



## WRITTEN TESTIMONY FOR THE LITTLE HOOVER COMMISSION

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This written testimony is provided in response to a request by the Little Hoover Commission dated November 1, 2012. Following are responses to the key questions posed by the staff of the Commission in order to prepare for the hearing on November 27, 2012. Additional information and/or background can be provided upon request.

### Introduction:

The right to bail has been part of our legal system since the beginning of our nation. This right was enshrined in the 8<sup>th</sup> Amendment to the Constitution and the first Judiciary Act of 1789. Most state constitutions contain right to bail provisions including Article I, Section 12 of California's constitution.

In California, the right to bail is usually implemented through commercial bail companies. These privately financed companies charge a nonrefundable fee, usually 10% of the bail amount, and guarantee the appearance of the defendant for all of his or her court proceedings. If the defendant fails to appear, the bail company must recapture and return the defendant to court within a limited time, usually 180 days, or pay the full bail amount to the court. Unlike county probation, bail companies provide their services at no cost to taxpayers.

Recently, California's commercial bail system has been under attack by the ACLU and other groups. The ACLU's primary criticism of commercial bail is that it is too expensive and because of this most pre-trial defendants are languishing in county jails. In this testimony, I will show that while this claim is exaggerated, reductions in county bail schedules are an inexpensive and effective way to reduce jail overcrowding and protect public safety.

### Effectiveness of Bail Versus Own Recognizance Release:

Our criminal justice system cannot function if defendants fail to appear for their court proceedings. It is only through the court process that the innocent are acquitted and the guilty are convicted and punished for their crimes. This results in deterrence for the convicted defendant and others in the community who will be deterred from committing crime by the defendant's punishment.

Pre-trial defendants released on commercial bail have much lower failure to appear rates than defendants released on their own recognizance (hereafter “OR”) and are more likely to be recaptured if they do fail to appear.

The largest and most comprehensive study ever done on bail is Eric Helland and Alex Tabarrok's: The Fugitive: Evidence on Public versus Private Law Enforcement from Bail Jumping, Journal of Law and Economics, 47(1):93-122, 2004.

This study was not funded by the bail industry, was peer reviewed and published in the prestigious Journal of Law and Economics and has a clearly defined methodology that controls for selection bias (cherry picking).

The study found that:

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. Deposit bonds perform only marginally better than release on own recognizance. Requiring defendants to pay their bonds in cash can reduce the FTA rate similar to that for those released on surety bond. Given that a defendant skips town, however, the probability of recapture is much higher for those defendants released on surety bond. As a result, the probability of being a fugitive is 64 percent lower for those released on surety bond compared with those released on cash bond. These findings indicate that bond dealers and bail enforcement agents (bounty hunters) are effective at discouraging flight and at recapturing defendants. Bounty hunters, not public police, appear to be the true long arms of the law. (Eric Helland and Alex Tabarrok, The Fugitive: Evidence on Public versus Private Law Enforcement from Bail Jumping, Journal of Law and Economics. 47(1):93-122, 2004, at p. 118.)

Professor Tabarrok expanded upon the above study in an article published in the Winter, 2011 edition of The Wilson Quarterly. Professor Tabarrok's article points out that communities that have done away with commercial bail and moved to OR programs have had problems:

In Philadelphia, where commercial bail has been regulated out of existence, The Philadelphia Inquirer recently found that “fugitives jump bail . . . with virtual impunity.” At the end of 2009, the City of Brotherly Love had more than 47,000 unserved arrest warrants. About the only time the city's bail jumpers are recaptured is when they are arrested for some other crime. One would expect that a criminal on the lam would be careful not to get caught speeding, but foresight is rarely a prominent characteristic of bail jumpers. Routine stops ensnare more than a few of them. When the jails are crowded, however, even serial bail jumpers are often released.

The backlog of unserved warrants has become so bad that Philadelphia and many other cities with similar systems, including Washington, D.C., Indianapolis, and Phoenix, have held "safe surrender" days when fugitives are promised leniency if they turn themselves in at a local church or other neutral location. (Some safe surrender programs even advertise on-site child care.) That's good for the fugitives, but for victims of crime, both past and future, justice delayed is justice denied. (Alex Tabarrok, The Bounty Hunter's Pursuit of Justice, The Wilson Quarterly, Vol. 35, No. 1, Winter 2011, at p. 60-61.)

#### Problems with GPS Monitoring of Defendants:

The bail industry has traditionally been an early adopter of technology, but GPS monitoring does not work nearly as well as its proponents claim. GPS monitoring is expensive, costing as much as \$10 per day per defendant, is easily jammed or spoofed and has a high rate of false alarms.

A 2011 study found that electronic monitoring had a 70% rate of false alerts causing significant increases in officer workloads, costs to taxpayers and dangers to public safety. (Gaylene S. Armstrong, Beth C. Freeman. Examining GPS monitoring alerts triggered by sex offenders: The divergence of legislative goals and practical application in community corrections, Journal of Criminal Justice, 2011; 39 (2):175-182, at p. 180-181.)

Furthermore, GPS monitoring devices can be easily jammed:

"The problem is that the GPS signal is very weak. It's like a car headlight 20,000 kilometres away," says consultant David Last, former president of the UK's Royal Institute of Navigation. You can't boost the signal any further because of the limited power supply on a satellite. (David Hambling, GPS chaos: How a \$30 box can jam your life, New Scientist Magazine, March, 2011, at p. 2)

The article also found that GPS jammers are cheap, easy to use, and readily available:

Last deliberately simulated a simple, commercially available jammer. Though illegal to use in the US, UK and many other countries, these low-tech devices can be bought on the internet for as little as \$30. Sellers claim they're for protecting privacy. Since they can block devices that record a vehicle's movements, they're popular with truck drivers who don't want an electronic spy in their cabs. They can also block GPS-based road tolls that are levied via an on-board receiver. Some criminals use them to beat trackers inside stolen cargo. "We originally expected that jammers might be assembled by spotty youths in their bedrooms," says Last. "But now they're made in factories in China." (David Hambling, GPS chaos: How a \$30 box can jam your life, New Scientist Magazine, March, 2011, at p. 2, emphasis added)

It is not hard to imagine a scenario in which an accused sex offender released on GPS monitoring, buys a cheap \$30.00 GPS jammer for his car and cruises elementary schools and parks looking for victims, in violation of the terms of his release. Unfortunately, the probation

department charged with monitoring this defendant would not know of his activities until he was caught molesting another child.

Finally, bail companies have a powerful financial incentive to make defendant appear in court. If the defendant fails to appear and can't be recaptured within a reasonable time, usually 180 days, the bail company must pay the full bail amount to the court. Local probation departments do not benefit from this incentive and often lack the resources to recapture defendants who have removed their GPS monitoring devices as illustrated in the recent scandal involving parolees:

A KCRA 3 investigation reveals more than 1,100 parolees in California are not wearing their electronic monitoring devices. And even if they are caught, they won't be going back to state prison. Instead, they will be spending just days in the county jail, if serving any time at all, under California's new realignment plan. (Mike Luery, 1,100+ parolees not wearing tracking devices, KCRA 3, November 13, 2012)

### How Bail Rates Influence Jail Crowding:

California has some of the highest bail schedules in the nation and this is an important factor in jail overcrowding.

Penal Code §1269b requires the superior court in each county to establish a schedule of bail, which is a list of crimes with a predetermined bail amount for each crime. Bail schedules are necessary because defendants have a right to bail 24 hours per day, even when the courts are closed on evenings, weekends and holidays.

Once the defendant appears in court, the scheduled bail amount can be raised or lowered. If bail is changed it is usually due to a motion by the prosecution or defense. However, it is more common for a court to keep the bail the same or raise it rather than to lower it below the scheduled bail amount and this is one reason why lowering these threshold amounts is important.

Current bail schedules do not reflect changes caused by realignment where defendants will be serving sentences of years and even decades in the county jail. Bail schedules also fail to reflect the 2008 recession and the resulting loss of real estate equity and high unemployment which our state is afflicted with. Defendants simply cannot afford the high bails of years past and our jails do not have the space to hold them.

However, claims by the ACLU and others that most pre-trial defendants are languishing in jail because they cannot afford bail are exaggerated. Many of these defendants, even if they technically have a bail set, are not eligible for release because they have immigration holds or other types of holds. This issue of immigration holds, also known as ICE detainers, has become so severe that in 2012 the California Legislature passed Assembly Bill 1081, also known as the "Trust Act," which was vetoed by Governor Brown.

We supported the Trust Act in the 2011-2012 legislature and we hope to work with the ACLU to pass the Trust Act in the 2013-2014 legislative session.

Furthermore, the ACLU recently sued the Los Angeles County Sheriff's Department over the immigration hold issue. In their October 19, 2012 press release, the ACLU claimed that:

“[u]nlike warrants, they are issued without any judicial determination of probable cause, and are frequently issued in error.” The ACLU goes on to claim that: “[i]n 2011 alone, LASD detained nearly 20,000 people without legal authority due to immigration holds when they otherwise would have been released from custody.”

A significant number of pre-trial defendants are in jail because they cannot afford bail, but not all are there due to high bail amounts. Immigration hold reform will also help reduce jail overcrowding.

#### How Jail Population Caps Influence the Bail System:

Seventeen of California’s jails are so overcrowded that they are subject to federal overcrowding orders. This has led to large numbers of defendants being released on OR due to overcrowding in these counties. However bail schedules have not been reduced so that some of these defendants could afford to bail out of jail rather than be released on OR. This is especially applicable to those defendants accused of Penal Code Section 1170(h) offenses which are eligible for OR release and where they will be doing their time in the county jail rather than state prison.

Unfortunately, reducing bail schedules has been opposed by some judges and prosecutors. This idea is counter intuitive to the way things have been done in the past and district attorneys and judges are worried that reducing bail schedules will make them look soft on crime when they run for reelection.

However, bail is a more secure form of pre-trial release with higher court appearance rates than OR. Many of the defendants released on OR fail to appear in court and this has caused crime to rise in these communities.

As stated above, it is critical for crime deterrence that defendants attend all of their court proceedings. It is only through the court process that guilty defendants are eventually convicted and punished for their crimes. This results in deterrence for the convicted defendant and others in the community who will be deterred from committing crime by the defendant’s punishment.

#### Whether Higher Bail Amounts Result in Higher Rates of Court Appearance Compliance:

Higher bail amounts result in higher court appearance rates because bail companies take more collateral on larger bonds. However, there is a point of diminishing returns where few defendants can afford to post high bail amounts. Bail should be set at the minimum amount necessary to insure the defendant’s appearance in court, protect public safety and the safety of the victim.

Unfortunately, few California courts have rigorously examined their bail schedules to make sure they are set at the minimum amount necessary to insure the defendant’s appearance in court and protect public safety.

One answer to this is legislation mandating a reduction of bail schedules and the opening of the judges meetings where the bail schedule is set to other stakeholders. Bail schedules are not determined in a public meeting and the court does not usually get input from all stakeholders. Some courts do get input from the DA’s office and law enforcement, but they rarely get input from the public defender’s office, victims’ rights groups or the bail industry.

The Realignment Community Correction Partnerships are a model on how to do this. They have public meetings and most of the stakeholders in the criminal justice system are part of the partnership. However, the bail industry and victims groups should be added.

Another solutions is an advisory statewide model bail schedule set by independent commissions with representatives from all stakeholder groups. This model bail schedule can be used as a guideline for local bail schedules while maintaining the right for local courts to deviate when necessary.

Finally, bail stacking should be eliminated in all cases where the defendant is charged with multiple offenses against the same victim. In Los Angeles and Orange counties, only the highest felony bail plus enhancements is used in these cases. The bail for other felonies and misdemeanors charged against the defendant are disregarded. In Fresno county and other counties, the bail for all charges is added together resulting in a much higher bail.

Reducing bail schedules is inexpensive because the commercial bail system is not paid for with taxpayer dollars.

#### What the Impact is of Bail Schedule Disparities Across Counties:

Large disparities in bail schedules among similar counties with similar demographics are not justifiable. For example, for simple drug possession the scheduled bail amount is \$5,000 in Fresno County and \$25,000 in Tulare County. Fresno and Tulare counties are adjacent to each other and are both located in the Central Valley. They are both agricultural counties with similar demographics. The fact that Tulare County's scheduled bail amount for felony drug possession is five times higher than Fresno County violates defendants' constitutional rights to be free from excessive bail.

However, local control of county bail schedules is important because there may be situations where a disparity in scheduled bail amounts is justifiable. San Francisco has much higher property values than Fresno and therefore, it is understandable why the scheduled bail amount for arson is much higher in San Francisco.

#### Whether the Bail Industry Uses Risk Assessment Tools to Determine Whether a Defendant is a Public Safety Risk or Separately, a Flight Risk:

A risk assessment tool is merely a questionnaire consisting of a list of factors that have been shown to correlate one way or another with criminality or flight risk. Despite claims by advocates that these risk assessment tools are "scientific", the reality is that they are more of an art form than scientific. They attempt to predict the future behavior of a human being and that is difficult at best.

Bail agents and probation look at similar factors in determining a defendant's flight risk. However, bail agents do their risk assessment at no cost to the taxpayers. The risk factors include, but are not limited to the following:

1. What is the bail amount?

2. What is the defendant's record of appearance at previous court proceedings?
3. What is the previous criminal history of the defendant?
4. What is the severity of the sentence that the defendant is facing?
5. What are defendant's ties to the community?
6. Is the defendant employed? If so, how long has the defendant worked for the same employer?
7. How long has the defendant lived in the community?
8. Does the defendant have a stable family arrangement?
9. Does the defendant have kids in local schools?
10. Does the defendant own real property in the community?
11. Is the defendant U.S. Citizen or permanent resident?
12. How long have the co-signers worked for the same employer?
13. Do the co-signers own real property?
14. What are the co-signers ties to the community?
15. How close is the relationship between the co-signers and the defendant?
16. What is the value of collateral put up as security for the bail bond?

The likelihood of the defendant committing an additional crime while released on bail is also a risk factor because it increases the severity of the punishment the defendant is facing and therefore his or her flight risk.

Furthermore, unlike probation departments, we get most of our risk information from the friends and family of the defendant who are co-signers on the defendant's bail bond. These sources tend to be more reliable than the defendant, who has an incentive to lie to get out of custody.

We also get information from the jail, court records, the defendant, credit reports, property records, and other sources. Many of these sources are used as corroboration tools to confirm that the information given to us about the defendant is correct. Most of these tools are not used by probation departments.

Risk assessment tools can also be used to justify reducing a defendants bail rather than releasing him or her on OR.

It is also important to note that bail companies usually get the defendants family or close friends to co-sign on the bail bond or to put up some form of collateral. This widening of the circle of responsibility for the defendants court appearances is one reason that defendants released on bail have much higher appearance rates than defendants released on OR. Even a serious offender is less likely to burn his mother by failing to appear in court than the judge or probation officer.

Additionally, because the co-signer is liable for the full bail bond amount, he or she will often help the defendant go to court. Additionally, a co-signor who will not cooperate with police who are looking for the defendant, will usually cooperate with the bail bondsman because they are liable for the bond.

As stated above, it is critical for crime deterrence that defendants attend all of their court proceedings. It is only through the court process that guilty defendants are eventually convicted and punished for their crimes. This results in deterrence for the convicted defendant and others in the community who will be deterred from committing crime by the defendant's punishment.

Finally, bail can itself serve as deterrence to future criminality because the defendant and/or his family have to pay to bail out of jail. Releasing defendants for free on OR removes this deterrence.

### The Role Alternative Supervision Programs Play in Managing Jail Population and Public Safety:

Problems with GPS monitoring of defendants and parolees is discussed above.

In addition, many of these offenders have long criminal records and have previously been sent to prison. They have already had the benefit of supervised probation that included rehabilitative programs. Many of these offenders refused treatment or violated probation so many times that they were considered by the courts to be unamenable to supervision, which is why they were sentenced to state prison. This option will no longer be available. The powerful disincentive of a possible state prison sentence will no longer exist for non-violent, non-serious, non-sex and PRCS offenders, and the prospect of any punishment in the form of incarceration will be severely curtailed, and in some cases eliminated, occurring only when there is sufficient room in an already overcrowded county jail.

This may be why the Fresno County alternative supervision program has only shown a 20% success rate in its first few months of operation.

Furthermore, PRCS violations are not scored the same way as parole violations were before realignment, which will make the success rate of these programs look better than they actually are.

### Conclusions and Recommendations:

Commercial bail is an essential component of the criminal justice system. It is the most effective form of pre-trial release with lower FTA rates better recapture rates than OR. Insuring that defendants appear for trial is critical to the functioning of the criminal justice system and crime deterrence. Additionally, commercial bail enjoys the added benefit of functioning at no cost to taxpayers.

However, commercial bail is more expensive than it needs to be and bail can be improved and made more widely available in the following ways:

1. Lower County Bail Schedules: Lower bail amounts to the minimum amount necessary to insure the appearance of the defendant, protect public safety and the safety of the victim.
  - a. Enact legislation requiring courts to review their bail schedules and lower them to account for the 2008 recession, higher unemployment and loss of real estate equity. This is especially important for jails that are subject to federal overcrowding orders and defendants accused of Penal Code §1170(h) felonies where the defendants are more likely to be released on OR.
  - b. Open up the court's mandated annual bail schedule review meeting to other community stakeholders including law enforcement, prosecutors, the bail industry, victims' rights groups, the public defender's office and the private criminal defense

- bar. This will insure that all criminal justice stakeholders have input, not just those that want the bail schedule to remain high or be increased.
- c. Require proposed bail schedules to be published on the courts web site and allow a public comment period.
  - d. Create a statewide bail commission whose mission is to lower bail schedules while protecting public safety. The commission will be required to annually issue a model bail schedule which local courts can use as a guideline. The model bail schedule would only be advisory and local courts could deviate when necessary. The commission would be composed of stakeholders in the criminal justice system including representatives from law enforcement, prosecutors, bail agents, public defenders, victim rights groups, and the private criminal defense bar.
  - e. Another idea is to move the jurisdiction for bail schedules from the courts to the Community Correction Partnerships. The CCP's have public meetings and most of the stakeholders in the criminal justice system are already part of the CCP. However, the bail industry and victims groups should be added along with a mandate to reduce bail schedule amounts to the minimum amount necessary to insure the appearance of the defendant, protect public safety and the safety of the victim.
2. Eliminate Bail Stacking: Bail stacking should be eliminated in all cases where the defendant is charged with multiple offenses against the same victim. Only the highest scheduled felony bail plus enhancements should be used to set bail in these cases. The bail for other felonies and misdemeanors charged against the defendant is disregarded. Bail stacking is currently prohibited in Los Angeles and Orange counties and this policy should be expanded statewide. In Fresno county and other counties, the bail for all charges is added together resulting in a much higher bail.
  3. Reform Immigration Hold Policy: Enactment of the Trust Act would prohibit California jails from honoring immigration holds unless the defendant is charged with a serious or violent felony. In his veto message, Governor Brown stated that he would sign the Trust Act if it was amended to allow compliance with immigration holds for defendants charged with certain addition crimes besides just serious and violent felonies. Enactment of the Trust Act with Governor Brown's amendments, would reduce jail overcrowding by making an estimated 40,000-50,000 additional defendants per year eligible for release on bail.
  4. Institute a Fast Track Bail System: The use of bail could be increased if bail bonds were processed prior to releasing defendants on OR. In some jails, OR release is prioritized over bail. This has led to situations where defendants that were in custody, where not allowed to be bailed out because the defendant were being processed for OR release due to overcrowding. Some jails refuse to accept bail bonds in these cases or ask the bail agent to pick up his or her bail bond. This should not happen, because bail is a more secure form of pre-trial release than OR and there is no issue of overcrowding as to that defendant. The bail agent was ready to post bail for the defendant.