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Best Practices in Bond Setting: Colorado's New Pretrial Bail Law

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Note: In 2014, the General Assembly passed Senate Bill 14-212 ("Concerning Clarifying Changes to the Provisions Related to Best Practices in Bond Setting," effective July 1, 2014), which made several modifications to the Colorado bail statute as re-drafted pursuant to H.B. 13-1236. Summaries of the most significant of these S.B. 14-212 modifications have been inserted into this paper in text boxes located at the end of each section to which the modification applies. In addition, they appear separately in an appendix to this paper.

Introduction

On May 11, 2013, Governor Hickenlooper signed into law H.B. 13-1236, which substantially alters the way judges are to administer bail in Colorado. The new law is the first major overhaul of the pretrial bail statute since 1972,

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and incorporates three recommendations voted out of the Colorado Commission on Criminal and Juvenile Justice's ("CCJJ") Bail Subcommittee. That Subcommittee spent nearly a year studying both federal and state legal and evidence-based criminal pretrial practices, and took advantage of years of local research, decades of national research, and practices already implemented in such counties as Larimer, Jefferson, Mesa, Boulder, and Denver as well as in other places nationally such as Kentucky and Washington D.C.

Overall, the new law represents an important step forward in Colorado pretrial justice as well as significant movement toward creating a model bail statute; the process used to create it, and even the compromises contained therein, may also serve as a template for other states struggling to address global issues in bail reform.

This article summarizes the new law, factors and events leading to its creation, and the research behind the CCJJ's recommendations underlying the statutory changes. By doing so, the author of this paper hopes to help guide those involved in the administration of bail through the process of moving from a primarily cash-based system toward more rational, transparent, and fair pretrial practices.[2]

A Brief History of Colorado Pretrial Bail Laws[3]

Until recently, pretrial bail laws in the United States have been molded by two generations of bail reform.[4] The first, in the 1960's, used the pioneering

[2] *See generally, Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process* (PJI/MacArthur Found. 2012) [hereinafter *Rational and Transparent*]. The subtitle of this particular document – moving from a cash-based to a risk-based process – accurately describes the entirety of the Colorado research and deliberations culminating in H.B. 13-1236. The author of the present article has added the word "fair" to remind those working on pretrial issues that fundamental fairness is a foundational principle of the law, and that even arguments supporting the rationality of a money-based bail system, however strained they may be, typically fail altogether to address the fundamental unfairness of a system offering pretrial release based on wealth. *See e.g., Bandy v. United States*, 82 S. Ct. 11, 13 (1961), in which Justice Jackson, sitting as circuit justice to decide the bail issue, stated: "[N]o man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on 'personal recognizance' where other relevant factors make it reasonable to believe that he will comply with the orders of the Court."

[3] This paper does not discuss post-conviction bail, which remains virtually unaltered with only minor conforming language added to 16 C.R.S. §§ 4-201 and 4-202. Additionally, the new law contains a single conforming word change to 19 C.R.S. § 2-509, dealing with juvenile bail. This paper also does not discuss other notable pretrial bills passed this session, including H.B. 13-1156 (concerning adult diversion), H.B. 13-1210 (concerning indigent representation during plea agreements), and H.B. 13-1242 (concerning sentencing for bail bond violations).

work of the Vera Foundation's Manhattan Bail Project to encourage using the least restrictive, non-financial conditions of release, as well as presumptions favoring release on recognizance based on information gathered concerning the defendant's community ties to help assure court appearance. The second, in the 1970's and 1980's, focused on the need to assess the risk to public safety as a constitutionally permissible purpose of limiting pretrial freedom. Both generations resulted in radical departures from the way bail had been administered previously, and both resulted in changes in federal and state statutes, and sometimes in state constitutions. Likewise, Colorado's pretrial bail laws were changed to account for these generational reform efforts.

Colorado Constitution

When the Colorado Territory became a state in 1876, it had two constitutional provisions dealing with bail. The first, in Article II, Section 19, provided "That all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great."[5] The second, in Article II, Section 20, stated, "That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[6] Except for the disappearance of the word "that," Section 20 has not changed since 1876. Section 19, however, was amended in 1982 to add current provisions denying the right to bail to persons charged with certain enumerated offenses after a hearing to find both "proof evident and presumption great" as to the offense charged as well as that "the public would be placed in significant peril if the accused were released on bail."[7] These so-called "preventive detention" provisions were adopted widely across America after Congress passed the District of Columbia Court Reform and Criminal Procedure Act of 1970, [8] believed to be the first bail law in the country to make community safety an equal consideration to future court appearance in the administration of bail. The United States

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[4] *See* John S. Goldkamp, *Judicial Responsibility for Pretrial Release Decisionmaking and the Information Role of Pretrial Services*, 57 Fed. Prob. 28, 34 n.3 (1993).

[5] Colo. Const. art. II, §19 (1876). As enacted, this provision was virtually identical to the Pennsylvania constitutional provision – adopted in 1682 and reincorporated after independence – which "became the model for almost every state constitution adopted after 1776." June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail,* 34 Syracuse L. Rev. 517, 532 (1983) (citing Pa. Const. ch. ii, § 28 (1776)) [hereinafter Carbone].

[6] Colo. Const. art. II, § 20 (1876). Presumably, this provision was modeled after the nearly identical language found in the Eighth Amendment to the U.S. Constitution.

[7] *See* Colo. Const. art II, § 19 (1) (a), (b).

[8] Pub. L. No. 91-358 (July 29, 1970), 84 Stat. 473.

Supreme Court ultimately affirmed the constitutional justification for limiting pretrial release based on public safety in *United States v. Salerno*,[9] which upheld the preventive detention provisions of the federal Bail Reform Act of 1984[10] against facial due process and Eighth Amendment challenges.

According to LaFave, et al., Colorado's constitutional provision dealing with the right to bail is like that found in 17 other states, which have each added amendments designed to address public safety through preventive detention provisions that deny bail for persons arrested for certain serious crimes.[11] Unfortunately, the Colorado Constitution does so without fully incorporating more meaningfully balanced risk-based elements into the bail/no bail determination.[12] State constitutional provisions providing (and denying) a right to bail without fully incorporating or balancing risk-based elements are significant in that they naturally hinder the legislature's ability to fully implement risk-based pretrial release statutes because those statutes might conflict with the constitution. Concomitantly, when neither the constitution nor the state bail statute allows for detention of certain high risk individuals, judges will feel compelled to use money as a means to detain those defendants, a practice that fosters the use of money at bail and that is of doubtful constitutional validity for use with bailable defendants.[13] For this

[9] 481 U.S. 739 (1987).

[10] The Bail Reform Act of 1984 was contained in Chapter I of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984) and was codified in 18 U.S.C. §§ 3141-3156.

[11] *See* Wayne R. LaFave, Jerold H. Israel, Nancy J. King, & Orin S. Kerr, Criminal Procedure, § 12.3 (b), at 687 (5th Ed., West Pub. Co. 2009) [hereinafter LaFave 5th Edition]; Wayne R. LaFave, Jerold H. Israel, Nancy J. King, & Orin S. Kerr, Criminal Procedure, Vol. 4, § 12.3 (b), at 47 (3d Ed., West Pub. Co. 2007).

[12] Despite the Colorado Constitution's relatively broad risk analysis, that is, whether the public would be placed in significant peril, its gateway offenses – those offenses initially triggering a consideration of the denial of bail – are relatively narrow, mostly involving crimes of violence with some precondition such as "while on bail," or "while on probation or parole" for a conviction of a crime of violence. In contrast, the federal statute includes wider gateway offenses, but a more detailed and carefully circumscribed risk analysis. *See* 18 U.S.C. § 3142 (e), (f).

[13] Among other things, *Stack v. Boyle*, 342 U.S. 1 (1951), has been read to stand for the proposition that bail may not be set to achieve invalid state interests, *see, e.g., Galen v. County of Los Angeles*, 477 F.3d 652, 660 (2007), and has been cited by both courts and scholars for the proposition that bail set with a purpose to detain would be invalid. *See, e.g.*, William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 69 (citing cases) (1977) [hereinafter Duker]; Daniel J. Freed & Patricia M. Wald, Bail in the United States: 1964 at 8 ("In sum, bail in America has developed for a single lawful purpose: to release the accused with assurance he will return at trial. It may not be used to detain, and its continuing validity when the accused is a pauper is now questionable."). *Stack* held that "Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose [court appearance] is 'excessive' under the Eighth Amendment." 342 U.S. at 5. In his concurrence, Justice Jackson addressed a claim that the trial court had set bail in that case with a purpose to detain as follows: "[T]he amount is said to have been fixed not as a reasonable assurance of [the defendants'] presence at the trial, but also as an assurance they would remain in jail. There seems reason to believe that this may have been the spirit to which the courts below have yielded, and it is contrary to the whole policy and philosophy of bail." *Id.* at 10. While the Court in *Salerno* upheld purposeful pretrial detention pursuant to the Bail Reform Act of 1984, it did so only because the

reason, pretrial experts have advocated that states adopt meaningful, risk-based preventive detention provisions, such as those found in the Federal and District of Columbia statutes, when attempting to reduce the use of money at bail.[14]

In Colorado, the current statutory preventive detention provisions found in Section 16-4-101, C.R.S., were designed to mirror the constitutional ones.[15] Thus, changing the statutory preventive detention provisions would necessarily require a change in the Colorado Constitution. As we will see later in this paper, however, the CCJJ Bail Subcommittee chose not to recommend changes to the constitutional preventive detention provisions. Accordingly, the new bail law is still possibly somewhat deficient in giving judges the ability to detain certain high risk defendants without using money.

Colorado Statutes

Colorado's bail statute (currently found in Title 16, Article 4) has been amended several times over the years. In 1963 – before the full impact of the Vera Project was known, before the National Conference on Bail and Criminal Justice in 1964, and before the first Bail Reform Act in 1966 (i.e., essentially before the first generation of bail reform), Colorado's bail law was sparse. Specifically, it contained only the following substantive statutory bail provisions in Chapter 39:

> [Judges and justices of the peace] shall have power to cause to be brought before them all persons who shall break the peace,

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statute contained "numerous procedural safeguards" that are rarely, if ever, satisfied merely through the act of setting a high money bail. *See United States v. Salerno*, 481 U.S. at 742-43, 750-51 (1987). Therefore, when a state has established a lawful method for preventively detaining defendants, setting money bail to detain otherwise bailable defendants outside of that method could still be considered an unlawful purpose.

[14] *See. e.g., National Symposium on Pretrial Justice: Summary Report of Proceedings* (PJI/BJA 2011) at 43 ("Ideally, the Model [Bail] Code would . . . [a]uthorize the preventive detention of certain defendants (modeled after current federal bail legislation) to provide an element of public safety protected by appropriate and required due process.") [hereinafter *National Symposium*].

[15] Broadly, the 1982 Amendment to the Colorado Constitution allowed courts to deny bail altogether for defendants facing three categories of offenses when coupled with certain conditions precedent, such as for a crime of violence "while on probation or parole resulting from the conviction of a crime of violence." *See* Colo. Const. Art. II, Section 19 (b) (I). In 1987, the General Assembly incorporated the constitutional language into the statute, listing, almost verbatim, those same three categories. In 2000, the General Assembly added a fourth category to the statute to deny bail for persons charged with possession of a weapon by a previous offender. However, because neither this category nor a fifth category added into H.B. 13-1236 by a floor amendment in the House, are listed in Art. II, Section 19, they are both constitutionality suspect. *See* discussion *infra* at note 124 and accompanying text.

and commit them to jail, or admit them to bail, as the case may require; and to cause to come before them all persons who shall threaten to break the peace, or shall use threats against any person in this state, concerning his body, or threaten to injure his property, or the property of any person whatever; and also all such persons as are not of good fame;[16] and the judge, or justice of the peace, being satisfied by the oath of one or more witnesses of his bad character, or that he had used threats aforesaid shall cause such persons to give good security for the peace or for their good behavior toward all the people of this state, and particularly toward the individual threatened.

If any person against whom such proceedings are had shall fail to give a recognizance, with sufficient security, it shall be the duty of the judge or justice of the peace before whom he shall be brought, to commit such person to the jail of the proper county until such security be given, or until the next term of the district court.

All recognizances to be taken in pursuance of this section shall be returnable to the next district court . . . and where the persons committed are in jail at the sitting of such district court, the court shall examine the witnesses, and either continue the imprisonment, bail the prisoner, or discharge him as to the court shall appear to be right, having due regard for the safety of the citizens of this state.[17]

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[16] The term "good fame" appears to be a reference to historic bail provisions enacted after the English Statute of Westminster in 1275, in which bailability was governed by three main criteria: (1) the nature of the offense (for example, those arrested for homicide or forest offenses were not bailable, while those arrested for larceny were); (2) probability of conviction (for example, those who confessed were not bailable, while those accused on "light suspicion" were); and (3) "ill fame," akin to criminal history. *See* Statute of Westminster I, 3 Edward I, c. 15 (1275); *see generally* Elsa De Haas, Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275, (AMS Press, 1966) [hereinafter De Haas]; *see also* Duker, *supra* note 13, at 43-50; Carbone, *supra* note 5, at 523-527.

[17] 39 C.R.S. § 2-1 (1) - (3) (1963). The line regarding "having due regard" for public safety while released on bail preceded national recognition of public safety as a valid constitutional purpose for limiting pretrial release. In 1963, the only constitutionally valid purpose for such limitations was court appearance. *See Stack v. Boyle*, 342 U.S. 1, 5 (1951) ("Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused."); *see also People v. Sanders*, 522 P.2d 735, 736 (Colo. 1974) ("the primary function of bail is to assure the presence of the accused, and that this end should be met by means which impose the least possible hardship upon the accused.").

Section 39-2-3 (1), C.R.S., contained a somewhat redundant and similarly succinct requirement: when a person is brought before a court with or without a warrant, the court "shall inquire into the truth or probability of the charge exhibited against such prisoner by oath of all the witnesses attending, and upon consideration of the facts and circumstances then proved, either shall commit such person so charged to jail, admit him to bail, or discharge him from custody."[18] Mirroring the original constitutional provisions in Article II, Section 19, Section 39-2-3 (2), C.R.S., provided that, "[w]hen the proof is evident, or the presumption is great, that a person charged with treason, murder or any offense punishable by death, is guilty of such crime, no justice of the peace shall admit such person to bail."[19] And finally, Section 39-2-3 (3), C.R.S., contained the only express condition of release – that the accused appear for court.[20]

As noted previously, during the 1960's, America went through its first generation of bail reform, culminating in the federal Bail Reform Act of 1966[21] and the American Bar Association's Criminal Justice Standards on Pretrial Release in 1968.[22] Both that law and the Standards would influence the next substantive changes to the Colorado bail statute.

The Bail Reform Act of 1966, the first major reform of the federal bail system since the Judiciary Act of 1789, contained the following provisions: (1) a presumption in favor of releasing non-capital defendants on their own recognizance; (2) secondarily, conditional pretrial release with nonfinancial conditions imposed to reduce the risk of failure to appear; (3) restrictions on money bail bonds, which the court could impose only if non-financial release options were not enough to assure a defendant's appearance; and (4) a deposit money bail bond option, allowing defendants to post a 10% deposit of the financial condition of release with the court in lieu of the full monetary amount of a cash or surety bond.[23] Generally, the Act provided that a judicial officer was to release a non-capital defendant pending trial on his or her personal recognizance or on an unsecured appearance bond unless

[18] 39 C.R.S. § 2-3 (1) (1963).
[19] *Id.* § 2-3 (2).
[20] *Id.* § 2-3 (3).
[21] Pub. L. 89-465, June 22, 1966, 80 Stat. 214 (codified at 18 U.S.C. §§ 3146-3152 (1966)).
[22] *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007) [hereinafter ABA Standards].
[23] *See* Bail Reform Act of 1966, Pub. L. 89-465, June 22, 1966, 80 Stat. 214; Evie Lotze, John Clark, D. Alan Henry, & Jolanta Juszkiewicz, *The Pretrial Services Reference Book*, Pretrial Servs. Res. Ctr. (Dec. 1999), at 5 [hereinafter Lotze, et al.].

that judicial officer determined that this type of release would not adequately assure court appearance. In that case, the judge was to choose the least restrictive ("the first of the following") conditions from an enumerated list of conditions designed to secure appearance. As one of the options, release on a secured money bond was intentionally placed in the statute near the end of the list as a more restrictive alternative to release on nonfinancial conditions and the deposit bond option.

The American Bar Association Standards on Pretrial Release were written concurrently to give input on relevant bail and pretrial release, detention, and supervision issues at a national level.[24] The Standards were initially based on the same research and reform efforts leading to the provisions codified in the 1966 federal act,[25] and reflected the view that the existing bail system was flawed, primarily due to its emphasis on money bail bonds and commercial sureties. In its first general expression on the topic in 1968, the ABA stated:

> [t]he bail system as it now generally exists is unsatisfactory from either the public's or the defendant's point of view. Its very nature requires the practically impossible task of transmitting risk of flight into dollars and cents and even its basic premise – that risk of financial loss is necessary to prevent defendants from fleeing prosecution – is itself of doubtful validity. The requirement that virtually every defendant must post bail causes discrimination against defendants and imposes personal hardship on them, their families, and on the public which must bear the cost of their detention and frequently support their dependents on welfare.[26]

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[24] The ABA Standards were followed by the National Advisory Commission on Criminal Justice Standards and Goals in 1973, the National District Attorneys Association's Prosecution Standards in 1977, and the National Association of Pretrial Services Agencies' Standards on Pretrial release in 1978, each reflecting the view that the traditional money bail system was flawed. Today the ABA Standards are still considered the preeminent source for statements on criminal justice (including pretrial) policy. For an article articulating compelling reasons for using the ABA standards as an important source of authority, *see* Martin Marcus, *The Making of the ABA Criminal Justice Standards, Forty Years of Excellence*, 23 Crim. Just. (Winter 2009) [hereinafter Marcus] and *infra* note 98.

[25] Though virtually identical to the 1966 Bail Reform Act, these Standards added recommendations on two important issues: (1) public safety as a valid rationale for limiting pretrial freedom; and (2) commercial sureties. *See* Timothy R. Schnacke, Michael R. Jones, and Claire M.B. Brooker, *The History of Bail and Pretrial Release*, (PJI 2010) found at http://pretrial.org/1964Present/PJI-History%20of%20Bail%20Revised%20Feb%202011.pdf.

[26] American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Pretrial Release – Approved Draft, 1967* (New York: ABA, 1968), at 1 (reprinted in ABA Standards, *supra* note 22, at 31).

This sentiment was echoed by the Colorado Supreme Court in 1971, when it characterized a state bail appeal as "condemn[ing] time-worn practices that admittedly require change," and quoted the above ABA's "unsatisfactory" statement in full.[27]

After passage of the Federal Bail Reform Act of 1966, many states, including Colorado, passed similar reform measures reflecting the Act and the ABA Standards. In its new 1972 Code of Criminal Procedure, the Colorado General Assembly incorporated many elements from the first generation of bail reform, including aspects of the 1966 Act and the ABA Standards, into the bail provisions.[28] Significantly, the 1972 law created a new type of release – "personal recognizance" – which meant that a defendant could be released without a secured (i.e., money paid up-front or promised by a commercial bail bondsman) money bond.[29] It also added criteria for judges to use in determining the amount of bail and type of bond, including various individualized factors in the federal law that were noted in the opinion in *Stack v. Boyle*[30] as well as "strong ties to the community," which had been shown by the Vera Study to be an effective criteria for use in determining whether release on recognizance could provide an adequate substitute for release under traditional bail practices using secured financial conditions.[31]

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[27] *People v. Jones*, 489 P.2d 596, 598 (1971).

[28] *See generally, Release from Custody Pending Final Adjudication (Release on Bail),* 39 C.R.S. §§ 4-101-205 (1972).

[29] *See* 39 C.R.S. § 4-104 (1972).

[30] 342 U.S. 1 (1951). In *Stack*, the Supreme Court wrote: "Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." *Id.* at 5. At the time, the federal "standards" were those found in Federal Rule of Criminal Procedure 46, which included individualized criteria for setting the amount such as the nature and circumstances of the offense charged, the weight of the evidence, the character of the defendant, and his ability to pay. *See id.* at 7 n. 3. In his concurrence, Justice Jackson observed that if the bail in *Stack* had been set in a uniform blanket amount without taking into account differences between defendants, it would be a "clear violation" of Rule 46. *Id.*at 9.

[31] *See* 39 C.R.S. § 4-105 (1) (l) (1972). In October of 1961, the Vera Foundation (now the Vera Institute of Justice) and the New York University Law School began the Manhattan Bail Project, a study that was designed "to provide information to the court about a defendant's ties to the community and thereby hope that the court would release the defendant without requiring a bail bond [i.e., release on the defendant's own recognizance]." Wayne H. Thomas, Jr., *Bail Reform in America* (Univ. CA Press 1976) [hereinafter Thomas] at 4. The success of the program quickly became evident: "In its first months the Project recommended only 27 percent of their interviews for release. After almost a year of successful operation, with the growing confidence of judges, the Project recommended nearly 45 percent of arrestees for release. After three years of operation, the percentage grew to 65 percent with the Project reporting that less than one percent of releases failed to appear for trial." Lotze, et al., *supra* note 23, at 4; *see also* Thomas, *supra* at 4-6.

The new law's connection to the ABA Standards was expressly mentioned in two contemporaneous Colorado Supreme Court opinions. In *People v. Dunbar,* the Court described the new legislative criteria as being "substantially equivalent to the *American Bar Association's Standards for Criminal Justice Relating to Pretrial Release*."[32] In *People v. Sanders*, the Court cited the entirety of the new bail law and stated:

> These provisions follow, in the main, the *ABA Standards Relating to Pretrial Release* (Approved Draft 1968). They reflect the philosophy, articulated in *Stack v. Boyle,* and in the *Standards*, that the primary function of bail is to assure the presence of the accused, and that this end should be met by means which impose the least possible hardship on the accused.[33]

Practically speaking, however, the 1972 statute was far from an ideal bail law, and many of the provisions enacted in 1972 were the very provisions requiring remedy through H.B. 13-1236. For example, while the 1972 law permitted release on personal recognizance, it contained no presumption for release under that method, as articulated in the 1966 Bail Reform Act and recommended by the ABA Standards. Indeed, the 1972 law simultaneously granted prosecutors "veto power" over recognizance release for certain defendants currently on bond or with certain enumerated offenses in their criminal history.[34]

Most notably, however, the 1972 law did not treat money as a separate release condition; in Colorado, bail was defined as an amount of money, and thus Section 39-4-103, C.R.S., stated that "[a]t the first appearance of a person in custody . . . the amount of bail and type of bond shall be fixed by the judge." Accordingly, pursuant to the 1972 law judges were required to set financial conditions of release on literally every bail bond in Colorado. This requirement was a substantial departure from both the federal statute and the ABA Standards, which discouraged using money as a limitation on pretrial freedom, and which treated money at bail as merely one of several

[32] 500 P.2d 358, 359 (1972).
[33] 522 P.2d 735, 736 (1974) (internal citation omitted).
[34] *See* 39 C.R.S. § 4-105 (1) (m), (n) (1972) (requiring district attorney consent before judges could release a defendant on a personal recognizance bond if that defendant was currently on bond for a felony or class 1 misdemeanor or if he or she had a record of conviction of a felony or class 1 misdemeanor within five and two years prior to the bail hearing, respectively).

possible conditions – a "financial condition" – that was more restrictive than nonfinancial conditions, and that may or may not be appropriate on any given bail bond when assessed for legality and effectiveness.[35] These deficiencies, in particular, likely resulted in the very thing that the 1966 Act and the ABA Standards hoped to prevent; by continuing to define bail as an amount of money, by legislatively requiring money on every bail bond, and by allowing district attorneys to block release on recognizance, the 1972 bail statute undoubtedly caused Colorado judges to impose unnecessary secured financial conditions (and thus cause unnecessary pretrial detention) in countless criminal cases over the last four decades.[36]

Since 1972, the Colorado statute has undergone piecemeal amendment, with some changes that clearly have followed the pretrial field's research and best-practice standards, and with others that clearly have not. For example, in 1991, the General Assembly added provisions permitting courts to establish pretrial services programs to screen arrested persons and provide information to give courts "the ability to make a more appropriate initial

[35] Colorado is not alone in struggling with this fundamental point of departure from the law and standards. In previous Montana Code Annotated comments summarizing the lengthy deliberations of the Montana Commission on Criminal Procedure leading to statutory bail changes in 1991, that Commission reported that one of two key changes was to treat money – which it called the "posting of bail," and which had been previously required in every case – "in the same fashion as any other condition of release." *See* Chapter Commission Comments to § 46-9-103 (2010) (currently unpublished), available from the author.

[36] These requirements became a major stumbling block to implementing pretrial reform in Colorado using the pre-2013 statute. In a study examining the effects of judges setting secured versus unsecured bonds on court appearance, public safety, and jail bed use, researchers in Jefferson County observed that when prosecutors did not consent to the court's use of a personal recognizance bond, the court would have to set some amount of secured money – typically, what it considered to be a "low cash" bond – so that the defendant would obtain release. Unfortunately, these "low" bonds often kept defendants in jail. In 2010, Jefferson County researchers found that thirty-five percent of defendants with cash-only bond of $500 or less did not post their bond. In a follow-up 2011 study, those same researchers found that sixty percent of pretrial defendants still in custody after 48 hours said they had no ability to post the secured amount of their bond. *See Jeffco Study Reveals All Cost and No Benefit for Cash and Surety Bonds,* distributed to members of the House and Senate and available from the author [hereinafter *Jeffco Study*]. In September of 2012, approximately 100 presentenced inmates in the Jefferson County Detention Facility were held on bond amounts of $500 or less, and over 90 additional inmates had bond amounts between $501 and $1,000. The notion that some defendants remain incarcerated for lack of money has been criticized by some opponents of bail reform, but has been reported in both national and statewide data. *See* Thomas H. Cohen and Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts, 1990-2004*, U.S. Dep't of Just. Office of Just. Programs, Bureau of Just. Stats. (Nov. 2007) at 2 ("Among the 38% of defendants detained until case disposition, about 5 in 6 had a bail amount set but did not post the financial bond required for release.") [hereinafter Cohen & Reaves]; Marie VanNostrand, *New Jersey Jail Population Analysis: Identifying Opportunities to Safely and Responsibly Reduce the Jail Population* (Mar. 2013) at 13 ("[J]ust over 5,000 inmates, or 38.5% of the total population, had an option to post bail but were held in custody solely due to their inability to meet the terms of bail. This means that the inmates were not serving a sentence, had no holds or detainers, and could have been released if they were able to post bail in the form of cash, cash/bond, 10% option or support arrears.") [hereinafter *New Jersey Study*].

bond decision which is based upon facts relating to the defendant's risk of danger to the community and . . . risk of failure to appear for court."[37] While the General Assembly did not mandate them, the amendment allowing their existence has led to the creation of numerous formal pretrial programs, covering 80% of the state's population, and coming ever closer to the ABA's recommendation that they be established in every jurisdiction.[38] The amendment's provisions allowing for pretrial supervision using "different methods and levels of community-based supervision . . . [and] established supervision methods . . . to decrease unnecessary pretrial incarceration" furthers the purpose of bail as a mechanism of release,[39] is a recommended best-practice,[40] and has been shown empirically by at least one randomized and controlled study to increase court appearance and public safety rates during pretrial release.[41]

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[37] 16 C.R.S. § 4-105 (3) (c) (I) (2012).

[38] *See* ABA Standards, *supra* note 22, Std. 10-1.10, at 54.

[39] The purpose of bail as a mechanism of release is supported by history and law. Pursuant to the 1275 English Statute of Westminster's bail/no bail dichotomy, despite all other complicating historical factors, bail was generally equated with release and no-bail was equated with detention. Moreover, throughout English history, major reforms came about primarily to eliminate abuses that interfered with the pretrial liberty that was assumed for all bailable offenses. In America, a country that largely followed the English legal model but that also expanded on its notions of liberty by removing even more vestiges of English law that hindered pretrial release of bailable defendants, the right to bail came to mean one thing – a right to release from confinement prior to trial. *See* Hermine Herta Meyer, *Constitutionality of Pretrial Detention,* 60 Geo. L. J. 1139, 1178 (1971-72) [hereinafter Meyer]; *see generally*, Duker, *supra* note 13, passim; Carbone, *supra* note 5, passim. In *Stack v. Boyle*, the United States Supreme Court expressly equated the right to bail with the "traditional right to freedom before conviction" and "[t]he right to release before trial," and the *Salerno* Court, which discussed the procedure necessary for the "no-bail" side of the dichotomy, only reinforced *Stack's* coupling of the notions of "bail" and "release" when it wrote that pretrial "liberty" is the American norm. 481 U.S. at 755 (1987). While perhaps practical, court opinions holding that defendants have no constitutional right to financial conditions that they can meet even when those conditions result in the detention of otherwise bailable defendants, are nonetheless perverse to the historic and legal principle of bail primarily meaning conditional release from confinement.

[40] The ABA Standards "emphasize the central role of pretrial services agencies in pretrial release and detention determinations both as a matter of principle and in recognition of their growing practical importance in the judicial process." ABA Standards, *supra* note 22, Std. 10-1.10 (a) (commentary) at 56. As for their supervision function, the commentary states: "A number of pretrial services agencies have developed supervision strategies that have been effective for released defendants posing different types of risks. The Standard does not specify the elements of supervision, but rather leaves it to individual jurisdictions to experiment and develop effective strategies." *Id.* at 59 (citation omitted). Those who employ pretrial services supervision recognize that conditions of bail designed to provide reasonable assurance of public safety are typically non-financial conditions, which require supervision techniques, such as office visits, drug and alcohol testing, and electronic monitoring to effectuate them. Created in the 1960's primarily as entities able to investigate defendants for pretrial risk, and later evolving into entities capable of public safety supervision, pretrial services programs have also historically ensured that defendants came to court. Thus, unlike commercial sureties, these entities perform services going to both functions of conditions of release while on bond – court appearance and public safety.

[41] *See* Marie VanNostrand, Kenneth J. Rose, & Kimberly Weibrecht, *State of the Science of Pretrial Release Recommendations and Supervision* (PJI/BJA 2011) at 32 (while acknowledging the need for more research, stating that, "[t]he most recent study conducted in this area, however, does suggest that

On the other hand, the General Assembly has also previously amended the statute with provisions that run directly counter to the research and best-practice standards. For example, in three places the previous bail statute set presumptive amounts for financial conditions (as high as fifty thousand dollars) based primarily on the alleged charge.[42] These provisions: (1) limited judicial discretion to fashion appropriate conditions designed to balance the government's interest in public safety and court appearance with the constitutional rights of defendants; (2) emphasized and even encouraged financial conditions above all other conditions of release,[43] seemingly for purposes of public safety – a practice that is discouraged by the ABA Standards[44] and is without basis in the research (no empirical study has linked money with public safety) and, most importantly, the law (in Colorado, money may not be forfeited for new crime violations);[45] (3) resembled a "statutory money bail schedule," akin to bail schedules used across America that assign money amounts to lists of charges, a practice that the ABA Standards "flatly reject" as being the antithesis of a risk-based system of bail;[46] (4) conflicted with other statutory provisions requiring

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supervision generally provided to defendants results in substantially lower rates of failure to appear and rearrest when compared to defendants released without supervision.") [hereinafter VanNostrand, *State of the Science*].

[42] *See* 16 C.R.S. §§ 4-103 (1) (b) (driving while license restrained due to a driving under the influence conviction), (b.5) (vehicular eluding and driving under the influence), (d) (I) (distribution of a schedule I or II controlled substance) (2012).

[43] The ABA Standards state: "The Third Edition continues the philosophy of restricting the use of financial conditions of release. The policy reasons underlying this philosophy have been discussed above in the commentary accompanying Standards 10-1.4(c) – (f). In brief, they include the absence of any relationship between the ability of a defendant to post a financial bond and the risk that a defendant may pose to public safety; the conviction that courts, not bondsmen, should make the actual decision about detention or release from custody; the unhealthy secrecy of the bondsmens' decision-making process; and the need to guard against undermining basic concepts of equal justice." ABA Standards, *supra* note 22, Std. 10-5.3 (a) (commentary) at 111.

[44] Standard 10-5.3 (b) states: "Financial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person." According to the commentary, "This Standard explicitly prohibits the setting of financial conditions of release in order to prevent future criminal conduct or protect public safety. The prohibition is based on a fundamental principle of these Standards: concerns about risks of pretrial crime should be addressed explicitly through non-financial release conditions or, if necessary, through pretrial detention ordered after a hearing-not covertly through the setting of bail so high that defendants cannot pay it." ABA Standards, *supra* note 22, Std. 10-5.3(b) (and commentary) at 110, 112.

[45] Pursuant to 16 C.R.S. § 4-103 (2) (a) (2012), "A condition of every bail bond, and the only condition for a breach of which a surety or security on the bail bond may be subjected to forfeiture, is that the released person appear to answer the charge [at the proper time and place]." This provision was retained in H.B. 13-1236, and is now codified in 16 C.R.S. § 4-105 (1) (2013).

[46] Standard 10-5.3 (e) states: "Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the defendant's flight risk, and should never be set by reference to a predetermined schedule

judges to individualize bail settings, including consideration of the defendant's financial condition and to avoid "oppressive" bail amounts; [47] and (5) violated the principle of using "least restrictive conditions," a principle articulated both in the Standards[48] and in Colorado law.[49]

The list of amendments not conforming to the law[50] and best-practices is unfortunate, but the 2012 bail statute also suffered from a longer list of best-practice provisions never enacted. For example, as previously mentioned, there was no presumption of release on recognizance. Moreover, there were no explicit statements articulating a presumption of pretrial liberty generally, limiting the use of money, or ensuring that money did not detain.[51] Finally, there were no explicit statements concerning the purpose of the bail decision or incorporating public safety into judicial decision-making.[52] Overall, based on the array of topics addressed in the pretrial literature, from reforming

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of amounts fixed according to the nature of the charge." According to the commentary, "This Standard emphasizes the importance of setting financial conditions through a process that takes account of the circumstances of the individual defendant and the risk that the individual may not appear for scheduled court proceedings. It flatly rejects the practice of setting bail amounts according to a fixed bail schedule based on charge. Bail schedules are arbitrary and inflexible: they exclude consideration of factors other than the charge that may be far more relevant to the likelihood that the defendant will appear for court dates." ABA Standards, *supra* note 22, Std. 10-5.3 (e) (and commentary) at 110, 113.

[47] *See* § 16-4-105, C.R.S. (2012).

[48] ABA Standard 10-1.2 contains the general recommendation for release on least restrictive conditions. *See* ABA Standards, *supra* note 22, Std. 10-1.2 and commentary at 39-40.

[49] *See Sanders*, 522 P.2d at 736 ("[The bail provisions] reflect the philosophy, articulated in *Stack v. Boyle* and in the *Standards*, that [assurance of court appearance] should be met by means which impose the least possible hardship upon the accused.") (internal citation omitted).

[50] As discussed later in this paper, 16 C.R.S. § 4-101 was amended in 2000 to add a fourth broad category of offenses for which bail may be denied for any particular defendant, an amendment directly conflicting with the Colorado Constitution.

[51] ABA Standard 10-5.3 (a) states: "The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay." ABA Standards, *supra* note 22, Std. 10-5.3 (a) at 110. The federal and the District of Columbia statutes each have provisions prohibiting judges from ordering financial conditions that result in the pretrial detention of the defendant. *See* 18 U.S.C. § 3142 (c) (2); D.C. Stat. § 23-1321(c) (3).

[52] An express statement indicating that public safety was a valid purpose of limiting pretrial freedom (apart from the "significant peril" language found in the constitutional and duplicative statutory preventive detention provisions) came only from the 1991 amendment adding Section 16-4-105 (3), which allowed for the creation of pretrial services programs designed to, among other things, "provide the court with the ability to make a more appropriate bond decision which is based upon facts relating to the defendant's risk of danger to the community and the defendant's risk of failure to appear for court." 16 C.R.S. § 4-105 (3) (c) (I) (2012). Beyond this one sentence, however, public safety had to be inferred through various statutory provisions, such as the provisions denying a right to bail for certain serious offenses, 16 C.R.S. § 4-101 (2012), the requirement that judges consider the defendant's criminal history or "any facts indicating the possibility of violations of law if the defendant is released without restrictions." 16 C.R.S. §§ 4-105 (1) (i), (j), (2012).

arrest versus citation and summons policies[53] to addressing bond violations with rational responses,[54] Colorado's pretrial bail statute suffered from a numerous deficiencies, both from inclusion and exclusion.

The Colorado Commission on Criminal and Juvenile Justice

At least some of these statutory deficiencies were known to Colorado Commission on Criminal and Juvenile Justice ("CCJJ") members soon after its creation. The CCJJ was created in 2007 to "engage in an evidence-based analysis of the criminal justice system in Colorado," with a mission to "enhance public safety, to ensure justice, and to ensure protection of the rights of victims through the cost-effective use of public resources."[55] Among other things, the CCJJ was mandated to "investigate effective alternatives to incarceration, the factors contributing to recidivism, evidence-based recidivism reduction initiatives, and cost-effective crime prevention programs."[56] In its first annual report, the CCJJ listed six specific recommendations related to bail:[57] (1) encourage the use of summonses in lieu of arrest;[58] (2) create a percentage deposit bond-to-the-court system;[59] (3) allow courts with this deposit bond-to-the-court alternative to retain a

[53] The ABA Standards devote an entire section each to release by law enforcement without an arrest (Part II) and courts issuing summonses in lieu of arrests (Part III). For a number of reasons, the CCJJ Bail Subcommittee did not focus on these areas for potential improvement.
[54] *See* ABA Standards, *supra* note 22, Stds. 10-5.5 (willful failure to appear or to comply with conditions) at 115, and 10-5.6 (sanctions for violations of conditions of release) at 116-17.
[55] 16 C.R.S. §§ 11.3-101 (2); 11.3-103 (1) (2013).
[56] *Id.* § 16-11.3-103 (2) (b) (2013).
[57] Some have argued that there were seven by including CCJJ BP-41, which recommended using summonses in lieu of arrests for persons facing probation revocations. However, while that recommendation had potential implications similar to pretrial improvements on jail bed use, its application to convicted persons distinguishes it from typical reform efforts aimed at pretrial defendants.
[58] Colo. Comm'n on Crim. & Juv. Just., 2008 Ann. Rept., Rec. L-6, at 27 ("The implementation of this recommendation would result in a reduction in the number of pretrial detainees without compromising public safety. Poor offenders are disproportionately unlikely to bond out of jail. In those cases, bonding becomes punitive and often results in loss of job, income, housing, and child custody.") The "L" in the recommendation denotes an item requiring legislative action.
[59] *Id.* Rec. L-7, at 27-28. In Colorado, a deposit bond option is not allowed without statutory change due to the case of *People v. District Court*, 581 P.2d 300 (1978). In that case, a district court judge authorized the pretrial release of a defendant upon the deposit of cash equal to 10% of the money bail bond amount. The district attorney appealed to the Colorado Supreme Court, arguing that the trial court exceeded its jurisdiction by authorizing the 10% deposit. The Court agreed. Relying on the clear language of 16 C.R.S. § 4-104, which provided for the pretrial release of a defendant by either a personal recognizance or "upon execution of a bond in the full amount of the bail," the court ruled that the district court exceeded its jurisdiction, stating that "[t]he statute does not expressly or impliedly authorize courts to permit 10% cash bail deposits. Moreover, the statutory requirement that the 'full amount of bail' be secured negates the contention that courts may permit the deposit of a percentage of the full amount of the bail." *Id.* at 302 (quoting 16 C.R.S. § 4-104 (1)). H.B. 13-1236 did not substantially change that particular language, and so a deposit bond option would still require further statutory authority.

percentage of the bond to pay for programs, including pretrial programs;[60] (4) require courts to apply cash bonds that would otherwise be returned to defendants first to outstanding costs, fees, fines, or surcharges;[61] (5) encourage judicial districts to create bond commissioners and systems for delegated release authority such as that being used in Larimer County at the time;[62] and (6) develop an advisory statewide monetary bond schedule.[63]

In terms of implementation, the first five recommendations as drafted were only partially successful.[64] The sixth, however, ultimately became the catalyst for H.B. 13-1236 when it was significantly re-drafted to move from creating a statewide bond schedule to creating "bonding guidelines." In 2009, the CCJJ reported on Recommendation BP-39 as follows:

> Since the publication of the December 2008 report, this recommendation was revised to suggest the development of statewide advisory bonding guidelines. The Commission recognizes that some existing bonding schedules are antiquated and, in the interest of justice, recommends that these be reexamined and updated. The Supreme Court and the Chief Judges Council are encouraged to create statewide advisory bonding guidelines or give directions to jurisdictions to create such guidelines. The Commission will partner with the Judicial Branch to examine best practices in the area of advisory bonding guidelines. In addition, the Commission recognizes that the Jefferson County Criminal Justice Planning Committee has undertaken a significant study in this area and requests that

[60] Colo. Comm'n on Crim. & Juv. Just., 2008 Ann. Rept., Rec. L-8, at 28.
[61] *Id.*, Rec. L-9, at 28.
[62] *Id.* Rec. BP-40, at 42. The "BP" in the recommendation denotes an item requiring a change in criminal justice business practices.
[63] *Id.* Rec. BP-39, at 41-42.
[64] The General Assembly followed Recommendation L-6 to vote into law H.B. 09-1262, which amended 16 C.R.S. § 5-206 to allow judges to issue summonses in lieu of warrants in certain cases without the previously required prosecutor consent unless a law enforcement officer "presents in writing a basis to believe there is a significant risk of flight or that the victim or public safety may be compromised." After intense lobbying by the commercial surety industry, the General Assembly failed to pass S.B. 11-186, which encapsulated Recommendations L-7 and L-8 concerning an alternative percentage-bond-to-the-court system. The General Assembly followed Recommendation L-9 to vote into law H.B. 10-1215, which permits, but does not require, the application of cash bonds to costs and fees. According to the CCJJ's 2009 Annual Report, Recommendation BP-40 (encourage the use of bond commissioners) was only partially implemented through the creation of a research document by the Department of Criminal Justice and Larimer County officials. *See* Colo. Comm'n on Crim. & Juv. Just., 2009 Ann. Rept. at 71.

representatives from this organization be included in these discussions of bond reform.[65]

Motivation for Reform

This CCJJ recommendation would ultimately lead to the creation of the CCJJ's Bail Subcommittee in late 2011, which would then provide new recommendations forming the core of H.B. 13-1236. In 2009, however, Colorado still lacked the education and motivation necessary to drastically improve its bail laws. This would change over the next two years, as activity in three broad areas would significantly raise criminal justice leaders' level of bail-education as well as their desire to pursue meaningful change.

The first group of activities was initiated by commercial bail bondsmen and their insurance company lobbyists, who drafted and promoted a citizen's ballot initiative and advanced legislation to further their industry interests in 2010 and 2011.[66] The citizen initiative, in particular, was notable for its lack

[65] *Id.* at 70.

[66] Two attempts at legislation were meant to get away from, or at least postpone, a bail industry sunset review scheduled for 2011 by the Department of Regulatory Agencies ("DORA"), the overseer of the Colorado's commercial bail industry. Leading up to 2011, DORA had been handling a significant number of enforcement actions to curb abuses by bail bondsmen in Colorado. As of 2008, DORA regulated approximately 550 bail bonding agents out of a total of 110,500 regulated insurance producers through its Division of Insurance. In 2008 alone, DORA reported 180 total enforcement actions against insurance producers doing business in Colorado. If these enforcement actions were evenly filed against all resident and nonresident insurance producers regulated by the Division of Insurance, commercial bail bondsmen would be expected to account for only .005% of the actions (or only one case). Instead, commercial bail bondsmen accounted for 99 of the 180 enforcement actions against regulated insurance entities, or 55% of all cases for that year. Information about DORA enforcement actions for companies and producers can be found through their website at http://www.colorado.gov/cs/Satellite?c=Page&childpagename=DORA-DI%2FDORALayout&cid=1251625532807&p=1251625532807&pagename=CBONWrapper. Moreover, in 2010, DORA began aggressively targeting bail insurance companies in a series of "market conduct examinations." In August of 2010, DORA fined New Jersey-based International Fidelity Insurance Company $442,000 for bail bond violations, and put other bail bond insurers on notice that DORA would be conducting additional examinations. *See In Re Market Conduct Exam. of Int'l. Fidelity Ins. Co.,* Amended Final Agency Order 0-11-024, at 6-7 (Aug. 5, 2010); *International Fidelity Fined $442,000 for Bail Bond Violations; Other Bail Bond Insurers Put on Notice* (DORA Press Release, Sept. 7, 2010), available at: http://insurancenewsnet.com/article.aspx?id=224427. In October of 2010, DORA fined Los Angeles-based Pioneer General Insurance Company $553,000 for violations of insurance law related to its Colorado bail bond business. *See In Re Market Conduct Exam. of Pioneer Gen. Ins. Co,* Final Agency Order O-11-053, at 6 (Oct. 15, 2010) (settlement after appeal in *In Re Market Conduct Exam. of Pioneer Gen. Ins. Co.,* Amended Final Agency Order O-11-171 (Jun. 7, 2011). In November of 2010, DORA fined Baltimore-based Lexington National Insurance Corporation $332,000 for marked conduct violations. *See In Re Market Conduct Exam. of Lexington Nat'l Ins. Corp.,* Final Agency Order O-11-057 (Nov. 12, 2010) (settlement after appeal in *In Re Market Conduct Exam. of Lexington Nat'l Ins. Corp.,* Amended Final Agency Order (Jul. 19, 2011). Finally, in 2010, DORA contacted the Minnesota Surety and Trust Company, informing it of an upcoming market study examination. After numerous delays, during which time the company submitted some, but not all of the requested documents, including some that were

of adherence to bail research and best practices. Proposition 102, as it was called, was designed to force judges wanting to authorize pretrial services supervision to also add up-front money conditions to virtually all criminal defendants' bail bonds.[67] Since a great number of Colorado judges liked pretrial supervision, having them add money to virtually all bonds would effectively assure that at least some defendants would not be able to afford that amount without the help of bondsmen. From those people, the bondsmen could choose who to release, based primarily on who could pay. Such a change to Colorado's bail statute was counter to the law (which favors release over detention and requires an individualized bail determination over the use of blanket conditions of release),[68] the research (which has yet to demonstrate that money alone provides assurance of public safety or court appearance),[69] and the best practice standards, which

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submitted "in a duffle bag . . . in disarray, and in no logical or other order," DORA found credible evidence that the insurance company was altering some of its files. *See Stipulation for Entry of Final Agency Order Re: Notice of Show Cause Hearing*, D.O.I. Case No. 231258 (Apr. 22, 2011). DORA issued an emergency order for the insurance company to cease and desist altering or destroying various records, which included altering records after the fact to include crucial information to consumers that had been omitted from the bail bonds being examined. DORA ultimately found credible evidence showing that Minnesota Surety "should have known about the unfair business practices of its insurance producers and thus may be held financially responsible for its producers, who, while acting on behalf of the insurer, engaged in unfair business practices that violated provisions of" Colorado law. *Id.* at 11. DORA subsequently revoked Minnesota Surety's authority to do business in Colorado, and fined the company 1.2 million dollars, one million of which was stayed pending adherence to the stipulated order. As part of the stipulation, the Insurance Commissioner agreed not to exercise his authority to refer the matter to criminal law enforcement authorities unless Minnesota Surety failed to pay $200,000 of the penalty within fourteen days. *Id.* at 11-15. Bills introduced apparently to avoid DORA's potentially harmful recommendations in the sunset review included: (1) H.B. 11-1135, which sought to replace DORA oversight with a newly-created seven member "state bail bonding agent board," and which would be comprised of a majority (four of seven, with a quorum of four) bail agents; and (2) H.B. 11-1306, which was drafted by out-of-state bail lobbyists and introduced in April, roughly seven months after DORA began its review. That bill simply sought to extend the review until 2017, ostensibly to help DORA by streamlining it with other 2017 reviews.

[67] *See* 2010 State Ballot Information Booklet (Legislative Council of the Colo. Gen. Assembly Res. Pub. 599-1), at 30, [hereinafter Blue Book] available online at http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251658319927&ssbinary=true.

[68] In *United States v. Salerno*, 481 U.S. 739, 755 (1987), the Court wrote perhaps its most quoted line articulating a presumption of release: "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." In the State Ballot Blue Book, the neutral Legislative Council of the Colorado General Assembly concluded that Prop. 102's fiscal impact to local jails would instead lead to an increase in detention, driven by two main forces: "National data indicates that it takes about eight days for defendants with a secured bond to obtain financing for release as opposed to those who are released immediately on an unsecured bond. Additionally, about 30 percent of defendants with a secured bond never obtain the financing to secure release." *See Blue Book, supra* note 67, at 31.

[69] Attempts to ascertain the effect on public safety and court appearance rates by release type (which includes variations in the use of financial conditions) has been elusive, primarily due to the admitted limitations of the State Court Processing Statistics data, the primary data collection set used for examining felony case processing in state courts. *See* VanNostrand *State of the Science, supra* note 41, at 35-35;

recommend less reliance on money and complete abolition of commercial sureties.[70] The initiative failed, but only after scores of criminal justice leaders in Colorado spent over six months to defeat it.

The second group of activities involved efforts by those same criminal justice leaders in attempting to pass S.B. 11-186, the CCJJ bill designed to implement a statutory deposit bond option pursuant to 2008 CCJJ Recommendations L- 7 and L-8.[71] Because they tend to perpetuate the traditional money bail system, deposit bond options, or "percentage bail to the court options," as they are sometimes called, are by no means the acme of bail reform; they are, however, recommended by the national best-practice standards on pretrial release as an appropriate way of dealing with money at bail,[72] and they are also specifically recommended by the National Association of Counties in its criminal justice policy platform.[73] At the time, the option existed in approximately thirty jurisdictions in the United States – about 28 states, the District of Columbia, and the federal system, itself comprised of 94 judicial districts – and in most of those places, the for-profit bail bondsmen continued to thrive. Nevertheless, commercial surety lobbyists argued that the bill would eliminate their industry in Colorado,[74] and after an intense two-month campaign, for-profit bail agent and insurance company lobbyists managed to kill what many believed to be a relatively minor improvement to the law.

The third group of activities surrounded what I have previously called the Third Generation of Bail Reform, which began to flourish between 2008 and

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Bureau of Justice Statistics, 2010, *Data Advisory: State Court Processing Statistics Data Limitations*, Washington, DC: U.S. Department of Justice. Retrieved on April 20, 2013, available at: http://bjs.gov/content/pub/pdf/scpsdl_da.pdf. Accordingly, until recently, the best anyone could say about the research concerning this issue was that the lack of detail in collecting and evaluating the relevant variables meant that the studies to date were insufficient to lead to valid conclusions. Recently, however, two separate Colorado studies, using two different data sets, have each concluded that ordering secured (money paid up-front) versus unsecured (money only paid if the defendant fails to appear) bonds has no effect on public safety or court appearance rates, but leads to significant differences in pretrial jail bed use and thus detention costs. *See Jeffco Study*, *supra* note 36; *Evidence Supporting Pretrial Improvement: Data from Colorado Courts* (Jan. 2013) [hereinafter *Evidence*] distributed to members of the House and Senate and available from the author.

[70] *See* ABA Standards, *supra*, note 22, Std. 10-5.3, at 110-11; 10-1.4 (f), at 42.

[71] H.B. 11-186 (2011).

[72] *See* ABA Standards, *supra* note 22, Std. 10-5.3, at 110.

[73] *See The American County Platform and Resolutions 2012-2013 (Justice and Public Safety)* at 99, found at http://www.naco.org/legislation/policies/Documents/Justice%20and%20Public%20Safety/JPS12-13.pdf.

[74] *See Proposed 'Alternative Bond Program' Threatens to Eliminate Colorado Bail Industry,* Collateral Magazine (AboutBail March 14, 2011) found at http://www.aboutbail.com/articles/723/sb-11-186-threatens-colorado-bail-bonds.

2011, and which has been highlighted by the Attorney General's National Symposium on Pretrial Justice beginning in May of the latter year.[75] Previous generations of American bail reform, which I have mentioned earlier in this paper, came about when years of research culminated in broad consensus on improvements to pretrial justice, which, in turn, manifested into changes to bail policies, statutes and court rules, and occasionally state constitutions. This current generation is best defined as one that aims primarily to reduce the deleterious effects of money at bail and to focus more on transparent and rational processes, such as assessment and supervision to address a particular defendant's pretrial risk. It has been summed up and explained most recently in the 2012 document by the Pretrial Justice Institute and MacArthur Foundation entitled *Rational and Transparent Bail Decision Making: Moving from a Cash-Based to a Risk-Based Process*.[76] Like previous generations of bail reform, this generation is the result of decades of research culminating in broad consensus over improvements,[77] and it is now leading to significant change.

Overall, the wealth of information and consensus toward meaningful pretrial improvement crated by this generation of reform, coupled with the unfortunate experiences of both promoting and fending off piecemeal changes to the pretrial bail statute, likely led CCJJ leaders to pursue a more global endeavor – one that would examine the entire system of administering bail in Colorado. It would do so through CCJJ Recommendation BP-39, which called for a CCJJ/Judicial Department partnership to create bonding guidelines.

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[75] *See* Timothy R. Schnacke, Claire M.B. Brooker, & Michael R. Jones, *The Third Generation of Bail Reform*, (Univ. Denver L. Rev. Online), found at: http://www.denverlawreview.org/online-articles/2011/3/14/the-third-generation-of-bail-reform.html.

[76] *Rational and Transparent, supra* note 2.

[77] National groups that are expressly behind the latest movement toward pretrial justice include the American Bar Association, the National Association of Pretrial Services Agencies, the National Association of Counties, the Association of Prosecuting Attorneys, the American Council of Chief Defenders, the International Association of Chiefs of Police, the American Jail Association, the National Sheriff's Association, and the National Association of Criminal Defense Lawyers. Most recently, the Conference of State Court Administrators ("COSCA") issued a policy paper on evidence-based pretrial practices in which it calls for pretrial reform (including changes to state law) based on the legal and empirical research, and the Conference of Chief Justices (made up of the highest judicial officers in all American jurisdictions) has expressly endorsed the COSCA position. *See 2012-2013 Policy Paper: Evidence-Based Pretrial Release*, (COSCA 2012); *Conference of Chief Justices Resolution 3: Endorsing the COSCA Policy Paper on Evidence-Based Pretrial Release* (2013) ("The Conference of Chief Justices . . . joins with [COSCA] to urge that court leaders promote, collaborate and accomplish the adoption of evidence-based assessment of risk in setting pretrial release conditions and advocate for the presumptive use of non-financial release conditions to the greatest degree consistent with evidence-based assessment of flight risk and threat to public safety and to victims of crimes.").

CCJJ Bail Subcommittee/Recommendations

In late 2011, CCJJ members asked a sitting district court judge to co-chair its new Bail Subcommittee. According to that judge, the Subcommittee was tasked with "(1) examining evidence-based practices in pretrial release and detention, and (2) assessing whether the current [CCJJ] recommendations were sufficient or appropriate given the examination of those practices."[78] The Subcommittee was made up of several pretrial experts, including judges, prosecutors and defense attorneys, sheriffs, a police chief and a county commissioner, pretrial services and community corrections officials, bail bondsmen, and a victim's representative. In a process described as both "thorough and fair,"[79] these persons spent months studying research on the history of bail, state and federal legal foundations of bail, model bail laws and research-driven practices from Colorado as well as other states, and national standards on bail and pretrial justice.[80] At the end of its investigation, the Bail Subcommittee voted on four recommendations that "accurately reflected the members' discussions, viewpoints, and concerns" of the Subcommittee.[81] The recommendations were then passed favorably by the full CCJJ,[82] and three of the four recommendations ultimately became the basis for the improvements drafted in H.B. 13-1236.[83]

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[78] *Best Practices in Bond Setting: Hearing on H.B. 13-1236 Before the Senate Jud. Comm.*, 2013 Leg., 1st Sess. (Colo. Apr. 10, 2013) (Statement by Judge Margie Enquist) [hereinafter Enquist Statement]. The formal mission statement adopted by the Subcommittee was "to conduct a comprehensive review and analysis of the Colorado bail system. This review and analysis should include, but not be limited to: the purpose of bail: current practice; strengths and weaknesses; evidence based practice/emerging best practice locally and nationally; and, identifying gaps between the current system and the preferred system for Colorado. Upon the completion of the analysis, develop recommendations (policy and/or legislative) for submission to the Commission by September 30, 2012, that will enhance the efficiency and effectiveness of the Colorado bail system." Colo. Comm'n on Crim. & Juv. Just., 2012 Ann. Rept. at 10.

[79] Enquist Statement, *supra* note 78.

[80] Some of the research/resources presented to the Bail Subcommittee are found on the CCJJ website, at http://www.colorado.gov/cs/Satellite/CDPS-CCJJ/CBON/1251623050482. Much of the first full meeting was spent discussing the various deficiencies in Colorado's pretrial bail statutes.

[81] Enquist Statement, *supra* note 78.

[82] *See* Minutes of CCJJ meeting on October 12, 2012, found at http://www.colorado.gov/ccjjdir/Resources/Meetings/2012/1012_Minutes.pdf.

[83] Legislation drafted pursuant to CCJJ recommendations must be reviewed and approved by its Legislative Subcommittee, made up of persons chosen from CCJJ membership and appointed by the CCJJ Chair. Language concerning the fourth recommendation, which was to "[i]mplement 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," was not included in H.B. 13-1236 due to logistical issues surrounding creation of the instrument. Work on that particular recommendation is ongoing.

Those three recommendations, which were included in packets distributed to General Assembly members throughout the bill's passage, are as follows:

1. "Implement Evidence Based Decision Making Practices and Standardized Bail Release Decision Making Guidelines."[84]

A fairly broad recommendation, and one that potentially could subsume all others as research and evidence continue to point away from using money and toward using nonfinancial conditions of release and traditional pretrial services program functions at bail, this recommendation primarily focuses on establishing a statutory basis for implementing the Colorado Pretrial Assessment Tool, or "CPAT." The CPAT is "an empirically derived multi-jurisdiction pretrial risk assessment instrument for use in Colorado" designed to improve on the various risk assessment procedures currently used across Colorado.[85] The previous Colorado bail statute (as in most states) listed criteria judges must use in making pretrial decisions, but the factors listed in the statute were not necessarily predictive of pretrial failure, and, for those that were predictive, did not tell judges how to define or weigh them to more accurately assess risk to public safety or for court appearance. The CPAT does both of those things and represents a state-of-the-art predictive tool that is currently only used in a handful of states and in the federal system.[86] It is the result of years of data collection and analysis by both local and national pretrial experts, it has been evaluated and endorsed by the Colorado Department of Criminal Justice, and most of the larger Colorado jurisdictions (primarily those with pretrial services programs) are already in the process of implementing it.[87]

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[84] Recommendation FY13-BL01, *available at* http://www.colorado.gov/ccjjdir/Resources/PM/FY13-BL01.pdf. A slightly different summary is provided directly below the 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."

[85] *See Colorado Pretrial Assessment Tool (CPAT): Administration, Scoring, and Reporting Manual, Version* 1, at 3 (PJI 2013), available at http://www.pretrial.org/Setting%20Bail%20Documents/CO%20PAT%20Manual%20v1%20-%20PJI%202013.pdf; *The Colorado Pretrial Assessment Tool(CPAT): A Joint Partnership among Ten Colorado Counties, the Pretrial Justice Institute, and the JFA Institute, Revised Report* (PJI/JFA Oct. 19, 2012), at 5, found at http://pretrial.org/Setting%20Bail%20Documents/CO%20Pretrial%20Assessment%20Tool%20Report%20Rev%20-%20PJI%202012.pdf [hereinafter *CPAT Joint Partnership*].

[86] *See id.* at 5.

[87] *See e.g., Best Practices in Setting: Hearing on H.B. 13-1236 Before the House Judiciary Comm.*, 2013 Leg., 1st Sess. (Colo. Mar. 12, 2013) (Statement of Greg Mauro, Denver, Colo.).

The more interesting part of this recommendation concerns the implementation of "standardized" bail decision making guidelines or processes. This part of the recommendation refers to the rather delicate subject of guiding judges toward more rational and transparent pretrial release and detention decisions once they know a particular defendant's risk profile. In creating such a process, the law, the research, and the national standards would suggest the use of a "bail/no bail" (release/no release) dichotomy, which would likely closely resemble either the District of Columbia or federal bail statute.[88] And, indeed, H.B. 13-1236 was drafted by modeling the federal statute, which guides judges through a decision-making process that starts with presumptions of release on recognizance for lower risk defendants, includes release on various least restrictive conditions for medium to higher risk defendants, and ends with detention (i.e., "no bail") for those defendants who are so high risk that "no condition or combination of conditions" will suffice to provide reasonable assurance of public safety or court appearance.[89]

2. "Discourage the use of financial bond for pretrial detainees and reduce the use of bonding schedules." More particularly, "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 [a] due process hearing is held pursuant to Article 2, Section 19 of the Colorado Constitution and C.R.S. 16-4-101 [the statutory "mirror" of the constitutional provisions]."[90]

In the discussion accompanying this recommendation, the CCJJ expressly disagrees with its much earlier recommendation to create a statewide money

[88] A "bail/no bail" dichotomy recognizes that some defendants will be unbailable due to public safety and court appearance concerns and thus detained, but that bailable defendants will likely be released. Virtually every state sets up this dichotomous process either through its constitution ("all persons shall be bailable except") or through statutory preventive detention provisions. In a model statutory scheme, such as the federal statute as reviewed by the United States Supreme Court in *United States v. Salerno,* 481 U.S. 739 (1987), the detention provisions are transparent, contain due process safeguards, and are considered to be a "carefully limited exception" to the "norm" of pretrial liberty. Bailable defendants are presumed to be released under the least restrictive conditions necessary to reasonably assure court appearance and public safety. Conditions placed on otherwise bailable defendants that lead to detention are clues that the detention process is either proceeding carelessly or that it has not been crafted to adequately address a given jurisdiction's notions of risk. It is within this first recommendation that jurisdictions can view an example of a bail "guidelines matrix," which is designed to infuse risk elements into a traditional bail schedule format, while re-enforcing a bail/no bail, release/no release structure based on best practices.

[89] *See* 18 U.S.C. § 3142 (a) – (e).

[90] Recommendation FY13-BL02, *available at* http://www.colorado.gov/ccjjdir/Resources/PM/FY13-BL02.pdf.

bail bond schedule due to its emphasis on money: "[U]pon further study, the research shows that monetary conditions do not ensure court appearance or improve public safety."[91] Citing the ABA Standards as well as local and national research, it continues:

> 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. 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. 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.'
>
> 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.[92]

Understandably, this recommendation received opposition, including from the commercial surety industry, which feared that it might lead to more drastic statutory changes to reduce the use of money at bail. As a result, the final draft of H.B. 13-1236 contains a good deal of compromise. As we will see, the new law does not eliminate money at bail or even bail schedules; however, it includes much language designed to drastically reduce their use.

3. "Expand and improve pretrial approaches and opportunities in Colorado."[93]

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[91] *Id.*
[92] *Id.* at 2 (further citation and quotations omitted).

Recognizing that many jurisdictions have not necessarily budgeted for formal pretrial programs as they are known today, the Bail Subcommittee correctly examined and focused on the primary functions of pretrial services programs, which are (1) gathering information, especially for use in pretrial risk assessment; (2) providing objective pretrial release and detention recommendations to the court; and (3) providing community monitoring or supervision for both court appearance and public safety concerns. These functions, wherever they are housed and by whomever they are performed, are vitally important to criminal justice systems and, when they are performed well, the benefits are significant: "jurisdictions can minimize unnecessary pretrial detention, reduce jail crowding, increase public safety, ensure that released defendants appear for scheduled court events, and lessen the invidious discrimination between rich and poor in the pretrial process."[94] This recommendation seeks to encourage jurisdictions with pretrial programs to improve those programs using best-practices, and to encourage jurisdictions without those programs to develop the functions. As we will see, H.B. 13-1236 implements this recommendation through language urging judges and counties to discuss the development of these program functions.

In addition, this recommendation's rationale includes two lines about conditions of release, many of which, it says, 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." These statements correctly recognize a significant issue both nationally and locally, which is that all release conditions, both financial and nonfinancial, are potentially unlawful when they are ordered for invalid purposes, when they are arbitrary or unreasonable, when they lead to detention without appropriate due process safeguards, and when they are excessive under state or federal constitutional analysis.

Overall, judges following Colorado's new pretrial bail law should recognize the relationship between these recommendations, and thus the new statutory provisions, to the ABA's best-practice standards. The Bail Subcommittee reviewed those Standards in detail at its first meeting, and they remain listed

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[93] Recommendation FY13-BL03, *available at* http://www.colorado.gov/ccjjdir/Resources/PM/FY13-BL03.pdf,

[94] Barry Mahoney, Bruce D. Beaudin, John A. Carver III, Daniel B. Ryan, & Richard B. Hoffman, *Pretrial Services Programs: Responsibilities and Potential,* Nat'l Inst. of Just. (Washington D.C. 2001), at 1.

as a primary source of its resource material. All three recommendations are foundational principles of the Standards, which, in turn, incorporate fundamental legal principles and empirically sound social science research into their own suggestions specifically designed to: (1) improve pretrial decision making;[95] (2) reduce the use of financial conditions of release;[96] and (3) expand and improve upon the core functions of pretrial services programs.[97] Just as the Colorado Supreme Court did in the early 1970's, state courts today may confidently acknowledge that the ABA Standards served as an important source of authority for the improvements to our bail statute.[98]

Nevertheless, judges should also recognize the rapid pace of pretrial research in America, and the implications of that research on best-practices. As only one example, the Third Edition of the ABA Standards on Pretrial Release was approved by the House of Delegates in 2002, but the first empirically derived state pretrial risk assessment instrument was completed in Virginia in 2003.[99] The CPAT, Colorado's equivalent to the Virginia instrument, is one of the nation's most recently created tools, completed only a year ago. Judges should be grateful, though, that H.B. 13-1236 was written to provide flexibility to accommodate future research as well as to avoid legal mandates that might later prove to be unsupported by the evidence.

Legislative Debate

Looking broadly at the House and Senate testimony as well as statements from the floor of each body, one can see three main themes.[100] First, the

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[95] *See generally,* ABA Standards, *supra* note 22, Stds. 10-1.1 through 10-10.9; 10-5.1 through 10-5.6.
[96] *See id,* Stds. 10-1.2; 10-1.4; 10-5.3.
[97] *See id.* Std. 10-1.10.
[98] The ABA's Criminal Justice Standards are often used as important sources of authority. They have been either quoted or cited in more than 120 U.S. Supreme Court opinions, approximately 700 federal circuit court opinions, over 2,400 state supreme court opinions, and in more than 2,100 law journal articles. By 1979, most states had revised their statutes to implement some part of the Standards, and many courts, including the Colorado Supreme Court, have used the Standards to implement new court rules. According to Judge Martin Marcus, Chair of the ABA Criminal Justice Standards Committee, "[t]he Standards have also been implemented in a variety of criminal justice projects and experiments. Indeed, one of the reasons for creating a second edition of the Standards was an urge to assess the first edition in terms of the feedback from such experiments as pretrial release projects." Marcus, *supra* note 24, at 13 (internal quotation omitted).
[99] Marie VanNostrand, *Assessing Risk Among Pretrial Defendants In Virginia: The Virginia Pretrial Risk Assessment Instrument.* (Va. Dept. of Criminal Just. Servs. 2003).
[100] A fourth theme, which is more structural to the bill itself and evident from its clear language, was to enact provisions accomplishing the three CCJJ recommendations without mandating them and without in any way diminishing judicial discretion granted under the previous statute.

overall concern for which the bill was drafted was clearly a perception that current bail-setting practices had led to the unnecessary incarceration of an unacceptable number of relatively low risk pretrial inmates who simply could not afford the financial condition of their bail bonds.[101] This theme was articulated both by members of the CCJJ Bail Subcommittee[102] as well as the bill's sponsors.[103] Second, the way to address this concern was to reduce the use of money at bail, including monetary bail bond schedules. Bill sponsor Representative Claire Levy stated that "[t]he main focus of the bill is to limit the use of money bonds in the bail decision-making process with the presumption that all pretrial detainees are eligible for pretrial release unless they are ineligible under existing law or the constitution."[104] Moreover, she said, the bill does not eliminate money bonds, "but it does

[101] This has been a primary flaw of the commercial surety system since its inception in America near 1900. While the previous personal surety system showed failures in the early to mid-1800s due to a decrease in the number of sureties willing to take on the responsibilities without remuneration, the commercial surety replacement has never been able to replicate a fully-functioning personal surety system, which had, until the 1800's, resulted in the release of virtually all bailable defendants. *See* Tabolowsky, P. & Quinn, J., *Pretrial Release in the 1990s: Texas Takes Another Look at Nonfinancial Release Conditions,* 19 New Eng. J. on Crim. & Civ. Confinement 273, 274, n. 38 (1993) ("Although courts initially welcomed the emergence of this commercial surety system as a means to fill the void left by the erosion of the personal surety system, the commercial system's inability to duplicate the benefits of the personal surety system and the abuses that arose in the administration of the system were increasingly apparent."); Ronald Goldfarb, *Ransom: A Critique of the American Bail System* (New York: John Wiley & Sons, 1968) at 95 (noting that "[the bondsman's] purpose was to help the poor and the friendless. In fact that is not the case today."); Carbone, *supra* note 5, at 540, n. 105 (noting that at least one study of colonial bail practices showed that the personal surety system worked to release most defendants, despite the relatively high financial conditions imposed). For discussions of the transition between the personal to commercial surety systems in America, *see generally* Duker, *supra* note 13; De Haas, *supra* note 16; Meyer, *supra* note 39; and James V. Hayes, *Contracts to Indemnify Bail in Criminal Cases,* 6 Fordham L. Rev. 387 (1937).

[102] *See, e.g., Best Practices in Bond Setting: Hearing on H.B. 13-1236 Before the House Jud. Comm.*, 2013 Leg., 1st Sess. (Colo. Mar. 12, 2013) (Statement by Doug Wilson, CCJJ Bail Sucomm. Co-Chair) ("It is a problem when people are sitting in custody, often times with bail amounts or bond amounts that they cannot meet."); *id.* (Statement by Sheriff Stan Hilkey, Mesa County, Colorado) (urging the wise use of jail beds for high risk people, and not for people who simply cannot make the financial conditions of bond).

[103] *See, e.g., Best Practices in Bond Setting: Hearing on H.B. 13-1236 Before the House Jud. Comm.*, 2013 Leg., 1st Sess. (Colo. Mar. 12, 2013) (Statement by Rep. Levy) (noting that current bail practices and the use of bail schedules had led to a national pretrial inmate population of over 60%, made up of persons who are "not being held there to protect the public or to assure that they appear for court dates, [but] because they cannot afford to post bond."); Colo. Sen. Journal (Apr. 17, 2013) (Statement by Sen. Ulibarri) ("[O]ur jails are full of folks who are low risk . . . but who can't get out of jail before their court hearing because they don't have the financial means to do so even with the very low level bond condition.").

[104] *Best Practices in Bond Setting: Hearing on H.B. 13-1236 Before the House Jud. Comm.*, 2013 Leg., 1st Sess. (Colo. Mar. 12, 2013) (Statement by Rep. Claire Levy). In her statement, Rep. Levy referenced work done in both Mesa and Jefferson Counties, the latter of which implemented practices to reduce its use of money at bail, and to presume that more people would be released on bond through the use of personal recognizance bonds with nonfinancial conditions set to protect the public and to provide reasonable assurance of court appearance. *See id.*, (Written testimony of Judge R. Brooke Jackson). *See also id.*, (statement by Doug Wilson, CCJJ Bail Subcomm. Co-Chair) ("The concept of the bill was to encourage less use of monetary bonds, encourage less reliance upon strict bail schedules.").

express a preference for least restrictive conditions that are consistent with public safety."[105] And third, limiting money at bail was a part of an overall legislative strategy to infuse research driven, best-practices into the administration of bail. As stated by Representative Levy, "These new provisions place greater emphasis on research and empirically-based decision making during the bond setting process and encourages best practices in pretrial justice."[106] According to co-sponsor Senator Ulibarri, the bill "incorporates best practices," and "ensures that as we look at methods for pretrial release . . . that we're looking at evidence-based practices based on risk."[107]

These three themes – reducing unnecessary pretrial detention by limiting the use of money and using other research-driven best practices in the administration of bail – should be important considerations whenever arguments arise over whether a particular practice is furthering the goals of the legislation.

Colorado's New Pretrial Bail Provisions

The principal drafter of H.B. 13-1236 testified that the bill significantly simplified the title 16 bail provisions,[108] which is seen generally by changing passive to active voice wherever possible, clarifying certain sentences, and removing a great deal of legalese. Additionally, the bill rearranged various parts of the old law to increase the statute's readability by providing a more logical flow. Over time, various amendments to the 1972 law had created a somewhat confused arrangement, which included a long list of statutory conditions of bond before foundational statements concerning setting and selecting types of bond, and which included pretrial services program provisions embedded in the section on bond selection criteria. Now the statute is structured as follows: (1) eligibility and the right to bail; (2) broad foundational statements on the setting and selection of bond, including bail-setting criteria for setting types of bonds and for conditions of release; (3) the four main types of release (dictated primarily

[105] *Id.* (Statement by Rep. Claire Levy).
[106] Colo. House Journal (Mar. 19, 2013) (Statement by Rep. Levy).
[107] Colo. Senate Journal (Apr. 17, 2013 (Statement by Sen. Ulibarri). At bail, of course, we look at both legal and evidence-based practices, because the law provides an overarching boundary for practices, no matter what the evidence. For example, while the evidence might support incarcerating 100% of defendants to attain higher court appearance and public safety rates, the law would not allow it.
[108] *Best Practices in Bond Setting: Hearing on H.B. 13-1236 Before the House Jud. Comm.*, 2013 Leg., 1st Sess. (Colo. Mar. 12, 2013) (Statement by Maureen Cain).

by the conditions of release associated with them) as well as any limitations on judges in selecting them; (4) conditions of release, which include existing mandatory statutory conditions as well as conditions associated with courts employing the use of pretrial services programs; (5) pretrial services programs; (6) hearings to re-consider unattainable monetary conditions of bond; and (7) conforming amendments to existing statutory sections.[109]

More substantive changes primarily reflect the three main recommendations passed by the CCJJ, which include encouraging evidence-based bail decisions, discouraging financial conditions of release and monetary bail bond schedules, and expanding and improving pretrial services functions across Colorado. To a great extent, these recommendations are interconnected: evidence-based practices at bail point to using objective risk assessment instruments, nonfinancial conditions of release to better protect public safety as well as to provide reasonable assurance of court appearance, and community supervision to maximize pretrial release while making sure the conditions are met; pretrial services program functions are designed to effectuate these practices. As noted in the House and Senate testimony, language reflecting the recommendations is largely permissive.[110] Nevertheless, because of how it is worded, even this permissive language, when combined with the more mandatory provisions left alone from prior law, show a clear legislative intent for jurisdictions to carry out the recommendations passed by the CCJJ.

Definition of Bail – § 16-1-104 C.R.S. (2013)

Like many bail statutes across America, Colorado's statute was initially written at a time when money was the only means of release. Suffice it to say that because bail has been linked with money for so long (over 1,000 years),[111] many states, including Colorado, have actually defined bail to be an amount of money. Despite some continuing inconsequential disagreement on certain details of the proper definition of bail, both CCJJ members and

[109] There was a purposeful effort to retain as much prior law as possible, to add only that language necessary to effectuate the CCJJ recommendations, and to remove only that language clearly conflicting with them. Nevertheless, because the recommendations necessarily led to changes in many foundational aspects of the law, there was some need for conforming language, re-ordering, and re-numbering throughout the statute. *See id.*

[110] *See generally, Best Practices in Bond Setting: Hearing on H.B. 13-1236 Before the House Jud. Comm.*, 2013 Leg., 1st Sess. (Colo. Mar. 12, 2013) (passim).

[111] *See* Timothy R. Schnacke, Michael R. Jones, & Claire M.B. Brooker, *Glossary of Terms and Phrases Relating to Bail and the Pretrial Release or Detention Decision,* at 2 (PJI 2011).

the General Assembly now agree that bail is not money; money, instead, is a financial condition of release. Thus, the new statutory definition of bail, loosely following one of Black's 9th Edition definitions,[112] is that bail is "a security, which may include a bond with or without monetary conditions, required by a court for the release of a person in custody set to provide reasonable assurance of public safety and court appearance."[113] "Security," in this sense, is used broadly, as in some pledge of assurance. To avoid confusion with other areas of the statute using "security" to mean an amount of money, drafters of the statute intentionally included the words "which may include a bond with or without monetary conditions."[114]

This new definition of bail is not simply academic. Indeed, it sets the tone for a statute that correctly places money on par with (if not less than, in terms of desirability) other conditions of pretrial release. Moreover, it provides the first clear statement of constitutionally valid purposes for limiting pretrial freedom – court appearance and public safety – which were lacking in the prior statute.[115]

Finally, the new definition naturally leads to additional global changes in the wording of the statute. Because bail equaled money under the old statute, it

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[112] As a noun, Black's defines bail first as security required for release and secondarily as the process of release. Although Black's mentions cash in addition to a bond as an example of "security" in the first definition, the statute drafters were determined to eliminate all reference to money in the definition. *See* Black's Law Dictionary 160 (9th ed. 2009).

[113] 16 C.R.S. § 1-104 (3) (2013).

[114] The new definition of "bond," which was urged primarily by the bail industry, is "a bail bond which is an undertaking, with or without sureties or security, entered into by a person in custody by which he binds himself to comply with the conditions of the undertaking and in default of such compliance to pay the amount of bail or other sum fixed, if any, in the bond." *Id.* § 1-104 (5) (2013).

[115] The need for some statutory expression of the purpose of limitations on pretrial freedom has been evidenced by court opinions that have not kept up with changes in the bail statute. In *People v. Sanders*, the Colorado Supreme Court stated that "the primary function of bail is to assure the presence of the accused, and that this end should be met by means which impose the least possible hardship upon the accused." 522 P. 2d 735, 736 (Colo. 1974). This seminal statement, however, was uttered before the 1984 Bail Reform Act, before the United States Supreme Court's decision in *Salerno*, and before state legislation was enacted that specifically concerned danger to the community or public safety. The statement was based, instead, on the philosophy originally reflected in the 1968 ABA Standards that the primary function of conditions of bail was to prevent flight, as well as language in *Stack v. Boyle* that "[b]ail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment." *See id.* (citing ABA Standards (1968) and *Stack*, 342 U.S. 1, 3). Nevertheless, despite the General Assembly's passage of numerous amendments implicating public safety in addition to court appearance as a valid purpose for limiting pretrial freedom, some recent Colorado Court of Appeals decisions have continued to mechanically cite *Sanders* to articulate the purpose of bail, thus failing to acknowledge these statutory provisions. *See, e.g., Fullerton v. County Ct.*, 124 P.3d 866, 870 (Colo. App. 2005); *People v. Rickman*, 155 P.3d 399, 401 (Colo. App. 2006) (*aff'd in part, rev'd in part, People v. Rickman*, 178 P.3d 1202 (Colo. 2008)).

perhaps made some sense to essentially require money on all bail bonds through statements such as, "[a]t the first appearance of a person in custody . . . the amount of bail and type of bond shall be fixed by the judge."[116] Statements like these, however, forced judges to include financial conditions of release on all bail bonds, whether they were supported by research, the law, or even the facts of any particular case. Readers of the new statute will note that in virtually every instance the phrase "amount of bail and type of bond" has been replaced with "type of bond and conditions of release." When speaking specifically of the use of money at bail, the statute now correctly uses the terms "financial condition" or "monetary condition."

Eligibility/Bailable Offenses – § 16-4-101 C.R.S. (2013)

Several CCJJ Bail Subcommittee discussions focused on creating a "bail/no bail" dichotomy that would lead to bailable defendants having a presumption of release and nonbailable defendants being detained through a due process hearing pursuant to Section 16-4-101 and Article II, Section 19 of the Colorado Constitution. Such a process is recommended generally by the ABA Standards, and is modeled through the federal bail statute, which was reviewed by the United States Supreme Court in *United States v. Salerno.*[117] Accordingly, this notion of a dichotomous bail process was expressly added to the new Colorado statute in Section 16-4-103, which states that "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 . . . 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."[118]

Unfortunately, though, compared to the federal statute, Colorado's preventive detention provisions (the "no-bail" side of the dichotomy) are somewhat lacking. Like the federal statute, Colorado's constitutional preventive detention provisions "operate[] only on individuals who have been arrested for a specific category of extremely serious offenses."[119] Unlike the federal statute, however, detention in Colorado is only triggered by serious offenses coupled with certain conditions precedent, such as the defendant being on probation, parole, or bail for another crime of violence,

[116] 16 C.R.S. § 4-103 (1) (a) (2012).
[117] 481 U.S. 739 (1987).
[118] 16 C.R.S. § 4-103 (4) (a) (2013).
[119] *Salerno,* 481 U.S. at 750 (1987).

or having certain violent crimes in his or her criminal history. While perhaps laudable to those advocating a strong right to bail, these provisions inevitably preclude the detention option for high risk defendants who have committed extremely serious offenses but who do not meet the conditions precedent. Only one example is sufficient. In February 2010, Bruco Eastwood walked onto the grounds of Deer Creek Middle School in Littleton, Colorado, and shot two students. At his bail hearing, there was a great deal of discussion of his extreme risk both to public safety and for flight if he were to be released. Under the Colorado preventive detention provisions, Eastwood did not fit into any of the categories triggering a detention hearing.[120] Under federal law, he did.

Once the federal detention provisions are triggered, the government must not only show probable cause for the arrest, but also, through a "full-blown adversary hearing" that includes the right to counsel, to testify, to cross-examine witnesses, and to proffer evidence, must show "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."[121] Colorado law requires the court to hold a hearing, but it does not expressly articulate procedures. The burden of proof at the hearing is "proof evident or presumption great"[122] for the crime alleged and a finding that the public will be placed in "significant peril" if the accused were released on bail. The law does not require the court to consider whether other conditions will suffice.

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[120] Because he was not on probation, parole, or bail at the time of the offense, and because he did not have the requisite criminal history, Eastwood was technically "bailable" under Colorado law. Accordingly, the judge issued an order of release with a secured financial condition of $1 million cash, essentially assuring his detention. The ABA Standards emphasize that a fundamental premise of its preventive detention recommendations is to create "an open process that provides due process to the defendant." ABA Standards, *supra* note 22, Std. 10-1.6 (commentary) at 49-50. In their recommendations concerning money at bail, the Standards further state, "This Standard explicitly prohibits the setting of financial conditions of release in order to prevent future criminal conduct or protect public safety. The prohibition is based on a fundamental principle of these Standards: concerns about risks of pretrial crime should be addressed explicitly through non-financial release conditions or, if necessary, through pretrial detention ordered after a hearing – not covertly through the setting of bail so high that defendants cannot pay it. If it appears that it may not be possible to address risks of dangerousness through other conditions of release, the judicial officer hold [sic] a pretrial detention hearing pursuant to Standard 10-5.9 to decide whether the defendant should be detained pending adjudication of the charges." *Id.* Std. 10-5.3 (b) (commentary) at 112.

[121] *Salerno*, 481 U.S. at 742, 750; 18 U.S.C. §§ 3142 (e) (f).

[122] While cases discussing bail in Colorado are infrequent, several courts have at least said that the constitutional standard is greater than probable cause. *See, e.g., Orona v. Dist. Ct.*, 518 P.2d 839, 840 (Colo. 1974) ("By definition, the standard which the constitution requires before bail may be denied is greater than probable cause – though less than that required for a conviction.").

Perhaps because changes to the preventive detention statute would also require changes to the Constitution, the CCJJ chose not to recommend altering any of the bail eligibility provisions. The impact of this choice will soon be seen; a continuation of objectively high cash-only bonds set without a meaningful due process hearing should be an indicator of the need for additional reform in this area. As in 1974, however, when the Colorado Supreme Court read the various sections of the new criminal code as a reflection of the current law and the ABA Standards, it is hoped that judges today will likewise follow *Salerno's* and the Standard's overall philosophy of transparent detention by following the constitutional provisions of Article II, Section 19, in all cases to which it applies, and by using money bail as a substitute only when absolutely necessary.[123]

Unlike the CCJJ, however, the General Assembly did choose to alter the statutory preventive detention provisions, albeit without the requisite changes to the Constitution, thus creating an unfortunate situation of having passed what is likely to be viewed as an obviously unlawful provision. As noted previously, the statutory preventive detention provisions found in Section 16-4-101, C.R.S., were initially designed to mirror the constitutional ones, which denied bail for three broad categories of defendants besides those facing capital crimes. In 2000, however, the General Assembly added a fourth broad category to the statute – persons charged with possession of a weapon by a previous offender – that didn't exist in the Colorado Constitution. And in H.B. 13-1236, on the floor of the House, Section 16-4-101 was amended yet again to add a fifth broad category of non-bailable defendants – persons charged with certain sex offenses – that also does not exist in the Constitution.[124] These additions are almost certainly unconstitutional,[125] and their inclusion in the statute is regrettable. Because

[123] There was some Bail Subcommittee discussion surrounding the relative infrequency of Colorado detention hearings. Of course, the provisions can be effectively avoided by instead setting high financial conditions. Using high money bail to detain, however, is potentially unlawful under both Due Process Clause and 8th Amendment analysis, as previously noted in note 13 to this paper, *supra*. Nevertheless, the author of this paper believes that judges in many jurisdictions might avoid these constitutional issues if they conduct due process detention hearings for any defendant who is not eligible for detention under the constitution, but who has nonetheless been flagged by the pretrial services program as someone for whom no condition or combination of conditions will provide reasonable assurance of appearance or public safety.

[124] *See* 16 C.R.S. § 4-101 (1) (b) (V) (2013).

[125] At the Senate Judiciary Committee Hearing, a representative from the Attorney General's Office testified that both provisions are "constitutionally suspect." *See Best Practices in Bond Setting: Hearing on H.B. 13-1236 Before the Senate Jud. Comm.*, 2013 Leg., 1st Sess. (Colo. Apr. 10, 2013) (Statement by Deputy A.G. David Blake). Apparently, Section 16-4-101 (1) (b) (IV) has never been challenged in the appellate courts. Given the ease with which money bail detains in Colorado, it is also likely that it has never been used. It is noted that in 2012, the General Assembly also changed the language requiring speedy trial

of this, however, the bill's sponsor added a severability clause to minimize the effect on other parts of the statute in the event of a court ruling against the offending provisions.[126]

Right to Bail – § 16-4-102 C.R.S. (2013)

This Section is substantially the same as prior law, with only minor changes for clarity. Essentially, the Section mandates courts to set bail for defendants accused of bailable offenses. Though never construed in this way, the Section is entirely compatible with a bail/no bail dichotomy that also encourages the actual *release* of constitutionally bailable defendants.

Setting and Selection Type of Bond/Criteria – § 16-4-103 C.R.S. (2013)

New Section 16-4-103 is substantially different from the old provision, and contains the language meant primarily to implement the three CCJJ recommendations as well as housing various parts of old Section 16-4-105, which articulate the criteria for setting bond conditions. Only the first paragraph of the old provision has been retained in current Section 16-4-103. Paragraphs setting presumptive bail amounts for certain charges (as well as accompanying language requiring the amounts for one of the charges to be adjusted for inflation) have been deleted as not following research and best-practices that favor a risk-based over a charge-based system.[127] Paragraphs

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for non-capital offenses to begin from "not more than ninety days" after the denial of bail to "not more than ninety-one days" after the denial of bail, creating an additional, albeit somewhat less significant, discrepancy with the Colorado Constitution.

[126] *See* 16 C.R.S. § 4-115 (2013).

[127] In many ways, these provisions (16 C.R.S. §§ 4-103 (1) (b), (b.5), and (d) (I) (2012)) were the antithesis of a risk-based bail system, with only their presumptive nature saving them from being deemed unlawful under Colorado's otherwise mandatory individualized bail scheme. Presumptive bail amounts based on charge alone suffer from the following additional flaws: (1) the amounts are arbitrary, with no rational basis given for why one amount, such as $50,000, was chosen over any other; (2) they are apparently based, at least partially, on concerns for public safety, and yet money has never been shown to protect public safety and, indeed, is not even forfeitable for breaches in public safety; (3) they raise an inference of punishment at bail for certain serious crimes, a constitutionally invalid purpose for limiting pretrial freedom; (4) they are counter to ABA best-practices, as articulated in the Standards, not to give inordinate weight to the nature of the charged offense, *see* Std. 10-1.7, to reject setting predetermined, arbitrary amounts of money to charges (such as in bail schedules) without including more relevant pretrial risk factors, *see* Std. 10-5.3(e), and to generally restrict the use of financial conditions of release, *see* Std. 10-5.3 (a); (5) they are counter to the most current research, which demonstrates that money at bail does not increase public safety or court appearance rates, but does increase unnecessary detention, *see Jeffco Study*, *supra* note 36; *Evidence*, *supra* note 69; *New Jersey Study*, *supra* note 36; *cf.* Tara Boh Klute & Mark Heverly, *Report on Impact of H.B. 463: Outcomes, Challenges and Recommendations*, at 4-10 (KY Pretrial Servs. 2012) [hereinafter *H.B. 463 Impact*], available at:

from the old Section creating statutory conditions have been moved to Section 16-4-105, the provision now dedicated to conditions of release. And finally, other miscellaneous paragraphs (such as paragraphs keeping intoxicated defendants from bail hearings and requiring notices of forfeitures) have been moved to sections more relevant to those issues.

In new Section 16-4-103, readers should note the important interaction between provisions mandating action through the use of "shall" and "must," and those that are merely permissive. For example, a broad reading of this Section reveals that the statute does not necessarily require courts to use either an empirically developed risk instrument[128] or to consider the previously mandatory bail setting criteria.[129] However, the statute is clear that judges "shall" take into consideration the individual characteristics of each defendant,[130] that conditions "must" be tailored to address specific concerns,[131] and that even bond schedules, if used, "shall" incorporate factors that consider the defendants' individualized risk profile.[132] Clearly, in addition to making the most logical sense, the least arbitrary and subjective way to follow these latter requirements concerning individualization while making effective bail determinations is through using the non-mandated CPAT.

As noted previously, the requirement in prior Subsection (1) that a judge fix the "amount of bail and type of bond" has been changed to mandate courts to determine the "type of bond and conditions of release,"[133] a phrase designed to move away from presuming that secured money will be set for

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http://www.pretrial.org/Docs/Documents/Kentucky%20Pre%20Post%20HB%20463%20First%20Year%20Pretrial%20Report.pdf; and (6) they are counter to the research used to generate the Colorado Pretrial Assessment Tool, which studied the impact of charge on risk and yet "failed to show that the nature (e.g., person or property crime) or severity (felony, misdemeanor) of the defendant's current charge was statistically significantly related to pretrial misconduct," a finding that, while somewhat counterintuitive, is "consistent with the finding that some items appear on some risk assessment instruments but not on others, or that the same item is scored differently (and sometimes in the opposite direction) on different instruments." *CPAT Joint Partnership*, *supra* note 85, at 20; *see also generally* Cynthia A. Mamalian, *State of the Science of Pretrial Risk Assessment* (PJI/BJA 2011).

[128] 16 C.R.S. § 4-103 (3) (b) (2013) (stating "[i]n determining the type of bond and conditions of release, *if practicable and available in the jurisdiction*, the court shall use an empirically developed risk assessment instrument") (emphasis added).

[129] *See id.* § 4-103 (5) (2013) (stating that the court "may" consider the criteria).

[130] *See id.* § 4-103 (3) (a) (2013). This Section follows the mandate of *Stack v. Boyle*, 342 U.S. 1, 5 (1951), in which the Court wrote: "Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the [constitutionally valid purposes for limiting pretrial freedom]."

[131] *Id.* § 4-103 (4) (a) (2013).

[132] *Id.* § 4-103 (4) (b) (2013).

[133] *Id.* § 4-103 (1) (2013).

most bonds and toward thinking about bail as a process of release with appropriate and least restrictive conditions.

The language in new Subsection (2) has been separated from the old law's first paragraph and slightly re-worded to more forcefully emphasize that judges "shall review the propriety of the type of bond and conditions of release" when those elements were fixed upon return of an indictment or the filing of an information or complaint.[134] The notion of reassessing bond and conditions of release is especially important whenever the initial setting did not have the benefit of an objective and individualized risk assessment (as is often the case with warrants),which is encouraged through the rest of the statute.[135]

New Subsection (3) (a) states: "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 in custody, including the person's financial condition." In addition to mandating an individualized bail setting, this Subsection again reiterates the two constitutionally valid purposes for limiting pretrial freedom – court appearance and public safety – the latter purpose being less than explicit in the old statute.

This Subsection is also important, however, because it clearly mandates that courts take into consideration a defendant's financial condition, and the importance of this mandate requires some background information. The previous statute, like many other state statutes, included certain mandatory bond-setting criteria that helped guide judges through an individualized bail setting. As mentioned previously, when those criteria were enacted, their empirical predictive nature for risk to public safety and court appearance were largely unknown and the statute provided no guidance on how much weight to assign any particular factor. Moreover, judges and others operating in the pretrial field could never be sure if the statute was leaving out more predictive criteria. With the development of the CPAT, researchers have

[134] *Id.* § 4-103 (2) (2013).

[135] For example, in Jefferson County, Colorado, researchers noted that advisement judges saw numerous defendants brought in on warrants with financial conditions set by another judge, and would often decline to re-assess the propriety of the financial condition even though that condition was set based only the charge and affidavit. *See The Jefferson County Bail Impact Study: Initial Report on Process Data for the System Performance Subcommittee* (July 23, 2010) at 22-24, available from the Jefferson County Criminal Justice Planning Unit.

found 12 weighted factors to be collectively predictive of pretrial failure, and thus the assessment tool provides a superior method for judges attempting to evaluate the old criteria. Because the CCJJ chose not to mandate the use of the CPAT, however, [136] statute drafters altered the old criteria by making it equally permissive; it simply made no sense to continue to mandate statutory factors that were inferior to empirically demonstrated criteria that were only permissive. Nevertheless, there is one notable exception to the General Assembly's overall reluctance to dictate specific bail setting criteria: the defendant's financial condition.

In the new statute, the General Assembly has intentionally removed consideration of financial condition from the now permissive criteria provision found in Subsection (5) and has placed it into Subsection (3) (a), which mandates it. Indeed, it is the only specific individualized criteria that judges are required to consider for at least four good reasons: (1) considering a defendant's financial condition necessarily removes at least one level of arbitrariness from money amounts at bail; (2) sometimes judges set secured financial conditions intending to release a defendant, but the conditions become a barrier to release for defendants who cannot afford them; (3) secured financial conditions of release can never become motivational for court appearance until they are met – until then, they merely detain and consideration of the defendant's financial condition will help reduce unnecessary pretrial detention;[137] and (4) appellate courts will be better able to assess money bail amounts for due process, excessive bail, and other law violations when there is some record concerning the judge's knowledge of a particular defendant's ability to pay.

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[136] It was not mandated primarily to allay the concerns of persons advocating for local control and against unfunded state mandates. The trend toward creating permissive statutory provisions simply to avoid these objections is unfortunate, however, when, as here, a statewide instrument has been developed that is clearly superior to existing instruments and personal judgment and that would bring standardization and effectiveness to an area of the law in need of statewide reform. Indeed, at least three states (Kentucky, Hawaii, and Delaware) have recently mandated statewide empirical pretrial risk assessment. *See* Ky. Rev. Stat. Ann. §431.066 (2012) (providing that "the court shall consider the pretrial risk assessment for a verified and eligible defendant," as defined by *Order Approving Judicial Guidelines for Pretrial Release and Monitored Conditional Release*, Ky. Sup. Ct. 2011-12); Haw. Rev. Stat. § 353.10 (3) (2012) (providing that reentry intake service centers "shall . . . provide pretrial assessments [using an 'objective, research-based validated assessment tool'] on adult offenders within three days of admission"); Del. Code Ann., tit. 11 § 2104 (a) (3) (2012) (providing that "the court shall employ an objective risk assessment instrument to gauge the person's risk of flight and re-arrest").

[137] On this topic, the ABA Standards state: "This Standard prohibits the imposition of financial conditions that the defendant cannot meet. The intent behind this limitation is to ensure that financial bail serves only as an incentive for released defendants to appear in court and not as a subterfuge for detaining defendants." ABA Standards, *supra* note 22, Std. 10-1.4 (e) (commentary) at 44.

Subsection (3) (b) creates the language encouraging jurisdictions to use objective risk instruments. It states as follows:

> In determining the type of bond and conditions of release, if practicable and available in the jurisdiction, the court shall use an empirically developed risk assessment instrument designed to improve pretrial release decisions by providing to the court information that classifies a person in custody based on predicted level of risk and pretrial failure.[138]

Note that the Subsection does not recommend any particular risk instrument, but it would certainly make sense for courts to use the CPAT, currently the only empirically developed risk instrument designed for use on Colorado defendants.[139]

Subsection (4) contains language specifically addressing the CCJJ recommendations dealing with money and bail schedules. As noted previously, Subsection (4) (a) contains the requirement that courts:

> [p]resume that all persons in custody are eligible for release on bond with the appropriate and least-restrictive conditions . . . 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.[140]

In addition to the line requiring judges to presume defendants are eligible for release unless detainable pursuant to the constitutional preventive detention provisions – a line that should cause judges to seriously reconsider any casual use of financial conditions – this Section adds the language "least-restrictive conditions" to Colorado law, a common phrase used both in the ABA Standards as well as in other state's statutes based on those Standards. Because of some apparent confusion over this phrase, however, and because

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[138] 16 C.R.S. § 4-103 (3) (b) (2013).

[139] "Borrowing" another jurisdiction's pretrial risk assessment instrument is typically only recommended as a short-term measure while working toward validating it for the borrower's county. *See, e.g.,* Stephanie J. Vetter & John Clark, *The Delivery of Pretrial Justice in Rural Areas: A Guide for Rural County Officials,* (PJI/NACo, Jan. 2013) at 16.

[140] 16 C.R.S. § 4-103 (4) (a) (2013).

the commercial surety industry has incorrectly argued that money at bail should be considered a "least-restrictive condition," it requires some discussion.[141]

Commentary to the ABA Standard recommending release under the "least restrictive conditions" states as follows:

> This Standard's presumption that defendants should be released under the least restrictive conditions necessary to provide reasonable assurance they will not flee or present a danger is tied closely to the presumption favoring release generally. It has been codified in the Federal Bail Reform Act and the District of Columbia release and pretrial detention statute, as well as in the laws and court rules of a number of states. The presumption constitutes a policy judgment that restrictions on a defendant's freedom before trial should be limited to situations where restrictions are clearly needed, and should be tailored to the circumstances of the individual case. Additionally, the presumption reflects a practical recognition that unnecessary detention imposes financial burdens on the community as well as on the defendant.[142]

This principle is foundational, and is expressly reiterated throughout the Standards when, for example, those Standards recommend citation release or summonses versus arrest [143] and the use of unsecured over secured bonds.[144] Moreover, the Standard's overall scheme creating a presumption of release on recognizance,[145] followed by release on nonfinancial conditions,[146] and finally release on financial conditions[147] is directly tied to this foundational premise. Indeed, the principle of least restrictive conditions transcends the Standards and flows from even more basic understandings of criminal justice, which begins with presumptions of innocence and freedom, and which correctly imposes increasing burdens on the government to

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[141] *See HB13-1236: The Professional Bail Agents of Colorado Oppose the Introduced Version of HB 1236 Because it Restricts Judicial Discretion and Will Result in the Over-Supervision of People Charged With But Not Convicted of Crimes*, available at http://www.thekylegroup.com/pdf/PBAC%20oppose%20HB13-1236%20(final).pdf.
[142] ABA Standards, *supra* note 22, Std. 10-1.2 (commentary) at 39-40 (internal citations omitted).
[143] *See id.*, Std. 10-1.3, at 41.
[144] *See id.*, Stds. 10-1.4 (commentary) at 43, 44; 10-5.3 (commentary) at 111-14.
[145] *Id.* Std. 10-5.1 at 101.
[146] *Id.* Std. 10-5.2 at 106-107.
[147] *Id.* Std. 10-5.3 at 110-111.

incrementally restrict one's liberty. The principle is now rightly contained in the bail statute; however, it has clearly been a part of Colorado law through the Supreme Court's statement that the function of bail "should be met by means which impose the least possible hardship upon the accused."[148]

More specifically, however, the ABA Standard's commentary on financial conditions makes it clear that the Standards consider secured money bonds to be a more restrictive alternative to both unsecured bonds and nonfinancial conditions: "When financial conditions are warranted, the least restrictive conditions principle requires that unsecured bond be considered first."[149] Moreover, the Standards state, "Under Standard 10-5.3(a), financial conditions may be employed, but only when no less restrictive non-financial release condition will suffice to ensure the defendant's appearance in court. An exception is an unsecured bond because such a bond requires no 'up front' costs to the defendant and no costs if the defendant meets appearance requirements."[150] These principles are well founded in logic: setting aside, for now, the argument that money at bail might not be of any use at all, it at least seems reasonably clear that secured financial conditions (requiring up-front payment) are always more restrictive than unsecured ones, even to the wealthiest defendant. Moreover, in the aggregate, we know that secured financial conditions, as the only condition precedent to release,[151] are highly restrictive compared to all nonfinancial conditions and unsecured financial conditions in that they tend to cause pretrial detention.[152] Like detention itself, any condition causing detention should be considered highly restrictive.

Thus, the new law's inclusion of the phrase "least restrictive conditions" may not be read in a vacuum. Instead, it must be read in conjunction with the legislative history, summarized above, which indicates the General Assembly's desire specifically to reduce secured financial conditions of bail, to reduce unnecessary pretrial detention, and to generally follow best-practices, as embodied in the ABA Standards, which consider secured

[148] *People v. Sanders*, 522 P.2d 735, 736 (1974).
[149] ABA Standards, *supra* note 22, Std. 10-1.4 (c) (commentary) at 43-44.
[150] *Id.* Std. 10-5.3 (a) (commentary) at 112.
[151] Most conditions of release are conditions subsequent – that is, release is obtained, but if the condition occurs (or fails to occur, depending on its wording) it will trigger some consequence, and sometimes bring pretrial freedom to an end. Secured money at bail is the quintessential, and typically the only condition precedent; unlike other conditions, some or all of a secured financial condition often must be paid first in order to initially gain release from jail.
[152] *See* Cohen & Reaves, *supra* note 36, at 3 ("There was a direct relationship between the bail amount and the probability of release . . . [t]he higher the bail amount the lower the probability of pretrial release.").

financial conditions to be highly restrictive as compared to other nonmonetary or unsecured money conditions.

In theory, of course, some defendants (especially wealthy ones) would gladly trade telephone check-ins, drug and alcohol testing, electronic monitoring, stay-away orders, or other nonfinancial conditions of bail simply by paying a bondsman a small percentage of the financial condition or depositing the full amount with the court. Unfortunately, however, most of these nonfinancial conditions are set by judges hoping to reduce the risk to public safety; because money is not forfeitable for breaches in public safety, however, it is irrelevant to a discussion of least restrictive conditions designed to protect the public. As far as defendants who pose *only* risk of flight, judges must weigh whether the particular pretrial services supervision for that defendant, which might be fairly minimal for a defendant posing no risk to public safety, would be less restrictive than money. In virtually every case involving only a risk of flight, the minimal supervision necessary to provide reasonable assurance of court appearance (or in some cases, virtually no supervision at all, such as with highly effective court date reminders)[153] will be objectively less-restrictive than a secured financial condition.[154] In cases in which the defendant poses a dual risk for public safety and flight, the supervision already in place for public safety purposes will likely be sufficient to also provide adequate assurance of court appearance because the interventions with the defendant are the same (e.g., face to face visits, continually verifying residence and employment, meetings to test for drug and alcohol use). In those cases, money will not only be more restrictive, but also unnecessary and possibly irrational. In sum, money is a highly restrictive condition, and even more so when combined with other conditions that serve the same purpose.[155]

[153] *See generally* VanNostrand, *State of the Science*, *supra* note 41, at 15-20.

[154] There are probably exceptions to this rule, and theoretically a defendant could pose no risk to public safety, an enormous risk for flight, appear unlikely to cooperate or be responsive to nonfinancial conditions designed to reduce the risk of flight, and yet be motivated by losing money paid up-front (and not necessarily motivated by losing money on the back-end through an unsecured bond) to such a degree that losing that money would be more motivational than following court orders setting alternative conditions.

[155] The Supreme Court in *Salerno* explained that in determining Eighth Amendment excessiveness, one must compare the proposed conditions of release or detention against the government interest: "when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more." 481 U.S. 739, 754 (1987). Presumably, money bail set to ensure a goal that has already been met by other less-restrictive conditions would run afoul of this statement.

The line in Subsection (4) (a) that monetary conditions be "reasonable" is merely a shorthand statement representing 100 years of Colorado law concerning excessive bail,[156] although the perception of an unreasonable amount might also trigger due process analysis. However, reasonableness, in the broader sense, also goes to whether the monetary condition furthers the purpose for which it is set. As noted previously, researchers are increasingly determining empirically that using money at bail does not increase either public safety or court appearance rates, and only leads to increased detention. If so, attorneys should be quick to object to a condition that serves no valid constitutional purpose for limiting pretrial freedom.

Subsection (4) (b) deals with monetary bail bond schedules and states as follows: "To the extent a court uses a bond schedule, the court shall incorporate into the bond schedule conditions of release and factors that consider the individualized risk and circumstances of a person in custody and all other relevant criteria and not solely the level of offense."[157]

To fully comprehend the complexity of the debate surrounding bond schedules, one must first understand that most, if not all of them are created with good intentions, often to help defendants gain their release from jail. Thus, advocating for either their elimination or a reduction in their use often means arguing with judges, prosecutors, and others who have lent a benevolent hand in creating them for well-intentioned purposes. Unfortunately, however, bail schedules tend to grow almost organically into unmanageable beasts, sometimes over one hundred pages long,[158] which

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[156] *See In Re Losasso,* 24 P. 1080, 1082 (Colo. 1890) (stating that bail must be "reasonably sufficient" to secure the prisoner's presence at trial); *People v. Lanzieri,* 25 P.3d 1170, 1175 (Colo. 2001) ("The right to reasonable bail . . . following arrest lessen[s] the impact of an unlawful arrest."). *Compare Stack v. Boyle,* 342 U.S. 1, 5 (1951) ("Bail set at a figure higher than an amount reasonably calculated to [provide adequate assurance of court appearance] is excessive.").

[157] 16 C.R.S. § 4-103 (4) (b) (2013). Other sections provide additional authority for limiting the use of a traditional money bail bond schedule. Section 16-4-104 requires all courts, not just courts of record at a first advisement, to determine bond types, and requires judges only to set a secured money bond type (a Subsection (1) (c) type) when the money is "reasonable and necessary to ensure the appearance of the person in court or the safety of any person or persons or the community." This limitation is new to the law, and must be considered whenever a secured financial condition is set. Likewise, Section 16-4-105 sets forth all discretionary and nondiscretionary conditions of release, a section that must be followed even when a jurisdiction is using a bond schedule not at the first appearance before a court or record. That section allows judges to set financial conditions, but only when they comply with § 16-4-104 (1) (c), which, in turn, requires the amount to be reasonable and necessary for a particular defendant. Most, if not all traditional bail schedules, which have financial conditions of release set in advance and are addressed to all defendants of like charge, would likely run afoul of these two sections in addition to § 16-4-104 (4) (b).

[158] The 2013 San Diego County bail schedule is 132 pages in length, having grown from 128 pages in 2011. *See Superior Court of California, County of San Diego Bail Schedule* (Jan. 1, 2013) available at

then typically serve as the first and last word on the financial condition of bond. Accordingly, as noted by the CCJJ,

> 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.[159]

There are many reasons for recommending that jurisdictions reduce their use of bail schedules,[160] but the most common reason is the schedules' inherent lack of individualization for particular defendants. In *Stack v. Boyle,* the United States Supreme Court admonished the bail-setting court for not following the individualized criteria found in existing Federal Rule of Criminal Procedure 46 when it set blanket, identical bail amounts for twelve defendants with differing backgrounds and, presumably, different risk profiles. The Court wrote:

> Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant [at the time, the only constitutionally valid purpose for limiting pretrial freedom]. The traditional standards, as expressed in [Federal Rule 46, which included the nature and circumstances of the offense, the weight of the evidence, the financial security of the defendant, and the character of the defendant] are to be applied in each case to each defendant.[161]

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http://www.sdcourt.ca.gov/pls/portal/docs/PAGE/SDCOURT/CRIMINAL2/CRIMINALRESOURCES/BAIL_SCHEDULE.PDF.

[159] CCJJ Recommendation FY13-BL02 (quoting Lindsey Carlson, *Bail Schedules, A Violation of Judicial Discretion?* 26 Crim. Just. 1 (ABA 2011) at 6). In the article, the quote continues, "On the other hand, bail schedules permit dangerous or risky defendants to purchase release without judicial review or other conditions tailored to prevent danger or flight."

[160] For example, in addition to allowing the release of higher risk defendants who have money while tending to detain lower risk defendants who have no money (often without any procedural hearing, implicating due process in addition to equal protection principles), they are arbitrary, inflexible, typically inexplicably inconsistent between jurisdictions, place inordinate weight on the current charge (which, in Colorado, is not predictive of pretrial failure), and foster an unhealthy focus on only one condition of bond – the financial condition – the usefulness of which is currently in doubt.

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

In his concurring opinion, Justice Jackson opined that, at a minimum, ordering a blanket financial condition based on charge alone violated Rule 46 because "[e]ach defendant stands before the bar of justice as an individual," and to presume without inquiry that each defendant is identical pursuant to the relevant factors "violates the law of probabilities." [162]

Stack's requirement that judges be guided by standards when making bail determinations, bolstered by research indicating the usefulness of certain additional information on release, detention, and pretrial failure, led states to enact lists of individualized bail-setting criteria (such as those created in 1972 in Section 16-4-105, C.R.S.) mandating judges to consider an array of factors applicable to each defendant. These standards, when enacted, typically became the hallmark of any particular state's individualized bail-setting scheme. Unfortunately, setting financial conditions through bail schedules is no different than the blanket bail-setting practice deemed unlawful in *Stack*, [163] and too often violates a particular state's constitutional provisions or any state law creating the individualized scheme. [164]

It was for these reasons that the CCJJ changed its initial recommendation for a statewide bond schedule to a more general recommendation to create bail bonding guidelines. Bail schedules are the antithesis of an individualized bail-setting scheme and foster an unwarranted focus on only one bail-setting criterion (charge) and only one condition (money). Any thoughtful discussion of pretrial risk, of individualization, and of the proper role of money as only one of numerous less-restrictive bond conditions naturally leads to recommendations advocating the decreased use of such a widespread practice.

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[162] *Id.* at 9.

[163] According to LaFave, et al., because the nature of the offense is not the only relevant factor in Eighth Amendment analysis, *Stack* would indicate that "the use of a bail schedule, wherein amounts are set solely on the basis of the offense charged, violates the Eighth Amendment except when resorted to as a temporary measure pending prompt judicial appearance for a particularized bail setting." Lafave Fifth Edition, *supra* note 11, at 681.

[164] *See e.g., Clark v. Hall,* 53 P.3d 416, 417 (Ok. Ct. Crim App. 2002) (holding that "We find the [bail schedule statute] is unconstitutional because it violates the due process rights of citizens of this State to an individualized determination of bail."); *Pelekai v. White,* 861 P. 2d 1205, 1210-11 (Haw. 1993) (ruling that the trial judge abused her discretion when she rigidly followed a bail schedule without also considering the statutorily mandated personal characteristics of the defendant.); *Demmith v. Wisc. Jud. Conf.,* 480 N.W. 2d 502, 507 (Wis. 1992) (concluding that the state court's Uniform Misdemeanor Bail Schedule based solely on the alleged charge failed to comply with state statutes requiring that cash bail guidelines "relate primarily to individuals."); *Cf.* Op. Tex. Att'y Gen. No. DM-57 (1991), at 2-3 ("Bail amounts must be determined on a case-by-case basis, not pursuant to a pre-set schedule of amounts."); Op. Tex. Att'y Gen. No. H.-856 (1976), at 4 ("The amount of bond must be determined by the Constitution and rules set out in [the statute], rather than any arbitrary 'schedule of amounts.'").

Nevertheless, the new statute does not abolish bail schedules. It does, however, require courts to incorporate individualized elements into whatever new iteration of a "bail schedule" they attempt to use. This will not be easy, and courts may find that such an endeavor is likely more difficult than simply assessing each defendant for risk and determining conditions at advisement based on those assessments.[165]

Subsection (4) (c) states that judges "shall . . . consider all methods of bond and conditions of release to avoid unnecessary pretrial incarceration and levels of community-based supervision as conditions of pretrial release." Although worded somewhat awkwardly, this Subsection elevates avoiding unnecessary pretrial incarceration to a foundational consideration at bail; the previous statute only made passing reference to the notion as a function of pretrial services programs.[166] In the field of pretrial justice, unnecessary pretrial detention is epitomized by incarcerating defendants, typically through the use of secured financial conditions, when other less restrictive conditions or combinations of conditions would suffice to manage those defendants in the community.

Subsection (5) contains a reformatted and slightly re-worded version of the previous statute's bond-setting criteria found in Section 16-4-105 (2012). They were previously mandatory, and now they are permissive. The subsection requiring the financial condition not to be "oppressive" has been deleted, primarily because it adds little to a statute already requiring judges to use least restrictive conditions, to consider bond types that will avoid unnecessary pretrial detention, and to use financial conditions only when they are "reasonable" (i.e., not excessive, and presumably not arbitrary or

[165] Jefferson County, Colorado, successfully eliminated its use of a bail schedule, and although some believe it to cause slightly more work among justice officials (by requiring universal risk assessment, weekend advisements, and a more thoughtful consideration of bond conditions) the process better follows the law, has reduced the pretrial jail population, and has not led to any notable decreases in court appearance or public safety rates. There was a great deal of discussion in the CCJJ Bail Subcommittee of jurisdictions using "matrixes" or guided-discretion documents that list risk levels (not charge) and presumptive non-financial conditions (not money) to be associated with risk. These types of documents appear to have some of the well-intentioned benefits of money bail schedules without their negative aspects, and a skeletal version of one was attached to CCJJ Rec. FY 13-BL #1, reproduced in the CCJJ's October 12 meeting minutes, available at http://www.colorado.gov/ccjjdir/Resources/Resources/Handout/2012/101212_BLRec_FY13-BL1-4.pdf.

[166] *See* 16 C.R.S. § 4-105 (3) (d) (2012) (allowing pretrial services programs to use "established supervision methods for defendants who are released prior to trial in order to decrease unnecessary pretrial incarceration").

irrational) and "necessary"[167] in relation to their alternatives. Likewise, previous criteria found in Subsections (k.5) and (k.7),[168] which required judges to place an emphasis on particular charges rather than on factors traditionally used to assess risk, have been deleted.

In sum, Section 16-4-103 is important to understand. It *requires*: (1) the court to determine the type of bond and conditions of release; (2) review of any bond and conditions fixed upon return of an indictment or filing of the information or complaint (including on warrants issued after the filing of charging documents); (3) a presumption of release under least-restrictive conditions unless the defendant is unbailable pursuant to the Constitutional preventive detention provisions; (4) individualization of conditions of release (including in "bond schedules") and express mandatory consideration of a defendant's financial condition or situation; (5) "reasonable" financial conditions, and non-statutory conditions to be "tailored to address a specific concern;" and (6) consideration of ways (including changing bond types) to avoid unnecessary pretrial detention. In making the individualized determination, it *strongly encourages* using an empirically developed risk assessment instrument, and it *allows* consideration of various pre-existing bail setting criteria.

2014 Legislative Changes

In 2014, the General Assembly passed Senate Bill 14-212 ("Concerning Clarifying Changes to the Provisions Related to Best Practices in Bond Setting"), which further amended Section 16-4-103 (1) by removing the words "a court of record" and replacing them with "any court or any person designated by the court to set bond." The bill also added the words "or person" after "the court" when describing who or which entity shall determine the type of bond and conditions of release.

Before the amendment, the entire Section began, "At the first appearance of a person in custody before a court of record, the

[167] *See* discussion of 16 C.R.S. § 4-104 (1) (c) (2013), *infra*.
[168] *See* 16 C.R.S. § 4-105 (1) (k.5) (2012) (requiring judges to consider the fact that a defendant is accused of using or distributing drugs on the grounds or near any school or other nearby public place); § 16-4-105 (1) (k.7) (2012) (requiring judges to consider the fact that a defendant is accused of "soliciting, inducing, encouraging, intimidating, employing, or procuring a child to act as his agent to assist in the unlawful distribution, manufacture, dispensing, sale, or possession for the purposes of sale of any controlled substance").

court shall determine the type of bond and conditions of release unless the person is subject to the provisions of section 16-4-101." Unfortunately, the phrase "court of record" was already defined in Section 16-1-104 (8) as "any court except a municipal court unless otherwise defined by a particular section." This definition, coupled with the retention of the phrase itself, led municipal judges to think, reasonably, that they had been excluded from the requirements of 16-4-103. This was not an intended outcome of the 2013 law, however, and so the phrase "court of record" was changed to the amended language. Accordingly, the change intends first to make clear that municipal courts and judges should be subject to the same bonding requirements as state courts and judges under the new law.

In addition, certain Colorado judges had been given misleading information premised on the argument that because Section 16-4-103 began by speaking only of "courts of record," the remainder of the section only applied to events or decisions happening in actual courtrooms. More particularly, some argued that because many charge-based monetary bail bond schedules were being used outside of an actual courtroom (and thus not in a "court of record"), those bond schedules did not need to be individualized for risk as required by 16-4-103 (4) (b). Relying on this mistaken interpretation of the statute, some judges were continuing to use charge-based money bond schedules, which assign mostly random amounts of money to charges without defendant individualization. This was not the intent of the Colorado Commission on Criminal and Juvenile Justice (CCJJ) or the General Assembly, both of which were clear in their decision to craft legislative language that was designed to reduce the use of money and traditional money bond schedules, and to mandate consideration of individual defendant risk whenever bond schedules are used. Thus, the change in language from this Section of the 2014 bill is also meant to make clear that all of Section 16-4-103 applies to all aspects of bail setting, whether done in a courtroom, or outside of a courtroom through any lawful process of delegated authority such as through bond commissioners or bond schedules.

Types of Bond – § 16-4-104 C.R.S. (2013)

Because historically money has been the only means for release at bail, bond types were typically labeled based on how they used money as a condition. For example, "personal recognizance" bonds required no money, "surety" bonds required the money to be backed by some surety – typically a commercial surety but sometimes non-commercial ones – and "cash-only" bonds required the money to be paid up-front and in full in advance of release. With the advent of nonfinancial conditions, however, jurisdictions have begun to correctly view bail as a release/no release process, with a hierarchy of possible release options based on their restrictiveness, from release with no conditions,[169] to release with nonfinancial conditions, to release with financial conditions (unsecured and secured), and finally, to detention. The ABA Standards are built upon this hierarchy, and the federal and District of Columbia "model" statutes emulate it. Likewise, the new Colorado bail law has been written to more closely resemble this hierarchical process.

Whereas the previous statute created two broad bond types – personal recognizance and "cash-property-surety" types,[170] which were characterized by their unsecured versus secured money bases – the new statute creates four categories of bond types, each more appropriately defined by its restrictive nature. The first, found in Subsection (a), is an "unsecured personal recognizance bond," which is intended to be used for those defendants whose risk profile indicates that the current mandatory, statutory conditions of bond are sufficient to provide reasonable assurance of public safety and court appearance.[171] Note that this type of bond still requires an unsecured amount to be set ("in an amount specified by the court"). This is unlike many states, which have so-called "pure" personal recognizance bonds with no financial requirement whatsoever. Nevertheless, because it is unsecured, the amount should not hinder the release of any particular defendant, and yet

[169] Of course, all bail bonds have at least one condition, which is to appear for court. In the broadest possible definition of bail, citation release is a form of bail that typically only has this one condition.
[170] Over the years, Colorado judges and others have begun to think of cash, property, and surety bonds as three separate types of bonds. Technically, however, they are more accurately described as three separate ways of satisfying the secured financial condition component of the second type of bond, which simply required payment of the "full amount of the bail." *See* 16 C.R.S. § 4-104 (1) (b) (2012).
[171] 16 C.R.S. § 4-104 (1) (a) (2013). Mandatory conditions are listed in new § 4-105 (2013), and include appearing for court, executing a waiver of extradition (for felony defendants), not committing any new felonies, acknowledging the protection order in domestic violence cases, not driving (when arrested for driving while under certain license restraint cases), and various conditions mandated for certain driving under the influence cases.

it can be set to appropriately account for both risk of flight and the defendant's financial condition.[172] As before, this bond type specifically permits the use of co-signors, who would also be responsible for the unsecured amount should the defendant fail to appear for court.

The second bond type, found in Subsection (b), is an "unsecured personal recognizance bond with additional non-monetary conditions of release designed specifically to reasonably ensure the appearance of the person in court and the safety of any person or persons or the community."[173] Presumably, the word "unsecured" means that this bond type, too, will always contain some financial condition, albeit an unsecured one, in addition to the other non-monetary ones. The phrase "additional non-monetary conditions of release" means in addition to the statutory ones listed in new Section 16-4-105, most of which were previously codified in Section 16-4-103 of the old law. These nonfinancial conditions would include pretrial supervision as well as any conditions associated with that supervision.[174]

The third bond type was the source of much compromise in the bill. As originally introduced, the Subsection contained an express presumption for release on recognizance by allowing secured money conditions only "when it is determined that release on an unsecured personal recognizance bond with additional conditions but without monetary conditions does not reasonably assure the appearance of the person in court or the safety of any person or persons or the community."[175] As mentioned previously, such an express presumption follows the law, which favors release, the research, which recognizes that secured money conditions cause unnecessary pretrial detention, and the ABA's best-practice standards, which state:

> The presumption that defendants are entitled to release on personal recognizance is one of the core principles of these Standards. It is closely linked to the principle that an accused person is presumed innocent until proven guilty and to basic

[172] Requiring a financial condition, even when that condition is unsecured, on all personal recognizance bonds is not necessarily in line with best-practices at bail as it somewhat limits judicial discretion to assess individualized risk, assumes that money is effective as a condition generally, and fosters the notion that all bail bonds require some financial condition. This part of the statute, as well as the retention of other blanket statutory conditions that may not be supported by best-practices, is unexplainable except as the result of the perhaps inevitable compromise occurring on any particularly politicized piece of legislation.
[173] 16 C.R.S. § 4-104 (1) (b) (2013).
[174] *See id.* § 4-105 (8) (2013).
[175] H.B. 13-1236 (as introduced, page 8, lines 23-27).

> notions of due process – a decision to restrict liberty should be made only after a judicial officer has determined that there is probable cause to believe that the defendant has committed the offense charged and that there is evidence justifying any restriction on liberty.
>
> It makes the presumption a starting point for release/detention decision-making while also providing that the presumption may be rebutted by evidence that there is a substantial risk of nonappearance or danger to public safety that requires additional conditions or secure detention. [176]

Due to opposition by the commercial surety industry, however, that express presumption is no longer there. Nevertheless, the presumption is clearly implied by the remaining language, other statutory provisions, and a general understanding of the legislative history of the bill.

The statute now reads that a defendant may be released on "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 in the community." [177] When the express presumption was deleted, the bill's drafters intentionally added the word "necessary" to place a higher level of judicial scrutiny over using secured financial conditions – scrutiny that inevitably requires judges to question whether nonfinancial conditions and unsecured financial conditions are insufficient by themselves to provide reasonable assurance of public safety or court appearance (recognizing, of course, that the secured money amounts cannot be forfeited for new crimes or other breaches in public safety). This additional scrutiny is entirely consistent with a statute enacted to address concerns over unnecessary pretrial detention by reducing judges' reliance on money and through using best-practices, which, in turn, recommend a presumption of release on recognizance as better following the law and the research. Moreover, by

[176] ABA Standards, *supra* note 22, Std. 10-5.1 (commentary) at 102-03 (internal citations omitted).
[177] Theoretically, because the secured portion of a bail bond cannot be forfeited for public safety reasons, and because there is no empirical link between money and public safety, using a secured financial condition for public safety purposes cannot be considered reasonable unless it is used to detain. In that event, the practice is vulnerable to constitutional attack. *See Galen v. County of Los Angeles*, 477 F.3d 652, 660 (2006) ("The state may not set bail to achieve invalid interests, *see Stack*, 342 U.S. at 5, 72 S. Ct. 1; *Wagenmann v. Adams*, 829 F.2d 196, 213 (1st Cir.1987) (affirming a finding of excessive bail where the facts established the state had no legitimate interest in setting bail at a level designed to prevent an arrestee from posting bail), nor in an amount that is excessive in relation to the valid interests it seeks to achieve, *see Salerno*, 481 U.S. at 754, 107 S.Ct. 2095.").

adding a new provision to Colorado law requiring judges to presume pretrial release with "least restrictive conditions," the General Assembly has clearly indicated its continued desire for judges to impose secured financial conditions only when release through a less-restrictive methods – typically nonfinancial conditions or unsecured monetary conditions – will not suffice.[178]

The General Assembly's structuring bond type alternatives in this Section from least to most restrictive also continues to suggest legislative intent to use Subsection (c) only as a last resort. It is a logical structuring scheme that is used by both the ABA Standards as well as the federal pretrial release statute, which are only slightly more explicit than the Colorado statute in creating a presumption against secured money bonds. Finally, as we will see in Section 16-4-107, the General Assembly has separated and emphasized a mechanism for defendants to move to request relief from an unattainable secured financial condition, further indicating a legislative intent to avoid financial conditions that unnecessarily detain.[179]

Overall, judges who have already considered the statute's provisions requiring a presumption of release under least-restrictive conditions, who have noted other statutory provisions attempting to model principles embodied in the ABA Standards, who have been made aware of the research showing that secured money does not necessarily increase public safety rates or court appearance rates but instead causes unnecessary pretrial detention (which the statute seeks to avoid), and who understand the overall legislative intent to reduce financial bonds and to use best-practices at bail settings, should naturally consider secured financial conditions to be "necessary" only when no other less-restrictive condition or combination of conditions suffice to provide adequate assurance of court appearance.[180] At the very least, it should drastically reduce the use of so-called "double supervision," which is caused by judges coupling surety bonds with pretrial program supervision.[181]

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[178] *See* discussion on "least restrictive conditions," *supra* note 141 and accompanying text.
[179] *See* discussion *supra*, at note 228 and accompanying text.
[180] This statute should go far in reducing secured financial conditions that judges believe to be "low" but that are, in fact, prohibitive and thus lead to unnecessary pretrial detention. Therefore, objectively unattainable secured financial conditions set for public safety purposes pursuant to this statute should evidence a need for continued examination into the adequacy of Colorado's preventive detention provisions.
[181] National Association of Pretrial Services Standards expressly discourage coupling surety bonds with pretrial supervision. *See Standards on Pretrial Release (3rd Ed)*, Nat'l Assoc. of Pretrial Servs. Agencies Std. 1.4 (g) (commentary), at 19 (Oct. 2004). The current ABA Standards do not contain an express

The fourth type of bond is one with "secured real estate conditions." This section was not subject to any compromise and thus retains the language as introduced in H.B. 13-1236 that judges consider it only "when it is determined that release on an unsecured personal recognizance bond without monetary conditions will not reasonably ensure the appearance of the person in court or the safety of any person or persons in the community."[182] The creation of a separate bond type secured by real estate in Subsection (d) thus conflicts slightly with Subsection (c), which does not expressly require judges to consider personal recognizance alternatives, and which allows a defendant to satisfy that particular secured bond type through real estate. Moreover, the real-estate bond type found in Subsection (d) is slightly different than a Subsection (c) bond in that Subsection (d) does not require the real estate to be worth one and one-half times the amount of the financial condition. Presumably, however, these differences will prove inconsequential. In the extremely rare instances in which real estate will be used, judges will have already considered less-restrictive alternatives for the numerous reasons articulated above, and will also have considered the financial condition of the defendant, therefore satisfying both sections of the statute.

When ordered, defendants may pay secured money conditions in the ways previously allowed by statute, except that payment through stocks and bonds has been eliminated.[183] An interesting alteration in the statute involves a slight change to the line introducing the allowable options for payment. The previous statute read, "The defendant may be released from custody upon execution of bond in the full amount of the bail to be secured in any one or more, or any combination of, the following ways."[184] The new language reads, "The person may be released from custody upon execution of bond in the full amount of money to be secured in any one of the following ways."[185] Read in isolation, the elimination of the words "or more, or any combination" would indicate that the practice of setting so-called "split-bonds," in which the judge allows the defendant the option of paying, for example, one amount in cash and another through a surety, has been eliminated. But unlike the old statute, the first line of new Subsection (c)

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recommendation on this issue, choosing instead to re-emphasize its position that commercial sureties be abolished. *See* ABA Standards, *supra* note 22, Std. 10-1.4 (f) (commentary), at 45.

[182] 16 C.R.S. § 4-104 (1) (d) (2013).

[183] *Compare id.* § 4-104 (c), (d) (2013) *with* §§ 4-104 (1) (b) (I), (2) (2012).

[184] *Id.* § 4-104 (1) (b) (2012).

[185] *Id.* § 4-104 (1) (c) (2013).

clearly provides that judges may order "secured monetary conditions," plural, and the second line provides that "the financial conditions shall state an amount of money." Accordingly, the new statute's express allowance of judges to set multiple financial conditions on a bail bond thus actually provides more explicit authority for split-bonds than existed under the previous statute.[186]

Despite arguments to the contrary,[187] there is nothing in the new statute to limit a judge's ability to order a financial condition to be paid in a particular way, such as through a cash-only bond. Judges are given broad authority over setting types of bond and conditions of release, which includes the ability, as before, to set a condition that the secured money portion of a bond be satisfied through one of the allowable methods.[188]

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[186] Under the new law, a judge could now clearly order two financial conditions pursuant to his or her authority to set a bond with "secured monetary conditions," order the payment of each condition through separate means pursuant to his or her authority generally to set conditions of release, and the defendant will be released when one of those options has been met pursuant to the language that the "the person may be released upon execution of bond in the full amount of money to be secured in any one of the following ways."

[187] At a May 14, 2013, presentation before the First Judicial District Bar Association, bail industry representatives argued that the statute eliminated judicial discretion to set cash-only bonds by limiting those judges to setting only the amount of the financial condition and giving defendants the statutory ability to choose the method of meeting that condition. However, the statute contains no language to support that argument. As before, the section limits the allowable options for payment, not the judicial authority to order one or more of those options as a condition of release. Moreover, during the drafting of the statute, there was a strong emphasis on retaining judicial discretion over all aspects of bail-setting, something the bail industry insisted upon in order to avoid drastic limitations on money and/or surety bonds. The primary drafter of the bill has confirmed that there was no intent to eliminate cash–only bonds, and there is also no indication of that intent anywhere in the legislative history.

[188] *See* 16 C.R.S. § 4-103 (1) (2013) ("At the first appearance . . . 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."); *Id*, § 4-105 (8) (2013) ("In addition to the conditions specified in this Section, the court may impose any additional conditions on the conduct of the person released that will assist in obtaining the appearance of the person in court and the safety of any person or persons and the community."); *see also People v. Rickman,* 178 P.3d 1202, 1206-07 (2008) ("The trial court has the authority to make bail bond decisions, subject to limitations imposed by statute. . . . Taking bail and setting the amount of a bail bond are incident to the court's power to hear and determine cases. Necessarily, the discretion to set conditions of a bail bond is also a part of the court's judicial function.") (internal citations omitted). The only Colorado court opinion to discuss "cash-only" bonds, *Fullerton v. County Court,* 124 P.3d 866 (Colo. Ct. App. 2005), would appear to add at least some authority for the practice. While *Fullerton* involved a money bail bond for a defendant awaiting extradition, a division of the Colorado Court of Appeals remarked on the constitutional propriety of cash-only pretrial bonds under the "sufficient sureties" clause of the Colorado Constitution. After surveying other states' relevant case law on the issue, the court concluded: "we agree with the majority of jurisdictions considering the issue that, in reference to bail, the term 'sureties' refers to a broad range of guarantees used for the purpose of securing the appearance of the defendant. Such guarantees include, but are not limited to, bonds secured by cash." *Id.* at 870. The court continued: "[i]nterpreting the word 'sureties' broadly to encompass multiple bond forms satisfies [the goal of court appearance]. When bail may be secured by a court in a variety of ways, the court's ability to assure the presence of the accused at trial is strengthened." *Id.*

Portions of the old law articulating bondsmen requirements when dealing with real estate have been moved to Title 10. Other provisions dealing with real estate as security have been slightly altered for clarity.

As noted above, the statute still retains language requiring that secured financial conditions be executed "in the full amount of money" through cash, real estate, noncommercial or commercial sureties.[189] The Colorado Supreme Court has held that the prior language, which required that the bond be executed "in the full amount of the bail," meant that courts could not, without statutory change, release defendants upon the deposit to cash equal to 10% of the financial condition.[190] The new language likely precludes that practice as well.

Due to additional compromise, Section 16-4-104 retains some limitations on personal recognizance bonds, including what have been called the "district attorney vetoes" for those types of bonds.[191] These provisions were first enacted in 1972 when personal recognizance bonds were introduced as lawful options. In 1972, judges could not order a defendant released on a personal recognizance bond without district attorney consent when the defendant was already on bond in another criminal matter for a felony or class one misdemeanor, or when the defendant had been previously convicted of a class one misdemeanor within two years or a felony within five years of the current case.[192] Additionally, Subsection (o) of the 1972 law provided that judges could not release a defendant on a personal recognizance bond until the judge had "reliable information concerning the accused, prepared or verified by a person designated by the court, or substantiated by sworn testimony at a hearing before the judge, from which an intelligent decision based on the [bond] criteria . . . can be made."[193] In 1981, the General Assembly passed Subsection (p), which kept judges from releasing a defendant on a personal recognizance bond when that defendant was already on a surety bond for a felony or class one misdemeanor without

[189] *Id.* § 4-104 (c) (2013).
[190] *See People v. Dist. Ct.*, 581 P.2d 300, 302 (1978) (stating that "[t]he statute does not expressly or impliedly authorize courts to permit 10% Cash bail deposits. Moreover, the statutory requirement that the 'full amount of bail' be secured negates the contention that courts may permit the deposit of a percentage of the full amount of the bail.").
[191] *See* 16 C.R.S. §§ 4-104 (2), (3) C.R.S. (2013).
[192] *See* 39 C.R.S. §§ 4-105 (1) (m), (n) (1972).
[193] *Id.* § 4-105 (1) (o) (1972).

surety notification and a chance for the surety to surrender the defendant.[194] In 1992, the General Assembly enacted Subsection (p.5), which kept judges from releasing a defendant on a personal recognizance bond if he or she was arrested for failing to appear for the present case (if the charge was a class 1 misdemeanor or felony) and could not provide evidence that the failure to appear was beyond his or her control.[195] In 1997, the General Assembly enacted Subsection (n.5), which kept judges from releasing a defendant on a personal recognizance bond without district attorney consent when the defendant had any failure to appear on any felony or class one misdemeanor case in the preceding five years.[196]

Restrictions like these are not unheard of, but they are not as prevalent in other state statutes.[197] Generally, restrictions on recognizance release reflect a misunderstanding of the role of conditions of release in the administration of bail, in which release with numerous nonfinancial conditions can provide adequate assurance of court appearance *and* public safety and need not be thought of as a lenient response to crime.[198] Best practices at bail encourage criminal justice leaders and the general public to reconsider their assumptions of both secured and unsecured financial conditions of bail bonds as valid indicators of the system's notions about crime severity. Accordingly, the new statute somewhat alters these limitations.

Under the prior law, when district attorneys did not consent to a personal recognizance bond, the court had no choice but to order a secured financial condition, thus virtually ensuring that some defendants would remain detained for lack of money. Under the new statute, the district attorneys may still withhold their consent in appropriate cases, but only to preclude release under new Subsection 16-4-104 (1) (a). Accordingly, even without district

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[194] *See* 16 C.R.S. § 4-105 (1) (p) (2012).
[195] *See id.* § 4-104 (1) (p.5) (2012).
[196] *See Id.* § 4-104 (1) (n.5) (2012).
[197] In my own research of state bail statutes, I considered restrictions on personal recognizance bonds to be somewhat aberrational, and certainly so to the degree that they have existed in Colorado. In the last several years, however, they have become more prevalent as the commercial bail industry has drafted and backed legislation designed to limit release on personal recognizance bonds often to force judges to use more surety bonds.
[198] The notion that release without secured financial conditions is a lenient response to crime is perpetuated by the media, which focuses primarily on the amount of money in articles describing release through bail, but also by some judges, who similarly focus on the amount and who fail to adequately explain on the record how their use of nonfinancial conditions provides reasonable assurance of court appearance and public safety. *See* Timothy R. Schnacke, *Ten Things the Media Needs to Know About Bail* at 9-11 (2012) (discussing the tendency of the media and criminal justice leaders to focus primarily on the amount) available at http://thecrimereport.s3.amazonaws.com/2/7b/c/1468/what_the_media_needs_to_know.pdf.

attorney consent, a judge may order the release of a defendant on an unsecured personal recognizance bond "with additional non-monetary conditions" pursuant to new Subsection 16-4-104 (1) (b).

Of equal significance is the change in wording in prior Subsection 4-105 (1) (n.5). Under the previous law, a judge could not order a defendant released on personal recognizance without district attorney consent "if the person's criminal record indicate[d] that he or she failed to appear on bond in any case involving a felony or class 1 misdemeanor charge in the preceding five years."[199] Under the new statute, the person must have "willfully failed to appear."[200] Those who have worked with criminal histories in Colorado know that the term "failure to appear" is used in many instances that cannot be deemed willful, including instances when the defendant is incarcerated in another jurisdiction.[201] Criminal justice actors perhaps overemphasize prior failures to appear for court in bail hearings, and for that reason alone jurisdictions should take care in how they are entered and reviewed.[202] Adding the word "willful" follows best practice standards[203] as well as the most current Colorado research concerning the predictive value of prior failures to appear.[204] Finally, in addition to these important changes, prior Subsections (o) and (p.5), summarized above, have been eliminated.

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[199] 16 C.R.S. § 4-105 (1) (n.5) (2012).
[200] *Id.* § 4-104 (2) (c) (2013).
[201] Even in my earlier bail research, I questioned the fairness of overreliance on prior FTAs in Colorado. In 2009, I wrote: "FTAs in the criminal histories raise particular concerns, as their accuracy is often questioned by defendants, they appear to differ from jurisdiction to jurisdiction, and they typically are not purged from the system." I recommended that criminal histories "should be scrutinized to make sure that they include only accurate and statutory relevant information." *Summary and Analysis of Bail Administration During Seven Weeks of Duty Division* at 7 (Jefferson Cty. Crim. Just. Planning, Oct. 21, 2009). Indeed, the proliferation of seemingly non-willful failures to appear in Jefferson County led to an earlier pilot project designed to remind defendants of their court dates so that they could avoid altogether an FTA entry on their criminal histories. One premise of that pilot project was that a large number of defendants failed to appear for court for reasons other than willful flight, and indeed, the pilot showed that simply reminding defendants of their upcoming court dates significantly increased the court appearance rate on the cases studied. *See* Timothy R. Schnacke, Michael R. Jones, & Dorian M. Wilderman, *Increasing Court Appearance Rates and Other Benefits of Live-Caller Telephone Court Date Reminders*, 48 Court Review 87 (2013). Given the statutory change, the Judicial Department should reassess and possibly improve its policy and current practices for entering failures to appear into court databases.
[202] Research in Jefferson County showed that when prosecutors spoke at bail settings, they discussed the defendant's criminal history (including prior FTAs) and/or the police affidavit in 84% of cases, but discussed the various other risk components of the Pretrial Services Unit's assessment in only 17% of cases. *See The Jefferson County Bail Impact Study: Initial Report on Process Data for the System Performance Subcommittee* at 41 (Jefferson Cty. Crim. Just. Planning, July 23, 2010).
[203] *See* ABA Standards, *supra* note 22, Std. 10-5.5 at 115 and 10-5.6 at 116-17 (recommending responses and sanctions only for willful failures to appear).
[204] Research used to complete the CPAT concluded that no variable measured concerning prior failures to appear had significant predictive value on pretrial failure. At least one researcher creating a state instrument

2014 Legislative Changes

In 2014, the General Assembly passed Senate Bill 14-212 ("Concerning Clarifying Changes to the Provisions Related to Best Practices in Bond Setting"), which further amended Section 16-4-104 (1) (c) to: (1) allow a presumption for defendant choice in how to post a secured financial condition; and (2) provide an express statutory articulation allowing a judge to nonetheless require a defendant to post a secured financial condition pursuant to a particular method, such as through a "cash-only" bond, so long as the judge makes findings on the record for the need to require the defendant to post the bond through that particular method.

Before the amendment, the Section read: "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 ways," with the statute then listing cash, real estate, noncommercial and commercial sureties as the ways in which the secured bond might be satisfied. Now, the Section reads, "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 changes in this Section are directly related to judicial bail-setting behavior since the passage of the 2013 law. Many persons who worked on that law hoped that judges would be guided toward using more personal recognizance bonds (i.e., unsecured financial conditions) through the various limitations on secured financial conditions that were passed and that are discussed throughout this paper. Unfortunately, there were

has found significance in prior FTAs when measured by formal FTA convictions. *See* Marie VanNostrand & Kenneth Rose, *Pretrial Risk Assessment in Virginia,* at 8 (Va. Dept. of Crim. Just. 2009).

many reports of judges setting secured financial conditions that were still leading to the unnecessary detention of bailable defendants (i.e., according to Colorado law, persons not detainable pursuant to the process articulated by the Colorado Constitution), a problem that the 2013 law sought specifically to remedy. The changes to this Section should be read primarily as a further attempt to persuade judges to make sure that bailable defendants are actually released when the judge determines that they can be safely managed within the community through conditions that are less restrictive than secured money.

For the most part, the changes to this Section may be considered mere "clean up" to the 2013 law, but some changes represent more than simple clarification. For example, the 2013 law did not intend to limit judicial discretion to order defendants to post secured bonds in any particular way, such as through a "cash-only" bond. Thus, the express articulation of a judge's ability to do that in this amendment eliminates arguments to the contrary. However, the 2013 law was not meant to diminish judicial discretion at all, and so the new provision requiring judges to make express findings on the record is a significant change from prior law.

As another example, the 2013 law was also designed to help release bailable defendants and to reduce unnecessary pretrial detention. Thus, to the extent that allowing a defendant to choose how he or she can post a particular bond more often results in his or her release, then that allowance could be viewed as merely cleaning up the 2013 law by helping bailable defendants obtain actual release. Unfortunately, there is some possibility that the changes to this Section will actually increase the detention of bailable defendants if judges begin setting high single amounts to account for the ability of defendants to choose how they post the bond.

History and experiences in other states have shown significant unintended consequences from changing statutory language dealing with bond types, conditions, and money, and states across the country have realized that "defendant choice" does not always lead to increased release of bailable defendants.

Indeed, there is a possibility that these changes will lead some judges to set amounts that are unattainable in cash form so as to avoid making a record, and while thinking, perhaps erroneously, that the defendant will "choose" a commercial surety bond. Unfortunately, even if the defendant chooses a commercial surety bond, the commercial surety may not choose to help the defendant – for any reason, including caprice. Accordingly, it is not completely clear that the Colorado Commission on Criminal and Juvenile Justice (CCJJ) would necessarily have agreed to these changes due to the delicate and complicated nature of Colorado law surrounding this Section. Unlike the 2013 changes, the 2014 "clean up" bill was not a CCJJ bill, and the CCJJ never discussed the ramifications of a presumption of defendant choice for posting secured financial conditions of bond.

In fact, the "defendant choice" provision was first introduced in 2014 by Representative Jared Wright and backed by commercial bail bondsmen (H.B. 14-1261). That bill, which also sought to undo several other provisions of the 2013 law, included a section that would require judges merely to set an amount of a financial condition and then allow the defendant to choose how to pay it. Although bail industry lobbyists argued that the provision was intended to help get bailable defendants out of jail, it is more likely that their support was due to the fact that the provision (as worded) would have stopped the existing practice of judges setting cash-only bonds, a practice that has the potential to eliminate defendants' use of commercial bail bondsmen altogether. However, the use of surety bonds is currently a primary cause of unnecessary pretrial detention in America, and thus any argument that defendant choice would necessarily foster the release of bailable defendants (at least without mechanisms to control amounts or to force sureties to contract with defendants) is untenable.

Although H.B. 14-1261 died, the idea of "defendant choice" remained intriguing to defense attorneys, who, over the past year, saw defendants detained on relatively low cash-only bonds and considered surety bonds to be a better alternative to detention. Nevertheless, prosecutors and sheriffs were adamant

about retaining judicial authority to set cash-only bonds, as those types of bonds are often the only way judges can detain high risk defendants when they are not eligible for detention through the Colorado constitutional detention provisions. In the end, the compromise that virtually everyone (including most bondsmen) supported was a presumption of defendant choice but with express allowance of cash-only bonds upon a factual finding.

For reasons articulated throughout this paper, this requirement for a factual finding presents hazards that could potentially cause significant problems for judges on appeal. For example, if a judge sets a cash-only bond and articulates on the record that he or she has done so to protect the public, an appellate court might rule that the condition is irrational, given that the money may not even be legally forfeited for breaches in public safety under Colorado law. As another example, if a judge sets a cash-only bond and articulates on the record that he or she has done so to detain the accused, an appellate court might find that the judge's decision was unlawfully avoiding the proper constitutional mechanism for detaining defendants pretrial in Colorado. Too general a record may lead to remand; too specific a record may lead to reversal.

Judges can avoid many of these pitfalls by simply relying more on unsecured bonds (through subsections (a) and (b) of Section 16-4-104 (1)) – a practice that would follow the research showing that unsecured bonds can increase release rates while not diminishing public safety or court appearance rates in Colorado (*see* Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (PJI 2013), found at: http://www.pretrial.org/download/research/Unsecured%20Bonds,%20The%20As%20Effective%20and%20Most%20Efficient%20Pretrial%20Release%20Option%20-%20Jones%202013.pdf). Alternatively, courts could simply set cash-only bonds that are attainable to the defendant (the factual finding could merely be that the judge believes the motivation from the cash-only financial condition for court appearance to be superior to any other type of financial condition, such as one backed by a commercial surety, through which a defendant loses money

whether he shows up for court or not). Finally, courts could set so-called "split bonds," which would entail the judge setting an amount for each type of bond and then allowing the defendant to choose the method and thus the bond amount. As the body of this paper indicates, it appears that split bonds are still lawful after the 2013 enactment, and the 2014 amendment did nothing to change that.

This author emphasizes the negative consequences associated with release through commercial surety bonds. On the one hand, lower risk defendants are often denied the assistance of for-profit bail bondsmen when they or their families cannot pay the fee or collateralize the bond. This is directly contrary to the spirit of the 2013 law, which sought, more than anything, to reduce the unnecessary pretrial detention of bailable defendants. On the other hand, for-profit bail bondsmen have also been known to fashion various "deals," whereby higher risk defendants are allowed out of jail with little or no money down and on payment plans. Most puzzling, of course, is that the money these bondsmen make by helping release these higher risk defendants can only be lost if the defendant fails to appear for court – the money cannot be lost due to breaches in public safety. To the extent that any particular judge is concerned about a defendant's risk to public safety – whether manageable or unmanageable – then that judge should use alternatives to commercial surety bonds.

Overall, even after passage of H.B. 13-1236 and S.B. 14-212, bail setting in Colorado can be challenging. The 2013 legislation went far toward helping bailable defendants actually obtain release, but the statute did not address the equally important issue of preventive detention, or "no bail," based on risk. We are thus only partially through the journey toward true bail reform in Colorado. Until the day that both release and detention are properly addressed, judges must maneuver through the perils of deciding release and detention pursuant to a scheme that is still somewhat deficient.

In this author's opinion, however, there is an effective way to maneuver through Colorado's current bail laws in a manner that

protects public safety and enhances court appearance while remaining consistent with legislative intent. In any case in which a defendant is deemed to be low to medium risk (and perhaps even in some cases involving high risk defendants), the judge should set an unsecured financial condition (i.e., personal recognizance or "PR" bond) with appropriate nonfinancial conditions, when necessary, to provide reasonable assurance of public safety and court appearance. When a defendant is deemed so high risk that the judge determines that no condition or combination of conditions suffice to protect the public or provide reasonable assurance of court appearance, then that judge has two alternatives. If the defendant is eligible for detention under our current state constitutional detention provisions, then the judge should detain that defendant pursuant to that enacted process. If not, the judge should set a secured cash-only bond designed to detain the defendant. To avoid a constitutional objection (because setting a high money bond designed to detain is likely to be successfully appealed on constitutional grounds), the judge should first hold a due process laden hearing, much like the federal pretrial detention hearing that was approved by the United States Supreme Court in *United States v. Salerno*, before setting that amount. In the event of an appeal, the judge can then at least point to a de facto due process procedure in the particular case leading to detention.

Conditions of Release – § 16-4-105 C.R.S. (2013)

The new Section on conditions of release contains all mandatory and discretionary conditions. The previous statutory bond conditions -- return to court,[205] consent to extradition for felony offenses,[206] don't commit a felony,[207] acknowledge the protection order in domestic violence cases,[208] don't drive if arrested for driving under restraint,[209] and monitored sobriety in certain DUI cases[210] – have been retained. As previously mentioned,

[205] 16 C.R.S. § 4-103 (2) (a) (2012); § 4-105 (1) (2013).
[206] *Id.* § 4-103 (2) (b) (2012); § 4-105 (2) (2013).
[207] *Id.* § 4-103 (2) (c) (2012); § 4-105 (3) (2013).
[208] *Id.* § 4-103 (2) (d) (2012); § 4-105 (4) (2013). However, the previous statute's inclusion of persons arrested for stalking for purposes of this Subsection has been eliminated.
[209] *Id.* § 4-103 (2) (e) (2012); § 4-105 (5) (2013).
[210] *Id.* § 4-103 (1) (e) (2012); § 4-105 (6) (2013).

however, prior provisions setting presumptive financial conditions for certain crimes (e.g., $50,000 for persons arrested for distribution of schedule I or II drugs) have been eliminated as not following best practices designed to emphasize risk over money, reducing judge's discretion to set appropriate conditions of release, placing undue emphasis on the alleged charge, and suggesting arbitrary amounts.[211] Additionally, by adding new Subsection (7), which allows judges to release a person "on a bond with monetary condition of bond, when appropriate, as described in Section 16-4-104 (1) (c)," the statute reinforces the idea that money at bail is merely a condition of release that must be separately assessed for legality, effectiveness, and its comparatively restrictive nature in any particular case.[212]

Finally, where the previous statute allowed judges to condition release upon the "supervision of some qualified person or organization,"[213] the new statute expands this statement by adding, "or supervision by a pretrial services program established pursuant to Section 16-4-106," and then lists a variety of conditions of release that judges may impose while the defendant is on pretrial supervision, such as telephone contacts, office visits, drug testing, etc.[214] Under the prior law, although called "conditions for pretrial release," this list was a part of the provision allowing pretrial services programs to include "different methods and levels of community based supervision as a condition of pretrial release," causing some confusion as to whether judges should articulate each condition in the list versus simply ordering "pretrial supervision" as a broad, umbrella condition. The new statute clears up this confusion by correctly placing the list in the section articulating all discretionary and non-discretionary conditions of release.[215]

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[211] Those Sections were contained in prior Sections 16-4-103 (1) (b), (b.5), and (d) (I), C.R.S. (2012). Section 16-4-105 (6), C.R.S. (2013), which was enacted in 2011, and which mandates monitored abstinence for defendants arrested for DUI or DWAI who have previous convictions under Section 42-4-1301, C.R.S., suffers from similar defects as other statutorily mandated conditions based on charge – primarily, that it does not necessarily reflect the true risk to public safety or for flight that might be assessed through an objective risk assessment instrument. This particular Section, however, was endorsed by the CCJJ, *see* Colo. Comm'n On Crim., & Juv. Just. 2011 Ann. Rept. at 2, 15, and appears originally to have been designed to steer defendants into early treatment. *See Addendum to November report from the Commission on Criminal and Juvenile Justice* (CDPS, Dec. 23, 2009) Rec. DUI-9, at 8 ("On a 3rd and subsequent alcohol-related driving arrest, if the defendant is granted bond, the conditions of the bond must include participation in a treatment program and regular monitoring such as electronic monitoring, alcohol testing and/or vehicle disabling devices.").

[212] *See id.* § 4-105 (7) (2013).

[213] *Id.* § 4-103 (2) (f) (2012).

[214] *Id.* § 4-105 (8) (2013).

[215] Moving this list to § 16-4-105 concerning conditions or release follows, in the main, the Colorado Supreme Court's opinion in *People v. Rickman*, 178 P.3d 1202, 1207 (Colo. 2008), in which the court

For the most part, this list is the same, albeit with: (1) slight differences in wording; (2) the addition of language indicating that mental health treatment or domestic violence counseling may only be ordered with defendant consent; and (3) the inclusion of a catch-all statement that judges may condition release using "other supervision techniques shown by research to increase court appearance and public safety rates for persons released on bond."[216]

As with the previous statute, possibly the most important subsection dealing with conditions for judges and others to fully understand is Subsection (1), which permits forfeiture of secured money amounts only for failing to appear for court.[217] This provision, like similar laws across America, makes setting attainable financial conditions for public safety somewhat irrational.[218] In research going back decades, no single study has found an empirical link between money and public safety. Thus, ever since the U.S. Supreme Court recognized public safety as a valid constitutional purpose for limiting pretrial freedom, the best-practices for addressing public safety concerns have focused on using nonfinancial conditions for lower risk defendants and secure detention for extremely high risk ones. The research and best practices alone should cause judges to question using money for public safety concerns, which are often perceived primarily through reading the alleged charge and affidavit; the fact that such financial conditions cannot be forfeited for anything but failure to appear should lead conclusively to a discontinuation of the practice.[219]

2014 Legislative Changes

In 2014, the General Assembly passed Senate Bill 14-212 ("Concerning Clarifying Changes to the Provisions Related to Best Practices in Bond Setting"), which further amended Section 16-4-105 (4) to reinstate the requirement that defendants must

stated that "a court may not delegate its authority to set bond conditions," and serves to caution judges to, whenever possible, articulate individualized conditions of release from the bench.

[216] *See* 16 C.R.S. §§ 4-105 (8) (d), (f), (i) (2013).

[217] *Id.* § 4-105 (1) (2013).

[218] The law, of course, places limits on unattainable amounts, no matter how rational they may seem. *See Stack v. Boyle*, 342 U.S. 1, 5 (1951); *United States v. Salerno*, 481 U.S. 739 752-54 (1987).

[219] The General Assembly and the people of Colorado have previously declared which class of defendants should be held without bail. *See* Colo. Const. Art. II, Section 19. Because this categorization has not been altered, it must be assumed that judges who intend defendants to be detained will follow the provisions outlined in that Section, or, at least, follow a due-process procedural hearing, such as that reviewed by the U.S. Supreme Court in *Salerno*, 481 U.S. 739 (1987), before setting any condition that leads to detention.

acknowledge the protection order in stalking cases under Section 18-3-602.

The 2013 bill eliminated the statutory reference to stalking in the mandatory conditions provision (*see* footnote 208 in this paper), but the elimination was apparently an oversight.

Pretrial Services Programs – § 16-4-106 C.R.S. (2013)

Once buried in the statutory provisions dealing with bond type and criteria,[220] pretrial services programs now have a separate section, which retains much of the prior language, clarifies other language, and strongly encourages judicial districts to create and support pretrial services functions, which it does through the following provisions:

> The chief judge of any judicial district shall endeavor to consult, on an annual basis, with the county or counties within the judicial district in an effort to support and encourage the development by the county or counties, to the extent practicable and within available resources, of pretrial services programs that support the work of the court and evidence-based decision-making in determining the type of bond and conditions of release.
>
> To reduce barriers to the pretrial release of persons in custody whose release on bond with appropriate conditions reasonably assures court appearance and public safety, all counties and cities and counties are encouraged to develop a pretrial services program in consultation with the chief judge of the judicial district in an effort to establish a pretrial services program that may be utilized by the district court of such county or city and county.[221]

Other notable alterations to the previous statute include changing the generic statement that pretrial programs "shall make a recommendation regarding whether there should be a pretrial release of any particular defendant,"[222] to a more particularized statement that the program "may advise the court if the

[220] *See* 16 C.R.S. § 4-105 (3) (2012).
[221] *Id.* §§ 4-106 (2), (3) (2013).
[222] *Id.* § 4-105 (3) (a) C.R.S. (2012).

person is bond eligible, may provide information that enables the court to make an appropriate decision on bond and conditions of release, and may recommend conditions of release consistent with this Section."[223]

Like before, programs established under this Section must be done "pursuant to a plan formulated by a community advisory board" with certain mandatory membership.[224] A late amendment to H.B. 13-1236 added a line encouraging judges to include a representative of the bail bond industry, but that membership position is not mandatory.[225]

Subsection (4) (c) includes an important new provision reiterating the General Assembly's intent to encourage the use of research-based risk assessment instruments. It requires the pretrial services program, in conjunction with the community advisory board, to "make all reasonable efforts to implement an empirically developed pretrial risk assessment tool and a structured decision-making design based on the person's charge and the risk assessment score."[226] Moreover, new Subsection (4) (d) includes language designed to assure pretrial services program compliance with laws surrounding victim's rights.[227] Finally, as noted previously, the list of conditions/supervision methods and techniques has been moved to the general provision on conditions but that provision is referenced in Subsection (5) in its allowance of "different methods and levels of community based supervision." The rest of the Section, including the core functions of the programs and reporting requirements enacted in 2012, is essentially the same as prior law.

2014 Legislative Changes

In 2014, the General Assembly passed Senate Bill 14-212 ("Concerning Clarifying Changes to the Provisions Related to

[223] *Id.* § 4-106 (1) (2013).
[224] *Id.* § 4-106 (3) (2013).
[225] *Id.* Judges should weigh a decision to include commercial bail bondsmen or their designates with the knowledge that many persons in that industry continue to actively oppose and promote the elimination of pretrial services programs, publishing such documents as "Taxpayer Funded Pretrial Release: A Failed System," available at https://www.aiasurety.com/home/pretrialtruth.aspx. While inclusion of bondsmen, insurance companies, and their lobbyists was perhaps crucial to the CCJJ's attempt to perform an exhaustive examination of bail practices in Colorado, their inclusion on the community advisory board creating and overseeing pretrial services programs may be counterproductive.
[226] 16 C.R.S. § 4-106 (4) (c) (2013).
[227] *Id.* § 4-106 (4) (d) (2013) ("The program must work with all appropriate agencies and assist with all efforts to comply with Sections 24-4.1-302.5 and 24-4.1-303, C.R.S.").

Best Practices in Bond Setting"), which further amended Section 16-4-106 (4) (c) to add the requirement that the empirically developed risk assessment tool "be used by the [pretrial services] program, the court, and the parties to the case solely for the purpose of assessing pretrial risk."

Pretrial risk assessment instruments are created solely to help determine the risk of pretrial misbehavior so as to aid in the decision to release or detain a defendant during the pretrial phase of the case. During the past year, however, there were reports from various jurisdictions that pretrial risk assessment scores were also being used when considering such things as whether to offer a plea bargain, screening for various other programs unassociated with pretrial release, and even during sentencing. These are improper uses of pretrial risk assessment instruments in general and the Colorado Pretrial Assessment Tool in particular, and thus the statute was amended to make clear that the score can lawfully be used only for gauging a defendant's *pretrial* risk.

Hearing After Setting of Monetary Conditions – § 16-4-107 C.R.S. (2013)

Previous Subsection 16-4-105 (2), enacted in 1972, allowed a defendant who could not furnish security for a bond within two days to make a written motion for reconsideration setting forth evidence "not heard or considered by the [bail-setting] judge." Under that Section, the judge had the option of holding a hearing or summarily denying the motion.[228] New Section 16-4-107 includes a similar mechanism for relief from secured financial conditions, albeit with four important changes.[229] First, defendants must wait seven days instead of two before filing the motion. Second, rather than presenting evidence "not heard or considered," the defendant need only present evidence "not fully considered" by the bail setting judge. This distinction is crucial, as judges may already have considered the financial condition of the defendant or even research concerning the appropriate use of money at bail, but not fully considered those things given the resulting pretrial detention. Third, in deciding the motion, the new Section requires

[228] *Id.* § 4-105 (2) (2012).
[229] *See* 16 C.R.S. § 4-107 (2013).

judges to "consider the results of any empirically developed risk assessment instrument," a requirement that should help guide those judges toward consideration of more meaningful and research-based conditions designed to provide reasonable assurance of court appearance and public safety short of secured detention. And fourth, the new Section requires that if a hearing on the motion is held (the law still allows summary disposition), it must be held "promptly," but in all cases within 14 days of the motion.[230]

2014 Legislative Changes

In 2014, the General Assembly passed Senate Bill 14-212 ("Concerning Clarifying Changes to the Provisions Related to Best Practices in Bond Setting"), which further amended Section 16-4-107 primarily to clarify the interplay between this Section and Section 16-4-109, which also allows defendants to move to modify financial conditions of bond. Section 107 now makes it clear that the defendant may only file a written motion pursuant to that Section one time, but also that the 107 filing does not preclude making a motion pursuant to Section 109 at any time during the pendency of the case.

In addition to reports of confusion with the interplay between the two Sections in various judicial districts, there were also reports that because of the seven-day waiting period for filing the motion under Section 107, some judges were not allowing any motions regarding bond amounts, even pursuant to Section 109, until the seven day period had passed. The significance of Section 107 has not changed. It was intended to further emphasize the need for judges to set the type of bond and conditions of release in ways that does not cause the unnecessary or unintentional pretrial detention due to a defendant's lack of money. If money is the cause of unnecessary pretrial detention, Section 107 provides one path toward rectifying the situation. Section 109 provides another path, albeit with different procedural requirements.

[230] *Id.* Previous law contained no explicit time limits for conducting the hearing.

Additional Provisions

Except for minor word changes for clarity (such as changing the word "bail" to "monetary conditions"), making slight modifications to surety notification requirements, and, as previously mentioned, moving sections dealing with real estate to more relevant provisions), prior Sections 16-4-106 (when original bond continued, re-numbered to be 108), 16-4-107 (reduction or increase in bail – change in bond type, re-numbered to be 109), and 16-4-108 (exoneration from bond liability, re-numbered to be 110) are virtually unchanged. New Section 16-4-111 (disposition of security deposits upon forfeiture or termination of bond, prior number 109) now correctly includes the disposition of real estate provisions that were once housed in prior Section 16-4-104 dealing with bail bond alternatives; otherwise, that Section, along with new Section 16-4-112 (enforcement when forfeiture not set aside, prior number 110) are virtually unchanged from prior statutory provisions.

Prior Section 16-4-111, "type of bond in certain misdemeanor cases," has been re-numbered as Section 16-4-113 and continues to require judges to release defendants on personal recognizance bonds for class 3 misdemeanor, petty, or other offenses for which the maximum penalty does not exceed six month's imprisonment, unless certain enumerated facts are present. Those facts, which include indications of risk to public safety or for court appearance, really make the core mandate in this section merely a presumption of recognizance release for these levels of offenses. Moreover, Subsection (c), which states that that the presumption might fail if "the continued detention or posting of a surety bond is necessary to prevent imminent bodily harm to the accused or to another" has serious flaws in that detention is only allowable pursuant to the preventive detention provisions expressed in the Colorado Constitution and, as mentioned previously, an attainable financial condition has no legal or empirical link to public safety. Finally, although this Section of the statute does not refer to it, judges will be able to best assess defendant risk for purposes of these cases by also using an empirically developed risk assessment tool, such as the CPAT.

Finally, the Section dealing with enforcement procedures for compensated sureties (prior Section 16-4-112, new Section 16-4-114) remains unchanged,

and there slight, mostly conforming, changes to various parts of the insurance title dealing with commercial sureties.[231]

2014 Legislative Changes

In 2014, the General Assembly passed Senate Bill 14-212 ("Concerning Clarifying Changes to the Provisions Related to Best Practices in Bond Setting"), which further amended Section 16-4-111 to expressly articulate the courts' ability to declare forfeitures of unsecured financial conditions equal to their ability to declare forfeitures of secured financial conditions.

Despite the statutory scheme's use and, indeed, emphasis on unsecured financial conditions of bond, there were reports of persons in some jurisdictions who believed that the statute did not allow courts to declare a forfeiture of those unsecured amounts. This change to Section 111 puts unsecured financial conditions on par with secured financial conditions by requiring the judge to declare a forfeiture of the unsecured amount if the defendant does not appear for court. By making the change, it is hoped that judges will make more use of unsecured financial conditions, which is consistent with the intent of the broader 2013 legislation. Moreover, the statutory mandate to declare forfeitures in no way requires judges to enter judgments on the forfeited amounts.

Conclusion

The Summary Report from the 2011 National Symposium on Pretrial Justice ends with the following recommendation for legislators:

> Review proposed pretrial bills for their compatibility with the policies and practices for pretrial release decision-making outlined by the American Bar Association in its Standards on Pretrial Release.

[231] A hallmark of any jurisdiction's reliance on money bail is the amount of statutory space dedicated to forfeitures, judgments, exonerations, stays, sanctions, and other rules and regulations dedicated to the commercial surety industry. States that have eliminated the industry have found no need for the massive regulatory infrastructure that Colorado has retained in Titles 16, 12, and 10.

> The law, professional standards, and science have demonstrated pretrial release decisions should be guided by risks, not the defendant's access to money, that money bail is not designed to and does nothing to address concerns for community safety, and that jurisdictions should establish a pretrial services function to provide information and viable options to the court in every case.[232]

With the enactment of H.B. 13-1236, the General Assembly has diligently followed this recommendation by creating a new law that focuses on risk, reduces the use of money bail, and encourages the creation and continued functioning of valuable pretrial services functions.

At various times during the drafting process, H.B. 13-1236 was officially called "Best-Practices in Bond Setting,"[233] and though this name ultimately gave way to the more prosaic "Concerning Pretrial Release from Custody," the new statute overflows with best practices. Concomitantly, by promoting those best-practices, the statute benefits judges, lawyers, court officials, victims and their representatives, defendants, and the community at large, who now operate under a pretrial statutory scheme that is more rational, transparent, and fair.

For decades, Colorado judges have been forced to rely on inadequate criteria and charge-based money bail bond schedules to determine which defendants will be released pretrial and under which conditions. However, research and common sense tells us that if judges use empirical assessment instruments shown to better predict individual pretrial risk, those judges can make better and safer release decisions. After years in the making, Colorado now has a research-based, statistically verified risk assessment instrument that identifies the relative risk of pretrial defendants, and Colorado's new bail statute encourages judicial districts to use that instrument, along with other risk-focused, structured decision making tools at the pretrial phase.

For decades, too, Colorado law has encouraged judges to use secured money as the primary determinate of which defendants should be released or detained before their trials. However, research over the last several decades has shown that money does not ensure public safety and does not ensure that

[232] *National Symposium*, *supra* note 14, at 40.
[233] The name still appears on the Colorado General Assembly's website, and was used by various persons testifying in support of the bill.

defendants will appear for their court dates, but does keep a large number of relatively low risk and presumptively innocent defendants in jail at significant costs to taxpayers. The new statute does not eliminate the use of money, and it does not eliminate those persons, such as commercial bail bondsmen and large insurance companies, who profit from the current system. The statute does, however, place up-front money in its proper perspective – as one of many tools that judges may use, albeit sparingly if ever, to help provide reasonable assurance of court appearance.

The new law also correctly encourages jurisdictions to expand and improve pretrial service functions across Colorado. Only half of the judicial districts in this state have pretrial service entities designed to (1) screen and investigate defendants for pretrial risk, (2) make objective recommendations to judges concerning effective bond conditions to help assure public safety and court appearance, and (3) supervise appropriate defendants in the community at a fraction of the cost to keep those defendants in jail. As noted previously, evidence-based practices point to using objective risk assessment instruments, nonfinancial conditions of release to better protect public safety, and community supervision to make sure those conditions are met. Pretrial services entities make all of this happen. Through Colorado's new pretrial bail statute, jurisdictions with pretrial services are encouraged to improve, and jurisdictions without those functions are encouraged to develop them.

The new statute will undoubtedly test people's assumptions about practices that have become routine through habit and custom. Moreover, this statute may lead to a heightened realization that other provisions of the law may be in need of examination and reform. In particular, a continuation of objectively high and unattainable bond amounts may indicate the need to reevaluate the Colorado preventive detention provisions to allow judges to detain dangerous and high-risk defendants though a lawful and transparent mechanism. Nevertheless, operating efficiently, the statute should help to accomplish what the law, the research, and the best-practice standards aspire to accomplish in the administration of bail, which is to simultaneously maximize release, court appearance, and public safety rates.[234] By enacting a

[234] At least one other state has demonstrated that this is possible. In 2011, Kentucky passed H.B. 463, which "was intended to reduce the ever-increasing financial burden of housing Kentucky's inmates while continuing to ensure public safety." Key provisions affecting pretrial release included defining pretrial risk assessment as a formal objective, requiring a risk-based decision making process, and dramatically reducing the use of money at bail. One year after its enactment, the Kentucky Pretrial Services Program reported increases in release rates (from 65% to 70% due largely to decreasing the number of secured

statutory scheme that helps to make this happen, Colorado has significantly furthered pretrial justice.

money bonds), court appearance rates (from 89% to 90%), and public safety rates (from 91% to 92%). *H.B. 463 Impact*, *supra* note 127, at 4-10.

Appendix – 2014 Amendments

2014 Legislative Changes – § 16-4-103, C.R.S.

In 2014, the General Assembly passed Senate Bill 14-212 ("Concerning Clarifying Changes to the Provisions Related to Best Practices in Bond Setting"), which further amended Section 16-4-103 (1) by removing the words "a court of record" and replacing them with "any court or any person designated by the court to set bond." The bill also added the words "or person" after "the court" when describing who or which entity shall determine the type of bond and conditions of release.

Before the amendment, the entire Section began, "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." Unfortunately, the phrase "court of record" was already defined in Section 16-1-104 (8) as "any court except a municipal court unless otherwise defined by a particular section." This definition, coupled with the retention of the phrase itself, led municipal judges to think, reasonably, that they had been excluded from the requirements of 16-4-103. This was not an intended outcome of the 2013 law, however, and so the phrase "court of record" was changed to the amended language. Accordingly, the change intends first to make clear that municipal courts and judges should be subject to the same bonding requirements as state courts and judges under the new law.

In addition, certain Colorado judges had been given misleading information premised on the argument that because Section 16-4-103 began by speaking only of "courts of record," the remainder of the section only applied to events or decisions happening in actual courtrooms. More particularly, some argued that because many charge-based monetary bail bond schedules were being used outside of an actual courtroom (and thus not in

a "court of record"), those bond schedules did not need to be individualized for risk as required by 16-4-103 (4) (b). Relying on this mistaken interpretation of the statute, some judges were continuing to use charge-based money bond schedules, which assign mostly random amounts of money to charges without defendant individualization. This was not the intent of the Colorado Commission on Criminal and Juvenile Justice (CCJJ) or the General Assembly, both of which were clear in their decision to craft legislative language that was designed to reduce the use of money and traditional money bond schedules, and to mandate consideration of individual defendant risk whenever bond schedules are used. Thus, the change in language from this Section of the 2014 bill is also meant to make clear that all of Section 16-4-103 applies to all aspects of bail setting, whether done in a courtroom, or outside of a courtroom through any lawful process of delegated authority such as through bond commissioners or bond schedules.

2014 Legislative Changes – § 16-4-104, C.R.S.

In 2014, the General Assembly passed Senate Bill 14-212 ("Concerning Clarifying Changes to the Provisions Related to Best Practices in Bond Setting"), which further amended Section 16-4-104 (1) (c) to: (1) allow a presumption for defendant choice in how to post a secured financial condition; and (2) provide an express statutory articulation allowing a judge to nonetheless require a defendant to post a secured financial condition pursuant to a particular method, such as through a "cash-only" bond, so long as the judge makes findings on the record for the need to require the defendant to post the bond through that particular method.

Before the amendment, the Section read: "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 ways," with the statute then listing cash, real estate, noncommercial and commercial sureties as the ways in which the secured bond might be satisfied. Now, the Section reads, "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 changes in this Section are directly related to judicial bail-setting behavior since the passage of the 2013 law. Many persons who worked on that law hoped that judges would be guided toward using more personal recognizance bonds (i.e., unsecured financial conditions) through the various limitations on secured financial conditions that were passed and that are discussed throughout this paper. Unfortunately, there were many reports of judges setting secured financial conditions that were still leading to the unnecessary detention of bailable defendants (i.e., according to Colorado law, persons not detainable pursuant to the process articulated by the Colorado Constitution), a problem that the 2013 law sought specifically to remedy. The changes to this Section should be read primarily as a further attempt to persuade judges to make sure that bailable defendants are actually released when the judge determines that they can be safely managed within the community through conditions that are less restrictive than secured money.

For the most part, the changes to this Section may be considered mere "clean up" to the 2013 law, but some changes represent more than simple clarification. For example, the 2013 law did not intend to limit judicial discretion to order defendants to post secured bonds in any particular way, such as through a "cash-only" bond. Thus, the express articulation of a judge's ability to do that in this amendment eliminates arguments to the contrary. However, the 2013 law was not meant to diminish judicial discretion at all, and so the new provision requiring judges to make express findings on the record is a significant change from prior law.

As another example, the 2013 law was also designed to help release bailable defendants and to reduce unnecessary pretrial

detention. Thus, to the extent that allowing a defendant to choose how he or she can post a particular bond more often results in his or her release, then that allowance could be viewed as merely cleaning up the 2013 law by helping bailable defendants obtain actual release. Unfortunately, there is some possibility that the changes to this Section will actually increase the detention of bailable defendants if judges begin setting high single amounts to account for the ability of defendants to choose how they post the bond.

History and experiences in other states have shown significant unintended consequences from changing statutory language dealing with bond types, conditions, and money, and states across the country have realized that "defendant choice" does not always lead to increased release of bailable defendants. Indeed, there is a possibility that these changes will lead some judges to set amounts that are unattainable in cash form so as to avoid making a record, and while thinking, perhaps erroneously, that the defendant will "choose" a commercial surety bond. Unfortunately, even if the defendant chooses a commercial surety bond, the commercial surety may not choose to help the defendant – for any reason, including caprice. Accordingly, it is not completely clear that the Colorado Commission on Criminal and Juvenile Justice (CCJJ) would necessarily have agreed to these changes due to the delicate and complicated nature of Colorado law surrounding this Section. Unlike the 2013 changes, the 2014 "clean up" bill was not a CCJJ bill, and the CCJJ never discussed the ramifications of a presumption of defendant choice for posting secured financial conditions of bond.

In fact, the "defendant choice" provision was first introduced in 2014 by Representative Jared Wright and backed by commercial bail bondsmen (H.B. 14-1261). That bill, which also sought to undo several other provisions of the 2013 law, included a section that would require judges merely to set an amount of a financial condition and then allow the defendant to choose how to pay it. Although bail industry lobbyists argued that the provision was intended to help get bailable defendants out of jail, it is more likely that their support was due to the fact that

the provision (as worded) would have stopped the existing practice of judges setting cash-only bonds, a practice that has the potential to eliminate defendants' use of commercial bail bondsmen altogether. However, the use of surety bonds is currently a primary cause of unnecessary pretrial detention in America, and thus any argument that defendant choice would necessarily foster the release of bailable defendants (at least without mechanisms to control amounts or to force sureties to contract with defendants) is untenable.

Although H.B. 14-1261 died, the idea of "defendant choice" remained intriguing to defense attorneys, who, over the past year, saw defendants detained on relatively low cash-only bonds and considered surety bonds to be a better alternative to detention. Nevertheless, prosecutors and sheriffs were adamant about retaining judicial authority to set cash-only bonds, as those types of bonds are often the only way judges can detain high risk defendants when they are not eligible for detention through the Colorado constitutional detention provisions. In the end, the compromise that virtually everyone (including most bondsmen) supported was a presumption of defendant choice but with express allowance of cash-only bonds upon a factual finding.

For reasons articulated throughout this paper, this requirement for a factual finding presents hazards that could potentially cause significant problems for judges on appeal. For example, if a judge sets a cash-only bond and articulates on the record that he or she has done so to protect the public, an appellate court might rule that the condition is irrational, given that the money may not even be legally forfeited for breaches in public safety under Colorado law. As another example, if a judge sets a cash-only bond and articulates on the record that he or she has done so to detain the accused, an appellate court might find that the judge's decision was unlawfully avoiding the proper constitutional mechanism for detaining defendants pretrial in Colorado. Too general a record may lead to remand; too specific a record may lead to reversal.

Judges can avoid many of these pitfalls by simply relying more on unsecured bonds (through subsections (a) and (b) of Section 16-4-104 (1)) – a practice that would follow the research showing that unsecured bonds can increase release rates while not diminishing public safety or court appearance rates in Colorado (*see* Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (PJI 2013), found at: http://www.pretrial.org/download/research/Unsecured%20Bonds,%20The%20As%20Effective%20and%20Most%20Efficient%20Pretrial%20Release%20Option%20-%20Jones%202013.pdf). Alternatively, courts could simply set cash-only bonds that are attainable to the defendant (the factual finding could merely be that the judge believes the motivation from the cash-only financial condition for court appearance to be superior to any other type of financial condition, such as one backed by a commercial surety, through which a defendant loses money whether he shows up for court or not). Finally, courts could set so-called "split bonds," which would entail the judge setting an amount for each type of bond and then allowing the defendant to choose the method and thus the bond amount. As the body of this paper indicates, it appears that split bonds are still lawful after the 2013 enactment, and the 2014 amendment did nothing to change that.

This author emphasizes the negative consequences associated with release through commercial surety bonds. On the one hand, lower risk defendants are often denied the assistance of for-profit bail bondsmen when they or their families cannot pay the fee or collateralize the bond. This is directly contrary to the spirit of the 2013 law, which sought, more than anything, to reduce the unnecessary pretrial detention of bailable defendants. On the other hand, for-profit bail bondsmen have also been known to fashion various "deals," whereby higher risk defendants are allowed out of jail with little or no money down and on payment plans. Most puzzling, of course, is that the money these bondsmen make by helping release these higher risk defendants can only be lost if the defendant fails to appear for court – the money cannot be lost due to breaches in public safety. To the extent that any particular judge is concerned about a defendant's risk to public safety – whether manageable

or unmanageable – then that judge should use alternatives to commercial surety bonds.

Overall, even after passage of H.B. 13-1236 and S.B. 14-212, bail setting in Colorado can be challenging. The 2013 legislation went far toward helping bailable defendants actually obtain release, but the statute did not address the equally important issue of preventive detention, or "no bail," based on risk. We are thus only partially through the journey toward true bail reform in Colorado. Until the day that both release and detention are properly addressed, judges must maneuver through the perils of deciding release and detention pursuant to a scheme that is still somewhat deficient.

In this author's opinion, however, there is an effective way to maneuver through Colorado's current bail laws in a manner that protects public safety and enhances court appearance while remaining consistent with legislative intent. In any case in which a defendant is deemed to be low to medium risk (and perhaps even in some cases involving high risk defendants), the judge should set an unsecured financial condition (i.e., personal recognizance or "PR" bond) with appropriate nonfinancial conditions, when necessary, to provide reasonable assurance of public safety and court appearance. When a defendant is deemed so high risk that the judge determines that no condition or combination of conditions suffice to protect the public or provide reasonable assurance of court appearance, then that judge has two alternatives. If the defendant is eligible for detention under our current state constitutional detention provisions, then the judge should detain that defendant pursuant to that enacted process. If not, the judge should set a secured cash-only bond designed to detain the defendant. To avoid a constitutional objection (because setting a high money bond designed to detain is likely to be successfully appealed on constitutional grounds), the judge should first hold a due process laden hearing, much like the federal pretrial detention hearing that was approved by the United States Supreme Court in *United States v. Salerno*, before setting that amount. In the event of an appeal, the judge can then at least point to a de facto

due process procedure in the particular case leading to detention.

2014 Legislative Changes – § 16-4-105, C.R.S.

In 2014, the General Assembly passed Senate Bill 14-212 ("Concerning Clarifying Changes to the Provisions Related to Best Practices in Bond Setting"), which further amended Section 16-4-105 (4) to reinstate the requirement that defendants must acknowledge the protection order in stalking cases under Section 18-3-602.

The 2013 bill eliminated the statutory reference to stalking in the mandatory conditions provision (*see* footnote 208 in this paper), but the elimination was apparently an oversight.

2014 Legislative Changes – § 16-4-106, C.R.S.

In 2014, the General Assembly passed Senate Bill 14-212 ("Concerning Clarifying Changes to the Provisions Related to Best Practices in Bond Setting"), which further amended Section 16-4-106 (4) (c) to add the requirement that the empirically developed risk assessment tool "be used by the [pretrial services] program, the court, and the parties to the case solely for the purpose of assessing pretrial risk."

Pretrial risk assessment instruments are created solely to help determine the risk of pretrial misbehavior so as to aid in the decision to release or detain a defendant during the pretrial phase of the case. During the past year, however, there were reports from various jurisdictions that pretrial risk assessment scores were also being used when considering such things as whether to offer a plea bargain, screening for various other programs unassociated with pretrial release, and even during sentencing. These are improper uses of pretrial risk assessment instruments in general and the Colorado Pretrial Assessment Tool in particular, and thus the statute was amended to make

clear that the score can lawfully be used only for gauging a defendant's *pretrial* risk.

2014 Legislative Changes – § 16-4-107, C.R.S.

In 2014, the General Assembly passed Senate Bill 14-212 ("Concerning Clarifying Changes to the Provisions Related to Best Practices in Bond Setting"), which further amended Section 16-4-107 primarily to clarify the interplay between this Section and Section 16-4-109, which also allows defendants to move to modify financial conditions of bond. Section 107 now makes it clear that the defendant may only file a written motion pursuant to that Section one time, but also that the 107 filing does not preclude making a motion pursuant to Section 109 at any time during the pendency of the case.

In addition to reports of confusion with the interplay between the two Sections in various judicial districts, there were also reports that because of the seven-day waiting period for filing the motion under Section 107, some judges were not allowing any motions regarding bond amounts, even pursuant to Section 109, until the seven day period had passed. The significance of Section 107 has not changed. It was intended to further emphasize the need for judges to set the type of bond and conditions of release in ways that do not cause the unnecessary or unintentional pretrial detention due to a defendant's lack of money. If money is the cause of unnecessary pretrial detention, Section 107 provides one path toward rectifying the situation. Section 109 provides another path, albeit with different procedural requirements.

2014 Legislative Changes – § 16-4-111, C.R.S.

In 2014, the General Assembly passed Senate Bill 14-212 ("Concerning Clarifying Changes to the Provisions Related to Best Practices in Bond Setting"), which further amended Section 16-4-111 to expressly articulate the courts' ability to declare

forfeitures of unsecured financial conditions equal to their ability to declare forfeitures of secured financial conditions.

Despite the statutory scheme's use and, indeed, emphasis on unsecured financial conditions of bond, there were reports of persons in some jurisdictions who believed that the statute did not allow courts to declare a forfeiture of those unsecured amounts. This change to Section 111 puts unsecured financial conditions on par with secured financial conditions by requiring the judge to declare a forfeiture of the unsecured amount if the defendant does not appear for court. By making the change, it is hoped that judges will make more use of unsecured financial conditions, which is consistent with the intent of the broader 2013 legislation. Moreover, the statutory mandate to declare forfeitures in no way requires judges to enter judgments on the forfeited amounts.