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**STATE OF COLORADO**  
**DEPARTMENT OF LAW**

**Office of the Attorney General**

**Attorney General Phil Weiser**  
**Testimony on Senate Bill 20-161**  
**Before the Committee on the Judiciary,**  
**Colorado Senate**  
**- February 24, 2020 -**

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Members of the Committee, thank you for allowing me to join you today to express my strong support for Senate Bill 20-161 (“SB 161”). I am very grateful for the sponsors’ efforts to reform cash-bail requirements for those charged with a crime. In 1964, U.S. Attorney General Robert F. Kennedy explained to Congress that:

Bail has only one purpose . . . to insure that the person who is accused of a crime will appear in court for his trial.<sup>1</sup>

Attorney General Kennedy got it exactly right. The main purpose of our bail system is both simple and limited – ensuring defendants appear in court and protecting public safety while defendants await their trial. The central point here is that when we talk about bail or other pre-trial services, we are referring to citizens who are not guilty (yet) of any crime, and who hold the presumption of innocence until proven guilty.<sup>2</sup> Cash bail requirements shouldn’t be permitted to serve as a revenue generator, an ineffective alternative for individualized judgments as to whether a person is a risk (to society or to flee), or, worst of all, an instrument of criminalizing poverty.

Because cash bail is a pre-trial measure, as opposed to a criminal punishment, we allow some defendants charged with crimes to depart jail while awaiting trial, whether

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<sup>1</sup> Testimony by Attorney General Robert F. Kennedy on Bail Legislation Before the Subcommittees on Constitutional Rights and Improvements in Judicial Machinery of the S. Judiciary Comm.: Hearing on S. 2838, S. 2839, and S. 2840, 88th Cong. 1 (1964), *available at* <https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf>.

<sup>2</sup> See Krista Ward & Todd R. Wright, *Pretrial Detention Based Solely on Community Danger: A Practical Dilemma*, 1999 FED. CTS. L. REV. 2, I.1 (“Because a defendant is presumed innocent until proven guilty, a judge may order pretrial detention only under limited circumstances.”).

through bail or through posting a bond. But this system – using ability to pay as a proxy for risk (to commit crimes or flee) – is fundamentally flawed.

I commend Senators Gardner and Lee, as well as the Colorado Commission on Criminal and Juvenile Justice (“CCJJ”), for their commitment to reform our pre-trial procedures. With this bill, Colorado can provide greater fairness, improve public safety, operate more cost-effectively, and ensure more humane treatment of those awaiting trial.

For too long, we have allowed persons accused of low-level, and often non-violent, offenses to languish in jail, simply due to their inability to afford bail. According to a report by the Hamilton Project, the United States has far more people detained pre-trial than any other developed nation.<sup>3</sup> In many cases, these individuals are not evaluated for any risk of harm (or flight), but instead are detained solely due to their lack of financial resources.<sup>4</sup> This is simply unacceptable. Consider, for example, that 80% of Americans are living paycheck-to-paycheck and half of all Americans have reported they would be unable to raise \$400 to address an emergency.<sup>5</sup> or the majority of Americans, in other words, cash bail means a *de facto* pre-trial jail sentence.

The impact of our cash bail system is widespread and painful. First, consider the impact on a person already cash-strapped, who may then lose his or her job because of the time spent in jail awaiting trial. And if that person has a family, there are painful ripple effects at home stemming from his or her absence. Finally, there is emotional trauma caused by the experience of spending time in jail – particularly when one is unable to meet financial and family obligations. In short, it is fair to say that our current system of cash bail – when untethered from risk assessments – criminalizes poverty and hurts many hard-working people who happen to find themselves in the criminal justice system, some of whom will never be adjudicated as guilty of any crime. And while this impact is, by definition, on lower income groups, it is also disproportionately felt by those in communities of color and other marginalized groups.<sup>6</sup>

The second set of injustices inflicted by a cash bail system is that it creates coercive incentives for persons sitting in jail to accept a worse outcome than those not detained before their trial. A number of studies have powerfully demonstrated this dynamic,

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<sup>3</sup> Will Dobbie & Crystal Yang, *Proposals for Improving the Pretrial System*, THE HAMILTON PROJECT, 4, Mar. 2019, available at [https://www.hamiltonproject.org/assets/files/DobbieYang\\_PP\\_20190319.pdf](https://www.hamiltonproject.org/assets/files/DobbieYang_PP_20190319.pdf).

<sup>4</sup> Cherise Fanno Burdeen, *The Dangerous Domino Effect of Not Making Bail*, THE ATLANTIC, Apr. 12, 2016, available at <https://www.theatlantic.com/politics/archive/2016/04/the-dangerous-domino-effect-of-not-making-bail/477906/>.

<sup>5</sup> See, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *Report on the Economic Well-Being of U.S. Households in 2017*, 21 (May 2018), available at <https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf>; Robert Reich, *Almost 80% of US Workers Live from Paycheck to Paycheck. Here's Why*, THE GUARDIAN (Jul 2018), available at <https://www.theguardian.com/commentisfree/2018/jul/29/us-economy-workers-paycheck-robert-reich>.

<sup>6</sup> See, e.g., Cynthia E. Jones, ‘Give Us Free’: Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 919 (2013).

providing another reason to reform our current bail system.<sup>7</sup> But the intuition behind this state of affairs is quite clear – for those who sit in jail because they cannot afford bail, a time will often come when a prosecutor will ask “do you just want to plea guilty to ‘time served’ and go home?” In such a situation, even if another disposition (whether a plea to a lower charge or an alternative disposition) would be more appropriate, the coercive effect of being in jail makes this outcome desirable to the defendant. That’s not justice.

Third, the current system of cash-bail does not protect public safety. For many, the superficial appeal of a bail system is that it keeps dangerous people off the streets. But the reality is that many people who are not dangerous are kept in jail and end up more likely to become dangerous because of their pre-trial jail sentence. The intuition behind this point is not hard to follow – people separated from their families and who lose their jobs become more vulnerable to committing crimes. As one study found, defendants who pose very limited risk and are kept in jail pending trial were 27% more likely to be later convicted of another crime than similarly situated defendants who were released pre-trial.<sup>8</sup> That study also notes the importance of low-risk defendants released quickly post-arrest, highlighting that those released on the first day are 50% less likely to be arrested for an another crime than those held for four to seven days.<sup>9</sup>

Finally, it is important to note that the costs of this system are not just about the accused. Whenever an otherwise non-dangerous person is kept in jail before trial, we, as taxpayers, foot the bill. Nationwide, pre-trial detainees make up two-thirds of our jail population,<sup>10</sup> at a cost of \$13.6 billion a year by recent estimates.<sup>11</sup> And the costs have increased – between 2010 and 2014, approximately 95% of the growth in our jail population stemmed from people who had not yet been found guilty of the charges against them.<sup>12</sup> Indeed, in Mesa County, the implementation of a pre-trial reform plan cut its jail population by 27% and saved \$2 million per year.<sup>13</sup>

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<sup>7</sup> *Id.*; see also Juleyka Lantigua-Williams, *Why Poor, Low-Level Offenders Often Plead to Worse Crimes*, THE ATLANTIC, July 24, 2016, available at <https://www.theatlantic.com/politics/archive/2016/07/why-pretrial-jail-can-mean-pleading-to-worse-crimes/491975/>. For an especially heartbreaking example, see Josh Shaffer, *Without Bail Money, She Pleaded Guilty so She Wouldn't Give Birth in Jail*, RALEIGH NEWS & OBSERVER, Feb. 21, 2019, available at <https://www.newsobserver.com/news/state/north-carolina/article225516005.html>.

<sup>8</sup> See Christopher Lowenkamp, Marie VanNostrand, Alexander Holsinger, “The Hidden Costs of Pretrial Detention,” Laura and John Arnold Foundation, 8 (2013), available at <https://nicic.gov/hidden-costs-pretrial-detention>.

<sup>9</sup> *Id.* at 18.

<sup>10</sup> See Eric Holder, Att’y Gen., U.S. Dep’t of Justice, Address at the National Symposium on Pretrial Justice, Jun. 1, 2011, available at <http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110601.html>.

<sup>11</sup> Bernadette Rabuy, *Pretrial Detention Costs \$13.6 billion Each Year*, PRISON POLICY INITIATIVE, Feb. 7, 2017, available at [https://www.prisonpolicy.org/blog/2017/02/07/pretrial\\_cost/](https://www.prisonpolicy.org/blog/2017/02/07/pretrial_cost/).

<sup>12</sup> Zhen Zeng, *JAIL INMATES IN 2016 (NCJ 251210)*, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (Feb. 2018), available at <https://www.bjs.gov/content/pub/pdf/ji16.pdf>.

<sup>13</sup> PRETRIAL RELEASE TASK FORCE: RECOMMENDATION PRESENTED TO THE COLO. COMM’N ON CRIMINAL AND JUVENILE JUSTICE, at 3, available at [https://cdpsdocs.state.co.us/ccjj/Meetings/2018/2018-11-09\\_RecFY19-PR03-b.pdf](https://cdpsdocs.state.co.us/ccjj/Meetings/2018/2018-11-09_RecFY19-PR03-b.pdf).

Let's add up the costs of our current bail system. First, there is the impact on public safety – our current system results in more crimes than would take place under a risk assessment model. Moreover, by not focusing on willingness to pay (rather than risk), our system sometimes allows dangerous individuals to go free because they have greater financial means.<sup>14</sup> Second, there is tremendous costs to taxpayers, paying for people to remain in jail who don't need to be there. Third, there are costs to the defendant, in terms of lost income, lost employment, separation from family, and emotional trauma. But worst of all, there is a high cost to justice – disparate outcomes for lower income individuals due to the coercive impact of being in jail, regardless of whether they pose any risk.

To correct this state of affairs, Colorado needs not only to enact a new legal framework, but also to make an investment in pre-trial services. In many parts of our state, relying on ability to pay to determine pre-trial detention is a shortcut borne of a lack of resources. Some counties with lower incomes lack resources to support the necessary risk-assessment to allow persons out of jail before their trial (and, in some cases, subject to some electronic monitoring). Other counties might need both the legal push and the economic incentive to build such capacity. And for counties that have already built such capacity and are achieving impressive results – there is a compelling case for performance-based grants so that they can do even more to improve their pre-trial services processes.

Colorado is not the first state to take this important step. New Jersey, for example, has moved away from exclusively relying on cash bail and has adopted pre-trial services that allow for effective risk assessment. The early results from this state are impressive. Pre-trial reforms in New Jersey all but eliminated the use of monetary bail as a release condition and cut the state's jail population by 20% without creating any measurable rise in crime rates.<sup>15</sup> After these reforms there was also a significant reduction in the number of arrests in New Jersey.<sup>16</sup> And, as noted above, efforts in Mesa County here in Colorado have delivered similar results.

The bill before the Committee today, SB 161, is the culmination of years of work to launch a meaningful pre-trial services program that, when coupled with action taken in the 2019 legislative session, moves Colorado to a more just system.

The bill requires each of Colorado's judicial districts to craft and implement a pre-trial screening process and criteria to immediately release certain defendants without monetary payment. It also requires each district to assess a defendant for pre-trial screening no later than 24 hours after admission, and each judicial district's pre-trial

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<sup>14</sup> Laura and John Arnold Foundation, *Developing a National Model for Pretrial Risk Assessment, Research Summary*, 1 (Nov. 2013) (“[O]ur research has shown that defendants who are high-risk and/or violent are often released.”).

<sup>15</sup> Hon. Stuart Rabner, N.J. Sup. Court, *Criminal Justice Reform is About Fairness: The New Jersey Approach*, THE JUDGES J. 13, 13-14 (Aug. 1 2018).

<sup>16</sup> Chloe Anderson et al., *Evaluation of Pretrial Justice System Reforms that Use the Public Safety Assessment: Effects of New Jersey's Criminal Justice Reform*, MDRC CENTER FOR CRIMINAL JUSTICE RESEARCH, 15, Nov. 2019.

screening process will be evaluated for accuracy and potential bias to ensure that the new programs do not perpetuate the old system.

The bill creates a presumption that defendants will be released without monetary conditions – so long as a person poses no substantial risk of danger, failure to appear in court, or obstruction of the criminal process – and with the least restrictive possible nonmonetary conditions. Defendants who violate the conditions of their bond will no longer be charged with a new crime. Rather than sending a person back to jail on technical violations, like failing drug tests, courts have the ability to work with the defendant and prosecutor to determine the best course of action. As many Coloradans continue to struggle with substance abuse, we should not be criminalizing addiction and jailing people for relapses.

One particular point to raise for the Committee’s consideration – SB 161 will only be successful in reforming our cash bail processes *if we fully fund its policy changes*. Those least able to afford bail often live in counties with the fewest resources. For this program to work, the State must provide adequate funding to implement pre-trial release screening, otherwise we risk leaving out the people who benefit the most from this program. Failing to support these communities with adequate funding would undermine the goals of this reform. For this reason, the Department of Law FY 2020-21 budget request to the Joint Budget Committee urges that \$6.5 million be dedicated to fully fund this important legislative priority.

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Before this Committee today is an opportunity to overhaul our flawed cash bail system, and replace it with a fairer system for communities, defendants, and their families. This bill, combined with needed budget resources and a commitment from the Colorado criminal justice system, will make this model work. And I commit to this Committee that the Department of Law will be a fully engaged partner to ensuring the program’s success.

Members of the Committee, thank you for the opportunity to speak to you today. I am pleased to answer any questions you may have.