

Money Bond and Pretrial Release: The National Landscape, Legal Analysis, and Supreme Court Cases

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Purposes of bail and pretrial decision making:

- ▶ 1) Maximize Release
 - ▶ Presumption of Innocence = presumption of release
 - ▶ If a defendant can be safely managed in the community during the pretrial period, they should be released.

- ▶ 2) Maximize Public Safety
 - ▶ Safety of victims and witnesses
 - ▶ Community safety

- ▶ 3) Maximize Court Appearance
 - ▶ Avoid prosecution } 5% estimated
 - ▶ Flight risk }
 - ▶ Failures to Appear...due to irresponsibility/inattention) } 95% estimated

- ▶ 4) Maintain the Integrity of the Judicial System
 - ▶ Intimidation / bribery / tampering / retaliating

- ❖ Factors related to sentencing, but NOT pretrial decisions:
Punishment and, to an extent, rehabilitation

Overview of the Pretrial Landscape

- ▶ 1) The current pretrial / bail system in Colorado and beyond
 - ▶ Money Bond and Pretrial Release
- ▶ 2) The other option - a hold / release system - pretrial detention
 - ▶ The National Landscape
- ▶ 3) What is legally required for a hold / release system?
 - ▶ Supreme Court Case U.S. v. Salerno

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Overview of the Pretrial Landscape

1. *The current pretrial / bail system in Colorado*

Some Pretrial Statistics:

- ▶ Approximately 63% of the people in local jails are pretrial.
 - ▶ Do we have the RIGHT people in jail?
- ▶ Jail costs? \$50 - \$100+ per day (nationally \$38 million/day)
- ▶ Pretrial Services costs approx. \$5 - \$20 per day.
- ▶ In a large majority of criminal cases, Judges impose a surety bond condition, and then it is left to a defendant's financial means and a bail bondsman to decide whether the defendant remains in jail.
- ▶ In Mesa County - pre-reform - approx. 70% of defendants received a surety bond per a bond schedule based on charge - not based on risk or any consideration of the individual defendant's circumstances.
- ▶ 34% of felony defendants in Colorado never post their \$\$\$ bond.
- ▶ 18% of misdemeanor defendants never post their \$\$\$ bond.
- ▶ Mesa County - approx. 10% do not post \$\$\$ bond.

Overview of the Pretrial Landscape

1. *The current pretrial / bail system in Colorado*

- ▶ “The effect of such a system (our current bail system) is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety - who, in their judgment, is a good risk. The bad risks, in the bondsmen’s judgment, and the ones who are unable to pay the bondsmen’s fees, remain in jail. The Court and the (Bond) Commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.”

Pannell v. U.S., 320 F.2d 698, 699 (D.C. Cir. 1963).

Overview of the Pretrial Landscape

1. *The current pretrial / bail system in Colorado*

Commercial Sureties - aka, Bail Bondsman

- ▶ “We have always done it this way.” “Everybody does it.”
- ▶ When did they first appear? Have they been around forever?
- ▶ “By 1898, the firm of McDonough Brothers, established as a saloon, found its business niche by underwriting bonds for defendants who faced charges in the nearby Hall of Justice...”
- ▶ The U.S. and the Philippines are the only two countries in the world that use commercial bail bondsmen.
- ▶ In England, and other countries, it is a crime to do what U.S. bail bondsmen do.

Overview of the Pretrial Landscape

1. *The current pretrial / bail system in Colorado*

Commercial Sureties - aka, Bail Bondsman (continued)

- ▶ The ABA has advocated for the elimination of bondsmen since 1968.
 - ▶ “Their role (bondsmen) is neither appropriate nor necessary and the recommendation that they be abolished is without qualification.”
- ▶ Jurisdictions that have eliminated the use of bail bondsmen - or made them virtually unused and/or irrelevant:
 - ▶ Most of the world - except a majority of U.S. states and Philippines.
 - ▶ U.S. Federal system - since 1984.
 - ▶ Washington, D.C. - for the past approx. 30+ years.
 - ▶ Illinois - 1963 - the 10% plan
 - ▶ Kentucky, Oregon, and Wisconsin (all have statutes disallowing bail bondsmen).
 - ▶ Maine, and Nebraska rarely use them (add NJ after 2017).
 - ▶ New Jersey - (in 2017 judges imposed surety bonds on only 44 cases).
 - ▶ California - will eliminate money bail and bondsmen on October 1, 2019

Overview of the Pretrial Landscape

1. The current pretrial / bail system in Colorado

Monetary Conditions of Bond / Release

- ▶ Does requiring a monetary condition of bond increase / maximize release?
 - ▶ In Colorado 18% of misd. and 34% felony defendants never post the \$\$\$ bond.
 - ▶ Washington, D.C. they have a 94% initial release rate.
 - ▶ In 2017 New Jersey had a 94% initial release rate.
 - ▶ In Mesa Co. we release approx. 80% of defendants on summons or PR bonds.
- ▶ Does *posting* a monetary condition of bond increase / maximize public safety?
 - ▶ Defendants / bondsmen do not lose any \$\$\$ for new criminal activity.
 - ▶ No evidence or research indicates posting a monetary condition of bond helps public safety.
- ▶ Does posting a monetary condition of bond increase / maximize court appearance?
 - ▶ Majority of evidence suggests no positive impact from posting a monetary condition of bond.
 - ▶ Colorado - 88% for PR bonds vs. 81% for \$\$\$ bonds
 - ▶ Mesa Co. - 89% for PR bonds vs. 87 % for \$\$\$ bonds
 - ▶ Washington, D.C. has a court appearance rate of 90%

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Overview of the Pretrial Landscape

2. The other option - a hold/release system - pretrial detention

Release/Detention (in or out) Systems

- ▶ The question is simply whether the defendant should be in or out.
- ▶ Judges decide whether a person is detained or released - not a person's financial means or a bail bondsman.
- ▶ Who will be eligible for pretrial detention?
- ▶ How will we decide?
- ▶ Two main limiting mechanisms - "net" and "process"
- ▶ Initial net / process - limited and based on a prediction of what a defendant might do or not do.
- ▶ Secondary net / process - broader and based actual pretrial behavior

Overview of the Pretrial Landscape

2. The other option - a hold/release system - pretrial detention

Who currently uses a release/detain system?

- ▶ U.S. Federal System - since 1984
 - ▶ 86% of cases are felony cases (vs. an 80/20 state court ratio)
- ▶ Washington, D.C. for 30+ years
 - ▶ No constitutional provisions / extensive pretrial services program
- ▶ New Jersey since 2017
 - ▶ Probably the best jurisdiction to consider re: outcomes
- ▶ New Mexico since 2017 (for felony offenses only, and only for public safety)
 - ▶ Because of limitations, probably not the best model
- ▶ California - beginning in October 2019
 - ▶ Completely eliminates \$\$\$ and bail bondsman

Overview of the Pretrial Landscape

2. The other option - a hold/release system - pretrial detention

Colorado's current "hold w/o bail" provisions

- ▶ Colorado's constitution currently only allows for detention for:
 - ▶ 1) "Capital crimes" when the "proof is evident or the presumption is great"
 - ▶ 2) Certain very narrow categories of crimes w/ a hearing within 96 hours

Overview of the Pretrial Landscape

2. The other option - a hold/release system - pretrial detention

Examples: Release/detain system - Washington, D.C.

- ▶ Has an initial “charge-based net” (the who)
- ▶ A detention hearing process with similar components as *Salerno* case. (the how)
- ▶ “. . . 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.”
- ▶ Initial (after detention hearings) release / detention rate of 94% / 6%.
- ▶ 88% of defendants remain released w/o \$\$\$ during the pretrial period.
- ▶ Pretrial law abiding rate of 91%.
- ▶ Court appearance rate of 90% (defendants who have a perfect court appearance rate).

Overview of the Pretrial Landscape

2. The other option - a hold/release system - pretrial detention

Examples: Release/detain system - New Jersey

- ▶ Passed legislature unanimously. Public voted 66% to pass constitutional amendment.
- ▶ Implementation of constitutional amendment and new statutes was on January 1, 2017.
- ▶ Very broad initial charge-based detention net, and similar process.
- ▶ “. . . Clear and convincing evidence that no amount of monetary bail, non-monetary conditions of pretrial release or combination of monetary bail and conditions would reasonably assure the eligible defendant’s appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.
- ▶ Judges in New Jersey had 142,663 cases in 2017 - bonds were set in 44,319 cases.
- ▶ Prosecutors asked for detention in 19,366 cases - 44%.
- ▶ Judges actually detained 8,043 defendants - 42% of the cases where prosecution asked.
- ▶ 94% release rate / 6% detention rate
- ▶ Only 44 defendants received a monetary condition of bond.
- ▶ Experienced a reduction in jail population of 20% in one year, and 35% over 3 years.

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3. Legal requirements for a hold/release system

U.S. v. Salerno, 481 U.S. 739 (1987)

- ▶ The United States Supreme Court upheld the federal Bail Reform Act of 1984. The act's preventative detention provisions against facial due process and eighth amendment challenges.
- ▶ For the first time public safety was approved by the Supreme Court as a proper pretrial / bail consideration.
 - ▶ "The government's interest in preventing crime by arrestees is both legitimate and compelling." *Id.* at 749.
- ▶ The defendant's liberty interest may be outweighed by the compelling governmental / societal interest of effectively prosecuting crimes and public safety during the pretrial period.
- ▶ "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 falls within that carefully limited exception." *Id.* at 759.

Overview of the Pretrial Landscape

3. Legal requirements for a hold/release system

“Requirements” for pretrial detention - U.S. v. Salerno, 481 U.S. 739 (1987)

- ▶ Who? (the “charge based net”) “. . . the most serious of crimes.”
- ▶ How? (the process) “The arrestee is entitled to a prompt detention hearing.”
 - ▶ 1) PC - not a preliminary hearing
 - ▶ 2) “full-blown adversary hearing”
 - ▶ Defendants have right to counsel
 - ▶ Defendants may testify - “or present information by proffer or otherwise and cross-examine witnesses who appear at the hearing” (but no witnesses are required and rules of evidence do not apply)
 - ▶ 3) Prosecution must provide “clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.”

See also, *In Re: Kenneth Humphrey, on Habeas Corpus* [A152056, 01/25/2018, California Court of Appeal, First Appellate District, Division 2]. (university.pretrial.org/viewdocument/in-re-humphrey-on-habeas-corpus-in)

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Organizations with statements that support a reduced emphasis on money bail...



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