THE COLORADO BAIL BOOK

A Defense Practitioner's Guide to Adult Pretrial Release

September 2015

Colorado Criminal Defense Institute

Colorado State Public Defender

National Association of Criminal Defense Lawyers (NACDL)

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

ACKNOWLEDGEMENTS

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

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

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

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A Defense Practitioner's Guide to Adult Pretrial Release

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

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

“As we speak, close to three quarters of a million people reside in America’s jail system . . . Across the country, nearly two thirds of all inmates who crowd our county jails — at an annual cost of roughly nine billion taxpayer dollars — are defendants awaiting trial. . . . Many of these individuals are nonviolent, non-felony offenders, charged with crimes ranging from petty theft to public drug use. And a disproportionate number of them are poor. They are forced to remain in custody . . . because they simply cannot afford to post the bail required.”

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

INTRODUCTION

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

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

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

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

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

THE COLORADO STORY

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

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

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

The Colorado Pretrial Assessment Tool (CPAT)

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

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

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

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

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

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

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

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

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

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

CPAT Items and Scoring

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

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

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

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

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

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

CPAT Risk Categories

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

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

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

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

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

Other Risk Assessment Tools

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

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

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

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

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

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

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

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

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

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

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

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

Note: All statistical comparisons were not statistically significantly different.

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

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

Additionally, the study showed that:

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

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

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

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

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

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

SECTION 1:
THE IMPORTANCE OF LITIGATING PRETRIAL RELEASE

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

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

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

Clients who stay in jail pending trial get longer sentences.

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

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

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

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

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

16. *Id.*

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

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Lawyers Make a Significant Difference at Bail Hearings

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

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

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

SECTION 2:
TOOLS FOR LITIGATING PRETRIAL RELEASE

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

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

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

Tool #1: Initial Client Interview

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

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

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

2.2 NLADA: Initial Interview

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

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

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

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

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

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

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

(B) The Interview:

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

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

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

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

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

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

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

(c) the client's immediate medical needs;

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

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

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

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

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

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

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

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

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

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

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

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

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

Tool #2: Risk Assessment Tools

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

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

Tool #3: Colorado Statutes

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

Overall intent of the new Colorado bail statutes:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Also,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Tool #4: Guiding US and Colorado Constitutional Provisions

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

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

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

Bail/pretrial release is a Constitutional right.

United States Constitution, Eighth Amendment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Counsel at First Appearance is a Constitutional Right

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

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

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

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

Tool #5: Colorado Case Law on Bond

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

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

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

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

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

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

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

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

General Bond Issues

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Specific Law on Juvenile Matters

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

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

Appealing the Court's Bail Order

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

SECTION 3:
ADVOCATING FOR THE CLIENT AT THE BOND HEARING

Making the Argument

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

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

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

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

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

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

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

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

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

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

Specific Problem Areas

Video Bond Hearings

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

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

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

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

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

Over-conditioning

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

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

Use of GPS

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

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

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

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

Cash Only Bonds

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

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

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

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

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

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

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

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

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

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

Victim Rights Act (VRA)

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

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

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

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

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

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

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

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

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

See also Appendix 13 for further arguments on the VRA.

Other Fees/Costs that Keep Clients in Jail

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

SECTION 4:
APPEALING THE COURT'S BAIL ORDER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Contents of petition

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

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

Procedure

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

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

Procedures if filed in District Court

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

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

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

Procedures if filed in Court of Appeals

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

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

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

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

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

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

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

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

Petitions filed pursuant to Colorado Appellate Rule 21

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

District court bail orders

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

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

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

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

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

County court bail orders

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Case Law

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

What is a Surety?

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

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

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

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

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

Bail Forfeiture: "Unjust Enrichment" Issues

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

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

Bail agents challenging Pretrial Service Programs

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

Bail Forfeiture: Notice Requirement Issues

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

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

Refund of Premium

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

Surrender to the Court and Notice

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

CONCLUSION

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

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

October 12, 2012

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

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

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

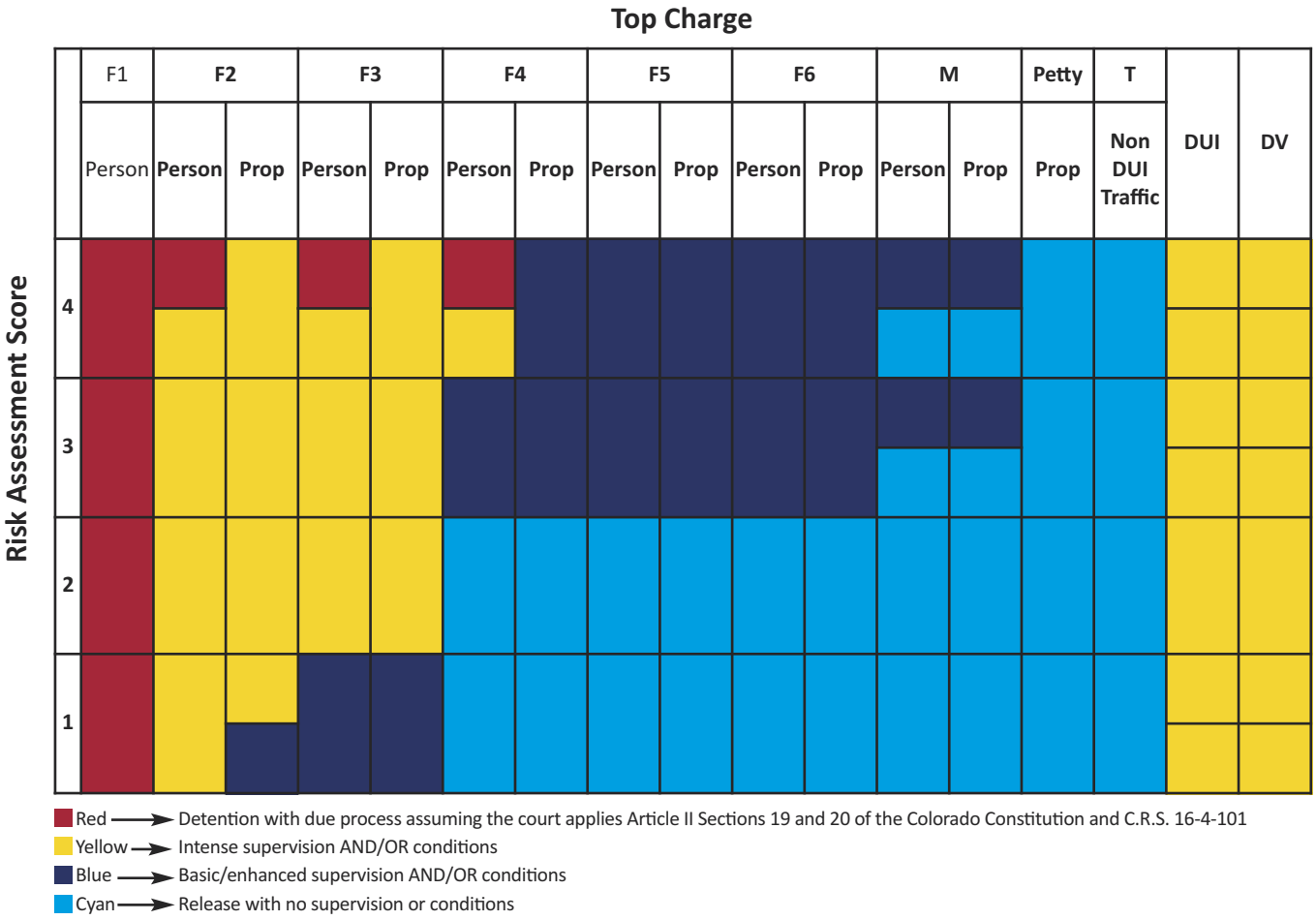
Research undertaken on pretrial defendants in ten Colorado judicial districts indicates that the vast majority of individuals appear in court and remains crime-free during the pretrial period.[3] This research resulted in the development of the Colorado Pretrial Assessment Tool (CPAT), a four-category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

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

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

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

Release Decision Guidelines Matrix



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

Recommendation:

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

Discussion:

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

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

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

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

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

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

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

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

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

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

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

9. See Carlson, 2011.

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

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

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

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

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

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

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

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

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

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

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

APPENDIX 2:
Background Information and Problems with the ODARA Tool

Christopher Richardson, Colorado State Public Defender, Denver County

Background Information

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

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

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

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

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

Bullet Point Problems with the Development of the ODARA

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

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

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

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

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

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

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

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

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

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

Problems with Using ODARA for Bond Determinations.

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

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

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

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

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

Hypothetical Using ODARA Scoring Manual.

Client A:

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

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

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

Client B:

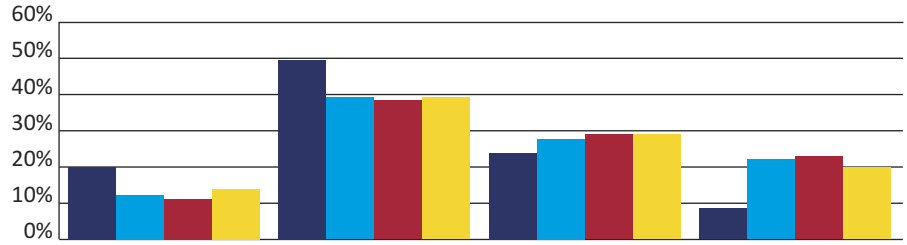
Client is a 61 year old male with a job, one previous misdemeanor conviction. The current allegation involves no visible injuries.

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

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

APPENDIX 3:
Denver CPAT Numbers

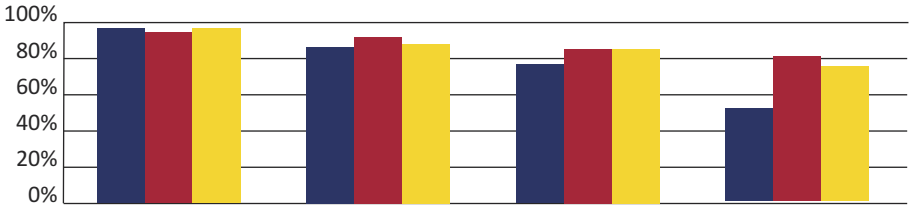
CPAT Assessment Information



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

Denver County Preliminary Statistics as of 06/03/2015

Court Appearance Rates by CPAT Category

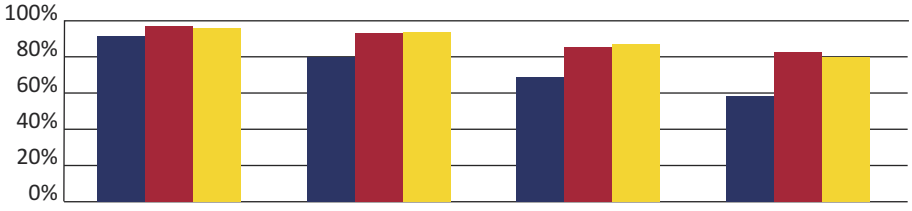


	CPAT 1	CPAT 2	CPAT 3	CPAT 4
CPAT Projected	95%	85%	77%	51%
2013 Actual	93%	89%	84%	80%
2014 Actual	95%	86%	84%	77%

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

Denver County Preliminary Statistics as of 06/03/2015

Public Safety Rates by CPAT Category



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

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

Denver County Preliminary Statistics as of 06/03/2015

Charts provided by Denver County and reformatted for this manual.

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

New Data-Driven Matrix — Implemented January 1, 2015

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

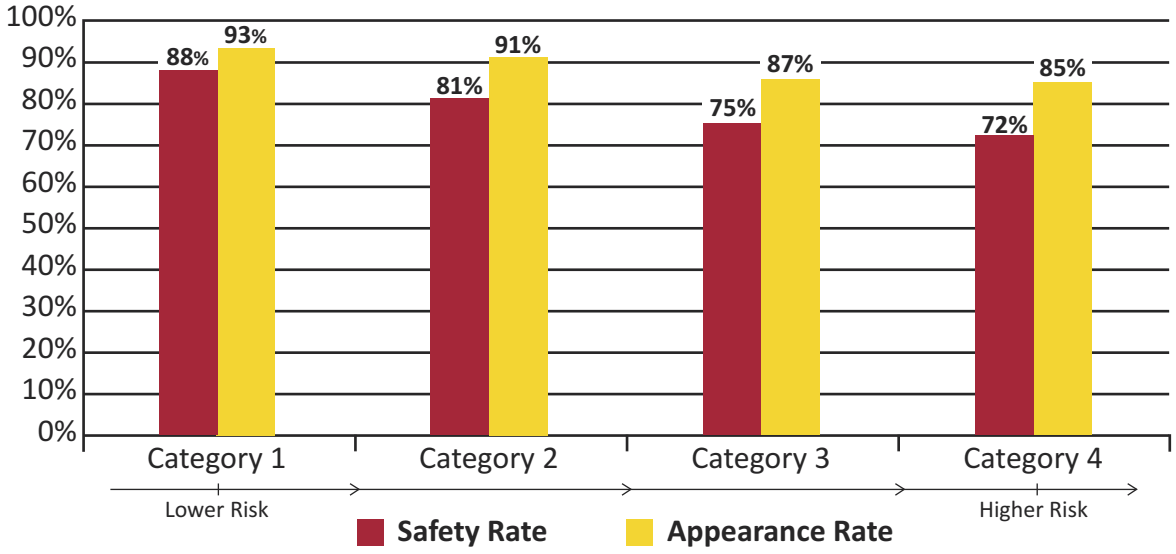
CPAT Risk Category	1 Felony VRA Crimes (C.R.S. 24-4.1-302)	2 Drug Distribution	3 Aggravated DUI & DARP	4 Domestic Violence DVSI 11 or Greater	5 Domestic Violence DVSI 10 or Less	6 Other Felony Crimes & Misdemeanor VRA (C.R.S. 24-4.1-302)	7 Other Misdemeanor & Traffic Offenses
Category 1	PR or Cash Only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

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

No More Money Ranges!

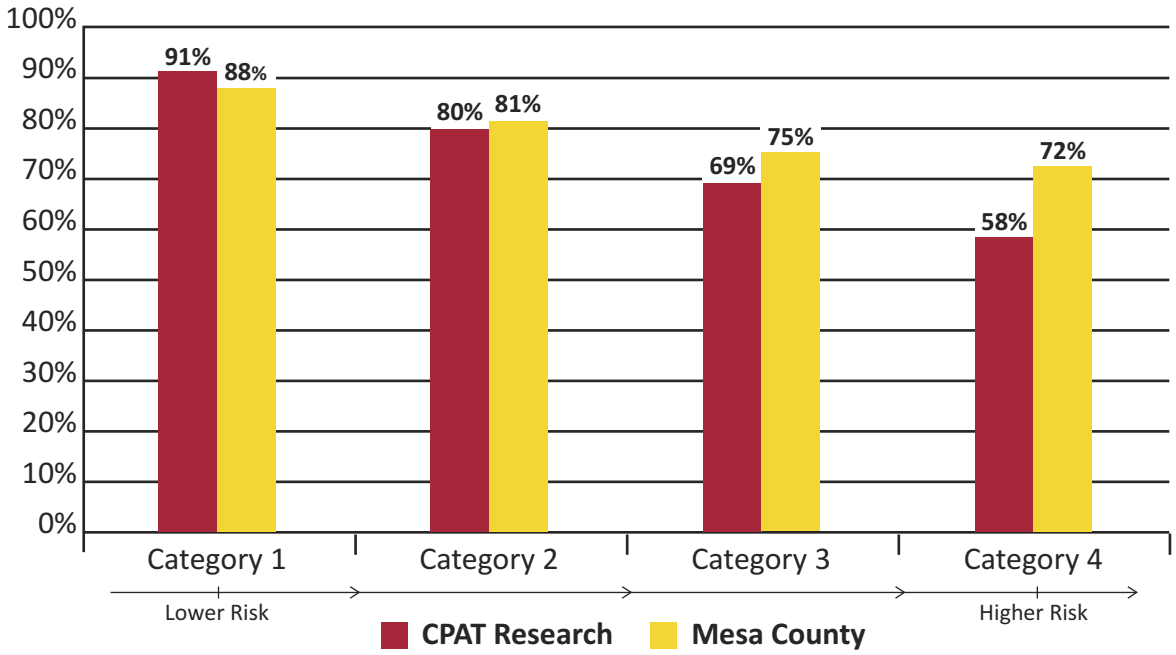
Convincing Local Outcomes of Colorado's Risk Instrument

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



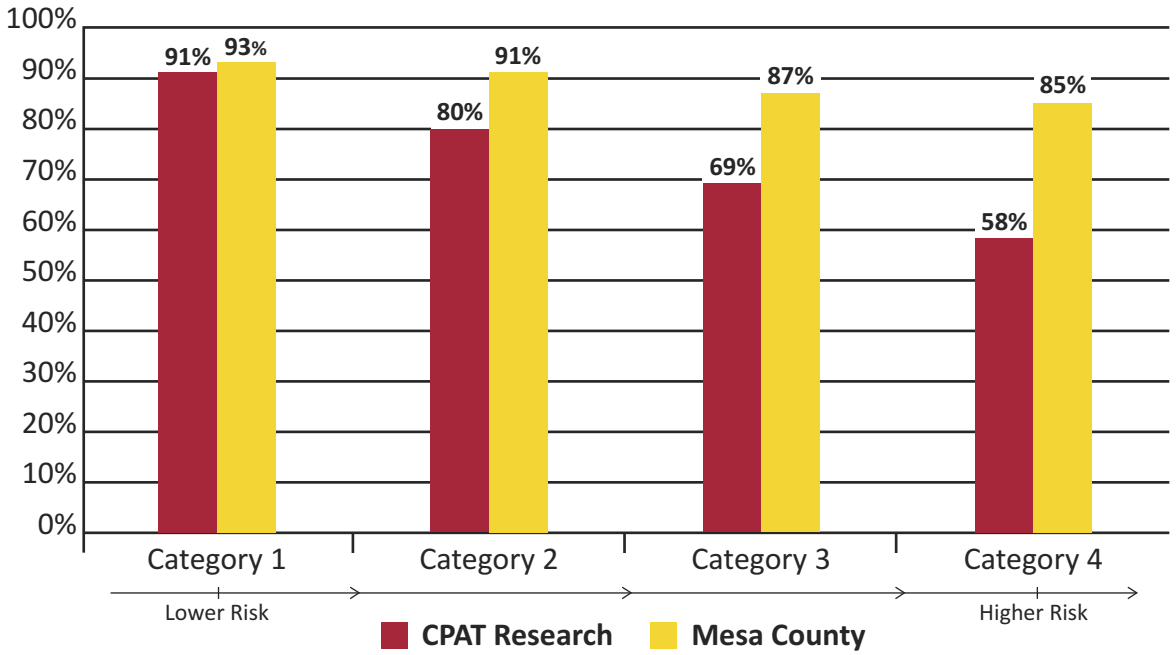
Charts provided by Mesa County and reformatted for this manual.

Colorado Outcomes Vs. Mesa (2014) Public Safety Rates



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

Colorado Outcomes Vs. Mesa Court Appearance Rates

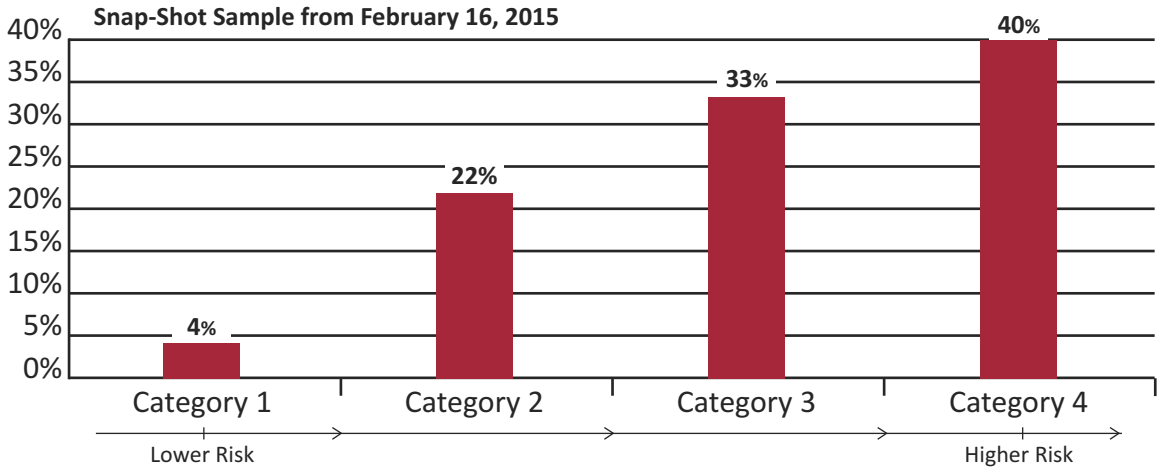


Note: The CPAT study included some minor traffic, cases whereas the Colorado Statute only requires misdemeanor traffic cases to be recorded. This may be reflected in some of the number differences in the above chart.

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

Charts provided by Mesa County and reformatted for this manual.

Mesa County Jail Pretrial Population By Empirical Risk Level



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

Appearance Rates Mesa County and Colorado Secured Verses Unsecured Bonds

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

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

Public Safety Rates Mesa County and Colorado Secured Verses Unsecured Bonds

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

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

Charts provided by Mesa County and reformatted for this manual.

APPENDIX 5:
Client Interview Form For Bail

Name: _____ **Case:** _____

Considerations for Release Argument

Offense(s) charged: _____

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

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

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

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

CRITERIA:

A. Employment status, history of accused: _____

_____

_____

_____

B. Nature and Extent of family relationships:

_____

_____

_____

C. Past and Present Relationships: _____

_____

_____

D. Past and Present Residences: _____

_____

_____

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

_____

_____

_____

F. Current and former drug/alcohol treatment: _____

_____

_____

_____

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

_____

_____

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

_____

_____

_____

I. Prior Criminal History and FTAs: _____

_____

_____

_____

(Continued on next page)

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

_____
_____
_____
_____
_____

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

_____
_____
_____

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

_____
_____
_____
_____

M. Ties to community/community involvement: _____

_____
_____
_____
_____
_____
_____

N. Military service history: _____

_____
_____
_____
_____

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

_____
_____
_____
_____
_____

a. Years in Colorado? Denver? _____

b. Education: _____

c. Pretrial Conditions to ensure appearance: _____

_____
_____
_____
_____

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

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

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

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

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

APPENDIX 7:
Bond Argument Cheat Sheet

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

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

Bond Criteria: (C.R.S. § 16-4-103):

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

Pre-Trial Services Conditions *may* include:

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

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

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

If PR Bond Denied or Unable to Post Bond:

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

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

Bond may be denied:

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

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

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

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

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

APPENDIX 8:
Bond Argument for Misdemeanors in Denver County Court

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

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

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

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

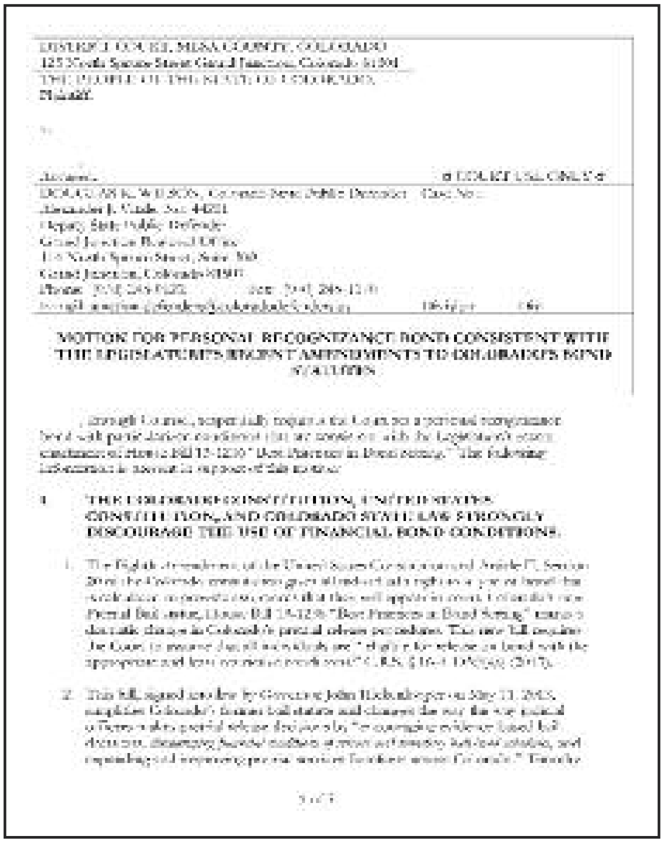
****CPAT Scores ALL OR NOTHING (e.g., 0 pts if no past jail, 4 pts if any past jail)****

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

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

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

APPENDIX 9:
Motion for Personal Recognizance Bond

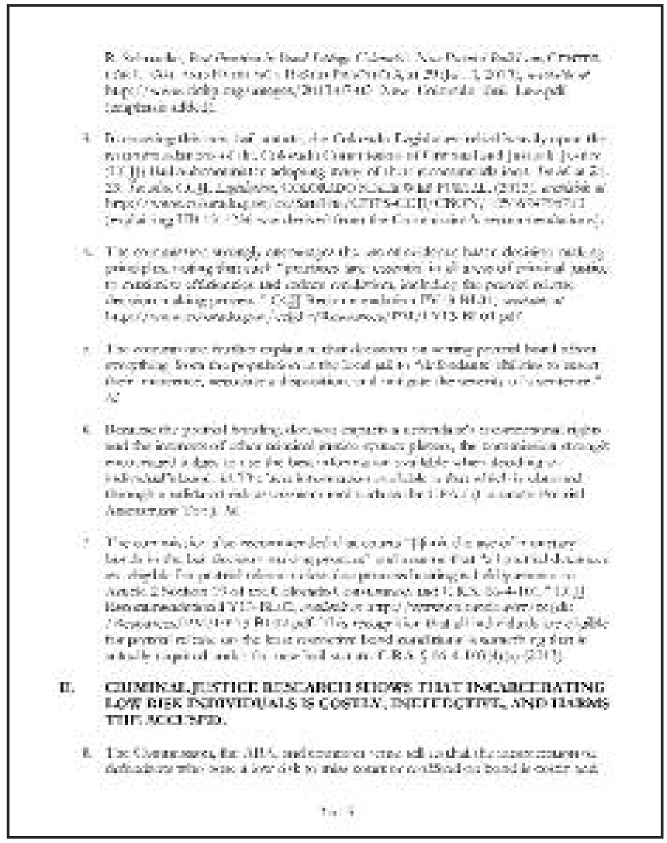

DISTRICT COURT, MESA COUNTY, COLORADO

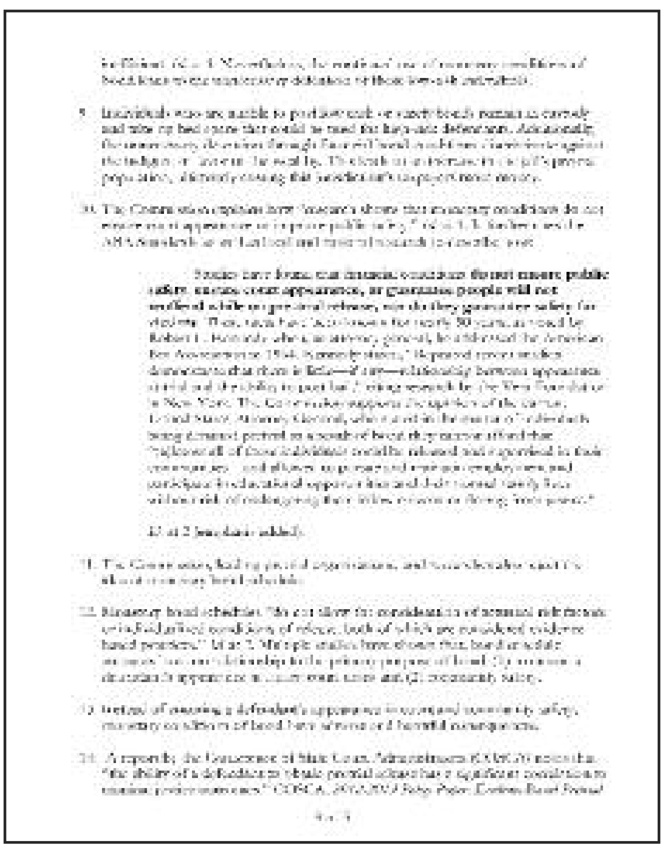
THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff

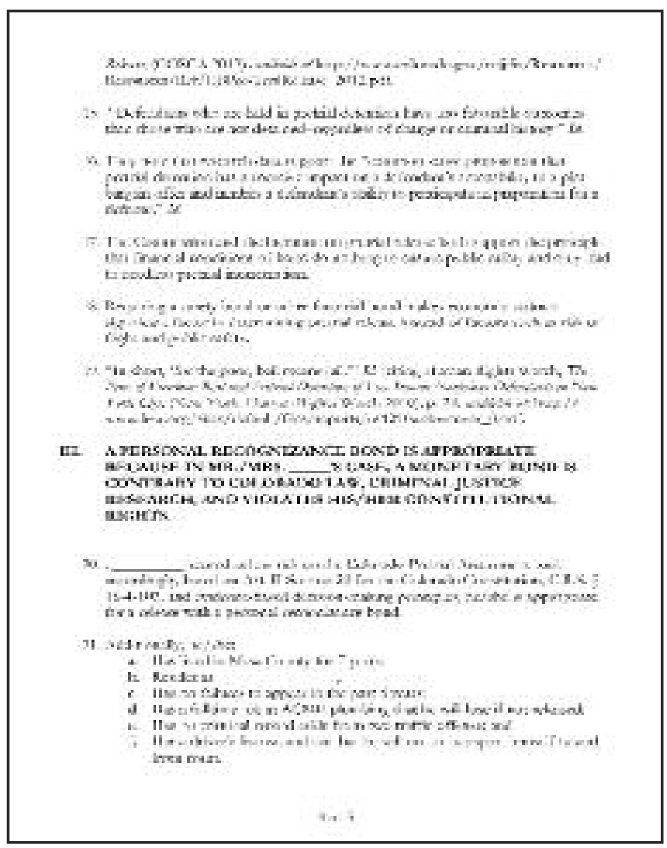
COURT USE ONLY

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

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


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




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

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APPENDIX 9:
Motion for Personal Recognizance Bond (Continued)

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

Respectfully Submitted,

Deputy State Public Defender

Dated: June 21, 20

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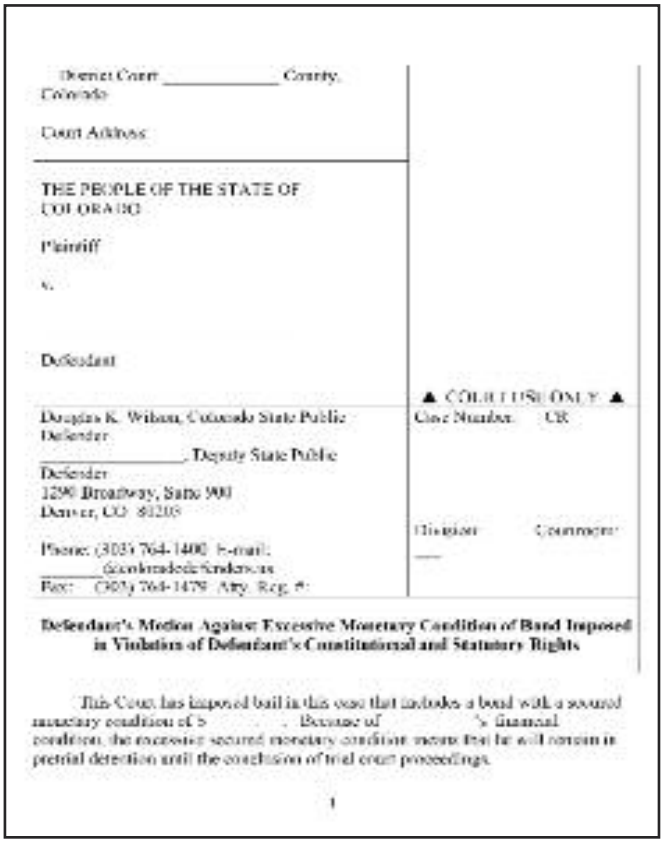
APPENDIX 10:
Motion Against Excessive Monetary Condition of Bond Imposed in Violation of Defendant's Constitutional and Statutory Rights



District Court _____ County, Colorado

Court Address:

THE PEOPLE OF THE STATE OF COLORADO

Plaintiff

v.

Defendant

▲ COURT USE ONLY ▲

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

Case Number: CR

Division: Courtroom:

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

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

1

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

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

A. The United States Constitution.

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

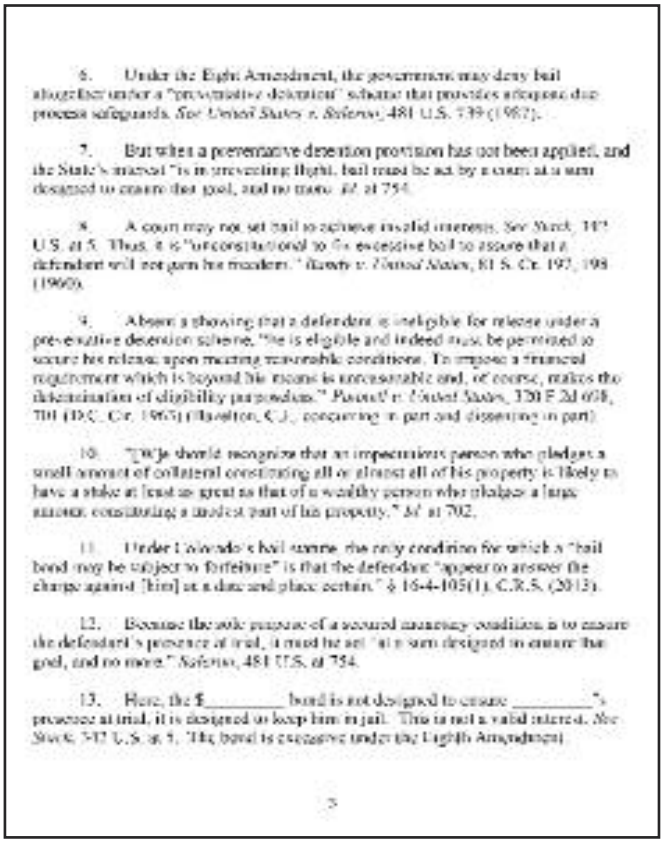
2. "The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. Like the ancient practice of securing oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring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

3. "The practice of release on bail . . . is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the *contrary*, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty." *Id.* at 7-8 (Jackson, J., concurring).

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

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

2



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

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

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

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

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

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

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

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

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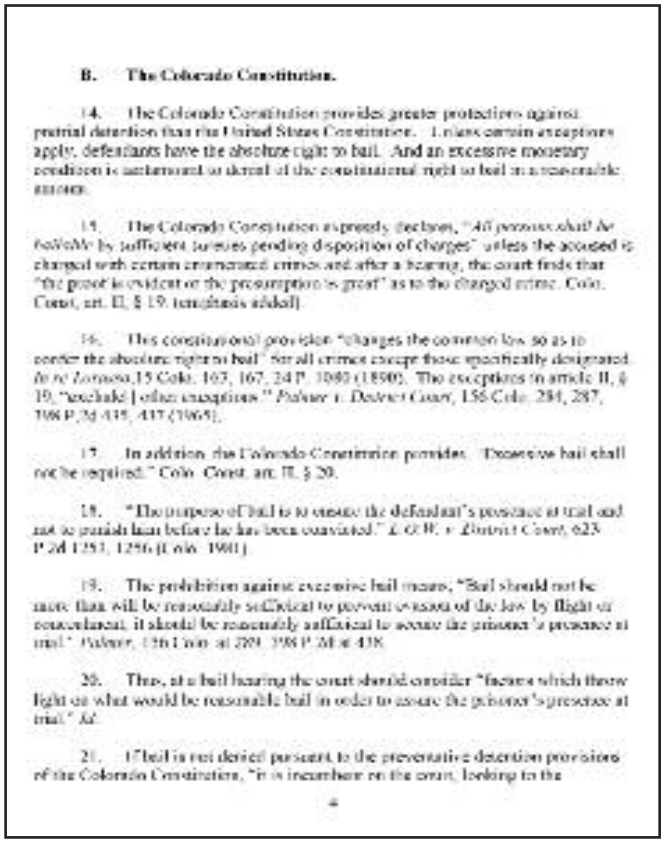

B. The Colorado Constitution.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5

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

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

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

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

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

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

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

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

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

> (4) When the type of bond and conditions of release are determined by the court, the court shall:
> (a) Presume that all persons in custody are eligible for release on bond with the appropriate and least-restrictive conditions consistent with the provisions in paragraph (a) of subsection (2) of this section unless a person is otherwise ineligible for release pursuant to the provisions of section 16-4-101 and section 19 of article II of the Colorado constitution. A monetary condition of release must be reasonable and any other condition of conduct not mandated by statute must be tailored to address a specific concern.

§ 16-4-103(4)(a), C.R.S. (2013).

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

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

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

7

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

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

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

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

IV. Deprivation of defendant's trial rights.

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

42. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895).

43. "Th[e] traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (citing *Hudson v. Parker*, 156 U.S. 277, 285 (1895)).

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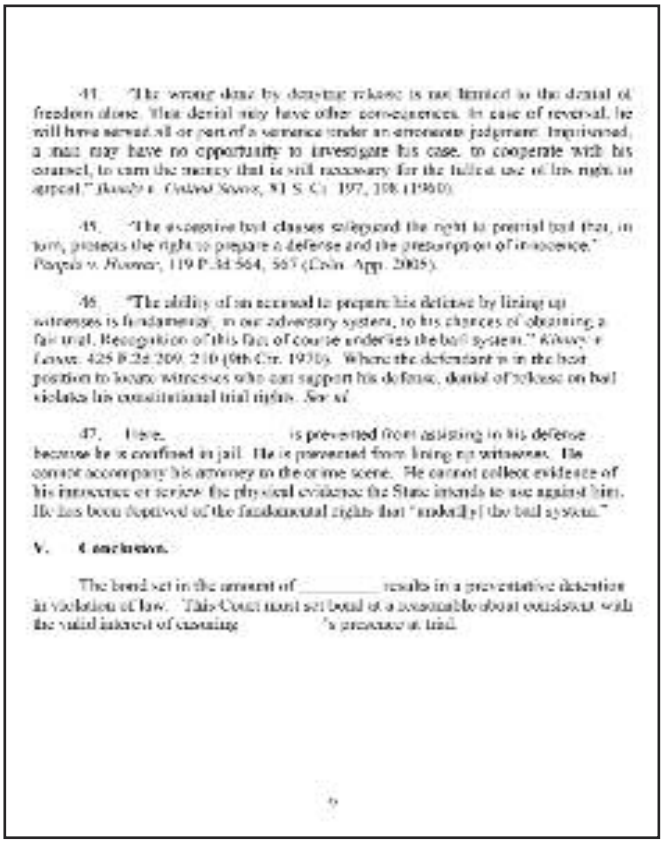
APPENDIX 10:
Motion Against Excessive Monetary Condition of Bond Imposed in Violation of Defendant's Constitutional and Statutory Rights (Continued)



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

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

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

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

V. Conclusion.

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

9

DOUGLAS K. WILSON
Colorado State Public Defender

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

CERTIFICATE OF SERVICE

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

_____

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APPENDIX 11:
Motion Against Cash Only Monetary Condition of Bail

District Court _____ County, Colorado

Court Address:

THE PEOPLE OF THE STATE OF COLORADO

Plaintiff

v.

Defendant

▲ COURT USE ONLY ▲

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

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

Case Number: __CR____

Division: ___
Courtroom: ___

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

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

1

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

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

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

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

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

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

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

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

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

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

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

§ 16-4-104(1)(c), C.R.S.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24. The leading case holding that the "sufficient sureties" clause prohibits "cash only" pretrial bonds is *State v. Brooks*, 604 N.W.2d 345 (Minn. 2000). *See also State v. Hance*, 910 A.2d 874 (Vt. 2006); *Smith v. Leis*, 835 N.E.2d 5 (Ohio 2005); *Iowa v. Hendon*, 654 N.E.2d 541 (Ohio 1995); *State v. Golden*, 546 So.2d 501 (La. 1989); *State v. Rodriguez*, 678 P.2d 280 (Mont. 1981); *Lewis Bail Bond Co. v. Court of Madison County*, 1997 WL 711137 (Tenn. Ct. App. 1997).

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

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

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

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

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

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

30. Other courts agree with this reasoning. *See Hance*, 910 A.2d at 884 ("To construe the 'sufficient sureties' clause as permitting cash-only bail would increase government power to engage in pretrial confinement, a result which cannot be reconciled with the history of the 'sufficient sureties' clause or our own cases discussing bail, in which we have recognized the threat to individual liberty inherent in pretrial detention."); *Anon.*, 659 N.E.2d at 543-44 ("We agree that [the sufficient sureties clause] is silent as to the forms which bail may take . . . . [But] once a judge chooses a [monetary condition of bond] and sets the amount of bond, we find no legitimate purpose in further specifying the form of bond which may be posted. Indeed, the only apparent purpose in requiring a 'cash only' bond to the exclusion of other forms . . . is to restrict the accused's access to surety and, thus, to detain the accused in violation of [the constitution].").

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

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

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

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

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

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

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

C. Conclusion.

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

DOUGLAS K. WILSON

Colorado State Public Defender

_____
ATTORNEY, ATTORNEY ?
[Add office address]

_____
[Add office phone number] ___

CERTIFICATE OF SERVICE

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

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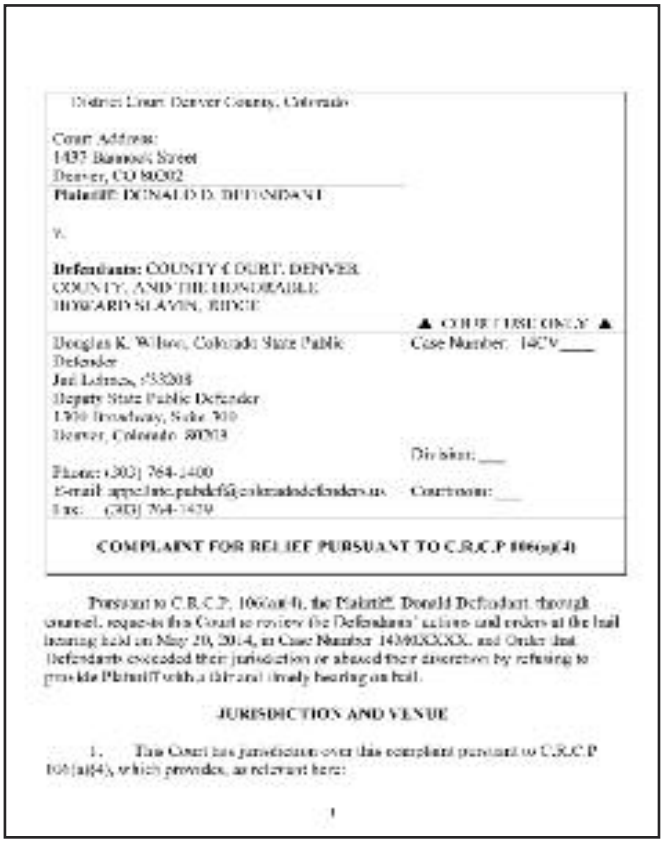
APPENDIX 12:
Complaint for Relief Pursuant to C.R.C.P. 106(a)(4)



District Court, Denver County, Colorado

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

v.

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

▲ COURT USE ONLY ▲

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

Case Number: 14CV____

Division: ___

Courtroom: ___

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

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

JURISDICTION AND VENUE

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

1

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

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

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

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

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

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

GENERAL ALLEGATIONS

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

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

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

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

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

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

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

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

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

FIRST CLAIM FOR RELIEF – BAIL SET WITHOUT HEARING

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THIRD CLAIM FOR RELIEF—STATUTORILY DEFECTIVE BAIL SCHEDULE

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

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

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

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

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

PRAYER FOR RELIEF

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

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

DATED: June _____, 2014.

DOUGLAS K. WILSON
Colorado State Public Defender

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

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

DISTRICT COURT, DENVER COUNTY, COLORADO

Address: [redacted]
Denver, CO 80202

DONALD D. DEFENDANT, Plaintiff,

v.

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

▲ COURT USE ONLY ▲

Case Number: [redacted]

Division: 376

Attorneys for Plaintiff:
[redacted]

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

AMENDED COMPLAINT

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

1

INTRODUCTION

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

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

3. Section 16-4-102 complies with the constitutional command that persons should not be jailed because of their poverty. As the federal government recently stated in an Alabama federal case about improper bail practices: "It is the position of the United States that, as courts have long recognized, any bail or bond scheme that maintains payment of pre-fixed amounts for different offenses in order to gain pre-trial release, without any regard for indigence, not only violates the Fourteenth Amendment's Equal Protection Clause, but also contradicts bail policy." Statement of Interest of the United States, *Walker v. City of Calhoun*, No. 4:15-cv-34-WTM-WC, at 1 (N.D. Ala. Oct. 13, 2015).

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

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

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

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

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

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

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

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

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

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

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

PARTIES, JURISDICTION, AND VENUE

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

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

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

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

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

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

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

FACTUAL ALLEGATIONS

Colorado's Reformed Bond Laws

17. Denver County Court is a court of record.

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

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

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

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

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

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

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

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

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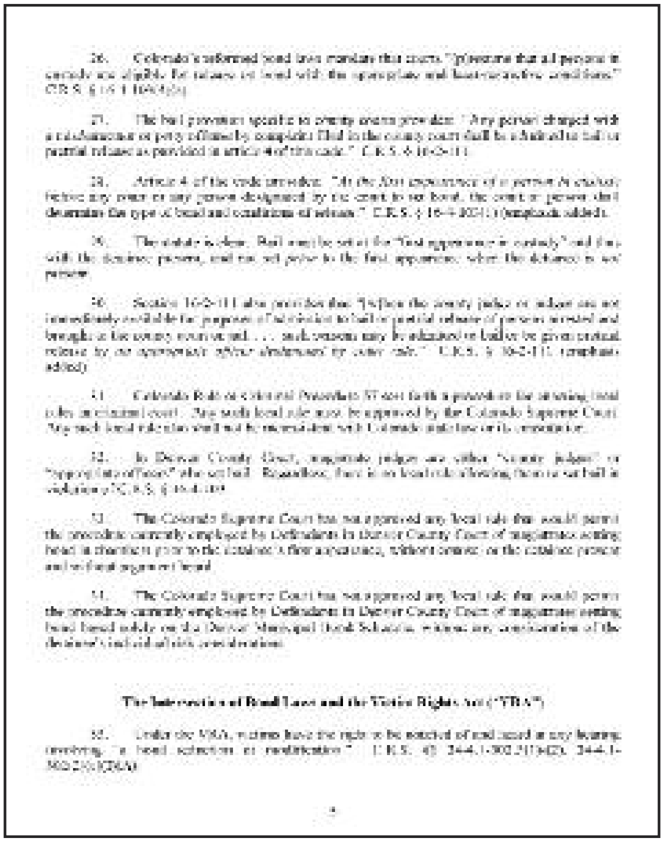
For electronic copies of these motions, please contact the Office of the Colorado State Public Defender.

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



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

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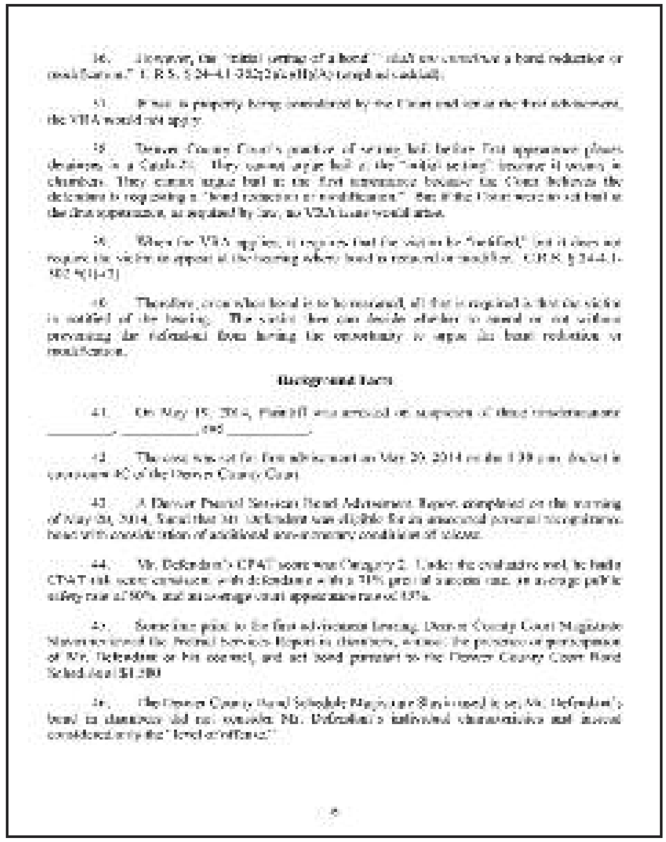

Background Facts

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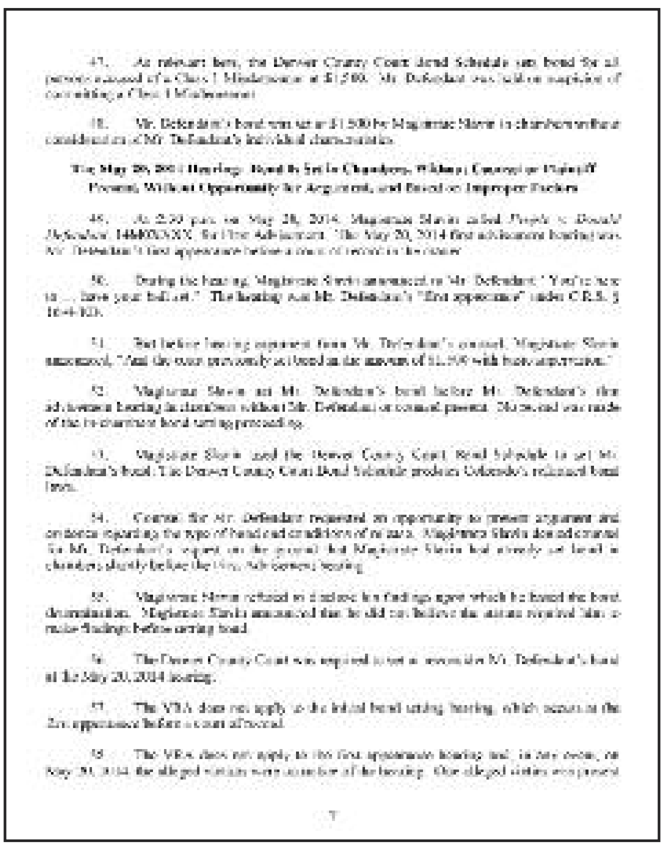

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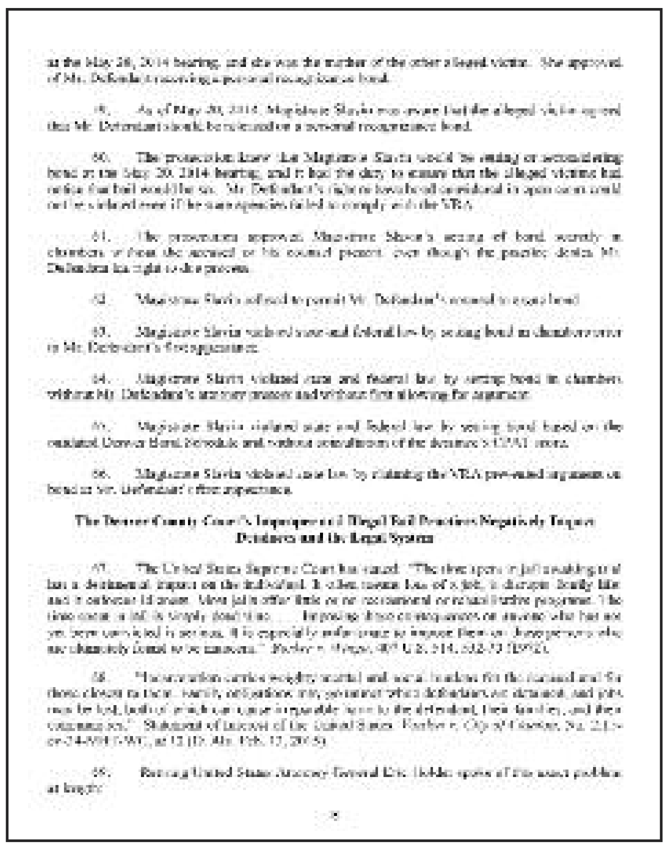

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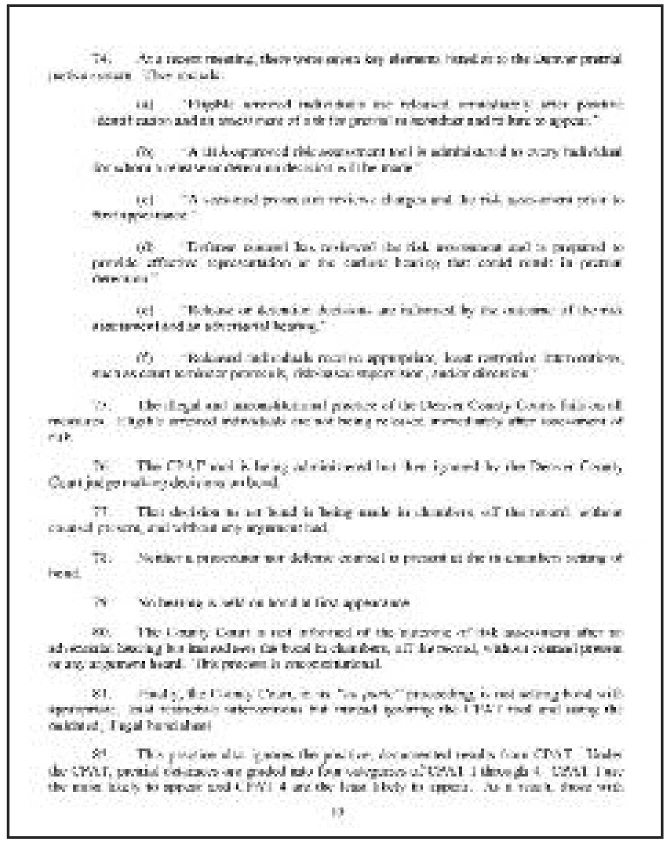
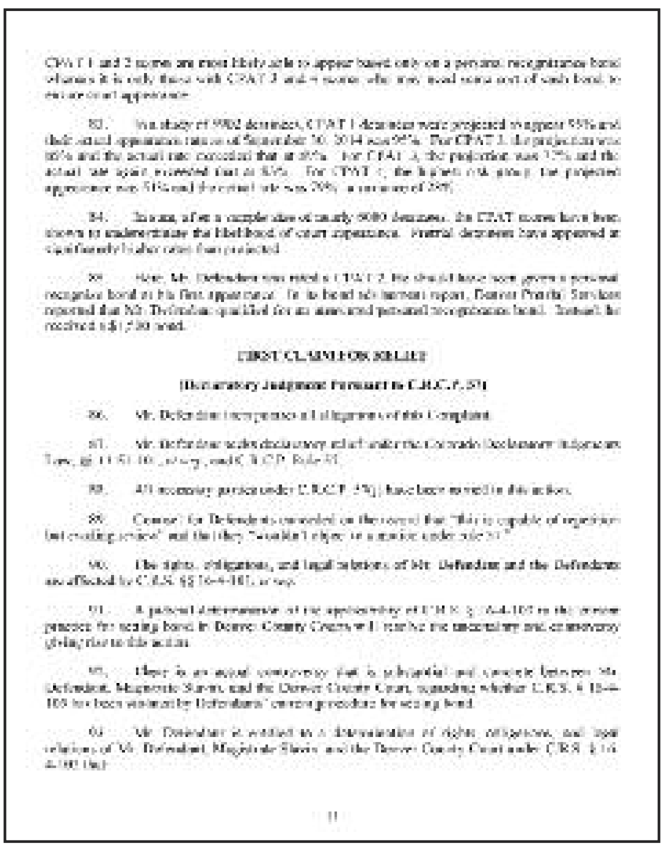
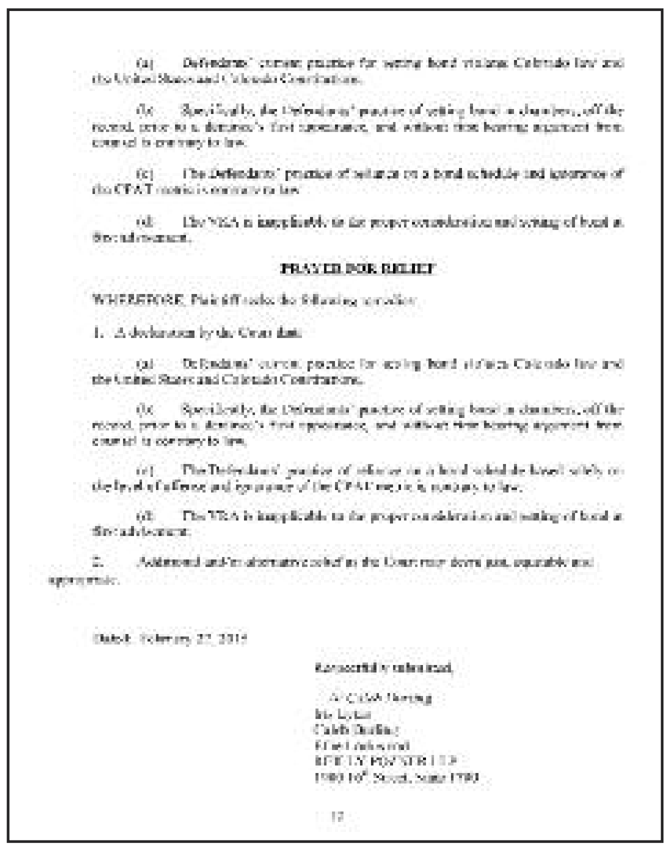
Complaint for Relief Pursuant to C.R.C.P. 57 (Continued)







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

Denver, CO 80202

and

DOUGLAS K. WILSON
Colorado State Public Defender

/s/ Jill Lehmer
Jill Lehmer
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Denver, CO 80203

Attorneys for Plaintiff Donald D. Defendant

Plaintiff's Address:
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Denver, CO 80000

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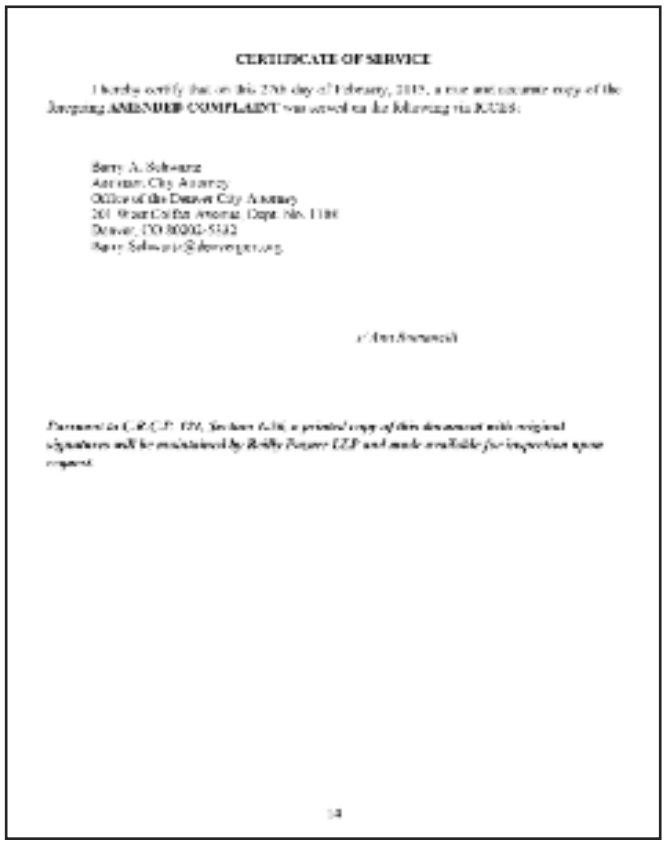

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2015, a true and accurate copy of the foregoing **AMENDED COMPLAINT** was served on the following via ICCES:

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

s/ Jen Swarovski

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

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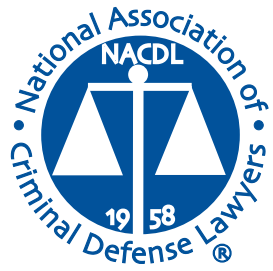
Notes

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

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



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