ALTERNATIVES TO BAIL ACT

Issues Memorandum and Note to the Committee of the Whole

TO: Uniform Law Commission

FROM: William Barrett and John McAvoy, Co-Chairs

Date: June 17, 2019

The Drafting Committee on Alternatives to Bail submits its draft Act to the Conference for a first reading.

1. History of the Act

Bluntly put, as the history recited below reveals, the road to here has already been long, and we confess we think the challenges the draft has presented indicates there is much more work to be done. We look forward to receiving at this first reading not only technical drafting suggestions, but affirmance or expressions of differences as to choices or alternatives that this draft presents.

In December of 2013 the Director of the American Bar Association Criminal Justice Section submitted a proposal to the ULC to draft a uniform act on Pretrial Justice. Included within the topics for treatment by such an act were conditions of pretrial release and preventive detention. This proposal was considered by the Committee on Scope and Program at its January 2014 meeting and the Committee concluded to take no action at that time.

Criminal justice reform was already a matter of considerable media attention and public discussion. That attention continued to grow. State legislatures also began to address the subject. In 2014, New Jersey enacted a "Bail Reform Act" that, subject to a necessary 2017 constitutional amendment, established policies, practices and procedures that significantly changed that State's bail system. The Act directed that pretrial release be done "primarily…by non-monetary means" and that monetary bail was permitted only when "no other condition of release" would assure the defendant's appearance.

That same year the Supreme Court of New Mexico held that under New Mexico's constitutional prohibition against excessive bail a defendant charged with first degree felony murder could not be held on a $250,000 bail bond he could not satisfy when the evidence presented at a hearing challenging the imposition of this bond "demonstrated that less restrictive conditions of pretrial release would be sufficient" to "reasonably assure that Defendant was not likely to pose a flight or safety risk." State v. Brown, 338 P 3rd 1276,

1278 (N.M. 2014).

Cash bail has been the continuing subject of legislative modification or elimination in several States, and challenged as to its use in practice in numerous cases before the Courts.[1]

In 2015 and early 2016 the ULC Staff was requested by Commissioner Lyle Hillyard to do research of the possible need for a drafting project on the subject of alternatives to the use of bail bonds as conditions for pretrial release of defendants.

In January 2017 the ULC Committee to Monitor Developments in Criminal Justice Reform (CMDCJR) recommended to the Scope and Program Committee the formation of a drafting committee on alternatives to bail. This recommendation was considered by the Scope and Program Committee during its meeting in San Diego in July 2017, and the Committee on Scope and Program after consideration referred the proposal back to CMDCJR for further review, with the request that CMDCJR return at the appropriate time with more information on potential state legislation on pretrial bail reform.

In May 2017 CMDCJR received from then-Uniform Law Commission Fellow Mary L. Shelly a memorandum regarding "Bail Reform/Alternatives to Bail." In her introduction to the topic Ms. Shelly wrote:

> "It is difficult to defend the use of money bail on its merits. Decades of research show that the pervasive use of money bail in the criminal justice system harms low-income defendants and their communities as well as defendants of color and their communities, and pretrial incarceration for nonpayment of bail increases both negative outcomes for defendants as well as burdens on taxpayers and criminal justice budgets."

In June of 2017 the American Bar Association Criminal Justice Section published "Standards for Criminal Justice: Pretrial Release." Among the general principles set forth in this Standard for Pretrial Release is the following:

> "When release on personal recognizance is not appropriate reasonably to ensure the defendant's appearance at court and to prevent the commission of criminal offenses that threaten the safety of the community or any person, constitutionally permissible non-financial conditions of release should be employed.... "Standard 10.4(b)
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> ...
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> "Release on financial conditions should be used only when no other conditions will ensure appearance.... The judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the

[1] The States that have undertaken such changes include Alaska, California, Colorado, Florida, Indiana (by State Supreme Court rule), Michigan, Missouri, New York, Ohio and Oklahoma. There may be others.

defendant's inability to pay." Standard 10.1-4(c) and (e).[2]

In January 2018 the ULC Committee on Criminal Justice Reform returned to the Committee on Scope and Program to report on the research it had conducted regarding the kinds of provisions that might be incorporated in an act on alternatives to bail and the Committee on Scope and Program recommended to the Executive Committee that a drafting committee be formed. The language of the CMDCRJ recommendation upon which Scope and Program acted is as follows:

"...[T]he Committee feels that [the "Alternatives to Bail proposal'" dated December 13, 2013, attached to its Report and Drafting Committee Recommendations to Scope and Program, dated June 15, 1917] provides a strong basis and foundation of policies that should be incorporated into the drafting of a uniform act in the subject area." (Emphasis added.)

On January 19, 2018, the Committee on Scope and Program voted to "recommend

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[2] At approximately the same time the ABA Criminal Justice Section also adopted the following resolution:

> RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to promote public safety and assure that defendants appear in court by adopting policies and procedures that:
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> 1. favor release of defendants upon their own recognizance or unsecured bond;
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> 2. require that a court determine that release on cash bail or secured bond is necessary to assure the defendant's appearance and no other conditions will suffice for that purpose before requiring such bail or bond;
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> 3. prohibit a judicial officer from imposing a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay;
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> 4. permit a court to order a defendant to be held without bail where public safety warrants pretrial detention and no conditions of pretrial release suffice, and require that the court state on the record the reasons for detention; and
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> 5. bar the use of "bail schedules" that consider only the nature of the charged offense, and require instead that courts make bail and release determinations based upon individualized, evidence-based assessments that use objective verifiable release criteria that do not have a discriminatory or disparate impact based on race, ethnicity, religion, socio-economic status, disability, or sexual orientation, or gender identification.

to the Executive committee that a drafting Committee on Alternatives to Bail be formed," and on January 20, 2018, the Executive Committee approved that recommendation.

Thereafter President Ramasastry appointed the members of the drafting committee. It has conducted two in person meetings, two meetings by phone, and used a subcommittee to assist in advancing the drafting of language to refine alternatives and articulate the choices the Commissioner members have made regarding the topic. The result now being reported to the Conference is the Drafting Committee's effort to address the charge it was given.

In preparing this draft, the Committee has benefitted from comments by representatives of Observers including the Pew Research Center, the National Conference of State Legislatures, the National Center for State Courts, the American Civil Liberties Union, the Southern Poverty Law Center, the National Sheriffs' Association, the District of Columbia Pretrial Services Agency, and the ABA Criminal Justice Section Pretrial Justice Committee.

2. Principal Issues and Policy Choices Presented

The law and practice in the several states with regard to pretrial release, while exhibiting certain general likenesses among several states, nonetheless is characterized by considerable non-uniformity and practices that with increasing frequency are found by the Courts to be unconstitutional.

The principal argument currently asserted to challenge the existing bail systems is that they unconstitutionally discriminate against poor persons criminally charged. This unconstitutionality is usually based on either the prohibition against excessive bail (Eighth Amendment) or violation of the right to equal protection of the laws (Fourteenth Amendment). The history of the Commission's consideration of this drafting project, described in Part 1a, above, discloses that a principal focus for the drafting committee's work is to address this legal and social problem of unneeded and unjustified confinement of persons charged with crimes, but not yet tried upon those charges, often arising out of an inability of a defendant to meet the financial conditions (cash or secured bond) for release.

The draft submitted at this meeting is the product of considerable effort to draft legislation on a matter where there are strongly held differing views -- and on the subject of criminal law, an area of law that for good reason has not often been the work of the Conference. It also is an area of law seeing rapid change as a result of judicial decisions and efforts by legislatures to respond to challenges to existing practices. The Drafting Committee also was mindful that its resulting work should "incorporate" the policies articulated in the portion of the December 13, 2013 proposal relating to alternatives to bail.

The statistics regarding pretrial confinements make it clear there is a need to address the fiscal and social costs of pretrial detention, as well as its Constitutional parameters. The Department of Justice Bureau of Justice Statistics recently announced that at midyear 2017

county and city jails held 745,200 inmates upon State criminal charges, of which 482,000 (64.7%) individuals were confined "awaiting court action on a current charge." [3]

The first thing to note is that this number does not include inmates in State prisons, already convicted, or any federal criminal statistics. The breakdown between felony and misdemeanor charges is difficult to determine for several reasons, including the practice of prosecuting attorneys to initially "overcharge" a defendant, usually for plea bargain purposes. Nonetheless, the number for inmates for which the highest charge is only a misdemeanor is estimated to be somewhere between 125,000 and 300,000. The number of persons confined by reason of a misdemeanor charge pursuant to an order of detention versus held because of a failure to meet a condition of release is uncertain, but surely large.

Approaching these numbers another way leads to the same conclusion. Recent data (August 2018), prepared by the Prison Policy Initiative, estimates that 27% (128,000) of all persons confined pretrial were there because the bond amount or terms could not be met. Of this population, approximately 70,000 persons had children under 18 years of age. The impact of pretrial confinement of this magnitude is hard to imagine. Its consequences, including pleading guilty to a charge because the sentence will not extend the confinement, are unduly harsh and socially injurious. In addition, we all know that confinement, even for limited times, beyond its cost to the government, has a tremendous social cost when breadwinners lose their jobs, as well as the frequent attendant losses such as evictions, education dropouts, and other "collateral consequences" of detention. It is the mitigation of these unwanted consequences that results in efforts to address current law and practice regarding bail.

With that background, the main conceptual issue to be resolved is "how deeply into criminal procedure will the Act go?" At one end of the spectrum, the Act could simply provide that wealth-based disparities in pre-trial release are not allowed, provide that a Court review the bail status of all arrestees who do not make bail within X hours, and provide for a list of alternatives ranging from release on recognizance to home detention to govern the terms of an arrestee's pre-trial release. At the other end of the spectrum, the Act could provide for which offenses are bailable (recognizing the many state constitutions that contain bail provisions), when law enforcement officers may make warrantless arrests as opposed to issuing citations, and set up the sequence and timing of court review of arrestees' status.

The Committee has taken the latter approach for a number of reasons. First, as noted, the contours of bail practice are changing rapidly, both through litigation and through legislation. Federal constitutional challenges to cash bail systems, many of them successful, have been filed recently, and more are pending. A narrowly focused Act, as

[3]According to a DOJ Bureau of Justice Statistics Special Report (NCJ 214994) in November 2017, for the period 1990 to 2004 approximately 30% of State Court defendants held on felony charges and subject to release on bail set at less than $5000 were still confined until case disposition. Nothing suggests that this percentage would be lower were the charges misdemeanors. Given the percentage increase since then of charged individuals confined to nearly two-thirds of the State prison population, this probably substantially understates the confinement of those not released because of failure to "make bond."

described above, could wind up being a nullity or a near nullity: if the constitutional attacks on the current bail and bail bond systems around the country continue to succeed, an Act that is conceptually an adjunct to those challenged systems is unlikely to gain legislative attention.

The second reason for a more detailed Act is really the mirror of the first. Most of the challenges to the current systems are based on the ideas that pre-conviction liberty should be the norm and that indigent criminal defendants (and even many who do not cross the threshold of "indigence") are denied equal protection merely because they cannot afford to make bail or bond. California is eliminating cash bail by legislation, and Indiana has set up an alternate system by State Supreme Court rule. Because the status of cash bail/bail bonds and the proceedings related to pretrial detention and release at the end of this project may be quite different from their status today, the rapidly changing landscape presents the Conference with the opportunity to provide assistance to the States at the very moment the States are wrestling with these issues.

Third, if the goal is to reduce the number of persons subject to pretrial detention, structuring the Act to commence with the first interaction between a law enforcement officer and an individual, and defining and limiting the circumstances in which the officer may effectuate a warrantless arrest will further that goal. The Committee acknowledges, however, that whether to allow the warrantless arrest of an individual on a misdemeanor charge or to instead require the issuance of a citation to such a person is a policy decision that varies widely in the States and that to stake out the position of the current draft may be to court opposition in the legislatures. The Committee looks forward to guidance from the Committee of the Whole on this question, as well as on the other policy positions reflected in the current draft of the Act.

Whether the Act ultimately is drafted more broadly or more narrowly, another issue--that of fiscal impact--must be considered. As currently structured, the Act unfolds largely chronologically. It begins with the interaction between a law enforcement officer and a person that leads either to an arrest or to the issuance of a citation (however denominated) to appear in court. For persons arrested, the Act then sets up a series of hearings designed to ensure such persons receive a prompt determination of eligibility for, and the conditions of, release, along with review to determine that the financial impact of any conditions of release is not a barrier to release. In an effort to move people out of pretrial detention as quickly as possible. the Act provides that the first of those hearings is to occur within 24 or 48 hours and that the arrested individual has a right to appointed counsel, even if the individual is not indigent. For individuals released after any of these hearings, the Act provides for various conditions (based on individual circumstance) with which the released individuals must comply.

Some of these provisions very likely will have a fiscal impact, at least in some jurisdictions: judicial officers, appointed counsel, and, in at least some instances, prosecutors, will be required to perform additional tasks, including on weekends, and some of those tasks may entail the use of support staff and/or jail transport staff. Specifically as to appointed counsel, the structure created by the Act provides for the appointment of

counsel at an earlier stage of proceedings than is currently the practice in some States. [4]

In a related issue, not all jurisdictions have pretrial services available to monitor persons on conditional pretrial release and help ensure their attendance at hearings and trial, and the Act does not require the implementation of such services. Nonetheless, for alternatives to bail to be effective, courts may want such services to be available, whether provided through a new pretrial services agency, through an expansion of duties of the probation department, or otherwise. The same is true for "risk assessment" tools, which are relied on in some, but not all, jurisdictions. The Act does not use or define the term "risk assessment," and takes no position on the matter, thus sidestepping the controversy over the cost of the instruments. States that currently use these tools may continue to do so to evaluate risk consistent with the Act, and states that do not use them may continue to rely upon other means to evaluate risk consistent with the Act.

It deserves emphasis that while the Committee has undertaken to cover the subject of alternatives to bail in the draft present at this meeting, the Committee is continuing to debate varying approaches that might significantly change the Act from what is being presented to the Committee of the Whole at this meeting. An example is the number of hearings provided/required. The draft presented provides for three hearings: a "release hearing" (Article 3), a "review hearing" (Article 4) and a "detention hearing" (Article 5). As the committee has considered the draft there has grown a concern that this three-step process may be more burdensome than any benefit that might come from it, and that it would not be attractive those in the legislatures of several states on grounds of cost and expenditure of Court time. The practicability of reducing the number of hearings to two will be a subject of consideration by the Drafting Committee in its next meeting.

Other policy considerations on which the Drafting Committee will welcome the input of the Committee of the Whole are discussed in the Summary of Content of the Act, Section 3, below.

3. Summary of the Contents of the Act

1. As discussed above, a first issue the Committee faced was whether to limit the drafting effort to not deal with the obvious first alternative to arrest and the possibility of detention, that is citation or summons to appear in lieu of arrest. The Committee considered the potential benefit of avoiding the challenge of developing standards for when to restrict authority to arrest. It chose, however, to include Article 2, with the goal of reducing the occasions when law enforcement results in arrest and the ensuing need for a subsequent consideration of the questions of release, and its attendant conditions, or continued confinement.

[4] Writ large, a reduction in a jurisdiction's number of pretrial detainees and a reduction in the average length of time in pretrial detention for pretrial detainees will reduce costs to Sheriffs and other officials charged with housing pretrial detainees, but interdepartmental budgeting, both State and local, is rarely viewed in the aggregate.

The Committee's approach, as reflected in Article 2, is to expressly limit the circumstances under which an individual may be arrested without a warrant (Section 201) and to specify (a) those limited occasions when arrest is permitted (Section 202) and (b) the content of the summons or citation to be provided to the summonsed individual (Section 203).

2. Most of the major features of the Act are contained in Article 3, called "Release Hearing." Article 3 takes up 11 of the 21 pages of substantive provisions of the Act. The first matter addressed is the mandated time by when an arrested person shall appear before a judicial officer on the question of release.

Arrested individuals fall into two categories: those arrested on a warrant, and those subjected to warrantless arrest. Arrests pursuant to warrant carry with them the judicial imprimatur of probable cause. Not so warrantless arrests. Hence, for almost 30 years, all US jurisdictions have had to comply with the USSC decision in *City of Riverside v. McLaughlin,* 500 U.S. 44 (1991), which requires a judicial determination of probable cause within 48 actual hours of a warrantless arrest. The Committee has chosen in Section 301 to set an arrested individual's first appearance before a judicial officer on the question of release on that same 48-hour track (with brackets for a different period to be chosen by a State).

3. Section 302 provides that detained individuals have a right to counsel at this first release hearing, even if only for purposes of that hearing, and even if they are not indigent for purposes of appointment of trial counsel. The Committee invites input from the Committee of the Whole on this procedure. (Judicial officers and jailers across the country are accustomed to the weekend probable cause determinations inherent in *City of Riverside's* 48-hour time period. The involvement of prosecutors and defense attorneys, however, varies widely among the States at this early stage of proceedings, and the creation of a 48-hour time limit on Section 301 release hearings is one of those areas likely to raise the issue of fiscal impact.)

4. Having decided not to eliminate cash bail, one of the most difficult issues for the Committee was how to address cash bail's continuing role and the related question of how to address an individual's inability to make cash bail in a given case. The Committee has retained a Court's ability to make either secured or unsecured cash bail a condition of release, but has barred the use of "bail schedules" and circumscribed the use of cash bail as outlined in detail in Section 304(d)-304(g). Moreover, if an individual is unable to satisfy a secured condition of appearance (*i.e.,* a bail bond), the Court—at the Review Hearing set up as the second hearing under the current structure of the Act—may not continue the condition. Section 403(2).

5. Two related and complex issues are next addressed by the Act. Those are (a) the factors to be considered by the Court in determining if a defendant may be released until trial and (b) the conditions the Court may impose to provide "reasonable assurance" that the defendant will neither flee nor commit unsafe or unlawful acts while released.

The Committee spent considerable time and great effort to find and articulate an approach to each of these very difficult questions. A principle that was accepted by the Committee was that there is increasing recognition, in the decisions of several Courts in many communities, that the federal Constitution, as well as that of many States, protects those arrested for and/or charged with, but not yet found guilty of, crimes from detention or unreasonable conditions of release, except as the safety of the community rationally requires it. Section 303 seeks to establish a balance between this interest of the individual in release and society's interest in adequately assuring that the individual does not abuse the freedom from confinement during the pretrial period.

6. Articles 4, 5 and 6 deal with the hearings subsequent to the initial "Release Hearing. As has been mentioned above, the creation of a three-step hearing process will be reconsidered in the Committee's further meetings. The standards and conditions for release enunciated in these articles are the same as that for the Release Hearing (Article 3).

7. The working title of the Act is "Alternatives to Bail." Inherent in this title is the issue of whether, and if so, how, the Act should address cash bail (including bail bonds). The Committee has decided to prepare a draft that does not seek to eliminate cash bail. This means that the bail bond industry (represented among our Observers) will not view the Act as a zero-sum game. In turn, it is hoped this will enhance enactability.[5]

8. Also related to enactability is the Act's attention to community safety. The Committee discussed at length whether those individuals released under some set of conditions under the Act who are subsequently arrested and/or charged during the pendency of the proceedings during which they secured their original release should be analyzed under the same criteria when seeking their second release.

On the one hand, a subsequent arrest and charge carry with them the same presumption of innocence as the original arrest and charge. Moreover, an individual charged, for example, with two unrelated misdemeanor offences may present little more risk to community safety (depending on the nature of the charge) than an individual charged with only one misdemeanor offence. Finally, if the function of bail is to ensure a defendant's appearance in court, a subsequent arrest and charge do not equate to a failure to appear in court on the original charge.

On the other hand, it is a virtually universal condition of pretrial release (whether on bail or recognizance) that the released individual not be arrested during the pendency of the proceedings under which the individual was released, and the failure to comply with one court ordered condition increases the likelihood of a failure to comply with another. Moreover, the risk of flight increases with the number of charges and possible consequences an individual is facing (although the degree of increase varies based on nature and severity of charges, degree of community contacts, etc.). There is also the need for Courts to be able to enforce their orders and to have the failure to comply with their orders carry consequences.

[5] Nowhere does the current draft of the Act use the word "bail" other than in the title. The Drafting Committee anticipates seeking permission for a name change during the second year of its work.

Balancing these factors, the Committee has adopted the view that the Court should consider whether an individual seeking release is facing another charge. *See* Sections 303(b)(5), 305(a)(3).

9. Another question in a Court's determination of an individual's possible release and the conditions of any such release is the question of the risk of "harm" or "physical injury" to another individual. Sections 201,303 and 304 raise this question, and the Committee has bracketed these terms not for the States but for consideration and suggestions by the Committee of the Whole. There is a concern within the Committee that allowing a Court to assess an individual's risk of "harm" to another allows too much discretion, which may result in initial arrest, or detention, where it is not necessary. There is a countervailing concern within the Committee that limiting a Court to the assessment of an individual's risk of "physical injury" to another ignores the ability of an individual to cause grave economic harm through electronic or other means. Accordingly, the Committee seeks the input of the Committee of the Whole on the question.

10. Section 701 is the Conference-standard section on "Uniformity of Application and Construction." Given the wide disparities among the States on matters of criminal procedure, and the need to incorporate the workings of the Act with other pretrial procedures and practices in each jurisdiction that adopts it, this section may be of limited utility to the Courts called upon to construe it.

4. Conclusion

This memorandum is not an exhaustive discussion of the entire content of the Act, but is an effort to introduce many the challenging issues with which the Committee has tried to deal. The Committee welcomes questions about its deliberations and guidance on the major issues that need addressed in continuing to draft an Act regarding bail.