

COLORADO COMMISSION ON CRIMINAL AND JUVENILE JUSTICE

Bail Subcommittee
Initial Meeting: 12/02/2011

DEFINITIONS OF TERMS AND PHRASES

*See Glossary of Terms and Phrases Relating to Bail and the Pretrial
Release or Detention Decision: PJI/Washington, DC, March 11, 2011*

WHY?

- “The beginning of wisdom is a definition of terms.”
- Bail is complex – can lead to misuse and confusion (at the highest levels)
- Overview of the Glossary and its value to you

IMPORTANT EXAMPLES

- “Bail” = \$? ? ?
- “Court Appearance Rate”
- “LEBP”
- “Money Bail System”
- “Pretrial”

IMPORTANT EXAMPLES

- “Pretrial Release Decision”
- “Pretrial Release Outcomes”
- “Preventive Detention”
- “Public Safety”
- “Right to Bail”

THE HISTORY OF BAIL AND PRETRIAL RELEASE

See History of Bail and Pretrial Release: PJI/Washington, DC,
updated September 24, 2011

WHY DOES IT MATTER?

?

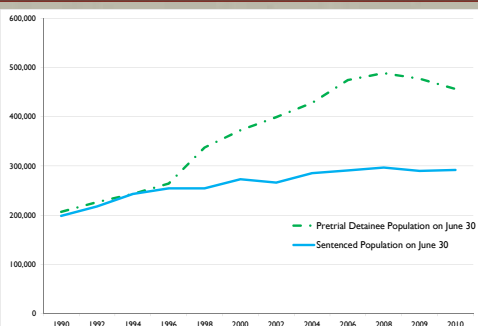
THE WORLD NEEDS YOUR HELP

- International pretrial issues
- “If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice.”
- The United States, in turn, is looking to Colorado

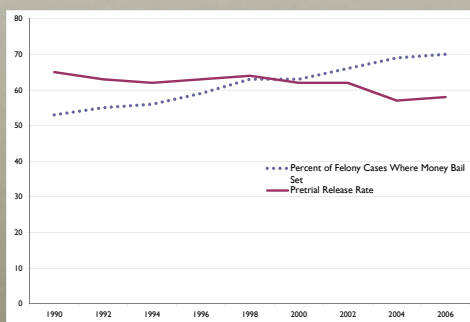
CRIME/FEAR OF CRIME

- “The war on crime is over.”
- Total and violent crime rates near 1960’s levels
- “Overall, crime rates remain low. Crime has been decreasing for many years.”
- The war on the fear of crime has begun

NUMBER OF JAIL INMATES 1990-2010 (61% PRETRIAL)



USE OF MONEY ON THE RISE



WHO IS IN JAIL?

- Among those detained until adjudication, ~85% had a bail amount set but did not post the financial condition required for release (BJS, 2007)
- Bond amounts not being met are often “low”

WHY CARE?

- Higher risk defendants released with no conditions or inadequate conditions are more likely to fail on pretrial release
- Lower risk defendants released with unnecessary conditions consume caseloads, reduce time available for supervision of others with more risk, and experience increased pretrial misbehavior
- Jail crowding can lead to emergency release of some defendants who often perform worse on release
- Serving time in any facility can slightly increase recidivism, an undesirable outcome
- The longer a person spends in pretrial detention, the more likely he will be convicted and the more severe the sentence – no matter the charge, criminal history, family ties, or type of counsel

THE BEGINNING

- Early England
- Norman Invasion
- Prediction/“Abuses”
- American Principles
- Money Bail Grows
- Generations



BAIL REFORM: THE FIRST GENERATION

- “In too many instances, the present system . . . neither guarantees security to society nor safeguards the rights of the accused. It is lax with those with whom it should be stringent and stringent with those whom it could safely be less severe.”

• Arthur L. Beeley, *The Bail System in Chicago* (Chicago: University of Chicago Press, 1927; reprinted 1966)

STACK V. BOYLE, 342 U.S. 1 (1951)

- “[T]he 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. Bail set at a figure higher than an amount *reasonably calculated* to fulfill this purpose is ‘excessive’ under the Eighth Amendment.” (italics added).
- Purpose and right to bail
- Embraces (or more) the concept of an individualized bail setting based on standards relevant to purpose of bail

PURPOSE OF BAIL

“From . . . 1789 . . . federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”

Stack v. Boyle

INDIVIDUALIZED BAIL SETTING

“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. [Those standards] are to be applied in each case to each defendant.”

“ To infer from the fact of indictment alone [no individualized facts] a need for bail in an unusually high amount is an arbitrary act.”

Stack v. Boyle

CARLSON V. LANDON, 342 U.S. 524 (1952)

- Habeas case and dicta, but Supreme Court indicates that bail is not an absolute right in all cases
- Parameters of bail to be determined by federal legislature and the states
- State constitutions may give more rights than federal, subject to the Supremacy Clause
- Colorado Constitution

VERA PERSONAL RECOGNIZANCE EXPERIMENT, 1961


- Interviewed defendants at jail
- Demonstrated that defendants could be released and show up for trial based on factors like community ties, rather than on their ability to afford a money bond
- Origin of "release on own recognizance"
- Origin of "Vera Point Scale"

1964


- Illinois adopts a Ten Percent Deposit Plan, allowing defendants to post 10 percent of a bail amount directly with the court, effectively eliminating commercial sureties.
- National Conference on Bail and Criminal Justice is held (the first of two).
- Pretrial programs modeled after the Manhattan Bail Project (Vera) begin in St. Louis, Chicago, Tulsa, and Nassau County, New York.

**NATIONAL CONFERENCE ON BAIL AND
CRIMINAL JUSTICE
MAY 27 – 29, 1964**

"There is a special responsibility on all of us here, a special responsibility to represent those who cannot be here, those who are poor, those who are unfortunate – the 1,500,00 persons in the United States who are accused of crime, who haven't been yet found guilty, who are yet unable to make bail and serve a time in prison prior to the time that their guilt has even been established. For these people, for those who cannot protect themselves, for those who are unfortunate, we here, over the period of the next three days, have a special responsibility . . ."



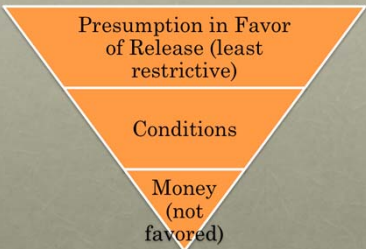
**NATIONAL CONFERENCE ON BAIL AND
CRIMINAL JUSTICE
MAY 27 – 29, 1964**



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

**FEDERAL BAIL REFORM
ACT OF 1966**

- Sole focus was on appearance risks
- Hierarchy of bail conditions:



FIRST GENERATION CONTINUED

- DC Bail Agency Act of 1967
 - Created by Congress to help judges implement the Federal Bail Reform Act of 1966
- National Standards, beginning in 1968
 - American Bar Association, Criminal Justice Standards
 - National Advisory Committee (NAC)
 - NAPSA and NDAA

All provided standards for practices governing bail, but ABA Standards preeminent (discussed later)

FIRST GENERATION CONTINUED

- National Association of Pretrial Services Agencies founded, 1973
- Federal Speedy Trial Act of 1974
 - Established 10 Federal pilot sites for pretrial services programs
- 1975, U.S. District Court for Southern Texas: *Alberti v. Sheriff of Harris County*
 - conditions of the local detention facility found unconstitutional and orders the establishment of a pretrial services agency in that jurisdiction
 - use of pretrial programs to reduce jail crowding would become common throughout the 1980s
- Kentucky outlaws commercial surety and starts state-wide pretrial services program, 1976

FIRST GENERATION CONTINUED

- 1977
 - NDAA Standards released (update to NAC)
 - Pretrial Services Resource Center founded
- Wisconsin abolishes commercial surety, 1979
- Federal Pretrial Services Act of 1982
 - Congress mandated that all Federal districts provide pretrial services

THE SECOND GENERATION

- Since 1970, D.C. and the States had already addressed future dangerousness
- In 1984, federal government expanded the permissible purpose of bail (from only appearance risks) to include consideration of danger
- Established “preventive detention” in the federal courts

US V. SALERNO, 481 U.S. 739 (1987)

- Upheld constitutionality of the Federal Bail Reform Act of 1984 against facial Due Process and 8th Amendment challenges; preventive detention is permissible due to “extensive” due process safeguards:
 - Only certain categories of offenses;
 - PC not enough – “full blown adversary hearing;”
 - New standard – clear and convincing evidence;
 - No condition or combination of conditions will provide assurance of appearance or public safety;
 - Judicial discretion guided by statutory factors;
 - Written reasons for detention;
 - Expedited appellate review of detention order.
- NAPSA and NDAA standards revised to add danger; some States changed their statutes

DETENTION PRETRIAL TO BE USED SPARINGLY

"In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. The (Federal Bail Reform Act of 1984) authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing."

Chief Justice Rehnquist, U.S. v. Salerno

SALERNO'S IMPACT

Due Process – pretrial detention passes *facial* substantive and procedural challenges.

Test for Excessiveness – “The only arguable substantive limitation of the Bail Clause is that the Government’s proposed *conditions of release or detention* not be ‘excessive’ in light of the perceived evil.” Compare govt. response to valid interest.

Now two constitutionally valid purposes of bail.

1988-PRESENT – A THIRD GENERATION?

- Body of research literature concerning LEBP
- Embraced by multiple national organizations
- Consensus on need to improve current bail system, preferably without blame
- Attitudes toward crime and punishment
- Budgets (recognized by CCJJ)
- 2009-2010 leading up to National Symposium

WALTER A. ROTHGERY V. GILLESPIE COUNTY, TEXAS, 128 S. CT. 2578 (2008)

- “A criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”
- Attachment does not also require that a prosecutor be aware of, or involved in, that initial proceeding.

NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE

- May 31-June 1, 2011 (OJP and PJI)
- Attendees
- Report and recommendations expected this fall
- Current Activity
- Themes
- Video

COLORADO CONSTITUTION

- 1876 – “That all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.” (Art. II, Sect. 19 from Pennsylvania model).
- “That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” (Art. II, Sect. 20 from U.S. Constitution).
- Changed to include preventive detention in 1987
- Other States

COLORADO STATUTES

- 1963
- *People v. Jones*, 176 Colo. 61 (1971) – “The attack which has been made goes to the heart of our bail system and condemns time-worn practices that admittedly require change”
- *People v. Dunbar*, 179 Colo. 304 (1972) – “Our legislative standards [in the new Code of Criminal Procedure, 1972] are substantially equivalent to the [ABA] Standards for Criminal Justice Relating to Pretrial Release.”
- 1987 (preventive detention) and 1991 (PTS programs)

TITLE 12 PROFESSIONS AND OCCUPATIONS

- 12-7-101 to 12-7-113 = Bail Bonding Agents
- Has its own definitions section specific to Colorado
- Has provisions for licensing, pre-licensure education, advisory committee, reporting, bail recovery (bounty hunting); rules for denial, suspension, and refusal of renewal of license; rules for bonding agreements; prohibited activities, etc.
- 2011 DORA sunset document

TITLE 16

- Pretrial Bail versus Bail After Conviction
- 16-4-101, 102 = Bailable Offenses and Right to Bail
- 16-4-103 = Fixing Bail and Conditions of Bond --
“At the first appearance . . . the amount of bail and type of bail bond shall be fixed by a judge” (unless on parole or unless amount and type has been fixed on indictment, information, or complaint “in which case the propriety of the bail bond shall be subject to reappraisal.”)

16-4-103

- Has three statutory bail amounts
- 2 (a) “A condition of every bail bond, *and the only condition for a breach of which a surety or security on the bail bond may be subjected to forfeiture*, is that the released person appear.”
- Other statutory conditions
- Catch-all condition in subsection (f)

BAIL BOND ALTERNATIVES

- 16-4-104 – (1) PR or PR Co-sign; (2) deposit of “full amount of the bail to be secured in any one or more, or any combination of”
 - Cash or stocks or bond
 - Property
 - Sureties by bail bonding agent or cash bail agent
- Property bonds difficult and rarely used
- Split bonds/cash only bonds/deposit bonds

BAIL BOND CRITERIA 16-4-105

- List of factors (individualized) like many other States and the feds
- “Judge . . . shall consider and be governed by”
- Multiple restrictions on PR bonds unlike many other states and the feds (requires security)
- Section 3 (b) allows creation of Pretrial Services Programs to help court “make a more appropriate initial bond decision which is based on facts relating to the defendant’s risk of danger to the community and . . . failure to appear for court.”

OTHER SECTIONS

- 16-4-107 – Reduction or increase of bail, change in type of bail bond
- 16-4-108 – Exoneration (uncompensated sureties)
- 16-4-109 – Disposition of security deposits upon forfeiture
- 16-4-110 – Enforcement when forfeiture not set aside (RD)
- 16-4-111 – Certain misdemeanor offenses (16-2-111)
- 16-4-112 – Enforcement & forfeiture for compensated sureties
- 16-4-204, 205 – Appellate review

ISSUES

- Municipal Bonding Practices
- Victims' Rights
- Contrary to ABA Standards & research
- Constitutional and other legal issues
- "Fundamental Constitutional Defect"

COURT RULES

- "These Rules are intended to provide for the just determination of criminal proceedings. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay."
- Crim. P. Rules 4, 5, and 46
- Perhaps an avenue for improvement?

COLORADO CASE LAW

- Sparse
- The right to bail and purpose of bail
- Cases on excessiveness
- Deposit bonds
- Cash-only bonds
- Conditions – *Rickman*

NATIONAL STANDARDS

- Long history of best practice standards in CJ
- Three in use in 2007-2008
- American Bar Association Criminal Justice Standards on Pretrial Release
- WHO?
- LEBP – Law and social science research
- Remember, already used by our General Assembly and Supreme Court

ABA STANDARDS

- General Principles (a “must read”)
- Part II – Release by LE without a warrant
- Part III – Summons in lieu of arrest
- Part IV – Release by judicial officer at first appearance or arraignment
- Part V – The release and detention decisions
- Part VI – Notice to victims of crime

INTRO/GENERAL PRINCIPLES

- “[T]hese Standards aim to minimize *unnecessary* pretrial detention in a variety of ways.” (p. 30)
- Two kinds of mistakes in striking the balance
- Focus on a release/no-release system; release with conditions (nonfinancial, then financial) or detention used transparently and lawfully
- Deals with issues of money bail head on
- “Major improvements in pretrial processes are needed and are clearly feasible.”

PRINCIPLES (CONT.)

- Purpose of the pretrial release decision
- Release under least restrictive conditions, including diversion and alternative release options
- Citations and summonses
- Conditions of release
 - First: Promote release of defendants OR (PR) or, when necessary, on unsecured bond
 - Second: Constitutionally permitted *nonfinancial* conditions
 - Third: Financial conditions – the big issue

PRINCIPLES – FINANCIAL CONDITIONS

- Use only when no other conditions will assure appearance
- At “lowest level necessary to ensure [reasonably assure] the defendant’s appearance and with regard to a defendant’s financial ability to post bond.”
- “Financial conditions should not be employed to respond to concerns for public safety” or to placate public opinion.
- No financial condition “that results in the pretrial detention of a defendant solely due to . . . inability to pay.”
- Commercial sureties -- three methods for \$ in 10-5.3

PRINCIPLES – PRETRIAL SERVICES AGENCIES

- “Every jurisdiction should establish”
- Primary functions of pretrial services agencies/programs
- Roles and functions defined by the generations of bail reform/changing over the years

ISSUES AT THE PRETRIAL PHASE -- EXAMPLE

- Arrest v. Citation – Summons v. Warrant
 - Issue?
 - Standards?
 - Recommendation: Generally, follow the Standards

ISSUES AT THE PRETRIAL PHASE – EXAMPLE (CONT)

- Money bail schedules
 - Issue?
 - Standards?
 - Recommendation: Generally, eliminate them but won't need them if other reforms are implemented

ISSUES AT THE PRETRIAL PHASE – EXAMPLE (CONT)

- Compensated Sureties
 - Issue?
 - Standards?
 - Recommendation: Money is the more important issue; anyone could supervise

ISSUES AT THE PRETRIAL PHASE – EXAMPLE (CONT)

- Pretrial Services Programs
- Delegated Release Authority
- First Court Appearance (prompt and nature)
- Release/Detention Decision
- Monitoring Pretrial Status
- Allocating Resources

STATUS OF EMPIRICAL RESEARCH

- Validated Pretrial Risk Assessment
 - Utilizes:
 - Current Charge
 - Other Pending Cases
 - Criminal History
 - Failure to Appear History
 - Residence
 - Employment
 - History of Drug Abuse or Mental Illness
 - Can exist at state- or county-level

STATUS OF EMPIRICAL RESEARCH (CONT)

- Pretrial Supervision
 - Court date notification
 - Not yet enough known
- Bond Type and Conditions
 - SCPS
 - Trends from newer, better research

CURRENT COLORADO PRACTICES AND ISSUES

- Recent & forthcoming legislative activity

2010

- Proposition 102 (Require secured money bail bonds)

2011

- HB1088 (Change bail bonding for illegal aliens)
- HB1135 (Change commercial bail bonding regulation from DORA to independent board)
- HB1189 (Require bail bond conditions for DUI defendants) [became law]
- HB1306 (Delay DORA's sunset review of commercial bail bonding)
- SB186 (Create 10% deposit bond to the court)

2012

- DORA Sunset bill for commercial bail bonding
- Others?

CURRENT COLORADO PRACTICES AND ISSUES (CONT)

- Pretrial Services programs or functions
 - A county government function
 - Adams, Arapahoe, Boulder, Denver, Douglas, El Paso, Larimer, Jefferson, Mesa, Montezuma, Pueblo, Weld
- Forthcoming validated pretrial risk assessment instrument
- Forthcoming research-based supervision
 - Match bond and supervision conditions to each defendant's individual risk profile
- Improved performance measurement and reporting
 - For pretrial "system" – includes programs, sureties, courts, etc...
 - Main goal: Maximize public safety and court appearance while minimizing pretrial detention

ONE FINAL RECOMMENDATION

- To optimize effective decision-making and minimize political influences, and to be more consistent with the CCJJ's mission, it will be useful to ask two questions:
 - What are the reasons to change the way Colorado administers bail and the pretrial process?
 - What legal and empirical research and evidence exists to support those reasons?

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