

# **GLOSSARY OF TERMS AND PHRASES RELATING TO BAIL AND THE PRETRIAL RELEASE OR DETENTION DECISION**



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## Introduction

The complicated nature of various terms and phrases relating to bail and pretrial release or detention can sometimes lead to confusion and misuse of those terms. That, in turn, may lead to unnecessary quibbling and distraction from fundamental issues in the administration of bail and pretrial justice. Some of this confusion and misuse is quite understandable. For example, in his *Dictionary of Modern Legal Usage*, Bryan Garner describes the term “bail” as “a chameleon-hued legal term,” with strikingly different meanings depending on its overall use as either a noun or a verb.<sup>1</sup> A term like “habeas corpus,” as another example, has little meaning to one not fully immersed in the legal waters of the American system of justice. How does one sum up a concept like habeas corpus, when, as the online company Twitter said when explaining its own service in March of 2010, “it’s a whole thing?”

Misuse of terms can be caused by simple lack of education. That “bail” is used primarily to refer to amounts of money is likely due only to a lack of education for not only the public and the press, but also for some criminal justice practitioners. Other terms are often so ingrained in

usage that they seem correct even when they are misused. For example, the terms “pretrial” and “pretrial services” are sometimes used as short-hand nouns referring to pretrial services agencies or programs (e.g., “Pretrial wants to eliminate commercial bail bonding.”), instead of their proper use as (1) a period of time, and (2) the actual services provided by the pretrial services agency or program.

These predominantly legal terms are difficult enough without any layer of confusion and misuse. Accordingly, this glossary of terms and phrases has been written to provide current definitions, in context, and with historical references as needed, to clarify a comprehensive set of common terms relating to bail and the pretrial release and detention decision. The authors hope that the glossary will be used to find consensus on common terms and phrases to avoid needless distractions from the important work of making the administration of bail more effective. References to *Black’s Law Dictionary* (or “Black’s”) are to the Ninth Edition.<sup>2</sup>

## Adversary System

Black’s calls it “[a] procedural system, such as the Anglo American Legal System, involving active and unhindered parties contesting with each other to put forth a case before an independent decision maker.” According to Michael Asimow, “[t]he central precept of the adversary system is that the sharp clash of proofs presented by opposing lawyers, both zealously representing the interests of their clients, generates the information upon which a neutral and passive decision maker can most justly resolve a dispute.”<sup>3</sup> It is typically contrasted with the inquisitorial system of justice, in which the judge controls most of the pretrial and trial procedures, including framing the issues, supervising criminal investigations and discovery, questioning and cross-examining witnesses, and summarizing evidence. Understanding the adversary system’s importance at bail is critical, for initiation of adversary proceedings triggers certain rights, such as the right to counsel. In practice, judges comfortable operating in a system in which they are to oversee two sides in the adversarial clash of proofs often find that the typical bail hearing is overwhelmingly lopsided, many times operating with no defense counsel, and instead proceeding with defendants who are unprepared to argue issues concerning their pretrial release. The adversary system presupposes somewhat equal adversarial opponents, but bail hearings often lack that equality.

## Affidavit

A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths (Black’s). Among other things, affidavits are drafted to obtain search warrants and to document an officer’s probable cause for making a warrantless arrest. In the administration of bail, some persons may be tempted to place a greater

emphasis on this sometimes riveting recitation of “facts” and to the charge filed, to the exclusion of other relevant factors used to assess risk of flight and to public safety.

## American Bar Association (“ABA”) Criminal Justice Standards

The American Bar Association is the 400,000-plus member national association for the legal profession and those interested in the legal profession. In 1964, the ABA implemented its “Criminal Justice Standards Project,” which has created and updated best practice standards on twenty-three areas in criminal justice. The Third Edition of the ABA’s Standards on Pretrial Release (black letter standards approved in 2002, commentary approved in 2007) are based on empirically sound social science research, as well as on fundamental legal principles, and have been used by courts, legislatures, scholars, and others interested in best practices in the field of pretrial justice.

## Appearance Bond

*see Bail Bond*

## Appearance Rate

*see Court Appearance Rate*

## Arraignment

A criminal proceeding at which the defendant is read the charge or charges and asked to enter a plea. The essence of the arraignment is the act of pleading (e.g., guilty, not guilty, no contest) to the formal charge or charges, and although an arraignment may be continued or postponed, its goal is to obtain the defendant’s plea. The term is sometimes incorrectly used to mean the defendant’s “first appearance” or “initial appearance,” but the arraignment needn’t be the first appearance. As correctly noted in Black’s and other sources, the law

regarding arraignments varies from jurisdiction to jurisdiction, and is typically explained by court rules or statutes governing those jurisdictions.

## Arrest Warrant

*see Warrant*

## Bail

In criminal law, bail is the process of releasing a defendant from jail or other governmental custody with conditions set to reasonably assure public safety and court appearance. “Bail” is perhaps one of the most misused terms in the field, primarily because bail has grown from the process of delivering the defendant to someone else, who would personally stand in for the accused if he or she did not appear for court, to presently being largely equated with sums of money. It is now clear that, whatever pure system of “standing in” for a particular defendant to face the consequences of non-appearance in court may have existed in the early Middle Ages, that system was quickly replaced with paying for that non-appearance first with goods (because standardized coin money remained relatively rare in Anglo Saxon Britain until the Eighth and Ninth Centuries) and later money. The encroachment of money into the process of bail has since been unrelenting. And, unfortunately to this day, the terms “money” and “bail” have also been joined in an unholy linguistic alliance.

This coupling of money and bail is troubling for several reasons. First, while money bail may have made sense in the Anglo Saxon criminal justice system – comprised of monetary penalties for nearly allailable offenses – the logic eroded once those monetary penalties were largely replaced with corporal punishment and imprisonment. Second, while perhaps logically related to court appearance (many people

believe that money motivates human action, and in most state statutes, money amounts are forfeited for failure to appear), to date money has never been empirically related to it – that is, no studies have shown that money works as an added incentive to appear for court. Third, the purpose of bail itself has changed over the past 100 years from reasonably assuring only court appearance to also reasonably assuring public safety, and research has demonstrated that money is in no way related to keeping people safe. Indeed, this notion is reflected in most state statutes, which routinely disallow the forfeiture of money for breaches in public safety. Fourth, money bail does not reflect the criminal justice trend, since the 1960s, to make use of own recognizance or personal recognizance bonds with no secured financial conditions. And finally, in most jurisdictions monetary conditions of release have been overshadowed by the numerous nonfinancial conditions designed to further bail’s overall purpose to provide a process for release while reasonably assuring court appearance and public safety.

Garner has correctly noted the multiple definitions of bail that have evolved over time, most of which presuppose some security in the form of money.<sup>4</sup> For example, besides being defined as the security agreed upon, bail was also once defined as a person who acts as a surety for a debt, and was often used in sentences such as, “The bail is supposed to have custody of the defendant.”<sup>5</sup> However, because much has been learned over the last century about money at bail (including its deleterious effect on the concept of pretrial justice), and because the very purpose of bail has also changed to include notions of public safety in addition to court appearance (preceding a new era of release on nonfinancial conditions), defining the term “bail” as an amount of money, as many state legislatures, criminal justice practitioners,

newspapers, and members of the public do, is flawed. Thus, a new definition of the term is warranted.

Bail as a process of release is the only definition that: (1) effectuates American notions of liberty from even colonial times; (2) acknowledges the rationales for state deviations from more stringent English laws in crafting their constitutions (and the federal government in crafting the Northwest Territory Ordinance of 1787); and (3) naturally follows from various statements equating bail with release from the United States Supreme Court from the late 1800s to 1951 (in *Stack v. Boyle*, the Supreme Court wrote that, “federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction”)<sup>6</sup> and to 1987 (in *United States v. Salerno*, the Supreme Court wrote that, “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”)<sup>7</sup>

Bail as release accords not only with history and the law, but also with scholar’s definitions (in 1927, Beeley defined bail as the release of a person from custody), the federal government’s usage (calling bail a process in at least one document), and use by organizations such as the American Bar Association, which has quoted Black’s Law Dictionary definition of bail as a “process by which a person is released from custody.”<sup>8</sup> States with older (and likely outdated) bail statutes often still equate bail with money, but many states with newer provisions, such as Virginia (which defines bail as “the pretrial release of a person from custody upon those terms and conditions specified by order of an appropriate judicial officer”),<sup>9</sup> and Colorado (which defines bail as security like a

pledge or a promise, which can include release without money),<sup>10</sup> have enacted statutory definitions to recognize bail as something more than simply money. Moreover, some states, such as Alaska,<sup>11a</sup> Florida,<sup>11b</sup> Connecticut,<sup>11c</sup> and Wisconsin,<sup>11d</sup> have constitutions explicitly incorporating the word “release” into their right to bail provisions.

The phrase “or other governmental custody” is added in recognition of the fact that bail, as a process of releasing a defendant prior to trial, includes various mechanisms occurring at various times to effectuate that release, for example, through station house release from a local police department. The term “with conditions” is added with the understanding that by changing the status of an individual from citizen to defendant in a court proceeding, each release of any particular defendant contains at least one condition – attendance at trial – and typically more to reasonably assure court appearance as well as public safety.

## Bail Bond

An agreement between the defendant and the court, or between the defendant, the surety (commercial or noncommercial surety), and the court, originally designed primarily to assure the defendant’s appearance in court and later expanded in the federal system and most states to include public safety protections. Bail bonds are sometimes called “appearance bonds,” as all bail bonds are minimally appearance bonds, but that term does not fully reflect the purpose of bail, which is to normally afford release while reasonably assuring court appearance and public safety.

Black’s Law Dictionary defines “bond” generally as an obligation or a promise, and “bail bond” as “[a] bond given to the court by a criminal defendant’s surety to guarantee that the defendant will duly appear in court in the

future and, if the defendant is jailed, to obtain the defendant's release from confinement. The effect of release on bail bond is to transfer custody of the defendant from the officers of the law to the custody of the surety on the bail bond, whose undertaking is to redeliver the defendant to legal custody at the time and place appointed in the bond." A broader definition, however, correctly takes into account the fact that many defendants are released without third party sureties, and recognizes the dual purpose of bail.

In the law there are numerous types of bonds, and specifically several different types of "bail bonds," all of which fall under one of two categories of pretrial release from custody or confinement: (1) those that require a secured financial condition of release; and (2) those that do not.<sup>12</sup> The United States Department of Justice, Bureau of Justice Statistics ("BJS"), provides the following categories and explanations of financial bonds that require immediate payment or secured guarantee of payment prior to a defendant's release from detention:

*[Compensated] Surety bond* – A bail bond company signs a promissory note to the court for the full [money] bail [bond] amount and charges the defendant a fee for the service (usually 10% [or more] of the full [money] bail [bond] amount). If the defendant fails to appear, the bond company is liable to the court for the full [money] bail [bond] amount. Frequently the [money bail] bond company requires collateral from the defendant [or friend or relative of the defendant for the full amount of the bail bond] in addition to the fee.

*Deposit bond* – The defendant deposits a percentage (usually 10%) of the full [money] bail [bond] amount with the court. The percentage of the [money] bail [bond]

is returned after the disposition of the case, but the court often retains a small portion for administrative costs. If the defendant fails to appear in court, he or she is liable to the court for the full [money] bail [bond] amount.

*Full cash bond* – The defendant posts the full [money] bail [bond] amount in cash with the court. If the defendant makes all court appearances, the cash is returned. If the defendant fails to appear in court, the bond is forfeited.

*Property bond* – Involves an agreement made by a defendant as a condition of pretrial release requiring that property valued at the full [money] bail [bond] amount be posted as an assurance of his or her appearance in court. If the defendant fails to appear in court, the property is forfeited. Also known as 'collateral bond.'<sup>13</sup>

BJS also provides the following categories of bonds that do not require immediate payment or guarantee of payment prior to a defendant's release from detention:

*Release on recognizance (ROR)* – The court releases some defendants on a signed agreement that they will appear in court as required ... [which] includes citation releases in which arrestees are released pending their first court appearance on a written order issued by law enforcement or jail personnel. [In many jurisdictions, a ROR (also known as "Own Recognizance," "Personal Recognizance," or "PR") bond may also be an unsecured financial bond if it has money attached].

*Unsecured bond* – The defendant pays no money to the court but is liable for the full

amount of [the money] bail [bond] upon failure to appear in court.

*Conditional release* – Defendants are released under specified conditions. A pretrial services agency usually conducts monitoring or supervision, if ordered for a defendant. In some cases, such as those involving a third-party custodian or drug monitoring and treatment, another agency may be involved in the supervision of the defendant. Conditional release sometimes includes an unsecured bond.<sup>14</sup> There is growing recognition that “typing” bail bonds based on a single condition of release – money, such as when labeling a bail bond a “surety bond” or a “cash bond” – is an archaic practice, and thus the better practice (as reflected in the ABA Standards) is to refer either to “release” or “detention,” with release having one or more conditions – financial or non-financial – as limitations on pretrial freedom.

### Bail Bondsman

Also known as a commercial or compensated surety, a bail bondsman is one who guarantees a defendant’s appearance for court by promising to pay a financial condition of bond if the defendant does not appear for court. Bail bondsmen are typically licensed by the state and have an appointment from an insurance company to act as such. For their services, bail bondsmen charge defendants a non-refundable fee, and usually require the defendant (or his or her friends or family) to collateralize the full amount of the financial condition with cash or property.

### Bail Reform Act of 1966

The first major reform of the federal bail system since the Judiciary Act of 1789, which established the federal judiciary. The 1966

Act contained the following provisions: (1) a presumption in favor of releasing non-capital defendants on their own recognizance; (2) conditional pretrial release with conditions imposed to reduce the risk of failure to appear; (3) restrictions on money bail bonds, which the court could impose only if nonfinancial release options were not enough to assure a defendant’s appearance; (4) a deposit money bail bond option, allowing defendants to post a 10% deposit of the money bail bond amount with the court in lieu of the full monetary amount of a surety bond; and (5) review of bail bonds for defendants detained for 24 hours or more.<sup>15</sup> After passage of this Act, many states passed similar laws.

### Bail Reform Act of 1984

The Act that amended the 1966 Bail Reform Act to include danger to the community, or public safety, as a consideration in the pretrial release and detention decision. The 1984 Act mandates “pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court . . . unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.”<sup>16</sup> The Act further provides that if, after a hearing, “the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.”<sup>17</sup> The Act creates a rebuttable presumption toward confinement when the person has committed certain delineated offenses, such as crimes of violence or serious drug crimes.<sup>18</sup> The preventive detention provisions of the 1984 Act were upheld as constitutional in *United States v. Salerno*.<sup>19</sup>

**See Salerno**



## Bail Schedule

*see Money Bail Bond Schedule*

## Bench Warrant

*see Warrant*

## Bounty Hunter

Also known as a “bail recovery agent,” “fugitive recovery agent,” and other similar terms, a bounty hunter is one who seeks to capture wanted persons for the reward (bounty) offered for the capture. *Taylor v. Taintor*, 83 U.S. 366 (1872), is commonly cited as the authority for persons to act as bounty hunters in the administration of bail. Bounty hunters were thought to be an essential ingredient to bail administered through a personal surety system, which placed enormous responsibility on sureties but did not allow them to profit from or be indemnified through the bail transaction. With the advent of the commercial bail system in about 1900, however, the need for the bounty hunter function has grown increasingly dubious. Indeed, given the widespread capability of traditional law enforcement and the tendency for bail bondsmen to collateralize the full amount of bail bonds (thus obviating the need to “track someone down” to avoid payment), there is substantial debate over the continued need for the bounty hunter profession.

## Capias

From the Latin for “that you take,” a *capias* is the general name for several types of writs, the common characteristic of which is that they require the officer to take a defendant into custody (Black’s).

## Carlson v. Landon

342 U.S. 524 (1952). The United States Supreme Court case clarifying the concept of a

right to bail via the Excessive Bail Clause in the federal system, written just four months after *Stack v. Boyle*. In *Carlson*, the Court wrote:

The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.<sup>20</sup>

## Citation

According to Black’s, a citation is (1) a “court ordered writ that commands a person to appear at a certain time and place to do something demanded in the writ; (2) A police issued order to appear before a judge on a given date to defend against a stated charge, such as a traffic violation.” The second definition seems to reflect more common usage. Citation release is a large but often ignored part of pretrial justice, which involves a host of decisions that occur from arrest until case disposition, including whether to release an arrestee with a citation versus taking that person to jail. Despite the fact that pretrial release has not been historically viewed as a police function, through their discretionary decision-making ability to issue citations in lieu of arrests in certain cases, “the police are often in the best position to provide for the speedy release of criminal defendants.”<sup>21</sup> Pretrial literature now typically discusses citation release under the

topic of “delegated release authority,” which includes release of defendants prior to their first appearance by field officers and jail staff, in addition to pretrial services program staff.

Following the principle of releasing defendants under the least restrictive conditions, the American Bar Association Criminal Justice Standards on Pretrial Release “favor use of citations by police . . . in lieu of arrest at stages prior to the first judicial appearance in cases involving minor offenses.”<sup>22</sup> In Part II of the ABA Standards, “Release by Law Enforcement Officer Acting Without an Arrest Warrant,” Standard 10-2.1 states that “[i]t should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. This policy should be implemented by statutes of statewide applicability.”<sup>23</sup> Commentary to that standard explains that “emphasis on citation release (as well as ‘stationhouse’ release) was a logical extension of bail reform presumptions favoring pretrial release and release under least restrictive alternatives as well as encouraging diversion from the justice system altogether.”<sup>24</sup> ABA Standard 10-2.2 recommends mandatory issuance of citation for minor offenses, and would require law enforcement agencies to document in writing the reasons for choosing to take a suspect into custody at a secure facility on a minor offense.<sup>25</sup> Moreover, Standard 10-2.3 recommends that,

[e]ach law enforcement agency should promulgate regulations designed to increase the use of citations to the greatest degree consistent with public safety. Except when arrest or continued custody is necessary, the regulations should require such inquiry as is practicable into the accused’s place and length of residence, family relationships, references, present

and past employment, criminal record, and any other facts relevant to appearance in response to a citation.<sup>26</sup>

Citations are also sometimes called “desk appearance tickets,” and are most used when the risk to public safety and for failure to appear for court are perceived as low.

### Collateral

Generally, collateral is property that is pledged as security against a debt (Black’s). Specifically, collateral in the administration of bail is typically a deposit of money or property to protect a commercial bail bondsman from loss if a defendant fails to appear for court. It can come from the defendant, but often comes from friends and family of the defendant.

### Commercial Surety or Compensated Surety

*see Bail Bondsman*

### Condition

A future and uncertain event on which the existence or extent of an obligation or liability depends; an uncertain act or event that triggers or negates a duty to render a promised performance (Black’s). In the administration of bail, conditions are requirements that must be met to avoid certain consequences. Pretrial release often hinges on defendants promising to follow certain conditions of release, which are set to further the constitutionally valid purposes for limiting pretrial freedom (i.e., to reasonably assure court appearance and public safety). Among many other delineations in the law, these conditions may be precedent and subsequent. Most bail bond conditions are conditions subsequent – that is, release is obtained, but if the condition occurs (or fails to occur, depending on its wording), it will trigger

some consequence, and sometimes bring pretrial freedom to an end. Money at bail is the quintessential, and typically the only condition precedent. Unlike other conditions, some or all of a financial condition often must be paid first in order to initially obtain release.

### Consent of Surety

Primarily used with commercial bail bondsmen, consent of surety refers to a written document from the bondsman agreeing to remain as surety despite good cause for a bail bond to be revoked.

### Contempt

Black's defines criminal contempt as "[a]n act that obstructs justice or attacks the integrity of the court." Generally speaking, a court can declare a defendant to be in contempt for any number of disruptive acts that interfere with the administration of justice, including violating a formal court order. Contempt of court may occur directly (committed in the immediate vicinity of the court) or indirectly (committed outside of court).

### Co-signor

A person, separate from and in addition to the defendant, who guarantees compliance with a bail bond. Despite having a parallel function to that of a commercial surety, the term co-signor has grown in use primarily to refer to an uncompensated surety who guarantees only the financial condition of release. **See Surety**

### Court Appearance Rate

A more representative way of expressing the court appearance outcome by focusing on the more frequent number of court appearances, instead of the typically much lower number of failures to appear ("FTA") for court. This rate may be calculated at the person level, by deter-

mining how many persons in a group appeared for all court events, or at the court event level, by determining what percentage of court events were attended by any person or group of persons. See Pretrial Release Outcomes

### Criminal History

Also known as a criminal record, it is a compilation of criminal offenses associated with a particular individual. Criminal histories can be powerful documents in the administration of bail, so great caution is urged in compiling and interpreting them.

### Defendant

The accused in a criminal proceeding.

### Delegated Release Authority

The entrusting – to law enforcement, or in some places, a pretrial services agency or program – of judicial authority to release an arrested person before his or her first court appearance.

### Diversion

According to the National Association of Pretrial Services Agencies' Performance Standards and Goals for Pretrial Diversion/Intervention, pretrial diversion/intervention is "a voluntary option which provides alternative criminal case processing for a defendant charged with a crime that ideally, upon successful completion of an individualized program plan, results in a dismissal of the charge(s)." The purpose of such a program is to "enhance justice and public safety through addressing the root cause of the arrest provoking behaviors of the defendant, reducing the stigma which accompanies a record of conviction, restoring victims and assisting with the conservation of court and criminal justice resources."<sup>27</sup> The Pretrial

Justice Institute’s website contains links to a variety of publications related to this topic.<sup>28</sup>

### Double Supervision or “Doubling Up”

The practice of setting a commercial surety bond along with professional pretrial agency or program supervision. The National Association of Pretrial Services Agencies Standards on Pretrial Release recommend not using this practice of “doubling-up” supervision:

[p]ending abolition of compensated sureties, jurisdictions should ensure that responsibility for supervision of defendants released on bond posted by a compensated surety lies with the surety. A judicial officer should not direct a pretrial services agency to provide supervision or other services for a defendant released on surety bond. No defendant released under conditions providing for supervision by the pretrial services agency should be required to have bail posted by a compensated surety.<sup>29</sup>

Commentary to that Standard provides the following reasoning:

[o]ther provisions of the Standards emphasize that financial bail should be used only if other conditions are insufficient to minimize the risk of nonappearance, and that, if [secured] financial conditions are imposed, the bail amount should be posted with the court under procedures that allow for the return of the amount of the bond if the defendant makes required court appearances. There is no reason to require defendants to support bail bondsmen in order to obtain release (and to pay the bondsman a fee that is not refundable even if they are ultimately cleared of the charges), and the practice of [simultaneously] providing for supervision by the pretrial services agency simply encourages perpetuation of

the undesirable practices associated with commercial bail bonding. It also drains supervisory resources from often understaffed and overworked pretrial services agencies, making it more difficult to supervise the defendants for whom they properly have responsibility.<sup>30</sup>

The American Bar Association at one time had a position on “double supervision” in its Standards for Pretrial Release, but it has since removed it “so as to leave no doubt as to the imperative nature of the recommendation that [commercial sureties] be abolished.”<sup>31</sup>

### Due Process

Refers generally to protecting individuals from arbitrary or unfair federal or state action pursuant to the rights afforded by the Fifth and Fourteenth Amendments of the United States Constitution (and similar state provisions). As noted by the Supreme Court in *United States v. Salerno*, due process is further broken down into two subcategories:

So called ‘substantive due process’ prevents the government from engaging in conduct that ‘shocks the conscience,’ or interferes with rights ‘implicit in the concept of ordered liberty.’ When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as ‘procedural’ due process.<sup>32</sup>

In the administration of bail, due process considerations include fundamental fairness arguments that high money bail bonds lead to defendants being unfairly punished prior to trial, as well as concerns that high money bonds and the resulting detention affects the fairness of a defendant’s trial and the ultimate

disposition of the case. When financial conditions of release result in a defendant's pretrial detention without the type of hearing envisioned by the U.S. Supreme Court in Salerno, a procedural due process claim might also prove successful.

## Eighth Amendment

Typically refers to the Eighth Amendment to the United States Constitution, which states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *See Excessive Bail*

## Emergency Release

As it relates to the field of bail and pretrial release, it is the release of any prisoner due to an emergency situation, such as (and typically) jail crowding. As a jail's percentage of pretrial inmates rises, that jail's overall population can rise above its operational capacity. Because many jurisdictions are uneasy with making policy changes affecting the pretrial population, one sometimes sees jails releasing convicted inmates early, often pursuant to elaborate emergency release schemes designed to comfort the public. At the extreme, emergency releases are a response to a court order to reduce a jail's population, but some programs are voluntary to remain within agreed-upon caps based on budgetary or other reasons. Emergency releases are relatively rare, but represent a significant and often well-publicized failure to manage a jail's population.

## Equal Protection

Refers generally to protecting individuals from laws that treat people unequally pursuant to the right guaranteed by the Fourteenth Amendment of the United States Constitution (and similar state provisions). In addition to considerations of due process (which include funda-

mental fairness arguments that high money bail bonds lead to defendants being unfairly punished before trial, as well as concerns that high money bonds and detention affects the fairness of a defendant's trial and the ultimate disposition of the case), many scholars have argued that equal protection considerations should serve as an equally compelling basis for fair treatment in the administration of bail, especially when considering the disparate impact of money bail bonds on defendants due only to their level of income.<sup>33</sup>

Over the years, this argument has been bolstered by language from Supreme Court opinions in cases like *Griffin v. Illinois*, which dealt with a defendant's ability to purchase a transcript required for appellate review. In that case, Justice Black stated that, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."<sup>34</sup> Moreover, sitting as circuit justice to decide a prisoner's release in two cases, Justice Douglas uttered the following dicta frequently cited as support for equal protection analysis: (1) "Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?";<sup>35</sup> and (2) "[N]o man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on 'personal recognizance' where other relevant factors make it reasonable to believe that he will comply with the orders of the Court."<sup>36</sup> Overall, despite scholarly arguments to invoke Equal Protection Clause analysis to the issue of bail, the federal courts have not been inclined to do so.

## Excessive Bail

A legal term of art used to describe bail that is unconstitutional pursuant to the Eighth Amendment to the United States Constitution (or similar state provisions). The Eighth

Amendment states that, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The Excessive Bail Clause derives from reforms made by the English Parliament in the 1600s to curb the abuse of judges setting impossibly high money bail to thwart the purpose of bail to afford a process of pretrial release. The English Bill of Rights of 1689 first used the phrase, “Excessive bail ought not be required,” which was incorporated into the 1776 Virginia Declaration of rights, and ultimately found its way into the United States and many other state constitutions.

Excessiveness must be determined by looking both at federal and state law, but a rule of thumb is that term relates overall to reasonableness. In *United States v. Salerno*, the Court stated as follows:

The only arguable substantive limitation of the Bail Clause is that the Government’s proposed conditions of release or detention not be ‘excessive’ in light of the perceived evil. Of course, to determine whether the Government’s response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. *Stack v. Boyle*, *supra*. We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.<sup>37</sup>

Thus, to determine excessiveness, one must “look to the valid state interests bail is intended to serve for a particular individual and judge

whether bail conditions are excessive for the purpose of achieving those interests. The state may not set bail to achieve invalid interests [flight and public safety are valid; at least one federal court has held that the state’s interest in setting bail at a level designed to prevent the arrestee from posting it is invalid, see *Wagenmann v. Adams*, 829 F.2d 196, 211-14 (1st Cir. 1987), and bail as punishment would also undoubtedly be an invalid state interest], nor in an amount that is excessive in relation to the valid interests it seeks to achieve.”<sup>38</sup>

The law of *Stack v. Boyle* is still strong: when the state’s interest is assuring the presence of the accused, “[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’ under the Eighth Amendment.”<sup>39</sup> Nevertheless, as the language in *Salerno* indicates, financial conditions (i.e., amounts of money) are not the only conditions vulnerable to an excessive bail claim. Any unreasonable condition of release (e.g., a nonfinancial condition having no relationship to reducing or ameliorating an identified risk, or that exceeds what is needed to assure the constitutionally valid state interest) might be deemed constitutionally excessive.<sup>40</sup>

## Exoneration

Exoneration generally is the removal of a responsibility. In the administration of bail and the pretrial process, it is a term of art referring to one being released from liability on a bail bond upon the successful satisfaction of all conditions of the bond, upon payment of a forfeiture of the bond, or upon the occurrence of any other statutorily enumerated justification, such as the death of the defendant, the surrender of the defendant into custody before the forfeiture process is complete, or deficiencies in the process affecting a surety’s liability.

## Failure to Appear (FTA)

The phrase typically used when a defendant or witness under subpoena does not show up for a scheduled court appearance. It is understood to carry with it some penalty for the failure, such as the issuance of a bench warrant. It has sometimes been defined as a “willful” absence from a court appointment, but research and experience has shown that FTAs needn’t be willful to nonetheless occur.

## Failure to Appear Rate

**see Court Appearance Rate**

## Felony

A serious crime usually punishable by imprisonment for more than one year or by death (Black’s). Also called “major” or “serious” crimes. What is and is not considered a felony (and whether it is even called a felony) differs among jurisdictions, and the lines of demarcation between less-serious felonies and more-serious misdemeanors are often blurred, so reference to each state’s sometimes complex criminal code is necessary to determine the precise definition. When reporting crime statistics, many entities (including the Federal Bureau of Investigation) categorize offenses using other classifications, such as “violent” and “property” offenses.

## First Appearance

The court proceeding in which a criminal defendant is first brought before a judge, either physically or through some electronic transmission. The laws concerning first appearances vary among the states, and can have different names. For example, in *Rothgery v. Gillespie County*, the case dealing with the Sixth Amendment right to counsel at the initial appearance, that appearance was called an “article 15.17 hearing,” in which the Texas

courts combined a probable cause determination with charge recitation and bail setting.<sup>41</sup> The relevant statute typically requires such a hearing “without unreasonable delay,” causing some practical variation, and usually includes an advisement of defendant rights, a recitation of charges, and bail bond setting. Also called an “initial appearance.” **See also Presentment**

## Forfeiture

To forfeit something generally in the law means to lose the right to money or property based on the breach of a legal obligation. In the administration of bail and the pretrial process, forfeiture refers to the procedure in which a court orders that the money paid up-front be retained by the court or that a surety pay the security pledged to the court when a defendant fails to fulfill the requirements of a bail bond. It is often used in relation to the bond agreement between a court, the defendant, and a commercial surety (bail bondsman), with numerous complicated statutory provisions governing the forfeiture procedure.<sup>42</sup>

## Habeas Corpus

From the Latin, “that you have the body,” the term is short for *habeas corpus ad subjiciendum*, which means “that you have the body to submit to,” and long for “habeas,” as in “the defendant filed his habeas petition today.” The term “habeas corpus” actually precedes any number of writs designed to bring a person from one place to another, typically court. The most frequently used and referred to (*ad subjiciendum*) is directed to someone detaining another person and commanding that the detained person be brought to court, typically to ensure that the person’s imprisonment is not illegal. It is one means available for defendants to obtain judicial review of the right to bail, or the amount of a financial condition of a bail bond. To Garner, the term

habeas corpus “is the quintessential Latinism that has taken on a peculiar meaning so that no homegrown English term could now supply.”<sup>43</sup>

It is often referred to as the “Great Writ,” in recognition of its importance among all other writs, and has been described by the United States Supreme Court as “the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.”<sup>44</sup> As Justice Stevens once wrote, “[t]he great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom. Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments.”<sup>45</sup>

Habeas corpus derives from the famous 1676 English case of an individual known only as Jenkes, who was held for two months on a charge that, pursuant to statute, required admittance to bail. Jenkes’ case, and cases like it, ultimately led to Parliament’s passage of the Habeas Corpus Act of 1679, which established procedures to prevent long delays before a bail hearing was held. The United States explicitly incorporated the right of habeas corpus into the Constitution in Article 1, Section 9, which reads, “[t]he privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.” The first Judiciary Act provided habeas corpus for federal prisoners, and in 1867 Congress expanded the process to allow federal courts to grant writs of habeas corpus in all cases, including state cases, where any person may be restrained in violation of the Constitution or U.S. law or treaty. Each state typically also has its own habeas right and procedure, which is often incorporated into an overall postconviction remedy provision.

Like “bail,” habeas corpus is a process, implicating a unique legal procedure and body of legal precedent.

## Immigration and Customs Enforcement (“ICE”)

The principal investigative arm of the United States Department of Homeland Security, created in 2003 by merging parts of the United States Customs Service and the Immigration and Naturalization Service. In some jurisdictions, ICE places immigration holds on defendants that can affect their perceived risk and thus their pretrial status.

## Incarceration

According to Black’s, it is the act or process of confining someone. By most estimates, the United States has the highest number of inmates and the highest incarceration rate in the world, with China (number of inmates) and Russia (incarceration rate) coming in second.

## Incarcerated Population

Also known at the local level as the jail population, the incarcerated population is the number persons held in one or more detention facilities. Jail population dynamics are important to understand when dealing with policies and procedures that affect that population, such as those surrounding bail and pretrial release. A typical jail is akin to a water barrel, which has an overall amount of liquid based on how much water is put into it, and how long that water stays inside the barrel until it is let out. Like the water barrel, the average daily jail population is determined by bookings (inflow) and length of stay (outflow). Thus, in addition to variations in bookings, various jail subpopulations can drive the average daily population based on their lengths of stay, and these lengths of stay, in turn, are affected by local



policies and procedures. As it pertains to bail and pretrial release, the Bureau of Justice Statistics reports that jail populations peaked in 2008, but have been declining since then. Nevertheless, approximately two thirds of the inmates housed in our nation’s jails are pretrial detainees, and the use of secured money at bail has increased the lengths of stay of pretrial inmates.

### Individualized Bail Determination

The notion underlying a risk-based administration of bail that each defendant poses his or her own risk, which can be assessed using professional standards and research. It presupposes that the fixing of bail in a blanket fashion not taking into consideration those individual risk characteristics is flawed and possibly illegal. The notion was first articulated by the United States Supreme Court in *Stack v. Boyle*, 342 U.S. 1, 5-6 (1951), when the Court wrote that “[t]o infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act,” and “[s]ince the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards as expressed in the Federal Rules of Criminal Procedure are to be applied in each case to each defendant.” The particular standards referred to in *Stack* included the nature and circumstances of the offense, the weight of the evidence, the financial ability of the defendant, and his or her character. Most states have similar standards in their bail statutes, thus statutorily mandating an individualized bail setting.

### Initial Appearance

*see First Appearance*

### Integrity of the Judicial Process

A term of art in the field of bail and pretrial release that often sums up a number of variables typically related to risk to court appearance and public safety. The phrase has sometimes been used as a label for a third constitutionally valid purpose for limiting pretrial freedom beyond court appearance and public safety, but often the phrase is either used without definition or has been further defined as relating to either court appearance or public safety. For example, the American Bar Association states that the purpose of the pretrial release decision includes “maintaining the integrity of the judicial process by securing defendants for trial.”<sup>46</sup> Other jurisdictions use the phrase when describing the threat of intimidating or harassing witnesses, arguably clear risks to public safety.

The phrase “ensure the integrity of the judicial process” was used in *United States v. Salerno*,<sup>47</sup> but only in a passing reference to the argument on appeal. Reviewing the court of appeals ruling, however, sheds some light on that argument. The principle contention at the court of appeals level was that the Bail Reform Act of 1984 violated due process because it permitted pretrial detention of defendants when their release would pose a danger to the community or any person.<sup>48</sup> As the appeals court noted, this contention was different from what it considered to be the clearly established law that detention was proper to prevent flight or threats to the safety of those solely within the judicial process, such as witnesses or jurors. The appeals court found the idea of potential risk to the broader community “repugnant” to due process and, had the Supreme Court not reversed, the distinction between those in the judicial process and those outside of it might have remained. However, by upholding the Bail Reform Act’s preventive detention provi-

sions, the Supreme Court forever expanded the notion of public safety to encompass consideration of all potential victims, whether in or out of the judicial process. Today, use of the phrase typically begs further definition so as to clarify whether judicial integrity means specifically court appearance or public safety, more general compliance with all court-ordered conditions of one's bail bond, or some other relevant factor.

## Jail

A jail is a building designated and used to temporarily confine persons who are sentenced to minor crimes or who do not obtain release during the pretrial period, typically operated by local jurisdictions. As Black's notes, it is a place of confinement that is somewhat more than a police station, and less than a prison. Jail is pronounced the same as "gaol," the British variant, which is traced to the Latin term for "cage." Because jails are seen as somewhat temporary, they often do not have the sort of long-term rehabilitation programs afforded in many prisons.

## Judge

A public official appointed or elected to hear and decide legal matters in court (Black's). The term is often used interchangeably with "court," as in "I hope that the court will decide this matter soon." There are numerous types of judges, from county and district to military and "senior visiting," so one should attempt always to further clarify the title. The term is frequently misused to describe those on supreme courts, who are typically instead called "justices." In some jurisdictions the title is important when determining the authority to grant or fix bail.

## Judicial Officer

Broader than the term "judge," judicial officers include judges and magistrates, as well as other officers of the court as defined locally or in state or federal bail statutes. In some jurisdictions the title is important when determining the authority to grant or fix bail.

## Least Restrictive Conditions

Least restrictive conditions is a concept related to excessive bail, as evidenced by the United States Supreme Court's opinion in Salerno, which explained that conditions of bail must be set at a level designed to assure a constitutionally valid purpose for limiting pretrial freedom "and no more." The phrase "least restrictive conditions" is a term of art expressly contained in the federal and District of Columbia statutes, the American Bar Association best-practice standards on pretrial release, and other state statutes based on those Standards (or a reading of Salerno). Moreover, the phrase is implicit through similar language from various state high court cases articulating, for example, that bail may only be met by means that are "the least onerous" or that impose the "least possible hardship" on the accused.

Commentary to the ABA Standard recommending release under the least restrictive conditions states as follows:

This Standard's presumption that defendants should be released under the least restrictive conditions necessary to provide reasonable assurance they will not flee or present a danger is tied closely to the presumption favoring release generally. It has been codified in the Federal Bail Reform Act and the District of Columbia release and pretrial detention statute,

as well as in the laws and court rules of a number of states. The presumption constitutes a policy judgment that restrictions on a defendant's freedom before trial should be limited to situations where restrictions are clearly needed, and should be tailored to the circumstances of the individual case. Additionally, the presumption reflects a practical recognition that unnecessary detention imposes financial burdens on the community as well as on the defendant.

The least restrictive principle is foundational, and is expressly reiterated throughout the ABA Standards when, for example, those Standards recommend citation release or summonses versus arrest. Moreover, the Standard's overall scheme creating a presumption of release on recognizance, followed by release on nonfinancial conditions, and finally release on financial conditions is directly tied to this foundational premise. Indeed, the principle of least restrictive conditions transcends the Standards and flows from even more basic understandings of criminal justice, which begins with presumptions of innocence and freedom, and which correctly imposes increasing burdens on the government to incrementally restrict one's liberty.

More specifically, however, the ABA Standard's commentary on financial conditions makes it clear that the Standards consider secured money bonds to be a more restrictive alternative to both unsecured bonds and nonfinancial conditions: "When financial conditions are warranted, the least restrictive conditions principle requires that unsecured bond be considered first." Moreover, the Standards state, "Under Standard 10-5.3(a), financial conditions may be employed, but only when no less restrictive non-financial release condition will suffice to ensure the defendant's appearance in court. An exception is an unse-

cured bond because such a bond requires no 'up front' costs to the defendant and no costs if the defendant meets appearance requirements."

## Legal and Evidence-Based Practices

According to Marie VanNostrand, Ph.D., who first coined the term, they are "interventions and practices that are consistent with the pretrial legal foundation, applicable laws, and methods research has proven to be effective in decreasing failures to appear in court and danger to the community during the pretrial stage. The term is intended to reinforce the uniqueness of the field of pretrial services and ensure that criminal justice professionals remain mindful that program practices are often driven by law and when driven by research, they must be consistent with the pretrial legal foundation and the underlying legal principles."<sup>49</sup>

## Magistrate

A judicial officer, often with limited jurisdictional power, who possesses whatever authority that is given to him or her through appointment or law. In some jurisdictions the title is important when determining the authority to grant or fix bail.

## Manhattan Bail Project (or Vera Study)

One of the best known social science studies of bail, and the first to explore alternatives to release on secured financial conditions (money bail bonds). It was conducted by the Vera Foundation (now the Vera Institute of Justice) and the New York University Law School beginning in October of 1961. It was designed "to provide information to the court about a defendant's ties to the community and thereby hope that the court would release the defendant without requiring a bail bond [i.e., release on the

defendant’s own recognizance].”<sup>50</sup> The project was a focal point of discussion at the National Conference on Bail and Criminal Justice in 1964, and generally in the bail reform movement of the 1960s.

### Misdemeanor

A crime that is less serious than a felony and is usually punishable by a fine or relatively brief confinement in a place other than a prison (Black’s). ***See also Felony***

### Monetary Bail Bond Schedule (or Bail Schedule)

A written listing of amounts of money to be used in bail setting based on the offense charged, regardless of the characteristics of any individual defendant. While they are often created with good intentions, many argue that bail schedules are the antithesis of individualized bail determinations, and thus clearly violate principles articulated by the Supreme Court in *Stack v. Boyle*.<sup>51</sup> To many, they also improperly displace judicial discretion, and they have been “flatly reject[ed]” by the American Bar Association’s Criminal Justice Standards on Pretrial Release because they are “arbitrary and inflexible,” and because they exclude individualized factors that are more relevant to risk. At least three state supreme courts have examined procedures to implement non-discretionary bail amounts and found them legally deficient.<sup>52</sup>

### Money Bail

A shorthand term used primarily for describing bail or a bail bond using secured financial conditions. The two central issues concerning money bail are: (1) unnecessary incarceration of defendants who cannot afford to pay; and (2) the use of secured financial conditions to

protect public safety, a notion with no empirical support and no legal basis in the more enlightened states’ statutes.

### Money Bail System

The “traditional” money or financial bail system, which includes any system of the administration of bail that is over-reliant on money. Some of its hallmarks include monetary bail bond schedules, overuse of secured bonds, a reliance on commercial sureties (for-profit bail bondsmen), financial conditions set to protect the public from future criminal conduct, and financial conditions set without consideration of the defendant’s ability to pay, or without consideration of non-financial conditions that would likely reduce risk.

### National Association of Pretrial Services Agencies (“NAPSA”) Standards on Pretrial Release

NAPSA is the national professional association for the pretrial release and pretrial diversion fields. Like the ABA’s Standards, the NAPSA’s Standards on Pretrial Release serve as best practice standards in the field.<sup>53</sup> In many areas, the NAPSA Standards compliment (and sometimes mirror) the ABA Standards, but they also provide important detailed guidance on best practices for operating pretrial services agencies or programs.

### National Conference on Bail and Criminal Justice

The 1964 conference, convened by United States Attorney General Bobby Kennedy, which brought together over 400 judges, prosecutors, defense lawyers, police, bondsmen, and prison officials to present “for analysis and discussion specific and workable alternatives to [money] bail based on the experience of the Manhattan

Bail Project and some others which followed in its wake.”<sup>54</sup> Attorney General Kennedy closed the conference with the following memorable statement:

For 175 years, the right to bail has not been a right to release, it has been a right merely to put up money for release, and 1964 can hardly be described as the year in which the defects in the bail system were discovered.

\* \* \*

What has been made clear today, in the last two days, is that our present attitudes toward bail are not only cruel, but really completely illogical. What has been demonstrated here is that usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money. How much money does the defendant have?<sup>55</sup>

## Plea

In criminal law, it is an accused person’s formal response to a criminal charge (e.g., “guilty,” “not guilty,” “no contest”) (Black’s).

## Parole

Release from jail, prison, or other confinement after actually serving part of a sentence (Black’s).

## Plea Bargain

A negotiated agreement between a prosecutor and a criminal defendant whereby the defendant typically pleads guilty to a lesser offense, or to one of multiple charges, in exchange for some concession by the prosecutor, such as

an agreement to a more lenient sentence or a dismissal of other charges. It is also called a “plea agreement.” There is a significant, but extremely sensitive issue in the administration of bail concerning whether a defendant’s pretrial status has the effect of “coercing” a plea, typically by providing the defendant with a Hobson’s choice (a take it or leave it option) of pleading guilty in order to be released from confinement. Given the large percentage of cases ending with guilty pleas, research is needed to shed further light on this issue.

## Point Scale

A system by which number or “point” values are assigned to various characteristics and circumstances associated with individual defendants. Threshold scores are established that identify defendants as eligible for release or not. Many pretrial programs have used a version of the original VERA point scale at one time, but many others have developed local or statewide validated pretrial risk assessments as called for by national standards. See Pretrial Risk Assessment

## Preliminary Hearing

A criminal hearing to determine whether there is sufficient evidence to prosecute an accused person. If sufficient evidence exists, the case proceeds to the next phase. Also called a preliminary examination, a probable cause hearing, or a bindover hearing (Black’s).

## Presentment

A little-used term to describe the act of bringing a defendant before a judge for the defendant’s first appearance as soon as reasonably possible. The United States Supreme Court recently commented on the federal presentment requirement, writing that it is not just some “administrative nicety,” but in

fact still has practical importance: “As we said, it stretches back to the common law, when it was one of the most important protections against unlawful arrest. Today presentment is the point at which the judge is required to take several key steps to foreclose Government overreaching: informing the defendant of the charges against him, his right to remain silent, his right to counsel, the availability of bail, and any right to a preliminary hearing; giving the defendant a chance to consult with counsel; and deciding between detention or release.”<sup>56</sup> See First Appearance

## Presumption

A legal inference of assumption that a fact exists, based on the known or proven existence of some other fact or group of facts. Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption (Black’s). Concerning bail and pretrial release, the term is often used in “presumption of innocence” (see below), a “presumption of release” (tied philosophically to the presumption of innocence, and included in both the ABA’s Criminal Justice Standards on Pretrial Release and NAPSAs Standards on Pretrial Release), a more specific “presumption of release on recognizance” (a principle flowing from the Standards’ recommendations to use least restrictive conditions of release), and sometimes a “presumption toward confinement” found in some preventive detention statutes.

## Presumption of Innocence

The fundamental principle that a person may not be convicted of a crime unless the government proves guilt beyond a reasonable doubt,

without any burden placed on the accused to prove innocence (Black’s). Although it is not mentioned in the United States Constitution, its tie to the criminal burden of proof implicates the Due Process Clause.<sup>57</sup> The United States Supreme Court first discussed the principle as the “true origin” of the doctrine of reasonable doubt, writing in *Coffin v. United States* that “a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”<sup>58</sup> The *Coffin* Court itself traced the presumption’s origins to various statements under Roman law, which included not only notions of proof, but also language re-articulated and published by Blackstone, who wrote that “it is better that ten guilty persons escape than that one innocent suffer.”

Some confusion surrounding the phrase derives from a line in *Bell v. Wolfish*, in which the Court stated that the presumption of innocence “has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.”<sup>59</sup> The temptation to use this quote to erode the role of the presumption in the administration of bail is dampened considerably by the scope of concerns addressed in the *Bell* opinion. As the Court expressly stated: “We are not concerned with the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily entails. . . . Instead, what is at issue when an aspect of pretrial detention that is not alleged to violate any express guarantee of the Constitution is challenged, is the detainee’s right to be free from punishment, and his understandable desire to be as comfortable as possible during his confinement, both of which may conceivably coalesce at some point.”<sup>60</sup> *Bell* was essentially a conditions-of-confinement case, and the “no application” language, above, was uttered in discussing a prisoner’s right to

be free from the correctional facility’s practice of “double bunking” inmates.

Thus, the presumption of innocence everything to do with bail and the decision to release or confine a particular inmate, and the Bell language should in no way diminish the strong statements concerning the right to bail found in *Stack v. Boyle*, in which the Court wrote,

From the passage of the Judiciary Act of 1789, to the present Federal Rules of Criminal Procedure, federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.<sup>61</sup>

That the broader notion of a right to bail necessarily triggers serious consideration of the presumption of innocence is also clearly seen in *United States v. Salerno*, through Justice Marshall’s dissent in which he wrote, albeit unconvincingly, that “the very pith and purpose of [the Bail Reform Act of 1984] is an abhorrent limitation of the presumption of innocence.”<sup>62</sup>

## Pretrial

A period of time referring to the phase of a criminal defendant’s case beginning at arrest and ending at final disposition. The term is often misused to refer to a pretrial services agency or program, or to pretrial services supervision.

## Pretrial Conditional Release

Pretrial conditional release refers to any form of release in which the defendant is required to comply with specific conditions set by the court, which can be financial, nonfinancial, or both.

## Pretrial Detention

Holding a defendant in secure detention before trial on criminal charges either because release was denied or because the established bail bond could not be posted (Black’s). As the definition implies, pretrial detention can be intended or unintended, and thus judges should be purposeful when setting bail bonds so that they realize their intention that the defendant either be released or remain detained.

## Pretrial Justice

According to Tim Murray, Director Emeritus of the Pretrial Justice Institute, pretrial justice involves the proper administration of laws through fair and effective pretrial policies and practices for “the host of decisions that occur, from the arrest up to the point at which the case is concluded or disposed of.”<sup>63</sup> This definition extends the concept beyond merely the bail, or release/detention decision, to all decisions made during the pretrial phase of a criminal case. A similarly broad definition, drafted with inspiration from the United States Probation and Pretrial Services Charter for Excellence, is as follows: “The honoring of the presumption of innocence, the right to bail that is not excessive, and all other legal and constitutional rights afforded to accused persons awaiting trial while balancing these individual rights with the need to protect the community, maintain the integrity of the judicial process, and assure court appearance.”<sup>64</sup>

## Pretrial Release Decision

A court’s determination of whether a criminal defendant will remain at liberty or be held in secure detention until the disposition of his or her case. According to the American Bar Association’s Criminal Justice Standards on Pretrial Release, “[t]he purposes of the pretrial release decision include providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses, and the community from threats, danger, or interference.”<sup>65</sup> The pretrial release decision, as contemplated by the Standards, is specifically distinguished from the traditional financial bail decision. *See Money Bail System, Bail*

## Pretrial Release Outcomes

Although the term “outcomes” can reflect whatever is measured (e.g., pretrial detention/release outcomes, adjudication and sentencing outcomes), it is typically used to refer to results tied to the two constitutionally valid purposes for limiting pretrial freedom – court appearance and public safety. A third outcome, compliance with all other bail bond conditions, may also be measured.

## Pretrial Risk Assessment

The method by which a pretrial services program/agency or individual identifies and categorizes risks of pretrial misconduct presented by a particular defendant based upon the information gathered before the bail hearing. The risk assessment can be either subjective or objective. Subjective assessments are based on an evaluation of the defendant by the interviewer, who draws on his or her prior experience to assess release appropriateness. Objective assessments are based on procedures and conclusions supported by research and

national organizations, such as the National Association of Pretrial Services Agencies and the American Bar Association, through their published standards.

## Pretrial Services Agency or Program

While widely varying, a pretrial services agency or program is generally known as any organization created ideally to perform the three primary pretrial agency or program functions of: (1) collecting and analyzing defendant information for use by the court in assessing risk; (2) making recommendations to the court concerning bail bond conditions of release to address risk; and (3) monitoring and supervising defendants who are released from secure custody during the pretrial phase of their cases in order to manage their risk. For a number of reasons, having a single entity provide these functions is likely the ideal, and is superior to separating the functions and having them performed by other, existing criminal justice entities.

## Pretrial Supervision

The act of managing, directing, or overseeing a defendant who has been released from secure custody during the pretrial phase of a criminal case, ideally to reasonably assure both court appearance and public safety. It is often re-phrased as “pretrial services supervision,” and used to refer to supervision by a pretrial services program or agency, engaged to provide oversight for compliance with all conditions of a bail bond to further the dual purpose of bail. Because commercial bail bondsmen are only concerned with court appearance, their oversight in any particular case could arguably be considered a more limited form of “pretrial supervision,” but likely never “pretrial services supervision.”



## Preventive Detention

Pretrial detention designed to prevent either flight or danger to the community. The laws of many states and the federal system allow the court to detain defendants in certain carefully defined categories of cases either based on the defendant's most serious charge or when no condition or combination of conditions of pretrial release can reasonably assure court appearance or public safety. When drafted properly, these laws include substantial due process elements, such as those reviewed and approved by the United States Supreme Court in *United States v. Salerno*.<sup>66</sup> It is correctly argued that such detention should be used sparingly, for while the Supreme Court in *Salerno* upheld the federal preventive detention provisions of the Bail Reform Act of 1984, it also uttered the memorable statement, "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."<sup>67</sup> In that opinion, the Court specifically emphasized that the "extensive safeguards" embedded in the Bail Reform Act and the "careful delineation of the circumstances under which detention will be permitted" were crucial to repelling the constitutional challenges. Nevertheless, some federal districts have reported pretrial detention rates as high as 70-80%, indicating potential overuse of the statutory provisions, and a trend contrary to the Court's warning to ensure that detention remain an exception.<sup>68</sup> Moreover, in many cases across this country bail bonds are often set in unaffordable, if not excessive amounts, leading to preventive detention without any of the procedural safeguards envisioned by the Court in *Salerno*.

## Prison

According to Webster's Dictionary, a prison is generally a place of confinement, and specifically an institution (as one under state jurisdic-

tion) for confinement of persons convicted of serious crimes. One should not expect to find any pretrial inmates housed in a state prison; however, defendants facing federal charges are sometimes held in federal prisons, and some states actually call their jails "prisons." Private prisons exist in the United States, which are run by private corporations whose services and beds are contracted out by state governments or the Federal Bureau of Prisons.

## Probable Cause

A reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime (Black's). Probable cause generally refers to having more evidence for than against. It is a term of art in criminal procedure referring to the requirement that arrests be based on probable cause. Probable cause to arrest is present when "at that moment the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [person] had committed or was committing an offense."<sup>69</sup> In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Supreme Court ruled that suspects who are arrested without a warrant must be given a probable cause hearing within 48 hours.

## Probation

A court imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending him or her to jail or prison (Black's). Though similarities exist between probation and pretrial release (indeed, sometimes pretrial services are delivered by a jurisdiction's probation office), the crucial difference is that probation is a sentence of punishment imposed upon conviction, and thus has entirely

different legal purposes than those underlying the bail process. There exists an unfortunate irony that many criminal defendants will spend the entire pretrial phase of their case in secured confinement, only to be released back into the community after conviction by being sentenced to probation.

### Pro se

For oneself, or on one's own behalf, without the assistance of a lawyer. Sometimes called in propria persona, or "pro per" for short (Black's). There are empirical data to support the notion that pro se defendants are at some significant disadvantage during their bail setting. *See Public Defender, Right to Counsel*

### Prosecutor

A legal officer who represents the government in criminal proceedings (although there is such a thing as a private prosecutor, it is rare). They are known by different names, including district attorney, county attorney, commonwealth attorney, municipal attorney, state's attorney, prosecuting attorney, etc. Prosecutors in the federal system are known as United States Attorneys and Assistant United States Attorneys, or "AUSA's" for short.

### Protection Order/Restraining Order

Often used interchangeably, but in some states defined differently, both terms refer to court orders prohibiting or restricting a person from engaging in delineated conduct. They can be mandated statutorily for all cases, or discretionary for particular cases, such as domestic violence.

### Public Defender

A lawyer or staff of lawyers, usually publicly appointed and paid, whose duty is to repre-

sent indigent criminal defendants (Black's). Any term relating to defense counsel raises the important but somewhat misunderstood issue of lawyer representation during the first appearance. The relevant National Association of Pretrial Services Agencies standard, Standard 2.2(d) states that "[a]t the defendant's first appearance, he or she should be represented by counsel. If the defendant does not have his or her own counsel at this stage, the judicial officer should appoint counsel for purposes of the first appearance proceedings, and should ensure that counsel has adequate opportunity to consult with the defendant prior to the first appearance."<sup>70</sup> Comments to that Standard explain that organization's position:

The committee that drafted the Standards recognizes that, as of the time of their adoption in 2004, many jurisdictions do not routinely provide for the appointment of counsel to represent defendants at first appearance. However, if the first appearance is to be fair and meaningful, it is vitally important to ensure that defendants are represented effectively at this proceeding. Attorneys who understand the importance of the decisions made at first appearance, are familiar with the contents of pretrial services reports and with available release options, and are able to advocate effectively for their clients – on the basis of consultation with the defendant and even very brief contact with family members or friends of the defendant – can make the difference between liberty and confinement for defendants during the pretrial period.<sup>71</sup>

The relevant ABA Standard concerning defendant representation recommends only that "[i]f the defendant is not released at the first appearance and is not represented, counsel should be appointed immediately. The next judicial proceeding should occur promptly, but

not until the defendant and defense counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived the right to be represented by counsel.”<sup>72</sup> Commentary to the Standard, however, better reflects the ABA’s position on the issue:

[i]n some jurisdictions, defendants are represented by counsel, at least provisionally, at their first appearance, but this is not a universal practice. ABA policy, however, clearly recommends that provision of counsel at first appearance should be standard in every court. Thus, the Providing Defense Services Standards call for counsel to be provided to the accused ‘as soon as feasible, and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs first.’

Provision of counsel at the first appearance is especially important if consideration is going to be given to detention or to release on conditions that involve a significant restraint on the defendant’s liberty.<sup>73</sup>

Fairly recent data support the recommendations contained in the ABA and NAPSA Standards. Noting that previous attempts to provide legal counsel in the bail process have been neglected, in 1998 the Baltimore, Maryland, Lawyers at Bail Project was created to demonstrate empirically whether or not lawyers mattered during bail bond setting hearings. Using a controlled experiment (with some defendants receiving representation at the bail hearing and others not receiving representation) the Project found that defendants with lawyers: (1) were over two and one-half times more likely to be released on their own recognizance; (2) were over four times more likely to have their initially-set

bail bond amounts reduced at the hearing; (3) had their money bail bond reduced by a greater amount; (4) were more likely to have the money bond reduced to a more affordable level (\$500 or under); (5) spent less time in jail (an average of two days versus nine days for unrepresented defendants); and (6) had longer bail bond review hearings than defendants without lawyers at first appearance.<sup>74</sup> In a paper reporting the results of this study, the authors concluded:

[L]awyers do make a difference. The randomized controlled experiment conducted by the Lawyers at Bail Project in Baltimore supports the conclusion that having a lawyer present at a bail hearing to provide more accurate and complete information has far-reaching consequences. The accused is considerably more likely to be released, to respect the system and comply with orders, to keep his job and his home, and to help prepare a meaningful defense. The public at large benefits, too, from the unclogging of congested court systems and overcrowded jails and the resulting savings in taxpayer dollars.<sup>75</sup>

At the time of their publication, Colbert et al. noted that sixteen states refused to provide lawyers at this initial proceeding altogether, and twenty-six states declined to provide defendant representation at bail bond settings in all but a few counties. According to the authors, only eight states and the District of Columbia provided a right to counsel at first appearance. ***See Pro Se, Right to Counsel***

## Public Safety

The second constitutionally valid purpose for limiting pretrial freedom, along with assuring court appearance, typically measured by new arrests or new charges, but sometimes, and

more appropriately, expressed in the negative from these measurements (e.g., the “no new arrest or charge rate”). The term is also somewhat overused by some public officials as an undefined and unmeasured, and thus unasailable rationale for defending certain policies and practices.

## Recognizance

Generally, an obligation by which a person promises to perform some act or observe some condition, such as to appear when called, to pay a debt, or to keep the peace. According to Black’s, a recognizance most commonly takes the form of a bail bond that guarantees an un-jailed criminal defendant’s return for a court date.

## Recommendations

Verbal or written suggestions to the court regarding the conditions of release or detention appropriate for the case at hand.

## Right to Bail

When granted by federal or state law, it is the right to release from jail or other government custody through the bail process. Technically, it is typically the “right to non-excessive bail,” which goes to the reasonableness of the conditions placed on any particular defendant’s release. The United States Constitution does not have an explicit right to bail clause, but that right is contained in the federal statute. Many states have right to bail clauses, even if that right has been limited for certain cases.

Some argue, incorrectly, that the right to bail means only the right to have bail set. This argument ignores clear statements by the United States Supreme Court indicating that the right to bail normally means a right to pretrial freedom, such as the following two state-

ments from *Stack v. Boyle*: (1) “federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.”<sup>76</sup>; (2) “The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty.”<sup>77</sup>). The argument also conflicts with the following seminal statement from *United States v. Salerno*: “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>78</sup>

The legal structure of the right to bail differs among the states. Nine states, like the federal system, have no right to bail articulated in their constitutions. Approximately twenty one states have “traditional” and fairly broad right to bail provisions, which were modeled after Pennsylvania’s law of 1682. The remaining states have amended their constitutions to allow for preventive detention in various ways.

## Right to Counsel

The Sixth Amendment right of the accused to assistance of counsel for his or her defense. There is also a Fifth Amendment right, which deals with the right to counsel during all custodial interrogations, but the Sixth Amendment right more directly affects the administration of bail as it applies to all “critical stages” of a criminal prosecution. According to the Supreme Court, the Sixth Amendment right “does not attach until a prosecution is commenced.”<sup>79</sup> Commencement, in turn, is “the initiation of adversary judicial criminal proceedings – whether by way of formal charge,

preliminary hearing, indictment, information, or arraignment.”<sup>80</sup> In *Rothgery v. Gillespie County*, the United States Supreme Court “reaffirm[ed]” what it has held and what “an overwhelming majority of American jurisdictions” have understood in practice: “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”<sup>81</sup>

## Salerno

Short for *United States v. Salerno*, 481 U.S. 739 (1987), the United States Supreme Court case that upheld the 1984 Bail Reform Act’s preventive detention language against facial Due Process and Eighth Amendment challenges. Regarding the Eighth Amendment claim, the Court concluded:

Nothing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the Government’s proposed conditions of release or detention not be ‘excessive’ in light of the perceived evil. Of course, to determine whether the Government’s response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. We believe that, when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.<sup>82</sup>

It was in the *Salerno* opinion that Chief Justice Rehnquist uttered the famous statement (and rallying cry for all those now seeking bail reform), “[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>83</sup> **See *Preventive Detention***

## Secured Bond

*see Bail Bond*

## Security

Collateral given or pledged to guarantee fulfillment of an obligation (Black’s). Implied is the forfeiture of this collateral if the obligation is not met.

## Stack v. Boyle

342 U.S. 1 (1951). The first major Supreme Court case to address issues in the administration of bail, albeit written at a time when the sole purpose of bail was to reasonably assure court appearance. Its holding included the following language:

the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’ under the Eighth Amendment. Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.<sup>84</sup>

The case is also often cited for the following language concerning the presumption of innocence:

[f]rom the passage of the Judiciary Act of 1789, to the present Federal Rules of Criminal Procedure, Rule 46 (a)(1),<sup>85</sup> federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.<sup>86</sup>

Finally, the case is known for language both in the majority opinion as well as Justice Jackson’s memorable concurring opinion, emphasizing the importance of individualized bail determinations that are tailored to each defendant.

### Standards (also “National Standards”)

Generally, standards are models accepted as correct by custom, consent, or authority, or a criterion for measuring acceptability, quality, or accuracy. In the field of pretrial release, “standards” refer to specific recommendations based on empirically sound social science research and fundamental legal principles designed to provide guidance and insight to policymakers and practitioners working to further pretrial justice. The standards published by the National Association of Pretrial Services Agencies (NAPSA) are directed specifically toward pretrial programs. The American Bar Association’s Criminal Justice Standards on Pretrial Release stand out due to their breadth of stakeholder input, their comprehensive process for adoption, and

their use by the courts and others as important sources of authority.<sup>87</sup>

### Sufficient Sureties

In the administration of bail, the phrase is used to mean adequate assurance as a limit to an unfettered right to bail, sufficient to accomplish the purpose of bail – that is, court appearance and public safety. The language is derived from the 1682 Pennsylvania constitutional provision, providing that “all prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great.”<sup>88</sup> The Pennsylvania law was quickly copied, and as the country grew “the Pennsylvania provision became the model for almost every state constitution adopted after 1776.”<sup>89</sup> The more litigated issue at bail is what the term “sureties” in “sufficient sureties” means, and specifically whether it limits the government to accepting commercial sureties versus, for example, cash-only financial conditions of release. In one state court case, the Colorado Court of Appeals reviewed other published state court decisions surrounding the issue and wrote the following:

the vast majority [of jurisdictions], either expressly or implicitly, understand the word ‘sureties’ in the phrase ‘sufficient sureties,’ to encompass a variety of bond forms, including cash. See *State v. Briggs*, supra, 666 N.W.2d at 583 (“the framers did not intend to favor one particular method of surety-commercial bonding-by inclusion of the sufficient sureties clause”); *State v. Brooks*, supra, 604 N.W.2d at 353 (the word “sureties” “encompasses a broad array of methods to provide adequate assurance that an accused will appear as the court requires”); see also *Ex parte Singleton*, supra, 902 So.2d at 135 (quoting *State v. Briggs*, supra, 666 N.W.2d at 581-83: “[w]e are also confident that the framers did not

intend to favor one particular method of surety”); *People ex rel. Gendron v. Ingram*, 34 Ill.2d 623, 217 N.E.2d 803, 806 (1966) (“the alternative methods of bail provided in [the statutes] do not violate the constitutional provision that all persons shall be bailable by ‘sufficient sureties’”); *Burton v. Tomlinson*, 19 Or.App. 247, 527 P.2d 123, 126 (1974) (“Nowhere does it say that lawful release of a defendant may be accomplished only through the medium of sureties.”); cf. *Rendel v. Mummert*, supra, 474 P.2d at 828; *State ex rel. Jones v. Hendon*, 66 Ohio St.3d 115, 609 N.E.2d 541, 543 (1993); but see *State v. Golden*, supra, 546 So.2d at 503 (limiting the “sufficient sureties” clause to commercial sureties).

Because the history of the phrase in each of the respective constitutions is similar, we are persuaded by the near uniformity of these opinions on this question. We also find particularly informative the exhaustive historical analysis done by the Iowa Supreme Court in *Briggs*. Specifically, that court noted that the several state constitutions that included “sufficient sureties” upon which the Iowa provision was patterned were drafted before commercial sureties even emerged as a popular bond form. Similarly, the court pointed to historical data indicating that personal, monetary, and property sureties were all more well-known ways to secure a bond when the Iowa Constitution was enacted. *State v. Briggs*, supra, 666 N.W.2d at 583; cf. *People v. Mellor*, 2 Colo. 705, (1875) (cash bond imposed by trial court).

Furthermore, in Colorado, as in most jurisdictions, the primary purpose of bail is to assure the presence of the accused at trial. See *People v. Sanders*, 185 Colo. 153, 156,

522 P.2d 735, 736 (1974) (such a purpose “should be met by means which impose the least possible hardship upon the accused”); see also *Reynolds v. United States*, 80 S.Ct. 30, 32, 4 L.Ed.2d 46 (1959). Interpreting the word ‘sureties’ broadly to encompass multiple bond forms satisfies this purpose. When bail may be secured by a court in a variety of ways, the court’s ability to assure the presence of the accused at trial is strengthened. See *Rendel v. Mummert*, supra, 474 P.2d at 828 (“‘sufficient sureties’ mean, at a minimum, that there is reasonable assurance to the court that if the accused is admitted to bail, he will return as ordered until the charge is fully determined”).

Accordingly, we agree with the majority of jurisdictions considering the issue that, in reference to bail, the term “sureties” refers to a broad range of guarantees used for the purpose of securing the appearance of the defendant. Such guarantees include, but are not limited to, bonds secured by cash.<sup>90</sup>

Historically, sureties were always people, and government officials attained sufficiency by “stacking” sureties – that is, by using multiple persons to take collective responsibility for the defendant pretrial.

## Summons

A notice requiring a person to appear in court as a juror or witness; a writ directing a sheriff or other proper officer to notify a defendant to appear in court on a day named (Black’s). In the administration of bail, there is a significant issue concerning what criteria should govern a judge’s decision to issue summonses in lieu of arrest warrants.

## Surety or Sureties

Generally, a surety is a person who is primarily liable for paying another’s debt or performing another’s obligation (Black’s). In the administration of bail, a “surety” is one of a broad range of guarantees (not necessarily a person) as a limit to an unfettered right to bail, sufficient to accomplish the purpose of bail – i.e., court appearance and public safety. The “sufficient surety” language found in many state constitutions was drafted long before the inception of pretrial services programs and agencies, before release on recognizance programs, and before the use of commercial sureties, so a somewhat broader definition is warranted to cover all current methods used to provide reasonable assurance of court appearance and public safety.

## Third Party Custody

A condition of release that requires that another person or program be responsible for assuring the defendant’s appearance and compliance with all other bond conditions. Typically, the defendant signs a bail bond and agrees to remain in the custody of a third party. The third party, in turn, agrees to supervise the defendant and report any violation of the conditions of release to the court. Other conditions may also be imposed.

## Unsecured Bond

*see Bail Bond*

## Vera Study

*see Manhattan Bail Project*

## Warrant

A writ directing or authorizing someone to do an act, especially directing a law enforcement officer to make an arrest, a search, or a seizure (Black’s). An arrest warrant typically refers to the warrant issued upon probable cause to arrest and bring a person to court. The term “bench warrant” is often used for any warrant issued from the bench, but more specifically for those warrants issued for the arrest of a person who has been held in contempt, who has failed to appear, or has disobeyed a subpoena.

## Writ

A court’s written order, in the name of a state or other competent legal authority, commanding the addressee to do or refrain from doing a specified act. There are numerous types of writs, including, technically, a *capias* or arrest warrant, and the Great Writ of *habeas corpus*.



## References

1. Bryan A. Garner, *A Dictionary of Modern Legal Usage* (Oxford Univ. Press, 3rd ed. 1995), at 96 [hereinafter Garner].
2. *Black's Law Dictionary* (West Pub. Co., 9th ed. 2009).
3. Asimow, *Popular Culture and the Adversary System*, 40 *Loy. L. A. L. Rev.* 653 (2007).
4. Garner, *supra* note 1, at 96. According to Garner, as a noun, people use the term bail to mean (1) a person who acts as a surety for a debt, (2) the security or guarantee agreed upon, and (3) the release on surety of a person in custody.
5. *Bouvier's Law Dictionary*, 8th ed., Vol. 1, at 153 (1858).
6. 342 U.S. at 4 (internal citation omitted) (emphasis added).
7. 481 U.S. 739, 755 (1987).
8. *Frequently Asked Questions About Pretrial Release Decision Making* (ABA 2012).
9. Va. Code. § 19.2-119 (2013).
10. Colo. Rev. Stat. § 16-1-104 (2013).
- 11a. Alaska Const. art. I, § 11.
- 11b. Florida Const. art. I, § 14.
- 11c. Conn. Const. art. 1, § 8.
- 11d. Wis. Const. art. 1, § 8.
12. Of course, there are other ways that defendants can be released from pretrial confinement, such as through an emergency release procedure in response to a court order placing limits on a jail's population.
13. Cohen & Reaves, *Felony Defendants in Large Urban Counties*, 2006, U.S. Dept. of Justice, Bur. of Justice Stats. (May 2010), at 17, found at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluco6.pdf>.
14. *Id.*
15. See Evie Lotze, John Clark, D. Alan Henry, & Jolanta Juskiewicz, *The Pretrial Services Reference Book*, *Pretrial Servs. Res. Ctr.* (Dec. 1999), at 5. The Act was codified at 18 U.S.C. §§ 3141-3151.
16. 18 U.S.C. § 3142 (b).
17. *Id.* § 3142 (e).
18. See *Id.*
19. 481 U.S. 739 (1987).
20. 342 U.S. 545-46.
21. Wayne H. Thomas, Jr., *Bail Reform in America* (Univ. CA Press 1976) [hereinafter Thomas] at 200.
22. American Bar Association Standards for Criminal Justice (3rd ed.) *Pretrial Release* (2007) [hereinafter ABA Standards] Std. 10-1.3, at 41. The term “minor offenses” is used rather than “misdemeanors” because the latter term is often defined differently among jurisdictions across the United States. Generally, according to the commentary to Standard 10-1.3, “‘minor offenses’ are the equivalent to lower-level misdemeanors. However, when the alleged offense involves danger or weapons – as, for example, is often the case in domestic violence misdemeanors – the Standard allows jurisdictions to determine that the offense is not ‘minor,’ regardless of its statutory designation.” *Id.*
23. *Id.* Std. 10-2.1, at 63.
24. *Id.* at 63-64.
25. *Id.* Std. 10-2.2, at 65.
26. *Id.* Std. 10-2.3, at 69.
27. See *Performance Standards and Goals for Pretrial Diversion/Intervention* (2008) at [http://www.napsa.org/publications/diversion\\_intervention\\_standards\\_2008.pdf](http://www.napsa.org/publications/diversion_intervention_standards_2008.pdf).
28. See at <http://www.pretrial.org/Diversion-Programs/Pages/default.aspx>.

29. Standards on Pretrial Release (3rd ed.), Nat'l Assoc. of Pretrial Servs. Agencies (Oct. 2004), Std. 1.4 (g) (commentary) at 16 [hereinafter NAPSA Standards].
30. *Id.* (commentary) at 19.
31. ABA Standards, *supra* note 22, Std. 10-1.4 (f) (commentary), at 45.
32. 481 U.S. 739, 746 (1987).
33. See, e.g. Soland, *Constitutional Law – Equal Protection – Imposing Money Bail*, 46 *Tenn. L. Rev.* 203 (1978).
34. 351 U.S. 12, 19 (1956).
35. *Bandy v. United States*, 81 S. Ct. 197, 198 (1960).
36. *Bandy v. United States*, 82 S. Ct. 11, 13 (1961).
37. 481 U.S. 739, 754 (1987).
38. *Galen v. County of Los Angeles*, 477 F.3d 652, 660 (9th Cir. 2007) (internal citations omitted).
39. 342 U.S. 1, 5 (1951).
40. See, e.g., *United States v. Polouizzi*, 697 F. Supp. 2d 381, 388 (E.D.N.Y. 2010) (“The excess can be reflected in monetary terms or in other limitations on defendant’s freedom such as curfews, house arrests, limits on employment, or electronic monitoring.”).
41. 554 U.S. 191, 195 (2008).
42. Compare, e.g., *Colo. Rev. Stat. § 16-4-112* (forfeiture procedure for compensated sureties) with *Colo. Rev. Stat. § 16-4-109* (forfeiture procedure for all other bonds).
43. Garner, *A Dictionary of Modern Legal Usage* (Oxford Univ. Press 1987) at 263.
44. *Harris v. Nelson*, 394 U.S. 286 290-91 (1969).
45. *Rose v. Lundy*, 455 U.S. 509, 546 n. 16 (1982) (J. Stevens, dissenting) (internal quotations omitted).
46. ABA Standards, *supra* note 22, Std. 10-1.1.
47. 481 U.S. 739, 753 (1987).
48. See *United States v. Salerno*, 794 F.2d 64 (2d Cir. 1986) *rev’d*, 481 U.S. 739, 753 (1987).
49. Marie VanNostrand, PhD., *Legal and Evidence Based-Practices: Applications of Legal Principles, Laws and Research to the Field of Pretrial Services* (Nat’l Inst. Corr. and the Crime and Justice Inst., April 2007) at 12.
50. Thomas, *supra* note 21, at 4.
51. 342 U.S. 1 (1951).
52. See *Clark v. Hall*, 53 P.3d 416 (2002); *Pelekai v. White*, 861 P.2d 1205 (1993); *Demmith v. Wisc. Jud. Conf.*, 480 N.W. 2d. 502 (Wisc. 1992).
53. NAPSA Standards, *supra* note 29.
54. National Conference on Bail and Criminal Justice, *Proceedings and Interim Report* (Washington, D.C. Apr. 1965), at XIV.
55. *Id.* at 296.
56. *Corley v. United States*, 129 S. Ct. 1558, 1570 (2009) (internal citations and quotations omitted).
57. See *In Re Winship*, 397 U.S. 358, 362-64 (1970) (“The [reasonable doubt] standard provides concrete substance for the presumption of innocence – that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law.”).
58. 156 U.S. 432, 460, 453 (1895).
59. 441 U.S. 520, 533 (1979).
60. *Id.* at 533-34.
61. 342 U.S. 1, 4 (1951).
62. 481 U.S. 739, 762-63 (1987).
63. See Transcript: Justice Matters – Interview with Tim Murray Regarding Pre-Trial Justice and the Crucial Role Reentry Programs Play in the Justice System, at <http://www.pretrial.org>.

org/Docs/Documents/Transcripts\_Justice\_Matters\_508.pdf.

64. Marie VanNostrand, *Pretrial Justice – Afforded to Few, Denied to Many*, at <http://www.luminosity-solutions.com/publications/PretrialJusticeAffordedtoFewDeniedtoMany.pdf>.

65. ABA Standards, *supra* note 22, Std. 10-1.1, at 36.

66. 481 U.S. 739 (1987).

67. *Id.* at 755.

68. See e.g., Marie VanNostrand, *Alternatives to Pretrial Detention: Southern District of Iowa – A Case Study* (June 2010) (in which that district undertook system improvements to use “alternatives to detention when appropriate to increase pretrial release rates while assuring court appearance and public safety”).

69. *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

70. NAPSA Standards, *supra* note 29, Std. 2.2 (d), at 27.

71. *Id.* Std. 2.2 (d) (commentary), at 30 (footnote omitted).

72. ABA Standards, *supra* note 22, Std. 10-4.3 (c), at 92.

73. *Id.* (commentary), at 96 (footnotes omitted).

74. See Douglas L. Colbert, Ray Paternoster, and Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail*, 32 *Cardozo L. Rev.* 1719 (2002). It is noted that, at the time of the study, the court used the services of a neutral pretrial services representative, who made a recommendation regarding a bail bond.

75. *Id.* at 1783.

76. 342 U.S. 1, 4 (internal citation omitted) (emphasis added).

77. *Id.* at 7-8 (concurring opinion).

78. 481 U.S. 739, 755 (1987).

79. *Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008) (internal quotation omitted).

80. *Id.*

81. *Id.* at 213.

82. 481 U.S. at 754-55.

83. *Id.* at 755.

84. 342 U.S. at 5 (internal citation omitted).

85. In addition to granting a right to bail, at the time of the decision Rule 46 also required the bail bond to be set to “insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.” 342 U.S. at 6 n. 3.

86. 342 U.S. at 4 (internal citations omitted).

87. See Marcus, *The Making of the ABA Criminal Justice Standards*, 23 *Crim. Just. No.* 4 (Winter 2009).

88. June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 *Syracuse L. Rev.* 517 (1983) at 531 (quoting 5 *American Charters* 3061, F. Thorpe ed. 1909) (footnotes omitted).

89. *Id.* at 532.

90. *Fullerton v. County Court*, 124 P.3d 866, 870 (Colo. App. 2005).