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Attorney General Phil Weiser Testimony Before the Committee on the Judiciary, Colorado House of Representatives

- March 14, 2019 -

Chairman Weissman, Vice Chair Herod, and members of the Committee, thank you for allowing me to join you today for this discussion on pre-trial services. I greatly appreciate that the Committee is addressing the issue of cash bail requirements for persons charged with a crime. Over 50 years ago, U.S. Attorney General Robert F. Kennedy told 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.[1]

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 the public safety while defendants await trial.[2] At the core of this issue is the bedrock point 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 innocent until proven guilty.[3] Cash bail should not be allowed to

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[1] 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.

[2] *See, e.g.*, Shima Baradaran, *Restoring the Presumption of Innocence*, 72 Ohio St. L.J. 723, 754 (2011) (noting that the "original purpose of bail" was "to assure that a defendant appears at trial"); William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 68-69 (1977) ("The function of bail is ... limited to insuring the presence of a defendant before the court."); David J. McCarthy, Jr. & Jeanne J. Wahl, *The District of Columbia Bail Project: An Illustration of Experimentation and a Brief for Change*, 53 Geo. L.J. 675, 715 (1965) ("[T]he purpose of bail is to ensure that the accused will appear in court ... not to prevent the commission of crime.").

[3] *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.").

become a revenue-generating device, an ineffective alternative for individualized judgments about whether an individual is a risk (to society or to flee), or 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 they await trial, either through bail or through bond. But this system – by using ability to pay as a proxy for risk (to commit crimes or flee) – is fundamentally flawed. I commend the Chair and Vice Chair, this committee, and the Commission on Criminal & Juvenile Justice (CCJJ) for its hard work to reform our pre-trial procedures. By passing this legislation, Colorado can provide for greater fairness, improve public safety, operate in a more cost-effective manner, and ensure the more humane treatment of individuals 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. 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.[4] This state of affairs is unacceptable. Consider, for example, that roughly 80% of Americans are living paycheck-to-paycheck[5] and half of all Americans have reported they would be unable to raise $400 to address an emergency.[6] For the majority of Americans, in other words, cash bail means a *de facto* pre-trial sentence in jail.

The impact of our cash bail system is widespread and painful. For starters, consider the impact on the individual who is already cash-strapped and can then lose his or her job because of the time in jail. And if that individual has a family, there are painful ripple effects on the home front, relating to his or her familial obligations. Finally, there is the emotional trauma caused by the experience of spending time in jail – particularly when one is unable to meet financial obligations and familial obligations. In short, it is fair to say that our current system of cash bail – when untethered from risk assessments – criminalizes poverty, and inflicts insult on top of the already fragile situation that many hard-working people find themselves in. 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.[7]

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[4]Cherise Fanno Burdeen,"The Dangerous Domino Effect of Not Making Bail," The Atlantic, https://www.theatlantic.com/politics/archive/2016/04/the-dangerous-domino-effect-of-not-making-bail/477906/

[5] Zach Friedman, "78% Of Workers Live Paycheck To Paycheck," Forbes (Jan. 11, 2019), *available at* https://www.forbes.com/sites/zackfriedman/2019/01/11/live-paycheck-to-paycheck-government-shutdown/#236efcd54f10.

[6] Board of Governors of the Federal Reserve System, Report of the Economic Well Being of U.S. Households in 2015 (2015) , *available at* https://www.federalreserve.gov/2015-report-economic-well-being-us-households-201605.pdf.

[7]*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).

The second set of harms inflicted by a cash bail system is that it creates coercive incentives for individuals sitting in jail to accept a worse outcome than those who are not detained pre-trial. The studies demonstrating this dynamic are powerful and provide another reason to reform our current bail system.[8] 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.

Finally, it is important to note that the costs of this fundamentally flawed 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. Nationally, pre-trial detainees make up two-thirds of our jail population,[9] at a cost of some $13.6 billion a year.[10] And the costs will only rise – between 2010 and 2014, some 95% of the growth in our jail population stemmed from individuals who have not yet been found guilty of the charges against them.[11]

Let's add up the costs of our current bail system. First, there is the impact on public safety – by not focusing on risk, but instead the willingness to pay, our system sometimes allows dangerous individuals to go free because they have greater financial means.[12] Second, there is the cost to the taxpayer, paying for people to be in jail who don't need to be there. Third, there is the cost to the defendant, in terms of lost income (or lost employment), separation from friends and family, and emotional trauma. But worst of all, there is the cost to justice – leading to disparate outcomes for poorer individuals because of the coercive impact of being in jail (whether or not they pose any risk).

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[8] *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.

[9] *See* Eric Holder, Att'y Gen., U.S. Dep't of Justice, "Address at the National Symposium on Pretrial Justice" (June 1, 2011), *available at* http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110601.html

[10] Bernadette Rabuy, "Pretrial detention costs $13.6 billion each year," Prison Policy Institute (Feb. 7, 2017), *available at* https://www.prisonpolicy.org/blog/2017/02/07/pretrial_cost/.

[11] Zhen Zeng, "Jail Inmates in 2016 (NCJ 251210)," Bureau of Justice Statistics (February 2018), *available at* https://www.bjs.gov/content/pub/pdf/ji16.pdf.

[12] Laura and John Arnold Foundation, "Developing A National Model for Pretrial Risk Assessment, Research Summary," at 1 (November 2013) *available at* https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF-research-summary_PSA-Court_4_1.pdf ("Our research has shown that defendants who are high-risk and/or violent are often released.").

To address these costs, our state 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, the reliance on an ability to pay to determine who is detained pre-trial is a short-cut borne of a lack of resources. Poorer counties, in other words, lack the resources to support the necessary risk-assessment processes to allow individuals out of jail (and, in some cases, subject to some electronic monitoring). In other counties, such counties might need both a legal push and economic support 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.

Colorado is not the first state to take this important step. In California, New Jersey, and Washington, DC, for example, jurisdictions have moved away from relying on cash bail and have adopted pre-trial services that allow for effective risk assessment. The early results from such experiences are very impressive: in New Jersey, for example, pre-trial reforms cut the jail population by 20% without creating any measurable rise in crime rates.[13]

Before this committee today are two bills. I believe both will make meaningful steps towards improving our pre-trial services and will make our cash-bail system fairer for those with less financial means.

House Bill 19-1225. House Bill 19-1225, sponsored by Representatives Herod and Soper, updates those offenses for which monetary bail is required to secure pre-trial release. Current State law provides that a court must release persons charged with a Class 3 misdemeanor, petty offense, or unclassified offense utilizing a personal recognizance bond, unless one of several conditions exist. This bill ends monetary requirements for release for defendants charged with lower-level traffic, petty, or municipal offense – with exceptions for traffic offenses involving death or injury, eluding a law enforcement officer, tampering with an ignition interlock device, or similar municipal offenses. This bill takes the needed step of ensuring that bail or bond requirements exist only for those offenses that truly demonstrate a risk to public safety.

House Bill 19-1226. House Bill 19-1226, sponsored by Representatives Herod and Soper, and Senator Lee, and endorsed by the Colorado Commission on Criminal and Juvenile Justice, makes multiple needed reforms to the bail/bond system in Colorado. Among its changes, House Bill 19-1226 requires each of Colorado's judicial districts to craft and implement a pretrial screening process and criteria for immediate release for certain defendants subject to no bail conditions. Each district

[13] Hon. Stuart Rabner, N.J. Sup. Court, "Criminal Justice Reform is About Fairness," Judges Journal 13, 13-14 (Summer 2018), *available at* https://www.njcourts.gov/courts/assets/criminal/cjrfairness.pdf?c=kZb.

will be required to assess a defendant for pre-trial screening no later than 24 hours after admission.

The bill also creates a new presumption that defendants be released with the least restrictive conditions possible 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. House Bill 19-1226 also requires courts to evaluate risk assessment when determining a defendant's bond and release conditions.

Finally, let me also acknowledge the importance of Senate Bill 19-036, sponsored by Representatives Benavidez and Carver, and Senators Lee and Cooke. This bill will provide electronic notifications (text messages, notably) to remind individuals to appear in court. When individuals fail to remember a court date, the court often issues a warrant for their arrest on the ground that they failed to appear. Based on past experiments with similar monitoring systems adopted elsewhere, jurisdictions have cut down greatly on missed court dates – and avoided the painful impacts of those forgetting to appear serving time in jail as a result.[14]

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In Colorado, we are collaborative problem solvers and pioneers. We now have an opportunity – and, I would suggest, a moral imperative – to reform our system of cash bail. This reform will involve changes to our legal framework, a financial investment from our State, and a commitment from the Colorado justice system to make this new model work. At the Attorney General's office, we will work tirelessly with our partners in the criminal justice system to support and monitor the implementation of this important reform.

Thank you, Mr. Chairman and Madame Vice Chair. We are here because of your leadership, compassion, and judgment. I appreciate the opportunity to share the views of the Department of Law with you all today and am pleased to answer any questions.

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[14] *See, e.g.*, "Use of Court Date Reminder Notices to Improve Court Appearance Rates," Pretrial Justice Center For Courts, (Sept. 2017), *available at* https://www.ncsc.org/~/media/Microsites/Files/PJCC/PJCC%20Brief%2010%20Sept%202017%20Court%20Date%20Notification%20Systems.ashx.