

**WRITTEN TESTIMONY**

**of**

**The American Bail Coalition**

**Concerning**

**“Exploring Federal Solutions to the State and Local Fugitive Crisis”**

*Senate Judiciary Committee  
Subcommittee on Crime and Drugs*

*0930 Tuesday, January 19<sup>th</sup> 2010*

**National Constitutional Center**

**Philadelphia, Pennsylvania**

**Introduction**

Mr. Chairman, members of the Sub-Committee,

Thank you for the opportunity to address the committee concerning the utilization of commercial surety bonds for release of defendants pending trial.

My name is Dennis Bartlett. I am the executive director of the American Bail Coalition, which is an association of bail insurance companies. Our 13 companies write most of the bail in the US. One of our companies has been doing this for over a century.

**What is a Bail Bond?**

There are at least five methods of pretrial release: (1) release on own recognizance (ROR) [No dollar amount set for bail.], (2) cash bail [Defendant posts full amount of bail.], (3) unsecured financial bail [Defendant posts no dollar amount and is released on promise to appear, upon failure of which, he is obligated for the whole amounts.], (4) cash deposit bail [Defendant pays a small percentage – usually 10% -- of the bond set, which is supposed to be refunded upon appearance (a system commonly used in Philadelphia).], and (5) surety bail [A private party, called a surety, guarantees the appearance of defendant in court, upon the failure of which, the surety pays the court the full amount of the bond]. For the past three decades, the Philadelphia bail system has functioned without benefit of commercial surety bail. \*

Surety bail is the only pretrial method wherein a third party, by means of a written undertaking, financially guarantees to the court the appearance of the defendant. If the defendant does not show, the surety pays.

### **Efficacy of Commercial Bail**

What is the purpose of bail? Is it to sweat plea bargains from defendants, to punish defendants, to enrich the state through forfeitures, to manage jail populations and enhance “system efficiency”, release the highest number of defendants possible? None of the above. The sole purpose of bail is to secure the appearance of the defendant in court. To wit:

*US Court of Appeals 11<sup>th</sup> Circuit in United States v. Diaz says that the primary purpose of bail is to assure the defendant’s appearance at all required court proceedings and trial.*

*In United States v. Ryder, the Supreme Court states: “...the object of bail in criminal cases is to secure the appearance of the principal before the court for purposes of public justice.”*

In achieving this end, the most efficient method of pretrial release is secured release, that is, release on commercial surety bonds. The U.S. government itself has confirmed this. The Bureau of Justice Statistics, using almost 15 years of data, has documented the track record of other methods and commercial bail. The recent BJS study, entitled *State Court Processing Statistics, 1990-2004, Pretrial Release of Felony Defendants in State Courts (November 2007, NJC 214994)*, upholds the assertion that commercial bail is more effective in getting defendants to court and confirms that those released on secured bonds are less likely to commit crimes than those on unsecured release while back on the streets awaiting trial.

What does the Bureau of Justice Statistics Conclude?

*Compared to release on recognizance, defendants on financial release were more likely to make all scheduled court appearances. Defendants released on an unsecured bond or*

*as part of an emergency release were most likely to have a bench warrant issued because they failed to appear in court.*

In addition, one of the authors of the BJS study, Thomas Cohen, J.D., Ph.D., has recently published an academic paper entitled “Commercial Surety Bail and the Problem of Missed Court Appearances and Pretrial Detention”. (Dr. Cohen has written this as a private academician and his views do not represent those of BJS or DOJ). Within his study, Dr. Cohen compares the performance of five counties where surety bail dominates and five where there is little to no surety bail. In Table 3 (p. 14) of the study, the results show that for non-surety counties the failure to appear (FTA) rate is 21% and for surety counties 11%, a ten percent better performance. Also for numbers of skips remaining as fugitives: for non surety – 7%; for surety -- 3%.

Former Attorney General of the United States William P. Barr stated that the bail bond system plays a critical role in the U. S. criminal justice system and wrote in a February 2000 letter to Congressman Charles Canady:

*On the one side of the balance are the rights of accused persons to be released on reasonable bail pending their trials. The Bail Clause of the Eighth Amendment to the Constitution embodies the long Anglo-American legal tradition favoring pre-trial release of accused persons. Bail insurers make this a reality by providing a financial service that permits such persons to post bail. The bail bond system thus performs an extraordinarily valuable public service by permitting accused persons to participate more fully in their own defense while at the same time freeing up crowded jail space. On the other side of the balance are the interests of the people as a whole in ensuring the persons accused of crimes appear for trial and that fugitives be returned to justice. Bail insurers provide appropriate assurances to the state that an accused person will appear as scheduled to answer charges. If the defendant “skips”, the bondsman has significant financial incentives to take investigative steps to insure his return. These efforts are credited with recovering approximately 35,000 fugitives each year. Without their efforts, these fugitives would either remain at large or significant state and local police resources would need to be diverted from other law enforcement activities to secure their capture. In short, the system works well, returning many fugitives to custody at no cost to the government and with a low rate of abuse.*

Not only the U.S. Government, but the academic community as well, has weighed in on the side of commercial bail. In April 2004, the University of Chicago Law School’s *The Journal of Law and Economics* (Vol XLVII [1]) published an article entitled “The Fugitive: Evidence on Public versus Private Law Enforcement from Bail Jumping” by two economic professors, Eric Helland and Alexander Tabarrok. They conclude:

*Defendants released on surety bond are 28 percent less likely to fail to appear than similar defendants released on their own recognizance, and if they do fail to appear, they are 53 percent less likely to remain at large for extended periods of time... Given that a defendant skips town, however, the probability of recapture is much higher for those defendants released on a surety bond. As a result, the probability of being a fugitive is*

*64 percent lower for those released on surety bond...These findings indicate that bond dealers and bail enforcement agents...are effective at discouraging flight and at recapturing defendants.*

Hence it is clear that commercial surety bail does very well what it is supposed to do. Return defendants to court.

## **Cost**

What would commercial bail cost the city? Nothing, in fact, the city stands to gain revenue.

Commercial bail agencies are private entities that bear all their own costs. No tax dollars go towards their operation.

As mentioned above, there is no question that in terms of release pending trial, commercial bail has the imprimatur of the Department of Justice's Bureau of Justice Statistics as the most effective method. Commercial bail brings to court more defendants (who commit less crimes while out) than any other method. Hence, among pretrial release mechanisms, commercial bail is the best method for stemming the social costs in terms of public safety.

What about dollars? What are the fiscal costs to Philadelphia without commercial bail? The loss of over \$1 billion in uncollected forfeitures is shocking enough. But what about those expenses just attributable to a failure to appear (FTA)? That is, the administrative costs of skipping court dates, the cost of no-shows, and the cost of jail cells for re-committed skips. A cost of an FTA is calculated in loss of time for attorneys, judges, court officers, witnesses, and law enforcement. In 1997 Michael Block, an economics professor at the University of Arizona, and a former Arizona deputy attorney general, Steve Twist, wrote a study on the costs of FTA's. Entitled *Runaway Losses*, the study established the cost of each FTA in the Los Angeles criminal justice system. The result: each FTA cost circa \$1,300. The current cost of an FTA today might vary according to each jurisdiction (and, in fact, might be less), but if multiplied by, say 50,000 FTA's, it annually would be an astounding sum, not to mention the dislocation to the courts.

Commercial bail would staunch Philadelphia's hemorrhage of FTA's right up front. Out of every 100 defendants released on a secured bond, it is estimated by industry performance in other states, that only eight will skip and of this hand full, all but two eventually will be recovered. In contrast, use of the current ten percent deposit bail method in the 23 states where it is permitted, results in a flood of FTA's. In some jurisdictions, such as Cleveland, Ohio, it runs as high as 50%, that is, one out of two released does not return. Also, a lower FTA rate, occasioned by commercial bail, means reduced jail occupancy. Those defendants on release pending trial on a secured bond are less likely to skip and less likely to commit crimes while back on the street.

Commercial bail is an insurance policy written in favor of the state. If the defendant does not appear and a forfeiture judgment is executed, commercial bail pays the amount of the bond, e.g. if the bond is \$50,000, commercial bail pays \$50,000 cash. And if the commercial bail entity does not pay, the license for writing bail bonds is revoked. Hence, there is a powerful financial incentive to recover the absconder, and if this fails, there is a stronger incentive to pay the forfeiture necessary to stay in business.

In contrast, under Philadelphia's current system, if the defendant absconds, the city is out 90% of the bond if the ten percent method is used, and 100% if other methods like own recognizance are used.

Under commercial bonds, the numbers of forfeitures would be reduced right up front because of the lower FTA rates. However, for those defendants who skip and are never recovered, the surety will pay up.

Another source of revenue would be the licensing fees. In addition, insurance companies will pay premium taxes on the bonds they write.

If commercial bail is so efficient in recovering fugitives, won't this clog up the already overcrowded jails? When they are on the loose, skips, of course, occupy no jail space. The problem arises when they are returned to custody. In the first place there will be a lower number of skips, at maximum perhaps eight out of a hundred. And some of these will be re-bonded out. Hence, this cohort of returned skips is more than offset by the numbers who will be not confined while awaiting trial.

Furthermore, the cost of recovering fugitives is borne solely by the bonding agent and not by the state. Under the current system the city must either recover the fugitive by means of law enforcement resources, or in the case of extradition, pay all costs involved.

Hence, commercial bail not only will **not** cost the city dollars, but also in fact, will bring in new revenue through fees, forfeitures, and premium taxes.

### **Replace Pretrial Services?**

There is no intention on the part of the commercial surety bail industry to replace the Philadelphia's current pretrial release system. That would be totally unrealistic and cause a severe dislocation in the court and criminal justice system. But there are cases in which the option of using a commercial surety bond would greatly assist the court. Example: A defendant arrested in Philadelphia often is discovered to have multiple failures to appear, each one for a further offense committed while pending trial for the previous release. With a commercial bond, the bonding agent would have a financial incentive to insure that that defendant makes his first court appearance. Under the current system there is little motivation for the defendant to appear, ever. Such lassitude brings disrespect for the law and the authority of the court.

While it is a fact that pretrial services aspire to eliminate commercial bail (standard V of the National Association of Pretrial Service Agencies calls for the elimination of commercial bail), the reverse is not true. Pretrial services should be lauded for their work with the indigent, homeless, and the mentally ill, and for defense of defendant's rights. Commercial bail's objections to pretrial services essentially are twofold: (1) pretrial services' demand for the abolition of commercial bail, and (2) bonding out defendants financially capable of purchasing a commercial bail bond.

### **Where Did Government Funded Pretrial Services (PTS) Come From?**

PTS got its start with the bail reform movement in the Sixties. They originally were set up to help the poor person sitting in jail who could not afford bail, namely, indigent first time non violent offenders. Nobody had any argument with this then, nor do they now. But over the past four decades, PTS has expanded in size and mission, and furthermore, has established as one of its goals the nationwide abolition of commercial bail. PTS advocates want to replace the national network of circa 14,000 bail agents (50% of whom are women) and 10,000 staffers with government agencies.

According to the Pretrial Justice Institute, currently there are about 300 PTS operations scattered throughout the US. (There are 3600 counties in the US.). They range in size from hundreds of employees with multimillion-dollar budgets to small part time operations. They cost the public close to \$100 million per annum. As large as this is, it is a far cry from aspiration entertained by the early proponents of the bail reform movement who advocated the excision of commercial bail to be exchanged for a PTS program in every jurisdiction. Not only has commercial bail not faded away, it has flourished in all states with the exception of Illinois, Kentucky, Oregon, and Wisconsin. In fact, since 1990, the courts' use of commercial bail bonds almost has doubled.. Nationwide, the number of transactions in commercial bail dwarfs those of pretrial services. Has commercial bail survived due to the cunning of its practitioners? Commercial bail has vigorously contested its right to exist, but there is more behind its success than the wiles of bail bondsmen. The ultimate arbiters of commercial bail's fate are public officials in all three branches of government. And in 46 states they generally agree to one thing about commercial bail: it works. It does what it is designed to do -- get people back to court on time

### **Objections to Commercial Surety Bail**

*Bail agents determine who gets out of jail and who does not, and, furthermore, such a third party should not be invested with this type of decision-making authority. That the bail agent makes this call is nonsense. It is the court that makes that decision. The bail agent does not even enter into the picture until the court has deemed the defendant eligible for release pending trial, and has set the bond amount.*

*Bail agents are accountable to no one. Bail agents sell an insurance product, a bail bond. At a minimum, agents have to meet the state's licensing and continuing education requirements. They have to comply with other regulations pursuant to business and*

professional codes. In addition they have to honor their contractual requirement with the courts and their insurance company on every bond they write. And their insurance companies have to be admitted to practice in each state and meet that state's fiscal requirements and submit quarterly financial statements. They are subject to tax on insurance premiums and exposed to legal liabilities like any other business. If their client skips they have to pay a forfeiture in favor of the state.

*The taking of collateral by the bonding agent reduces his incentive to recover an absconder.* The effort and legal expense of trying to litigate liquidation of a defendant's collateral to cover the losses of a forfeiture are way out of proportion to the effort required to apprehend the skip. It is so bothersome that the agent often finds it more expedient to accept the loss rather than to recover the collateral. It's much easier to track down a skip, regardless of how bothersome and expensive, than try to cash in the collateral. This argument also fails to consider the equally as important reason for the taking of collateral -- the development of other parties to share the economic concerns for appearance. If a criminal defendant has no one in the community willing to stand by him financially, it perhaps speaks volumes as to the defendant's standing within the community. If no family is willing to do so, often times this is indicative of the defendant's previous failures, which speak to the likelihood of a future failure to appear. A government funded pretrial release program brings neither of these controls to the table.

*The vast majority of FTA's are apprehended by law enforcement.* This is also an exaggeration. When people abscond, a warrant is issued for their arrest. It is entered into a national criminal justice data base, called the NCIC and administered by the FBI. It is accessible to law enforcement nationwide. The warrant squads of most law enforcement agencies are minimally staffed and the pursuit of skips is a low priority for police. They don't have the resources to chase fugitives. The only place they are likely to re-arrest an absconder is at a random traffic stop or during apprehension for another offense. In the commercial bail industry, due to the existence of a financial incentive for returning the skip to court, apprehension of the absconder is the highest priority for a bondsman. Bail agents return close to 97%-98% of their skips. Evidence suggests fugitives thrive and find safe haven in jurisdictions that have no commercial bail, such as Philadelphia, Chicago, Washington, DC, and Multnomah County, Oregon.

*The court surrenders its release power to a private entity.* The court "surrenders" no release power to a bail agent. The decision whether a defendant is to be released lies exclusively with the court. The relationship of the bail agent to the court is contractual for a single purpose: that the defendant appears in court. Unacceptable risk is the sole reason a bondsman would refuse to bond out a defendant. The bail agent is under no obligation to assume the risk any more than an insurance company is obliged to write an automobile policy for person with multiple DUI's. PTS says that by refusing to assume such a risk, the bail agent is overriding a judicial order. This is not "fair" according to PTS. This concept of fairness, subjective, free floating and abstract, is without roots in either criminal or civil law.

*Some bonds are so low that a bail agent will not take the trouble to write them* thereby forcing the defendant to stay in jail. This opinion is uninformed and reflects the thought -- "It's too much trouble." There is **no** bond so low that a bail agent will not write it. Within the commercial bail industry, examples abound with evidence that small bonds lead to larger bonds. Free market pressures assure that someone will write the small bond in hopes of developing a business relationship for the future.

*The commercial bonding system is filled with corruption and opportunities for corruption.* In this respect, the bonding community differs little from any other. Corruption is no more prevalent in commercial bail than in any other business or the courts, law enforcement, corrections, and so forth. The solution is not abolition of same, but to clean them up. For the most part commercial bail polices its own. Bondsmen don't cover for their own just because they are bondsmen. They are the first to approach authorities about corrupt colleagues. Commercial bail is competitive. Why allow another bondsman to obtain and or maintain an edge over you in the market through corrupt practices? Opponents also claims that commercial bail is like prostitution -- abuses are intrinsic to system. That is, wherever you find commercial bail, you find corruption. If this were the case, commercial bail would have disappeared decades ago. Neither the public nor public officials would have tolerated a business to operate openly that of its very nature is corrupt. Ironically, where commercial bail is prohibited in favor exclusively of government run pretrial services agencies like in Chicago, Portland, Oregon, and Philadelphia, an illegal bonding variant flourishes in the shadows like prostitution. Loan sharks put up the cash for bail for defendants and their families at exorbitant interest rates.

*Criminal justice professionals are unanimous in their belief that commercial bail is an obsolete and antiquated system.* This is hardly the case as evinced by the fact that within the judicial systems in 46 states where the use of commercially secured bonds is not only allowed, but the use of commercial bail has doubled since the early 1990's.

*Money bail does not work.* There is a shred of truth in this claim. If the financial condition of release used is the ten percent deposit bail option, it's true that money bail does not work. Criminals love this method. They get out of jail for one tenth the cost of the bond and there is almost nobody to pursue them. Many criminals, especially those in the illicit drug trade, consider the ten percent bail option just the cost of doing business.

*What about the poor?* Alexander Hamilton said that when you have liberty you have disparity of wealth. Hence, there are always going to be indigent or poor defendants. Pretrial services were established to handle the truly indigent. Commercial bail also helps the poor, through no interest easy credit terms. And families step up to the plate. Isn't this a burden on families? Of course it is. But name a family that does not willingly bear burdens for loved ones. That's what families are for, be it getting a kid out of trouble, paying orthodontic bills, assuming those backbreaking student loans, or that all time gut wrencher -- co-signing for your kid's first auto loan.

*Isn't bail paying to get out of jail?* Though out confinement, a defendant released on bail technically is still in legal custody. The conditions of confinement have changed. A surety bail bond basically is an insurance policy to guarantee the defendant's appearance. It's analogous to having a car insurance policy to exercise the freedom to drive.

*The bonding community makes money off the misfortunes of others.* In this respect, commercial bonding is little different from physicians, attorneys, mechanics, plumbers, laundries, Merrimaids, and technogeeks. Almost every profession or business is reparative in that it fixes something. And, furthermore, and when you receive such a service, you should not be surprised when you have to pay for it.

*Bondmen are low-lives.* There is no doubt that the commercial bonding profession suffers from a poor image problem due unflattering representations in the media, movies, and television. Several decades ago, this image perhaps comported with reality. Today, however, commercial bonding is complex, demanding, and highly professionalized. It employs staffs of attorneys, accountants, insurance specialists, investigators, and IT personnel to track the status of millions of transactions. However, even if it were true that bondsmen were lowlives, it's irrelevant. Your garbage man might have a degree in comparative literature, but what you want from him is that he cleans up your trash.

### **But What Does Commercial Bail Bring to the Table?**

*Bondsmen are a necessary and integral part of the pretrial process.* They help the court maintain a social control over the defendant in a manner unknown to PTS bureaucracies. The participation of friends and relatives is vital to both the court and bondsman by providing additional follow-up to insure the defendant's appearance in court.

*Local law enforcement is strapped for resources and bondsmen fill the gap by apprehending absconded defendants.* Bondsmen also assist the court to resolve mistaken and erroneous court dates. The bonding industry also helps ease the pressures of jail overcrowding by taking responsibility for defendants that the court could otherwise not release.

*A judge has an incentive to use a bondsman in that the responsibility for the defendant's release is shared with the bondsman.*

*Bondsmen deal with the reality as they find it.* They do not determine who is arrested or on what charges, they do not create the court or dictate its release policies or set its bonds.

*Commercial surety bonds are solvent.* Upon the execution of a forfeiture judgment, the bond is vacated with a cash payment made to the state.

Commercial bail has a long history in America. It was an outgrowth of medieval English common law in which a surety guaranteed a defendant's appearance to answer charges.

It was a natural market driven development. There was a need and private enterprise stepped in to provide the service. Early on in American history, corporations with enough capital and authority to become surety for others served the public interest. They were able to charge a premium for the service. Instead of burdening friends and family, those in need of surety could go to a company specializing in that business. Furthermore, the law provided protection to those for whose benefit the bond was written. Well over a century ago surety bail had become well established and most of the states had enacted statutes allowing public authorities to accept corporate surety bail bonds.

In contrast, the aspiration of the advocates of government run pretrial services to eliminate financial bonding is a concept foreign to American legal tradition. Though touted under the shibboleth of bail reform, pretrial services did not organically develop from within the American system and constitutes a foreign body on the corpus of American law. Perhaps this explains its failure and the lack of adoption by most jurisdictions. In point of fact, PTS has survived because it has gone into the bail bond business itself. Despite aspirations to non financial means of release and sugar-coating the reality with phrases like “least restrictive means of release”, PTS uses financial means of release, the most common of which is the ten percent cash deposit bail bond. (By means of this method, the defendant is released from custody after depositing with the court an amount equal to 10% of the bond. If all appearances are made, the court promises to refund the deposit.) But a PTS 10% deposit bond is worthless paper, in effect, a junk bond. In the event of an absconded defendant, the bond cannot be forfeited except pro forma because it has no financial backing. No one has assumed responsibility for the 90% balance of the bond other than the defendant himself and he’s gone. That is, nobody pays any penalty. (More seriously, this lapse prejudices the state -- both the defendant and the money are lost.) The bottom line, however, is that PTS ends up running a financial bail bond operation funded by taxpayers, trying to duplicate the private sector equivalent. Furthermore, in many instances, court costs, fines, attorney fees are now routinely being deducted from the funds on deposit, effectively eliminating the promise of a refund made at the outset of the transaction.

### **New and Hopeful Trend**

PTS and commercial bail share the same goals for release pending trial, which is: to release all defendants who are not a threat to public safety nor a flight risk. Competition between the two is wasteful and distracting. And furthermore, it’s not necessary.

Over a decade ago, at the request of the judges of Harris County (Houston), the American Bail Coalition teamed up with the Harris County Pretrial Service Agency. Pretrial services supervised the defendants who were then released on a commercial surety bond. The result? FTA’s were reduced to 2%.

At the annual meeting of the National Association of Pretrial Service Agencies, held last autumn in Charlotte, the number of attendees who reported teaming up with pretrial service agencies had doubled from the previous year. In fact many of the objections to the above referenced BJS study’s positive findings on behalf of commercial bail are from

pretrial services that have teamed up with commercial bail. They don't think that the results give them any credit. (According to the Pretrial Justice Institute's recent survey of pretrial service agencies, 20% of the time they recommend release on commercial surety bonds.) Still, many in the pretrial services community oppose this trend. Almost no one in the commercial surety bail industry does.

Hence, in adopting the commercial surety bail option and integrating it into the current release pending trial practices, Philadelphia, would have a chance not only to enhance the rights of the defendant, but to enhance public safety as well.

\*In theory, the Philadelphia court system since 2006 has allowed the use of commercial bail but under conditions which are distinguished by their disincentives for a commercial producer of bail bonds. The two most burdensome requirements are (1) a \$250,000 cash deposit, and (2) a cap of \$ 1 million penal sum in bonds. Bail insurance is insurance. It is its own deposit. How many property and casualty agents in Philadelphia are required to make a deposit? The \$1 million cap provides a profit margin so slim as to hardly justify tying up the \$250,000 deposit.