideration for risk to the community or likelihood of court appearance. Pretrial service programs can investigate and verify the defendant's background, stability in the community, risk to reoffend or flee, and provide objective recommendations to the court for appropriate *individualized* release conditions that can address these concerns. These agencies also can offer supervision services to the court.

Pretrial services or, where these are not available, jail or appropriate staff should be trained to conduct actuarial risk assessments through a comprehensive interview with the defendant and, when appropriate, recommend to the court very specific release conditions that are individualized for each offender. At a minimum, the court should have access to a completed risk assessment for every defendant to inform pretrial decision making.

Many release conditions commonly assigned to defendants are unrelated to the offense, unrelated to the individual defendant, and lack clarity and specificity. Neither bail amounts nor the conditions of bond should be used to punish defendants.

FY13-BL #4 Standardized Jail Data Collection across all Colorado Jurisdictions

Recommendation:
Implement a standardized data collection instrument in all Colorado jurisdictions and jails that includes, but is not limited to, information on total jail population, index crime, crime class, type of bond, bond amount if any, length of stay, assessed risk level, and the proportion of pretrial, sentenced and hold populations.

Discussion:
Policies and procedures for jails vary widely across jurisdictions. Consequently, there is no standardized or mandated data collection effort, leaving it impossible to obtain accurate information on population trends and possible causes for those trends. Without this basic information, it is difficult to identify statewide, regional, or local problems and solutions, particularly as these relate to facility overcrowding.

This data should be collected biannually by jail officials and forwarded to the Colorado Division of Criminal Justice which will compile the information and place it on its website.

APPENDIX 2:
Background Information and Problems with the ODARA Tool

Christopher Richardson, Colorado State Public Defender, Denver County

Background Information

The Ontario Domestic Assault Risk Assessment (ODARA) was developed as an actuarial tool to predict recidivism in wife assault. The assessment contains thirteen yes or no questions resulting in a raw score ranging from 0-13. A defendant's raw score is used to place him in one of seven categories of risk. Each category has a statistical likelihood of recidivism. The test can be scored with up to five unknown answers. These unknown answers are prorated after a raw score is created. The proration always increases the risk category. These are the thirteen questions:

1. Prior domestic assault (against a partner or the children) in police records
2. Prior nondomestic assault (against any person other than a partner or the children) in police records
3. Prior sentence for a term of 30 days or more
4. Prior failure on conditional release including bail, parole, probation,no-contact order
5. Threat to harm or kill anyone during index incident
6. Confinement of victim during index incident
7. Victim fears (is concerned about) future assault
8. More than one child altogether
9. Victim has a biological child from a previous partner
10. Violence against others (to any person other than a partner or the children)
11. More than one indicator of substance abuse problem: alcohol at index, drugs at index, prior drugs or alcohol, increased drugs or alcohol, more angry or violent, prior offense, alcohol problem, drug problem
12. Assault on the victim when she was pregnant
13. Victim faces at least one barrier to support: children, no phone, no access to transportation, geographical isolation, alcohol/drug consumption or problem

The original data sample by which the ODARA was "validated" consisted of the criminal records of 589 men. All offenders had been admitted to Oak Ridge, a maximum security psychiatric facility in Ontario, Canada. Each file contained at least one alleged domestic violence incident occurring prior to December 31, 1996. Neither an arrest nor a conviction was necessary for inclusion. To qualify as assault there had to have been evidence of physical contact with the victim or a credible threat of death with a weapon in hand in the presence of the victim. This assault was termed the "Index Offense." The index offense was committed against a wife by marriage or common law.

Once the index offense was determined, researchers analyzed the next five years of criminal history contained within each file looking for a subsequent domestic violence assault. Recidivism was assessed as any subsequent violence against an (ex) wife or, (ex) partner regardless of police action. Thus, false reports, minor instances not warranting arrest, and self-defense/mutual combat would all be considered an assault, if the researchers were satisfied that some force likely occurred.

The researchers coded each file containing a subsequent assault for the presence of a yes answer to each of the thirteen questions. The presence of a yes answer to each question correlates to a statistical likelihood of recidivism, I.e., confinement on index offense is found in x number of cases of recidivism. The researchers then totaled all the correlations between questions, scaled them based on likelihood of presence in a recidivist's file, and created percentage based risk categories.

Bullet Point Problems with the Development of the ODARA

- Was designed to assist Canadian police officers determine whether or not an arrest should be made. An arrest is automatic in domestic violence cases in Colorado.

- Postdictive analysis (ODARA) always starts with a conclusion and works backwards. Thus, by casting a wide enough net, it is always possible to prove the conclusion. Many of the questions in the ODARA test are so broad that it is almost impossible not to find them. For example, ANY history of alcohol or drug abuse by the victim adds a point to the defendant's risk assessment. Researchers have critiqued this type of assessment

- The time span of the initial ODARA validation was five years, meaning that the second act of domestic abuse could have occurred several years after the first. This predictive model is inappropriate for determining ***pretrial*** risk.

- Assuming the test is based on sound science, the ODARA was ***only*** 77% accurate at predicting the 30% of men out of 589 that recidivated during the five years covered by the study.

- In one study that spanned an average of five years, the ODARA was only 67% accurate at predicting recidivism amongst 391 inmates that were incarcerated for domestic abuse.

- Other studies span between 8-10 years with approximately the same accuracy.

- The author of the peer review article most cited by the creators of ODARA states that he cannot recommend one particular risk assessment over another due to the small number of prospective large scale validation studies available. The author states that the ODARA had only an adequate predictive validity.

- The ODARA was validated by testing it against other risk assessment tools that lack proper large scale validation studies. One benchmark assessment, the VRAG, was created by the same authors as the ODARA. The VRAG is laughable in both underlying science and reliability. It is barely more accurate than a coin toss.

- A Meta study of risk assessment tools including the ODARA, found substantial and statistically significant authorship bias. This bias was also found in the VRAG and the SARA tool designers reported predictive validity findings around two times higher than those of investigations reported by independent authors

    - The Meta study also examined disclosure rates. None of the 25 studies where tool designers or translators were also study authors published a conflict of interest statement to that effect, despite a number of journals requiring that potential conflicts be disclosed. This includes the VRAG and SORAG, two risk assessment created by the authors of ODARA.

Problems with Using ODARA for Bond Determinations.

- ODARA uses subjective data to create an objective determination of future risk. The predictive validity of victims' prediction of risk is not standardized, thus there is no criterion for correct administration. However, consistency in measurement is the most important characteristic of actuarial assessments like ODARA.
- There is no way to determine at the setting of bail whether a defendant will recidivate. The court is setting bail purely based on statistically speculative future dangerousness.

- Contrary to the CPAT, the ODARA does not test for risk ***pretrial*** — the purpose of bond. It tests for long term recidivism.

★ Contrary to the CPAT, all unknown information works to the detriment of our clients. Without an affirmative answer of no to a question, the answer is treated as unknown. A client with a raw score of four but with five unknown answers would be adjusted to a score of 7-13, the highest category of risk.

☆ This explains why we can see a CPAT category 1 and an ODARA of 7-13.

★ Certain yes answers to one question automatically requires a yes to a further question. See Questions 1 and 10 and Client A in hypo below. This artificially inflates the raw score of a defendant.

Hypothetical Using ODARA Scoring Manual.

Client A:

Client is a twenty eight year old male with no job and an extensive criminal record. The current offense involves multiple serious injuries.

1. Has a prior domestic violence offense against the same victim.
2. Has a prior 2nd degree assault against his mother.
3. Client served 30 months in DOC for assault on mother.
4. No
5. No
6. No
7. No
8. No
9. No
10. Yes. See Answer 2.
11. No
12. Unknown
13. No

RAW SCORE=4; Prorated score =4 (40% of such offenders with assault again within 5 years)

Client B:

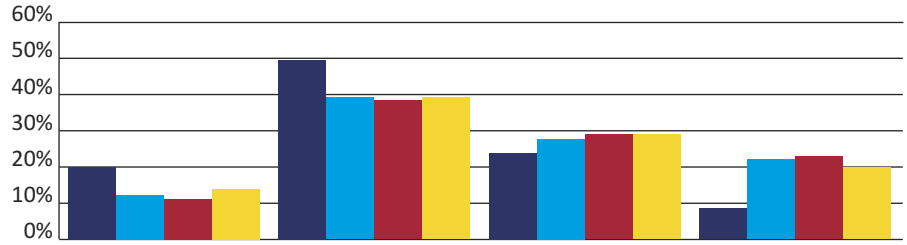
Client is a 61 year old male with a job, one previous misdemeanor conviction. The current allegation involves no visible injuries.

1. No
2. No
3. Unknown. Unclear from DUI.
4. Yes. Missed one probation meeting from a DUI.
5. Unknown if he made threats. Victim cannot remember.
6. Yes. Client grabbed victim by the arm after the alleged assault. No injuries and did not actually try to prevent escape.
7. No
8. Yes. Client has two adult children that do not live with him.
9. no
10. Unknown. Client was a combat veteran.
11. DUI 20 years prior.
12. No.
13. Yes. Victim had an alcohol problem in the past.

RAW SCORE= 5; Prorated score = 7-13 (70% of such offenders will assault again within 5 years.)

APPENDIX 3:
Denver CPAT Numbers

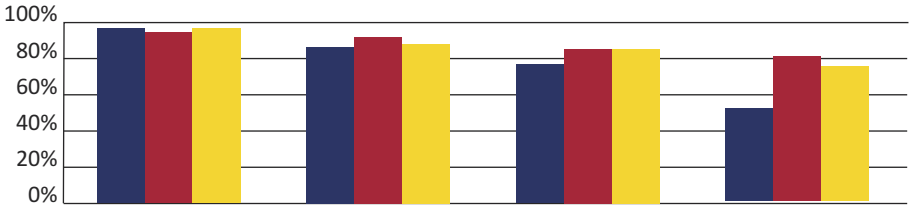
CPAT Assessment Information



	CPAT 1	CPAT 2	CPAT 3	CPAT 4
CPAT Projected	20%	49%	23%	8%
Denver 2012 (1817)	12%	39%	27%	22%
Denver 2013 (8035)	11%	38%	28%	23%
Denver 2014 (8170)	13%	39%	28%	20%

Denver County Preliminary Statistics as of 06/03/2015

Court Appearance Rates by CPAT Category

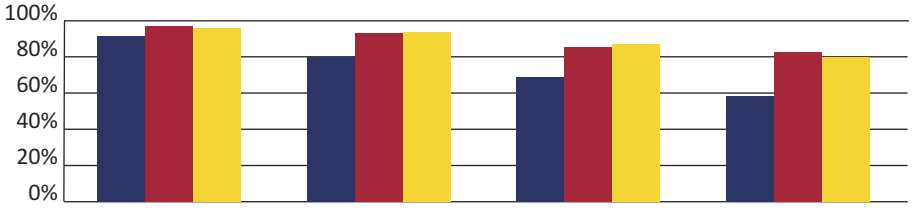


	CPAT 1	CPAT 2	CPAT 3	CPAT 4
CPAT Projected	95%	85%	77%	51%
2013 Actual	93%	89%	84%	80%
2014 Actual	95%	86%	84%	77%

*Court appearance rate refers to the number of closed cases in which the defendant was released from custody, was supervised by pretrial, and appeared for scheduled court appearances.

Denver County Preliminary Statistics as of 06/03/2015

Public Safety Rates by CPAT Category



	CPAT 1	CPAT 2	CPAT 3	CPAT 4
CPAT Projected	91%	80%	69%	58%
2013 Actual	97%	92%	85%	82%
2014 Actual	96%	93%	86%	80%

*Public Safety rate is defined as the number of closed cases in which the defendant was released from custody, was supervised by pretrial, and was not charged with a new criminal offense during the pretrial supervision period.

Denver County Preliminary Statistics as of 06/03/2015

Charts provided by Denver County and reformatted for this manual.

APPENDIX 4:
Mesa County Bond Policy and Guidelines Mesa CPAT Numbers and Jail Analysis

New Data-Driven Matrix — Implemented January 1, 2015

21st Judicial District Bond Policy and Guidelines — Administrative Order 15-01

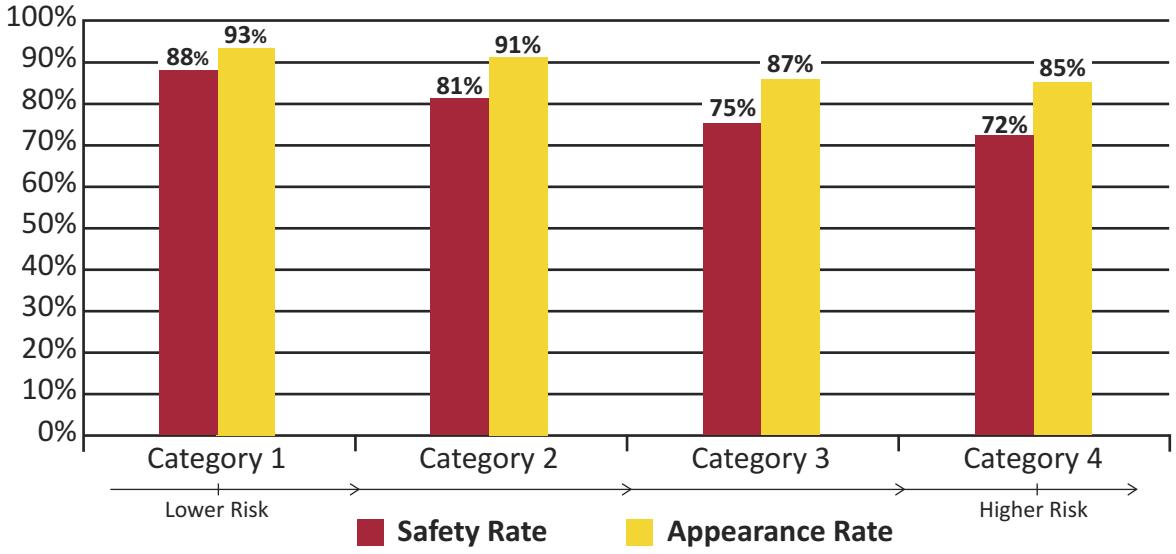
CPAT Risk Category	1 Felony VRA Crimes (C.R.S. 24-4.1-302)	2 Drug Distribution	3 Aggravated DUI & DARP	4 Domestic Violence DVSI 11 or Greater	5 Domestic Violence DVSI 10 or Less	6 Other Felony Crimes & Misdemeanor VRA (C.R.S. 24-4.1-302)	7 Other Misdemeanor & Traffic Offenses
Category 1	PR or Cash Only with PTS	PR with PTS	PR with PTS	PR with PTS	PR No Supervision	*PR No Supervision	*PR No Supervision
Category 2	PR or Cash Only with PTS	PR or Cash Only with PTS	PR or Cash Only with PTS	Cash Only with PTS	PR No Supervision	*PR No Supervision	*PR No Supervision
Category 3	Cash Only with PTS	Cash Only with PTS	Cash Only with PTS	Cash Only with PTS	PR or Cash Only with PTS	PR or Cash Only with PTS	*PR No Supervision
Category 4	Cash Only with PTS	Cash Only with PTS	Cash Only with PTS	Cash Only with PTS	Cash Only with PTS	Cash Only with PTS	PR or Cash Only with PTS

These bond guidelines are presumptions. Deviation from the presumptions may be appropriate based on case specific circumstances.

No More Money Ranges!

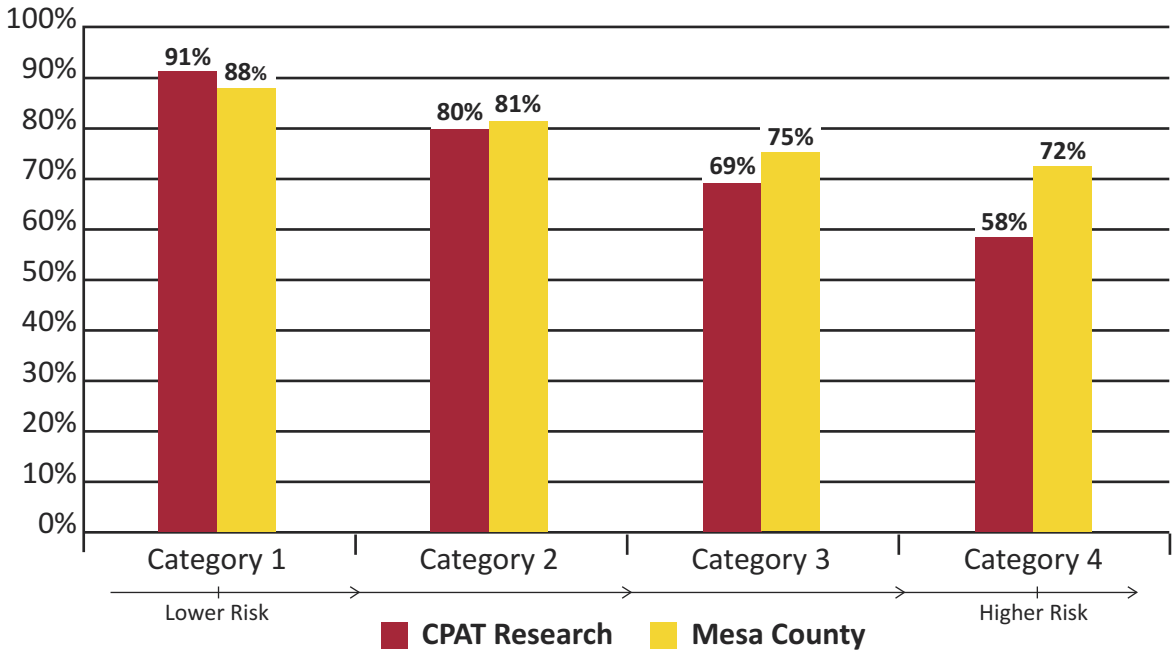
Convincing Local Outcomes of Colorado's Risk Instrument

- Local data demonstrates that the instrument is predicting accurately.
- Alleviates skepticism about local validity of the instrument.



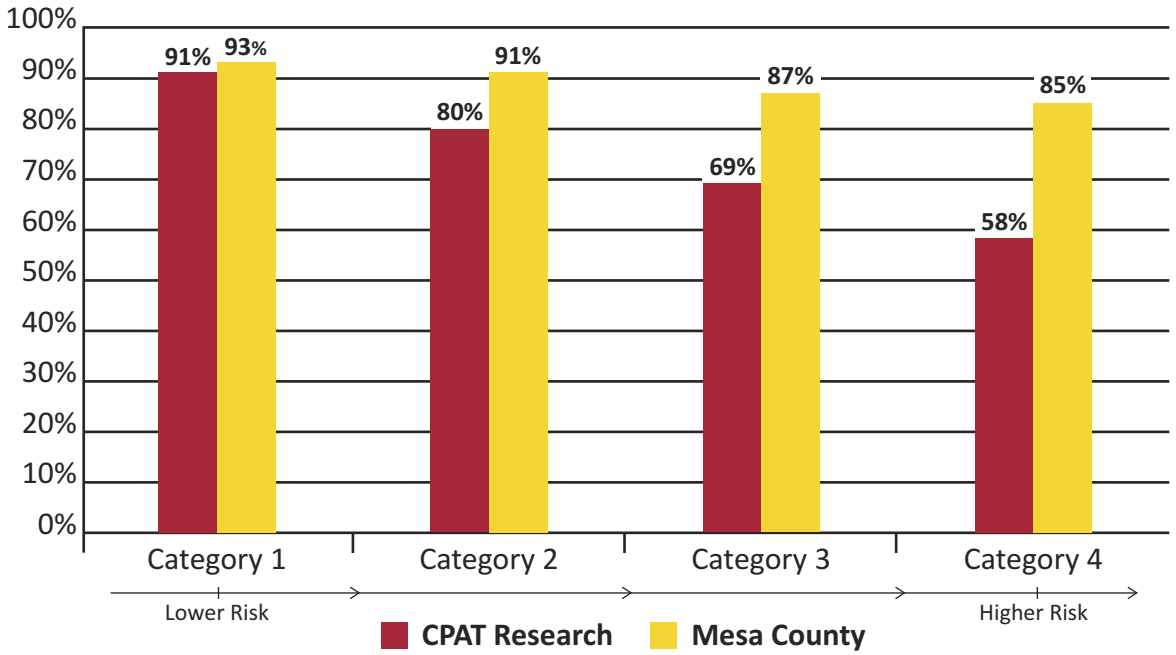
Charts provided by Mesa County and reformatted for this manual.

Colorado Outcomes Vs. Mesa (2014) Public Safety Rates



Note: The CPAT study included some minor traffic, cases whereas the Colorado Statute only requires misdemeanor traffic cases to be recorded. This may be reflected in some of the number differences in the above chart.

Colorado Outcomes Vs. Mesa Court Appearance Rates

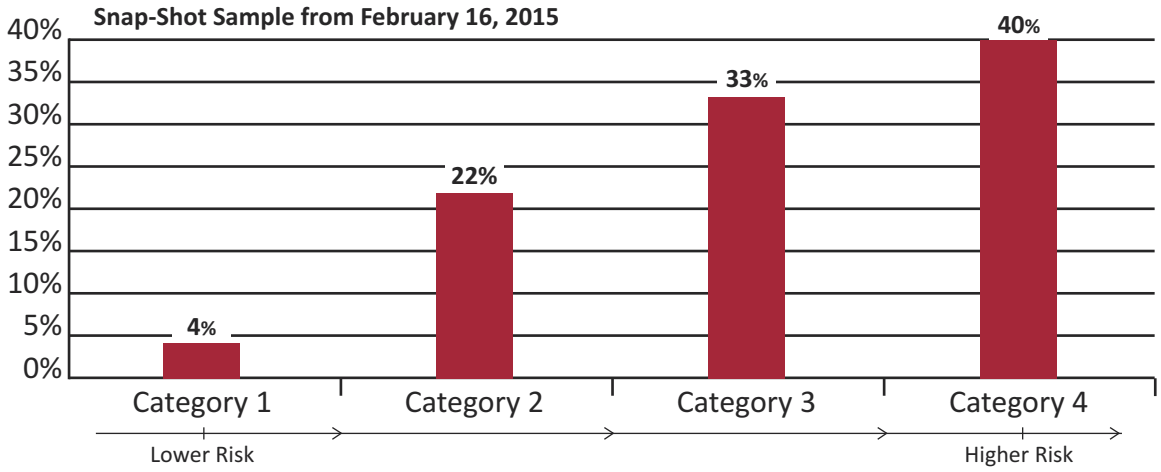


Note: The CPAT study included some minor traffic, cases whereas the Colorado Statute only requires misdemeanor traffic cases to be recorded. This may be reflected in some of the number differences in the above chart.

The Colorado Data also included a significant percentage of unsupervised individuals. The Mesa data includes supervised individuals only. So the ability to directly compare is limited.

Charts provided by Mesa County and reformatted for this manual.

Mesa County Jail Pretrial Population By Empirical Risk Level



N=248, n-221 **12% unknown due to inability to interview, refusals to interview, etc..**

Appearance Rates Mesa County and Colorado Secured Verses Unsecured Bonds

Risk Category	Appearance Rates MESA (YTD November 2014)		Appearance Rates Colorado (CPAT Research 2012)	
	Unsecured	Secured	Unsecured	Secured
Category 1	94%	95%	97%	93%
Category 2	90%	94%	87%	85%
Category 3	85%	90%	80%	78%
Category 4	86%	85%	43%	53%
Average	88%	89%	88%	81%

Statistics for unsupervised cases are currently unavailable in Mesa. Colorado's study group included both supervised and unsupervised cases. Colorado study (Michael R. Jones, PJI)

Public Safety Rates Mesa County and Colorado Secured Verses Unsecured Bonds

Risk Category	Public Safety Rates MESA (YTD November 2014)		Public Safety Rates Colorado (CPAT Research 2012)	
	Unsecured	Secured	Unsecured	Secured
Category 1	89%	84%	93%	90%
Category 2	82%	81%	84%	79%
Category 3	77%	72%	69%	70%
Category 4	73%	72%	64%	58%
Average	80%	74%	85%	76%

Statistics for unsupervised cases are currently unavailable in Mesa. Colorado's study group included both supervised and unsupervised cases. Colorado study (Michael R. Jones, PJI)

Charts provided by Mesa County and reformatted for this manual.

APPENDIX 5:
Client Interview Form For Bail

Name: _____ **Case:** _____

Considerations for Release Argument

Offense(s) charged: _____

VRA: ❑ Yes ❑ No ***Mandatory Protection Order:*** ❑ Yes ❑ No

Holds: ❑ None ❑ Parole ❑ Probation: Felony ❑ Probation: Misd. ❑ ICE

Currently on bond for pending matter(s)? ❑ Yes ❑ No

CPAT Score: _____ ***PR eligible per pretrial bond report?*** ❑ Yes ❑ No

CRITERIA:

A. Employment status, history of accused: _____

_____

_____

_____

B. Nature and Extent of family relationships:

_____

_____

_____

C. Past and Present Relationships: _____

_____

_____

D. Past and Present Residences: _____

_____

_____

E. Current and former mental health treatment (diagnosis; treatment; medications; dosage): _____

_____

_____

_____

F. Current and former drug/alcohol treatment: _____

_____

_____

_____

G. Who will agree to assist accused to appear? Information re: that person: _____

_____

_____

H. Who to contact to vouch for/testify for client: _____

_____

_____

_____

I. Prior Criminal History and FTAs: _____

_____

_____

_____

(Continued on next page)

J. Possible/probable sentence if convicted (i.e. will the person likely be granted probation or other community sentence if convicted of the offense?) Include here if any plea offers have been made.

_____
_____
_____
_____
_____

K. Facts indicating possibility of law violation if person in custody is released without certain conditions:

_____
_____
_____

L. Facts/lack of facts indicating the possibility of witness intimidation: _____

_____
_____
_____
_____

M. Ties to community/community involvement: _____

_____
_____
_____
_____
_____
_____

N. Military service history: _____

_____
_____
_____
_____

O. Any other factors indicating ties to the community, why won't flee, and absence of community danger concerns: _____

_____
_____
_____
_____
_____

a. Years in Colorado? Denver? _____

b. Education: _____

c. Pretrial Conditions to ensure appearance: _____

_____
_____
_____
_____

Attorney Signature: _____ ***Date:*** _____

APPENDIX 6:
ABA Ten Principles of a Public Defense Delivery System

Adopted in 2002, the ABA Ten Principles serve as a "practical guide for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems."[1] Cited frequently by courts and legal journals, these principles "constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney."[2]

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.
2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.
4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.
5. Defense counsel's workload is controlled to permit the rendering of quality representation.
6. Defense counsel's ability, training, and experience match the complexity of the case.
7. The same attorney continuously represents the client until completion of the case.
8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.
9. Defense counsel is provided with and required to attend continuing legal education.
10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

1. ABA Ten Principles of a Public Defense Delivery System (Feb. 2002), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf (last visited July 30, 2015).
2. *Id.*

APPENDIX 7:
Bond Argument Cheat Sheet

Bail: is now defined as a "security which ***may*** include a bond with or without monetary conditions." (C.R.S. § 16-1-104)

Presumes Release: 1) state policy favors summons except in class 1,2,3 felonies. C.R.S. 16-5-207(2), CRCP 4(a)(3). 2) "Avoid unnecessary pretrial incarceration. C.R.S. 16-4-103(4)(c) 3) *shall presume* eligible with "least restrictive conditions." C.R.S. 16-4-103. 4) The spirit of the procedure (bail) is to enable them to stay out of jail until a trial has found them guilty. *Stack v. Boyle*, 342 U.S. 1, 4 91951).

Bond Criteria: (C.R.S. § 16-4-103):

- ★ Court *shall* take into consideration "individual characteristics" of each person, including person's "financial condition" (3)(a)
- ★ *shall presume* eligible with "least restrictive conditions"
  - ☆ ABA says: secured monetary conditions like cash/surety *more* restrictive than PR bonds
- ★ monetary conditions of release *must* be "reasonable" (4)(a) (Argue reasonable in light of their financial conditions)
- ★ other conditions *must* be tailored to address a "specific concern." (4)(a)
- ★ *shall not* "solely" consider the "level of offense." (4)(b)
- ★ Court may also consider the following criteria: Employment Status current and past/Family Relationships/Residences (past/present)/Character and Reputation/ID of people who help you get to Court/Community Ties/Likely Sentence/Prior Crim Hx and FTAs/Facts indicating witness harassment/new law violations (5)

Pre-Trial Services Conditions *may* include:

Telephone Contact/Office Visits/Home Visits by PTS/MH or Subs Tx (including residential if Δ agrees) UAs and BAs/ DV Tx (if Δ agrees)/Pre-Trial Work Release [C.R.S. §16-4-105(8)]

Mandatory Conditions of Bond: C.R.S. § 16-4-105(1)-(6):

Consent of Surety (felonies only), No new felony charges, DV must acknowledge protection order, DUR-Alc cannot drive, DUI-2nd No alcohol/illegal drugs, DV Tx (if Δ agrees)[C.R.S. § 16-4-105(1)-(6)]

If PR Bond Denied or Unable to Post Bond:

Request Pre-Trial Work Release. C.R.S. 16-4-105(8)(h)
File Motion for Relief from Oppressive and Unreasonable Bond and Demand for Hearing. C.R.S. 16-4-107

PR Bond allowed over DA objection with additional NON-$ conditions [C.R.S. § 16-4-104(1)(b)]

Bond may be denied:

POWPO/filed under C.R.S. 18-12-108(2)(b);(2)(c);(4)(b);(4)(c);(5)/Awaiting sentencing/appeal on POWPO/COV weapons/Certain Violent or Sex Crimes following a proof evident hearing [C.R.S. § 16-4-101(1)(b)(IV) and (V)].

Argue POWPO/COV Weapons/Sex Crimes denial of bond unconstitutional under 8th, 14th, and Art II § 20 Colorado Const.

(CCJJ) Bail Subcommittee Findings[1] and Legislative Record:

- ★ "Limit the use of monetary bonds, and assume "all pretrial detainees are eligible for pretrial release" (CCJJ)
- ★ The incarceration of defendants who pose a low risk to miss court or reoffend on bond is costly and inefficient. (CCJJ and ABA agrees).
- ★ Unnecessary detention through financial bond conditions discriminates against the indigent in favor of the wealthy and results in less favorable outcomes regardless of charge or criminal history. See https://cdpsdocs.state.co.us/ccjj/Resources/Ref/2013-07-03_BondSetting-ColoradoCCJJ.pdf.
- ★ "Research shows that monetary conditions do not ensure court appearance or improve public safety." (CCJJ and ABA agrees).
- ★ "The previous bail-setting regime has resulted in sixty percent of Colorado's jail population being composed of defendants who were in pretrial custody." (Legislative record).

1. In enacting this new bail statute, the Colorado Legislature relied heavily upon the recommendations of the Colorado Commission of Criminal and Juvenile Justice (CCJJ) Bail Subcommittee. *See* CCJJ, *Legislation*, Colorado State Web Portal, (2013), *available at* http://www.colorado.gov/cs/Satellite/CDPS-CCJJ/CBON/1251624796713

APPENDIX 8:
Bond Argument for Misdemeanors in Denver County Court

Current Bond: _____ **Requested Bond:** _____ **Judge's Ruling:** _____

VRA:_____ **Prior FTA's (Historic):** _____ **Prior FTA's (This Case):** _____

SHALL Consider Individual Characteristics of Defendant	**16-4-103 (3)(a)**		**Bond Schedule — SHALL Consider Individual Circumstances, *Not Solely Level of the Offense***	**16-4-103 (4)(b)**	
SHALL Consider Financial Situation of Defendant	**16-4-103 (3)(a)**		**If Practicable and Available, SHALL Use an Empirical Risk Assessment Tool**	**16-4-103 (3)(b)**	
SHALL Presume All Defendants Eligible for Release	**16-4-103 (4)(a)**		**Bail No Longer Means "Money." A Security is ANY Condition, Not Just A Monetary One**	**16-4-103 (3)**	
SHALL Impose Least Restrictive Conditions of Release	**16-4-103 (4)(a)**		**SHALL Impose Bond Sufficient to REASONABLY Ensure Presence and Public Safety**	**16-4-103 (3)(a)**	
SHALL Consider all Methods of Bond and Conditions of Release to Avoid Pretrial Detention	**16-4-103 (4)(c)**		**Court CANNOT Forfeit Money Bond for Public Safety Violation**	**16-4-105 (1)**	

CPAT Score: CITE C.R.S. 16-4-103(3)(b) "[I]f practicable and available in the jurisdiction, the court SHALL use an empirically developed risk assessment instrument."
i.e., Colorado Pretrial Assessment Tool/CPAT

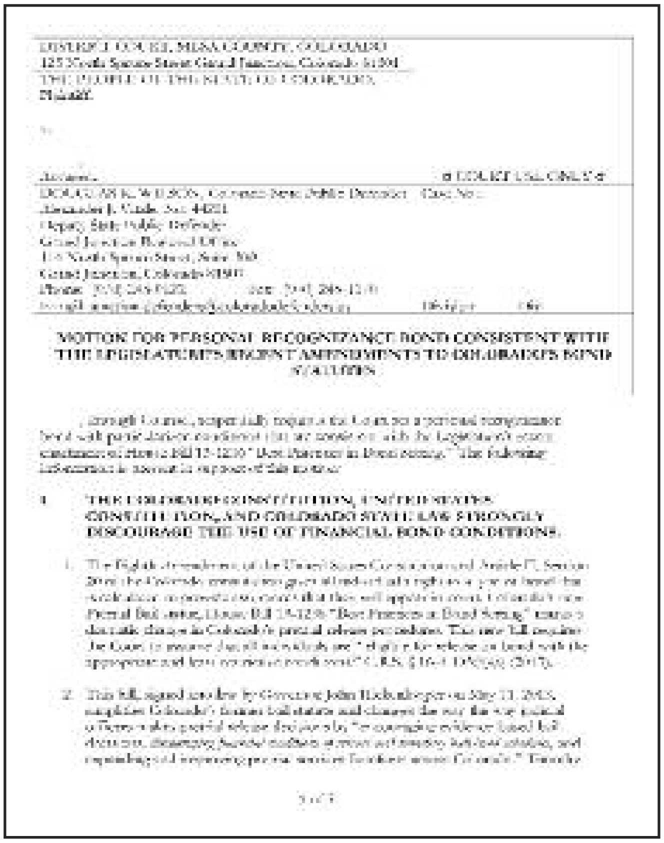
****CPAT Scores ALL OR NOTHING (e.g., 0 pts if no past jail, 4 pts if any past jail)****

Having a Home or Cell Phone	**0-5 pts**	
Owning or Renting One's Residence	**0-4 pts**	
Contributing to Residential Payments	**0-9 pts**	
Past or Current Problems with Alcohol	**0-4 pts**	
Past or Current Mental Health Treatment	**0-4 pts**	
Age of First Arrest	**0-15 pts**	
Past Jail Sentence	**0-4 pts**	
Past Prison Sentence	**0-10 pts**	
Having Active Warrants	**0-5 pts**	
Having Other Pending Cases	**0-13 pts**	
Currently on Supervision	**0-5 pts**	
History of Revoked Bond or Supervision	**0-4 pts**	
TOTAL C.P.A.T. SCORE	**0-82 pts**	

Risk Category	Risk Score	Public Safety Rate	Court Appearance Rate	Overall Success Rate	Percent of Defendants
1	0-17	91%	95%	87%	20%
2	18-37	80%	85%	71%	49%
3	38-50	69%	77%	58%	23%
4	51-82	58%	51%	33%	8%
Average	30	78%	82%	68%	

****NOTE: Pretrial Services GENERALLY Recommends PR for Category 1 and 2 Defendants****

APPENDIX 9:
Motion for Personal Recognizance Bond



DISTRICT COURT, MESA COUNTY, COLORADO

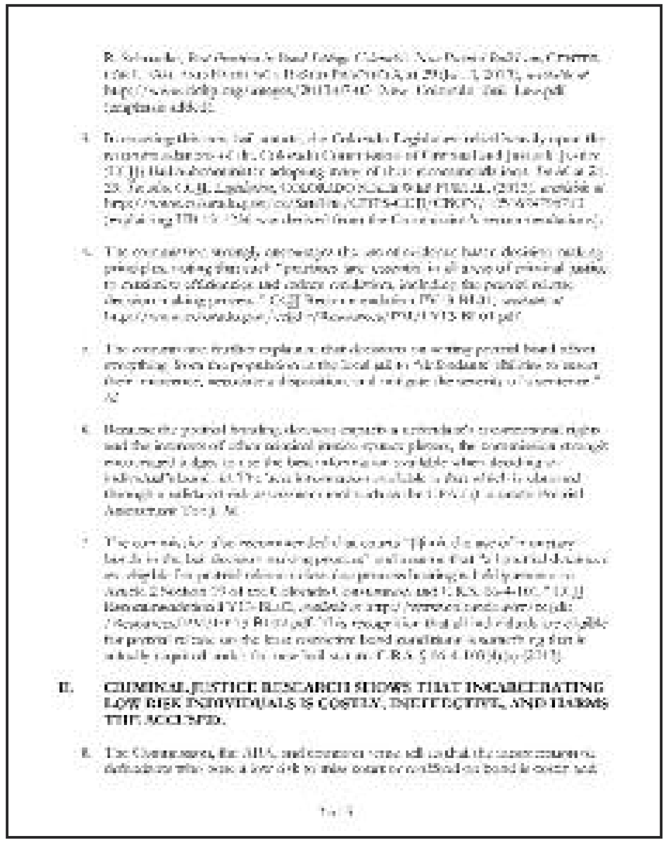
THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

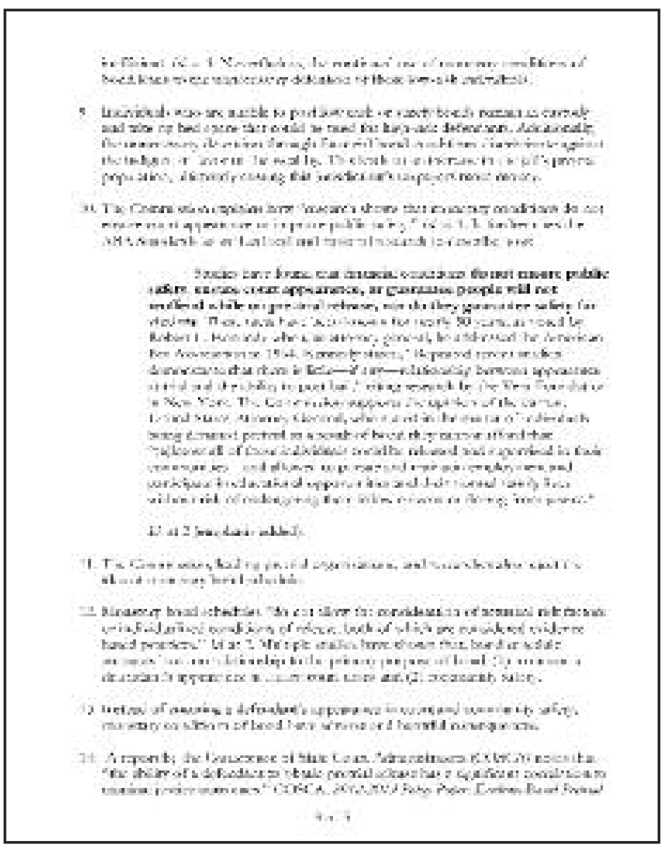
COURT USE ONLY

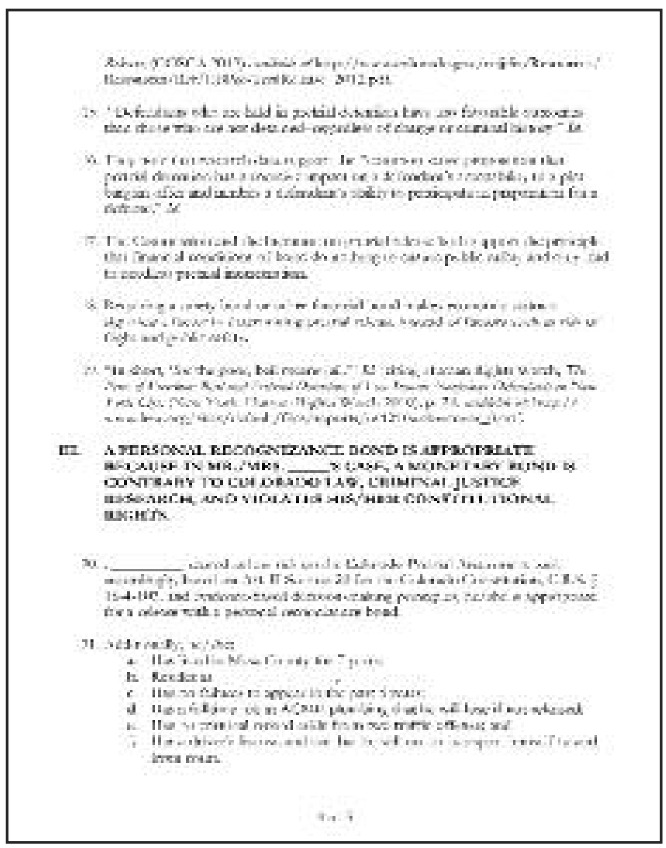
MOTION FOR PERSONAL RECOGNIZANCE BOND CONSISTENT WITH THE LEGISLATURE'S RECENT AMENDMENTS TO COLORADO'S BOND STATUTES

I. THE COLORADO CONSTITUTION, UNITED STATES CONSTITUTION, AND COLORADO STATE LAW STRONGLY DISCOURAGE THE USE OF FINANCIAL BOND CONDITIONS.



II. CRIMINAL JUSTICE RESEARCH SHOWS THAT INCARCERATING LOW RISK INDIVIDUALS IS COSTLY, INEFFECTIVE, AND HARMS THE ACCUSED.





III. A PERSONAL RECOGNIZANCE BOND IS APPROPRIATE BECAUSE IN MR./MRS. _____'S CASE, A MONETARY BOND IS CONTRARY TO COLORADO LAW, CRIMINAL JUSTICE RESEARCH, AND VIOLATES HIS/HER CONSTITUTIONAL RIGHTS.

For electronic copies of these motions, please contact the Office of the Colorado State Public Defender.

APPENDIX 9:
Motion for Personal Recognizance Bond (Continued)

WHEREFORE, , requests that the Court set a non-cash recognizance bond

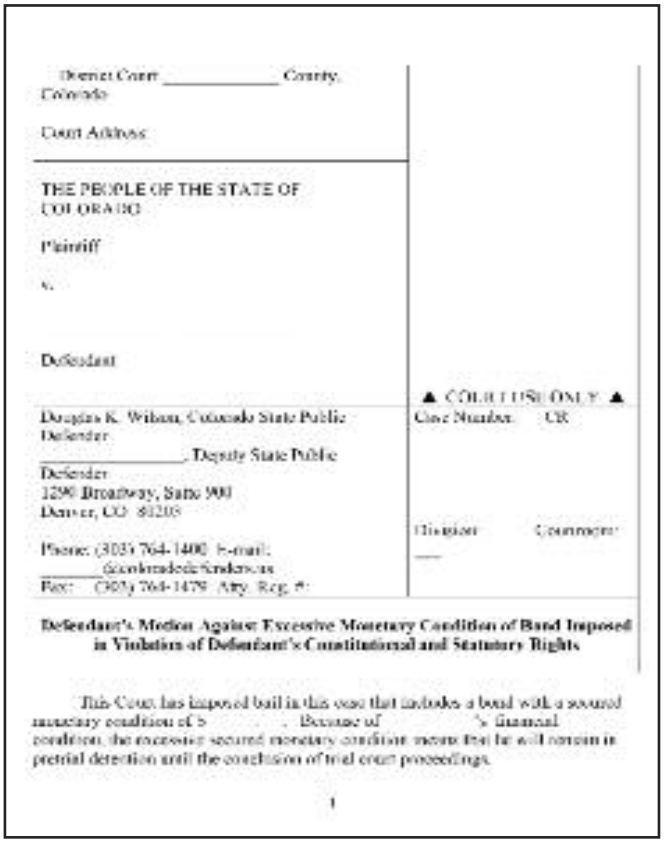
Respectfully Submitted,

Deputy State Public Defender

Dated: June 21, 20

For electronic copies of these motions, please contact the Office of the Colorado State Public Defender.

APPENDIX 10:
Motion Against Excessive Monetary Condition of Bond Imposed in Violation of Defendant's Constitutional and Statutory Rights



District Court _____ County, Colorado

Court Address:

THE PEOPLE OF THE STATE OF COLORADO

Plaintiff

v.

Defendant

▲ COURT USE ONLY ▲

Douglas K. Wilson, Colorado State Public Defender
_____, Deputy State Public Defender
1290 Broadway, Suite 900
Denver, CO 80203
Phone: (303) 764-1400 E-mail: _____@coloradodefenders.us
Fax: (303) 764-1479 Atty. Reg. #:

Case Number: CR

Division: Courtroom:

Defendant's Motion Against Excessive Monetary Condition of Bond Imposed in Violation of Defendant's Constitutional and Statutory Rights

This Court has imposed bail in this case that includes a bond with a secured monetary condition of $_____. Because of _____'s financial condition, the excessive secured monetary condition means that he will remain in pretrial detention until the conclusion of trial court proceedings.

1

The unreasonable monetary condition of bond results in a "preventative detention" of _____ that is not authorized by the state or federal constitutions and Colorado's statutes regarding release on bail. It deprives Mr. Defendant of the presumption of innocence and his rights to a fair trial. It is illegal.

I. A monetary condition of bail set at a figure higher than necessary to ensure a defendant's appearance in court is unconstitutional.

A. The United States Constitution.

1. The Eight Amendment of the United States Constitution provides, in relevant part, "Excessive bail shall not be required."

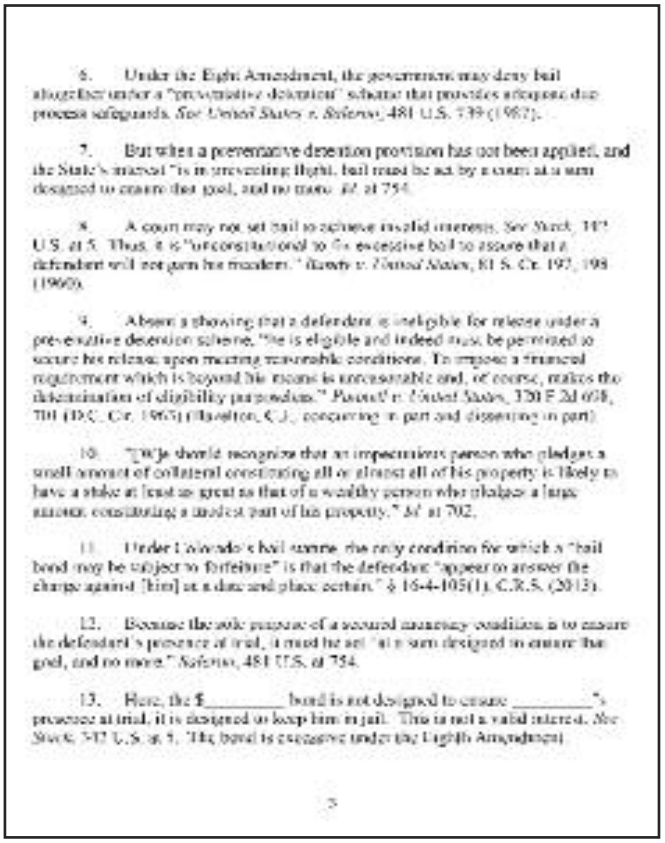
2. "The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. Like the ancient practice of securing oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. *Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment.*" *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951) (citations omitted, emphasis added).

3. "The practice of release on bail . . . 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." *Id.* at 7-8 (Jackson, J., concurring).

4. The "fixing of bail for an individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." *Id.* at 5. The "traditional standards" to be applied are "the nature and circumstances of the offense charged, the weight of the evidence against him, the *financial ability of the defendant to give bail* and the character of the defendant." *Id.* at 5 n.3 (emphasis added).

5. The mere fact that a defendant has been charged with a serious crime cannot justify bail in "an unusually high amount." *Id.* at 4.

2



6. Under the Eight Amendment, the government may deny bail altogether under a "preventative detention" scheme that provides adequate due process safeguards. *See United States v. Salerno*, 481 U.S. 739 (1987).

7. But when a preventative detention provision has not been applied, and the State's interest "is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. *Id.* at 754.

8. A court may not set bail to achieve invalid interests. *See Stack*, 342 U.S. at 5. Thus, it is "unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom." *Illinois v. United States*, 81 S. Ct. 197, 198 (1960).

9. Absent a showing that a defendant is ineligible for release under a preventative detention scheme, "he is eligible and indeed must be permitted to secure his release upon meeting reasonable conditions. To impose a financial requirement which is beyond his means is unreasonable and, of course, makes the determination of eligibility purposeless." *Pannell v. United States*, 320 F.2d 698, 701 (D.C. Cir. 1963) (Hamilton, C.J., concurring in part and dissenting in part).

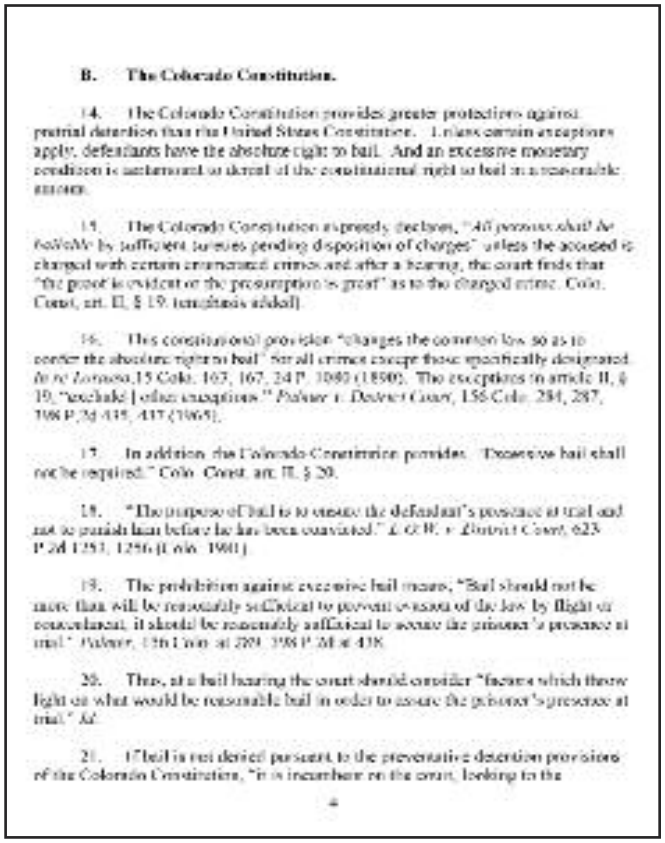
10. "[W]e should recognize that an impecunious person who pledges a small amount of collateral constituting all or almost all of his property is likely to have a stake at least as great as that of a wealthy person who pledges a large amount constituting a modest part of his property." *Id.* at 702.

11. Under Colorado's bail statute, the only condition for which a "bail bond may be subject to forfeiture" is that the defendant "appear to answer the charge against [him] at a date and place certain." § 16-4-105(1), C.R.S. (2013).

12. Because the sole purpose of a secured monetary condition is to ensure the defendant's presence at trial, it must be set "at a sum designed to ensure that goal, and no more." *Salerno*, 481 U.S. at 754.

13. Here, the $_____ bond is not designed to ensure _____'s presence at trial, it is designed to keep him in jail. This is not a valid interest. *See Stack*, 342 U.S. at 5. The bond is excessive under the Eighth Amendment.

3



B. The Colorado Constitution.

14. The Colorado Constitution provides greater protections against pretrial detention than the United States Constitution. Unless certain exceptions apply, defendants have the absolute right to bail. And an excessive monetary condition is tantamount to denial of the constitutional right to bail in a reasonable amount.

15. The Colorado Constitution expressly declares, "*All persons shall be bailable* by sufficient sureties pending disposition of charges" unless the accused is charged with certain enumerated crimes and after a hearing, the court finds that "the proof is evident or the presumption is great" as to the charged crime. Colo. Const. art. II, § 19. (emphasis added).

16. This constitutional provision "changes the common law so as to confer the absolute right to bail for all crimes except those specifically designated *by the Legislature*." 15 Colo. 167, 167, 24 P. 1060 (1890). The exceptions to article II, § 19, "exclude [other exceptions." *Palmer v. District Court*, 156 Colo. 284, 287, 398 P.2d 435, 437 (1965).

17. In addition, the Colorado Constitution provides: "Excessive bail shall not be required." Colo. Const. art. II, § 20.

18. "The purpose of bail is to ensure the defendant's presence at trial and not to punish him before he has been convicted." *L.G.W. v. District Court*, 623 P.2d 1351, 1356 (Colo. 1981).

19. The prohibition against excessive bail means, "Bail should not be more than will be reasonably sufficient to prevent evasion of the law by flight or concealment; it should be reasonably sufficient to assure the prisoner's presence at trial." *Palmer*, 156 Colo. at 289, 398 P.2d at 438.

20. Thus, at a bail hearing the court should consider "factors which throw light on what would be reasonable bail in order to assure the prisoner's presence at trial." *Id.*

21. If bail is not denied pursuant to the preventative detention provisions of the Colorado Constitution, "it is incumbent on the court, looking to the

4

For electronic copies of these motions, please contact the Office of the Colorado State Public Defender.

guidelines laid down by [the bond statute] and *Stack v. Boyle* to set reasonable bail in compliance with our Constitution and the Eighth Amendment[.]" *Dubler v. District Court*, 179 Colo. 304, 308, 500 P.2d 358, 360 (1972).

22. Where the monetary condition of bail is set at a higher amount than necessary to ensure the defendant's presence in court, it is "tantamount to denial of the right . . . to be admitted to bail in a reasonable amount." *Altobella v. District Court*, 153 Colo. 143, 145, 385 P.2d 663, 664 (1963).

23. Here, the $______________ bond is "tantamount" to denial of the right to bail.

II. Preventative detention is permissible under very limited circumstances and must be accompanied by significant procedural safeguards.

24. As previously noted, the Eighth Amendment's prohibition against "excessive bail" does not prohibit a total denial of bail — i.e., "preventative detention"—in some cases. *See Salerno*, 481 U.S. 741. In *Salerno*, the Court considered the constitutionality of the federal Bail Reform Act of 1984. *Id.* The Act permitted a judge to deny bail if, after a hearing, the judge found by "clear and convincing evidence" that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community[.]" *Id.* at 742. The Act "specified the considerations relevant" to the judge's decision." *Id.* And the detainee was "entitled to expedited review of the detention order." *Id.* at 743.

25. *Salerno* reasoned that the Eighth Amendment does not guarantee the right to bail in all cases: "'[e]xcessive bail shall not be required' . . . says nothing about whether bail shall be available at all." *Id.* at 752. Moreover, the "extensive safeguards" of the Act complied with procedural and substantive due process. *See id.* at 750-52.

26. The Colorado Constitution, by contrast guarantees the right to bail in almost all cases. *See* Colo. Const. art. II, § 19(1).

27. As originally enacted, our bill of rights provided, "All persons shall be bailable by sufficient sureties except for capital offenses, when the proof is evident or the presumption great." *See People v. Spinuzzi*, 149 Colo. 391, 397,

5

369 P.2d 427, 430 (1962). The provision clearly allowed "preventative detention" in only one class of cases. Article II, section 19, has now been amended to allow for preventative detention in an additional class of cases.

28. In its current form, article II, section 19 also allows preventative detention when the defendant is charged with "a crime of violence" and (1) the crime was alleged to have been committed when the defendant was on probation or parole for a crime of violence, or (2) the crime was alleged to have been committed while on bail pending the disposition of a previous crime of violence, or (3) the crime was committed after two prior felony convictions in cases separately brought and tried, or (4) the crime was alleged to have been committed after one prior crime of violence conviction. *See* Colo. Const. art. II, § 19(1)(b).[1]

29. Before preventative detention may be imposed, a court must find, "after a hearing within ninety-six hours of arrest and upon reasonable notice," that (1) "proof is evident or presumption is great" as to the charged crime and (2) "the public would be placed in significant peril if the accused were released on bail." *Id.*

30. Moreover, except in the case of a capital offense, the defendant is entitled to an expedited trial "not more than ninety days after the date on which bail is denied." Colo. Const. art. II, § 19(2). If a trial is not held within 90 days, the court must set a reasonable bail. *Id.*

31. The Colorado Constitution and the bail statute create a "bail/no bail" dichotomy. Bail may be denied outright in a discrete group of cases. In all other cases, the monetary condition of bail must be set a reasonable amount.

[1] Colorado's bail statute contains the same exceptions to the absolute right to bail, plus adds two types offenses to the list: (1) the crime of possession of a weapon by a previous offender and (2) certain types of sexual assaults. *See* § 16-4-101(1)(b)(IV) & (V), C.R.S. (2013).

6

III. The _______ bond results in a preventative detention in violation of the Colorado Constitution and the new bail statute.

32. Under Colorado's new bail regime, this Court violates the law when it sets the monetary condition of bail so high that it effects a de facto denial of release.

33. The new statutory scheme provides, in relevant part:

> (4) When the type of bond and conditions of release are determined by the court, the court shall:
> (a) Presume that all persons in custody are eligible for release on bond with the appropriate and least-restrictive conditions consistent with the provisions in paragraph (a) of subsection (3) of this section unless a person is otherwise ineligible for release pursuant to the provisions of section 16-4-101 and section 19 of article II of the Colorado constitution. A monetary condition of release must be reasonable and any other condition of conduct not mandated by statute must be tailored to address a specific concern.

§ 16-4-103(4)(a), C.R.S. (2013).

34. Section 16-4-103(3)(a), C.R.S. (2013), provides, "The type of bond and conditions of release shall be sufficient to reasonably ensure the appearance of the person as required and to protect the safety of any person or the community, taking into consideration the individual characteristics of each person in custody, *including the person's financial condition.*" (emphasis added).

35. Non-monetary conditions of bond aid community safety, but monetary conditions cannot rationally serve this purpose.

36. The Court has a host of available non-monetary conditions at its disposal to both ensure community safety and ensure the defendant's appearance in court. *See* § 16-4-105(2)-(8), C.R.S. (2013).

7

37. But a monetary condition of bond may be forfeited only if the defendant fails to appear in court. *See* § 16-4-109(1), C.R.S.

38. Because the defendant cannot forfeit money if he violates a condition of bond designed to enhance community safety, a monetary condition of bond cannot rationally ensure community safety.

39. The only way that a monetary condition of bond can possibly enhance community safety is by preventing the defendant's release from jail pending trial. *But this is not a valid interest.* The Excessive Bail Clause forbids the imposition of bail conditions that are excessive in light of the valid interests the state seeks to protect by offering bail. *See Salerno*, 481 U.S. at 754; *Altobella*, 153 Colo. at 145, 385 P.2d at 664.

40. This Court cannot circumvent a defendant's right to bail by imposing a monetary condition the defendant manifestly cannot make. It can only impose preventative detention where specifically authorized by the Colorado Constitution. The Court has taken an unconstitutional shortcut. It has imposed a de facto preventative detention in violation of the Eighth Amendment and article II, sections 19 and 20, of the Colorado Constitution.

IV. Deprivation of defendant's trial rights.

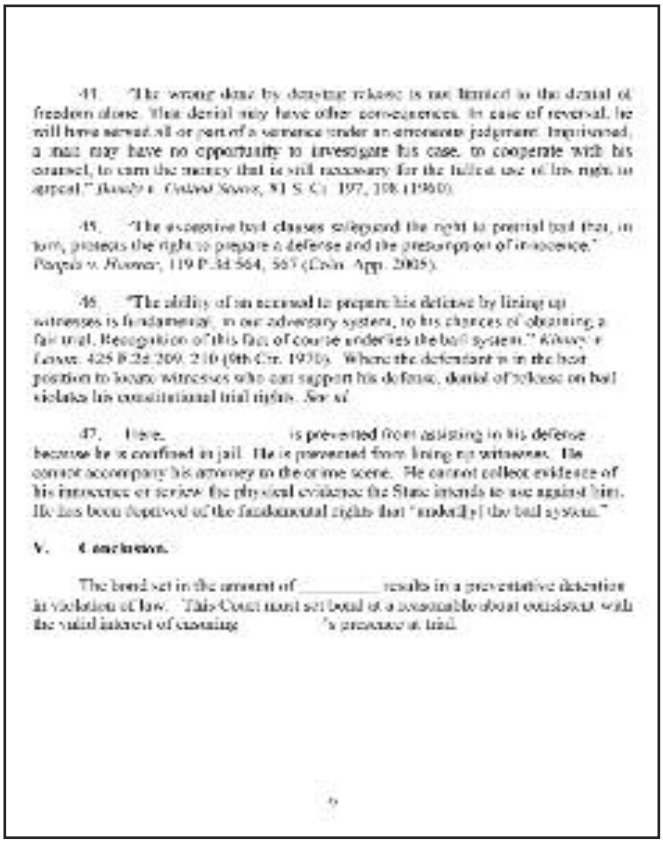
41. The excessive bond set by this Court deprives ________________ of the constitutional rights intended to secure a fair trial and the presumption of innocence.

42. "The principle that there is 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." *Coffin v. United States*, 156 U.S. 432, 453 (1895).

43. "Th[e] 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." *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (citing *Hudson v. Parker*, 156 U.S. 277, 285 (1895)).

8

APPENDIX 10:
Motion Against Excessive Monetary Condition of Bond Imposed in Violation of Defendant's Constitutional and Statutory Rights (Continued)



41. "The wrong done by denying release is not limited to the denial of freedom alone. That denial may have other consequences. In case of reversal, he will have served all or part of a sentence under an erroneous judgment. Imprisoned, a man may have no opportunity to investigate his case, to cooperate with his counsel, to earn the money that is still necessary for the fullest use of his right to appeal." *Bandy v. United States*, 81 S. Ct. 197, 198 (1960).

45. "The excessive bail clauses safeguard the right to pretrial bail that, in turn, protects the right to prepare a defense and the presumption of innocence." *People v. Romero*, 119 P.3d 564, 567 (Colo. App. 2005).

46. "The ability of an accused to prepare his defense by lining up witnesses is fundamental to our adversary system, to his chances of obtaining a fair trial. Recognition of this fact of course underlies the bail system." *Kilroy v. Lewis*, 425 F.2d 209, 210 (9th Cir. 1970). Where the defendant is in the best position to locate witnesses who can support his defense, denial of release on bail violates his constitutional trial rights. *See id.*

47. Here, _____ is prevented from assisting in his defense because he is confined in jail. He is prevented from lining up witnesses. He cannot accompany his attorney to the crime scene. He cannot collect evidence of his innocence or review the physical evidence the State intends to use against him. He has been deprived of the fundamental rights that "underl[y] the bail system."

V. Conclusion.

The bond set in the amount of _____ results in a preventative detention in violation of law. This Court must set bond at a reasonable about consistent with the valid interest of ensuring _____'s presence at trial.

9

DOUGLAS K. WILSON
Colorado State Public Defender

Deputy State Public Defender
1300 Broadway, Suite 900
Denver, CO 80203
303-764-1400

CERTIFICATE OF SERVICE

Undersigned hereby certifies that a copy of the Forgoing Motion for Sanction Reconsideration was served on the Office of the District Attorney by placing the same in the United States Mail.

_____

10

64

For electronic copies of these motions, please contact the Office of the Colorado State Public Defender.

APPENDIX 11:
Motion Against Cash Only Monetary Condition of Bail

District Court _____ County, Colorado

Court Address:

THE PEOPLE OF THE STATE OF COLORADO

Plaintiff

v.

Defendant

▲ COURT USE ONLY ▲

Douglas K. Wilson, Colorado State Public Defender
_____, Deputy State Public Defender
[Add office address] ___

Phone:
E-mail: _____@coloradodefenders.us
Fax:
Atty. Reg. #: _____

Case Number: __CR____

Division: ___
Courtroom: ___

Defendant's Objection to this Court's Imposition of a "Cash Only" Monetary Condition of Bond as a Violation of his Statutory and Constitutional Rights

_____, through counsel, moves this Court to vacate its Order requiring that he satisfy the secured monetary condition of his bond with "cash only"—i.e., a deposit of cash equal to the full secured monetary condition of bond.

1

This Court did not make sufficient factual findings to justify a bond with a cash only monetary condition under § 16-4-104(1)(c), C.R.S. The record does not support a cash only bond.

The requirement of a cash only bond is in violation of article II, section 19, of the Colorado Constitution, which provides, in relevant part, "All persons shall be bailable by sufficient sureties pending disposition of the charges[.]" The cash only requirement deprives _____ of his right to bail by sufficient sureties.

Even if this Court finds that cash only bonds are facially constitutional, it must rule that the cash only bond in this case violates _____'s constitutional right to bail by sufficient sureties. *See State v. Briggs*, 666 N.W.2d 573, 583 (Iowa 2003). Mr. _____ does not have access to sufficient cash to post the bond, either through himself or a third party. *See id.* at 581. The cash only bail is unconstitutional as applied to him.

A. Colorado's new bail statute prohibits the Court from imposing a cash only monetary condition of bond.

1. On May 13, 2013, Colorado enacted House Bill 13-1236, legislating a paradigm shift in the way judges administer bail in Colorado.

2. The new statute states, "All persons shall be bailable by sufficient sureties" except under specific circumstances not applicable here. § 16-4-101(1), C.R.S.

3. At a bond hearing, the court decides two matters: (1) the "type of bond" and (2) the "conditions of release." § 16-4-105(1), C.R.S.

4. Both the "type of bond" and the "conditions of release" shall be "sufficient to reasonably ensure the appearance of the person as required and to protect the safety of any person or the community, taking into consideration the individual characteristics of each person in custody, including the person's financial condition." § 16-4-103(1)(a), C.R.S. The court shall "presume" that all persons are eligible for release "with the appropriate and least restrictive conditions." § 16-4-105(4)(a), C.R.S.

2

5. The "conditions of release or bond" are described in § 16-4-105, C.R.S.

6. The "types of bond set by the court" are delineated in § 16-4-104, C.R.S. The court may choose a "type of bond" with unsecured monetary conditions or, alternatively, choose a "type of bond" with secured monetary conditions. See § 16-4-104(1)(a)-(e), C.R.S. The following provision applies when the court sets a bond with "secured monetary conditions":

> **16-4-104. Types of bond set by the court.** (1) The court shall determine, after consideration of all relevant criteria, which of the following types of bond is appropriate for the pretrial release of a person in custody, subject to the relevant monetary conditions of release listed in section 16-4-105. The person may be released upon execution of:
>
> * * *
>
> (c) A bond with secured monetary conditions when reasonably and necessary to ensure the appearance of the person in court or the safety of any person or persons or the community. The financial conditions shall mean an amount of money that the person must post with the court in order for the person to be released. The person may be released from custody upon execution of bond in the full amount of money to be secured by any one of the following methods, as selected by the person to be released, unless the court states factual findings on the record with respect to the person to be released that a certain method of bond, as selected by the court, is necessary to ensure the appearance of the person in court or the safety of any person, persons, or the community:
>
> (I) By a deposit with the clerk of the court of an amount of cash equal to the monetary condition of the bond;
>
> (II) By real estate situated in this state with unencumbered equity not exempt from execution owned by the accused or any other person acting as surety on the bond, which unencumbered equity shall be at least one and one-half the amount of the security set in the bond;
>
> (III) By sureties worth at least one and one half of the security set in the bond; or
>
> (IV) By a bail bonding agent, as defined in section 10-1-104(7.5).

§ 16-4-104(1)(c), C.R.S.

7. In interpreting a statute, a court's primary task is to effectuate the intent of the legislature. *City of Westminster v. Dogan Const. Co., Inc.*, 930 P.2d 585, 590 (Colo. 1997). To determine legislative intent, a court looks "first to the plain language employed by the General Assembly." *Id.*

8. Section 16-4-104(1)(c), gives courts the authority to decide whether to impose a bond with an unsecured monetary condition or a bond with a secured monetary condition. This is what is meant by the phrase "[t]he court shall determine . . . which of the following *types of bonds* is appropriate for the pretrial release of a person in custody[.]" § 16-4-104(1), C.R.S. (2013) (emphasis added).

9. When the court selects a bond with a "secured monetary conditions," the court then "decides the "amount of money the person must post with the court in order for the person to be released." § 16-4-104(1)(c), C.R.S. (2013).

10. The statute gives the detained person the right to post bond by the method of his choice: (1) cash, (2) real estate, (3) sureties, or (4) bondsperson. *Id.*

11. The court may only increase a cash only bond after making "factual findings on the record," specific to the detained person, that it is "necessary to ensure the appearance of the person in court or the safety of any person, persons, or the community." § 16-4-104(1)(c), C.R.S. (emphasis added).

12. Here, the court did not make the type of specific findings required by the statute. It did not properly consider Defendant's financial

3

4

65

For electronic copies of these motions, please contact the Office of the Colorado State Public Defender.

APPENDIX 11:
Motion Against Cash Only Monetary Condition of Bail (Continued)

condition when setting bail. To the extent it considered his financial condition, it set bail at an amount it knew Defendant could not make. The cash only bond is unreasonable, in violation of statute. *See* § 16-4-103(4)(a), C.R.S. ("A monetary condition must be reasonable[.]").

13. As explained Argument A, *supra*, interpreting § 16-4-103(1)(c) to allow a cash only bond in this case would violate the article II, section 19, of the Colorado Constitution. Such interpretation should be avoided. See § 2-4-201(1)(a), C.R.S. (2013) ("In enacting a statute, it is presumed that . . . [c]ompliance with the constitutions of the state of Colorado and the United States is intended[.]").

14. Moreover, the "object sought to be attained" by HB 13-1236, the bill creating Colorado's new bail statutes, was to provide a solution to a persistent problem: approximately 60% of the persons in county jail in Colorado are held prior to trial because, although they are presumed innocent, they cannot meet the monetary requirements of bond. See Hearing on H.B. 13-1236 before the H. Judiciary Comm. (Mar. 12, 2013) (available online at http://coloradoga.granicus.com/MediaPlayer.php?view_id=21&clip_id=3259) (visited Sep. 17, 2013). Allowing courts to impose cash only monetary conditions thwarts the legislative purpose.

15. Because a "cash only" bond is not authorized by statute, this Court should convert ___________'s bond to a "bond with secured monetary conditions" in the same amount. ___________ may post the bond in any of the four ways authorized by statute.

B. Colorado's appellate courts have never determined whether a cash only pretrial bond is constitutionally permissible.

16. Colorado's appellate courts have never considered whether a court has authority to make the monetary condition of bond "cash only" under any form of the *pretrial* bond statute.

17. In *Anderson v. County Court*, 124 P.3d 866 (Colo. App. 2005), the court of appeals held that § 16-19-117(1), C.R.S. (2004)—which governed bail pending extradition to another jurisdiction—allowed a court to set a "cash only" bond. The court specifically refused to consider whether §

5

16-4-104(1), C.R.S. (2004)—which governed pretrial bond—allowed a court to set a "cash only" bond. *See Id.* at 868. The court decided that "access to bail by a defendant pending extradition is . . . not required by the Colorado constitution." *Id.* at 870.

18. Likewise, in *People v. Hoover*, 119 P.3d 564 (Colo. App. 2005), the court of appeals held that § 16-4-203(2), C.R.S. (2004)—which governed appeal bonds—allowed a court to set a "cash only" bond. The court decided that the right to an appeal bond is not guaranteed by the Colorado Constitution. *Id.* at 566.

19. Thus, Colorado's appellate courts have never decided whether a cash only monetary condition of bail is permissible under article II, section 19. Although *Anderson*, 124 P.3d at 869-70, discussed the issue, the case was resolved on statutory interpretation, and its discussion is dictum. *See Bowlby v. Pino*, 222 P.3d 336, 340 (Colo.App 2009) (where a statement of the court is not part of its "holding and its necessary rationale," it is dictum).

C. A "cash only" bond is prohibited by article II, section 19, of the Colorado constitution.

20. This Court should avoid the constitutional question by interpreting the pretrial bail statutes to prohibit a cash only bond in this case. *People v. Thomas*, 867 P.2d 880, 883 (Colo. 1994) ("When possible, statutes are to be construed in such manner as to avoid questions of their constitutional validity."). Assuming that this Court rules that cash only bonds are statutorily permissible, it should find that they violate the Colorado Constitution.

21. The Colorado Constitution specifically provides, "All persons *shall be bailable by sufficient sureties* pending disposition of charges" subject to certain exceptions not present here. Colo. Const. art. II, § 19 (emphasis added).

22. This constitutional provision "changes the common law so as to confer the absolute right to bail" for all crimes except those specifically designated. *In re Losasso*, 15 Colo. 163, 167, 24 P. 1080 (1890). "Proofs may be *required in determining the amount of bail*, but the right thereto is no longer a matter of judicial inquiry or discretion." *Id.* (emphasis added).

6

23. "Sufficient sureties" clauses appear in the constitutions of many states. The courts of those states are divided as to whether they prohibit "cash only" bail bonds.

24. The leading case holding that the "sufficient sureties" clause prohibits "cash only" pretrial bonds is *State v. Brooks*, 604 N.W.2d 345 (Minn. 2000). *See also State v. Hance*, 910 A.2d 874 (Vt. 2006); *Smith v. Leis*, 835 N.E.2d 5 (Ohio 2005); *Iowa v. Hendon*, 644 N.E.2d 341 (Ohio 1993); *State v. Golden*, 546 So.2d 501 (La. 1989); *State v. Rodriguez*, 678 P.2d 280 (Mont. 1981); *Lewis Bail Bond Co. v. Court of Madison County*, 1997 WL 711137 (Tenn. Ct. App. 1997).

25. The leading case holding that the "sufficient sureties" clause does not prohibit "cash only" pretrial bonds is *State v. Briggs*, 666 N.W.2d 573 (Iowa 2003). *See also State v. Jackson*, 384 S.W.3d 208 (Mo. 2012); *State v. Gutierrez*, 140 P.3d 1106 (N.M. 2006); *Fragoso v. Fell*, 111 P.3d 1027 (Ariz. Ct. App. 2005).

26. Courts generally agree that the "sufficient sureties" clause has its roots in Pennsylvania's Great Law of 1682, which provided that "all Prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where the proof is evident or presumption great." *See e.g., Brooks*, 604 N.W.2d at 350; *Briggs*, 666 N.W.2d at 580. The Quakers of Pennsylvania enacted the Great law as a bulwark against the persecution they had faced under English law. *Brooks*, 604 N.W.2d at 350. It became part of almost every state constitution adopted since 1776, and is now in approximately two-thirds of state constitutions. *Brooks*, 604 N.W.2d at 350.

27. Likewise, courts generally agree that the word "sureties" is subject to various interpretations, including cash, property, and promises by third-parties (including bondspersons) to ensure the defendant's presence in court. *See e.g., Brooks*, 604 N.W.2d at 352-53; *Fragoso*, 111 P.3d at 1027.

28. However, the courts disagree as to whether a "sufficient sureties" clause allows a court to decide both the amount of bond and the ways in which it may be satisfied.

29. In holding that a "cash only" bond violated the clause, the Minnesota Supreme Court reasoned, "In essence, the clause limits the government's power to detain an accused prior to trial. The clause is intended

7

to protect the accused rather than the courts." *Brooks*, 604 N.W.2d at 350. "[W]e agree with the state . . . that surety has a broad meaning, but we disagree with their argument that this broad meaning gives the district court the discretion to limit the form of acceptable surety to cash only bail." *Id.* at 353. The "Bail Clause is for the protection of the accused rather than the court." *Id.* "If judges have unlimited discretion to specify the form of acceptable bail, they would, for example, be able to set bail payable only by real property. If the accused in such case does not own any real property, he is in essence being denied bail[.]" *Id.* "Similarly, cash only bail orders can be used to deny bail to those accused who have other means of providing sufficient surety." *Id.*

30. Other courts agree with this reasoning. *See Hance*, 910 A.2d at 884 ("To construe the 'sufficient sureties' clause as permitting cash-only bail would increase government power to engage in pretrial confinement, a result which cannot be reconciled with the history of the 'sufficient sureties' clause or our own cases discussing bail, in which we have recognized the threat to individual liberty inherent in pretrial detention."); *Anon*, 699 N.E.2d at 543-44 ("We agree that [the sufficient sureties clause] is silent as to the forms which bail may take. . . . [But] once a judge chooses a [monetary condition of bond] and sets the amount of bond, we find no legitimate purpose in further specifying the form of bond which may be posted. Indeed, the only apparent purpose in requiring a 'cash only' bond to the exclusion of other forms . . . is to restrict the accused's access to surety and, thus, to detain the accused in violation of [the constitution].").

31. By contrast, the Iowa Supreme Court held that the "sufficient sureties" clause "carved out a measure of discretion for the person overseeing the bailing process." *Briggs*, 666 N.W.2d at 582. The court reasoned that the clause "was a clear creation of a right to access a surety of some form," but "we are confident that the framers did not intend to favor one particular method of surety—commercial bonding—by inclusion of the sufficient sureties clause." *Id.* at 582-83. Realizing that its holding impinged on the right to bail guaranteed by the Iowa bill of rights, the court hedged its bet: "However, if the accused shows that the bail determination absolutely bars his or her utilization of a surety of some form, a court is constitutionally bound to accommodate the accused's predicament." *Id.* 583.

32. *Briggs* suffers from two flaws. First, it doesn't account for the fact that "sufficient sureties" clause is part of the state Bill of Rights, which

8

For electronic copies of these motions, please contact the Office of the Colorado State Public Defender.

APPENDIX 11:
Motion Against Cash Only Monetary Condition of Bail (Continued)

is a limit on government power. It interpreted the "sufficient sureties" clause as a grant of power to the courts, rather than a grant of power to the people. Second, it suffers from a logical flaw. Just because the framers did not intend to "force . . . commercial bonding" does not mean that they intended to give courts the authority to decide what type of surety the accused is forced to use.

33. The Washington State Supreme Court most recently weighed in on the issue, and it sided with *Brooks*: "This case centers on article I, section 20 of the Washington State Constitution and its mandate that criminal defendants 'shall be bailable by sufficient sureties. . . . We held that article I, section 20 means a defendant must be allowed the option to secure bail via a surety, as distinct from cash or other securities." *State v. Barton*, 131 P.3d 30, 31 (Wash. 2006) (emphasis added).

34. Article II, section 19, is part of Colorado's Bill of Rights and a limitation on government power. It expressly states that "all persons shall be bailable by sufficient sureties[.]" Under the Colorado Constitution, "*Proofs may be required in determining the amount of bail*, but the right thereto is no longer a matter of judicial inquiry or discretion." *In re Zamora*, 15 Colo. 163, 168, 24 P. 1068, 1081 (1890) (emphasis added). A "cash only" bond deprives an accused of his constitutional right to bail by "sufficient sureties." *See Brooks*, 604 N.W.2d at 330.

35. Assuming, *arguendo*, that this Court adopts Briggs's interpretation of the sufficient sureties clause, it must nevertheless hold that the cash only requirement in this case violates _____'s right to bail by sufficient sureties. The cash only requirement "absolutely bars" his utilization of a surety and this court is "constitutionally bound to accommodate the accused's predicament." *Briggs*, 866 N.W.2d at 388.

C. Conclusion.

WHEREFORE, _____ moves this Court to vacate its Order requiring that he satisfy the secured monetary condition of his bond with "cash only."

DOUGLAS K. WILSON

Colorado State Public Defender

_____
ATTORNEY, ATTORNEY ?
[Add office address]

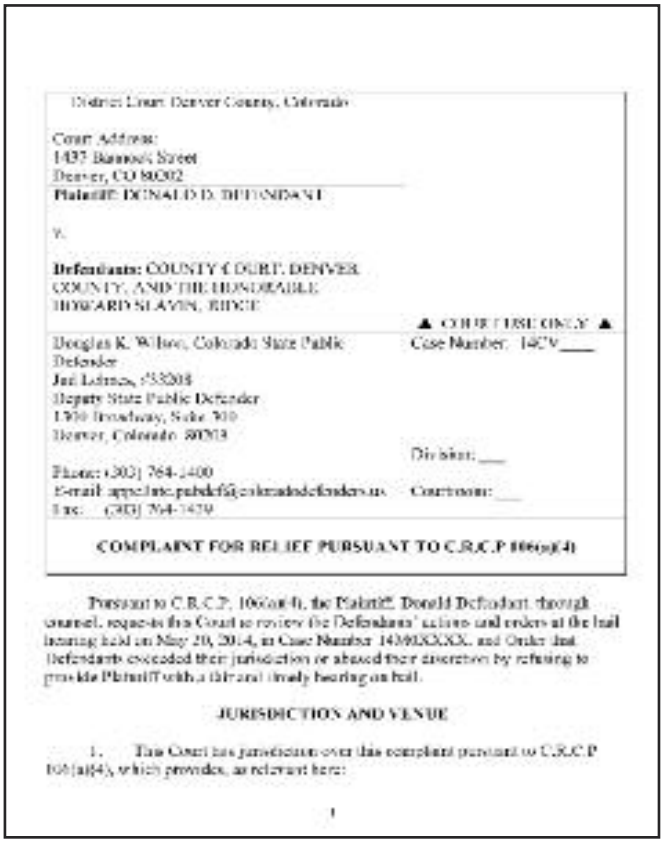
_____
[Add office phone number] ___

CERTIFICATE OF SERVICE

Undersigned hereby certifies that a copy of the foregoing Motion for Sentence Reconsideration was served on the Office of the District Attorney by placing the same in the United States Mail.

For electronic copies of these motions, please contact the Office of the Colorado State Public Defender.

APPENDIX 12:
Complaint for Relief Pursuant to C.R.C.P. 106(a)(4)



District Court, Denver County, Colorado

Court Address:
1437 Bannock Street
Denver, CO 80202
Plaintiff: DONALD D. DEFENDANT

v.

Defendants: COUNTY COURT, DENVER COUNTY, AND THE HONORABLE HOWARD SLAVIN, JUDGE

▲ COURT USE ONLY ▲

Douglas K. Wilson, Colorado State Public Defender
Jud Lehman, #53208
Deputy State Public Defender
1300 Broadway, Suite 300
Denver, Colorado 80203
Phone: (303) 764-1400
E-mail: appellate.pubdef@coloradodefenders.us
Fax: (303) 764-1479

Case Number: 14CV____

Division: ___

Courtroom: ___

COMPLAINT FOR RELIEF PURSUANT TO C.R.C.P. 106(a)(4)

Pursuant to C.R.C.P. 106(a)(4), the Plaintiff, Donald Defendant, through counsel, requests this Court to review the Defendants' actions and orders at the bail hearing held on May 20, 2014, in Case Number 14MXXXXX, and Order that Defendants exceeded their jurisdiction or abused their discretion by refusing to provide Plaintiff with a fair and timely hearing on bail.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this complaint pursuant to C.R.C.P. 106(a)(4), which provides, as relevant here:

1

In the following cases relief may be obtained in the district court by appropriate action under the practice prescribed in the Colorado Rules of Civil Procedure:

(4) Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy, and adequate remedy otherwise provided by law.

2. The Defendant court is a "lower judicial body." The Defendant judge is a "governmental officer."

3. This complaint alleges that the Defendants have exceeded their jurisdiction or abused their discretion by failing to abide by the dictates of the United States Constitution, the Colorado Constitution, and the Colorado statutes governing pre-trial bond, §§ 16-4-101, C.R.S. et seq.

4. There is no plain, speedy, and adequate remedy otherwise provided by law. This Complaint is the proper means for Plaintiff to seek relief. Fellman v. Cnty. Court, 124 P.3d 866, 867 (Colo. App. 2005) (criminal defendant filed C.R.C.P. 106 complaint to seek review of county court's bail decision).

5. Venue of this action is appropriate under C.R.C.P. 98(b).

GENERAL ALLEGATIONS

6. On May 19, 2014, Mr. Defendant was arrested on suspicion of three misdemeanors: , , and .

7. A Denver Pretrial Services Bond Advisement Report completed on the morning of May 20, 2014, found that Mr. Defendant was eligible for an unsecured personal recognizance bond with consideration of additional non-monetary conditions. See ATTACHMENT A (Pretrial Services Report).

8. At or about 1:30 p.m. on May 20, 2014, Denver County Court Judge Howard Slavin met in chambers with a representative of Denver Pretrial Services.

2

Judge Slavin and the representative discussed the Pretrial Services Bond Advisement Report. Judge Slavin set bond in the amount of $1,500. Neither Mr. Defendant nor the prosecution was present when bond was set. No record was made of the in-chambers proceedings.

9. At 2:30 p.m. on May 20, 2014, Denver County Court Judge Slavin called People v. Donald Defendant, 14M0XXXX, for first advisement. This was Mr. Defendant's first appearance before a court of record. The court appointed the Office of the Public Defender to represent Mr. Defendant. See ATTACHMENT B (transcript May 20, 2014, hearing).

10. Judge Slavin informed Mr. Defendant, "You're here to . . . have your bail set."

11. Before hearing argument of counsel, Judge Slavin announced, "And the court previously set bond in the amount of $1,500 with basic supervision."

12. When counsel for Mr. Defendant requested the opportunity to present argument and evidence regarding the type of bond and conditions of release appropriate in the case, Judge Slavin refused to permit it on the ground that he had already set bond in chambers.

13. Judge Slavin would not explain what discussions occurred in chambers, nor would he state on the record his reasons for setting a bond with a monetary condition of $1,500. He would not consider information or arguments from counsel regarding the propriety of the predetermined bail decision.

FIRST CLAIM FOR RELIEF – BAIL SET WITHOUT HEARING

14. The allegations stated above in paragraphs 1 – 13 are incorporated into this claim for relief.

15. The Defendants exceeded their jurisdiction or abused their discretion by setting the type of bond and conditions of release during an off-the-record, in-chambers proceeding held without Plaintiff's participation and prior to Plaintiff's first appearance before the court.

3

16. Denver County Court is a "court of record." § 13-4-111, C.R.S.; § 13-6-103, C.R.S.

17. In considering the question of bail, all courts of record shall be governed "by the statutes and the Constitution of the State of Colorado and the United States Constitution." Crim. P. 46.

18. Persons charged with misdemeanors "shall be admitted to bail or pretrial release as provided for" Article 4 of Title 16 of the Colorado Revised Statutes. § 16-2-112, C.R.S.

19. Pursuant to § 16-4-102, a person in custody "shall" be brought "before the court forthwith, and the judge shall set bail for the offense for which the person was arrested if bailable." § 16-4-103, C.R.S.

20. Mr. Defendant was held on suspicion of bailable offenses. See § 16-4-101, C.R.S. (delineating non-bailable offenses).

21. "At the first appearance of a person in custody before a court of record, the court shall determine the type of bond and conditions of release unless the person is subject to the provisions of section 16-4-101." § 16-4-103(1), C.R.S.

22. The Defendants had no statutory authority to set bail in an off-the-record in-chambers proceeding held a few hours prior to Mr. Defendant's "first appearance" before a "court of record."

23. Because the Denver County Court is a "court of record," Defendants abused their discretion or exceeded their jurisdiction by setting bail off the record. See Herrera v. People, 147 Colo. 442, 445, 363 P.2d 1044, 1046 (1961) ("It has been said that the reason for the creation of courts of record is founded on the proposition that judicial records are not only necessary but indispensable in the administration of justice. The court hears arguments and decides upon the records; it acts by its records; its openings, sessions and adjournments can be proved only by its records; its judgments can be evidenced only by its records. The case of a court of record are known by its records alone and cannot be established by parol testimony. The court speaks only through its records, and the judge speaks only through the court.")

4

For electronic copies of these motions, please contact the Office of the Colorado State Public Defender.

APPENDIX 12:
Complaint for Relief
Pursuant to C.R.C.P. 106(a)(4) (Continued)

24. Plaintiff has a substantive constitutional right to reasonable bail. See U.S. Const. amend VIII; Colo. Const. art. II, §§ 19, 20. He has a constitutional right to procedural due process. See U.S. Const. amend. XIV; Colo. Const. art. II, § 25. Due process requires, at a minimum, notice and the opportunity for a meaningful hearing before an impartial tribunal. See Mathews v. Eldridge, 424 U.S. 319, 333, 348-49 (1976); Armstrong v. Manzo, 380 U.S. 545, 552 (1965) ("A fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner.").

25. The Defendants violated Plaintiff's constitutional rights to reasonable bail and procedural due process by docketing bail in an in-chambers proceeding and depriving him of the right to notice and a right to be heard in a meaningful time and in a meaningful manner.

26. Even assuming that the Defendants were authorized to determine bail in chambers, they deprived Plaintiff of his constitutional and statutory rights by refusing to review that determination in open court at his first appearance.

SECOND CLAIM FOR RELIEF—FAILURE TO CONSIDER INDIVIDUAL CHARACTERISTICS AND AFFORD THE PRESUMPTION OF RELEASE

27. The allegations stated above in paragraphs 1 - 26 are incorporated into this claim for relief.

28. Defendants exceeded their jurisdiction or abused their discretion by failing to consider Plaintiff's individual characteristics in setting bail and failing to afford him the presumption of release on the least-restrictive conditions.

29. Pursuant to § 16-4-103(3)(a), C.R.S., "The type of bond and conditions of release shall be sufficient to reasonably assure the appearance of the person as required and to protect the safety of any person or the community, taking into consideration the individual characteristics of each person custody, including the person's financial condition." The court "shall" presume that "all persons are eligible for release with the least-restrictive conditions[.]" § 16-4-103(4)(a), C.R.S.

30. A court also has a constitutional obligation to consider the defendant's individual characteristics when setting bail. See Palmer v. District Court, 176 Colo. 284, 290 P.2d 435 (1968); Barber v. District Court, 179 Colo. 304, 500 P.2d 358 (1972).

31. The Defendants did not consider Plaintiff's individual characteristics, including his financial condition, when setting bond in this case. That information was not included in any of the information available to the Defendants at the in-chambers bond-setting. The Defendants made no findings to show that it considered Plaintiff's individual characteristics. The Defendants did not afford Plaintiff the presumption of release under the least restrictive conditions.

THIRD CLAIM FOR RELIEF—STATUTORILY DEFECTIVE BAIL SCHEDULE

32. The allegations stated above in paragraphs 1 - 31 are incorporated into this claim for relief.

33. Defendants exceeded their jurisdiction or abused their discretion by using a bond schedule based solely on the level of the offense for which the person in custody is held.

34. If a court uses a bond schedule, "the court shall incorporate into the bond schedule conditions of release and factors that consider the individualized risk and circumstances of the person in custody and all other relevant criteria and not solely the level of offense." § 16-4-103(4)(b), C.R.S. (emphasis added).

35. The Denver County Court bond schedule considers only the "level of offense." See ATTACHMENT C (Denver County Court Bond Schedule). As relevant here, it sets bond for all persons accused of class 1 misdemeanors at $1,500. Plaintiff was held on suspicion of committing a class 1 misdemeanor.

36. The Defendants set Plaintiff's bail using a bail schedule based solely on an offender's "level of offense." The Defendants were statutorily prohibited from relying upon the Denver County Court bond schedule, but did so anyway.

PRAYER FOR RELIEF

Plaintiff respectfully requests this Court to determine that the Defendants have exceeded their jurisdiction or abused their discretion by violating Plaintiff's statutory and constitutional rights, including:

(1) setting the Plaintiff's bail during an in-chambers, off-the-record proceeding without notice or participation of the Plaintiff;
(2) failing to take into consideration the Plaintiff's individual characteristics and failing to afford Plaintiff the presumption of release when setting bail; and
(3) using a bail bond schedule based solely on the level of offense.

DATED: June _____, 2014.

DOUGLAS K. WILSON
Colorado State Public Defender

JUD LORINES, #33216
Deputy State Public Defender
1300 Broadway, Suite 300
Denver, CO 80203
(303) 764-1601

For electronic copies of these motions, please contact the Office of the Colorado State Public Defender.

APPENDIX 13:
Complaint for Relief Pursuant to C.R.C.P. 57

DISTRICT COURT, DENVER COUNTY, COLORADO

Address: [redacted]
Denver, CO 80202

DONALD D. DEFENDANT, Plaintiff,

v.

COUNTY COURT, DENVER, THE HONORABLE JOHN M. MARCH, CO., PRESIDING JUDGE, AND THE HONORABLE HOWARD SLAVIN, JUDGE,
Defendants.

▲ COURT USE ONLY ▲

Case Number: [redacted]

Division: 376

Attorneys for Plaintiff:
[redacted]

Douglas K. Wilson, Colorado State Public Defender
[redacted]

AMENDED COMPLAINT

As directed by the Court in its October 21, 2014 Order, Plaintiff, Donald D. Defendant, for his Amended Complaint against The County Court, Denver County, Colorado, the Honorable John M. Marchant, Presiding Judge, and the Honorable Howard Slavin, states and alleges as follows:

1

INTRODUCTION

1. The purpose of bail is not to punish a defendant before conviction or to entrap the Colorado State Treasurer, but to make sure that an accused appears in court for trial. Holding pretrial detainees in jail solely because they cannot pay for release is unconstitutional and bad public policy. It is these constitutional principles that have led to sweeping bail reform around the country, including in Colorado.

2. In Colorado, presumptively innocent individuals who are currently awaiting trial have a right to bail or pretrial release. Bail is to be set at the first appearance before a court of record, where the court "shall determine the type of bond and conditions of release." C.R.S. § 16-4-103(1). In setting bond, the court is required to "take[] into consideration the individual characteristics of each person in custody, including the person's financial condition." *Id.* at (3)(a). The court is prohibited from using a bond schedule based solely on the level of offense, and must "avoid unnecessary pretrial incarceration." *Id.* at (4).

3. Section 16-4-102 complies with the constitutional command that persons should not be jailed because of their poverty. As the federal government recently stated in an Alabama federal case about improper bail practices: "It is the position of the United States that, as courts have long recognized, any bail or bond scheme that maintains 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 contradicts bail policy." Statement of Interest of the United States, *Walker v. City of Calhoun*, No. 4:15-cv-34-WTM-WC, at 1 (N.D. Ala. Oct. 13, 2015).

4. Ignoring these constitutional and statutory mandates, Denver County Court judges are engaging in unlawful practices when setting pretrial conditions of release. Specifically, judges are setting bond before pleas, cases in the vicinity of their discretion, without the accused or counsel present, and before person-specific (instead, individuals under a first appearance) cases. The judges are establishing pretrial release in these "no pretrial" proceedings on the payment of an amount of money pre-fixed by a bond bail schedule. The schedule considers only the level of offense. It has not been approved by the State. The judges are not considering the detainee's individual circumstances. They are using nothing to avoid unnecessary pretrial incarceration. The bail decision is made without any regard for indigence.

5. The practice of setting bail schedule-level first appearance hearings and assessing bail on illegal bond schedule based on level of offense violates C.R.S. § 16-4-103, as well as the constitutional rights of the presumptively innocent, individuals under the United States and Colorado Constitutions. Specifically, it violates the state and federal constitutional protections of due process and equal protection. *See* U.S. Const. amend. XIV; Colo. Const. art. II, § 25.

6. As a result of their improper practices, the Denver County Court and its judges are "punishing a person for his poverty," a practice prohibited by the United States Supreme Court. *See, e.g., Bearden v. Georgia*, 461 U.S. 660, 664-71 (1983).

2

7. The Denver County Court judges are committing these statutory and constitutional violations of the same form that a task force on which the Denver County Court Chief Judge sits is investigating these issues. The task force has reported that the key elements of bond reform include advanced hearings, use of risk assessment tools, and immediate release, none of which is presently happening or being implemented by the Denver County Court. Recent studies for Denver County Court show that, based upon Colorado's Pretrial Assessment Tool ("CPAT"), approximately more than half individuals are higher than predicted. Nevertheless, the Denver County Court and its judges continue to use a bond schedule that is expressly prohibited by C.R.S. § 16-4-103.

8. Finally, judges in the Denver County Courts are improperly using the Victim Rights Act (the "VRA") to deny pretrial detainees of their statutory and constitutional right to bail at the appearance because the judges are setting bond at discretion before they conduct the appearance hearings. The VRA does not apply to the initial setting of bond.

9. It is regrettable that it has come to this: that bail action is necessary in this court of law in the State of Other Colorado, and formal pleadings and conversations, but the Denver County Court's unrelenting failure to properly set bond has resulted this level of seeking legal redress and proper relief.

10. As a result, Mr. Defendant seeks a declaratory judgment that:

(a) Defendants' current practice for setting bond violates Colorado law and the United States and Colorado Constitutions;

(b) Specifically, the Defendants' practice of setting bond in chambers, off the record, prior to a defendant's first appearance and without first having appointed local counsel is contrary to law;

(c) The Defendants' practice of setting bond schedule and assessment of the CPAT results is contrary to law; and

(d) The VRA is inapplicable to the proper consideration and setting of bond at the advisement.

PARTIES, JURISDICTION, AND VENUE

11. Plaintiff Donald D. Defendant is an individual with a principal place of residence in Denver, Colorado.

12. Defendant the Denver County Court is the county court for the City and County of Denver.

13. Defendant Judge John M. Marchant is currently the Presiding Judge for the Denver County Court. Judge Marchant is the person responsible for creating, enacting,

3

implementing, or otherwise approving of the practices adopted by the Denver County Court regarding the setting of bail.

14. Defendant the Honorable Howard H. Slavin is a Magistrate Judge for the Denver County Court.

15. This Court has jurisdiction over this action pursuant to C.R.S. § 13-31-105 and C.R.C.P. 57 because facial constitutional challenges to general rules or policies applicable to classes of people are properly reviewed by this Court pursuant to C.R.C.P. 57.

16. Venue is proper in this Court under C.R.C.P. 98(b)(2) and (c)(1) because the events giving rise to this Complaint occurred in this district.

FACTUAL ALLEGATIONS

Colorado's Reformed Bond Laws

17. Denver County Court is a court of record.

18. All actions of a court of record must appear on the record.

19. In considering the question of bail, Denver County Court "shall be governed by the statutes and the Constitution of the State of Colorado and the United States Constitutions." Colo. Crim. P. 46.

20. In May 2013, the Colorado General Assembly passed House Bill 13-1236, which reformed the laws regarding pretrial release bond schedules.

21. Under Colorado's reformed bond laws, courts are required to consider the "individual characteristics of each person in custody, including the person's financial condition." C.R.S. § 16-4-103(3)(a).

22. "In determining the type of bond and conditions of release, if practicable and available in the jurisdiction, the court shall use an empirically developed risk assessment tool developed to support pretrial release decisions." C.R.S. § 16-4-103(4)(b).

23. The Colorado Pretrial Assessment Tool ("CPAT") is "an empirically derived multivariate pretrial risk assessment instrument for use in Colorado" and is "designed to improve the pretrial release assessment practices that exist in local Colorado jurisdictions."

24. The CPAT is available for use in the Denver County Court.

25. Under Colorado's reformed bond laws, "[i]n the event a court uses a bond schedule, the court shall incorporate into the bond schedule considerations of release and factors that consider the relative risk and appearance of a person in custody and all other relevant criteria and not solely the level of offense." C.R.S. § 16-4-104(1)(b).

4

For electronic copies of these motions, please contact the Office of the Colorado State Public Defender.

APPENDIX 13:
Complaint for Relief Pursuant to C.R.C.P. 57 (Continued)

26. Colorado's reformed bond laws mandate that courts "[p]resume that all persons in custody are eligible for release on bond with the appropriate and least-restrictive conditions." C.R.S. § 16-4-103(4)(a).

27. The bail provision specific to county courts provides: "Any person charged with a misdemeanor or petty offense by complaint filed in the county court shall be admitted to bail or pretrial release as provided in article 4 of this code." C.R.S. § 16-2-111.

28. Article 4 of the code provides: "At the first appearance of a person in custody before any court or any person designated by the court to set bond, the court or person shall determine the type of bond and conditions of release." C.R.S. § 16-4-103(1) (emphasis added).

29. The statute is clear. Bail must be set at the "first appearance in custody" and thus with the detainee present, and not set prior to the first appearance when the detainee is not present.

30. Section 16-2-111 also provides that "[w]hen the county judge or judges are not immediately available for purposes of admission to bail or pretrial release of persons arrested and brought to the county court or jail . . . such persons may be admitted to bail or be given pretrial release by an appropriate officer *designated by court rule*." C.R.S. § 16-2-111 (emphasis added).

31. Colorado Rule of Criminal Procedure 57 sets forth a procedure for adopting local rules in criminal court. Any such local rule must be approved by the Colorado Supreme Court. Any such local rule also shall not be inconsistent with Colorado state law or its constitution.

32. In Denver County Court, magistrate judges are either "county judges" or "appropriate officers" who set bail. Regardless, there is no local rule allowing them to set bail in violation of C.R.S. § 16-4-103.

33. The Colorado Supreme Court has not approved any local rule that would permit the procedure currently employed by Defendants in Denver County Court of magistrates setting bond in chambers prior to the detainee's first appearance, without counsel or the detainee present and without argument heard.

34. The Colorado Supreme Court has not approved any local rule that would permit the procedure currently employed by Defendants in Denver County Court of magistrates setting bond based solely on the Denver Municipal Bond Schedule, without any consideration of the detainee's individual risk considerations.

The Intersection of Bond Laws and the Victim Rights Act ("VRA")

35. Under the VRA, victims have the right to be notified of and heard at any hearing involving "a bond reduction or modification." C.R.S. §§ 24-4.1-302.5(1)(d), 24-4.1-302.5(1)(b.6).

36. However, the "initial setting of a bond" "shall not constitute a bond reduction or modification." C.R.S. § 24-4.1-302(2)(a.6)(II)(A) (emphasis added).

37. If bail is properly being considered by the Court and set at the first advisement, the VRA would not apply.

38. Denver County Court's practice of setting bail before first appearance places detainees in a Catch-22. They cannot argue bail at the "initial setting" because it occurs in chambers. They cannot argue bail at the first appearance because the Court believes the defendant is requesting a "bond reduction or modification." But if the Court were to set bail at the first appearance, as required by law, no VRA issue would arise.

39. When the VRA applies, it requires that the victim be "notified," but it does not require the victim to appear at the hearing where bond is reduced or modified. C.R.S. § 24-4.1-302.5(1)(d).

40. Therefore, even when bond is to be reduced, all that is required is that the victim is notified of the hearing. The victim then can decide whether to attend or not without preventing the defendant from having the opportunity to argue for bond reduction or modification.

Background Facts

41. On May 19, 2014, Plaintiff was arrested on suspicion of three misdemeanors __________, __________, and __________.

42. The case was set for first advisement on May 20, 2014 on the 1:30 p.m. docket in courtroom [illegible] of the Denver County Court.

43. A Denver Pretrial Services Bond Advisement Report, completed on the morning of May 20, 2014, found that Mr. Defendant was eligible for an unsecured personal recognizance bond with consideration of additional non-monetary conditions of release.

44. Mr. Defendant's CPAT score was Category 2. Under the evaluative tool, he had a CPAT risk score consistent with defendants with a 75% pretrial success rate, an average public safety rate of 80%, and an average court appearance rate of 85%.

45. Some time prior to the first advisement hearing, Denver County Court Magistrate Slavin reviewed the Pretrial Services Report in chambers, without the presence or participation of Mr. Defendant or his counsel, and set bond pursuant to the Denver County Court Bond Schedule at $1,500.

46. The Denver County Bond Schedule Magistrate Slavin used to set Mr. Defendant's bond in chambers did not consider Mr. Defendant's individual characteristics and instead considered only the "level of offense."

47. As relevant here, the Denver County Court Bond Schedule sets bond for all persons accused of a Class 1 Misdemeanor at $1,500. Mr. Defendant was held on suspicion of committing a Class 1 Misdemeanor.

48. Mr. Defendant's bond was set at $1,500 by Magistrate Slavin in chambers without consideration of Mr. Defendant's individual characteristics.

The May 20, 2014 Hearing: Bond Is Set in Chambers, Without Counsel or Plaintiff Present, Without Opportunity for Argument, and Based on Improper Factors

49. At 2:30 p.m. on May 20, 2014, Magistrate Slavin called *People v. Donald Defendant*, 14M0XXXX, for First Advisement. The May 20, 2014 first advisement hearing was Mr. Defendant's first appearance before a court of record in the matter.

50. During the hearing, Magistrate Slavin announced to Mr. Defendant, "You're here to . . . have your bail set." The hearing was Mr. Defendant's "first appearance" under C.R.S. § 16-4-103.

51. But before hearing argument from Mr. Defendant's counsel, Magistrate Slavin announced, "And the court previously set bond in the amount of $1,500 with home supervision."

52. Magistrate Slavin set Mr. Defendant's bond before Mr. Defendant's first advisement hearing in chambers without Mr. Defendant or counsel present. No record was made of the in-chambers bond setting proceeding.

53. Magistrate Slavin used the Denver County Court Bond Schedule to set Mr. Defendant's bond. The Denver County Court Bond Schedule predates Colorado's reformed bond laws.

54. Counsel for Mr. Defendant requested an opportunity to present argument and evidence regarding the type of bond and conditions of release. Magistrate Slavin denied counsel for Mr. Defendant's request on the ground that Magistrate Slavin had already set bond in chambers shortly before the First Advisement hearing.

55. Magistrate Slavin refused to disclose his findings upon which he based the bond determination. Magistrate Slavin announced that he did not believe the statute required him to make findings before setting bond.

56. The Denver County Court was required to set or reconsider Mr. Defendant's bond at the May 20, 2014 hearing.

57. The VRA does not apply to the initial bond setting hearing, which occurs at the first appearance before a court of record.

58. The VRA does not apply to the first appearance hearing and, in any event, on May 20, 2014 the alleged victims were notified of the hearing. One alleged victim was present

at the May 20, 2014 hearing, and she was the mother of the other alleged victim. She approved of Mr. Defendant receiving a personal recognizance bond.

59. As of May 20, 2014, Magistrate Slavin was aware that the alleged victim agreed that Mr. Defendant should be released on a personal recognizance bond.

60. The prosecution knew that Magistrate Slavin would be setting or reconsidering bond at the May 20, 2014 hearing, and it had the duty to ensure that the alleged victims had notice that bail would be set. Mr. Defendant's right to have bond considered in open court could not be violated even if the state agencies failed to comply with the VRA.

61. The prosecution approved Magistrate Slavin's setting of bond secretly in chambers without the accused or his counsel present, even though the practice denies Mr. Defendant his right to due process.

62. Magistrate Slavin refused to permit Mr. Defendant's counsel to argue bond.

63. Magistrate Slavin violated state and federal law by setting bond in chambers prior to Mr. Defendant's first appearance.

64. Magistrate Slavin violated state and federal law by setting bond in chambers without Mr. Defendant's attorney present and without first allowing for argument.

65. Magistrate Slavin violated state and federal law by setting bond based on the outdated Denver Bond Schedule and without consideration of the detainee's CPAT score.

66. Magistrate Slavin violated state law by claiming the VRA prevented argument on bond at Mr. Defendant's first appearance.

The Denver County Court's Improper and Illegal Bail Practices Negatively Impact Detainees and the Legal System

67. The United States Supreme Court has stated: "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).

68. "Incarceration carries weighty mental and social burdens for the detained and for those closest to them. Family obligations may go unmet when defendants are detained, and jobs may be lost, both of which can cause irreparable harm to the defendant, their families, and their communities." Statement of Interest of the United States, *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC, at 12 (M.D. Ala. Feb. 13, 2015).

69. Retiring United States Attorney General Eric Holder spoke of this exact problem at length:

For electronic copies of these motions, please contact the Office of the Colorado State Public Defender.

APPENDIX 13:
Complaint for Relief Pursuant to C.R.C.P. 57 (Continued)

Denver County Court Ignores Acknowledged Best Practices

FIRST CLAIM FOR RELIEF

(Declaratory Judgment Pursuant to C.R.C.P. 57)

PRAYER FOR RELIEF

For electronic copies of these motions, please contact the Office of the Colorado State Public Defender.

APPENDIX 13:
Complaint for Relief Pursuant to C.R.C.P. 57 (Continued)

Denver, CO 80202

and

DOUGLAS K. WILSON
Colorado State Public Defender

/s/ Jud Lohnes
Jud Lohnes
COLORADO STATE PUBLIC DEFENDER
1300 Broadway, Suite 400
Denver, CO 80203

Attorneys for Plaintiff Donald D. Defendant

Plaintiff's Address:
2751 Street Street
Denver, CO 80205

13

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2015, a true and accurate copy of the foregoing **AMENDED COMPLAINT** was served on the following via ICCES:

Barry A. Schwartz
Assistant City Attorney
Office of the Denver City Attorney
201 West Colfax Avenue, Dept. No. 1108
Denver, CO 80202-5332
Barry.Schwartz@denvergov.org

/s/ Ann Arnouvich

Pursuant to C.R.C.P. 121, Section 1-26, a printed copy of this document with original signatures will be maintained by Reilly Pozner LLP and made available for inspection upon request.

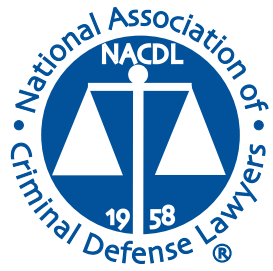
14

For electronic copies of these motions, please contact the Office of the Colorado State Public Defender.

Notes

"...Through most of the United States today the bail system is a cruel and illogical institution which perpetuates injustice in the name of the law. In actual practice, control is frequently in the hands of bondsmen rather than the courts. The system is subject to widespread abuse. It involves the wholesale restriction of freedom, impairment of the defendant's chances at trial and millions in needless detention costs at all levels of government. . . . I am hopeful that with your leadership, and that of others like you throughout the nation we can move ahead without delay. Until we have improved the administration of justice, until our laws bear evenly on all, rich and poor alike, we cannot be satisfied that we have achieved the American dream."

Address by Attorney General Robert F. Kennedy
to the Academy of Trial Lawyers of
Allegheny County, June 1, 1964



NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

1660 L Street NW, 12th Floor
Washington, DC 20036
Phone: 202-872-8600
www.nacdl.org

THE NEW JERSEY PRETRIAL JUSTICE MANUAL

DECEMBER 2016

ACLU
AMERICAN CIVIL LIBERTIES UNION of NEW JERSEY

National Association of Criminal Defense Lawyers
NACDL
19 58

NEW JERSEY
EQUAL JUSTICE FOR ALL
ESTABLISHED 1967
PUBLIC DEFENDER

American Civil Liberties Union of New Jersey
National Association of Criminal Defense Lawyers (NACDL)
State of New Jersey Office of the Public Defender

This project was supported by Grant No. 2013-DB-BX-K015 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. Points of view or opinions in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

ACKNOWLEDGEMENTS

The authors wish to thank the following individuals and organizations for their support in this project: The New Jersey Office of the Public Defender, in particular Public Defender Joseph Krakora and Training Director Jennifer Sellitti, for their valuable feedback during the drafting stages; the New Jersey Administrative Office of the Courts for their responsiveness to requests for information about court rules and pretrial risk assessment procedures; and Dr. Marie VanNostrand of Luminosity, Inc. for sharing information about the PSA tool.

Some sections of this manual were taken directly from The Colorado Bail Book, NACDL's first pretrial release manual. The authors wish to thank all those involved in the production of the Colorado Bail Book for their efforts, which created a template to follow in all future manuals.

Finally, the authors wish to thank Ivan Dominguez and Quintin Chatman of NACDL for their assistance in editing this manual; NACDL Art Director Cathy Zlomek and her staff for their expertise in preparing this manual for publication; Edward C. Monahan and B. Scott West for their groundbreaking work in developing the Kentucky Pretrial Release Manual and sharing their information with the defense bar nationwide; the Bureau of Justice Assistance for supporting this project; Pretrial Justice Institute for their continued support and assistance in this project; NACDL's leadership and Board of Directors for their enduring commitment to public defense reform and training; and the ACLU of New Jersey for its commitment to ending mass incarceration by fixing our broken bail system.

The American Civil Liberties Union of New Jersey, the National Association of Criminal Defense Lawyers, and the New Jersey Office of the Public Defender have joined together to craft this manual, The New Jersey Pretrial Justice Manual, in an effort to support New Jersey attorneys as they work to end pretrial injustice in the state. It is our hope that all defenders, both public and private, use this resource to aggressively and consistently challenge the pretrial system that punishes the accused before conviction, forces guilty pleas to obtain release, and incarcerates the poor simply because they cannot afford to post a money bond.

We have attempted to be as comprehensive as possible, outlining both law and research while providing practical pointers for the courtroom lawyer. We encourage all to use our work to give voice to the incarcerated accused, who deserve dedicated and robust legal representation from the moment they are deprived of their liberty.

Alexander Shalom
Senior Staff Attorney
American Civil Liberties Union of New Jersey

Colette Tvedt
Director of Public Defense Training and Reform
National Association of Criminal Defense Lawyers

Joseph E. Krakora
Public Defender
State of New Jersey Office of the Public Defender

Diane DePietropaolo Price
Public Defense Training Manager
National Association of Criminal Defense Lawyers

CONTENTS

Table of Appendices

"In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."

Salerno v. United States
481 U.S. 739, 755 (1987)

"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 . . . because they simply cannot afford to post the bail required."

Former U.S. Attorney General Eric Holder
at the National Symposium on Pretrial Justice, June 1, 2011

"Research during the past half century has clearly and consistently demonstrated that being incarcerated before trial can have significant consequences: defendants detained in jail while awaiting trial (1) plead guilty more often; (2) are convicted more often; (3) are sentenced to prison more often; and (4) receive harsher prison sentences than those who are released during the pretrial period."

Report of the New Jersey Joint Committee on Criminal Justice
March 10, 2014

INTRODUCTION

Pretrial detention causes lost employment and housing, disruption in education, and damage to family relationships. Defendants detained in jail awaiting trial plead guilty more often, are convicted more often, are sentenced to prison more often, and receive harsher prison sentences than those who are released during the pretrial period.[1] Avoiding unnecessary pretrial confinement should be of paramount importance to every court system. Moreover, courts must move away from reliance on money bail set through an arbitrary schedule and instead make individualized determinations about who will return to court when required. Having money to post bond is not a predictor of compliance with court requirements.

Obtaining pretrial release is an essential part of the promise of *Gideon* that defense lawyers are committed to provide.

Obtaining pretrial release is an essential part of the promise of *Gideon* that defense lawyers are committed to provide. This Manual is designed to give practitioners the guidance needed to achieve pretrial release for clients. It tells the story of how New Jersey came to reform its system of pretrial release and detention. It also presents the new risk assessment instrument and a decision making framework, which courts will be using to determine whether, and under what conditions, to release the accused pretrial. Because litigating pretrial release has such a critical impact on outcomes in criminal cases, the Manual provides a series of tools for litigating pretrial release, including: the initial client interview, taking advantage of the risk assessments, understanding the new statutes and applicable constitutional protections, and utilizing New Jersey case law on pretrial release. The Manual also provides advice for how to advocate on behalf of a client at both detention hearings and hearings designed to set conditions of release, before turning to a discussion of some problem areas, such as onerous conditions of release, costs of supervision, and the rights of domestic violence victims to receive notice of change of conditions. Finally, the Manual reviews the steps a practitioner must take to appeal an adverse determination regarding release conditions or detention.

1. Pretrial Justice Institute (PJI), Effective Pretrial Justice Communication, Guidelines for Champions & Spokespeople (2014), *available at* https://www.pretrial.org/download/pji-reports/Communication%20Guidelines%20(October%202014).pdf.

On a single day more than 5,000 people in New Jersey jails were able to be released on bail, but remained in custody simply because they lacked resources to post bail.

THE NEW JERSEY STORY

In March 2013, the Drug Policy Alliance released a study that confirmed what many defenders have known for a long time: New Jersey's jails are filled with low risk pretrial detainees who sit in jail simply because they lack small amounts of money necessary to secure release.[2] Specifically, the study revealed that on a single day more than 5,000 people in New Jersey jails were able to be released on bail, but remained in custody simply because they lacked resources to post bail.[3] The report also showed the disparate impact on minorities: 71% of the population in New Jersey jails was composed of blacks and Latinos. Of the total population, 38% were held solely due to their inability to meet the conditions of the bail set for them. And 12% of the population (more than 1,500 people) were held because of their inability to pay $2,500 or less.[4] The average length of stay in jail pending trial was about 10 months.[5]

Inspired by that report, among other things, in the summer of 2013 New Jersey Supreme Court Chief Justice Stuart Rabner established and chaired a special committee of the Supreme Court, the Joint Committee on Criminal Justice (JCCJ), which included the Attorney General, the Public Defender, private attorneys, judges, court administrators, and representatives of the Legislature and the Governor's Office.[6] The JCCJ was tasked with examining issues relating to bail and speedy trial to determine if reforms were needed. Drawing on data from the Administrative Office of the Courts, the JCCJ determined that "the average (median) length of stay for pretrial detainees is between 60-90 days,"[7] and that the average daily cost of housing a single inmate is approximately $100.[8] Meanwhile, New Jersey's resource-based bail system, in which defendants must pay for their release, risks a "dual system error," in that it leads to a system in which poor defendants who pose little risk to the community are unable to be released because they cannot pay for their release, while more dangerous individuals who have substantial resources are able to be freed.[9] After a period of study of New Jersey's existing system as well as systems that had implemented risk-based pretrial practices, the Committee concluded that reducing the number of pretrial detainees through the use of a risk-based approach could lead to substantial cost savings, as well as a "society that is freer, fairer and safer."[10]

---

2. Marie VanNostrand, New Jersey Jail Population Analysis (March 2013), *available at* https://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf.
3. *Id.* at 13.
4. *Id.*
5. *Id.* at 14 ("As of the day the jail snapshot was taken, inmates who had been indicted but had not yet had a trial had been in custody on average 314 days.").
6. Hon. Glenn A. Grant, Criminal Justice Reform, Report to the Legislature, Jan. 1, 2015 — Dec. 31, 2015, *available at* http://www.judiciary.state.nj.us/criminal/cjr/Criminal_Justice_Reform_Report_to_the_Legislature_12_01_15.pdf.
7. Note that this average is skewed downward by people who are arrested, jailed, and almost immediately released. As noted above, among people who are indicted, the average amount of time in jail was 314 days.
8. Report of the Joint Committee on Criminal Justice (March 2014) [hereinafter JCCJ 2014 Report] at 12, *available at* https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf.
9. *Id.* at 26.
10. *Id.* at 12.

The JCCJ ultimately recommended significant changes to the criminal justice system. The recommendations, memorialized in a March 2014 report, "represented the most comprehensive set of proposed reforms to the state's criminal justice system since the adoption of the 1947 constitution."[11] Specifically, the JCCJ recommended a shift from the resource-based system of pretrial detention and release to a risk-based system, the creation of a system of pretrial supervision, the ability to utilize preventive detention in rare circumstances where *no condition* or set of conditions could adequately protect the public and ensure that a defendant would appear in court, and the enactment of a statutory speedy trial scheme.[12]

Building on the JCCJ Report, in the summer of 2014 the Legislature passed and the Governor signed groundbreaking pretrial justice and speedy trial legislation that adopts many of the recommendations of the JCCJ, which is scheduled to take effect on January 1, 2017. In November 2014, New Jersey voters approved a constitutional amendment, also scheduled to take effect on January 1, 2017, to allow certain defendants to be detained pretrial without bail. The new law will require defenders to familiarize themselves with a totally new scheme in order to ensure that their clients are not unnecessarily detained or subjected to onerous conditions of release.

Switching from a system based solely on instinct and experience (often referred to as "gut instinct") to one in which judges have access to scientific, objective risk assessment tools could further the criminal justice system's central goals of increasing public safety, reducing crime, and making the most effective, fair, and efficient use of public resources.

Risk Assessment and Release/Detention Decision Making in New Jersey

The use of data, analytics, and technology has had a significant effect on the criminal justice system. Substantial research has led to the development of pretrial risk assessment instruments that assess the factors that correlate to successful pretrial release. Switching from a system based solely on instinct and experience (often referred to as "gut instinct") to one in which judges have access to scientific, objective risk assessment tools could further the criminal justice system's central goals of increasing public safety, reducing crime, and making the most effective, fair, and efficient use of public resources.[13] Defendants who do not threaten public safety and are predicted to appear for scheduled court dates should not remain in jail simply because they cannot afford bail. Jurisdictions such as Kentucky that have been successfully using risk assessment tools have seen the numbers of pretrial detainees lowered while public safety and court appearances have remained constant.[14]

11. *Id.* at 1.
12. *Id.* at 9.
13. Laura and John Arnold Foundation (LJAF), Developing a National Model for Pretrial Risk Assessment (2013), *available at* http://ncja.org/sites/default/files/documents/LJAF-Developing-a-National-Model.pdf.
14. Pretrial Services Administrative Office of the Courts Kentucky Court of Justice, Pretrial Reform In Kentucky (Jan. 2013) ("pretrial jail populations have decreased by 279 people, while appearance and public safety rates have remained consistent.") *available at* http://www.pretrial.org/download/infostop/Pretrial%20Reform%20in%20Kentucky%20Implementation%20Guide%202013.pdf.

The LJAF's risk assessment tool is unique for two reasons: first, it predicts risk on three axes (risk of failure to appear, risk of new criminal activity, and risk of new violent criminal activity) and second, it does so without the need for a client interview.

As required under the new law, the Judiciary sought to implement a comprehensive, evidence based risk assessment tool. To this end, the Judiciary partnered with the Laura and John Arnold Foundation ("LJAF") to adapt the Public Safety Assessment (PSA), a risk assessment instrument tool that was validated using more than 750,000 cases in other jurisdictions and then retrospectively studied and validated for use in New Jersey.

The LJAF's risk assessment tool is unique for two reasons: first, it predicts risk on three axes (risk of failure to appear, risk of new criminal activity, and risk of new violent criminal activity) and second, it does so without the need for a client interview. Using information drawn from court records only, the PSA provides scores for defendants, predicting their risk of non-appearance and recidivism and identifying defendants who pose heightened risks of committing new, violent offenses. But the scoring of the risk assessment is just the first step in the process of securing a client's pretrial release. Regardless of the individual score, defenders should be prepared to argue the individual circumstances of the defendant. ***Defense attorneys should review the report, assess its accuracy, and be prepared to rely on the instrument or distinguish the client's situation, as appropriate.*** If the defendant scores as low or moderate risk, defenders should be prepared to argue why the score is appropriate for the client. If the defendant scores as high risk, defenders should review the factors to determine whether there are explanations for the adverse factors that would support the client's release despite the high score.

In order to advocate for a client's release, defenders must understand how the PSA functions. The PSA contains nine risk factors[15] that provide three pretrial failure indicators. The PSA draws on objective data available in the court's computer systems and therefore does not require the interview of a defendant. The PSA provides separate scores regarding defendants' risk of: **failure to appear** (using a six point scale), **new criminal activity** (using a six point scale), and **new violent criminal activity** (using a flag to indicate an elevated risk of violence).

15. There is a national debate among defense lawyers and pretrial researchers regarding whether some of these factors may have a disparate racial impact, since many of the factors are impacted by socio-economic status, which may disadvantage minority communities that are, on average, poorer than white communities. These factors may change over time as research develops. Nonetheless, many pretrial risk tools have been empirically tested to ensure they do not overestimate pretrial risk based on race or ethnicity. The PSA was found not to be biased based on race or ethnicity. Should this change, New Jersey courts will be prepared to address the issue. While the United States Supreme Court accepted that "disparities in sentencing are an inevitable part of our criminal justice system[,]" *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987), "New Jersey's history and traditions would never countenance racial disparity in capital sentencing. As a people, we are uniquely committed to the elimination of racial discrimination." *State v. Marshall*, 130 N.J. 109, 207 (1992). Though it has only addressed race disparity in the capital context, the New Jersey Supreme Court has experience in evaluating complex statistical models to confront race bias. *See In re Proportionality Review Project*, 161 N.J. 71 (1999); *In re Proportionality Review Project (ii)*, 165 N.J. 206 (2000).

The risk factors that the PSA draws from are:

1. age at current arrest;
2. current violent offense;
   - 2a. current violent offense and 20 years old or younger;
3. pending charge at the time of the offense;
4. prior disorderly persons conviction (does not include ordinance violations or petty disorderly persons offenses);
5. prior indictable convictions (degrees one to four)
   - 5a. prior conviction;
6. prior violent conviction;
7. prior failure to appear at a pre-disposition court date in the last two years (does not include ordinance violations, traffic offenses, or petty disorderly persons offenses);
8. prior failure to appear at a pre-disposition court date more than two years ago (does not include ordinance violations, traffic offenses, or petty disorderly persons offenses); and
9. prior sentence to incarceration (only sentences of 14 days or more).

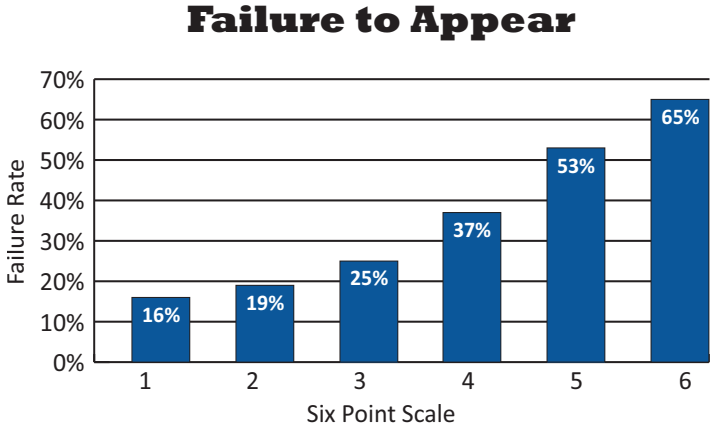
Of course, not every risk factor impacts each of the PSA scores — nor does every factor impact each score to the same extent. The weighting and scoring for the PSA and the corresponding decision making framework are explained below.

Failure to Appear

FTA Score Conversion

Raw Score	Six Point Scale
0	1
1	2
2	3
3-4	4
5-6	5
7	6

To calculate the risk of Failure to Appear (FTA), the PSA considers four factors: 1) if the defendant has a pending charge at the time of the offense he receives one point; 2) a prior conviction adds another point; 3) if the defendant failed to appear more than two years ago an additional point is added; 4) recent failures to appear — within two years — add two points if there is one and four points if there are two or more.[16] The defendant's raw score, which will be between zero and seven, is then converted into a six point scale as shown in the chart.[17]



Each point on the six point FTA scale corresponds to a different failure rate as shown in the chart below. A defendant who scores a one has, statistically, a 16% chance of failing to appear for his or her court date. A score of two corresponds

16. LJAF, Public Safety Assessment: Risk Factors and Formula, at 3, *available at* http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf [hereinafter Risk Factors and Formula].
17. *Id.* at 4.
18. Marie VanNostrand, Introduction to the Public Safety Assessment and Decision Making Framework: New Jersey, at 24 (on file with the authors) [hereinafter Introduction to PSA and DMF].

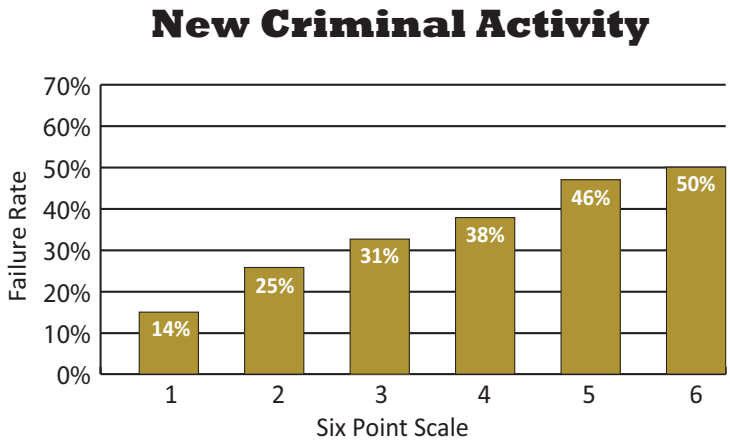
to a failure to appear rate of 19%; a score of three yields a 25% failure rate; four reflects a 37% failure rate; a defendant with a score of five has a predicted failure rate of 53%; and a defendant at the top of the scale, with six points, corresponds to a 65% failure rate.[18]

New Criminal Activity

NCA Score Conversion

Raw Score	Six Point Scale
0	1
1-2	2
3-4	3
5-6	4
7-8	5
9-13	6

To calculate the risk that a defendant will commit new criminal activity (NCA) while on release, the PSA examines seven factors: 1) if the defendant is 22 or younger he receives two points; 2) a pending charge adds three points; 3) any prior disorderly persons offense convictions add a total of one point; 4) any prior convictions for indictable offenses add a total of one point; 5) if the defendant has been convicted of a violent crime on one or two occasions another point is added; if there are three or more convictions for crimes of violence, two points are added; 6) if the defendant failed to appear in the last two years one point is added; if the defendant failed to appear more than once, two points are added; 7) if the defendant has previously been sentenced to a term of incarceration, two points are added.[19] The defendant then has a raw score of between zero and thirteen converted to a six point scale as shown in the chart.[20]



There are also failure rates associated with each point on the six point New Criminal Activity (NCA) scale. The failure rate in the NCA scale corresponds to the likelihood that the individual, if released, will be arrested for a new crime while the current case is pending. A score of one reflects a 14% chance that the defendant will be re-arrested; a score of two corresponds with a 25% failure rate; three reflects a 31% failure rate; four yields a 38% chance of new criminal activity; a defendant who scores a five has a 46% failure rate; when a defendant scores a six, the PSA predicts a 50% chance of criminal recidivism while on pretrial release.[21]

New Violent Criminal Activity

The PSA flags defendants as posing an elevated risk of New Violent Criminal Activity (NVCA) during the pretrial release period in approximately 11% of cases in which the defendant is released. To calculate the NVCA score, the PSA examines five factors: 1) a defendant receives two points if the current offense is a violent one; 2) a defendant receives an additional point if the current offense is violent and the defendant is under 21; 3) an additional point is given when the defendant has pending charges; 4) a prior conviction adds a point; and 5) if the defendant has one or two prior violent convictions he receives one point; if he has three or more he receives two points.[22] If the raw score is between four and seven he receives an NVCA flag.[23] This flag, which will be based on both the nature of prior criminal convictions and the current charge, will make release less likely. Those clients who are released after receiving a flag will be released under more onerous conditions.

19. Risk Factors and Formula at 3.
20. *Id.* at 4.
21. Introduction to PSA and DMF at 25.
22. Risk Factors and Formula at 3.

The Decision Making Framework

The PSA scores are only the beginning of the decision making process regarding pretrial release. While the PSA measures risk, New Jersey will also use a Decision Making Framework (DMF) to help manage that risk. The DMF produces a recommendation for a judge about conditions of release or detention. The ultimate decision about release or detention is held by judges, and therefore defense attorneys must concern themselves with convincing judges to release their clients on the least onerous condition or series of conditions.

Using the DMF as a recommendation, courts assign defendants different levels of supervision, referred to as Pretrial Monitoring Levels (PML). A defendant released ROR will have no conditions, no face-to-face contact with a pretrial services officer, and no phone contact with the officer. At PML 1, there is only monthly phone reporting. At PML 2, defendants must report once a month in person, once a month by telephone, and be subject to some monitored conditions such as a curfew. At PML 3, defendants are monitored in person or by phone every week and are also subject to monitored conditions. Defendants at the next level, PML 3 plus electronic monitoring or home detention, are subject to all the same conditions but also may be confined to their home or required to wear a GPS monitoring device. Finally, if release is not recommended, the DMF suggests that the defendant should be detained pretrial or, if release is allowed, ordered released on PML 3 with electronic monitoring or home detention.[24]

The DMF is a four step process. First, the court[25] completes the PSA to produce scores for FTA and NCA

Regardless of the risk assessment score or recommended release outcome, defense counsel should use the statistics regarding public safety rates and court appearance rates to the client's advantage.

and a flag for NVCA. Second, the court determines whether any of the circumstances or charges are present which, in a majority of cases, would produce a recommendation of preventive detention, regardless of PSA score. Such a recommendation exists if the defendant is charged with escape, murder, aggravated manslaughter, manslaughter, aggravated sexual assault, sexual assault, robbery in the 1st degree, or carjacking.[26] It also exists where the PSA resulted in an NVCA flag and the current offense is a violent one.[27] In the event that any of these conditions exist, release is not recommended or, if released, it is recommended that the defendant be released on the most restrictive conditions. If none of the conditions exists, the court proceeds to step three. In the third step, the court applies the FTA and NCA scaled scores to a DMF matrix to determine a risk level and a preliminary recommendation.

23. *Id.* at 4.
24. Introduction to PSA and DMF at 29.
25. In the DMF, various entities, such as pretrial services, complete various tasks. Ultimately all the steps are completed on behalf of the court, so in the section we refer to the DMF steps as being undertaken by the court regardless of who completes them.
26. N.J.S.A. 2C:29-5a; N.J.S.A. 2C:11-3; N.J.S.A. 2C:11-4; N.J.S.A. 2C:14-2a; N.J.S.A. 2C:14-2b; N.J.S.A. 2C:14-2c(1); N.J.S.A. 2C:15-1; N.J.S.A. 2C:15-2.
27. Introduction to PSA and DMF at 31.

	NCA 1	NCA 2	NCA 3	NCA 4	NCA 5	NCA 6
FTA 1	ROR 11.8% of population	ROR 7.7% of population				
FTA 2	ROR 0.5% of population	ROR 6.9% of population	PML 1 11.7% of population	PML 2 6.4% of population	PML 3 0.1% of population	
FTA 3		PML 1 2.0% of population	PML 1 8.8% of population	PML 2 6.0% of population	PML 3 2.9% of population	**Release Not Recommended** 0.5% of population
FTA 4		PML 1 0.6% of population	PML 1 1.5% of population	PML 2 3.5% of population	PML 3 4.8% of population	**Release Not Recommended** 0.9% of population
FTA 5		PML 2 0.0% of population	PML 2 0.4% of population	PML 3 2.0% of population	PML 3 + EM/HD 2.4% of population	**Release Not Recommended** 1.5% of population
FTA 6				**Release Not Recommended** 0.1% of population	**Release Not Recommended** 0.3% of population	**Release Not Recommended** 1.8% of population

Marie VanNostrand, Introduction to the Public Safety Assessment and Decision Making Framework: New Jersey (on file with the authors). Reformatted for this report.

Fourth, the court determines whether the defendant is charged with a No Early Release Act (NERA) crime not addressed in step three. If so, the level of recommended conditions increases one level (from ROR to release with PML 1; from PML 1 to PML 2 and so forth). If not, the preliminary recommendation is the final recommendation.[28]

Regardless of the risk assessment score or recommended release outcome, defense counsel should use the statistics regarding public safety rates and court appearance rates to the client's advantage. Explaining to a judge that an individual who scores two out of six on each scale has an 81% chance of returning to court and a 75% chance of staying out of trouble is more effective than simply pointing out the defendant's PSA scores. For example, if a client scores a three on the Failure to Appear scale, defense counsel should argue, "Based on Mr. Smith's PSA score alone, he has a predicted 75% court appearance rate." That sounds more persuasive than saying "Your honor, even though Mr. Smith scored a three, which is a moderate risk level, the court appearance rate for that category is 75%."

But as should be plainly apparent, the factors used to arrive at the PSA risk scores are derived from limited sources. Where the PSA relies exclusively on administrative data such as the charge, the defendant's criminal history, and the defendant's court appearance history, defense attorneys must present courts with a host of other information that might convince a judge that a defendant's PSA scores do not reflect the true extent of the defendant's risk (or lack thereof). Note that just as defenders will argue that facts not contained in the PSA should be considered to support their clients' release, prosecutors may argue that factors not contemplated by the PSA, such as petty disorderly persons convictions, ordinance violations, juvenile adjudications, and FTAs for those court events, counsel against release.

The new statutes grant strong deference to the recommendations of the Pretrial Services Program, and judges may depart from the recommendation, but have to explain their reasons for doing so.[29] Later sections of this Manual provide guidance for defense attorneys about getting appropriate information from their clients and presenting that information persuasively to the court.

28. *Id.* at 34.

29. N.J.S.A. 2A:162-23 provides, "If the court enters an order that is contrary to a recommendation made in a risk assessment when determining a method of release or setting release conditions, the court shall provide an explanation in the document that authorizes the eligible defendant's release." Judges may be hesitant, therefore, to depart from Pretrial Services recommendations, either due to fear of being held responsible for a defendant's misconduct if they release on lesser conditions than recommended, or desire to avoid additional paperwork.

SECTION 1: THE IMPORTANCE OF LITIGATING PRETRIAL RELEASE

Why Litigate Pretrial Release? Because it Affects Both Short-Term and Long-Term Outcomes for the Client

The importance of helping clients achieve pretrial release cannot be overstated. Not only is such advocacy required by professional standards,[30] but the impact of pretrial incarceration on a client is substantial. Social science research demonstrates that persons who are released have better outcomes than those who stay in jail pending resolution of their cases.

Clients who stay in jail pending trial get longer sentences.

A study using data from state courts found that defendants who were detained for the entire pretrial period were over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who were released at some point pending trial.[31] And their sentences were significantly longer — almost three times as long for defendants sentenced to jail, and more than twice as long for those sentenced to prison. A separate study found similar results in the federal system.[32]

> **"The existing bail system is not fair to poor defendants who, because they cannot post bail, are cut off from families, may lose their jobs, and may go without access to medication for a period of time. In terms of the charges against them, studies have shown that they face tougher plea offers and pressure to plead guilty because of the amount of time they have already spent in jail, and they receive longer sentences as compared to similarly situated defendants who were able to make bail."**
>
> ***Chief Justice Stuart Rabner***

Clients who stay in jail pending trial are at greater risk to recidivate in both the short term and the long term.

Jail makes people worse, even short stays. Using statewide data from Kentucky, a study conducted by the Laura and John Arnold Foundation (LJAF) uncovered strong correlations between the length of time low and moderate risk defendants were detained before trial and the likelihood that they would re-offend in both the short term and the long term. Even for relatively short periods behind bars, low and moderate risk defendants who were detained for more days were more likely to commit additional crimes in the pretrial period — and were also more likely to do so during the two years after their cases ended.[33]

---

30. *See* Nat'l Legal Aid and Defender Ass'n (NLADA) Standards 2.1 and 2.3, ABA Defense Function Standard 4-3.6, and New Jersey Rule of Prof'l Conduct 1.1(a).

31. *See* LJAF, *Pretrial Criminal Justice Research Summary* (2013), *available at* **http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf**.

32. *Id.*

33. Christopher T. Lowenkamp et al., LJAF, The Hidden Costs of Pretrial Detention 4 (2013), *available at*: **http://www.pretrial.org/download/research/The%20Hidden%20Costs%20of%20Pretrial%20Detention%20-%20LJAF%202013.pdf**.

Even for relatively short periods behind bars, low and moderate risk defendants who were detained for more days were more likely to commit additional crimes in the pretrial period — and were also more likely to do so during the two years after their cases ended.

Lawyers Make a Significant Difference at Pretrial Release Hearings

Research shows that counsel at the initial appearance before a judge or magistrate not only increases the accused's chances for release but also his or her sense of fairness about the process. A defendant with a lawyer at first appearance:

- ★ Is 2 ½ times more likely to be released on recognizance;
- ★ Is 4 ½ times more likely to have the amount of bail significantly reduced;
- ★ Serves less time in jail (median reduction from 9 days jailed to 2, saving county jail resources while preserving the client's liberty interests); and
- ★ More likely feels that he is treated fairly by the system.[34]

34. Kentucky Department of Public Advocacy, Kentucky Pretrial Release Manual (Jun. 2013) at 6 (citing Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail*, 23 Cardozo L. Rev. 1719 (2002)).

SECTION 2: TOOLS FOR LITIGATING PRETRIAL RELEASE

There are **FIVE MAJOR TOOLS** that every defense attorney must use when advocating for a client's pretrial release:

1. A thorough knowledge of the client gathered from a detailed initial interview;
2. Awareness of any risk assessment tools used in the specific jurisdiction;
3. An in-depth comprehension of the New Jersey pretrial release statutes;
4. Familiarity with United States and New Jersey Constitutional provisions regarding pretrial justice; and
5. An understanding of New Jersey case law regarding pretrial release.

The sections that follow contain an overview of each of these tools.

Tool #1: Initial Client Interview

A thorough knowledge of the client and his background is the most important tool that a lawyer possesses when litigating for release. Conducting a detailed initial interview gives the attorney the information needed to advocate fully and builds client confidence from the first meeting. Sample interviews forms that are easy to use and will obtain the necessary information are provided in Appendices 1 and 2. Note that the risk assessment scores in New Jersey rely exclusively on criminal justice data, not on interviews of defendants. The information that a defense attorney can learn in an interview may be a rich source of material that can be used to convince a judge to release a defendant who the judge would otherwise detain.

The National Legal Aid and Defender Association (NLADA) suggests that defense counsel should get the following information during his initial interview with the client:

2.2 NLADA: Initial Interview[35]

(A) Preparation: Prior to conducting the initial interview the attorney should, where possible:

(1) be familiar with the elements of the offense and the potential punishment, where the charges against the client are already known;

(2) obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by bail agencies concerning pretrial release, and law enforcement reports that might be available;

35. National Legal Aid and Defender Association, Performance Guidelines for Criminal Defense Representation, Guideline 2.2.

(3) be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;

Be prepared to conduct an interview with your client that addresses the risk assessment factors and be prepared to argue for ROR or release on the least restrictive conditions. Have the data available to argue probable success rates.

(4) be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release;

(5) be familiar with any procedures available for reviewing the trial judge's setting of bail.

(B) The Interview:

(1) The purpose of the initial interview is both to acquire information from the client concerning pretrial release and also to provide the client with information concerning the case. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome.

(2) Information that should be acquired includes, but is not limited to:

(a) the client's ties to the community, including the length of time he or she has lived at the current and former addresses, family relationships, immigration status (if applicable), employment record and history;

Get specific information from the client: names and ages of children and step children; addresses; telephone numbers; name and location of employer, and name and number of supervisor; whether client is receiving Social Security benefits, housing benefits, etc.

(b) the client's physical and mental health, educational and armed services records;

For physical and mental health: get dates, names of mental health treatment facilities and doctors. For military service: get branch, dates of active service, any injuries, any medication, and type of discharge. For education: ask about special schools and classes, individualized education plans (IEPs), instances where the client was held back in school, and other indicators of developmental or mental health issues. For all: get signed releases.

(c) the client's immediate medical needs;

Ask about type and dosage of medication; length of time client has been taking the medication; and names and addresses of doctors, therapists, or social workers. Additionally, it may be useful to learn about past health history including any significant injuries, operations, overnight hospital stays, or head trauma.

(d) the client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether he or she is on probation or parole and the client's past or present performance under supervision;

Ask for an NCIC report prior to the client interview; if not available ask client detailed, specific questions about their prior criminal history including nature of charges, disposition, FTAs, probation violations, parole violations, and any reasons for non-compliance.

(e) the ability of the client to meet any financial conditions of release;

Ask about child support obligations, rent or mortgage, family support, education payments, and any other financial obligations.

(f) the names of individuals or other sources that counsel can contact to verify the information provided by the client; counsel should obtain the permission of the client before contacting these individuals [...]

Names, addresses, emails, cell phone numbers. Get client's permission to talk to them and discuss what information about the criminal case can be shared before calling.

In addition to the client's social factors, attorneys should attempt to get a workable understanding of the client's version of events as early as possible in order to appropriately advocate for release. Defense counsel should always strive to conduct this initial interview with his client in a private, confidential space. Consider the ABA *Ten Principles of a Public Defense Delivery System*, Principle 4:

#4: Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

Commentary: Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.

Although the ABA commentary only addresses interviewing the client before a preliminary hearing or trial, it is equally essential to interview the client prior to the release hearing or any detention hearing. Defenders must ensure that they have ample confidential time and space to meet with the client during the initial interview. It is NOT appropriate to interview the client in the courtroom or lockup area surrounded by civilians, prosecutors, law enforcement agents, or other defendants.

See Appendix 3: ABA Ten Principles of a Public Defense Delivery System

Tool #2: Risk Assessment Instruments

The Risk Assessment Instrument in use in New Jersey was discussed in depth at the beginning of this Manual. Refer back to "The New Jersey Story" section of this Manual for a thorough discussion of the PSA. Defense attorneys should always be aware of their clients' scores on the PSA and be prepared to address them. If the scores indicate the defendant is low- or medium-risk, defenders should use that information as leverage to argue for ROR or release on conditions. If the score indicates that the client is high-risk, defenders must be prepared to counter those risk factors based on information gleaned from the client interview and be ready to suggest appropriate conditions of release that address the client's specific risk factors.

Tool #3: New Jersey Statutes

Summary of New Jersey Pretrial Release Statutes

New Jersey's new pretrial release statutes, N.J.S.A. 2A:162-15 et seq., are designed to be "liberally construed to effectuate the purpose of primarily relying upon pretrial release by non-monetary means to" achieve the three purposes of pretrial release: ensuring defendants' appearance in court; protecting the safety of any other person or the community; and preventing defendants from obstructing or attempting to obstruct the criminal justice process.[36] Throughout this Manual these purposes will be referred to as the goals of the pretrial release law. This section contains an overview of what the new statutes accomplish and is followed by a detailed explanation of the provisions of each new statute.

36. N.J.S.A. 2A:162-15.

As a last resort, the court may detain a defendant without bail, upon a motion of the prosecutor and after a hearing.

Process

The statute calls for every defendant who is charged following the issuance of a complaint-warrant — that is, every defendant who is not initially released on his own recognizance — to be temporarily detained to allow the preparation of "a risk assessment with recommendations on conditions of release . . . and for the court to issue a pretrial release decision."[37] The statute requires that this initial decision occur within 48 hours, but the Judiciary aims to conduct risk assessments within 24 hours.

Once a risk assessment has been conducted, the statute requires a court to consider the assessment "*and any information that may be provided by a prosecutor or the . . . defendant*" in reaching its decision regarding whether the defendant should be detained or released and, if released, on what conditions.[38] The statute provides a hierarchy for making such decisions, favoring release on the least restrictive conditions that are appropriate for the individual. Ideally, defendants should be released on their own recognizance or on execution of an unsecured appearance bond. If a release without conditions does not sufficiently achieve the goals of the pretrial release law, a defendant may be released on the least restrictive non-monetary condition or combination of conditions. If non-monetary conditions fail to ensure the defendant's presence, the court may set a monetary bail. As a last resort, the court may detain a defendant without bail, upon a motion of the prosecutor and after a hearing.

Release

Courts are authorized to release defendants on any condition that achieves the purposes of the pretrial release law (ensuring a defendant's presence in court, protection of the public, and prevention of obstruction of justice).[39] But, certain conditions can be expected to be imposed in virtually every case:

(A) the defendant shall not commit any offense during the period of release;

(B) the defendant shall avoid all contact with an alleged victim of the crime; and

(C) the defendant shall avoid all contact with all witnesses who may testify concerning the offense that are named in the document authorizing the eligible defendant's release or in a subsequent court order.[40]

37. N.J.S.A. 2A:162-16.
38. *Id.* (emphasis added).
39. N.J.S.A. 2A:162-17b(2).
40. N.J.S.A. 2A:162-17b(1).

Additional conditions that may be imposed when necessary include:

(A) abide by specified restrictions on personal associations, place of abode, or travel;

(B) report on a regular basis to a designated law enforcement agency, or other agency, or pretrial services program;

(C) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(D) comply with a specified curfew;

(E) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner;

(F) be placed in a pretrial home supervision capacity with or without the use of an approved electronic monitoring device;

(G) remain in the custody of a designated person, who agrees to assume supervision of the defendant;

(H) maintain employment, or, if unemployed, actively seek employment;

(I) maintain or commence an educational program;

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

(K) return to custody for specified hours following release for employment, schooling, or other limited purposes.[41]

Where a court orders that a defendant be subject to electronic monitoring, it may order that the defendant pay some or all of the costs of the monitoring, but the court is also authorized to waive the payment for an indigent defendant who has demonstrated an inability to pay all or a portion of the costs.

There also exists a catch-all condition, authorizing courts to place any other condition on the pretrial release of a defendant that achieves the purposes of the pretrial release law. It bears repeating that the condition or combination of conditions must be the least restrictive condition or combination of conditions that the court determines will reasonably achieve the purposes of the law.[42]

Where a court orders that a defendant be subject to electronic monitoring, it may order that the defendant pay some or all of the costs of the monitoring, but the court is also authorized to waive the payment for an indigent defendant who has demonstrated an inability to pay all or a portion of the costs.[43]

41. N.J.S.A. 2A:162-17b(2) (Note that conditions (g)-(k), while statutorily permitted, are discouraged by the judiciary because of the cost of enforcement. Additionally, condition (f) should be reserved for high-risk defendants.).

42. N.J.S.A. 2A:162-17b(2)(l).

43. N.J.S.A. 2A:162-17b(2)(k).

Courts are authorized to impose monetary bail ***only where non-monetary conditions are insufficient*** to serve the purposes of the statute. Further, courts may only issue money bails to assure a defendant's appearance in court; money bails cannot be issued to protect public safety or to prevent obstruction of the criminal justice process.[44] Individuals who remain in custody because they cannot pay the monetary bail are entitled to the same speedy trial protections that those who are subject to preventive detention are.

Where a prosecutor moves for preventive detention . . . "the prosecutor shall provide the defendant with all statements or reports in its possession relating to the pretrial detention application."

Detention

The statute also authorizes the prosecutor to seek detention of defendants under certain limited circumstances. Where a prosecutor moves for preventive detention, the defendant is entitled to significant discovery at the first appearance. Specifically, "the prosecutor *shall* provide the defendant with all statements or reports in its possession relating to the pretrial detention application. All exculpatory evidence must be disclosed."[45] A model pre-hearing discovery demand is provided at Appendix 4.

The crimes where a prosecutor can specifically move for detention are:

(1) any crime *or offense* involving domestic violence;[46]

(2) any crime of violence subject to the No Early Release Act (NERA);[47]

(3) any crime which subjects the defendant to a life sentence (including extended term sentences);

(4) any crime if the defendant has twice previously been convicted of NERA crimes or crimes carrying life sentences;

(5) any sex crime;[48] and

(6) any weapons offense identified in the Graves Act.[49]

There is also, however, a catch-all that allows prosecutors to move for detention where they "believe[] there is a serious risk that" the defendant will not appear in court as required, will pose a risk to another person or the community, or will attempt to obstruct justice.[50]

But the prosecutor seeking detention is just the first step in the process.

---

44. N.J.S.A. 2A:162-17c(1).
45. *R.* 3:4-2(c)(1)(B) (effective January 1, 2017) (emphasis added).
46. As defined in N.J.S.A. 2C:25-19; note this includes disorderly persons offenses which are not considered crimes under the Code of Criminal Justice. N.J.S.A. 2C:1-4(a), (b).
47. N.J.S.A. 2C:43-7.2.
48. Including those defined in N.J.S.A. 2C:7-2b(2), human trafficking (N.J.S.A. 2C:13-8) where the victim is a minor, or endangering the welfare of a child under N.J.S.A. 2C:24-4.
49. N.J.S.A. 2C:43-6c.
50. N.J.S.A. 2A:162-19a(7).

With respect to all triggering crimes other than murder and other crimes subjecting the defendant to a life sentence, there exists a presumption that some condition or combination of conditions will be sufficient to achieve the purposes of the pretrial release law — that is, there exists a presumption *against* detention.[51] A presumption of detention exists only where the court finds probable cause to believe that a defendant committed either murder or any crime eligible for a life sentence.[52]

Regardless of which presumption exists, in every case where the prosecutor moves for detention, the court shall conduct a hearing to determine whether any condition or set of conditions will achieve the three purposes of the pretrial release law. At the hearing, the defendant has a right to counsel and has a right to testify, present evidence, cross examine witnesses, and to present information by proffer. The Rules of Evidence do not apply at such hearings. If a detention hearing occurs after indictment, the State need not prove probable cause; otherwise the prosecutor must prove by a preponderance of the evidence that (1) there is probable cause that the defendant committed the charged offense, and (2) that no condition or set of conditions will achieve the goals of the law. Whether a presumption exists will govern who must present evidence first: if a presumption of detention exists, the defendant must first attempt to rebut it; otherwise, the State shoulders the burden of convincing the court that detention is appropriate.

In determining whether any condition (monetary or non-monetary) or set of conditions will achieve the law's purposes, courts are told to consider:

- ★ the nature and circumstances of the offense charged;
- ★ the weight of the evidence against the eligible defendant (including consideration of what evidence might be excluded);

Because the court must consider both the strength of the State's evidence and the admissibility of it, defense attorneys should not hesitate to explore weaknesses in the State's factual and legal case. Such exploration may prove valuable for a future motion to suppress or at trial.

- ★ the defendant's history and characteristics, including:
  - ❍ the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community and community ties;

Note that none of these factors will have been considered by the PSA so defense attorneys must be particularly conscious of bringing them to the court's attention.

  - ❍ the defendant's past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings;
  - ❍ whether, at the time of the current offense or arrest, the defendant was on probation, parole, or on other release pending trial, sentencing, appeal, or completion of sentence;

51. N.J.S.A. 2A:162-18b.
52. N.J.S.A. 2A:162-19b.

- ★ The nature and seriousness of the danger to any other person or the community that would be posed by the defendant's release;
- ★ The nature and seriousness of the risk of obstructing or attempting to obstruct the criminal justice process that would be posed by the defendant's release;
- ★ The release recommendation of the pretrial services program obtained using the PSA.[53] Court Rules allow courts to "consider as prima facie evidence sufficient to overcome the presumption of release a recommendation by the Pretrial Services Program established" by statute.[54] But the Rules do not preclude the consideration of other evidence, even when such a recommendation is made.[55]

As a general rule, hearings should take place at the first appearance or within three business days of the filing of the motion. Courts may grant a continuance of up to five business days when sought by the defendant or up to three business days when sought by the prosecutor. If a defendant has not yet been released at the time the prosecutor files a motion, he must remain in jail pending the judge's ruling; if the defendant had already been released, he will be ordered to appear at the hearing. After a hearing, if the court finds that material information that was not known to the prosecutor or the defendant is available, it may reopen the hearing at any time. Where a court determines that detention is proper, it must provide written findings of fact. These findings of fact, of course, can serve as the basis for an appeal. Appeals of detention orders and conditions are discussed below.

Defendants who are held pursuant to preventive detention are entitled to speedy trial protections outlined in N.J.S.A. 2A:162-22, discussed in detail below.

Note that the statute provides protections for the attorney-client relationship. For example, the court is authorized to temporarily release a defendant if the court determines that it is necessary for trial preparation or another compelling reason.

Specific Provisions of New Jersey's Pretrial Release Statutes

The following section explains the important provisions of the new pretrial release statutes that all practitioners must know.

Under the new statutory scheme, courts should primarily rely on non-monetary means to release defendants from jail pretrial.

53. N.J.S.A. 2A:162-20.
54. *R.* 3:4A(b)(5) (effective January 1, 2017).
55. *Id.*

N.J.S.A. 2A:162-15. Liberal Construction.

This section articulates the overall purpose of the new pretrial release laws. Under the new statutory scheme, courts should primarily rely on **non-monetary means** to release defendants from jail pretrial. Monetary bail should only be set if the court determines that "**no other conditions of release will reasonably assure**" that the defendant will appear for court. A defendant may only be detained pretrial if the court finds "**clear and convincing evidence that no condition or combination of conditions**" can reasonably assure that the defendant will appear in court, will not be a danger to the community, and will not obstruct the criminal justice process.

N.J.S.A. 2A:162-16. Detaining eligible defendant during preparation of risk assessment prior to trial.

This section requires that most defendants who are charged on complaint-warrants be "temporarily detained to allow the Pretrial Services Program [PSP] to prepare a **risk assessment with recommendations** on conditions of release."[56] The statute puts a 48-hour limit on the length of time that may pass between detention and the court making a decision on the individual's pretrial release conditions. The court, after considering the circumstances, the PSP's assessment and recommendations, and any information presented by either the prosecutor or the defendant (or his counsel), must order one of the following:

(A) Release on **recognizance** or an **unsecured bond**;

(B) Release on the **least restrictive non-monetary conditions** that will reasonably accomplish the purposes of the pretrial release statutes (defendant's appearance, safety of the community, and that the defendant will not obstruct justice);

(C) Release on a **monetary bond** or a **combination of non-monetary conditions and monetary bond**; or

(D) If the prosecutor moves for pretrial detention, **detention pending a hearing** pursuant to N.J.S.A. 2A:162-18 and N.J.S.A. 2A:162-19.

If a defendant is charged on a complaint-summons, he or she must be released from custody and not detained for a pretrial risk assessment. In the event that such an individual is subsequently arrested on a warrant for failing to appear in court, the defendant may be released on recognizance or on bail, in the court's discretion. Monetary bail must be set within 12 hours of arrest if the amount of bail was not set when the warrant was issued. If a monetary bail is set that the defendant cannot pay, he or she may have that bail reviewed "promptly" and can seek a bail reduction, "which shall be heard in an expedited manner." Any defendant who is incarcerated on a complaint-summons charge who does not post the bond set may not be held longer than the maximum jail or probation sentence associated with the offense.

56. Emphasis added. There are some defendants who are not subject to this screening and release procedure. *See* N.J.S.A. 2A:162-18 and N.J.S.A. 2A:162-19 for details.

N.J.S.A. 2A:162-17. Consideration for pretrial release.

This statute clearly articulates the order of preference for the type of release granted, and the kinds of conditions that may be imposed. **First**, the court must order either a **release on recognizance or an unsecured appearance bond** when doing so would reasonably accomplish the purposes of the pretrial release statute. **Second**, if the court finds that an ROR or unsecured bond would not provide appropriate assurances of appearance and safety, the court can order release on **non-monetary conditions**. Those conditions are that the defendant not commit any offense, avoid contact with any alleged victims, avoid contact with witnesses named in the release order, and one or more of a list of conditions set forth in N.J.S.A. 2A:162-17b(2) — provided that the conditions imposed must be the **least restrictive condition or combination thereof.** The permissible conditions (which include a catch-all "any other condition that is necessary") are clearly listed in the statute and were discussed above in the summary section. **Third**, if the court finds that ROR, unsecured bond, or release with non-monetary conditions will not reasonably accomplish the goals of the pretrial release law, the court may set a **monetary bond**. A monetary bond can only be imposed if the court finds it is necessary to reasonably assure the defendant's appearance, and is not able to be set in response to safety or obstruction concerns. **Finally**, if the court finds that none of the first three options is appropriate, a **combination of monetary and non-monetary conditions** may be set. Defendants who have monetary conditions set who are not able to pay the bail amount and thus remain in custody are entitled to the speedy trial provisions outlined in N.J.S.A.2A:162-22.

Although one of the concerns that the court is required to consider when setting release conditions is whether the defendant is a risk for obstructing justice, the last subsection of the statute, N.J.S.A. 2A:162-17e, puts the burden on the prosecutor to raise this concern.

Although one of the concerns that the court is required to consider when setting release conditions is whether the defendant is a risk for obstructing justice, the last subsection of the statute, N.J.S.A. 2A:162-17e, puts the burden on the prosecutor to raise this concern. Per the statute, "this reasonable assurance may be deemed to exist if the prosecutor does not provide the court with information relevant" to the obstruction risk.

N.J.S.A. 2A:162-18. Pretrial detention for certain eligible defendants ordered by court; appeal.

This statute begins the discussion of when a defendant may be detained pretrial rather than having conditions of release set. Under this section, the court may order detention of a defendant who is charged with one of the crimes/offenses listed in the next section, 2A:162-19, if the prosecutor seeks detention and the court makes appropriate findings after a hearing. If the defendant is charged with one of the crimes covered by **N.J.S.A. 2A:162-19a**, a defendant may be detained if the prosecutor moves for detention and the court finds after a hearing that there is **clear and convincing evidence** that no amount of monetary bail, non-monetary conditions, or combination thereof would reasonably accomplish the purposes of the pretrial release statutes. A defendant charged with one of these crimes has in his favor a

rebuttable presumption that some condition or set of conditions is appropriate to reasonably assure his appearance, the safety of the community, and prevent obstruction of justice. If the defendant is charged with one of the crimes covered by **N.J.S.A. 2A:162-19b (murder or crimes carrying life imprisonment)**, the court may order pretrial detention if the prosecutor requests it and the **defendant "fails to rebut a presumption of pretrial detention"** that exists for those crimes.

If the court orders pretrial detention, the defendant may appeal that order pursuant to the Rules of the Court. If the court does not order pretrial detention, it must set release conditions as required in N.J.S.A. 2A:162-17 (above).

N.J.S.A. 2A:162-19. Pretrial detention for certain eligible defendants requested by prosecutor.

Prosecutors may file a motion for pretrial detention at any time — **including after a defendant has already been released** — when the defendant is charged with one of the crimes or offenses listed in this section. A prosecutor may move for detention if a defendant is charged with one of the following crimes:

(1) Any crime of the first or second degree enumerated under subsection d of N.J.S.A. 2C:43-7.2;[57]

(2) Any crime carrying an ordinary or extended term of life imprisonment;

(3) Any crime at all, if the defendant has previously been convicted of two or more offenses listed in the prior two paragraphs;

(4) Any crime enumerated under paragraph (2) of subsection b of N.J.S.A. 2C:7-2[58] or crime involving human trafficking (N.J.S.A. 2C:13-8) where the victim is a minor, or endangering the welfare of a child under N.J.S.A. 2C:24-4;

(5) Any crime enumerated under subsection c of N.J.S.A. 2C:43-6;[59]

(6) Any crime or offense involving domestic violence as defined in N.J.S.A. 2C:25-19a;[60] or

---

57. The crimes listed in subsection d. of N.J.S.A. 2C:43-7.2 are N.J.S.A. 2C:11-3, murder; N.J.S.A. 2C:11-4, aggravated manslaughter or manslaughter; N.J.S.A. 2C:11-5, vehicular homicide; subsection b. of N.J.S.A. 2C:12-1, aggravated assault; subsection b. of section 1 of P.L.1996, c.14 (C.2C:12-11), disarming a law enforcement officer; N.J.S.A. 2C:13-1, kidnapping; subsection a. of N.J.S.A. 2C:14-2, aggravated sexual assault; subsection b. of N.J.S.A. 2C:14-2 and paragraph (1) of subsection c. of N.J.S.A. 2C:14-2, sexual assault; N.J.S.A. 2C:15-1, robbery; section 1 of P.L.1993, c.221 (C.2C:15-2), carjacking; paragraph (1) of subsection a. of N.J.S.A. 2C:17-1, aggravated arson; N.J.S.A. 2C:18-2, burglary; subsection a. of N.J.S.A. 2C:20-5, extortion; subsection b. of section 1 of P.L.1997, c.185 (C.2C:35-4.1), booby traps in manufacturing or distribution facilities; N.J.S.A. 2C:35-9, strict liability for drug induced deaths; section 2 of P.L.2002, c.26 (C.2C:38-2), terrorism; section 3 of P.L.2002, c.26 (C.2C:38-3), producing or possessing chemical weapons, biological agents or nuclear or radiological devices; N.J.S.A. 2C:41-2, racketeering, when it is a crime of the first degree; subsection i. of N.J.S.A. 2C:39-9, firearms trafficking; and paragraph (3) of subsection b. of N.J.S.A. 2C:24-4, causing or permitting a child to engage in a prohibited sexual act, knowing that the act may be reproduced or reconstructed in any manner, or be part of an exhibition or performance.

58. The crimes listed in N.J.S.A. 2C:7-2b(2) are aggravated sexual assault; sexual assault; aggravated criminal sexual contact; kidnapping pursuant to paragraph (2) of subsection c. of N.J.S.A. 2C:13-1; endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child pursuant to subsection a. of N.J.S.A. 2C:24-4; endangering the welfare of a child pursuant to paragraph (3) or (4) or subparagraph (a) of paragraph (5) of subsection b. of N.J.S.A. 2C:24-4; luring or enticing pursuant to section 1 of P.L.1993, c.291 (C.2C:13-6); criminal sexual contact pursuant to N.J.S.A. 2C:14-3b. if the victim is a minor; kidnapping pursuant to N.J.S.A. 2C:13-1, criminal restraint pursuant to N.J.S.A. 2C:13-2, or false imprisonment pursuant to N.J.S.A. 2C:13-3 if the victim is a minor and the offender is not the parent of the victim; knowingly promoting prostitution of a child pursuant to paragraph (3) or paragraph (4) of subsection b. of N.J.S.A. 2C:34-1.

59. Weapons offenses enumerated in the Graves Act.

60. "Domestic violence" means the occurrence of one or more of the following acts inflicted upon a person protected under this act by an adult or an emancipated minor: (1) Homicide N.J.S.A. 2C:11-1 et seq.; (2) Assault N.J.S.A. 2C:12-1; (3) Terroristic threats N.J.S.A. 2C:12-3; (4) Kidnapping N.J.S.A. 2C:13-1; (5) Criminal restraint N.J.S.A. 2C:13-2; (6) False imprisonment N.J.S.A. 2C:13-3; (7) Sexual assault N.J.S.A. 2C:14-2; (8) Criminal sexual contact N.J.S.A. 2C:14-3; (9) Lewdness N.J.S.A. 2C:14-4; (10) Criminal mischief N.J.S.A. 2C:17-3; (11) Burglary N.J.S.A. 2C:18-2; (12) Criminal trespass N.J.S.A. 2C:18-3; (13) Harassment N.J.S.A. 2C:33-4; (14) Stalking P.L.1992, c.209 (C.2C:12-10).

(7) **Any other crime** for which the prosecutor believes there is a serious risk that:

- **(a)** the defendant will not appear in court;
- **(b)** the defendant will pose a danger to another person; or
- **(c)** the defendant will obstruct or attempt to obstruct justice.

The prosecutor must establish by clear and convincing evidence that the defendant should be detained.

Most of the time, the prosecutor must overcome a **rebuttable presumption that the defendant is eligible to have release conditions set** before detention can be ordered. The prosecutor must establish by **clear and convincing evidence** that the defendant should be detained. However, **if the court finds probable cause that the defendant committed murder** pursuant to 2C:1-3 **or committed any crime carrying** an ordinary or extended term of **life imprisonment**, there is instead a **rebuttable presumption that the defendant shall be detained**. The presumption can be rebutted by proof provided by the defendant, the prosecutor, or from other materials, and the standard of proof for rebutting the presumption to detain is **preponderance of the evidence.**

Regardless of where the presumption lies, a hearing must be held. Generally, the pretrial detention **hearing must be held no later than the first appearance**, unless a continuance is requested. If the prosecutor's request for detention is filed after the first appearance, or the offense is one for which no first appearance is required, **the pretrial detention hearing must be scheduled within three working days of the prosecutor's filing**. Unless good cause is shown, a prosecutor's motion to continue a pretrial detention hearing may not exceed three working days, and a defendant's motion to continue may not exceed five working days. While the pretrial detention hearing is pending, **the defendant will remain incarcerated** unless he was already released, in which case he will be served with a notice to appear. The court, either on its own or by motion of the prosecutor, may order that an incarcerated defendant be evaluated for drug dependency.

If there is no indictment, the prosecutor must establish probable cause at the detention hearing. At the hearing, the defendant is entitled to be represented by counsel, and is entitled to appointed counsel if he cannot afford to retain counsel. The defendant must be allowed the opportunity to testify, present witnesses, cross-examine witnesses, and to present information by proffer or otherwise. **The rules of evidence do not apply to the pretrial detention hearing.** The hearing may be reopened at any time before trial "if the court finds that information exists that was not known to the prosecutor or the eligible defendant at the time of the hearing and that has a material bearing on the issue of whether there are conditions of release that will reasonably assure" the goals of the pretrial release law.[61]

61. 2A:162-19f.

N.J.S.A. 2A:162-20. Information considered in determination of pretrial detention.

The factors that courts may take into account during a hearing on whether a defendant should be detained pretrial are:

(A) The **nature and circumstances** of the offense;

(B) The **weight of the evidence** — taking into consideration admissibility;

(C) The defendant's **history and character**, including character; physical and mental condition; family ties; employment; finances; community ties and length of residence in the community; past conduct; drug or alcohol abuse history; criminal history; record of appearing for court; and whether s/he was on probation, parole, or other release pending trial, sentencing, or appeal in any state or federal court at the time of the offense or arrest;

(D) **Nature and seriousness of danger** to a person or the community that would be posed if the defendant were released;

(E) **Nature and seriousness of risk of obstruction of justice** that would be posed if the defendant were released; and

(F) The **recommendation of the pretrial services program.**

If a court orders that a defendant be subject to pretrial detention, the court must enter an order including written findings of fact and the reasons for detaining the defendant.

N.J.S.A. 2A:162-21. Contents of pretrial detention order; temporary release.

If a court orders that a defendant be subject to pretrial detention, the court must enter an **order including written findings of fact and the reasons for detaining the defendant**. The order must also direct that the defendant "be afforded reasonable opportunity for private consultation with counsel." Even if a defendant is detained pretrial, the court may later allow temporary release under appropriate conditions if the court finds that such temporary release is "necessary for preparation of the eligible defendant's defense or for another compelling reason." So, for example, a detained defendant could be temporarily released to visit a crime scene with his or her lawyer or to attend a funeral for a loved one. Defense counsel would need to explain why such release is required to adequately defend the case, or why the reasons for release are unusual and compelling.

N.J.S.A. 2A:162-22. Eligible defendant subject to pretrial detention, release; conditions.

This section sets time limits for the period between arrest and indictment and the period between indictment and trial that apply to anyone who is detained pretrial, either due to a preventive detention order or due to the inability to pay a monetary bail.

A defendant **cannot be detained more than 90 days prior to indictment,** not counting "excludable time for reasonable delays" that are listed in the last section of the statute. If the indictment is not returned in that time, the defendant must be released, following the procedures in N.J.S.A. 2A: 162-17. This time may only be **extended for up to 45 days**, and only if the prosecutor makes a motion and the court makes findings that a "substantial and unjustifiable" safety risk would result from the defendant's release *and* that the failure to indict was not a result of "unreasonable delay" by the prosecutor.

A defendant **cannot be detained more than 180 days between indictment and trial,**[62] not counting "excludable time for reasonable delays" that are listed in the last section of the statute. As above, that time may only be extended if the prosecutor makes a motion and the court makes findings that a "substantial and unjustifiable" safety risk would result from the defendant's release *and* there was no "unreasonable delay" by the prosecutor. If the court does not find a substantial risk or finds the prosecutor responsible for an unreasonable delay, the defendant must be released, following the procedures in N.J.S.A. 2A: 162-17. If **two years** (excluding delays attributable to the defendant)[63] pass after the issuance of the detention order and the defendant still has not been brought to trial, the defendant must be released, following the procedures in N.J.S.A. 2A: 162-17. A superseding indictment extends the time for trial. Additionally, if a defendant moves for dismissal of an indictment and the case is dismissed without prejudice, any subsequent indictment that is returned re-starts the clock.

A trial after mistrial or after reversal by an appellate court must begin within 120 days of the entry of the order.

Despite these time limits, **there are many events that cause the countdown clock to pause, at least for some period of time**. They include:

(A) Time resulting from an examination and hearing on competency, and any time that the defendant is incompetent;[64]

(B) The time between filing and disposition of a defendant's application for pretrial treatment or supervisory programs;[65]

(C) The time between filing and disposition of a pretrial motion made by either the prosecutor or the defendant (up to 60 days for briefing, argument and hearings and 30 days for a decision may be excluded, unless extraordinary circumstances require up to 30 additional days);[66]

---

62. Per N.J.S.A. 2A:162-22a(2)(b)(i), "a trial is considered to have commenced when the court determines that the parties are present and directs them to proceed to voir dire or to opening argument or to the hearing of any motions that had been reserved for the time of trial."

63. Court Rules provide that delays attributable to defendant are time resulting from: a competency evaluation where the defendant contends that he or she is incompetent; the filing of a motion for pretrial treatment or supervisory programs; motions filed by a defendant, not caused by "unreasonable actions of the prosecutor"; requests for continuance made by defendants, not caused by unreasonable prosecutorial actions; the defendant's presence in another jurisdiction, if the defendant left the jurisdiction after receiving notice of the charges; defendant's failure to appear; defendant's failure to provide discovery; and other periods of delay caused by unreasonable acts or omissions of the defendant. *R.* 3:25-4(d)(2) (effective January 1, 2017).

64. *R.* 3:25-4i(1) (effective January 1, 2017).

65. *R.* 3:25-4i(2) (effective January 1, 2017).

66. *R.* 3:25-4i(3) (effective January 1, 2017).

(D) Any time resulting from a continuance requested by the defendant or by the prosecutor and defendant mutually (any request must specify the time sought);[67]

(E) Time when a defendant is held outside the jurisdiction, provided that the prosecutor has "been diligent and has made reasonable efforts" to have the defendant be present;[68]

(F) Time resulting from "exceptional circumstances," such as natural disaster or "unavoidable unavailability" of the defendant or a material witness;[69]

(G) A prosecutor's motion to declare the case complex (requires a showing by the prosecutor, typically in cases with more than two defendants, novel questions of law or fact, hard to locate or produce witnesses, or voluminous or complicated evidence; such a motion must be approved by the criminal presiding judge);[70]

(H) Time resulting from severance of codefendants such that only one trial can begin during the set period (subsequent trials must commence within 60 days unless the defendant consents or good cause is found, otherwise the time ceases to be excludable);[71]

(I) Time attributable to a defendant's failure to appear;[72]

(J) Time resulting from a judge's recusal or disqualification (not to exceed 30 days of excludable time);[73]

(K) Time resulting from defendant's failure to provide discovery;[74]

(L) Any other periods if the court finds "good cause" (this provision is to be narrowly construed);[75] and

(M) Any other time provided by statute.[76]

The final section of this statute makes clear that a non-monetary release is truly non-monetary — defendants may not be assessed any fees relating to their release if they are released on personal recognizance or on non-monetary conditions only.

N.J.S.A. 2A:162-23. Notification to eligible defendant by court, conditions of release.

This section sets out what information the court must include in a release order. The order must contain a "sufficiently clear and specific" **notice of all of the conditions** that the defendant is subjected to on release, and the **consequences of violating** those conditions. However, the statute specifies that failure

67. *R.* 3:25-4i(4) (effective January 1, 2017).
68. *R.* 3:25-4i(5) (effective January 1, 2017).
69. *R.* 3:25-4i(6) (effective January 1, 2017).
70. *R.* 3:25-4i(7) (effective January 1, 2017).
71. *R.* 3:25-4i(8) (effective January 1, 2017).
72. *R.* 3:25-4i(9) (effective January 1, 2017).
73. *R.* 3:25-4i(10) (effective January 1, 2017).
74. *R.* 3:25-4i(11) (effective January 1, 2017).
75. *R.* 3:25-4i(12) (effective January 1, 2017).
76. *R.* 3:25-4i(13) (effective January 1, 2017).

to notify the defendant of the consequences of violation does not preclude legal remedies against the defendant for his violation. **If the court departs from the recommendation of pretrial services**, either as to the method of release or the setting of conditions, **the order must include an explanation**.[77]

The final section of this statute makes clear that a non-monetary release is truly non-monetary — defendants may not be assessed any fees relating to their release if they are released on personal recognizance or on non-monetary conditions only.

N.J.S.A. 2A:162-24. Violation of condition of release, motion by prosecutor.

Pretrial detention does not automatically result from a violation of release conditions, violation of a restraining order, or a finding of probable cause that the defendant has committed a new crime while on release. Pretrial detention, even after such a violation, is only appropriate where the court finds clear and convincing evidence that no bail and/or conditions would reasonably assure appearance and safety. The statute requires the court to consider "all relevant circumstances including but not limited to the nature and seriousness of the violation or criminal act committed," but does not specifically state the procedure that should be followed in making that determination.

N.J.S.A. 2A:162-25. Statewide Pretrial Services Program; risk assessment instrument.

This statute directs the Administrative Director of the Courts to **establish and maintain a statewide Pretrial Services Program (PSP)**. The PSP must conduct a risk assessment and make recommendations regarding whether a defendant should be released on recognizance or an unsecured appearance bond, released on non-monetary conditions, released on monetary bail, or released on a combination of monetary bail and non-monetary conditions. The risk assessment must be completed and presented to the court in time for the court to make a release decision — no longer than 48 hours after arrest at most. The PSP is also responsible for monitoring defendants who are released, when ordered by the court.

The risk assessment used by the PSP must be approved by the Administrative Director of the Courts, and must be objective, standardized, and based on analysis of empirical data and risk factors relevant to failure to appear and danger to the community. The risk assessment instrument must also gather defendant demographic information, including race, ethnicity, gender, financial resources, and socio-economic status.

The right to counsel at first appearance is also a protected Constitutional right. Defense attorneys should be familiar with the relevant Constitutional provisions and the case law interpreting them, and should refer to them in arguments for pretrial release.

77. This provision grants tremendous deference to the recommendation of pretrial services.

Tool #4: Guiding US and New Jersey Constitutional Provisions

It is important to remember that **the right to bail/pretrial release is a Constitutional right**, protected by both the Constitution of the United States and the New Jersey State Constitution. That means that the presumption should always be that the defendant will be released pending trial, subject to appropriate conditions. The right to counsel at first appearance is also a protected Constitutional right. Defense attorneys should be familiar with the relevant Constitutional provisions and the case law interpreting them, and should refer to them in arguments for pretrial release.

Bail/Pretrial Release is a Constitutional right.

United States Constitution, Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

"This Traditional right to freedom before conviction permits unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.... Unless this right to bail is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." Stack v Boyle, 342 U.S. 1 (1951).

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

"It is the position of the United States that … 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."

Guidance from U.S. Department of Justice

On February 13, 2014, the U.S. Department of Justice filed a statement of interest in the case of *Varden v. City of Clanton*, a civil lawsuit challenging the City of Clanton's practice of setting bonds for municipal court offenses pursuant to a bond schedule based on offense alone, with no regard for a person's ability to pay.[78] The Department of Justice's statement of interest made clear that if such a system is in fact in place, it is unconstitutional, stating, "It is the position of the United States that … 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."[79] Asserting that the justice system should not work differently for the poor

78. *Varden v. City of Clanton*, Case No. 2:15-cv-34-MHT-WC (M.D. Ala. Feb. 13, 2015).
79. Statement of Interest of the United States, *Varden v. City of Clanton*, Case No. 2:15-cv-34-MHT-WC (M.D. Ala. Feb. 13, 2015), *available at* **https://www.justice.gov/file/340461/download**. *See also* NACDL's summary of this and other statements of interest at **https://www.nacdl.org/criminaldefense.aspx?id=38532&libID=38502**.

than it does for the rich, the Department quoted powerful language from cases in the 1970s holding that imprisoning indigent people when those with financial means would not be imprisoned is an equal protection violation.

In addition to the Equal Protection concerns of a bail system that is based solely on money, the statement filed with the court by the Department of Justice discusses public policy concerns that are implicated by a system in which release of a defendant is determined solely by ability to pay. Such a system causes unnecessary detention of indigent defendants who cannot afford to pay, while allowing for the release of some high-risk defendants who have the resources to pay bond but "should more appropriately be detained without bail."[80] The statement discussed many of the harms of pretrial detention and "urges that pretrial detention be used only when necessary, as determined by an appropriate individualized determination."[81]

The Civil Rights Division of the Department of Justice sent a "Dear Colleague" letter warning state and local courts about serious constitutional concerns regarding imposing exorbitant fees, fines, and costs on poor defendants without any inquiry into their ability to pay.

On March 14, 2016, the Civil Rights Division of the Department of Justice sent a "Dear Colleague" letter warning state and local courts about serious constitutional concerns regarding imposing exorbitant fees, fines, and costs on poor defendants without any inquiry into their ability to pay.[82] In addition to concerns about fines and fees used at sentencing, the letter addressed pretrial release practices that impact indigent defendants, reiterating that "any bail practices that result in incarceration based on poverty violate the Fourteenth Amendment."[83]

The Department of Justice again intervened in a pending lawsuit regarding bond practices by filing an amicus brief in the case of *Walker v. City of Calhoun*.[84] In the brief, the DOJ declared once again 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."[85] In addition, the brief discusses the problems that result from unnecessary pretrial detention, such as jail overcrowding and increased burdens on taxpayers. The brief concludes that bail practices like Calhoun's are not only unconstitutional "but also conflict with sound public policy considerations."[86]

---

80. *Varden* Statement of Interest, *supra* note 79, at 11.
81. *Id.* at 14.
82. U.S. Department of Justice Civil Rights Division, Dear Colleague Letter Regarding Law Enforcement Fees and Fines (Mar. 14, 2016), *available at* https://www.justice.gov/crt/file/832461/download.
83. *Id.* at 7.
84. Brief for the United States as Amicus Curiae, *Walker v. City of Calhoun, Georgia*, No. 16-10521-HH (N.D. Ga. Aug. 18, 2016), *available at* https://www.justice.gov/crt/file/887436/download.
85. *Id.* at 12.
86. *Id.* at 23.

New Jersey Constitution

The New Jersey Constitution contains two provisions relevant to the setting of pretrial release conditions:

Article I, Paragraph 11 of the State Constitution was amended in November 2014 to provide that "[a]ll persons shall, before conviction, be eligible for pretrial release. Pretrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person's appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process."

Article I, Paragraph 12 provides that "[e]xcessive bail shall not be required. . . ."

Counsel at First Appearance is a Constitutional Right

The United States Supreme Court has held that the right to counsel attaches at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty, regardless of whether a prosecutor is aware of that initial proceeding or involved in its conduct.[87] In the civil case of *Rothgery v. Gillespie County, Texas*, the plaintiff/criminal defendant contended that if the county had provided a lawyer within a reasonable time after a probable cause hearing, he would not have been indicted, rearrested, or jailed for three weeks. The Supreme Court reversed a finding of summary judgment for the civil defendant county.

Tool #5: New Jersey Case Law on Pretrial Release

New Jersey courts have not yet addressed any features of the new pretrial release statute. Defense attorneys will need to be aggressive in creating new jurisprudence to ensure the best results for their clients. But, despite the new statute, defenders are not writing on a blank slate; the case law that developed under New Jersey's old bail scheme can be a useful tool in anticipating how courts will decide cases under the new pretrial release statute.

In ***State v. Tyrone Steele***,[88] the Appellate Division considered whether, under the old statute, courts could consider danger to the community in setting monetary bail. The new statute provides the precise answer to that question: money bails can only be used to ensure a defendant's presence, not to protect the public.[89] But the case makes clear that New Jersey Courts will enforce that limitation. In *Steele*, the trial court set an artificially high money bail because it feared that the defendant would continue to violate the law; the court had no concerns about the defendant showing up in court. The appellate court held that non-monetary conditions are the *exclusive* method for ensuring a defendant complies with the law.[90] Defense attorneys should use *Steele*, in addition to the statute, to ensure that the use of money bail does not expand.

87. *Rothgery v. Gillespie County, Texas*, 554 U.S. 191 (2008).
88. *State v. Steele*, 430 N.J. Super. 24, 36 (App. Div. 2013).
89. N.J.S.A. 2A:162-16b(2)(c).
90. It is worth noting that the New Jersey Supreme Court granted leave to appeal in *Steele. State v. Steele*, 214 N.J. 233 (2013). It later dismissed the appeal as improvidently granted. *State v. Steele*, 2014 N.J. LEXIS 895 (July 7, 2014).

The New Jersey Supreme Court considered the admissibility during a bail hearing of hearsay evidence in ***State v. Engel***.[91] Again, changes in the statute answer the direct question: the rules of evidence do not apply in detention hearings.[92] But, *Engel* did place limitations — grounded in due process and reliability — on the use of hearsay statements. In order to consider at a bail hearing the hearsay confession of a codefendant, the Court held that (1) the confession must be "more probative on the point for which it is offered than any other evidence that the State can procure through diligent efforts under all of the circumstances;" and (2) the confession must be sufficiently trustworthy, either on its own or through "circumstantial corroboration."[93] Thus, despite the permissive nature of the statute with respect to the Rules of Evidence, defense attorneys should seek to exclude harmful hearsay where it lacks indicia of reliability.

There is no doubt under the new pretrial release law that defendants have a right to counsel and to be present at detention hearings.[94] The statute is silent regarding a right to counsel and the right to be present for the setting of conditions of release. But prior case law provides support for the position that defendants have a right to appear and to be represented by lawyers in determining conditions of release. In ***State v. Fann***,[95] the court examined when the right to counsel attached in the context of setting bails. It determined that the setting of bail constitutes a "critical stage" in the criminal proceedings that triggers the right to counsel and a right to be present. The trial court in *Fann* balanced these critical rights against what it perceived as practical necessities. As a result, it mandated a procedure whereby bails could be set without counsel or the defendant being present; but, upon request, courts must review the bail with the defendant and an attorney. If a judge refuses to allow a defendant to be present or represented by counsel when conditions of release are set, the defendant unquestionably has a right to appear with counsel as those conditions are reviewed. This principle is also supported by extensive federal case law: Because of the essential part that lawyers play in the fair administration of justice, the right to counsel attaches as soon as judicial proceedings are initiated.[96] Once the right to counsel attaches, the defendant is entitled to the presence of counsel at any "critical stage" of the proceedings.[97] The right to have counsel present applies whenever counsel can provide assistance by acting "as a spokesman for, or advisor to, the accused."[98] As is apparent from this test, the right to counsel does not apply only at trial: "The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice."[99]

Under the former bail scheme, bail could be denied for defendants who were accused of violating conditions of their probation. In ***State v. Garcia***,[100] the Appellate Division held that the right to bail applies only before conviction; because people on probation have already been convicted, they could be detained without bail on the charge for which they were on probation. Under *Garcia*, a defendant was entitled to bail on the new charge, but detained on the previous charge. The same appears to be

91. 99 N.J. 453 (1985).
92. N.J.S.A. 2A:162-19e(1).
93. *State v. Engel*, 99 N.J. at 468.
94. N.J.S.A. 2A:162-19e(1).
95. *State v. Fann*, 239 N.J. Super. 507, 519 (Law Div. 1990).
96. *Rothgery*, 554 U.S. at 212 (2008).
97. *Id.*
98. *United States v. Ash*, 413 U.S. 300, 312 (1973).
99. *Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012).
100. *State v. Garcia*, 193 N.J. Super. 334, 338 (App. Div. 1982).

true under the new statute: in setting conditions of release for a person on probation the court may consider the fact that the defendant was on probation, but, in order to detain him must first determine that no amount of monetary bail, non-monetary conditions or combination of monetary bail and conditions would serve the three interests of the pretrial release law.[101] But, on the charge for which the defendant is serving probation, a separate statute still authorizes detention.[102]

Under the old bail laws, courts could legitimately consider a defendant's immigration status in setting bail. Specifically, in ***State v. Fajardo-Santos***,[103] the New Jersey Supreme Court held that courts could, in setting bail, consider whether federal authorities had lodged a detainer against an undocumented immigrant in a criminal case. The court held that such information was relevant to a determination of the likelihood that the defendant would flee prior to trial.[104] The new statute does not explicitly allow for the consideration of immigration status in setting conditions of release or in determining whether detention is appropriate, but because the Court has held that immigration status bears on risk of non-appearance, defense attorneys should anticipate such arguments from prosecutors.

In ***State v. Korecky***,[105] the New Jersey Supreme Court considered whether a defendant's monetary bail could be forfeited based on a violation of a non-monetary condition of release. The Court held that such forfeiture was appropriate where a defendant violated a no-contact provision of his release. New Jersey's new pretrial release statutes create a mechanism for addressing whether detention is appropriate after a violation of a condition of release.[106] The statute, however, is silent on the financial consequence where a defendant has posted a monetary bail. *Korecky* appears to still be good law.

Note also that juveniles (who are not waived to criminal court) do not have a statutory right to pretrial release in New Jersey.[107] Courts have consistently acknowledged the constitutionality of denying pretrial release to juveniles.[108]

101. N.J.S.A. 2A:162-20.
102. N.J.S.A. 2C:45-3a(3).
103. 199 N.J. 520, 522 (2009).
104. *Id.* at 531.
105. 169 N.J. 364, 367 (2001).
106. N.J.S.A. 2A:162-24.
107. N.J.S.A. 2A:4A-40.
108. *See, e.g.*, *In re Gault*, 387 U.S. 1, 14 (1967) (noting no right to bail in juvenile proceedings); *State v. Franklin*, 175 N.J. 456, 465 (2003) (explaining the juveniles being adjudicated delinquent are entitled to all adult criminal constitutional protections except indictment, trial by jury, and bail).

SECTION 3: ADVOCATING FOR THE CLIENT AT THE RELEASE HEARING

Making the Argument

Defenders must always remember there are only three legal and legitimate purposes of conditions of pretrial release: (1) to secure presence in court, (2) to maximize public safety by assessing whether the person might commit another crime while case is pending, and (3) to prevent the defendant from obstructing the criminal justice process. After looking at the statutes, defenders should:

In every pretrial release argument, counsel should presume unsecured release on personal recognizance and address the conditions that will meet any appropriate statutory concerns. Defenders should make the court aware of the research on money and its lack of connection to public safety or court appearance.

- ★ Know the risk assessment scores and understand their meaning;
- ★ Review the complaint and any other police reports available;
- ★ Understand the defendant's criminal history;
- ★ Understand the defendant's prior FTA(s);
- ★ Check for any prior pretrial misconduct;
- ★ Know if the defendant has family or friends in the courtroom who can support him or her;
- ★ Know any personal information about job, military history, mental health issues, drug or alcohol problems, school, family, etc., that is still relevant under the new statutes;
- ★ Consider the strength of the case. Is it a case that is not serious in nature? Is it a minor offense?;
- ★ Consider what the final outcome of the case likely to be. Is the defendant likely going to get probation? Why require a monetary bail if the defendant can be adequately supervised?; and
- ★ Know New Jersey's pretrial program and what supervision services it offers.

In every pretrial release argument, counsel should presume unsecured release on personal recognizance and address the conditions that will meet any appropriate statutory concerns. Defenders should make the court aware of the research on money and its lack of connection to public safety or court appearance.[109]

109. *See, e.g.*, Michael R. Jones, Pretrial Justice Institute, Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option, (Oct. 2013), *available at* http://www.pretrial.org/download/research/Unsecured+Bonds,+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option+-+Jones+2013.pdf (note that while the author examined bail setting practices in Colorado, he noted that the results could likely be extrapolated to other jurisdictions).

The argument to the court should be individualized to the client. Attorneys should talk about clients by name and outline the specific circumstances that make monetary conditions of bond or onerous non-monetary conditions unworkable. Where a judge sets a monetary bail that the client cannot afford, defenders should press the judge to rationalize the particular money bail; the statute prohibits the court from setting money bails designed to detain defendants.[110] Where applicable, defense attorneys should highlight the support he will get from family and other persons. It may also be helpful to describe why the services offered by the Pretrial Services Program will adequately secure the client's appearance in court and protect public safety.

Defenders should always know the judge. Judges frequently have specific condition-setting proclivities and/or biases that defenders should try to address with factual information about the client. Defenders should endeavor to avoid irritating the court, if possible, by making the record succinctly and accurately, but not at the expense of zealous advocacy.

When appropriate, federal and state constitutional provisions and case law can be used to bolster arguments for release. Whenever something is unfair, unreasonable, irrational, or arbitrary, the Due Process Clause of the Fourteenth Amendment and Article I, Paragraph 1 of the New Jersey Constitution should be invoked. For example, one may argue that unnecessarily onerous conditions represent punishment without trial, in violation of the client's substantive due process rights.

Specific Problem Areas

Over-conditioning

Remember the statute requires the "least restrictive" condition or conditions. What that specifically means is subject to argument and there is not yet clear case law in New Jersey on the issue. So attorneys should always argue against **any** conditions that are not relevant to the case. Conditions such as restrictions on alcohol use, unwanted no contact orders, regular reporting to pretrial services, etc., should all be challenged unless they can be individually justified for the client and the case. Defenders need to be aware of the research (and pretrial services should support this) that **over-supervision can make people worse** and unnecessarily wastes tax payer dollars.[111]

Video conferencing is a poor substitute for in-person hearings with the client standing directly before a judge. Among other problems, there are deficiencies related to access to counsel and presentation of evidence.

110. N.J.S.A. 2A:162-17c(1).

111. *See* American Bar Association, *Criminal Justice Standards on Pretrial Release, available at* **http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html**. *See also* Roger Przybylsk, *What Works, Effective Recidivism Reduction and Risk-Focused Prevention Programs* (Feb. 2008), *available at* **http://www.jrsa.org/njjec/publications/przbylski-2008.pdf** (providing comprehensive discussion of effective interventions in criminal justice, including reports on the research about over-supervision).

Lawyers should insist on having the opportunity for confidential communication with the client during the hearing if the client has any questions during the release hearing.

First Appearance by Video

Some vicinages plan to conduct first and/or second appearances via video conferencing. These hearings present unique problems for defense counsel. Video conferencing is a poor substitute for in-person hearings with the client standing directly before a judge. Among other problems, there are deficiencies related to access to counsel and presentation of evidence. The hearings tend to be more impersonal with the client often in jail and the judge present in a courtroom miles away. If the lawyer is with the client, the lawyer should make sure to explain what is happening in the courtroom. Lawyers should ask the client if any family members might be in the courtroom for the hearing. If so, the lawyer should attempt to contact the family prior to the hearing to see if they will support an argument for release. Also, lawyers should caution both clients and family members to avoid making any statements about the factual allegations. If the client is charged with an offense that might trigger a no contact order (particularly domestic violence cases), the attorney should try to determine if the victim is in the courtroom and attempt to interview that victim prior to the hearing to determine if the victim is favorable for the client and whether the victim will support or oppose a no contact order. Defenders should try to get any information helpful to the client's release from the victim if possible.

Attorneys practicing in vicinages where the lawyer is in the courtroom and the client is at a remote location should ensure that they have had enough time to interview the client prior to the hearing. Additionally, lawyers should insist on having the opportunity for confidential communication with the client during the hearing if the client has any questions during the release hearing. Defenders should be especially aware of concerns regarding confidentiality of attorney/client communications that are transmitted via video or phone.

Bail Source Hearings and Cash-Only Bails

While the new pretrial release law has changed courts' preferences for monetary bail — transforming it from the first option to the third option — it has not changed some of the rules associated with the posting of money bail. For example, for some crimes, where the court orders a monetary bail set, the prosecutor may move for a bail source hearing, at which the defendant is required to establish both the lawfulness of the source of funds and the connection between the defendant and the person posting the bail.[112] Also certain crimes remain "bail restricted," meaning a defendant must post the full amount of bail, post property, or rely on a commercial bond agent.[113] In the instances where a court imposes a monetary bail, these requirements and restrictions remain.

112. N.J.S.A. 2A:162-13.
113. N.J.S.A. 2A:162-12.

Costs of Supervision

In some other states, defendants are forced to bear the cost of pretrial supervision. New Jersey only allows such costs to be passed on to defendants in limited circumstances. The only condition for which a defendant can be required to pay is electronic monitoring.[114] And when that condition is imposed, the court retains the authority to waive the payment for an indigent defendant "who has demonstrated to the court an inability to pay all or a portion of the costs." Defense attorneys should challenge any attempt by a court to pass on other costs of supervision to a defendant.

Domestic Violence Cases

When New Jersey relied on money bails, special protections for victims of domestic violence prohibited judges from reducing bails in such cases "without prior notice to the county prosecutor and the victim."[115] That law also limited the ability of judges other than the judge who set the bail to reduce the bail.[116] On its face, the statute appears to apply only to *monetary bail*, rather than non-monetary conditions. It does not appear that the statute would require notice prior to the modification of, for example, a curfew. Defense attorneys should, however, be mindful that a prosecutor may seek to convince a judge that the court lacks the authority to make favorable modifications of conditions of release without prior notice.

The only condition for which a defendant can be required to pay is electronic monitoring. And when that condition is imposed, the court retains the authority to waive the payment for an indigent defendant "who has demonstrated to the court an inability to pay all or a portion of the costs." Defense attorneys should challenge any attempt by a court to pass on other costs of supervision to a defendant.

114. N.J.S.A. 2A:162-17b(2)(k).
115. N.J.S.A. 2C:25-26e.
116. *Id.*

SECTION 4: ADVOCATING FOR THE CLIENT AT A DETENTION HEARING

The Mechanics of a Hearing

When a prosecutor files a motion for detention, it will be scheduled soon thereafter.[117] Usually the hearing will occur at the first appearance (unless the first appearance has already happened by the time the motion is filed, in which case it will occur within three business days of the filing date). But, both the prosecutor and the defense attorney have the right to request a *brief* adjournment. Unless good cause is shown, adjournments are limited to three business days when requested by the State and five business days when requested by the defendant. In other words, defense attorneys will generally have about a week to prepare for a detention hearing.

Preparing for the Hearing

In preparing for the hearing, defense attorneys must consider both legal and factual issues. Legally, defenders must understand:

- ★ Whether there is a presumption of detention (if the defendant is charged with murder or a crime carrying a life sentence) or a presumption against detention (for every other crime);[118] and
- ★ Whether the defendant is eligible for detention based on the crime charged, or only on the basis of the catch-all that the prosecutor believes there is a serious risk of non-appearance, danger to the community or obstruction of justice.[119]

Factually, defenders should:

- ★ Know the risk assessment scores and understand their meaning;
- ★ Review the complaint and any other police reports available;
- ★ Understand the defendant's criminal history;
- ★ Understand the defendant's prior FTA(s);
- ★ Check for any prior pretrial misconduct;
- ★ Know if the defendant has family or friends who can support him or her at a detention hearing;
- ★ Know any personal information about job, military history, mental health issues, drug or alcohol problems, school, family, etc., that is still relevant under the new statutes;
- ★ Consider the strength of the case. Is it a case that is not serious in nature? Is it a minor offense?;
- ★ Consider what the final outcome of the case likely to be. Is the defendant likely to be acquitted? Is the defendant likely going to get probation? Why detain a defendant if he can be adequately supervised?; and
- ★ Know New Jersey's pretrial program and what supervision services it offers.

117. *See generally* N.J.S.A. 2A:162-19.
118. N.J.S.A. 2A:162-19.
119. *Id*.

In preparation for a detention hearing, counsel should examine and seek copies of all pertinent police reports, names and addresses of all witnesses, and any relevant medical records. Counsel should move to preserve or, where appropriate, seek court orders for preservation of evidence, such as 911 tapes, notes of investigating officers, and biological and forensic evidence. Attorneys should consider whether witnesses may be needed for the detention hearing, subpoena them to appear and, if needed, request funds for an investigator and/or interpreter to interview potential witnesses. At the hearing, defenders should object to hearsay, such as officers simply reading from police reports, and insist that live witnesses be called.

Defenders should also remind prosecutors that the speedy trial provisions of the pretrial release law are only triggered when a defendant is detained. So, if a prosecutor is vacillating about whether to seek detention, a reminder that if the defendant is at liberty the State can be more deliberate about prosecuting the case might tip the balance.

At the hearing, defenders should object to hearsay, such as officers simply reading from police reports, and insist that live witnesses be called.

Making the Argument

Remember that defendants can only be detained if the court is clearly convinced that no condition or set of conditions will achieve the three purposes of the pretrial release law: (1) to secure presence in court, (2) to maximize public safety by assessing whether the person might commit another crime while the case is pending, and (3) to prevent the defendant from obstructing the criminal justice process. In addition to that showing, the State must show probable cause to believe that the defendant committed the crime charged. Of course, if an indictment has been returned, it would satisfy that requirement.

In determining whether any condition (monetary or non-monetary) or set of conditions will achieve the law's purposes, courts are told to consider:[120]

- ★ the nature and circumstances of the offense charged;

Here, defenders should be prepared to explain why their client's case is not prototypical. For example, if the client is charged with an armed robbery, but the allegation is that he merely had a simulated weapon, defense counsel should argue that fact militates against detention because he represents less of a risk to the community than a typical armed robber.

120. N.J.S.A. 2A:162-20.

- the weight of the evidence against the eligible defendant (including consideration of what evidence might be excluded);

This factor gives defense counsel an opportunity to explore weaknesses in the State's factual and legal case. While the judge will likely prevent defenders from turning detention hearings into discovery sessions, meaningful consideration of this factor requires analysis of the admissibility of evidence and that which is learned in a detention hearing may prove useful in a later motion to suppress evidence (or trial).

- the defendant's history and characteristics, including:
  - the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community and community ties;

Because these factors are not considered in the PSA, defense counsel will need to present them to the court. While the Rules of Evidence do not apply in detention hearings, defenders should nonetheless consider the most effective method for eliciting helpful information.

  - the defendant's past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings;

Defense counsel should be prepared to present evidence that mitigates past misconduct, such as a limited role in the offense, remoteness, or evidence of subsequent rehabilitation.

  - whether, at the time of the current offense or arrest, the defendant was on probation, parole, or on other release pending trial, sentencing, appeal, or completion of sentence;
- The nature and seriousness of the danger to any other person or the community that would be posed by the defendant's release;
- The nature and seriousness of the risk of obstructing or attempting to obstruct the criminal justice process that would be posed by the defendant's release;

Defense attorneys should argue about the ways in which conditions of release can serve to lessen these dangers.

- The release recommendation of the pretrial services program obtained using the PSA.

Defenders can cross examine State's witnesses, call their own witnesses, and call their clients. While the State will likely try to keep many of their trial witnesses off the stand — to avoid later impeachment — defenders may be able to subpoena and call those witnesses. Defense attorneys can call State's witnesses if the attorney believes that they have information that either negates probable cause (perhaps an identification of someone else) or addresses the client's risk to the community or risk of non-appearance.

The argument to the court should be individualized to the client. Attorneys should talk about clients by name and outline the specific circumstances that make monetary or non-monetary conditions of release workable. Where applicable, defense attorneys should highlight the support the client will get from family and other persons. It may also be helpful to describe why the services offered by the Pretrial Services Program will adequately secure the client's appearance in court and protect public safety.

Whenever something is unfair, unreasonable, irrational, or arbitrary, the Due Process Clause of the Fourteenth Amendment and Article I, Paragraph 1 of the New Jersey Constitution should be invoked.

When appropriate, federal and state constitutional provisions and case law can be used to bolster arguments for release. Whenever something is unfair, unreasonable, irrational, or arbitrary, the Due Process Clause of the Fourteenth Amendment and Article I, Paragraph 1 of the New Jersey Constitution should be invoked. For example, one may argue that pretrial detention is punishment without trial, in violation of the client's substantive due process rights. Or if the client is detained without a meaningful hearing, an argument could be made that this is a violation of his procedural due process rights.

And remember: defenders must **always try to get their clients out of jail**. It will improve the outcome in most cases.

Specific Problem Areas

Overuse of the Catch-All

Prosecutors may seek detention if a defendant has been charged with committing an enumerated crime. But, a prosecutor may also move for detention if she believes that there is a serious risk of non-appearance, to public safety, or of obstruction of justice. The risk present in such cases must be exceptional. If a defender notices that prosecutors are routinely seeking detention under this exception — and that judges are granting it — the attorney should consider raising the issue on appeal. If this exception becomes the norm, prosecutors will wield more power than the Legislature intended and defendants will suffer greatly.

Detention for Disorderly Persons Offenses

While generally detention is appropriately reserved for defendants charged with serious crimes, the Legislature did provide for its use for defendants charged with nonindictable domestic violence offenses. The fact that such detention is potentially authorized does not change the usual calculus: detention is only permitted if no condition or set of conditions will achieve the various purposes of the statutes. The fact that a defendant has not been charged with an indictable offense — and is therefore facing six months or less in jail — weighs heavily in favor of an understanding that conditions of release, rather than detention, can be used to manage risk.

If courts do not comply with the statutory or constitutional requirements, defense counsel must appeal. . . . It is critical that practitioners become familiar with the process for appealing a court's bail order.

SECTION 5: APPEALING THE COURT'S RELEASE OR DETENTION ORDER

If courts do not comply with the statutory or constitutional requirements, defense counsel must appeal. The appellate procedure is essential to challenge courts that are not complying with the law. It is critical that practitioners become familiar with the process for appealing a court's bail order. It is extremely important, for purposes of review and development of more robust case law on the issues related to bail and pretrial release, that a full record be made regarding the arguments and evidence considered by the court in making pretrial release or detention decisions.

Issue of Mootness — Applicable to All Methods of Appellate Review

In cases dealing with conditions, the issue may be moot by the time an appeal is resolved because the client's case has already been resolved. But that does not mean that an appeal should be dismissed. It is important that counsel continue with the appeal to address issues "capable of repetition yet evading review." In New Jersey, courts can exercise "the discretion to decide an otherwise moot case that presents issues of significant public importance, or which stem from a controversy 'capable of repetition, yet evading review' because of the short duration of any [litigant's] interest."[121] It would, of course, be both unfair and inefficient to require a defendant to delay resolving the case — and thereby waive his speedy trial rights — in order to enforce his rights under the pretrial release law and the State and Federal Constitutions.

Procedures for Appeal

Decisions regarding pretrial release are reviewed under an abuse of discretion standard.[122] Typically, courts find abuses of discretion where "a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'"[123]

120. N.J.S.A. 2A:162-20.

121. *Finkel v. Township Committee of Tp. of Hopewell*, 434 N.J. Super. 303, 315 (App. Div. 2013) (citations omitted).

122. *Steele*, 430 N.J. Super. at 34 ("The setting of bail is vested in the sound discretion of the trial court, and we consequently review the trial court's decision for an abuse of discretion.").

123. *Flagg v. Essex County Prosecutor*, 171 N.J. 561, 571 (2002) (citations omitted).

In New Jersey, a defendant must seek "leave to appeal" any interlocutory decision — including decisions regarding pretrial release — unless the law explicitly provides for an appeal as of right.[124] The pretrial release law specifically provides for a right to appeal adverse *detention* decisions,[125] but provides no such right with respect to conditions of release. Detention decisions must be heard on an expedited basis.[126]

The procedure for filing an appeal, therefore, differs depending on what a defense attorney seeks to challenge. If a defendant is detained, he may appeal and the "appeal shall be heard in an expedited manner."[127] While the exact procedure has yet to be finalized, the Appellate Division expects to create a streamlined mechanism for challenges to detention orders.[128] Attorneys will be required to use the court's e-filing system and, rather than filing a full brief, will fill out a special form. The court will also set up a mechanism for lawyers to provide the court with transcripts in a timely fashion. Attorneys can, of course, seek leave to file a full brief, if the form does not provide a sufficient opportunity to explain the issues involved in the case. The statute requires a defendant to remain detained pending the resolution of the appeal.

If the Appellate Division rules against a defendant, the defense attorney can seek review from the Supreme Court. Review at the Supreme Court is discretionary. Defense counsel should begin by filling out the Supreme Court Emergent Matter Intake Form.[129] Even if the Supreme Court denies relief on an emergent basis, attorneys can seek Leave to Appeal in the ordinary course.

Where defense counsel seeks to challenge a condition of release, the order is interlocutory and review is completely discretionary. Depending on the nature of the condition, attorneys can file a Motion for Leave to Appeal or an Application for Permission to File Emergent Motion.[130] As with appealing detention decisions, if the Appellate Division rejects an appeal, defendants can seek discretionary review by the Supreme Court.

124. *See R.* 2:2-3 (providing for appeals as of right only for final judgments and for "cases as are provided by law"). Interlocutory orders, including the setting of conditions of pretrial release, are permitted "in the interest of justice." *R.*2:2-4.

125. N.J.S.A. 2A:162-18c.

126. *Id.*

127. *Id.*

128. Notice to the Bar: Criminal Justice Reform — Appellate Division Rule Recommendations Necessary to Implement the Bail Reform and Speedy Trial Law — Publication for Comment, *available at* **http://www.judiciary.state.nj.us/notices/2016/n160727a.pdf** (last checked Oct. 19, 2016).

129. Supreme Court Emergent Matter Intake Form, *available at* **http://www.judiciary.state.nj.us/prose/11641_sc_emergent_intake.pdf** (last checked Oct. 19, 2016).

130. Notice to the Bar: Appellate Division Guidelines for Entertaining Emergent Applications, *available at* **http://www.judiciary.state.nj.us/appdiv/forms/10498_appl_perm_file_emerg_motion_portal.pdf** (last checked Oct. 19, 2016).

CONCLUSION

Armed with a thorough understanding of the client, risk assessment instruments, and relevant laws, defense attorneys have the power to change the trajectory of their clients' criminal cases. Achieving pretrial release helps maintain clients' stability, increases trust in the attorney-client relationship, facilitates client participation in the defense of the case, helps preserve the presumption of innocence, and improves the likelihood of a better outcome. Increasingly compelling research supporting release for many accused persons coupled with growing budgetary concerns within the criminal justice system present defense attorneys with the perfect opportunity to sway even the most cautious judges. By using the laws, procedures, and techniques presented in this Manual, defense attorneys can succeed in helping the court identify the appropriate conditions of release to the maximum benefit of both the client and the community as a whole.

APPENDIX 1:
Client Interview Form For Bail

Name: _____ **Case No:** _____

Offense(s) charged: _____

Detention-eligible offense: ❑ Yes ❑ No ***Presumption:*** ❑ Detention ❑ Release

Currently on bond for pending matter(s): ❑ Yes ❑ No

Holds: ❑ None ❑ Parole ❑ Probation: Felony ❑ Probation: Disorderly ❑ ICE ❑ Other _____

PSA Scores:	***Client Financial Obligations:***
FTA Score _____ ***NCA*** _____	***Rent/Mortgage*** ❑ _____ ***Child Support*** ❑ _____
NVCA Flag? ❑ Yes ❑ No	***Car Payment*** ❑ _____ ***Education*** ❑ _____
Pretrial Services Rec: _____	***Debt Payments*** ❑ _____ ***Other*** ❑ _____
	Client Income _____ ❑ **Weekly** ❑ **Monthly** ❑ **Yearly**

A. Employment status, history of accused: _____

B. Nature and Extent of family relationships: _____

C. Past and Present Relationships: _____

D. Past and Present Residences: _____

E. Current and former mental health treatment (diagnosis; treatment; medications; dosage): _____

F. Current and former drug/alcohol treatment: _____

G. Who will agree to assist accused to appear? Information re: that person: _____

(Continued on next page)

H. Who to contact to vouch for/testify for client: _____

_____

_____

_____

I. Prior Criminal History and FTAs: _____

_____

_____

_____

J. Possible/probable sentence if convicted (i.e. will the person likely be granted probation or other community sentence if convicted of the offense?) Include here if any plea offers have been made.

_____

_____

_____

K. Facts indicating possibility of law violation if person in custody is released without certain conditions: ___

_____

_____

_____

L. Facts/lack of facts indicating the possibility of witness intimidation: _____

_____

_____

_____

M. Ties to community/community involvement: _____

_____

_____

_____

_____

N. Military service history: _____

_____

_____

_____

O. Any other factors indicating ties to the community, why won't flee, and absence of community danger concerns: _____

_____

_____

_____

a. Years in New Jersey? _____

b. Education: _____

c. Pretrial Conditions to ensure appearance: _____

_____

_____

_____

Attorney Signature: _____ ***Date:*** _____

APPENDIX 2:
Client Intake Form

Interviewer: _____ **Today's Date:** _____

Client Name As Charged: _____
(First) *(Middle)* *(Last)*

CURRENT CHARGES

Case Number	Charge	Class	Alleged Victim	Offense Date

BAIL/FIRST APPEARANCE INFORMATION

Conditions of Release

- ☐ Secured bond $ _____
- ☐ Cash bond $ _____
- ☐ Unsecured bond $ _____
- ☐ Personal recognizance
- ☐ Custody of _____
- ☐ Citation only/No arrest made
- ☐ Drug/Alcohol Treatment
- ☐ Anger management
- ☐ No contact with _____
- ☐ Stay away from _____
- ☐ Other: _____

Conditions met? ☐ Yes ☐ Will Meet ☐ No, held at _____
Warrants/Detainers? ☐ Yes ☐ No **Client Height:** _____
Serving sentence? ☐ Yes ☐ No **Client Weight:** _____
Distinctive features (scars, tattoos, etc.): _____

Unusual behavior at first appearance: _____

Other notes: _____

INCIDENT AND DEFENSE

Offense Date: _____ **Report date:** _____
Warrant Issued: _____ **Arrest date:** _____
Arresting Officer: _____ **Department:** _____
Alleged Victim: _____ **Relationship to client:** _____

FACTS OF CASE - *Client's Version*

(Continued on next page)

Co-Defendants ☐ Yes ☐ No

Name: _____ **DOB/Approx. Age:** _____

Relationship to Client: _____ **Phone:** _____

Address: _____ **Attorney:** _____

Name: _____ **DOB/Approx. Age:** _____

Relationship to Client: _____ **Phone:** _____

Address: _____ **Attorney:** _____

Do you belong to any social networking sites? ☐ Yes ☐ No List: _____

Have you posted anything online about this case? ☐ Yes ☐ No List: _____

Are you aware of anyone else (victims, witnesses, co-defendants) having posted information about this case online?

☐ Yes ☐ No List: _____

BACKGROUND INFORMATION

Full Legal Name: _____

(First) *(Middle)* *(Last)*

Goes By: _____ **Former Name(s):** _____

Date of Birth: ____/____/____ **Age:** _____ **Sex:** _____ **Race:** _____

Place of Birth: _____ **SSN:** _____

(if other than US, complete Immigration intake sheet)

Primary Language: _____ **Citizenship:** _____

Interpreter needed? ☐ Yes ☐ No **Green Card?** ☐ Yes ☐ No **Amnesty?** ☐ Yes ☐ No

Current client address: _____ Apt: _____

Length of time at address: _____ **in community:** _____

Lives with: _____

Current client phone: _____ **Alternate phone:** _____

Marital Status: ☐ Unmarried ☐ Married ☐ Separated ☐ Divorced ☐ Widowed

*		Name	Address	Phone	Age	Job
	Partner					
	Mother					
	Father					
	Sibling					
	Sibling					
	Child					
	Child					
	Child					

**** Place check mark in this box if attorney may call this person to locate client if client's contact information is out of date***

EDUCATION AND EMPLOYMENT

Last grade completed: _____ **Current student** ☐ Yes ☐ No **GED** ☐ Yes ☐ No

High School Name: _____ **Last Attended:** _____

College Name: _____ **Last Attended:** _____

_____

Held back in school? ☐ Yes ☐ No **Had an IEP?** ☐ Yes ☐ No **Special school/classes?** ☐ Yes ☐ No

Notes: _____

_____

_____

_____

Currently employed: ☐ Yes ☐ No **Name of Employer:** _____

Address/Location: _____

Contact: _____ **Phone:** _____

Type of job: _____ **Since:** _____

Prior employment: ☐ Yes ☐ No **Name of Employer:** _____

Contact: _____ **Phone:** _____

Type of job: _____ **Dates:** _____

Reason for leaving: _____

Public Benefits received: _____

Military Service: ☐ Yes ☐ No Dates: _____ Branch: _____

Type of Discharge: ☐ Honorable ☐ General ☐ Other Notes: _____

PHYSICAL AND MENTAL HEALTH HISTORY

Alcohol History: Drinks/week: ____ Prior Treatment? ☐ Yes ☐ No Interested in treatment? ☐ Yes ☐ No

Year	Location of Treatment	Length of treatment

Notes: _____

_____

Drug History: Drug of choice: _____ Age at first use: _____ Prior Treatment? ☐ Yes ☐ No

Current frequency of use: _____ Interested in treatment? ☐ Yes ☐ No

Year	Location of Treatment	Length of treatment

Notes: _____

_____

_____

_____

_____

_____

(Continued on next page)

Mental Health History: Diagnosis _____ Prior hospitalization/Treatment? ☐ Yes ☐ No ☐ Current

Year	Location	Doctor	Inpt/Outpt	Length

Physical Health History: Any significant injuries, operations, overnight hospital stays, or head trauma?
☐ Yes ☐ No
Notes: _____

Current medications

Name	Dosage/Frequency	Prescribing Dr.	Reason for taking	Started taking

CRIMINAL HISTORY

Is client currently on ☐ probation? ☐ parole?

Charge: _____ **Suspended sentence:** _____

Officer: _____ **Officer phone:** _____

Any prior violations? _____

Has client been on probation before? ☐ Yes ☐ No

Most recent term of probation: _____ **How terminated:** _____

Has probation ever been revoked? ☐ Yes ☐ No

Details: _____

Was client on pre-trial release for another offense at the time of this offense? ☐ Yes ☐ No

OTHER PENDING CHARGES

Case Number	Charge	Class	Alleged Victim	Offense Date	Attorney	Next Court Date

PRIOR CHARGES

Case Number	Charge	Class	Offense Date	Disposition	Disposition date	Jurisdiction

This document was compiled based on review of client intake documents from the Massachusetts Committee for Public Counsel Services, the Delaware Office of Public Defense, and Ray Moses's Client Interview Criminal Cases, http://criminaldefense.homestead.com/clientinterview.html

APPENDIX 3:
ABA Ten Principles of a Public Defense Delivery System

Adopted in 2002, the ABA Ten Principles serve as a "practical guide for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems."[1] Cited frequently by courts and legal journals, these principles "constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney."[2]

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.
2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.
4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.
5. Defense counsel's workload is controlled to permit the rendering of quality representation.
6. Defense counsel's ability, training, and experience match the complexity of the case.
7. The same attorney continuously represents the client until completion of the case.
8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.
9. Defense counsel is provided with and required to attend continuing legal education.
10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

1. ABA Ten Principles of a Public Defense Delivery System (Feb. 2002), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf (last visited July 30, 2015).
2. *Id.*

APPENDIX 4:
Sample Pre-Hearing Discovery Request

September 16, 2016

Assistant Prosecutor Smith
Hudson County Prosecutor's Office
595 Newark Ave
Jersey City, NJ

Re: ***State v. David Jones***
Complaint No. W-2016-123456-0777

Dear Ms. Smith:

As you know, *R.* 3:4-2(c)(1)(B) governs the discovery that must be provided in cases, such as this one, where the prosecutor is seeking pretrial detention. That *Rule* does not require defendants to make formal discovery requests ("the prosecutor shall provide"). Nonetheless, please accept this letter as a formal discovery request for all statements or reports in your possession relating to the pretrial detention application and for all exculpatory evidence.

As to the first category of information, the statements and reports relating to the pretrial detention application include any statements or reports that support or rebut the finding of probable cause do believe that Mr. Jones committed the crime charged and statements and reports that support or negate a finding that no condition or set of conditions will protect the public, prevent obstruction and ensure the his presence at required court hearings. If, for example, you seek to introduce evidence regarding an eyewitness identification, you must provide all statements and reports relating to any eyewitness identification, as those reports would relate to the pretrial detention application.

You must also disclose *any* exculpatory information. To be clear, while *Brady v. Maryland*, 373 U.S. 83 (1963) mandates reversal of convictions where information that is both exculpatory and material is withheld, *New Jersey Rules of Court* require more: all exculpatory evidence —

whether material or not — must be disclosed. Such exculpatory evidence includes information related to guilt or innocence, credibility, or both. It includes, but is not limited to:

1. Criminal arrest and conviction records for all prosecution witnesses (not just those people who will be called as witnesses at detention hearings, but also those people who have provided evidence upon which the testifying witness will rely).
2. Detailed description of criminal, immoral or other "bad acts" of each witness.
3. Written or oral cooperation agreements with witnesses, including informal agreements.
4. Any information that tends to show motive, bias or interest of a witness.
5. Any information tending to undercut the ability of a witness to provide accurate or reliable testimony, such as drug use, mental health issues or deficiencies with respect to hearing, eyesight or cognition.
6. Statements of witnesses that are arguably inconsistent (either internally inconsistent or inconsistent with statements of other witnesses).
7. Names and addresses of witnesses who failed to identify the defendant or identified or described someone else.
8. Any evidence tending to establish that defendant's acts were legally justified or excused, tending to show the existence of an affirmative defense or affecting the degree of his culpability.
9. Any evidence tending to establish a basis to exclude or suppress any evidence.
10. Any scientific evidence, testing or result that is inconsistent with or undercuts the alleged guilt of the defendant.

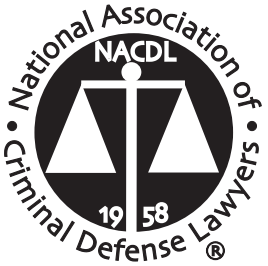
You must make diligent efforts to obtain necessary statements and reports from other law enforcement agencies. *See Giglio v. United States*, 405 U.S. 150 (1972) (information known by one member of law enforcement is attributable to the government, regardless of whether the individual prosecuting attorney knew about the evidence).

I appreciate your prompt accommodation with these requests.

Sincerely yours,

Jane Roberts, Esq.
Attorney for Mr. Jones

NOTES



NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L Street NW, 12th Floor, Washington, DC 20036
Phone: 202-872-8600 | www.nacdl.org

ESCAPING THE ABYSS: THE PROMISE OF EQUAL PROTECTION TO END INDEFINITE DETENTION WITHOUT COUNSEL

BRANDON BUSKEY*

INTRODUCTION: INDEFINITE DETENTION WITHOUT COUNSEL IN MISSISSIPPI

Indefinite detention. It is a phrase most recently associated with the War on Terror that the United States launched after the terrorist attacks of September 11, 2001. It conjures the military camp at Guantanamo Bay, Cuba, where the country detained hundreds of those it labeled "enemy combatants" for years without trial. Many were found guilty of the accusations against them. Many were not. But our nation's failure to respect the rule of law has forever tainted our confidence in those results. Most Americans would perhaps be surprised to learn that indefinite detention is not an anomaly sprung from the existential threat of 9/11. Rather, it was engineered on our shores, and it is alive and well.

I discovered this truth for myself during the summer of 2014, when, as a staff attorney for the American Civil Liberties Union, I began investigating the indefinite detention of those held prior to trial in Mississippi. In 2003, the NAACP Legal Defense Fund ("LDF") reported that, across the state, felony arrestees could be held in jail for months or years before trial, or before even being formally charged.[1] Widespread deficiencies in the state's public defender system had also been extensively documented.[2] Our goals were to find whether the practice had survived in the decade since the LDF report, and, if it did, to isolate a particularly virulent strain of the problem: indefinite detention of the poor without access to counsel.

Our investigation took us to twelve counties in each of the state's major geographic/cultural regions, including the Delta, the Gulf Coast, and the

* Senior Staff Attorney at the Criminal Law Reform Project of the American Civil Liberties Union and lead counsel on Burks v. Scott County, No. 3:14-cv-00745-HTW-LRA (S.D. Miss. Sept. 23, 2014).

1. SARAH GERAGHTY & MIRIAM GOHARA, NAACP LEGAL DEFENSE AND EDUCATION FUND, ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS (2003), https://static.prisonpolicy.org/scans/Assembly_Line_Justice.pdf [http://perma.cc/EQY6-3RTM].

2. *See, e.g.*, PHYLLIS E. MANN, NAT'L LEGAL AID & DEFENDER ASSOCIATION, MISSISSIPPI: A SHORT STORY (2010), http://nlada.net/library/article/ms_ashortstory [http://perma.cc/6U7A-NMEJ].

Appalachian Foothills.[3] In our conversations with public defenders, prosecutors, judges, and policymakers across Mississippi, it became clear that the phenomenon had deep roots. In almost every county, local officials described systems by which arrestees who could not afford counsel were held for months or longer without seeing a lawyer. Amazingly, those in counties that only required arrestees to languish in jail for "only a few weeks" typically viewed themselves as exemplary. Even where the county *did* make an arrestee wait for months, some other county was always worse.

We eventually identified three structural reasons why Mississippi's criminal justice system breeds indefinite detention without counsel. The first is that under the state constitution, a district attorney must obtain an indictment from a grand jury before prosecuting a felony.[4] But state law does not place any limit on how long a felony arrestee may be held in jail before a prosecutor obtains an indictment. The absence of such a limit converts this supposed right into a ransom, holding arrestees hostage to their own constitutional protection.

Mississippi is by no means an outlier in this regard. Eighteen states do not have a statute-specified time frame in which formal charges must be filed—either by indictment or information.[5] Six states require the filing of charges between three months and six months of arrest.[6] Ten states require the filing of charges between one month and three months of arrest.[7] Fifteen states require the formal filing of charges within a month of arrest.[8] Thus, the majority of

3. *See View By Region*, MISSISSIPPI ARTS COMMISSION (2013), http://www.arts.state.ms.us/folklife/view-by-region.php [http://perma.cc/G4EJ-UL9D].

4. MISS. CONST. art. 3, § 27.

5. The states are as follows: Alabama, Alaska, Colorado, Connecticut, Georgia, Hawaii, Kansas, Massachusetts, Mississippi, Missouri, New Jersey, New Hampshire, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, and West Virginia.

6. Nebraska (NEB. REV. STAT. § 29-1201 (West, Westlaw through 2017)); North Carolina (N.C. GEN. STAT. ANN. § 15-10 (2016)); Rhode Island (R.I. GEN. LAWS § 12-13-6 (2016)); South Carolina (S.C. R. CRIM. P. R. 2 (2016); S.C. R. CRIM. P. R. 3 (2016)); Pennsylvania (PA. R. CRIM. P. 600 (West, Westlaw through 2017)); and Texas (TX. CODE CRIM. PROC. ART. 32.01 (2015); Ex parte Martin, 6 S.W.3d 524, 529 (Tex. Crim. App. 1999)).

7. Arkansas (ARK. R. CRIM. P. 8.6 (West, Westlaw through 2017)); Delaware (DEL. SUP. CT. CRIM. R. 48 (2017)); Iowa (IOWA R. CRIM. P. 2.33 (2017)); Kentucky (KY. R. CRIM. P. 5.22 (2016)); Louisiana (LA. CODE CRIM. PROC. ART. 701 (West, Westlaw through 2017)); Maine (ME. R. CRIM. P. 48 (2016)); Maryland (MD. R. 4-212 (West, Westlaw through 2017); MD. R. 4-221 (West, Westlaw through 2017)); Nevada (NEV. REV. STAT. ANN. § 171.178 (2015); NEV. REV. STAT. ANN. § 171.196 (2015); NEV. REV. STAT. ANN. § 173.035 (2015); Berry v. Clark County, 571 P.2d 109 (1977)); New Mexico (NM. R. MAG. CT. R. 6-203 (2016); NM. R. DIST. CT. R. 5-302 (2016); NM. R. DIST. CT. R. 5-201 (2016)); and Wisconsin (WIS. STAT. ANN § 970.01 (2017); WIS. STAT. ANN § 970.03 (2017); State v. Evans, 522 N.W.2d 554, 563 (Wis. Ct. App. 1994)).

8. Arizona (ARIZ. R. CRIM. P. 4.1 (West, Westlaw through 2017); ARIZ. R. CRIM. P. 5.1 (West, Westlaw through 2017); ARIZ. R. CRIM. P. 13.1 (West, Westlaw through 2017)); California (CAL. PENAL CODE § 1382(a)(1) (West, Westlaw through 2017)); Florida (FL. ST.

states allow individuals to be held at least a month without formal charges.[9] However, many states mitigate this risk with speedy trial laws mandating that trials occur within specified times of arrest.[10] Mississippi's speedy trial act, however, triggers after indictment, not arrest, and it still allows the state 270 days after indictment to commence a felony trial.[11]

The second reason for indefinite detention is historical. Across the state, judges and court officers still "ride circuit" within a judicial district. The term evokes images of 19th Century judges riding on horseback or in carriages from courthouse to courthouse to conduct the judicial business of each locality. Today, the practice involves court personnel traveling among county seats—presumably by car—for set periods over the course of a year.[12] For example, in a district comprised of four counties, there will be a trial term in each county three times a year, with each term lasting about a month.[13] Trial terms generally overlap with convenings of the grand jury. By design, there will be approximately two months between each trial session in this hypothetical district.

The risk of delay under this system is immediately apparent. Someone arrested on a felony during a trial term stands almost no chance of their case being presented to the sitting grand jury. They must instead wait two months until the next grand jury. If they cannot make bail, they must spend two months in a jail cell just waiting for the next session. Many districts,

CRIM. P. R. 3.134 (2016)); Idaho (I.C. § 19-615 (2016); I.C.R. 5.1 (2016); I.C.R. 7 (2016)); Illinois (725 ILL. COMP. STAT. 5/109-3.1 (West, Westlaw through 2016)); Indiana (IND. CODE ANN. § 35-34-1-4(b)(1) (2016); Pawloski v. State, 380 N.E.2d 1230, 1234 (Ind. 1978)); Michigan (MICH. COMP. LAWS ANN. § 764.26 (West, Westlaw through 2017)); MICH. COMP. LAWS ANN. § 766.4 (West, Westlaw through 2017)); Minnesota (MINN. R. CRIM. P. 4.02 (2016); MINN. R. CRIM. P. 5.01 (2016); MINN. R. CRIM. P. 8.02 (2016)); Montana (MONT. CODE ANN. § 46-11-203 (2015)); New York (N.Y. CRIM. PROC. LAW § 180.80 (2017); People ex rel. Maxian on Behalf of Roundtree v. Brown, 570 N.E.2d 223, 225 (N.Y. 1991)); Oregon (OR. REV. STAT. § 135.745 (2016)); Utah (UTAH R. CRIM. P. R. 7 (West, Westlaw through 2017)); Vermont (VT. R. CRIM. P. 3 (2016); VT. R. CRIM. P. 5 (2016)); Washington (WASH. SUPER. CT. CRIM. P. R. 3.2.1 (2016)); and Wyoming (WYO. R. CRIM. P. 5 (2016)).

9. Virginia generally belongs to this group. However, because its charging statute is keyed to trial terms rather than finite days from arrest, and because judicial circuits differ substantially with respect to the frequency of trial terms, it cannot easily be classified into any of the above categories. VA. CODE ANN. § 19.2-242 (2016). The Virginia Circuit Court terms can be found at http://www.courts.state.va.us/directories/circ.pdf [https://perma.cc/SL69-JYAF].

10. *See, e.g.*, OHIO REV. CODE ANN. § 2945.71 (West, Westlaw through 2017) (requiring felony trial within 270 days of arrest).

11. MISS. CODE ANN. § 99-17-1 (West, Westlaw through 2017).

12. *See* MISS. CODE ANN. § 9-7-3 (West, Westlaw through 2017).

13. *See Circuit Court Terms in* Delbert Hosemann, Secretary of State, *2017 Mississippi Judiciary Directory and Court Calendar*, at 34–40, *available at* http://www.sos.ms.gov/Education-Publications/Documents/Downloads/2017%20JudicialDirectory/2017%20Judiciary%20Directory%20%20Court%20Calendar.pdf [https://perma.cc/Q6VM-TG8R].

particularly in more rural areas—and Mississippi is very rural—have only two or three trial terms per year, forcing arrestees to wait three to five months *just to see if the grand jury acts on their case*. Compounding matters, local officials in several counties reported that cases are rarely presented to the grand jury during the next trial term either. Our arrestee in the hypothetical district must now wait five to six months to learn her fate with the grand jury.

To determine how long arrestees actually wait until indictment, we surveyed public defenders from seventeen of the state's twenty-one judicial districts.[14] The results confirmed that these hypothetical concerns are quite real. Almost without exception, indictments typically occurred within six months to a year of arrest, and no public defender reported that the district regularly secured indictments within three months of arrest.[15]

The third driving force behind indefinite detention is another omission. Mississippi is one of six states that delegates non-capital, trial-level defense entirely to its counties.[16] There are no standards for the timing of counsel appointment, nor is there any oversight mechanism to enforce existing constitutional and ethical standards for appointed counsel. In this void, many districts wait until an arrestee is indicted to appoint counsel.

This perfect storm of deficiencies has helped spawn a culture of apathy toward the accused. To minimize the costs of providing appointed counsel, many counties use a flat-fee contract system to retain public defenders.[17] These arrangements usually involve a county contracting with one or more attorneys to handle all or some percentage of the county's indigent caseload. The contracting attorneys typically accept this work on a part-time basis, maintaining a private practice along with their defender duties.[18] The county's incentive to control costs is thus passed on to the public defender. As each new appointed client reduces the marginal value of the contract, while also threatening the time the attorney can devote to "paying clients," defenders naturally look to minimize their time on appointed cases.[19] One of the lasting memories from our investigation was a part-time public defender who candidly

14. Brandon Buskey & Marshall Thomas, *Mississippi Public Defender Survey* (Dec. 2014) (on file with author).

15. *Id.*

16. MANN, *supra* note 2.

17. OFFICE OF THE STATE PUBLIC DEFENDER, THE STATE OF THE RIGHT TO COUNSEL IN MISSISSIPPI: REPORT & RECOMMENDATIONS (2014), http://www.ospd.ms.gov/MS%20Report%20updated%20October%202014.pdf [http://perma.cc/68U7-FLED].

18. *Id.*

19. JON MOSHER, FLAT FEE CONTRACTS, NAT'L LEGAL AID & DEFENDER ASSOCIATION (2010), http://www.nlada.net/library/article/na_flatfeecontracts [http://perma.cc/DPX4-9BAQ] ("Because the lawyer will be paid the same amount, no matter how much or little he works on each case, it is in the lawyer's personal interest to devote as little time as possible to each appointed case, leaving more time for the lawyer to do other more lucrative work.").

admitted that she did not know her clients existed until indictment, and that, if she was to "keep the lights on" at her private practice, she could not afford to know them.

As open secrets go, indefinite detention without counsel may be one of Mississippi's most shameful. A lack of reliable data prevents an accounting of the number of people victimized by the state's de facto system of indefinite detention. But the practice was apparent wherever we visited.

Our investigation culminated in a lawsuit challenging the system of indefinite detention without counsel in Scott County, Mississippi. Located about forty-five minutes east of the capital Jackson, Scott County had all the features that make indefinite detention so pervasive. There are only four trial terms per year. Along with the other three counties in the district, Scott County only appointed counsel at indictment. Finally, the county relied on a part-time, flat-fee contract to retain public defenders.

The two named plaintiffs in the class action lawsuit we ultimately filed in federal court exemplified the problems in Scott County and the rest of the state.[20] The first, Josh Bassett, spent eight months in jail on a $100,000 bail he could not afford.[21] He was charged with a nonviolent property offense.[22] The second, Octavious Burks, had spent ten months in jail on a $30,000 bail he could not afford for an alleged attempted armed robbery.[23] Mr. Burks was no stranger to Scott County's indefinite detention system. He had spent fully three of the previous five years in the Scott County Detention Center on a variety of felony offenses.[24] Each time the county released him without an indictment.[25] A few days after we filed our lawsuit in September 2015, the county released both Mr. Bassett and Mr. Burks without requiring bail.[26] Mr. Bassett's charges were eventually dismissed; Mr. Burks was never indicted.[27]

But, the most shocking aspect of the lawsuit was our main defendant, then-senior district court judge Marcus Gordon. When Gordon died earlier this year, he was celebrated in the *New York Times* for his role in giving the maximum

20. This paragraph is based primarily on the author's knowledge gathered as lead counsel on Burks v. Scott County, No. 3:14-cv-00745-HTW-LRA (S.D. Miss. Sept. 23, 2014). Citations to filed court documents have been provided in notes 20–26, *infra*, for the benefit of the reader. All errors or omissions belong to the author.

21. Class Action Compl. at ¶¶ 23, 27, Burks v. Scott County, No. 3:14-cv-00745-HTW-LRA (S.D. Miss. Sept. 23, 2014).

22. *Id*. at ¶ 21.

23. Am. Class Action Compl. at ¶¶ 7, 9, 12, Burks v. Scott County, No. 3:14-cv-00745-HTW-LRA (S.D. Miss. Sept. 23, 2014).

24. *Id*. at ¶¶ 21–24.

25. *Id*.

26. *Id*. at ¶¶ 25, 42, 46.

27. *Id*. at ¶ 44. Mr. Burks did take a plea to being a felon in possession of a firearm in a separate federal prosecution for the same incident. *Id*. at ¶ 30.

sixty-year sentence to Edward Ray Killen, the man convicted in 2005 of the infamous 1964 assassination of three civil rights workers in Philadelphia, Mississippi.[28] But in September 2015, when the *Times* interviewed Gordon about our lawsuit, he seemed less the civil rights champion. When asked why he prefers to wait until indictment to appoint counsel, he offered, "The reason is, that public defender would go out and spend his time and money and cost the county money in investigating the matter . . . . And then sometimes, the defendant is not indicted by the grand jury. So I wait until he's been indicted."[29] As to indigent arrestees who want help prior to indictment to challenge their arrest or lower their bail, Gordon was unmoved. Such a person "can represent himself, or he can employ an attorney."[30] Gordon's callousness may have been unique, but the system of indefinite detention he helped maintain was all too common.

Scott County, and Mississippi more generally, present a vexing challenge. Particularly in a country purportedly committed to the presumption of innocence, the Kafkaesque practice of warehousing people prior to trial is abhorrent on a number of levels. Yet it is not clearly unconstitutional. Below, I discuss the Court's Sixth Amendment right to counsel jurisprudence to identify the proverbial cracks into which so many criminal defendants have slipped. Specifically, though the Court has held that criminal defendants have a Sixth Amendment right to counsel for all "critical stages" of the prosecution, it has never held that the initial appearance is one of those critical stages. More importantly for places like Mississippi, the Court's critical stage jurisprudence does not—and perhaps cannot—address when counsel must be appointed if the state detains someone but delays or does not conduct any subsequent critical stage before trial.

However, when and if the Court does confront the issue of indefinite detention without counsel, I propose that the Sixth Amendment lens, with its heavy focus on trial outcomes, is ultimately too myopic to offer meaningful solutions. The Court should instead return to the doctrinal roots of fundamental fairness and equal justice that animate its seminal decision in *Gideon v. Wainwright*,[31] and that drives the Court's access to courts jurisprudence. This new lens focuses on whether the state has provided meaningful access to the

28. Sam Roberts, *Marcus D. Gordon, Judge in 'Mississippi Burning Case', Dies at 84*, N.Y. TIMES (May 27, 2016), http://www.nytimes.com/2016/05/29/us/marcus-d-gordon-judge-in-mississippi-burning-case-dies-at-84.html [http://perma.cc/MP4X-JMQX].

29. Campbell Robertson, *In a Mississippi Jail, Convictions and Counsel Appear Optional*, N.Y. TIMES (Sept. 24, 2014), http://www.nytimes.com/2014/09/25/us/in-a-mississippi-jail-convictions-and-counsel-appear-optional.html [http://perma.cc/FQ7E-C534].

30. *Id.*

31. Gideon v. Wainwright, 372 U.S. 335 (1963).

pretrial process without regard to wealth. Indefinite detention without counsel cannot survive such a standard.

I. CRITICAL STAGES AND THE SIXTH AMENDMENT RIGHT TO COUNSEL

The Sixth Amendment requires that states provide attorneys for felony[32] and most misdemeanor trials,[33] as well as sentencing.[34] Once a prosecution has begun, the Sixth Amendment also secures a right to counsel for certain pretrial proceedings. As early as 1932, the Supreme Court recognized that because the pretrial period was "perhaps the most critical period of the proceedings," it necessitates "the guiding hand of counsel" to avoid emptying the right to a fair trial of all its force.[35] However, the right to counsel prior to trial is not absolute. Counsel is required only if the pretrial proceeding qualifies as a "critical stage," which the Supreme Court has most recently defined "as [a] proceeding[] between an individual and agents of the State (whether formal or informal, in court or out) that amount to trial-like confrontations, at which counsel would help the accused in coping with legal problems or . . . meeting his adversary."[36] In essence, the critical stage analysis asks whether counsel is necessary to preserve a defendant's right to a fair trial.[37]

Hence, in *United States v. Wade*, the Court declared that an in-person line-up, where the accused is displayed with others so that a witness may attempt an identification, is a critical stage because counsel could both ensure the fair conduct of the line-up and use her observations to cross-examine a witness's potentially devastating courtroom identification.[38] However, a photographic line-up, while just as easily leading to a damaging courtroom identification, is not a critical stage, primarily because the defendant's absence prevents a trial-like confrontation with the state.[39] In another example of contrasting critical stage outcomes, the Supreme Court has deemed preliminary hearings to be critical stages, since a defendant may challenge the state's probable cause for the offense by examining and cross-examining witnesses, as well as argue the need for a mental health exam or lowered bail.[40] But a judicial finding of

32. *Id*. at 343.

33. Shelton v. Alabama, 535 U.S. 654, 661 (2002).

34. Mempa v. Rhay, 389 U.S. 128, 137 (1967).

35. Powell v. Alabama, 287 U.S. 45, 57, 69 (1932).

36. Rothgery v. Gillespie Cty., 554 U.S. 191, 212 n.16 (2008) (quotations and citations omitted).

37. Charlie Gerstein, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1517 (2013).

38. 388 U.S. 218, 236–37 (1967).

39. United States v. Ash, 413 U.S. 300, 317 (1973).

40. Coleman v. Alabama, 399 U.S. 1, 9–10 (1970).

probable cause to authorize a brief period of detention is not a critical stage, as "[t]his issue can be determined reliably without an adversary hearing."[41]

Though the Supreme Court has grappled with the critical stage inquiry for over eighty years, it has never addressed an issue near the center of indefinite detention without counsel: whether an indigent defendant has a right to counsel at the first court appearance.[42] The Court came closest to deciding this issue in 2008 with *Rothgery v. Gillespie County*.[43] Walter Rothgery went six months—including three weeks in jail—without an attorney on a felony charge of being a felon in possession of a weapon.[44] Only, Mr. Rothgery had never been convicted of a felony.[45] Soon after his arrest, Rothgery had one court appearance, where a magistrate found probable cause for the arrest, informed Rothgery of the charge, and set bail.[46] By custom, the prosecutor did not attend the proceeding, nor did the county provide counsel to Mr. Rothgery. Instead, like Scott County, Gillespie County waited until after Rothgery's indictment to provide an attorney,[47] who promptly contacted the prosecutor with proof that his client was the victim of a faulty criminal background check.[48] Rothgery then sued the county for delaying the appointment of counsel, which Rothgery asserted would have prevented his indictment and time in jail—most of which occurred after his re-arrest upon indictment.[49]

When Rothgery's case reached the Supreme Court, the Court appeared poised to decide whether he should have been provided an attorney at his initial appearance before the magistrate judge.[50] The Court instead answered the antecedent question of whether Rothgery's right to counsel "attached" at the initial appearance. The general rule is that the right to counsel attaches once a criminal prosecution has begun; thereafter, the state must appoint counsel within a reasonable time to provide competent representation at any subsequent critical stage.[51] The Court had twice held that attachment occurs at the first appearance before a judicial officer.[52] Yet Gillespie County asserted that the absence of a prosecutor meant that Rothgery's prosecution had not

41. Gerstein v. Pugh, 420 U.S. 103, 120 (1975).

42. Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 333–34 (2011).

43. 554 U.S. 191, 194–95 (2008).

44. *Id.* at 196.

45. *Id.* at 195.

46. *Id.* at 196.

47. *Id.* at 196–97.

48. *Rothgery*, 554 U.S. at 196–97.

49. *Id.* at 197.

50. *See* Colbert, *supra* note 41, at 341.

51. *Rothgery*, 554 U.S. at 211–12.

52. *Id.* at 199.

begun.[53] The Court rejected this distinction, clarifying that the prosecutor's presence was immaterial to attachment.[54] But the Court explicitly left for another day the resolution of "whether the 6-month delay in appointment of counsel resulted in prejudice to Rothgery's Sixth Amendment rights," and it also declined to articulate what standards might govern that decision.[55] Until then, this task falls to the states and lower courts. As was the case before *Rothgery*, most states still do not guarantee counsel at the first appearance.[56]

II. THE SIXTH AMENDMENT'S LIMITS IN ADDRESSING INDEFINITE DETENTION WITHOUT COUNSEL

Rothgery reveals a major crack in the Court's right to counsel jurisprudence. By sidestepping whether counsel is required at the first appearance, states must continue measuring the timing for counsel appointment backward from the next critical stage—i.e., estimate when the critical stage will occur, and calculate how far in advance of that stage counsel must be appointed. To avoid such guesswork, several commentators have asserted that counsel is required at the first appearance because a defendant's fundamental right to pretrial liberty is at stake. They contend that defendants must have representation at first appearance bail hearings—which have not been declared critical stages—to guard against arbitrary detention.[57] Valuable in its own right, securing pretrial release also improves a defendant's chances at a favorable outcome either in plea bargaining or at trial.[58] Further, bail hearings typically involve complex questions beyond the layperson's ken, such as the propriety of nonmonetary bond and release conditions. On these grounds, New York's highest court has declared that the first appearance is a critical stage under the Sixth Amendment,[59] while Maryland's highest court reached the same conclusion under the state constitution's due process clause.[60]

I agree with these commentators and these courts that bail hearings should qualify as critical stages. But no one should expect that such a ruling from the Supreme Court will be enough to halt indefinite detention without counsel. One problem in places like Mississippi is that bail often is not set in a hearing. Many judges and law enforcement officers instead rely on bail schedules,

53. *Id.* at 197–98.

54. *Id.* at 207–08.

55. *Id.* at 213.

56. *See* Colbert, *supra* note 41, at 386.

57. *E.g.*, Gerstein, *supra* note 36, at 1523; Colbert, *supra* note 41, at 344.

58. Will Dobbie, et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* (The Nat'l Bureau of Econ. Research, Working Paper No. 22511, 2016).

59. Hurrell-Harring v. State, 930 N.E.2d 217, 223–24 (N.Y. 2010).

60. DeWolfe v. Richmond, 76 A.3d 1019, 1031 (Md. 2013).

which prescribe preset bail amounts or ranges according to the alleged offense.[61]

In fact, most places are like Mississippi on this score. By one survey, nearly two-thirds of counties around the country use bail schedules.[62] Consequently, many arrestees find that a judge has set bail before they are brought to court. As we witnessed time and again in Mississippi, if bail is addressed at the initial appearance, the only thing judges consider beyond the schedule is the arresting officer's recommendation as to the bail amount. Yes, the arresting officer. The prosecutor is rarely present. It is thus a fair assumption that most arrestees jailed on bail they cannot afford have never received anything resembling a hearing on their right to pretrial release. Indeed, the whole point of bail schedules is to eliminate such hearings.[63]

A likely rejoinder is that bail schedules are unconstitutional; they violate Supreme Court precedent prohibiting wealth-based detention and requiring individualized bail determinations. In fact, a number of courts and the Department of Justice have condemned bail schedules on these grounds.[64] Again, I agree. But the constitutional status of bail schedules says nothing about whether an initial appearance is a critical stage. The answer to that question is tied instead to another: when are states required to provide an individualized bail hearing—at the initial appearance, or some later date?

The Supreme Court has never squarely addressed the issue of by when an arrestee must receive a bail hearing. In *Gerstein v. Pugh*, where the Court recognized the right to a prompt probable cause hearing, the Court allowed states to experiment with conducting the probable cause and bail

61. *See* Lindsay Carlson, *Bail Schedules: A Violation of Judicial Discretion?* 26 CRIM. JUST. 12 (2011).

62. *Id.* at 14.

63. *Id.*

64. *See* Pugh v. Rainwater, 572 F.2d 1053, 1057–58 (5th Cir. 1978) (en banc); State v. Blake, 642 So. 2d 959, 968 (Ala. 1994); Lee v. Lawson, 375 So. 2d 1019, 1023 (Miss. 1979); Thompson v. Moss Point, 1:15-cv-182-LG-RHW, 2015 WL 10322003 (S.D. Miss. Nov. 6, 2015); Jones v. City of Clanton, 2:15-cv-34-MHT, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015); Cooper v. City of Dothan, 1:15–cv–425–WKW, 2015 WL 10013003 (M.D. Ala. June 18, 2015); Pierce v. City of Velda City, 4–15–cv–570–HEA, 2015 WL 10013006 (E.D. Mo. June 3, 2015); *see also* Stack v. Boyle, 342 U.S. 1, 4 (1951) (recognizing right to an individualized bail determination); Statement of Interest of the United States at 1, Varden v. City of Clanton, 2:15–CV–34–MHT (M.D. Ala. Feb. 13, 2015) (stating that the use of secured bail to detain the indigent "not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy"); Walker v. City of Calhoun, No. 4:15-cv-00170 (N.D. Ga. Jan. 26, 2016) (order granting preliminary injunction) ("[K]eeping individuals in jail solely because they cannot pay for their release, whether via fines, fees, or a cash bond, is impermissible") (citing Tate v. Short, 401 U.S. 395, 398 (1971) and Williams v. Illinois, 399 U.S. 235, 240–41 (1970)) (on appeal to the U.S. Court of Appeals for the Eleventh Circuit).

determinations at the initial appearance.[65] While the Court later ruled that the probable cause determination must happen within forty-eight hours of arrest,[66] regardless of when the initial appearance occurs, it has remained silent on whether arrestees have a comparable constitutional right to a prompt bail determination.[67]

Absent a constitutional requirement that states must conduct meaningful bail hearings at the first appearance, it is far from certain that the Court will require counsel at a proceeding most judges could literally conduct without looking up at or hearing from the defendant, where they need only recite the alleged charges and preset bail amount.[68] There is nothing "trial-like" about this process, though, as described above, the outcome of that process—release or detention—may prejudice the outcome in a defendant's case. Yet, even if the Court finally settles whether initial appearances are critical stages and/or the required promptness of bail hearings, there remains another puzzle to solving indefinite detention without counsel: when must counsel be appointed if the initial appearance and/or bail hearing is delayed? Or simply never happens?

Consider the curious case of Jessica Jauch. Police in Starkville, Mississippi arrested Ms. Jauch on April 26, 2012, for several traffic offenses.[69] The police then transferred Ms. Jauch to the nearby Choctaw County jail because she had an outstanding misdemeanor warrant in that jurisdiction.[70] Ms. Jauch cleared the warrant, but remained in jail after learning that the Choctaw County grand jury had issued a felony indictment against her in January 2012.[71] Unfortunately, Choctaw County was not in trial term when Jauch was arrested, and would not be until August.[72] Tragically, like Walter Rothgery, Jessica Jauch was innocent. Despite her repeated assertions of innocence and requests to be taken to a judge to post bail, Ms. Jauch sat in jail for 96 days. She finally appeared in court on July 31, 2012, wherein the judge appointed counsel and

65. 420 U.S. 103, 123–25 (1975).

66. Cty. of Riverside v. McLaughlin, 500 U.S. 44, 58–59 (1991).

67. The Court has recognized that "[a] prompt hearing is necessary," but in the context of interpreting the federal Bail Reform Act of 1984. United States v. Montalvo-Murillo, 495 U.S. 711, 716 (1990).

68. *See* Pauch v. Gautreaux, 973 F. Supp. 2d 658 (M.D. La. 2013) (holding that arrestee's Sixth Amendment right to counsel did not attach because the only hearing during seven months of detention was a video "jail callout" where a non-judge court commissioner set bail according to the bail schedule and the arrestee was not informed of charges); *see also* Farrow v. Lipetzsky, 637 F. App'x 986, 988 (9th Cir. 2016) (holding that "preliminary bail determination" did not render initial appearance a critical stage).

69. Jauch v. Choctaw Cty., No. 1:15-cv-75-SA-SAA, 2016 WL 5720649, at *1 (N.D. Miss. Sept. 30, 2016).

70. *Id.*

71. *Id.*

72. *Id.*

set bail. Ms. Jauch was released on August 6, 2012, and the prosecution finally dropped the charges against her in January 2013.

For those advocating the right to counsel at initial appearance, what should we make of Ms. Jauch's ordeal? She received counsel and a bail determination at her first appearance, but by that time she had been locked in jail *for three months*.[73] Like Walter Rothgery, Ms. Jauch filed a federal civil rights action against the county and its sheriff for the delays in bringing her to court and appointing counsel.[74] The federal district court made quick work of these claims. The court first dismissed Ms. Jauch's presentment claim on due process grounds.[75] It found that, because Ms. Jauch had already been indicted on the felony charge, she had no right to an initial appearance within forty-eight hours under Mississippi law, since the indictment supplied the requisite probable cause finding.[76] Denying Ms. Jauch's right to counsel claim thus became a matter of course under *Rothgery*—she was not subjected to a critical stage before her first appearance, and she received counsel at that first appearance.[77] The Sixth Amendment apparently requires nothing more.

The cases described above, particularly Jessica Jauch's, force the question of whether the Sixth Amendment is equal to the challenge of indefinite detention without counsel. The Supreme Court has made the right to pretrial counsel contingent on how the proceeding in question either affects or mimics the trial. This is entirely the wrong question. Once counsel was appointed, Josh Bassett, Walter Rothgery, and Jessica Jauch all had their cases dismissed by the prosecution without a trial. It is therefore hard to say counsel was appointed too late to protect their right to a fair trial. While theirs is certainly not the experience of most defendants subjected to prolonged pretrial detention—many of whom are willing to plead guilty despite their innocence—it does suggest the limitations of such an instrumentalist view of counsel's importance.

III. A NEW PATH: EQUAL ACCESS TO COURTS

Rather than ask whether counsel is necessary to protect a defendant's right a fair trial under the Sixth Amendment, the better question is whether we can condone a criminal justice system that tolerates unequal treatment of defendants based on wealth. Indefinite detention without counsel is almost exclusively the experience of the poor. Wealthier defendants can simply buy their way out of it by retaining counsel. Such inequities are properly addressed under the Fourteenth Amendment's Equal Protection and Due Process Clauses,

73. *Id.* at *2.
74. *Jauch*, 2015 WL 5720649, at *2.
75. *Id.* at *13.
76. *Id.* at *2 (citing Unif. R. of Cir & Cty. Ct. 6.05).
77. *Id.* at *4.

and the Court's line of cases establishing the right of meaningful access to courts. Framed this way, the right to counsel inquiry shifts from whether counsel is needed to avoid prejudice at a defendant's trial to whether counsel is needed to ensure that defendants are being treated fairly without regard to their resources.

The Court's access to courts jurisprudence finds its origins in *Powell v. Alabama*,[78] where the Court addressed the right to counsel in the infamous "Scottsboro boys" capital case. Though limiting itself to the extraordinary facts presented, the Court made clear its broader concern with "the inequitable treatment of indigents in criminal proceedings" and "indigents' ability to participate in the judicial process."[79] The Court later held in *Griffin v. Illinois* that the state could not deny trial transcripts on appeal to those unable to afford them when such access was necessary to secure meaningful appellate review.[80] In sweeping terms, the plurality opinion declared that, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[81]

This same principle of equal access is easily recognized in *Gideon v. Wainwright*, the Court's landmark decision guaranteeing state defendants the right to counsel in felony cases.[82] Though the Court grounded its decision in the Sixth Amendment, *Gideon* channeled *Griffin*, expressly noting that criminal justice systems must guarantee that "every defendant stands equal before the law."[83] In the Court's view, that counsel was an element essential to equality was apparent from the fact that "there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses."[84] Indeed, as originally understood, the Sixth Amendment primarily protected the right to counsel of choice for those who *could* afford attorneys.[85] Affirmatively requiring states to provide counsel to the indigent was therefore a radical shift, and one that only truly makes sense if the goal is to equalize access to the justice system.

It is worth noting that the parties in *Gideon* expressly grappled over whether *Griffin*'s equal access rule required the appointment of counsel in

78. 287 U.S. 45 (1932).

79. Lauren S. Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1221 (2013) (citing Sundeep Kothari, *And Justice for All: The Role Equal Protection and Due Process Principles Have Played in Providing Indigents with Meaningful Access to the Courts*, 72 TUL. L. REV. 2159, 2163 n.22 (1998)).

80. 351 U.S. 12, 13–14, 16, 19 (1956) ("Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.").

81. *Id*. at 19.

82. 372 U.S. 335 (1963).

83. *Id*. at 344.

84. *Id.*

85. United States v. Van Duzee, 140 U.S. 169, 173 (1891).

criminal cases.[86] And the same day the Court issued *Gideon*, it also decided *Douglas v. California*, which held that *Griffin* required the appointment of counsel on a defendant's first appeal as of right.[87] More explicit about its equal access framework, the *Douglas* Court explained:

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.[88]

Taken together, *Griffin*, *Gideon*, and *Douglas* support the proposition that relative wealth should not dictate a defendant's treatment in the criminal justice system. If the "basic tools" necessary for fair treatment are available for a price, the state must guarantee access to those for whom that price is too high.[89] From the equal access perspective, indefinite detention without counsel is not acceptable simply because the state fails to initiate a critical stage proceeding, though the practice may survive—and has survived—a Sixth Amendment challenge. Instead, the practice is unconstitutional because detained defendants with means would invariably hire an attorney to seek every available avenue to secure their release.

That a separate constitutional provision might guarantee a right to counsel outside the Sixth Amendment is not unusual. As mentioned above, the Fourteenth Amendment already guarantees a right to counsel on appeal, along with a right to counsel for juveniles facing detention in juvenile court.[90] And the Fifth Amendment's guarantee of a right to counsel for those facing custodial interrogation[91]—an iconic feature of *Miranda* warnings—is arguably better known than the Sixth Amendment's guarantee. The Court declared all of these rights either at the time of or after deciding *Gideon*. The Fifth Amendment right to counsel is especially significant because, like the equal access rule proposed here, it applies before a prosecution commences.

Thus, particularly for those facing detention, the equal access framework proposed here untethers the right to counsel from the Sixth Amendment's more rigid reliance on attachment, critical stages, and trial outcomes. A person's

86. Jerod H. Israel, Gideon v. Wainwright – *From a 1963 Perspective*, 99 IOWA L. REV. 2035, 2041–42 (2014).

87. Douglas v. California, 372 U.S. 353, 357–58 (1963).

88. *Id.*

89. Britt v. North Carolina, 404 U.S. 226, 227 (1971); *see also* State v. Touchet, 642 So. 2d 1213, 1215 (La. 1994) (finding that *Britt*'s requirement that the state provide "basic tools of an adequate defense" stems from *Griffin*'s equal access mandate) (quotations omitted).

90. *In re* Gault, 387 U.S. 1, 41 (1967).

91. Miranda v. Arizona, 384 U.S. 436, 471 (1966).

experience with the criminal justice system may begin before their prosecution, and includes more dimensions than will ever be addressed at trial. For example, it is difficult to conceive how the amount of bail prescribed *ex parte* by a schedule would ever become a substantive issue at trial.[92] Yet those who can and those who cannot afford that bail amount will experience dramatically different justice systems. As the families of Kalief Browder[93] and Sandra Bland[94] can attest, the difference is all too often that between life and death. The right to counsel at the first appearance—or upon detention—necessarily flows from the imperative to eliminate invidious discrimination of this sort. Critical stage or not, if a jurisdiction sets bail with a schedule, defendants with access to counsel, but who cannot afford bail, will have the means to contest that determination immediately. States cannot price the indigent out of the same opportunity.

Equal access thus allows a re-evaluation of the Jessica Jauch case. Had she been able to afford counsel, that attorney could have challenged her detention without bond through a habeas petition in the local trial courts,[95] or with a petition to the state appellate courts.[96] Counsel also could have begun preparing her defense, uncovered the evidence of her innocence, and confronted the prosecutor to have the case dismissed. Counsel could have done all this without waiting three months for the next trial term. The fact that Ms. Jauch's lack of wealth blocked her access to these vital protections undoubtedly violates the principles of equal justice outlined above. The same is true for every other defendant trapped in our nation's systems of indefinite detention.

CONCLUSION

Eradicating indefinite detention without counsel is not possible without first freeing defendants from the strictures of the Sixth Amendment's critical

92. *See* O'Donnell v. Harris Co., No. CV H-16-1414, 2016 WL 7337549, at *19 (S.D. Tex. Dec. 16, 2016) ("The inability to pay bail cannot be raised as a defense in a subsequent criminal prosecution.").

93. Michael Schwirtz & Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES (June 8, 2015), http://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html [http://perma.cc/AQV2-NNGM].

94. Leon Neyfakh, *Why Was Sandra Bland Still in Jail?*, SLATE (July 23, 2015, 8:17 PM), http://www.slate.com/articles/news_and_politics/crime/2015/07/sandra_bland_is_the_bail_system_that_kept_her_in_prison_unconstitutional.html [http://perma.cc/6GRQ-NG2L].

95. *See* MISS. UNIF. R. CIR. & CTY. CT. 2.07 (West, Westlaw through 2017) ("The writ of habeas corpus shall extend to all cases of illegal confinement or detention by which any person is deprived of his/her liberty, or by which rightful custody of the person is withheld from the person entitled thereto.").

96. *See* MISS. R. APP. P. 9 (West, Westlaw through 2017).

stage analysis. Pretrial detention is critical in its own right. Jailing an unconvicted person is always an emergency. It is an emergency to which people with means respond by hiring a lawyer. But, for the indigent in places like Mississippi, it is an emergency that too often goes unanswered. While the Constitution may tolerate delaying counsel until a critical stage, it cannot tolerate dual criminal justice systems based on wealth. Recognizing this command under the equal protection and due process principles outlined above, though a departure from the Court's recent Sixth Amendment jurisprudence, is more fundamentally a return to that doctrine's roots in meaningful and equal access to courts. It is also the clearest way to end the shame of indefinite detention without counsel.

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

KANDACE KAY EDWARDS, on behalf of herself and all others similarly situated, Plaintiff, v. DAVID COFIELD, in his official capacity as Randolph County Sheriff, CHRISTOPHER MAY, in his official capacity as Circuit Clerk, JILL PUCKETT, in her official capacity as Magistrate of the Randolph County District Court, and CLAY TINNEY, in his official capacity as the District Court Judge of the Randolph County District Court, Defendants.	Case No. 3:17-CV-321 (Class Action)

CLASS ACTION COMPLAINT

I. PRELIMINARY STATEMENT

1. Defendants Randolph County Sheriff David Cofield ("Cofield"), Circuit Court Clerk Christopher May ("May"), Magistrate Jill Puckett ("Puckett"), and District Court Judge Clay Tinney ("Tinney") are operating a two-tiered pretrial justice system. Secured financial conditions of release are required for misdemeanor and felony offenses pursuant to a predetermined bail schedule that specifies a monetary amount based only on the charge. A person arrested for a misdemeanor or felony offense who can afford the monetary amount is released from jail immediately upon payment. Those arrestees who cannot afford the monetary

amount may remain in jail for nearly four weeks before they are afforded a hearing to argue for their release. How quickly—or whether—a person is released from jail depends entirely on her access to money.

2. Pursuant to this discriminatory scheme, individuals remain detained for varying lengths of time. How long presumptively innocent arrestees remain in jail after arrest depends on whether they or their families are able to pay, to borrow sufficient resources, or to arrange for a third-party surety. Others, like Ms. Edwards, who are too poor to pay and unable to find anyone to pay the secured money bond for them, remain in jail for the entire duration of their case.

3. Ms. Edwards was arrested on May 17, 2017 and is currently incarcerated because she cannot afford to pay the secured monetary amount required by the predetermined bail schedule. If she could pay the amount, she would be released from jail immediately.

4. On behalf of herself and all others similarly situated, Ms. Edwards seeks declaratory relief and injunctive relief. Ms. Edwards also seeks a temporary restraining order on behalf of herself. Ms. Edwards seeks an injunction against Sheriff Cofield from prospectively jailing arrestees unable to pay secured monetary bail without an individualized hearing with adequate procedural safeguards that includes an inquiry into and findings concerning their ability to pay, the suitability of alternative non-financial conditions of release, and a finding on the record that any conditions of release are the least restrictive conditions necessary to achieve public safety and court appearance. She seeks declaratory relief against Defendants May, Puckett, and Tinney.

II. JURISDICTION AND VENUE

4. This is a civil rights action arising under 42 U.S.C. § 1983 and 28 U.S.C. § 2201, et seq., and the Fourteenth Amendment to the United States Constitution. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction).

5. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this district.

III. PARTIES

A. Plaintiffs

6. Plaintiff Kandace Kay Edwards is a resident of Roanoke, Alabama.

B. Defendant

7. Defendant David Cofield is the Randolph County Sheriff. He is sued in his official capacity.

8. Defendant Christopher May is the Circuit Court Clerk for Alabama's Fifth Judicial Circuit Court. He is sued in his official capacity.

9. Defendant Jill Puckett is the Magistrate for the Randolph County District Court. She is sued in her official capacity.

10. Defendant Clay Tinney is the Randolph County District Court Judge. He is sued in his official capacity.

IV. STATEMENT OF FACTS

A. Defendants' Money Bail Practices Detain People Based on Their Wealth Rather Than Their Suitability for Release.

i. Defendants Unconstitutionally Detain People Unable to Pay Secured Money Bail Set Pursuant to the Predetermined Bail Schedule.

11. One out of every five people in Randolph County lives in poverty.[1] One-third of the labor force is unemployed, and nearly half of the population over the age of sixteen did not work at all in 2015, the last year for which data is available.[2]

12. Although nearly half of the county residents do not have a job, the Sheriff requires any person arrested and charged with a misdemeanor or felony offense to pay a secured amount of money bail (i.e. cash, commercial surety, or property) to be released from jail following arrest. The amount of money that an arrestee must pay is pre-determined by a bail schedule based on the charge. *See* Bail Schedule, attached as Ex. A to West Decl.

13. Defendants do not consider a person's flight risk or danger to the community, whether a person can afford the predetermined amount of money, or whether any alternative non-financial conditions of release may mitigate any relevant risk before requiring the predetermined money bail amount. Instead, immediate access to money alone determines whether a person remains in jail following arrest. If a person can afford to pay the amount required, the individual is released from jail immediately. If the person is unable to pay, she remains incarcerated.

14. Prior to a first appearance in court, no official conducts an inquiry into the arrestee's ability to pay the amount required by the bail schedule, makes any findings concerning the arrestee's ability to pay, or considers forms of release other than secured money bail. Although the bail schedule states that a bail amount may be increased or reduced "on a case by case basis," in practice Defendants do not deviate from the bail schedule.

---

[1] U.S. Census Bureau, *Poverty Status in the Past 12 Months: 2011-2015 American Community Survey 5-Year Estimates*, *available at* https://goo.gl/uUZ3gb.

[2] *Id.*

15. District Court Judge Clay Tinney and Circuit Court Clerk Christopher May created the bail schedule that governs release from the Randolph County jail. The bail schedule is printed on Defendant Mays's letterhead and instructs anyone with questions to contact him. Defendant May and Defendant Tinney must approve any changes to the post-arrest procedures set forth in their bail schedule.

16. Defendant Tinney is responsible for setting policies governing release conditions and conducts the initial appearance for any arrestees unable to pay the monetary amount required by the bail schedule. Magistrate Jill Puckett enforces these policies and conducts initial appearances when Defendant Tinney is unavailable.

17. Sheriff David Cofield is responsible for the operation of the Randolph County jail and the release and detention of arrestees. *See* Ala. Code §14-6-1. As a matter of policy and practice, Defendant Cofield keeps arrestees in jail if they cannot pay the monetary amount required by the bail schedule and releases immediately those who can pay. Defendant Cofield maintains this policy and practice even though he receives no notice that there has been an inquiry into a person's ability to pay the amount set, findings that the person can afford to meet the financial conditions of release, and consideration of alternative non-financial conditions of release.

ii. Defendant Cofield Detains Arrestees Who Cannot Pay the Predetermined Money Bail Amount While Releasing Those Who Can Pay.

18. When a person is arrested in Randolph County, she is booked into the Randolph County Jail, which is operated by the Sheriff's Department. After booking, arrestees are informed by Sheriff's Department employees that they are eligible for immediate release, but only if they pay a predetermined amount of money. The Sheriff determines the required amount of money by referring to the bail schedule promulgated by Defendants Tinney and May. At no

point does any Defendant or other person perform any inquiry into the arrestee's ability to pay the money bail amount required by the schedule.

19. Arrestees who do not have other restrictions on their eligibility for release can post bail themselves, make a phone call to ask a friend or family to post bail on their behalf, or contact a bonding agent to assist in posting bail. If an arrestee can afford to pay the predetermined bail, the Sheriff's Department accepts the money and releases her.

20. A person with financial resources will be released almost immediately after posting bail, but the Sheriff's Department will continue to detain a person who cannot afford the preset, secured bail amount. This policy and practice results in systematic wealth-based detention in Randolph County.

iii. Defendants Puckett and Tinney Do Not Review the Predetermined Financial Conditions of Release for Up to Four Weeks.

21. Any person who cannot afford the monetary amount required by the bail schedule is taken before Defendant Tinney or Puckett for an initial appearance. Under Alabama law, a judge or magistrate is required to conduct the initial appearance within 48-hours following a warrantless arrest or 72-hours following a warrant arrest. Ala. R. Crim. P. 4.3(a)(1)(iii), (b)(2)(i).

22. The purposes of the initial appearance under state law are to (1) ascertain the defendant's true name and address, (2) inform the defendant of the charges against him, and (3) notify the defendant of the right to counsel. Ala. R. Crim. P. 4.4. A judicial officer is also required to determine a defendant's conditions of release. *Id.*; Ala. R. Crim. P. 7.4 ("If a defendant has not been released from custody and is brought before a court for initial appearance, a determination of the conditions of release shall be made.").

23. However, it is Defendants Tinney's and Puckett's general practice to refuse to determine an arrestee's conditions of release at the initial appearance. Defendants instead usually defer this determination for up to four weeks, when a preliminary hearing is conducted in a felony case for those arrestees who exercised their right to such a hearing. *See* Sample Order on Initial Appearance, attached as Ex. B to West Decl; *see also* Ala. R. Crim. P. 5. In a misdemeanor case, Defendants generally defer any review of an arrestee's conditions of release for up to two weeks until Defendant Tinney conducts a status hearing and only if an arrestee first filed a motion for a bond reduction. Because of these practices, the initial court appearance generally provides no opportunity for a person to raise ability to pay, to conduct a hearing on alternative conditions of release, or to raise any constitutional issues with ongoing post-arrest detention. Defendants are unrepresented by counsel at the initial appearance.

24. Defendants Tinney and Puckett generally do not allow arrestees to make arguments about their ability to pay or their suitability for release at the initial appearance. Pursuant to Defendants Tinney's and Puckett's policy and practice, arrestees are not permitted to challenge their financial conditions of release or to request non-monetary conditions of release.

25. At the initial appearance, Defendants Tinney and Puckett do not make any findings that a person can afford the pre-set amount required or that secured money bail is the least restrictive condition of release available. Defendants Tinney and Puckett also do not consider whether an arrestee may be safely released on affordable financial or non-financial release conditions, nor do they make any affirmative inquiry into or findings concerning arrestees' ability to pay the amount of secured money bail required.

26. Defendants Tinney and Puckett generally will not consider an arrestee's suitability for release or ability to pay until a later preliminary hearing in a felony case or a bond

reduction hearing in a misdemeanor case. As a matter of policy and practice, preliminary hearings are held once every four weeks in felony cases and hearings on motions for a bond reduction in misdemeanor cases are held twice per month in Randolph County. Thus, an individual who cannot afford the predetermined secured money bail amount usually will be detained for up to four weeks without any opportunity for an individualized release hearing or to otherwise raise any issues concerning her ability to pay or her suitability for release under alternative conditions.

27. By contrast, an arrestee who can pay the monetary amount required by the bail schedule is released immediately from jail.

28. Defendants' reliance on predetermined secured money bail has resulted in unnecessary wealth-based detention that is devastating for the poorest people in Randolph County. Many people in the Randolph County jail have not been convicted of a crime and are only in jail because they cannot afford to pay secured money bail.

29. Because the grand jury sits—and trials are held—only twice per year in Randolph County, a person unable to afford monetary bail may spend longer in jail before trial than under the sentence they would receive if they pleaded guilty or were found guilty following trial.

B. Plaintiff Edwards Cannot Afford the Monetary Amount Required by the Bail Schedule.

30. Ms. Edwards is a 29-year old woman, who lives in Roanoke, Alabama.

31. Ms. Edwards is 7.5 months pregnant and a mother of two other children, who are one and two years old. She served in the Army National Guard from 2006 to 2010 and was stationed in Gadsden, Alabama.

32. On May 17, 2017, Ms. Edwards was arrested for forging a check in the amount of $75 and charged with possession of a forged instrument in the second degree, a class C felony.

33. Ms. Edwards was taken to the Randolph County Jail and told that she would be released from jail only if she paid a $7,500 bond. A corrections officer told her that she has a court date on June 6, 2017 and that she will remain incarcerated until that date unless she can afford to pay her bond.

34. Ms. Edwards is indigent and cannot afford to buy her release from jail. She has no assets and recently lost her job at Huddle House because her pregnancy made it difficult for her to work. Her only source of income is food stamps and WIC. Ms. Edwards also suffers from serious mental illness and is relying on Medicaid to support her through her pregnancy.

35. Ms. Edwards was evicted from her home in December 2016 after losing her job. She has been homeless since the eviction and has been staying between friends' homes. Many of those homes do not have power or running water.

36. The cell she was originally assigned to had six women, but there were only four beds. The jail also does not have any shampoo or wash cloths because of severe jail overcrowding.

37. She is concerned about her health because her pregnancy is high-risk. Since being incarcerated, she has been sleeping on a mat on the floor of the jail.

C. Non-Financial Conditions of Release Alone or in Combination with Unsecured Money Bail Are As Effective As or More Effective than Secured Money Bail.

38. Detention on money bail increases the likelihood of conviction. Controlling for other factors, a person who is detained pretrial is 13% more likely to be convicted and 21% more likely to plead guilty than a person who is not detained.[3]

[3] Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* 18 (May 2, 2016) (finding that a person who is detained pretrial is 13% more likely to be convicted and 21% more likely to plead guilty than a person who is not detained), *available at* https://goo.gl/riaoKD; *see also* Arpit Gupta, Christopher Hansman, & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization* 15, 19 (May 2,

39. Studies show that those detained pretrial face worse outcomes at trial and sentencing than those released pretrial, even when charged with the same offense.[4] Controlling for other factors, those detained pretrial will be given longer jail sentences.[5] Detained defendants are more likely to plead guilty just to shorten their jail time, even if they are innocent.[6] They have a harder time preparing a defense, gathering evidence and witnesses, and meeting with their lawyers. A person's ability to pay money bail thus has an irreparable impact on the outcome of a criminal case.

40. Wealth-based pretrial detention also makes the community less safe. First, wealth-based detention unnecessarily jails those who could be released safely into the community. Several studies have shown that just two or three days in pretrial detention increases the likelihood of future crimes, as well as the future risk level of even low-risk defendants.[7] In

---

2016), *available at* https://goo.gl/OW5OzL (finding a 12 percent increase in the likelihood of conviction using the same data).

[4] Christopher T. Lowenkamp *et al.*, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Laura and John Arnold Foundation 4 (November 2013), *available at* https://goo.gl/FLjVZP (those detained for the entire pretrial period are more likely to be sentenced to jail and prison—and receive longer sentences—than those who are released at some point before trial or case disposition).

[5] *Id.*

[6] Stevenson, *supra* note 1 at 18 ("Pretrial detention leads to an expected increase of 124 days in the maximum days of the incarceration sentence, a 42% increase over the mean."); *see also* Gupta, et. al, *supra* note 1, at 18–19 ("Criminal defendants assessed bail amounts appear frequently unable to produce the required bail amounts, and receive guilty outcomes as a result. Entered guilty pleas by defendants unwilling to wait months prior to trial and unable to finance bail likely contribute to this result.").

[7] *See* Department of Justice, National Institute of Corrections, *Fundamentals of Bail*, 15-16 (2014), *available at* https://goo.gl/jr7sMg ("[D]efendants rated low risk and detained pretrial for longer than one day before their pretrial release are more likely to commit a new crime once they are released, demonstrating that length of time until pretrial release has a direct impact on public safety."); Christopher T. Lowenkamp *et al.*, *The Hidden Costs of Pretrial Detention*, Laura and John Arnold Foundation, 3 (November 2013) GQGNiY (studying 153,407 defendants and finding that "when held 2–3 days, low risk defendants are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours"); Paul Heaton *et al.*, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 768 (2017), *available at* https://goo.gl/Waj3ty ("While pretrial detention clearly exerts a protective effect in the short run, for misdemeanor defendants it may ultimately service to compromise public safety," and finding that in a representative group of

other words, detention based on poverty for just a few days *increases* recidivism. Second, wealth-based pretrial systems release individuals based only on their ability to pay and without any assessment of their risk of flight or dangerousness. Consequently, individuals who need monitoring or supervision to mitigate their risk of flight or dangerousness receive neither.

41. Pretrial detention causes instability in employment, housing, and care for children and other dependent relatives. It hurts families, leads to unemployment, and can make people homeless. Even a couple of days in pretrial detention can cause a person to lose housing, be removed from a shelter list, be terminated from a job, be exposed to unsafe and unsanitary conditions at the jail, and may result in serious trauma to dependent children.

42. The empirical evidence demonstrates that there is no significant relationship between requiring money bail as a condition of release and arrestees' rates of appearance in court.[8]

43. Other jurisdictions throughout the country do not keep people in jail based on their wealth. Instead of relying on money, these jurisdictions release arrestees with unsecured financial conditions, non-financial conditions, and pretrial supervision practices and procedures that can help increase court attendance and public safety without requiring detention.

44. Other jurisdictions employ numerous less restrictive, non-monetary conditions of release to maximize public safety and court appearances. Such non-monetary conditions of

---

10,000 misdemeanor offenders, pretrial detention would cause an additional 600 misdemeanors and 400 felonies compared to if the same group had been released pretrial).

[8] *See, e.g.*, Arpit Gupta, Christopher Hansman, & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization* 21 (May 2, 2016), *available at* https://goo.gl/OW5OzL ("Our results suggest that money bail has a negligible effect or, if anything, increases failures to appear."); Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* 11 (October 2013) *available at* https://goo.gl/UENBKJ ("Whether released defendants are higher or lower risk or in-between, unsecured bonds offer the same likelihood of court appearance as do secured bonds").

release include, but are not limited to: unsecured bond, reporting obligations, phone and text message reminders of court dates, rides to court for those without transportation or a stable address, substance abuse treatment, mental health treatment, counseling, alcohol monitoring devices, or, in extreme cases of particular risk, electronic monitoring and home confinement.

45. Jurisdictions that rely on pretrial services and non-monetary conditions of release do not sacrifice public safety or court attendance. For example, Washington, D.C. releases more than 94% of all defendants without financial conditions of release and no one is detained on secured money bail that they cannot afford.[9] Empirical evidence shows that nearly 90% of released defendants in Washington, D.C. make all court appearances, nearly 90% complete the pretrial release period without any new arrests, and 98-99% consistently avoid re-arrest for violent crime.[10]

46. The federal judiciary also eschews wealth-based detention, requiring any detention order to be based on a finding of dangerousness or flight risk, and the practice has not harmed court appearance rates or public safety.[11]

---

[9] *See* D.C. Code § 23-1321; *see also* Pretrial Services Agency for the District of Columbia, *Release Rates for Pretrial Defendants within Washington, DC available at* https://goo.gl/VSDeDk ("In Washington, DC, we consistently find over 90% of defendants are released pretrial without using a financial bond").

[10] *See* Pretrial Services Agency for the District of Columbia, *Outcomes for Last Four Years*, *available at* https://www.psa.gov/?q=node/558; Pretrial Just. Inst., *The D.C. Pretrial Services Agency: Lessons from Five Decades of Innovation and Growth* 2 (2009), *available at* https://goo.gl/6wgPM8 ("The high non-financial release rate has been accomplished without sacrificing the safety of the public or the appearance of defendants in court. Agency data shows that 88% of released defendants make all court appearances, and 88% complete the pretrial release period without any new arrests.").

[11] *See* 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."); *see also* Thomas H, Cohen, *Pretrial Release and Misconduct in Federal District Courts, 2008-2010*, Bureau of Justice Statistics Special Report 13 (Nov. 2012), *available at* https://goo.gl/hN99E7 (finding from 2008 to 2010, only 1% of federal defendants released pretrial failed to make court appearances and 4% were arrested for new offenses).

47. Pretrial detention based solely on wealth is consistently more expensive than effective pretrial supervision programs.[12] Without relying on a person's ability to afford cash bail, pretrial supervision programs can save taxpayer expense while maintaining high public safety and court appearance rates.

V. CLASS ACTION ALLEGATIONS

48. Ms. Edwards proposes one class seeking declaratory and injunctive relief pursuant to Fed. R. Civ. P. 23(a) and (b)(2). This Class is defined as: All arrestees who are or who will be jailed in Randolph County who are unable to pay the secured monetary bail amount required for their release.

49. A class action is a superior means, and the only practicable means, by which Ms. Edwards and unknown Class members can challenge Defendants' unlawful use of wealth-based detention.

50. Class action status is appropriate because Defendants have acted, or failed and/or refused to act, on grounds that apply generally to the proposed Class, such that final injunctive and declaratory relief is appropriate with respect to each Class member as a whole.

51. As set forth more fully below, this action satisfies the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a) and the class counsel requirements of Rule 23(g).

Numerosity

[12] *See, e.g.,* Pretrial Justice Institute, *Pretrial Justice: How Much Does It Cost?* (Jan. 11, 2017), *available at* https://goo.gl/0lLtLM ("It has been estimated that implementing validated, evidence-based risk assessment to guide pretrial release decisions could yield $78 billion in savings and benefits, nationally."); United States Court, *Supervision Costs Significantly Less than Incarceration in Federal System* (July 18, 2013), *available at* https://goo.gl/dJpDrn (In 2012, "[p]retrial detention for a defendant was nearly 10 times more expensive than the cost of supervision of a defendant by a pretrial services officer in the federal system").

52. The precise size of the Class is unknown by Plaintiff because it is forward-looking, but it is substantial, given the hundreds of felony and misdemeanor cases adjudicated each year in the Randolph County District Court. Joinder of these unknown future members is impracticable.

53. Many of the class members are low-income individuals who will likely lack financial resources to bring an independent action or to be joined in this action. Joinder of every member of the class would be impracticable.

Commonality

54. The relief sought is common to all members of the Class, and common questions of law and fact exist as to all members of the Class. Ms. Edwards seeks relief from Defendants' money bail policies, practices, and procedures, which violate the rights of the Class members. Ms. Edwards also seeks relief mandating Defendants to change their policies, practices, and procedures so that the constitutional rights of the Class members will be protected in the future.

55. Among the most important, but not the only, common questions of fact are:

a. Whether the Randolph County District Court and Defendant Cofield uses a predetermined secured money bail schedule created by Defendants May and Tinney;

b. Whether Defendant Cofield releases arrestees from jail who pay the monetary amount required by the bail schedule and detains those who cannot;

c. Whether Defendant Cofield detains all individuals who are unable to pay the monetary amount required by the bail schedule regardless of whether inquiry into their ability to pay has been made;

d. Whether and when Defendants Tinney and Puckett conduct individualized release

hearings and what procedural protections, if any, Defendants Tinney and Puckett provide to arrestees at those hearings; and

e. What standard post-arrest procedures Defendants perform on misdemeanor arrestees; for example, whether Defendants use any alternate procedures for promptly releasing people determined otherwise eligible for release but who are unable to afford a monetary payment.

56. Among the most important common question of law are:

a. Whether requiring a financial condition of pretrial release without inquiry into and findings concerning a person's ability to pay, and without consideration of alternative conditions of release, violates the Fourteenth Amendment's Due Process and Equal Protection Clauses;

b. Whether Defendants' actions in detaining arrestees solely based on their inability to pay a predetermined amount of money violate the Fourteenth Amendment's Due Process and Equal Protection Clauses;

c. Whether Defendants' detention of poor arrestees using predetermined amounts of money without providing a sufficiently prompt release hearing violates the Fourteenth Amendment; and

d. Whether Defendants' detention of poor arrestees without conducting an individualized release hearing with adequate procedural safeguards violates the Fourteenth Amendment.

Typicality

57. Ms. Edwards's claims are typical of the claims of the other members of the Class, and she has the same interests in this case as all other Class members that she represents. Each

of them suffers injuries from the failure of Defendants to comply with the Constitution: they are each confined in jail because they could not afford to pay their secured monetary bond amount. The answer to whether Defendants' money bail practices are unconstitutional will determine the claims of Ms. Edwards and every other Class member.

58. If Ms. Edwards succeeds in the claim that Defendants' policies and practices concerning wealth-based detention violate her constitutional rights, that ruling will likewise benefit every other member of the Class.

Adequacy

59. Ms. Edwards will fairly and adequately represent the interests of the proposed Class she seeks to represent.

60. Ms. Edwards has no interests separate from or in conflict with those of the proposed Class she seeks to represent as a whole and seeks no relief other than the declaratory and injunctive relief, which is sought on behalf of the entire proposed Class she seeks to represent.

Class Counsel

61. Ms. Edwards is represented by attorneys from Civil Rights Corps, the American Civil Liberties Union, and the Southern Poverty Law Center who have experience in litigating complex civil rights matters in federal court and extensive knowledge of both the details of Defendants' practices and the relevant constitutional and statutory law. Counsel has the resources, expertise, and experience to prosecute this action.

A. Rule 23(b)(2)

62. Class action status is appropriate because Defendants have acted in the same unconstitutional manner with respect to all class members: Defendants require all arrestees to

pay for their release in an amount pre-determined by a bail schedule. Those who can pay are released and those who cannot pay are detained.

63. The Class therefore seeks declaratory and injunctive relief that Defendants violate the Plaintiff's and Class members' rights under the Fourteenth Amendment by setting secured financial conditions of release without a prompt and individualized release hearing with adequate procedural protections that includes an inquiry into and findings concerning their ability to pay, or meaningful considerations of alternative conditions of release. Because the putative Class challenges Defendants' money bail practices as unconstitutional through declaratory and injunctive relief that would apply the same relief to every member of the Class, Rule 23(b)(2) certification is appropriate and necessary.

VI. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
Fourteenth Amendment to the Constitution
(Due Process and Equal Protection)
Plaintiff and the Proposed Class versus Defendants May, Puckett, Tinney, and Cofield

64. Ms. Edwards incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

65. The Fourteenth Amendment to the U.S. Constitution prohibits jailing a person solely because of her inability to make a monetary payment.

66. Ms. Edwards and the Proposed Class have a fundamental interest in their pretrial liberty under state and federal law.

67. Requiring a person arrested for a misdemeanor or felony offense to pay a monetary bail amount pre-determined by a bail schedule is not narrowly tailored to achieve the government's interests in securing a defendant's appearance in court or public safety.

68. There are less restrictive means to reasonably assure the government's interests.

69. Defendants violate Plaintiff's and the Proposed Class's fundamental rights under the Fourteenth Amendment by enforcing against them a post-arrest system of wealth-based detention in which they are kept in jail because they cannot afford a monetary amount of bail pre-determined by a bail schedule without inquiry into or findings concerning ability to pay, and without consideration of and findings concerning alternative non-monetary conditions of release.

SECOND CLAIM FOR RELIEF
Fourteenth Amendment to the Constitution
(Substantive and Procedural Due Process – Individualized Release Hearing)
Plaintiff and the Proposed Class versus Defendants Puckett, Tinney, and Cofield

70. Ms. Edwards incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

71. The Fourteenth Amendment to the U.S. Constitution prohibits Defendants from depriving any person of life, liberty, or property without due process of law.

72. Plaintiff and the Proposed Class have a fundamental interest in pretrial liberty.

73. The Fourteenth Amendment to the U.S. Constitution requires that pretrial arrestees receive an individualized release hearing with adequate procedural safeguards to determine the least restrictive conditions on their pretrial liberty.

74. Defendants do not provide counsel; give arrestees an opportunity to testify or present evidence; restrict detention to extremely serious offenses; or require a finding that no affordable financial or non-financial condition of release will ensure appearance or public safety before jailing pretrial arrestees on monetary bail amounts that they cannot afford. Because Defendants create de facto detention orders by using predetermined monetary amounts, they also fail to apply any legal or evidentiary standards to determine whether a person should be detained prior to trial based on some immitigable risk.

75. Defendants violate Ms. Edwards's and the Proposed Class's rights under the Fourteenth Amendment by jailing them without providing an individualized release hearing with the procedural protections described above.

THIRD CLAIM FOR RELIEF
Fourteenth Amendment to the Constitution
(Due Process – Prompt Release Hearing)
Plaintiff and the Proposed Class versus Defendants Puckett, Tinney, and Cofield

76. Ms. Edwards incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

77. The Fourteenth Amendment to the U.S. Constitution prohibits Defendants from depriving any person of life, liberty, or property without due process of law.

78. Plaintiff and the Proposed Class have a fundamental interest in their pretrial liberty, which outweighs any governmental interest in pretrial detention.

79. The Fourteenth Amendment requires a prompt release hearing following detention.

80. Defendants violate Ms. Edwards's and the Proposed Class's fundamental rights to pretrial liberty and due process by jailing them without providing a sufficiently prompt release hearing.

VII. Request for Relief

WHEREFORE, Plaintiff requests the following relief:

a. That the Court assume jurisdiction over this action;

b. Certification of a class under Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure, represented by Ms. Edwards;

c. A declaration that Defendants May, Puckett, and Tinney violate the Plaintiff's and Class members' rights under the Fourteenth Amendment by setting secured

financial conditions of release without inquiry into or findings concerning their ability to pay, or meaningful consideration of alternative non-financial conditions of release;

d. A declaration that Defendants Puckett and Tinney violate Ms. Edwards's and Class members' due process rights by jailing them without conducting an individualized release hearing with adequate procedural safeguards;

e. A declaration that Defendants Puckett and Tinney violate Ms. Edwards's and Class members' due process rights by jailing them without conducting a sufficiently prompt release hearing;

f. A temporary restraining order enjoining Defendant Cofield from prospectively detaining Ms. Edwards for failing to pay the monetary amount required by the bail schedule without a prompt individualized release hearing with adequate procedural safeguards that includes an inquiry into and findings concerning their ability to pay, the suitability of alternative non-financial conditions of release, and a finding on the record that any conditions of release are the least restrictive conditions necessary to achieve public safety and court appearance;

g. An order and judgment preliminarily and permanently enjoining Defendant Cofield from prospectively detaining arrestees for failing to pay the monetary amount required by the bail schedule without a prompt individualized release hearing with adequate procedural safeguards that includes an inquiry into and findings concerning their ability to pay, the suitability of alternative non-financial conditions of release, and a finding on the record that any conditions of release

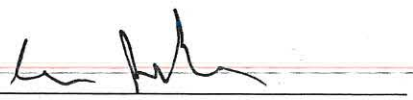
are the least restrictive conditions necessary to achieve public safety and court appearance;

h. An award of prevailing party costs, including attorney fees; and

i. Such other relief as the Court deems just and appropriate.

Dated: May 18, 2017.

Respectfully submitted,



Samuel Brooke
On behalf of Attorneys for Plaintiff

Samuel Brooke (ASB-1172-L60B)
Micah West (ASB-1842-J82F)‡
SOUTHERN POVERTY LAW CENTER
400 Washington Avenue
Montgomery, AL 36104
P: (334) 956-8200
F: (334) 956-8481
E: samuel.brooke@splcenter.org
E: micah.west@splcenter.org

Alec Karakatsanis (DC Bar No. 999294)*
Katherine Hubbard (Cal. Bar No. 302729)*
CIVIL RIGHTS CORPS
910 17th Street NW, Suite 500
Washington, DC 20006
P: (202) 930-3835
E: alec@civilrightscorps.org
E: katherine@civilrightscorps.org

Randall C. Marshall (ASB-3023-A56M)
ACLU FOUNDATION OF ALABAMA, INC.
P.O. Box 6179
Montgomery, AL 36106-0179
P: (334) 420-1741
E: rmarshall@aclualabama.org

Brandon Buskey (ASB-2753-A50B)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
CRIMINAL LAW REFORM PROJECT

125 Broad Street, 18th Floor
New York, NY 10004
P: (212) 549-2654
E: bbuskey@aclu.org

‡ *Admission pending*
**Attorneys for Plaintiffs*
Admission pro hac vice pending

CERTIFICATE OF SERVICE

I hereby certify that arrangements have been made to, on this date, deliver a true and correct copy of the foregoing by hand delivery to the following at the below addresses:

David Cofield, Sheriff
Randolph County Sheriffs' Office
1 N Main Street
Wedowee, AL 36278

Hon. Jill Puckett, Magistrate
Randolph County District Court
1 N Main Street
Wedowee, AL 36278

Christopher May, Circuit Clerk
Randolph County Circuit Court
1 N Main Street
Wedowee, AL 36278

Hon. Clay Tinney, Judge
Randolph County District Court
1 N Main Street
Wedowee, AL 36278

Formal proof of service will be filed with the Court when completed.

I further certify that arrangements have been made to, on this date, deliver a true and correct courtesy copy of the foregoing by hand delivery and by electronic mail to the following:

James W. "Jim" Davis, Section Chief
Constitutional Defense Section
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36104
E: jimdavis@ago.state.al.us

Jamie H. Kidd
J. Randall McNeill
WEBB & ELEY, P.C.
P.O. Box 240909
Montgomery, AL 36124
E: jkidd@webbeley.com
E: rmcneill@webbeley.com

John Alvin Tinney
Randolph County Attorney
P.O. Box 1430
Roanoke, AL 36274-9121
E: johntinneyattorney@gmail.com

on this May 18, 2017.

Samuel Brooke

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

Octavious Burks; Joshua Bassett, on Behalf of Themselves and All Others Similarly Situated,	*	
Plaintiffs,	*	
vs.	*	Case No: 3:14cv745HTW-LRA
Scott County, Mississippi; The Honorable Marcus D. Gordon, in his official capacity; The Honorable Bill Freeman, in his official capacity; The Honorable Wilbur McCurdy, in his official capacity; Mark Duncan, District Attorney for the 8th Circuit Court District, in his official capacity;	*	
Defendants.	*	

AMENDED CLASS ACTION COMPLAINT

INTRODUCTION

1. Plaintiff Octavious Burks is an unindicted felony arrestee who, at the time this suit was filed originally on September 23, 2014, had been held in the Scott County Detention Center without counsel since November 18, 2013. Plaintiff Joshua Bassett is a felony arrestee who, at the time this suit was filed originally on September 23, 2014, had been held in the Scott County Detention Center without counsel and without indictment since January 16, 2014. They bring this class action suit under 42 U.S.C. § 1983 on behalf of themselves and those similarly situated who have been indefinitely detained without individualized bail hearings in Scott County and who have been indefinitely denied counsel throughout the Eighth Circuit Court District.

2. As class representatives, Plaintiffs seek, for themselves and those similarly situated, declaratory relief to end and remedy Defendants' unconstitutional policies, which violate Plaintiffs' Sixth and Fourteenth Amendment rights to the assistance of counsel, their Sixth Amendment rights to a speedy trial, their Fourteenth Amendment rights against excessive and punitive pre-indictment detention, and their Fourteenth Amendment rights to an individualized bail hearing and determination.

3. Individually, Plaintiffs seek for themselves money damages against Defendant Scott County to compensate them for the months Plaintiffs wrongfully spent in jail awaiting indictment due directly to Scott County's unconstitutional customs and policies, which violate Plaintiffs' Sixth and Fourteenth Amendment rights to the assistance of counsel and their Fourteenth Amendment rights to an individualized bail hearing and determination.

JURISDICTION AND VENUE

4. Plaintiffs' claims arise under the Constitution and laws of the United States. This Court has jurisdiction over these claims pursuant to 28 U.S.C. §§ 1331, 1343(a)(3).

5. This Court has the authority to grant declaratory relief under 28 U.S.C. §§ 2201-2202 and Fed. R. Civ. P. 57. The federal rights asserted by Plaintiffs are enforceable under 42 U.S.C. § 1983.

6. Venue is proper in the Southern District of Mississippi under 28 U.S.C. § 1391(e). All Defendants, as well as the Named Plaintiffs and all potential class members, reside in this judicial district. All of the acts and omissions by Defendants giving rise to this action occurred in this judicial district.

PARTIES

Named Plaintiffs

7. Named Plaintiff Octavious Burks is a resident of Scott County, Mississippi.

8. On November 18, 2013, Mr. Burks was arrested in Scott County for attempted armed robbery, possession of a weapon by a felon, disorderly conduct, and possession of paraphernalia.

9. Justice Court Judge Bill Freeman conducted Mr. Burks' initial appearance on November 18, 2013. Mr. Burks was unrepresented at the initial appearance.

10. Mr. Burks has a fundamental constitutional right to bail under the Mississippi Constitution. Nevertheless, on the recommendation of the arresting officer, Judge Freeman set Mr. Burks' bail at $30,000. Judge Freeman set bail without any individualized hearing or

consideration of the bail factors required under state or federal law, including ability to afford bail and the appropriateness of nonmonetary bail options.

11. Mr. Burks could not afford this bail amount when it was set, and he continues to be financially unable to pay either the bond as set or any percentage of the bond that would be required for him to secure the bond through a licensed bond company or agent. Moreover, Mr. Burks does not have resources to enable him to post any kind of property bond in the amount of $30,000. Judge Freeman's order therefore constituted a denial of bail to Mr. Burks.

12. Mr. Burks was subsequently remanded to the Scott County Detention Center in Forest, Mississippi.

13. Mr. Burks has not been indicted by a Scott County grand jury.

14. After the filing of the Complaint, Scott County Sheriff Mike Lee publicly claimed that Plaintiff Burks could have made bail at $5,000. If true, none of the Defendants notified Plaintiff Burks that his bail had been, or could be, reduced from $30,000 to $5,000, and they did not they inform him of when this change occurred.

15. Mr. Burks could have afforded to pay the percentage of a $5,000 bond required to secure such a bond through a licensed bond company or agent.

16. The lowering of Plaintiff Burks' bond from $30,000 to $5,000, without any hearing, demonstrates that Defendant Freeman arbitrarily set Mr. Burks' bail at $30,000 in the first instance.

17. On November 18, 2013, the day of his initial appearance in the Scott County Justice Court, Mr. Burks completed an Affidavit of Indigence and Application for Appointment of Felony Indigent Counsel. Under Mississippi law, Plaintiff Burks's

submission of the Affidavit of Indigence entitled him to immediate representation by the public defender. Miss. Code Ann. § 25-32-9(1) ("Upon the signing of such affidavit by [the accused person], the public defender shall represent said person unless the right to counsel shall be waived by such person.").

18. Senior Circuit Judge Marcus Gordon, on behalf of Scott County, did not approve Mr. Burks' application for counsel until on or about December 19, 2013.

19. Judge Gordon and Scott County have not appointed counsel to represent Mr. Burks. They will not appoint counsel until Mr. Burks is indicted.

20. Had Defendant Scott County provided Plaintiff Burks with an individualized bail hearing and counsel either at or immediately after his initial appearance to conduct bail and preliminary hearings, the Justice Court would have set Mr. Burks bail at $5,000. Mr. Burks would have then secured his release from the Scott County jail and remained at liberty pending the action of the grand jury.

21. This case is not Mr. Burks' first experience with prolonged detention without counsel in Scott County. On two prior occasions, each for separate felony accusations, Mr. Burks has been held in the Scott County Detention Center without an affordable bail, without counsel, and without indictment.

22. Mr. Burks was first held for nearly 18 months, from August 30, 2009 to February 18, 2011 on suspicion of aggravated assault and disturbing the peace. He was indicted sometime around December, 2010, nearly sixteen months after his arrest. Mr. Burks was released in February, 2011.

23. Mr. Burks was held the second time for nearly a year, from June 18, 2012 to June 7, 2013 for possession of a firearm by a felon. The Sheriff's office eventually released him

on his own recognizance without a hearing. Upon information and belief, Mr. Burks has never been indicted on these allegations.

24. All told, Mr. Burks spent over three years in the Scott County jail since August 30, 2009, on three separate charges. He has only been indicted once, he has never been to trial, and he has never been convicted.

25. On September 26, 2014, three days after the filing of this lawsuit, this Court, on the application of the United States Attorney's Office, entered an order for writ of habeas corpus directing the Scott County jail to deliver Plaintiff Burks to federal custody for an initial appearance in federal court on October 16, 2014.

26. The order followed a federal indictment issued on September 9, 2014, charging Plaintiff Burks with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).

27. Neither Plaintiff Burks nor undersigned counsel were aware of the federal indictment prior to this Court's issuance of the writ.

28. This Court conducted Plaintiff Burks' initial appearance on his federal charges on October 16, 2014. Mr. Burks was represented by an attorney from the federal public defender's office.

29. Plaintiff Burks had the opportunity that day to conduct a bail hearing to determine his conditions for release. However, Mr. Burks waived this hearing because his official status as a Scott County inmate rendered a federal detention hearing moot.

30. Plaintiff Burks subsequently pleaded guilty to the indictment on October 21, 2014. His sentencing is currently scheduled for January 26, 2014.

31. Named Plaintiff Joshua Bassett is a resident of Scott County, Mississippi.

32. Plaintiff Bassett was arrested on January 3, 2014, pursuant to a warrant issued the same day for grand larceny and possession of methamphetamine.

33. Justice Court Judge Bill Freeman conducted Plaintiff Bassett's initial appearance on January 16, 2014. Mr. Bassett was unrepresented at the initial appearance.

34. Mr. Bassett has a fundamental constitutional right to bail under the Mississippi Constitution. Nevertheless, on the recommendation of the arresting officer, Judge Freeman set Mr. Bassett's bail at $100,000. Judge Freeman set bail without any individualized hearing or consideration of the bail factors required under state or federal law, including the appropriateness of nonmonetary bail options.

35. Mr. Bassett could not afford this bail amount when it was set, and he continues to be financially unable to pay either the bond as set or any percentage of the bond that would be required for him to secure bond through a licensed bond company or agent. Moreover, Mr. Bassett does not have resources to enable him to post any kind of property bond in the amount of $100,000. Judge Freeman's order therefore constituted a denial of bail to Mr. Bassett.

36. Mr. Bassett was subsequently remanded to the Scott County Detention Center in Forest, Mississippi.

37. On April 30, 2014, an arrest warrant issued for Mr. Bassett on one allegation of burglary and two allegations of petty larceny.

38. In March or April of 2014, Mr. Bassett completed an Affidavit of Indigence and Application for Appointment of Felony Indigent Counsel.

39. Under Mississippi law, Plaintiff Bassett's submission of the Affidavit of Indigence entitled him to immediate representation by the public defender. Miss. Code Ann.

§ 25-32-9(1) ("Upon the signing of such affidavit by [the accused person], the public defender shall represent said person unless the right to counsel shall be waived by such person.").

40. Senior Circuit Judge Marcus Gordon did not approve Mr. Bassett's application for counsel on or about May 21, 2014.

41. Scott County and Judge Gordon nonetheless did not formally appointed counsel to represent Mr. Bassett. They refused to appoint counsel until Mr. Bassett was indicted.

42. On September 25, 2014, two days after the filing of the original Complaint, Sheriff Lee released Plaintiff Bassett from the Scott County jail on a recognizance bond.

43. Defendant Lee released Plaintiff Bassett on the recommendation of Defendant District Attorney Gordon that Plaintiff Bassett be released if Scott County authorities determined that Mr. Bassett was not a flight risk or a danger to the community. Chris Allen Baker, *ACLU files lawsuit against Scott County*, Scott County Times, Oct. 1, 2014.

44. Plaintiff Bassett's release on his own recognizance demonstrates that Defendant Freeman arbitrarily set Mr. Bassett's bail at $100,000 in the first instance.

45. Had Defendant Scott County provided Plaintiff Bassett with an individualized bail hearing and counsel either at or immediately after his initial appearance to conduct the bail hearing, Mr. Bassett could have secured a recognizance bond soon after his arrest and remained at liberty pending the action of the grand jury.

46. Plaintiff Bassett was not indicted on the felony charges until December 4, 2014. He was not detained following indictment.

Defendants

47. Defendant Scott County is one of four counties in the Eighth Circuit Court District of Mississippi. The Mississippi Constitution and state law delegates to Scott County the State's Sixth and Fourteenth Amendment obligation to provide attorneys to arrestees who request and cannot afford them. *See, e.g.*, Miss. Const. art., 14, § 261; Miss. Code Ann. § 25-32-1; Miss. Code Ann. § 99-15-17.

48. To fulfill this duty, Scott County, through its Board of Supervisors and pursuant to Miss. Code Ann. § 19-3-69, has entered a *Contract for Employment of Felony Indigent Counsel* ("the Contract") with the circuit court, the Board of Supervisors of the other three counties in the Eighth Circuit, and four private attorneys.

49. The Contract obligates the county to provide a public defender to represent indigent felony arrestees in preliminary hearings in the Justice and Municipal Courts. The Named Plaintiffs and putative class members are intended third-party beneficiaries of this Contract.

50. Scott County nonetheless enforces a custom and policy of not providing counsel to indigent felony arrestees until they have been indicted.

51. Defendant the Honorable Marcus D. Gordon is the senior circuit judge for the Eighth Circuit Court District of Mississippi, located in Philadelphia, Mississippi and comprised of Leake, Neshoba, Newton, and Scott Counties. He is sued only in his official capacity.

52. Defendant Gordon is a signatory to the *Contract for Employment of Felony Indigent Counsel* on behalf of the Eighth Circuit. Under the contract and by custom, Defendant Gordon approves or disapproves the applications of individuals seeking appointed counsel due to indigence.

53. Under the contract and by custom, Defendant Gordon sets the appointment of counsel policies for all counties in the Eighth Circuit Court District, including Defendant Scott County. Judge Gordon's and the counties' uniform policy is to delay appointing counsel to eligible, indigent arrestees until they have been indicted, although the Contract and state law requires the counties to provide indigent counsel to individuals prior to indictment to conduct preliminary hearings.

54. Defendant Gordon is charged with impaneling grand juries in the Eighth Circuit District Court. MS R. Unif. Cir. and Cty. Ct. Rule 7.02. In Scott County, he impanels the grand jury three times per year.

55. Defendants Bill Freeman and Wilbur McCurdy are Justice Court judges for Defendant Scott County. In felony cases prior to indictment, they are responsible for conducting initial appearances and preliminary hearings, as well as for setting the conditions of release for arrestees. They are sued only in their official capacities.

56. Defendant Mark Duncan is the District Attorney for the Eighth Circuit District of Mississippi. His office is responsible for prosecuting felony cases in the District, including representing the state before the grand jury. He is sued solely in his official capacity.

FACTS

57. The Mississippi Constitution guarantees that the State may not formally proceed with a felony prosecution unless it first secures an indictment against the accused from a grand jury. Miss. Const. art. 3, § 27.

58. The State of Mississippi does not impose a limit on either the length of time a district attorney has to present a felony case to the grand jury for indictment, or on the length of time a felony arrestee may be held in jail without a valid indictment.

59. Thus, although those accused of a felony have a state constitutional right to an indictment before they may be formally prosecuted, an arrestee may spend an indefinite amount of time detained on a felony accusation prior to indictment.

60. Scott County's justice court judges increase the likelihood of indefinite detention prior to indictment by setting bail in arbitrary amounts, without individualized consideration of the bail factors required under state and federal law, including a defendant's ability to afford bail and the propriety of nonmonetary bail.

61. As a result of these practices by the Justice Court judges, felony arrestees in Scott County are routinely detained prior to indictment simply because they are too poor to afford bail.

62. The scarcity of grand jury panels further exacerbates the risk of indefinite pre-indictment detention in Scott County.

63. Defendant Gordon impanels the Scott County grand jury three times per year, typically in April, July/August, and November/December. The grand jury is discharged after no more than thirty days' service. Outside of these three grand jury terms, there is no continuous session of the Scott County grand jury.

64. Thus, depending on the timing of the arrest, a detained, felony arrestee may wait three to five months to learn if he has been indicted. Each time the District Attorney's office fails to present an arrestee's case to the grand jury potentially adds an additional three to five months to the length of detention.

65. The policies and practices of the District Attorney's office also contribute significantly to the incidence of indefinite pre-indictment detention in Scott County.

66. Specifically, the District Attorney's office does not regularly monitor the progress of law enforcement investigations to avoid delay in the preparation of cases for the grand jury. The District Attorney's office instead has a general policy of not reviewing most felony cases until the investigating law enforcement office completes its investigation and informs the District Attorney that the case is ready for grand jury presentment.

67. Exacerbating the problem of delayed indictment, indigent arrestees awaiting indictment in Scott County are uniformly denied the assistance of counsel.

68. Pursuant to Defendant Gordon's assignment of counsel policies for the counties constituting the Eighth Circuit, an indigent accused of a felony will not be appointed meaningful, continuous counsel unless and until the arrestee is indicted.

69. The policy stems from Judge Gordon's view that the Circuit Court lacks jurisdiction to appoint counsel for arrestees who request a preliminary hearing. Campbell Robertson, *In a Mississippi Jail, Convictions and Counsel Appear Optional*, N.Y. Times, Sept. 25, 2014, at A15.

70. Judge Gordon also stated his belief that appointing counsel prior to indictment would be a waste of resources. *Id.* ("The reason is, that public defender would go out and spend his time and money and cost the county money in investigating the matter . . . . And then sometimes, the defendant is not indicted by the grand jury. So I wait until he's been indicted.").

71. Because a felony arrestee may wait an indefinite amount of time prior to indictment, the amount of time an indigent felony arrestee may be denied the assistance of counsel prior to indictment is also indefinite.

72. This systemic denial of counsel is calamitous for those accused of felony offenses in the Eighth Circuit Court District.

73. An arrestee's right to counsel attaches at the initial appearance, and thereafter counsel must be provided in time for that attorney to provide meaningful representation at any subsequent "critical phase" of the criminal proceedings. *Rothgery v. Gillespie Cnty., Tex.*, 554 U.S. 191, 212-13 (2008).

74. Unindicted felony arrestees do not have attorneys to represent them at the initial appearance, a critical stage of the criminal proceedings in the Eighth District, where a defendant must argue for release or reasonable bail, or face an indefinite period of detention awaiting indictment.

75. Unindicted felony arrestees also have no attorney to protect their right to a preliminary hearing, despite the fact that the preliminary hearing is undeniably a critical stage of Mississippi criminal proceedings at which indigent arrestees are entitled to counsel. *McHale v. State*, 284 So. 2d 42, 44 (Miss. 1973) (citing *Coleman v. Alabama*, 399 U.S. 1 (1970)).

76. An arrestee has the right in a preliminary hearing to discover evidence, to call witnesses on her behalf, and to cross examine the state's witnesses. *Mayfield v. State*, 612 So. 2d 1120, 1129 (Miss. 1992).

77. If the court finds there is no probable cause, it must release the arrestee pending the action of the grand jury. MS R. Unif. Cir. and Cty. Ct. Rule 6.04. Should the court find probable cause, it may review the bail determination and set new conditions for release. *Id.*

78. Felony arrestees held in custody in Mississippi have an absolute right to request and to receive a preliminary hearing to challenge probable cause for the arrest prior to

indictment. MS R. Unif. Cir. and Cty. Ct. Rules 6.04, 6.05. However, an indicted defendant is not entitled to a preliminary hearing. *Id.*

79. The Mississippi Attorney General has twice announced that indigent arrestees should be appointed counsel prior to indictment to conduct preliminary hearings and to begin continuous representation. *See* MS AG Op., Miller (March 27, 2009) (citing MS AG Op., Rushing (March 24, 1993)).

80. However, according to Judge Gordon, an unindicted arrestee desiring a preliminary hearing "can represent himself, or he can employ an attorney." Robertson, *supra*, at A15.

81. The result of Defendant Gordon's and the counties of the Eighth Circuit's custom and policy is that unindicted, indigent arrestees, who are entitled to appointed counsel for a preliminary hearing under the Contract, state law, and federal law, receive neither counsel nor a preliminary hearing.

82. The arrestee also does not have an attorney to challenge the bail amount by pursuing a separate civil habeas action or a petition under Rule 9 of the Mississippi Rules of Appellate Procedure.

83. An unindicted arrestee has no advocate actively investigating the facts and law underlying the allegations, preparing a defense strategy, or negotiating a potential resolution with the State.

CLASS ACTION ALLEGATIONS

84. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Named Plaintiffs Burks and Bassett bring this suit on behalf of themselves and all others similarly situated

who are or will in the future be affected by Defendants' unconstitutional policies, practices, and customs.

85. The Named Plaintiffs seek to represent three classes of individuals to obtain declaratory and injunctive relief that requires Defendants to comply with the constitutional requirements of the assistance of counsel, a speedy trial, non-punitive pre-indictment detention, and an individualized bail determination.

86. The Named Plaintiffs seek to represent a first class [Class 1] comprised of felony arrestees in the Eighth Circuit Court District who have signed an affidavit of indigence and who have been or will be denied the assistance of counsel until indictment.

87. The Named Plaintiffs seek to represent a second class [Class 2] that consists of felony arrestees in Scott County who have been or will be detained indefinitely prior to indictment.

88. The Named Plaintiffs seek to represent a third class [Class 3] consisting of felony arrestees in Scott County with a right to bail under Mississippi law but who have been or will be denied individualized bail hearings.

89. The classes are so numerous that joinder of all members is impracticable, and, because the classes include future members, the size of all three classes will only grow over time so long as Defendants' unconstitutional practices persist.

90. There are questions of law and fact common to each class.

91. Common questions of fact for Class 1 include what are Defendant Gordon's and the Eighth Circuit counties' policies with respect to appointing counsel for indigent arrestees awaiting indictment and whether he enforces those policies throughout the 8th Circuit Court District.

92. Common questions of fact for Class 2 include how many individuals accused of felonies are currently in jail in Scott County awaiting indictment; what are the Sheriff's Office's policies, practices, and procedures for investigating felonies and handing over cases to the District Attorney for grand jury presentment; and what policies, practices, and procedures does the District Attorney's office follow with respect to monitoring the cases of individuals detained prior to indictment.

93. Common questions of fact for Class 3 include what types of hearings justice court judges provide in determining bail; what factors, if any, justice court judges use to arrive at bail determinations; and how many felony arrestees eligible for bail are nonetheless detained due to bail amounts they cannot afford.

94. Common questions of law for Class 1 include whether the initial appearance in Mississippi is a critical stage of the criminal prosecution such that the Sixth and Fourteenth Amendments to the United States Constitution require that arrestees in the Eighth Circuit Court District receive meaningful and continuous counsel at the initial appearance; and whether the Sixth and/or Fourteenth Amendments to the United States Constitution guarantee an indefinitely detained, indigent arrestee in the Eighth District the right to meaningful and continuous appointed counsel immediately following the initial appearance and prior to indictment.

95. Common questions of law for Class 2 include whether the indefinite length of time class members risk spending in jail prior to indictment violates, or unduly risks violating, their liberty interests in a speedy trial as protected by the Sixth and Fourteenth Amendments to the United States Constitution; whether the indefinite length of time class members risk spending in jail prior to indictment violates, or unduly risks violating, their

rights against excessive and punitive detention prior to indictment guaranteed by the Fourteenth Amendment to the United States Constitution; and whether the Sixth Amendment right to a speedy trial or the Fourteenth Amendment right against excessive and punitive detention prior to indictment place a limit on the amount of time the State may detain an individual without bringing formal charges via indictment.

96. Common questions of law for Class 3 include whether putative class members in Scott County who have a right to bail under Mississippi law are entitled to an individualized bail determination under the Fourteenth Amendment to the United States Constitution.

97. The claims or defenses of the Named Plaintiffs are typical of the claims or defenses of the three proposed classes. The constitutional deprivations suffered by Named Plaintiffs are the same as those of putative class members.

98. The Named Plaintiffs and their attorneys will fairly and adequately protect the interests of the classes. The Named Plaintiffs have no interests antagonistic to the proposed classes, and they are represented by attorneys with significant expertise in criminal procedure and complex civil litigation.

99. Named Plaintiffs seek systemic reform in Scott County to eliminate indefinite pre-indictment detention and indefinite denial of counsel. Defendants' actions and omissions in violation of the federal constitution apply generally within each class; thus, final declaratory and injunctive relief is appropriate for the proposed classes.

CLASS CLAIMS FOR RELIEF

Count I: Denial of the Sixth and Fourteenth Amendment Right to Counsel

100. Defendant the Honorable Marcus D. Gordon, in his official capacity as the Senior Circuit Court Judge of the Eighth Circuit Judicial District, by failing to appoint meaningful, continuous counsel to indigent arrestees accused of felonies either at the initial appearance or immediately after the initial appearance or arrest, and in delaying the appointment of meaningful, continuous counsel until these arrestees have been indicted, thus preventing indigent arrestees from receiving a preliminary hearing, has violated and continues to violate the Sixth and Fourteenth Amendment right to the assistance of counsel of Named Plaintiffs and putative class members in proposed Class 1.

Count II: Denial of Fourteenth Amendment Right to Counsel

101. Named Plaintiffs and putative class members in proposed Class 1 have a federally-, state-, and county-created liberty interest in the appointment of counsel at initial appearance, or immediately after the initial appearance to determine whether to seek and conduct a preliminary hearing and to otherwise represent them prior to indictment. This liberty interest is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

102. Defendant the Honorable Marcus D. Gordon, in his official capacity as the Senior Circuit Court Judge of the Eighth Circuit Judicial District, by failing to appoint meaningful, continuous counsel to eligible indigent arrestees accused of felonies either at the initial appearance or immediately after the initial appearance or arrest to conduct a preliminary hearing and begin case preparation, and in delaying the appointment of counsel until these arrestees have been indicted, has violated and continues to violate the Fourteenth Amendment due process and equal protection rights to the assistance of counsel of Named Plaintiffs and putative class members in proposed Class 1.

103. Defendant Gordon's policy of denying counsel to unindicted, indigent arrestees invidiously discriminates against Named Plaintiffs and the putative Class 1 members by denying them the ability, available to those able to afford private counsel, to request and to receive preliminary hearings, and to otherwise obtain the assistance of counsel during the indefinite pre-indictment period.

Count III: Denial of Sixth and Fourteenth Amendment Right to Speedy Trial

104. Defendants, by their collective policies, practices and procedures described above, have created in Scott County a system of arbitrary, indefinite detention without counsel for unindicted and indigent felony arrestees that deprives or unduly risks depriving Named Plaintiffs and putative class members in proposed Class 2 of their liberty as protected by the Sixth and Fourteenth Amendment right to a speedy trial.

Count IV: Denial of Fourteenth Amendment Right against Excessive Pre-indictment Detention

105. Named Plaintiffs and putative class members in proposed Class 2 have a state-created liberty interest to be free from prosecution for felony accusations unless the District Attorney first secures an indictment from a grand jury. This state-created liberty interest is protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment.

106. Defendants, by their collective policies, customs, and practices described above, arbitrarily deprive Named Plaintiffs and Class 2 members of their liberty interest in a grand jury indictment by creating in Scott County a system of indefinite detention without counsel for unindicted and indigent felony arrestees. This system of indefinite detention violates or creates an undue risk of violating Named Plaintiffs' and putative class members in proposed

Class 2's right against excessive and punitive detention prior to indictment as guaranteed by Fourteenth Amendment's right to substantive due process.

Count V: Denial of Fourteenth Amendment Right to an Individualized Bail Determination

107. Defendants Scott County, the Honorable Bill Freeman, and the Honorable Wilbur McCurdy implement a custom, policy and practice of arbitrarily setting bail amounts and conditions for release without individualized hearings or consideration of the bail factors required under state and federal law, including a arrestee's ability to pay and the propriety of nonmonetary bail.

108. Named Plaintiffs and the putative Class 3 members have a fundamental constitutional right to bail under the Mississippi Constitution that creates a liberty interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Defendants Scott County, Freeman, and McCurdy's failure to provide individualized bail hearings and determinations therefore violates Named Plaintiffs' and the putative class members' rights to due process under the Fourteenth Amendment.

INDIVIDUAL CLAIMS FOR RELIEF

Count I: Denial of Sixth Amendment Right to Counsel

109. Defendant Scott County, by failing to appoint meaningful, continuous counsel to indigent arrestees accused of felonies either at the initial appearance or immediately after the initial appearance or arrest, and in delaying the appointment of meaningful, continuous counsel until these arrestees have been indicted, thus preventing indigent arrestees from receiving a preliminary hearing, has violated the Sixth and Fourteenth Amendment right to the assistance of counsel of Plaintiffs Burks and Bassett.

110. As a direct and proximal result of Defendant Scott County's failure to provide Plaintiffs Bassett and Burks' with counsel, both Plaintiffs were wrongfully detained at the Scott County jail for 8 and 10 months, respectively.

Count II: Denial of Fourteenth Amendment Right to Counsel

111. Plaintiffs Burks and Bassett have a federally-, state- and county-created liberty interest in the appointment of counsel at the initial appearance or immediately after the initial appearance to conduct a preliminary hearing and to otherwise represent them prior to indictment that is protected by the Due Process Clause and Equal Protection Clauses of the Fourteenth Amendment.

112. Defendant Scott County, by failing to appoint meaningful, continuous counsel to indigent arrestees accused of felonies either at the initial appearance or immediately after the initial appearance or arrest to conduct a preliminary hearing and begin case preparation, and in delaying the appointment of counsel until these arrestees have been indicted, has violated Plaintiffs' Fourteenth Amendment due process and equal protection rights to the assistance of counsel.

113. Defendant Scott County's policy of denying counsel to unindicted, indigent arrestees invidiously discriminates against Plaintiffs and Bassett by denying them the ability, available to those able to afford private counsel, to request and to receive preliminary hearings, and to otherwise obtain the assistance of counsel during the pre-indictment period.

114. As a direct and proximal result of Defendant Scott County's failure to provide Plaintiffs Bassett and Burks' with counsel, both Plaintiffs were wrongfully detained at the Scott County jail for 8 and 10 months, respectively.

Count III: Denial of Fourteenth Amendment Right to an Individualized Bail Hearing

115. Defendant Scott County, the Honorable Bill Freeman and the Honorable Wilbur McCurdy implement a policy, custom, and practice of arbitrarily setting bail amounts and conditions for release without individualized hearings or consideration of the bail factors required under state and federal law, including an arrestee's ability to pay and the propriety of nonmonetary bail.

116. Plaintiffs Bassett and Burks have a fundamental constitutional right to bail under the Mississippi Constitution that creates a liberty interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Scott County's failure to provide individualized bail hearings and determinations violated Plaintiffs' rights to due process under the Fourteenth Amendment.

117. As a direct and proximal result of Defendant Scott County's failure to provide Plaintiffs Bassett and Burks' with individualized bail hearings, both Plaintiffs were wrongfully detained at the Scott County jail for 8 and 10 months, respectively.

RELIEF REQUESTED

WHEREFORE, Named Plaintiffs Burks and Bassett request that this Court:

a. Certify the three proposed classes as defined in paragraphs 85-96 above;

b. Enter a judgment declaring that Defendant Gordon has violated and is violating Named Plaintiffs' and the Class 1 members' right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution by failing to assign meaningful, continuous counsel either within 7 days of arrest, or within a reasonably immediate period of time to allow counsel to request, prepare for, and conduct preliminary and bail hearings;

c. Enter a judgment declaring that Defendant Gordon has violated and is violating Named Plaintiffs' and the Class 1 members' right to counsel under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution by failing to assign meaningful, continuous counsel either within 7 days of arrest, or within a reasonably immediate period of time to allow counsel to request, prepare for, and conduct preliminary and bail hearings;

d. Enter a judgment declaring that Defendant Scott County has violated and is violating the right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution of Plaintiffs Bassett and Burks by failing to by failing to assign counsel within 7 days of their arrests, or within a reasonably immediate period of time to allow counsel to request, prepare for, and conduct preliminary and bail hearings;

e. Enter a judgment declaring that Defendant Scott County violated Plaintiffs Bassett and Burks's right to counsel under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution by failing to assign them counsel within 7 days of their arrests or within a reasonably immediate period of time to allow counsel to request, prepare for, and conduct preliminary and bail hearings.

f. Enter a judgment declaring that Defendants are violating or unduly risk violating Named Plaintiffs' and the Class 2 members' right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution by failing to provide periodic judicial hearings to review and determine the propriety of their continued custody prior to indictment as a matter of right;

g. Enter a judgment declaring that Defendants are violating or unduly risk violating Named Plaintiffs' and the Class 2 members' right against excessive and punitive pre-indictment

detention under the substantive component of the Due Process Clause of Fourteenth Amendment to the United States Constitution by failing to provide periodic judicial hearings to review and determine the propriety of their continued custody prior to indictment as a matter of right;

h. Enter a judgment declaring that Defendants Scott County, Freeman, and McCurdy are violating Named Plaintiffs' and the Class 3 members' Fourteenth Amendment due process rights to individualized bail determinations;

i. Enter a judgment declaring that Defendant Scott County violated Plaintiffs Bassett and Burks' Fourteenth Amendment due process rights to individualized bail determinations;

j. Award damages against Scott County to Plaintiffs Burks and Bassett for the time they spent wrongfully detained at the Scott County jail due directly to Scott County's failure to provide them with counsel and individualized bail hearings;

k. Award costs and attorney's fees pursuant to 42 U.S.C. § 1988;

l. Grant or award any other relief this Court deems just and proper.

This the Twelfth day of December, 2014.

Respectfully submitted,

/s/Brandon Buskey
Brandon J. Buskey*
Ezekiel Edwards*
American Civil Liberties Union Foundation
Criminal Law Reform Project
125 Broad Street, 18th Floor
New York, NY 10004
212-284-7364
bbuskey@aclu.org
eedwards@aclu.org
* Pro Hac Vice

/s/Charles Irvin
Charles Irvin (MS Bar No. 99607)
ACLU of Mississippi, Foundation, Inc.
233 East Capital Street
Jackson, MS 39201
(601) 3543408
cirvin@aclu-ms.org

James Craig (MS Bar No. 7798)
Katie Schwartzmann*
Roderick and Solange MacArthur Justice Center
4400 S. Carrollton Avenue
New Orleans, LA 70119-6824
504-620-2259 phone
jim.craig@macarthurjustice.org
katie.schwartzmann@macarthurjustice.org

J. Cliff Johnson (MS Bar No. 9383)
Roderick and Solange MacArthur Justice Center
P.O. Box 1848
University, MS 38677
662-915-7629 phone
cjohnson@macarthurjustice.org

CERTIFICATE OF SERVICE

I hereby certify that on this, the 12th day of December, 2014, the foregoing Amended Complaint was filed with the Clerk of Court using the CM/ECF system which sent notifications to all counsel of record.

s/ *Cliff Johnson*
J. Cliff Johnson (MS Bar No. 9383)
Roderick and Solange MacArthur Justice Center
P.O. Box 1848
University, MS 38677
662-915-7629 phone
cjohnson@macarthurjustice.org

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

HENRY AYO, and KAIASHA WHITE on behalf of themselves and all others similarly situated, Plaintiffs, v. CLEVE DUNN, Sr., REHABILITATION HOME INCARCERATION, EAST BATON ROUGE PARISH, Defendants.	Case No. 3:17-cv-526 **COMPLAINT – CLASS ACTION** **JURY DEMAND**

I. PRELIMINARY STATEMENT

1. For years, Defendant Rehabilitation Home Incarceration ("RHI"), a private organization purporting to provide pretrial supervision services, has profited off individuals in East Baton Rouge Parish by requiring them to pay hundreds of dollars to RHI to be released from jail—effectively holding them for ransom. This fee is the creation of RHI alone—it is not ordered by any court. Those who cannot afford the fee languish in jail for days, weeks, or even months as they and their loved ones scramble to pay off RHI.

2. This scheme is arranged by Cleve Dunn, Sr. ("Dunn"), RHI's Chief Executive Officer, and officials with the East Baton Rouge Parish Prison (the "Prison"), who, at RHI's direction, refuse to release individuals ordered to RHI supervision until they pay the initial fee. These officials do not inquire into an individual's ability to pay RHI's initial fee.

3. The practice occurs with the knowledge of Trudy White, a criminal court judge of the Nineteenth Judicial District Court of Louisiana (the "JDC"), who sets bond for arrestees and indiscriminately orders them to undergo supervision by RHI—often for indefinite periods of time before their cases go to trial.

4. After arrestees pay RHI's initial fee and are released by the Prison, RHI continues to exact money from them, charging a $225 monthly fee and additional fees for requirements such as classes and ankle monitoring. RHI and Dunn wrongfully use the threat of arrest by East Baton Parish Rouge law enforcement or RHI officials, as well as the threat of bond revocation by the JDC and additional jailing at the Prison, to coerce payment.

5. Plaintiffs Kaiasha White and Henry Ayo bring this class action pursuant to 42 U.S.C. § 1983, the Louisiana and federal Racketeering Influenced and Corrupt Organization Acts (RICO), and other state causes of action against Defendants Dunn, RHI", and East Baton Rouge Parish ("the Parish"). Defendant Dunn regularly commits predicate acts under RICO–extorting money from Plaintiffs and the proposed Class—by wrongfully detaining them in jail until they pay RHI's initial fee, then threatening them with additional jailing if they fail to satisfy RHI's continuing demands for money once released. Plaintiffs seek actual and treble damages to compensate them and the proposed Class for the injuries they have sustained, and continue to sustain, because of Defendant Dunn's extortionate activities.

6. Plaintiffs Ayo and White and the proposed Class also seek damages from East Baton Rouge Parish and RHI for their policy and practice of detaining Plaintiffs and proposed Class members in the Prison until they paid RHI's initial fee, in violation of the Fourteenth Amendment's guarantees of due process and equal protection and their Fourth Amendment right against unreasonable seizures.

7. Finally, Plaintiffs Ayo and White individually seek damages from RHI under the Louisiana Unfair Trade Practices Act for RHI's harmful and oppressive commercial practices, and, on behalf of themselves and the proposed Class, seek damages from RHI for conversion and unjust enrichment under state law.

II. JURISDICTION AND VENUE

8. This is a civil class action arising under 42 U.S.C. § 1983, 18 U.S.C. § 1964, the United States Constitution, and Louisiana law.

9. The Court has jurisdiction over Plaintiffs' federal claims pursuant to 28 U.S.C. § 1331 (federal question jurisdiction). The Court has jurisdiction over Plaintiffs' claims under Louisiana law pursuant to 28 U.S.C. § 1367 (supplemental jurisdiction).

10. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this district.

III. PARTIES

A. Plaintiffs

11. Plaintiff Henry Ayo is a resident of East Baton Rouge Parish.

12. Plaintiff Kaiasha White is a resident of East Baton Rouge Parish.

B. Defendants

13. Defendant Cleve Dunn, Sr., is the Executive Director of Rehabilitation Home Incarceration. He is a resident of East Baton Rouge Parish, Louisiana.

14. Defendant Rehabilitation Home Incarceration ("RHI") is a non-profit corporation registered with the State of Louisiana, with its principal place of business in East Baton Rouge Parish, Louisiana.

15. Defendant East Baton Rouge Parish is a parish organized under the laws of the State of Louisiana.

IV. FACTS

General Facts

A. The Nineteenth Judicial District Court

16. The Nineteenth Judicial District Court (the "JDC") has original jurisdiction over all civil and criminal matters and original exclusive jurisdiction of state felony cases in East Baton Rouge Parish, Louisiana. La. Const. art. V, § 16(A)(1)-(2). Louisiana district court judges are elected and serve six-year terms. There are eight criminal court judges who hear misdemeanor and felony cases in the JDC.

17. The JDC and individual judges also make agreements with private companies to provide certain court services such as pre-trial supervision.

18. Judge White has served on the JDC since 2009 and was re-elected to the JDC in 2014. She presides over both civil matters and state misdemeanor and felony cases assigned to Criminal Division J, Section 8, of the JDC.

B. RHI's Judicial and Political Ties to Judge White

19. RHI is among the private companies that offer pretrial supervision services for the JDC.

20. According to its website, RHI, which is registered as a non-profit corporation in Louisiana,[1] has supervised thousands of individuals in East Baton Rouge, Orleans, Ascension, and Tangipahoa parishes since its inception in 1993.[2]

[1] *See* La. Sec'y of State, "Search for La. Business Filings," Rehabilitation Home Incarceration, https://coraweb.sos.la.gov/CommercialSearch/CommercialSearchDetails.aspx?CharterID=601962_DF50A07E17.

21. RHI is owned and operated by the Dunn family, who live in Baton Rouge. Cleve Dunn Sr., Evonne Dunn, and Tameka Dunn all serve as co-directors of RHI.

22. RHI is the only approved vendor for pre-trial supervision on Judge White's website.[3]

23. RHI does not have a formal written contract with the JDC. Its provision of services to Judge White is based on an informal arrangement between RHI and Judge White.

24. RHI officials and Judge White are political allies. RHI officials and employees supported Judge White's 2014 re-election campaign.

25. Cleve Dunn Jr. served as Chairperson of Judge White's Campaign Committee; White's campaign paid Cleve Dunn, Sr. for marketing; and RHI paid Frederick Hall, a former RHI employee, and his wife, Gloria Hall, who owns and operates the bond company to which RHI routinely refers putative supervisees, for campaign support activities.

C. **Defendants' Pretrial Supervision Scheme**

26. Individuals arrested for criminal offenses in East Baton Rouge Parish are initially taken to the East Baton Rouge Parish Prison (the "Prison").

27. The following day, they appear via closed-circuit television between the Prison and the JDC for a hearing to determine probable cause for detention and to set bond. The eight criminal judges of the JDC take turns conducting this hearing, with each serving as the "duty judge" for a given week.

---

[2] *Who We Are*, REHAB. HOME INCARCERATION (2014), http://www.rhiweb.com/.

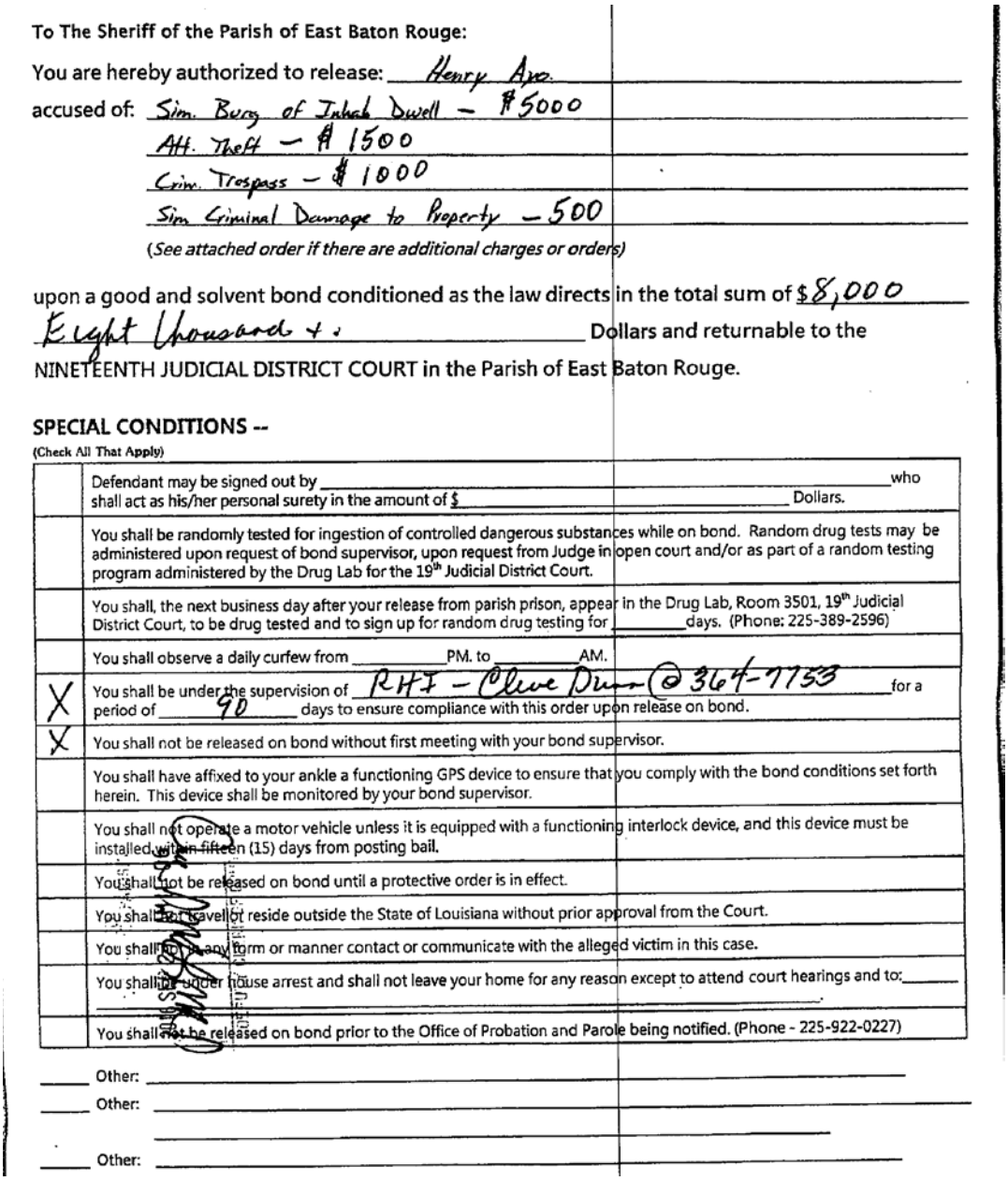
[3] Judge Trudy M. White, "Approved Vendors," http://judgetrudywhite.com/page.php?name=vendors (last visited Mar. 31, 2017). Judge White also assigns individuals a company called Street Crimes Alternatives for pretrial supervision. However, this company is also run by Dunn.

28. Usually before the hearing, the judge on duty has already reviewed the affidavit of probable cause and set a bond amount and release conditions for the defendant. At this hearing, the duty judge may adjust an arrestee's bond based on facts disclosed at the hearing.

29. When Judge White is on duty, she typically asks an arrestee only about his knowledge of the charges and informs him of the bond amount. She generally does not ask questions beyond these topics. Nor does she allow arrestees to be heard on issues beyond these topics. Although a public defender may be present to note the cases appointed to the public defender office, no representation is provided at this initial hearing.

30. Since Judge White's re-election to the JDC in 2014, she has assigned arrestees to supervision by RHI. White does so without conducting in open court an individualized determination of, or providing an opportunity for arrestees to be heard on, the need for, or the conditions of, RHI supervision. Indeed, White appears to make assignments to RHI via the bond form before arrestees appear before her, and she does not ask arrestees any questions before assigning them to RHI, such as whether an arrestee can afford to pay bond or RHI's initial or monthly fees.

31. Rather than conduct these inquiries, Judge White signs an order making RHI supervision a condition of release on bond, without instruction about the terms of this supervision. Plaintiff Ayo's bond order, which includes the term of supervision by RHI while on bond, is reproduced here:



To The Sheriff of the Parish of East Baton Rouge:

You are hereby authorized to release: Henry Ayo.

accused of: Sim. Burg of Inhab Dwell – $5000
Aff. Theft – $1500
Crim. Trespass – $1000
Sim Criminal Damage to Property – 500

(See attached order if there are additional charges or orders)

upon a good and solvent bond conditioned as the law directs in the total sum of $8,000 Eight Thousand + . Dollars and returnable to the NINETEENTH JUDICIAL DISTRICT COURT in the Parish of East Baton Rouge.

SPECIAL CONDITIONS --

(Check All That Apply)

	Defendant may be signed out by _____ who shall act as his/her personal surety in the amount of $_____ Dollars.
	You shall be randomly tested for ingestion of controlled dangerous substances while on bond. Random drug tests may be administered upon request of bond supervisor, upon request from Judge in open court and/or as part of a random testing program administered by the Drug Lab for the 19th Judicial District Court.
	You shall, the next business day after your release from parish prison, appear in the Drug Lab, Room 3501, 19th Judicial District Court, to be drug tested and to sign up for random drug testing for _____ days. (Phone: 225-389-2596)
	You shall observe a daily curfew from _____ PM. to _____ AM.
X	You shall be under the supervision of RHI – Clive Dunn @ 364-7753 for a period of 90 days to ensure compliance with this order upon release on bond.
X	You shall not be released on bond without first meeting with your bond supervisor.
	You shall have affixed to your ankle a functioning GPS device to ensure that you comply with the bond conditions set forth herein. This device shall be monitored by your bond supervisor.
	You shall not operate a motor vehicle unless it is equipped with a functioning interlock device, and this device must be installed within fifteen (15) days from posting bail.
	You shall not be released on bond until a protective order is in effect.
	You shall not travel or reside outside the State of Louisiana without prior approval from the Court.
	You shall not in any form or manner contact or communicate with the alleged victim in this case.
	You shall be under house arrest and shall not leave your home for any reason except to attend court hearings and to: _____
	You shall not be released on bond prior to the Office of Probation and Parole being notified. (Phone - 225-922-0227)

_____ Other: _____

_____ Other: _____

_____ Other: _____

32. Judge White usually sets the duration of RHI's supervision at either ninety days, irrespective of the supervisee's next court date, or for an indefinite period of time.

33. As shown in Ayo's bond order, however, Judge White otherwise does not provide specific supervision terms for RHI to enforce. For instance, Judge White does not order a curfew or impose house arrest on those assigned to RHI, though those are listed as "special conditions" that she could check to apply in her standard order.

34. Nor does Judge White order payment of the initial fee or monthly fee as a condition of release from the Prison. Instead, RHI sets this payment as a condition of release.

35. East Baton Rouge Parish has authority over, and responsibility for, operating the Prison, and Sheriff Gautreaux III and Warden Grimes have final policymaking authority for the East Baton Rouge Parish's operation of the Prison.

36. Through an agreement with RHI, Sheriff Gautreaux III and Warden Grimes, as final policymakers for East Baton Rouge Parish with respect to jailing and releasing arrestees at the Prison, created and enforce a policy that the Prison will not release arrestees from the Prison until it receives permission from RHI—permission that comes only after RHI is satisfied with the initial payment made.

37. RHI demands an initial fee of $525.

38. Arrestees typically only learn they must pay this initial fee to be released when they or their family members attempt to post bail or when they first meet with RHI at the Prison.

39. Arrestees who cannot immediately pay the initial RHI fee may wait in jail for days or weeks until they can pay all or some portion of the initial fee.

40. At the time of release, the arrestee's next court date typically has not been scheduled, and the arrestee has not been arraigned. In some cases, the supervisee is not arraigned during the RHI supervision term. Thus, supervision sometimes ends before the arrestee ever re-appears before Judge White for his or her next hearing.

41. Upon release, RHI requires the arrestee—now a "supervisee"—to sign a contract setting forth RHI's future fees and conditions of supervision. A copy of a redacted, standard contract is reproduced here:

Contract

This Contract between Rehabilitation Incarceration referred to as RHI and [redacted] referred to as client is effective as follows: This contract made and entered into this 7TH day of OCT 2016. This client agrees to be intensely monitored by RHI upon release by the Court, and further agrees to adhere to the monitoring procedures explained and listed below. The client agrees to comply with the following: SUN - THURS 10P - 6A FRI - SAT 11P - 6A

1. Curfew shall be from ~~9:00pm until 6:00am~~. On the days the client is not working, the client shall be confined to his/her residence unless an emergency occurs. The client *shall inform the assigned monitor who will evaluate* the emergency and make a decision.
2. The Client shall provide RHI with a work schedule weekly and immediately inform the assigned monitor of any changes.
3. The Client shall not consume any alcohol beverages and/or any illegal drugs during this monitored period; *and will refrain from bad associates and stay away from any* and all firearms and weapons.
4. The Client shall not leave the Parish of East Baton Rouge without permission from [redacted] RHI and the court. 8A - 11A - 3P - 8P
5. The client shall contact the monitor four different times during the day providing the monitor with all activities, when not working.
6. The Client agrees to be available for mental evaluation immediately upon release from jail; the evaluation must be done by a certified physician in the area. Please provide results to your Monitor.
7. All clients will be required to do a minimum of 50 hours of community service; and will have to take an Anger Management class.
8. The Client understands that any violation of this agreement shall be immediately reported to the courts, which may result in the client immediate arrest either by [redacted] RHI official or East Baton Rouge City Police.

In condition of the provided services, the client agrees to pay RHI a registration fee of $225.00, plus a $300.00 investigation fee, which are both non-refundable. Payments shall be made in U.S. currency, money order or certified check. This payment is due upon the release of the client from incarceration. RHI monthly fee is $225.00 that's due at the first of every month. **THUS done and signed this 7TH day of OCT, 2016 AT BATON ROUGE, LOUISIANA.**

42. According to the terms of RHI's standard contract, RHI supervisees must pay a $225 monthly fee to their assigned RHI officer, or "Monitor," during their supervision term.

43. The standard contract also sets a curfew for supervisees, restricting supervisees from spending the night anywhere other than at their reported residential address.

44. Despite collecting significant fees for its supervision, RHI does not require supervisees to make other substantive reports to their RHI Monitor other than their compliance with curfew. Nor does it typically require supervisees to meet their Monitor in person unless it is to make payment of their supervision fees. Rather, supervisees must only call their RHI Monitor by telephone multiple times a day and leave a voicemail message if the Monitor does not answer.

45. At RHI's discretion, a Monitor may require a supervisee to wear an electronic monitoring device at all times for additional fees.

46. Additionally, RHI may require supervisees to attend and pay additional fees for classes taught by RHI employees. RHI also imposes a number of other conditions, including prohibiting supervisees from consuming any alcohol, restricting their movement to within East Baton Rouge Parish, requiring them to complete a "mental evaluation" through a certified physician, or mandating 50 hours of community service.

47. RHI's standard contract with supervisees explicitly states that it will report any violation of these conditions to the JDC, which may result in the supervisee's arrest by "East Baton Rouge City Police" or by an RHI official.

48. RHI Monitors and Dunn himself threaten supervisees with re-arrest if they fail to make financial payments or comply with RHI's costly supervision conditions—without affirmatively inquiring into their ability to pay. Accordingly, supervisees pay (or attempt to pay) the fee out of fear of re-arrest and bond revocation by scraping together money from friends or family.

49. The policies and practices of RHI, including the standard contract and the fees required, were implemented by Defendant Dunn and enforced by his employees at his direction.

D. Plaintiffs' Experience with Defendants' Pretrial Scheme

a. Plaintiff Henry Ayo

50. Plaintiff Henry Ayo appeared before Judge White on August 8, 2016, via closed circuit television from the Prison after he was arrested on suspicion of attempting to steal an air conditioning unit from a vacant property.

51. Judge White set his bond at $8,000, informed him of the charges, and assigned him to RHI supervision. White informed him that someone from RHI would visit him at the Prison to explain the process.

52. Judge White did not ask Mr. Ayo any questions about himself, his charges, or his case; she did not set or otherwise explain any terms of the RHI supervision; and she did not allow Mr. Ayo to ask any questions concerning the supervision.

53. A few days later, a RHI employee Frederick Hall came to the Prison and brought documents for Mr. Ayo to sign. Mr. Hall told Mr. Ayo that he would have to wear an ankle monitor and pay for it before he could be released. Mr. Hall said that once he was released, Mr. Ayo would have to call his RHI monitor every day in the morning and at night to ensure he was complying with his curfew, and that he would also have to pay a monthly fee to RHI. Mr. Hall explained that Mr. Ayo would be under house arrest, but he could leave for approved events like work and church.

54. Mr. Ayo stayed in jail another two months because he and his wife could not afford the bond amount and to pay RHI. Mr. Ayo was not working at the time and relied on his wife's earnings.

55. When Mr. Ayo and his wife finally saved up enough money, the bail bondsperson came to their house, took the money for the bail fee, and agreed to post bail. The bondsperson told Ms. Ayo that she needed to call RHI but that the bondsperson did not know why.

56. Ms. Ayo called RHI and spoke to Mr. Hall. Mr. Hall informed her that she still had to pay approximately $500 to RHI for Mr. Ayo to be released from the Prison and would have to continue paying each month. Mr. Hall then came to her house to collect this initial fee. Ms. Ayo told Mr. Hall she could not pay the full amount at that time. Mr. Hall allowed her to pay $225 initially, and to pay the rest later. She asked Mr. Hall how much they would have to pay in total, and Mr. Hall told her it would likely add up to $1000.

57. RHI then notified Prison officials that they could release Mr. Ayo from jail, and the Prison released Mr. Ayo.

58. Later, an RHI Monitor came to Mr. Ayo's home for him to sign additional documents. The Monitor required Mr. Ayo to sign a contract, which provided that, if Mr. Ayo violated the agreement, including nonpayment of the $225 monthly fee, he could be arrested by an RHI official or East Baton Rouge law enforcement.

59. The Monitor told Mr. Ayo that in addition to reporting to her, he would have to take a decision-making class with an additional fee. However, Mr. Ayo never paid or went to this class.

60. While on RHI supervision, Mr. Ayo, who was not stably employed at the time, would pay as much money as he could to cover RHI's fees—typically sending $50 or $100 money orders in the mail. Despite their attempts to keep up with the payments, RHI charged them late fees. Mr. Ayo and his wife, who helped with the payments and was working two jobs, had to put off paying for utilities such as water and electricity to pay RHI.

61. Mr. Ayo was never given an ankle monitor, though the RHI representative had told him his fees were in part to pay for the ankle monitor.

62. Mr. Ayo paid until his case concluded on February 27, 2017.

63. After the case closed, RHI still called Mr. Ayo to demand that he pay $200 that it claimed he owed RHI. Altogether Mr. and Mrs. Ayo have paid approximately $1,000 to RHI.

b. Plaintiff Kaiasha White

64. Plaintiff Kaisha White appeared before Judge White on August 8, 2016, after her arrest on charges of simple and aggravated battery concerning an argument with her partner.

65. Judge White set her bond at $4,000 and informed her that she would also have to report to RHI.

66. Judge White did not ask Ms. White any questions about herself, her charges, or her case; did not set any terms of the RHI supervision; and did not allow Ms. White to ask any questions about the supervision.

67. Ms. White did not have money to pay RHI, as she was unemployed at the time and relied on her partner and family members to pay her living expenses. Thus, she was detained in the Prison for another month until her mother received a social security check.

68. On or about September 1, 2016, Ms. White's mother gave a bail bondswoman $500. The bondswoman told Ms. White that the bondswoman and RHI would split the payment, and that a portion would go towards RHI's initial fee.

69. The next day, RHI employee Hall went to the Prison and met with Ms. White. He informed her that she would have to pay the remainder of the initial fee and monthly supervision fee after she was released. He then had her sign RHI's contract, which provided that Ms. White could be arrested by an RHI official or East Baton Rouge law enforcement if she violated its terms. Later that day, Ms. White was released from the Prison.

70. During Ms. White's detention in the Prison for her inability to pay RHI's initial fee, a severe flood hit Baton Rouge in mid-August, damaging her home and her and her son's

belongings. Because she was being held in the Prison, she could not check on her home or attempt to salvage her possessions for several weeks.

71. Following Ms. White's release from the Prison, Ms. White's mother paid an additional $250 towards the initial fee. Ms. White later met with Frederick Hall at her house. Mr. Hall told her that she would have to wear an ankle monitor and that he would call her each night to make sure she obeyed curfew.

72. In the following months, Ms. White called Mr. Hall on occasion to let him know she was trying to save up money to pay her monthly fee. She repeatedly asked him how long she would be on RHI supervision, but he did not give her a definite time; her bond order also did not indicate how many days she would be on supervision. Mr. Hall also did not provide Ms. White with an ankle monitor.

73. As time passed and she still was not able to pay RHI's monthly fees, Mr. Hall accused her of falsely claiming that she was trying to pay. Ms. White became afraid that RHI would have her arrested.

74. During this time, Ms. White lacked a stable place to live and had to stay with family and friends because her home was still flood damaged.

75. On or about late December or early January, Ms. White told Mr. Hall that she could pay RHI $300.

76. Because Ms. White was worried that if she saw Mr. Hall in person, he would have her arrested, she had her son meet Mr. Hall to deliver the payment.

77. Sometime after she made this payment, another RHI representative also called Ms. White to inform her she had failed to pay for and attend a $55-per-month class. However, Mr. Hall had not told Ms. White that she was required to attend this class. The RHI

representative told her that if she did not comply, RHI would have her arrested during the next police "round up."

78. Ms. White called Mr. Hall to ask why she was being required to take and pay for the class, but no one answered at his phone number. She subsequently received a letter from RHI stating that Mr. Hall had left RHI.

79. Ms. White did not hear from Mr. Hall again. However, she began receiving letters from RHI claiming that she owed roughly $800. Ms. White lacks the money to pay this amount. She still does not know for how long she was under RHI supervision or whether it has actually ended.

Facts Common to All RICO Counts

80. Plaintiff White is a "person" entitled to bring a private cause of action under 18 U.S.C. § 1964(c) and La. Stat. Ann. § 15:1356(E).

81. Plaintiff Ayo is a "person" entitled to bring a private cause of action under 18 U.S.C. § 1964(c) and La. Stat. Ann. § 15:1356(E).

82. RHI is a corporate enterprise that regularly engages in interstate commerce. RHI's engagement in interstate commerce includes, but is not limited to, using telecommunications and electronic monitoring technology to track supervisees across state lines, purchasing and employing electronic monitoring devices that are produced and sold outside the state of Louisiana, accepting payment of fees by credit card, and maintaining a website available to users in interstate commerce.

83. Defendant Dunn is an individual and thus a "person" within the meaning of 18 U.S.C. § 1961(3).

84. Defendant Dunn has conducted the affairs of RHI through a pattern of racketeering to achieve the common purpose of unlawfully extorting money from Plaintiffs Ayo and White and the proposed Class. These racketeering acts are an integral part of RHI's regular course of business.

85. As described above, on numerous occasions over an unknown period of time Defendant Dunn has committed related, predicate acts of extortion by threatening to keep, and—through East Baton Rouge officials Gautreaux III and Grimes—arranging with the Prison to keep Plaintiffs and the proposed Class in jail until they have paid RHI's required initial fee, and instructing his employees to do the same. Thereafter, Defendant Dunn, directly and through the actions of his Monitors and other employees, continues this unlawful use of fear to threaten Plaintiffs and the proposed Class with further jail time or court sanctions if they fail to pay RHI's monthly and programmatic fees.

86. Pursuant to and in furtherance of this unlawful scheme, Defendant Dunn has committed multiple, related predicate acts of extortion by refusing to authorize the release of Plaintiffs and the proposed Class from the Prison until they paid money towards the RHI initiation fee. Additionally, by unlawfully using the fear of arrest and jail by East Baton Rouge law enforcement or RHI officials, Dunn on numerous occasions extorted from Plaintiffs and the proposed Class a monthly supervision fee, along with fees for classes or other requirements imposed at the discretion of RHI employees.

87. Defendant Dunn's use of RHI to extort money from arrestees assigned by Judge White constitutes a pattern of racketeering activity.

88. These actions are a regular way of conducting the ongoing business of RHI.

89. As a direct and proximate result of Defendant Dunn's racketeering activities, Plaintiffs and the proposed Class have been injured in their property in that they have paid and continue to pay RHI's fees due to the fear induced by Dunn and RHI employees' wrongful use and threats of arrest and jailing.

V. CLASS ACTION ALLEGATIONS

90. Plaintiffs White and Ayo propose a class seeking damages as to the First, Second, Third, Fourth, Sixth, and Seventh Claims for Relief, pursuant to Fed. R. Civ. P. 23(a) and (b)(3). The Class is defined as: All individuals whom Judge White ordered to pretrial supervision by Defendant RHI who were subsequently supervised by RHI.

91. A class action is a superior means, and the only practicable means, by which the named Plaintiffs and putative Class members can challenge Defendants' extortionate racketeering scheme and unlawful use and threat of wealth-based detention to extort fees from Plaintiffs and the Class.

92. Class-action status under Rule 23(b)(3) is appropriate because questions of law or fact common to proposed Class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

93. Furthermore, as detailed below, this action satisfies the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a).

A. Requirements of Rule 23(a)

Rule 23(a)(1) - Impracticability of Joinder Due to Numerosity

94. The precise size of the proposed Class is unknown by Plaintiffs, but it is substantial given the number of arrestees Judge White has assigned to RHI supervision in recent years.

95. Court records indicate that over three hundred people were ordered to RHI supervision by Judge White in 2015 and 2016.

96. Many of the proposed Class members are low-income individuals who will be difficult to identify and likely lack financial resources to bring an independent action or to be joined in this action. Joinder of every member of the proposed Class would be impracticable.

Rule 23(a)(2) - Commonality

97. The relief sought is common to all members of the Class, and common questions of law and fact exist as to all members of the proposed Class. The named Plaintiffs seek monetary relief from Defendants' extortionate and unconstitutional pretrial supervision practices, which violate the state and federally-protected rights of the Class members.

98. Among the most important common questions of fact for the proposed Class are:

a. Whether RHI, independent of Judge White, sets terms for an arrestee's release and the fees for its supervision services;

b. Whether Dunn, RHI, and the Parish have made an agreement that individuals Judge White assigns to RHI may not be released from the Prison until they have paid RHI's initial fee, and RHI notifies the Prison of such payment;

c. Whether RHI and the Parish enforce this agreement against the proposed Class without determining whether proposed Class members can afford to pay RHI's initial fee;

d. Whether the Parish has a policy, practice, or custom of detaining arrestees until obtaining RHI's permission to release them;

e. Whether RHI's standard contract provides for an initial fee and monthly fees;

f. Whether RHI's standard contract provides for arrest and jailing for failure to pay its fees;

g. Whether Dunn directs RHI employees to threaten to arrest and jail Proposed Class members who do not pay the monthly supervisory fees and other mandated fees to RHI;

99. Among the most important common questions of law for the proposed Class are:

a. Whether Defendant Dunn's operation of RHI through a pattern of racketeering activity, specifically, extorting money from Plaintiffs and the Proposed Class by unlawfully detaining them in the Prison until they pay RHI's initial fee, then threatening them with additional jailing if they fail to pay RHI monthly fees once released, violates the Louisiana and federal RICO Acts;

b. Whether East Baton Rouge Parish and RHI's practice of detaining Plaintiffs Ayo and White and members of the proposed Class in the Prison because they could not pay RHI's initial fee violates Plaintiffs and proposed Class members' rights under the Fourteenth Amendment to due process and equal protection;

c. Whether East Baton Rouge Parish's and RHI's detention of Plaintiffs and the proposed Class members after they posted bonds constituted an unreasonable seizure in violation of the Fourth Amendment; and

d. Whether RHI lacks any legal authority or right to collect fees from Plaintiffs and the proposed Class members.

Rule 23(a)(3) - Typicality

100. The named Plaintiffs' claims are typical of the claims of the other members of the proposed Class, and they have the same interests in this case as all other proposed Class members that they represent. Each of them suffers injuries from Defendants' failure to comply with state and federal law: they were each confined in jail for nonpayment of RHI's initial fee, without inquiry into their ability to pay, and then threatened with additional jailing if they did not pay RHI's subsequent fees and costs. The answer to whether Defendants' scheme is unlawful will determine the claims of the named Plaintiff and every other proposed Class member.

101. If the named Plaintiffs succeed in the claim that Defendants' policies and practices violate their federal and state rights, that ruling will likewise benefit every other member of the proposed Class.

Rule 23(a)(4) - Adequacy

102. Plaintiffs will fairly and adequately represent the interests of the proposed Class they seek to represent.

103. Plaintiffs have no interests separate from, or in conflict with, those of the proposed Class they seek to represent as a whole, and they seek damages, which Plaintiffs pursue on behalf of the entire proposed Class that they seek to represent.

C. The Requirements of Rule 23(b)(3)

104. Class certification of the proposed Class is appropriate because common questions of law and fact, including those listed above, predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

105. The proposed Class seeks damages against Defendant Dunn, East Baton Rouge Parish, and RHI for jailing the proposed Class until its members were able to pay RHI's initial fee, engaging in a pretrial supervision scheme that allowed RHI, under Dunn's direction, to extort additional fees and costs from the proposed Class by wrongfully threatening future jail time and court sanctions for nonpayment.

D. **The Requirements of Rule 23(g)**

106. Plaintiffs are represented by attorneys from the American Civil Liberties Union, the American Civil Liberties Union Foundation of Louisiana, and the Southern Poverty Law Center who have experience litigating complex civil rights matters in federal court and extensive knowledge of both the details of Defendants' practices and the relevant constitutional and statutory law. Counsel has the resources, expertise, and experience to prosecute this action.

VI. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Federal Racketeering Influenced and Corrupt Organization Act

(18 U.S.C. § 1962(c))

Plaintiffs Ayo and White the Proposed Class against Cleve Dunn, Sr.

107. Plaintiffs incorporate and adopt Paragraphs 1 through 106 of this Complaint.

108. Rehabilitation Home Incarceration ("RHI") is an enterprise engaged in and whose activities affect interstate commerce. Defendant Cleve Dunn, Sr., is RHI's Executive Director.

109. In violation of 18 U.S.C. § 1962(c), Defendant Dunn conducts RHI's affairs through a pattern of racketeering activity to illegally extort money from Plaintiffs Ayo and White and proposed Class Members. Specifically, Dunn has made an agreement with Judge Trudy White for RHI to be Judge White's approved vendor for pretrial court supervision. Dunn then

imposes conditions of supervision for arrestees assigned to RHI, including imposing fees for release and monthly supervision, and uses threats of incarceration for supervisees who do not comply with RHI's conditions or pay the required fees.

110. Dunn has made a separate agreement with Prison officials that prohibits the release of pretrial arrestees assigned to RHI unless the arrestees pay RHI's initial fee and RHI sends confirmation to the Prison that the arrestee has paid said fee.

111. Pursuant to and in furtherance of this unlawful scheme, Defendant Dunn has committed multiple, related predicate acts of extortion by refusing to authorize the release of Plaintiffs Ayo and White and the proposed Class from the East Baton Rouge Parish Jail until they paid the initial fee to RHI. By unlawfully using the fear of arrest by East Baton Rouge law enforcement or RHI officials to coerce payment, Dunn additionally extorted from Plaintiffs Ayo and White and the proposed Class on numerous occasions a monthly monitoring fee of $225, along with other fees for classes required at the discretion of RHI employees.

112. Defendant Dunn's use of RHI to extort money from arrestees assigned by Judge White constitutes a pattern of racketeering activity.

113. As a direct and proximate result of Defendant Dunn's racketeering activities and his violations of 18 U.S.C. § 1962(c), Plaintiffs Ayo and White and the proposed Class have been injured in their property because they have paid and continue to pay RHI's fees from the fear induced by Dunn and RHI's wrongful threats of arrest and jailing.

SECOND CLAIM FOR RELIEF

Louisiana Racketeering Influence and Corrupt Organization Act

(LA. STAT. ANN. § 15:1353(C))

Plaintiff Ayo and White and the Proposed Class against Cleve Dunn, Sr.

114. Plaintiffs incorporate and adopt herein Paragraphs 1 through 106 of this Complaint.

115. RHI is an enterprise that conducts business in the state of Louisiana. Defendant Cleve Dunn, Sr., is RHI's Executive Director.

116. In violation of LA. STAT. ANN. § 15:1353(C), Defendant Dunn conducts RHI's affairs through a pattern of racketeering activity to illegally extort money from Plaintiffs Ayo and White and proposed Class Members. Specifically, Dunn has made an agreement with Judge Trudy White for RHI to be White's approved vendor for pretrial court supervision. Dunn then imposes conditions of supervision for arrestees assigned to RHI, including imposing fees for release and monthly supervision, and uses threats of incarceration for supervisees who do not comply with RHI's conditions or pay the required fees.

117. Dunn has made a separate agreement with Prison officials that prohibits the release of pretrial arrestees assigned to RHI unless the arrestees pay RHI's initial fee and RHI sends confirmation to the Prison that the arrestee has paid said fee.

118. Pursuant to and in furtherance of this unlawful scheme, Defendant Dunn has committed multiple, related predicate acts of extortion by refusing to authorize the release of Plaintiffs Ayo and White and the proposed Class from the East Baton Rouge Parish Jail until they secured and paid the initial fee to RHI. By unlawfully using the fear of arrest by East Baton Rouge law enforcement or RHI officials to coerce payment Dunn additionally extorted from Plaintiffs Ayo and White and the proposed Class on numerous occasions a monthly monitoring fee of $225 on behalf of RHI, along with other fees for classes or other services required at the discretion of RHI employees.

119. Defendant Dunn's use of RHI to extort money from arrestees assigned by Judge White constitutes a pattern of racketeering activity under Louisiana law.

120. As a direct and proximate result of Defendant Dunn's racketeering activities and violations of LA. STAT. ANN. § 15:1353(C), Plaintiffs Ayo and White and the proposed Class have been injured in their property in that they have paid and continue to pay RHI's fees from the fear induced by Dunn and RHI's wrongful threats of arrest and jailing.

THIRD CLAIM FOR RELIEF

Fourteenth Amendment to the Federal Constitution

(Due Process and Equal Protection)

Plaintiffs Ayo and White and the proposed Class against East Baton Rouge Parish and RHI

121. Plaintiffs incorporate and adopt herein Paragraphs 1 through 79 and 90 through 106 of this Complaint.

122. The Fourteenth Amendment's guarantees of due process and equal protection prohibit jailing a person solely because of her inability to access money and make a monetary payment.

123. Plaintiffs Ayo and White and the proposed Class have a fundamental interest in pretrial liberty under state and federal law.

124. Defendant East Baton Rouge Parish's practice and policy—enforced through its final policy makers Gautreaux III and Grimes—to jail Plaintiffs and members of the Proposed Class until they could pay RHI the initial fee, without an affirmative inquiry into or findings concerning ability to pay, and without consideration of and findings concerning alternative conditions of release, violated Plaintiffs' and the proposed Class's fundamental rights under the

Fourteenth Amendment by detaining arrestees until they could pay the initial RHI fee and be released from the Prison.

125. Defendant RHI also violated Plaintiffs' and the proposed Class's fundamental rights under the Fourteenth Amendment by detaining arrestees until they could pay the initial RHI fee and be released from the Prison, without an affirmative inquiry into or findings concerning ability to pay, and without consideration of and findings concerning alternative conditions of release.

FOURTH CLAIM FOR RELIEF

Fourth Amendment to the Federal Constitution

Plaintiffs Ayo and White and the proposed Class against East Baton Rouge Parish and RHI

126. Plaintiffs incorporate and adopt herein Paragraphs 1 through 79 and 90 through 106 of this Complaint.

127. The Fourth Amendment prohibits unreasonable searches and seizures—including the detention of individuals beyond expiration of a valid order of confinement, without probable cause.

128. Defendant East Baton Rouge Parish's practice and policy—enforced through its final policy makers Gautreaux III and Grimes—and Defendant RHI's practice to continue to detain Plaintiffs and the proposed Class members, until they paid the initial RHI fee, without probable cause, and thus beyond the time Plaintiffs and the proposed Class members should have obtained pretrial release after posting bond, violated Plaintiffs proposed Class members' Fourth Amendment rights.

FIFTH CLAIM FOR RELIEF

Louisiana Unfair Trade Practices Act

(La. Stat. Ann. § 51:1405)

Plaintiffs Ayo and White against RHI

129. Plaintiffs incorporate and adopt herein Paragraphs 1 through 79 of this Complaint.

130. The Louisiana Unfair Trade Practices Act ("LUTPA") bars "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce," La. Stat. Ann. § 51:1405, and authorizes recovery for any person who suffers an "ascertainable loss" as a result of this misconduct, whether of money or property, La. Stat. Ann. § 51:1409(A).

131. Defendant RHI has violated LUTPA by entering an agreement whereby White assigns pretrial arrestees to RHI without a meaningful hearing as to whether RHI supervision is appropriate, and without allowing any other pretrial supervision agency to provide whatever supervisory conditions may be appropriate.

132. Defendant RHI further violates LUTPA by imposing conditions of release and determining its supervision fees without any lawful authority, thereby allowing RHI to charge supervisees exorbitant rates without any market competition. RHI then collects these fees by jailing or threatening to jail those under its supervision.

133. RHI's practices offend public policy and are unethical, oppressive, unscrupulous, and substantially injurious. They have directly and proximately caused Plaintiffs significant losses in both their money and property.

SIXTH CLAIM FOR RELIEF

Conversion

Plaintiffs Ayo and White and the proposed Class against RHI

134. Plaintiffs incorporate and adopt herein Paragraphs 1 through 79 and 90 through 106 of this Complaint.

135. Louisiana law protects against the intentional wrongful exercise or assumption of authority over another's goods, depriving her of permanent or indefinite possession.

136. Through the scheme described above, RHI has engaged in the tort of conversion by charging and collecting fees that are not authorized by statute or by order of the JDC.

137. RHI has also prevented Plaintiffs' and proposed Class members' release from jail until arrestees pay the initial fee, and RHI used the threat of future jailing to coerce payment of further fees.

138. Thus, Plaintiffs and proposed Class members are forced to agree to pay, and do pay, these fees under threats of arrest, jail, bond revocation, and duress.

139. As a result, RHI lacks any legal authority or right to collect and retain Plaintiffs' and the proposed Class members' initial and monthly fees. RHI thus has intentionally and wrongfully deprived Plaintiffs and proposed Class members of their monetary property.

140. RHI's practices have directly harmed Plaintiffs and proposed Class members in their loss of property.

SEVENTH CLAIM FOR RELIEF

Unjust Enrichment

Plaintiffs Ayo and White and the proposed Class against RHI

141. Plaintiffs incorporate and adopt herein Paragraphs 1 through 79 and 90 through 106 of this Complaint.

142. Article 2298 of the Louisiana Civil Code provides that "[a] person who has been enriched at the expense of another is bound to compensate that person."

143. Through the scheme describe above, RHI has unjustly enriched itself at Plaintiffs' and proposed Class members' expense by requiring exorbitant and unnecessary fees that are collected under threat and that are not authorized by law.

VII. REQUESTED RELIEF

WHEREFORE, Plaintiffs requests the following relief:

144. That the Court assume jurisdiction over this action;

145. Certification of the Class under Fed. R. Civ. P. 23(a) and (b)(3);

146. Award treble damages to each Plaintiff and Class member and against Defendant Dunn for his violations of the federal Racketeering Influenced and Corrupt Organization statutes (Count I);

147. Award the greater of treble damages or $10,000 to each Plaintiff and Class member and against Defendant Dunn for his violations of the Louisiana Racketeering Influenced and Corrupt Organization statutes (Count II);

148. Award damages to Plaintiffs and Class members and against Defendants East Baton Rouge Parish and RHI for these Defendants' jailing of Plaintiffs and Class members because of nonpayment of RHI's initial fee without properly considering Plaintiffs' ability to pay, in violation of Plaintiffs' and Class members' Fourteenth Amendment right to Equal Protection and Due Process (Count III);

149. Award damages to Plaintiffs and Class members and against Defendants East Baton Rouge Parish and RHI for their jailing of Plaintiffs and Class members for unlawfully prolonging Plaintiffs' and Class members' detention at the Prison after posted bond, in violation of Plaintiffs' and class members' right to be free from unreasonable seizures under the Fourth Amendment (Count IV);

150. Award damages to Plaintiffs and against Defendant RHI for RHI's violations of the LUTPA (Counts V);

151. Award damages to Plaintiffs and proposed Class members and against Defendant RHI for RHI's conversion and unjust enrichment (Counts VI and VII);

152. Award prevailing party costs, including attorney fees;

153. Grant other relief as the Court deems just and appropriate.

DATED this 7th day of August, 2017

Respectfully submitted,

/s/ Ivy Wang

Ivy Wang
On Behalf of Plaintiffs' Counsel

Ivy Wang, La. Bar No. 35368
SOUTHERN POVERTY LAW CENTER
1055 St. Charles Avenue, Suite 505
New Orleans, Louisiana 70130
P: 504-228-7279
F: 504-486-8947
E: ivy.wang@splcenter.org

Emily Early, ASB-8536B18H*
SOUTHERN POVERTY LAW CENTER
150 East Ponce de Leon Ave., Suite 340
Decatur, Georgia 30037
P: 404-221-4036
F: 404-221-5857
E: emily.early@splcenter.org

Sara Zampierin, ASB-1695-S34H*
SOUTHERN POVERTY LAW CENTER
400 Washington Avenue
Montgomery, Alabama 36104
P: 334-956-8200
F: 334-956-8481
E: emily.early@splcenter.org
E: sara.zampierin@splcenter.org

Bruce Hamilton, La. Bar No. 33170
ACLU Foundation of Louisiana
P.O. Box 56157
New Orleans, Louisiana 70156
P: 504-522-0628
F: 504-613-6511
E: bhamilton@laaclu.org

Brandon Buskey (ASB-2753-A50B)*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
CRIMINAL LAW REFORM PROJECT
125 Broad Street, 18th Floor
New York, NY 10004
P: (212) 549-7364
E: bbuskey@aclu.org

**application for pro hac vice pending*

Attorneys for Plaintiffs