

March 15, 2017

To: Nevada Jurists and Policy Makers
Re: Changes in Nevada's Pretrial Release Systems

We submit the accompanying 'white paper' regarding the Nevada criminal justice system pretrial release factors for your review and consideration. Due to a recently activated pilot project in Nevada, pretrial release vehicles are changing rapidly with significant public policy impact.

State and federal courts vigorously protect against excessive bail being required. Private sector bail bonds are one option alongside many other release alternatives. 'Secured Bail' via bail bond provides a valuable means for allowing pretrial release while ensuring appearance in court by an arrestee and protecting the community's interests in security. Bail is a tried and true constitutional option to provide an opportunity to criminal defendants to avoid pretrial restrictions on their liberty by posting a bond. Courts generally choose the least onerous conditions that will ensure a defendant's appearances through all court proceedings.

Where a secured bond is an appropriate means of offering release with adequate incentive to appear for future court proceedings, a defendant's family is generally fully integrated into the release, resulting in the low failure to appear (FTA) rate of secured bail. Government sponsored pretrial release certainly serves a significant purpose, but the non-monetary tracking and reporting requirements can raise constitutional issues of its own. Both private and public pretrial release options are valuable tools for criminal justice.

Most sincerely yours,

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Real Solutions for Nevada's County Jail Populations

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There has been much discussion lately about reforming the bail system in Nevada. The discussion generally emanates from social justice reformers primarily concerned with a perceived inequity of an accused having to pay for his or her release from jail. To entice decision makers at the state level (read legislators) these social justice reformers bury their primary concern under a shroud of penological inefficiency and claim that 63% of persons incarcerated in county jails are in custody for the sole reason that they cannot afford bail.

If 63% of the county jail population is behind bars solely because of the inequities surrounding the setting and posting of bail, the Nevada bail industry fully supports change. Identifying what changes to make is one area of disagreement.

The challenge that reform of any field presents is to fully understand what the problem is and its causes. This essential step has been overlooked. With the fervor that accompanies most passions, these social justice reformers ignore the role accountability should play in a criminal justice system. To be sure, there are ways the bail system may be made more efficient and equitable. The Nevada bail industry has several suggestions that will make bail more affordable, retain accountability, and leave an essential tool in a jail manager's tool box.

The Unsentenced Population

As of December 2015 (the latest date for which such information is available) in California, nearly a quarter (22%) of prisoners incarcerated in county jails are held in the Los Angeles county jail system. In 2011, at the dawn of Realignment, Los Angeles County and the ACLU co-funded a jail population study. JFA Institute conducted the study and found that 70% of the jail population was in pretrial status. However, that number "included inmates who have been sentenced to one or more charges and have at least one pending charge." When pretrial inmates simultaneously serving a sentenced were accounted for, the "percentage of 'pure' pretrial cases [was] 45% and not 70%." Further, 25% of the pure pretrial inmates "had a 'no bail' order imposed by the court."¹

The JFA Institute also found that "about half of the pretrial and pretrial/sentenced populations [were] charged with violent or sex crimes." Since a "vast majority (66%) of the releases are people being released...(pretrial)," the JFA Institute studied "pure" pretrial that remained in custody for at least 7 days. Of that sampling (10,545), only 12.9% (1,367) of the defendants were eligible to be released pretrial. The remaining 87.1% of the inmates either had

¹ The JFA Institute, "Evaluation of the Current and Future Los Angeles County Jail Population" (April 10, 2012), P. 18-19, Available at: https://www.aclu.org/files/assets/austin_report_20120410.pdf.

no-bail holds imposed by a judge, were serving a sentence on another matter, had an outstanding warrant from another county, had a violent, assaultive crime, or was classified as “high security”².

The JFA Institute study was conducted during the initial weeks and months of California’s Realignment of the criminal justice system, and years before Propositions 47, 57, and 64. The jail populations have changed dramatically as a result of each tweak to the criminal justice system. The cumulative effect of these reforms is staggering, but no wide-scale study designed to capture the contours of the unsentenced population has been conducted since these reforms have been implemented.

Alternatives to Bail

The social justice reformers hold up the pretrial detention system in use in Washington, D.C. as the preferred model to manage jail populations. Termed a “Detain or Release” system, it entails the administration of a criminal risk assessment tool and intensive supervision of those deemed worthy of release. For those that the tool deem unworthy, bail is not an option and they remain in custody until their case is resolved. The detain or release model of pretrial management has shown good results. But, such results should be expected when implementation costs are not a concern. D.C. comprises 68 square miles and inhabits 660,000 people. The annual budget for the D.C. detain or release system is \$65 million. Extrapolated on a per population basis, such a system would cost more than \$3.8 billion per year to implement in California.³ The estimated cost in Nevada would be \$268 million.

Furthermore, criminal risk assessments have been shown to discriminate against black defendants.⁴ San Francisco recently adopted the Arnold Foundation’s criminal risk assessment. This risk assessment tool was harshly criticized as unfair and racially discriminatory by San Francisco Public Defender Jeff Adachi:

Even the data-driven part of the tool is suspect. The algorithm inexplicably considers a person with 10 felony convictions to be lower risk than a person with a single felony and a single misdemeanor.⁵

The Surety Bail System

² The JFA Institute, “Evaluation of the Current and Future Los Angeles County Jail Population” (April 10, 2012), p. 25-26, Available at: https://www.aclu.org/files/assets/austin_report_20120410.pdf.

³ Pretrial Services Agency for the District of Columbia, Congressional Budget Justification and Performance Budget Request Fiscal Year 2017 (February 2016), p. 6, Available at: <http://www.psa.gov/sites/default/files/FY2017%20PSA%20Congressional%20Budget%20Submission.pdf>

⁴ Angwin, J., Larson, J., Mattu, S., & Kirchner, L. (2016). Machine Bias. There is software that is used across the county to predict future criminals. And it is biased against blacks. Available at: <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

⁵ Adachi, Jeff, Daily Journal, “Bail algorithm falters on its promise” (August 18, 2016), Available at: <https://dailyjournal.com/public/PubMain.cfm>.

Currently, judges have complete discretion to release a defendant on the defendant's own recognizance if they believe that individual will not harm the community and will appear in court. Bail amounts are set by judges that, by state law, annually create a bail schedule. Still, a judge may raise or lower the bail amount based on individual circumstances. When a defendant is arrested, the bail schedule enacted in the county where the crime occurred determines the bail amount. That amount may be paid in cash, delivered to the jail. Or, it may be posted by pledging real property with an appraised equity value greater than 1½ times the bail amount to the court (after a hearing). Or, bail may be posted by the defendant or his or her family by purchasing a surety bail bond.

If a surety bail bond is posted, the defendant or friends or family will pay 15% of the bail amount to the bail agent. The bail agent delivers to the jail a bond in the full amount of the bail. The bond inures to the benefit of the state should the defendant not appear in court. However, if the bail agent returns the defendant to the jurisdiction of the court within a statutorily prescribed period, then the bond does not have to be paid.

The Nevada bail industry has responsibility for roughly 27,000 defendants at any one time. However, it is not only the bail agents that hold and exercise that responsibility. Each surety bail transaction requires contract terms to be agreed to and signed. In the vast majority of the cases, co-signers are required, usually more than one. The co-signers join the bail agent in the responsibility of ensuring that the terms of bail are met and the defendant makes every one of his or her court appearances. It is estimated that nearly 54,000 family members and friends are supervising the compliance of defendants' bail terms at any one time. They do this because their own assets and good credit standing are guaranteeing the bond amount to the bail agent, while the bail agent, licensed by the state and backed by an admitted surety insurer, are guaranteeing the bond amount to the state. All of this occurs at no cost to the state, or county. All costs related to the posting of bail are borne by the bail industry, supported by the defendant and his or her family and friends.

More than half of the bail agencies in Nevada are small businesses owned by women and minorities. These agencies facilitate the posting of bail and subsequent release from jail for many that could not otherwise afford to post bail. They do so at a small fraction of the full bail amount. And, "market conditions among [bail agencies] may actually reduce discrimination against poor and middle-class defendants." While a judge's setting of bail may create an invidious discriminatory affect upon a defendant, "competition among [bail agencies] serves to lessen the impact of that judicial discrimination."⁶

This is why the bail industry and the bounty hunters it employs have become "indispensable actors in the state's program of pretrial detention."⁷

The Effectiveness of Surety Bail

⁶ Ian Ayres & Joel Waldfogel, A Market Test for Discrimination in Bail Setting, (1994) 46 Stan. L. Rev. 987, 1047, Available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2526&context=fss_papers.

⁷ John A. Chamberlin, Bounty Hunters: Can the Criminal Justice System Live Without Them?, 1998 U. ILL. L. REV. 1175, 1195 (1998).

For more than 20 years, the Bureau of Justice Statistics routinely tracked millions of state court felons to determine the effectiveness of surety bail releases compared to unsecured release in getting defendants back to court. The data from 1990 to 2004 in the nation's 75 largest counties breaks down release types to three categories: surety bond; conditional OR (own recognizance); and unsecured bond. The data shows that surety bond is by far the least prone to failure than all the other forms of release. Failure-to-appear rates were 22% higher for conditional release than surety; 44% higher for recognizance than surety; and 67% higher for unsecured release. The BJS also tracked the percent of absconded defendants that remain fugitives after one year. Again, surety bond has the least percentage of fugitives after one year at 3%. Conditional release had 6%; Recognizance had 8%; and for Unsecured Bond — 10% of absconded defendants remained fugitives after one year.⁸

Professor Alex Tabarrok, a highly respected economist, along with Eric Helland published a report in the University of Chicago Journal of Law and Economics that focused on the difference in effectiveness between public law enforcement and what they termed “private law enforcement” in returning fugitives to justice. Professor Tabarrok and Helland use the term private law enforcement to describe bail agents responsible for returning absconded defendants to court. The authors conclude that “defendants released via surety bond have lower FTA rates than defendants released under other methods.” They go on to say, “[I]f they do fail to appear, they are 53 percent less likely to remain at large for extended periods of time.”⁹

Professor Robert G. Morris of the University of Texas, Dallas conducted a study comparing different pretrial release mechanisms and the differences in failure to appear, recidivism/pretrial misconduct, and associated costs. Professor Morris found that “when comparing similarly situated defendants’ probability of FTA for all case types, defendants released via a commercial bond were significantly and substantively less likely to fail to appear in court...” He then calculated the system-wide cost savings of fewer failures to appear. Using the assumption that the public cost per failure to appear was \$1,775, Morris concluded that using surety bond releases saved Dallas County over \$11.1 million.¹⁰

Conclusion

The Nevada bail industry is a valued partner of and stakeholder in the Nevada criminal justice system. As such, they have worked closely with legislators, sheriffs, district attorneys, public defenders, and victims’ groups over many decades. Several ways have been identified to streamline processes and improve efficiencies. Legislative proposals have been presented in the past and in some cases found opposition from other stakeholders. The time is ripe for

⁸ By Thomas H. Cohen and Brian A. Reaves, "Pretrial Release of Felony Defendants in State Courts," Bureau of Justice Statistics (November 2007), Available at: <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf>.

⁹ Helland and Tabarrok, "The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping" (2004) 47 J.L. & Econ. 93, Available at: <https://mason.gmu.edu/~atabarro/PublicvsPrivate.pdf>.

¹⁰ Robert G. Morris, "Pretrial Release Mechanisms in Dallas County, Texas: Differences in Failure to Appear, Recidivism/Pretrial Misconduct, and Associated Costs of FTA," The University of Texas at Dallas (2013), p. 2-3, Available at: <https://www.utdallas.edu/epps/ccjs/dl/Dallas%20Pretrial%20Release%20Report%20-FINAL%20Jan%202013c.pdf>.

addressing important incarceration policies. But, before real solutions can be found, in-depth study of the jail populations and the many ripples of recent criminal justice reforms must be conducted. Don't let this opportunity be lost in the clatter of over simplified 140-character prescriptions to a disease that has not yet been diagnosed.