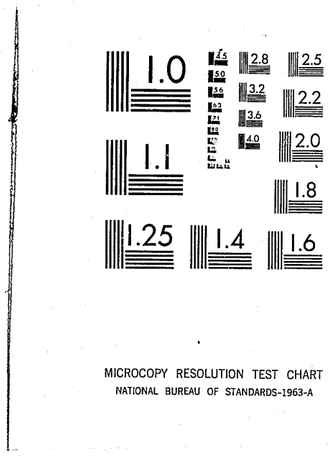

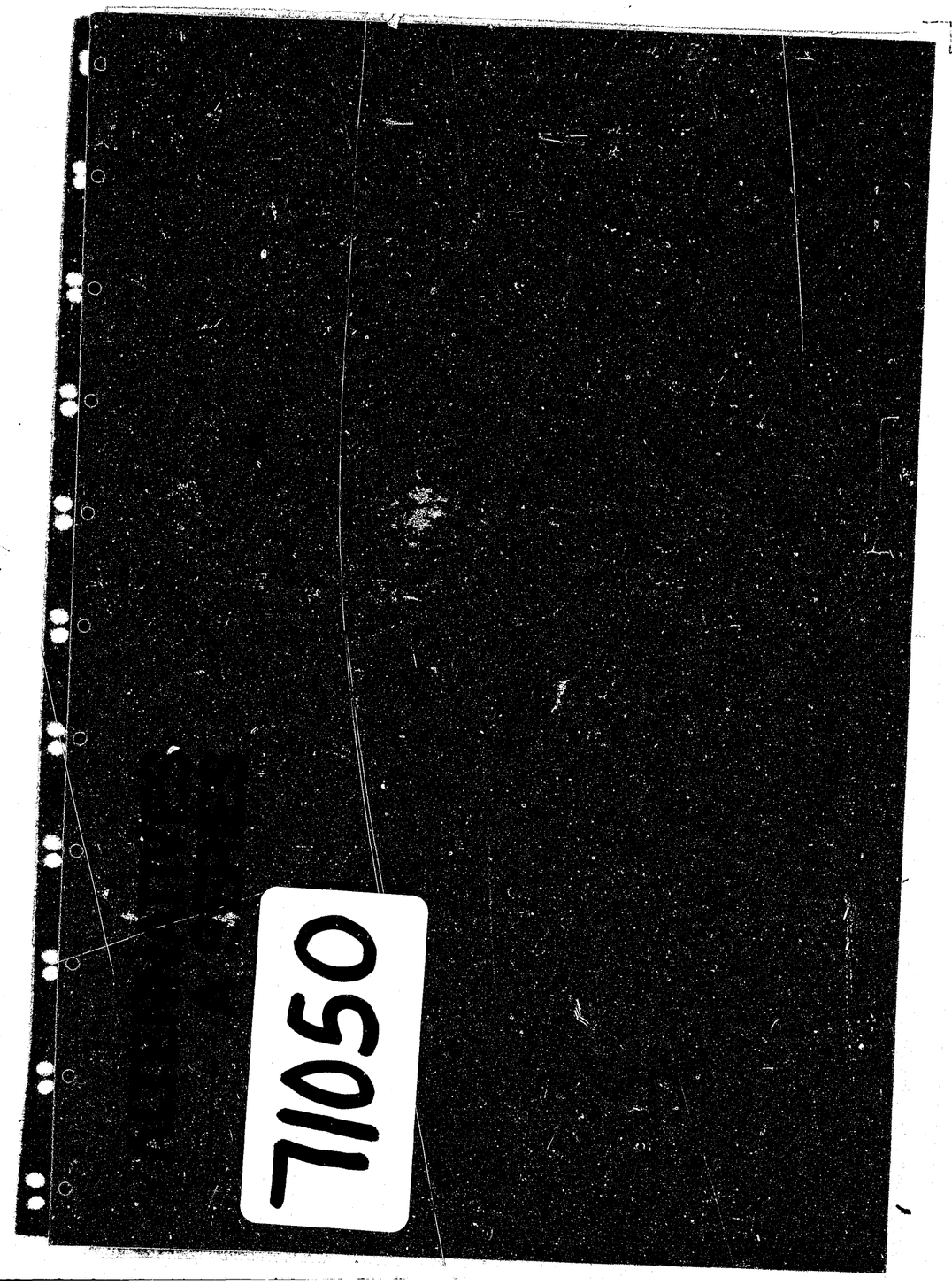

"TEN PERCENT DEPOSIT BAIL"

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JANUARY 1980

This publication is supported by Grant Number 78-MU-AX-0022 awarded by the Law Enforcement Assistance Administration, United States Department of Justice. Points of view or opinions stated in this publication are those of the Pretrial Services Resource Center and do not necessarily represent the official position of the United States Department of Justice.

TEN PERCENT

ACKNOWLEDGEMENTS

Thanks are due to many people who helped this bulletin reach its final state. Practitioners in the field and Resource Center staff offered comments and criticisms that were helpful and accurate.

Special thanks are due Lawrence Baskir, Bruce Beaudin, Floyd Feeney, Angela Grant, Michael Kirby, Wayne Thomas, and Steven Wheeler. Each graciously agreed to review drafts of this bulletin and offered comments that are incorporated in this product. Their participation in this project should not be construed however as their endorsement of the ideas or concrete proposals suggested in this bulletin.

D. Alan Henry

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INTRODUCTION

During the nineteen-sixties the pretrial system of justice in the U.S. was changed by a number of occurrences. Among these were: the passage of the Federal Bail Reform Act of 1966, the rapid growth in the number of pretrial release screening agencies, the development of citation release practices at the police level, and the increased use of summonses in lieu of arrest. Based at least in part on the legal presumption of innocence that accompanies an arrested individual, these changes attempted to insure that punishment in the form of incarceration did not occur prior to adjudication.

The main cause of such pretrial incarceration was and continues to be the inability of arrested individuals to meet financial bond requirements imposed by the courts or bail bondsmen. This reliance on financial bond has existed for over a hundred years, although there have been no definitive works that show a relationship between a person's financial status and pretrial fugitivity or crime.

Whether financial bond should however exist is not the issue here. Instead, this bulletin will examine a particular type of financial bond, the ten percent deposit system.

For the purposes of this bulletin, the term ten percent deposit system is defined as that system where an arrested individual is allowed to post with the court 10% of the face value of the bond amount imposed to obtain release. This deposit is then returned to the individual when the criminal case is resolved. In some instances an administrative fee may be retained by the court from the deposit.

This bulletin describes the percentage deposit system beginning with a short history of its development: its roots in Illinois, how the option was modified and included in the Federal Bail Reform Act, and the current status of each state vis-a-vis percentage legislation. It discusses the legal methods used to achieve such a system: case law, court rule, and legislative changes. Next, practical considerations in implementing such a system based on the experiences of jurisdictions which have adopted a ten percent deposit plan are discussed. Finally, appendices to the bulletin include examples of percentage deposit legislation and court rule used in jurisdictions where percentage options now exist, and a question-answer section covering the most often asked questions about such plans and the answers generally given.

It must be emphasized that this bulletin does not recommend that a ten percent deposit system be the primary type of release employed by a jurisdiction. Non-financial conditions of release are preferable in the majority of cases. It is only for those few cases where a judicial officer decides that the most appropriate and least restrictive conditions of release are financial that the ten percent deposit option should be considered. For those few cases, implementation of the percentage deposit option in place of surety bonds will improve the pretrial system of justice.

HISTORY

> "The genesis of this provision in the Illinois Code (percentage deposit) was bottomed on a very basic principle: the Illinois statute permits professional bondsmen to charge the premium of 10% for all bonds executed with a minimum fee of $10 for those under $100...We reasoned that in the ordinary case, if the accused can raise 10% to pay the bondsman's fee, he can raise it to deposit it with the clerk. In fact, a refund of 90% upon compliance can probably make it easier to raise the 10% among family, relatives, or friends." 1/

The Development of Ten Percent

In 1964 Illinois became the first state to adopt a pretrial percentage deposit system as an alternative to the traditional bail bond practices existing in the United States. 2/ Prior to that time Illinois courts relied extensively on surety bonding companies to determine which defendants should be released or detained pretrial. Once a judge or magistrate had set the bond amount at the defendant's first court appearance, the decision of whether that defendant would be detained pending his or her trial was left almost exclusively in the hands of bail bonding companies, whose decisions were based on economic considerations.

The initial legislation passed in Illinois was conditional, allowing both a ten percent deposit system and the traditional surety bond system to coexist. 3/ In 1965, after two years of demonstrated success with the ten percent deposit system, the Illinois legislature rewrote the percentage deposit legislation without the accompanying surety bond provision. 4/ This law and those which followed in other states had one clear intent: to effectively curtail the bail-bonding-for-profit business that existed in the criminal justice system. The legislation closed off an obvious avenue for bribery, corruption, and fraud, which had involved both bail bondsmen and judicial officers through the years. 5/ But more basically, the legislation sought to accomplish a fundamental goal--to return the decision of release or detention prior to judgment to a judicial officer. Although every state has legislation that governs in varying degrees bail bonding practices, no legislation dictates guidelines bail bondsmen

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1/ From the testimony of Professor Charles H. Bowman before the Subcommittee on Constitutional Rights and Improvement in Judicial Machinery of the Committee on the Judiciary of the United States Senate, 86th Congress, Second Session, on bills to improve federal bail procedures. August 6, 1964.

2/ Illinois Annotated Statutes, Chapter 38, Section 110-115 (1963).

3/ Ibid.

4/ The current governing citation is Illinois Annotated Statutes, Chapter 38, Section 110-7 (1970).

5/ Numerous authors have detailed problems with the bail bond system. Among their works are: Ron Goldfarb, Ransom: A Critique of the American Bail System, Harper & Row, (1965) New York, page 102; John Murphy, Arrest by Computer, Lexington Books (1975), Lexington, Massachusetts, Chapter 4, pp. 35-47; Wayne Thomas, Bail Reform in America, University of California Press, (1976) Berkeley, California, pp. 15-17; Paul Wice, Freedom for Sale by Lexington Books, (1974) Lexington, Massachusetts, p. 62; Forrest Dill, Bail and Bail Reform: A Sociological Study, University of California at Berkeley, Graduate Division, (1973) p. 59. Numerous newspaper articles have also been written describing scandals involving local bail bondsmen. Probably the most recent work summarizing some of the recorded bail bondsmen scandals is the article "Whither the Bondsmen?" by Andreas DeRhoda in the National Law Journal, Volume 1, No. 19, January 22, 1979.

must follow in deciding which bonds to write. 6/ Interviews with bail bondsmen 7/ have shown that this important decision is often decided by monetary, 8/ racial, 9/ or sexist 10/ concerns, all of which would be found blatantly unconstitutional if used as the basis for any other criminal justice action. In addition, bondsmen had demonstrated their ability to bring court systems to a virtual standstill by threatening to strike if their demands for increased premiums were not met. The effects of such a strike by the bondsmen would be immediate; the population in the local jail could double in a matter of days. 11/ With the adoption of a percentage deposit system, the courts reassume the position of decision maker, abrogated with the development of bail bonding for profit in the late 19th century. 12/

According to Professor Charles Bowman, who chaired the Joint Committee of the Illinois State and Chicago Bar Associations when that body drafted the state's ten percent deposit legislation, the idea was based in large part on a work by Professor Caleb Foote which examined the New York bail system in 1958. 13/ Foote indicated in his article that in certain cases judicial officers in New York City were allowing defendants to post 10% of the bail amount set with the clerk of the court. Foote went on to state that the option was rarely used; it was more the exception than the rule. Bowman and his committee saw no reason why that exception could not become the rule in Illinois.

Following the success of the initial two-year experimental system, the enacted 1965 legislation accomplished three things:

1. It allowed for three methods of posting a financial bond within the state: a defendant could post 10% of the bond amount with the clerk of the court, 90% of which would be returned at the termination of the case; the defendant could post cash or securities equal to the total bond with the

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6/ California probably has the most detailed regulations governing the practices of bail bondsmen. See California Insurance Code, Division 1.2. C.7 Section 1085(b), Section 1800, 1801, 1802; California Penal Code (1972) Title 10 C.1, Articles 1-9, Sections 1268-1320.5; Government Code, Title 2, Division 3, Part 1, Chapter 5; California Administrative Code, Title 10, Article 2, Sections 2053-2104. For a more standard example, see Title 15, Sections 201-206 of Alabama Rules of Criminal Procedure.

7/ See for example, R. Ramey, "The Bail Bond Practice from the Perspective of Bondsmen", Creighton Law Review, (July 1975) Omaha, Nebraska, Volume 8, pp. 865-892.

8/ Ibid. at 871.

9/ Ibid at 872.

10/ Ibid.

11/ See for example the appellant-plaintiff's brief for the Tennessee Court of Appeals in the case of Clark v. Thomas, heard March 22 and April 1, 1977, and supra 7.

12/ In Dill's work, Bail and Bail Reform: A Sociological Study, the author traces the gradual change from the system of personal bail which existed in this country through the 18th century to current practices. He suggests that the key turning point was in the case of Leary v. U.S., 225 U. S. 567 (1912), pointing out, "Though applicable to only federal courts, the 1912 Supreme Court decision in Leary v. U.S. gave general assent to the proposition that bail bond transactions amounted legally to a form of ordinary insurance...the historic connection between the right to bail and the individual's family and community ties were severed. For all practical purposes, the right to bail had become a right to the services of a bondsman."

13/ "Administration of Bail in New York," Caleb Foote, 106 University of Pennsylvania Law Review, 685, 719 (1958).

court, which would be returned at the termination of the case; the defendant could post evidence with the court of possessing property in the state worth twice the amount of the bond.

2. The legislation made the deposit system applicable to all offenses where bail was allowed.

3. The legislation repealed all other methods of giving, taking, or enforcing bail in the state (i.e., bail bonding for profit). 14/

While the Illinois deposit system was still in its infancy, the U. S. Senate was holding hearings on revisions to the federal bail system. These hearings in 1964 and 1965 eventually led to the enactment of the Federal Bail Reform Act of 1966, the governing bail statute for the federal courts today. It is interesting to note that in both legislative sessions (the second session of the 88th Congress and the first session of the 89th) bills were introduced virtually identical to the enacted Illinois legislation. 15/ These bills did not survive intact, however, but were combined with others into one Omnibus Bail Reform Bill (S.1357 of the 89th Congress), which eventually became the Federal Bail Reform Act of 1966.

The intent of the federal legislation was not different from Illinois'--both laws sought to make the bail system more equitable with less importance assigned to a defendant's financial ability to pay. While in some ways the federal law went further than that of Illinois in mandating overall pretrial release reform, 16/ it did not go as far as the Illinois legislation in the area of percentage deposit. The federal law allows the judicial officer to place a ten percent deposit option on bail bonds set; the officer still has the option of imposing a surety bond if he or she feels that this is necessary to insure the defendant's appearance at future court hearings. 17/ In Illinois the ten percent deposit option is automatic whenever a financial bond is set.

Three distinct differences exist between the current Illinois law and the federal law governing pretrial percentage deposit:

- In Illinois once the amount of bond is set by the judicial officer the defendant chooses how to satisfy the bond requirements. 18/ (Defendant option)

14/ Supra 4.

15/ In the 88th Congress, see Senate Bill 2840; in the 89th, Senate Bill 648.

16/ The Bail Reform Act mandates that the judicial officer choose the least restrictive alternative necessary to insure the defendant's appearance in court, beginning with release on one's own recognizance. The Illinois legislation requires no such prioritization, simply listing the alternatives available to a judicial officer.

17/ See Title 18, USC, §3146(a)(4).

18/ Illinois Code of Criminal Procedure 38 §§110-7(a); Title 18 U.S.C. §3146(a).

- In the federal system the judicial officer determines the amount and the method by which the bond requirements may be satisfied. The defendant has no option. 19/ (Judicial or court option)

- The Illinois statute allows for the retention of a portion of the deposit by the court to cover administrative costs while the federal law returns the entire deposit to the defendant. 20/

Current Status

Following the enactment of the Bail Reform Act, states began to adopt legislation with similar, and in some cases identical, wording. The breakdown of states and their governing legislation is provided in Appendix A. An examination of the various states' legislation shows the following:

- five states have a percentage deposit system as a defendant option with an accompanying administrative fee requirement;

- two states have percentage deposit systems as a court option with the administrative fee requirement;

- fourteen states have percentage deposit as a court option without an accompanying administrative fee;

- twenty-six states have no legislation covering percentage deposit; 21/ and

- four states, Michigan, Ohio, Wisconsin, and California have some combination of the above depending on the charge.

19/ Supra 17.

20/ In Illinois, see Illinois Code of Criminal Procedure 38, §110-7.(f); for the federal courts see Title 18, U. S. Code, §3146(a)(3).

21/ Some of these twenty-six states may, in fact, have case law that interprets existing legislation to allow for the implementation of 10 percent within the statutory wording.

RESULTS

What results can a jurisdiction expect following implementation of a percentage deposit system? Enough time has passed since the first deposit plans were introduced to allow at least a partial response to that question. But first it is necessary to restate the objectives that lead a jurisdiction to consider percentage deposit in the first place. By implementing a percentage deposit plan, the system hopes:

1. to decrease the numbers of pretrial detainees incarcerated solely due to inability to meet financial bond requirements imposed by bail bondsmen; and/or

2. to do away with the system of bail bonding for profit entirely.

The jurisdiction wants to achieve the above without an accompanying increase in the failure-to-appear or rearrest rate in the jurisdiction. Can these objectives be achieved? To respond, we will examine five jurisdictions which have adopted percentage deposit systems.

Kentucky

A discussion of any type of bail reform inevitably includes some reference to the Commonwealth of Kentucky. While other states have caused the demise of bail bonding by making other alternatives more attractive, Kentucky has gone further, making the practice of writing bonds for profit a crime. 22/ Where other states have used percentage deposit systems as a means to an end (the abolition of bail bonding), Kentucky accomplished the "end" without intermediary steps. Currently the only state that attaches criminal penalties to bail bonding, Kentucky also has the only formal state wide system of pretrial release agencies to provide information to judicial officers at first appearance.

Kentucky's governing legislation, the Kentucky Bail Reform Act of 1966, includes a court option ten percent deposit system. Statistics prepared by the Kentucky Pretrial Services Agency indicate that for the year ending July 1, 1979, 13% of those custodially arrested obtained their release by this method. In order to determine characteristics associated with ten percent deposit the Pretrial Services Agency took a sampling of over 1,000 persons released on ten percent deposit during April and May of 1979. Tracing these individuals' cases through to disposition, the Agency arrived at a failure-to-appear rate of 6.43% and a rearrest rate of 3.6%. During the same time period the rates for the Commonwealth's non-financial releases showed a failure-to-appear rate of 2.34% and rearrest rate of 4.28%. 23/

22/ See, K.R.S. 431.520-530.

23/ See, Third Annual Report, July 1, 1978 - June 30, 1979 Kentucky Pretrial Services Agency. Since the governing legislation requires that judicial officers in Kentucky first consider release on recognizance prior to any financial conditions of release, one can assume that the percentage deposit cases were, as a group, considered more likely not to appear for court, thus explaining the slightly higher failure-to-appear rate registered.

Whether the new legislation has been responsible for a decrease in jail populations cannot be determined at this point. While it is clear that, at least in the three major urban areas of the state, jail populations have decreased over the past three years, no causal relationship can be clearly demonstrated. 24/

Illinois

The legislation enacted in Illinois on January 1, 1964, established the first percentage system of deposit bail in the United States. It also is one of the only jurisdictions that has available data that allows "pre/post" comparisons; that is, examining rates of custody and failure-to-appear both prior to the percentage deposit system and after its implementation. In the seminal work on pretrial release, Bail Reform in America, Wayne Thomas examined the records available in the state from the years 1962 to 1971 and arrived at the following conclusions:

- The ten percent deposit legislation in Illinois effectively abolished bail bonding for profit in the state.
- The number of persons able to obtain pretrial release was higher than when the bail bond system existed.
- The percentage of failures to appear remained as low or lower than when the bail bond system existed.
- No appreciable difference exists in the costs of the two systems.
- While it is an improvement over the bail bond system, the percentage deposit system was still a form of financial bond. Therefore, the possibility of discrimination based on wealth still existed. 25/

While the system in Illinois is not above reproach, 26/ it has been found preferable to its predecessor. The U. S. Supreme Court noted this preference in its decision in the case Schilb v. Kuebel, a case challenging the constitutionality of the one percent administrative fee.

> "We are compelled to note preliminarily that the attack on the Illinois bail statutes, in a very distinct sense, is paradoxical. The benefits of the new system, as compared with the old, are conceded. And the appellants recognize that under the pre-1964 system Schilb's particular bail bond cost would have been 10% of his bail or $75;

24/ Ibid at 23. Some feel that the new legislation in Kentucky also has affected recidivism. In the Plenary Address of the 1979 National Symposium on Pretrial Services then Governor Julian Carroll said, "For persons not considered proper risks for ROR, the ten percent deposit bail option provides a true financial incentive to appear. Because their deposit is refunded when they appear at court, no longer will defendants be forced to commit further crimes against the community in order to pay off the bail bondsman."

25/ Supra 5 at 183-199.

26/ Smith and Reilly, The Illinois Bail System: A Second Look, 6 J. Marshall J. Prac. & Proc. 33, 37 (1972).

> that this premium price for his pretrial freedom, once paid, was irretrievable, and that, if he could not have raised the $75, he would have been consigned to jail until his trial. Thus, under the old system the cost of Schilb's pretrial freedom was $75, but under the new it was only $7.50." (404 US 366)

Philadelphia, Pennsylvania

In 1972 Philadelphia implemented a ten percent deposit system by local court rule that gave defendants the choice of posting a ten percent deposit of the bond set with the court or paying it to a bail bondsman as a premium. Since the money paid to a bail bondsman was lost entirely whereas 90% of the court deposit was returned, it was not surprising when bail bonding became virtually extinct within a year. 27/

It seems that the predicted deleterious effects of such a change were not to be. The failure-to-appear rate in 1972 was 7.5% and has remained within a percentage point of that figure since then. 28/ Also, the jail population has decreased. Though no direct causal relationship can be shown, the decrease and the implementation of the percentage system were at least concurrent. In a report released in January 1978, the director of the Philadelphia Pretrial Services Division, Dewaine L. Gedney, was able to show that while the arrrest rate in the city had increased by 5% since 1971, the detained population had, in fact, declined by approximately 25% during the same period. 29/

Detroit, Michigan

In December 1977 the Michigan Supreme Court adopted Michigan General Rule 790. Although the percentage deposit had been available as a court option, the new rule increased its usage by making the alternative (surety bond) more cumbersome for the judicial officer. 30/

Figures submitted by the Release on Recognizance Division of the Recorder's Court of Wayne County showed the following:

27/ Thomas at 188.

28/ Ibid. Also see Gedney, The Philadelphia Detention Population (1978). Unpublished study of pretrial detainee statistics in Philadelphia. Available from Philadelphia Pretrial Services Division.

29/ Ibid.

30/ The new Supreme Court rule still leaves the surety bond option available to judicial officers. However, whenever it is imposed, the judicial officer now must first find that the defendant's appearance cannot otherwise be assured either through non-financial or other financial conditions and state the reason why a surety bond is necessary.

WAYNE COUNTY BAIL SETTING STATISTICS: 1977 AND 1978 31/

	1977	1978
Arraignments	12,113	10,553
Released on OR	4,610 (38%)	4,683 (44%)
10% set	5,587 (46%)	5,583 (53%)
Surety set	1,037 (9%)	1
Posted 10%	3,643 (30%)	2,861 (27%)

The above figures show that in 1977, 68% of the total arraigned were released, either on their own recognizance or by posting 10% of the bond set. In 1978 the figure is 71%. But we still are unable to conclusively state that more people were released pretrial in 1978 since we do not know how many people managed to satisfy bondsmen's requirements and obtain their release in 1977. If, for example, all those who had surety bond imposed in 1977 were released, then 77% of those arraigned obtained their pretrial freedom. If none were able to do so, the figure remains 68%.

When failures to appear are examined the results are more clearly stated. In 1977, 780 failures to appear were noted for ten percent deposit cases; in 1978, 486. 32/ Even with the decrease in number of persons that were able to make a 10% bond in the two years, there is a net 4% decrease in the failure-to-appear rate in 1978.

The District of Columbia

As a federal district the District of Columbia was governed by the federal Bail Reform Act from its passage in 1966 till new legislation was passed by Congress in 1970 specifically for D.C. The relevant passages governing the ten percent deposit option remained unchanged, however, so that D.C. continues to have a ten percent deposit system available as a judicial option. 33/ The ten percent deposit option has rarely been used, however. In the first half of 1972, for example, surety bonds were imposed almost four times as often as were 10% bonds. 34/ In 1977 surety bonds were imposed 4-1/2 times as often. 35/

31/ "Bailbond statistics for 1977-78 from the County of Wayne", Release on recognizance Division of Recorders Court, Wayne County, Michigan.

32/ Ibid.

33/ See, D.C. Code Chapter 13, §23-1321(a)(3).

34/ Thomas at 187.

35/ D.C. Bail Agency Annual Report 1977, p. 7.

This minimal use of ten percent deposit when it is a judicial or court option is not peculiar to D.C. In his book Bail Reform in America, Thomas states, "In several states that have adopted the federal bail act provision (i.e., 10% as a judicial option), there has been virtually no use of deposit bail." 36/

Summary

An analysis of the above information leads to the following statements:

- When a jurisdiction implements a defendant option percentage deposit system, bail bonding for profit will cease to exist.
- When a jurisdiction implements a judicial or court option percentage deposit system (assuming surety bond remains as an option), the percentage deposit option will rarely be used by the judiciary.
- A decrease in the jail population may occur as a result of the implementation of a percentage deposit system.
- Insufficient data currently exist to determine if the implementation of a percentage deposit system will have any effect on a jurisdiction's rearrest rate.
- Failure-to-appear rates will not increase with the implementation of a percentage deposit system.

36/ Supra 34.

LEGAL CONSIDERATIONS

In the last section materials presented centered around quantifiable changes that might result following the implementation of a percentage deposit system: pretrial detention rates, failure-to-appear rates, and rearrest rates. But there are other questions that must also be addressed: will the quality of justice be enhanced by such a system change?, and more basic, does our system of justice as defined in our constitution and legislation require that such a change occur no matter what the costs? In some instances the practices of a system indicate wholesale changes are in order; in other instances only minor remedies are necessary.

For over one hundred years bail bonding for profit has existed as an institution in the U. S. In recent years more and more challenges to that system have been raised on legal grounds. The legal challenges have resulted in case law, court rule changes, and legislative changes. The challenges have called for both minor changes and wholesale changes in the manner in which bond conditions are set.

Case law

Cases challenging bail bonding practices often suggest a percentage deposit system as a viable alternative that the court should order. In demonstrating the need for a change in the system, some, if not all, of the following issues are usually raised:

a. Defendant's due process rights are abrogated when he or she is summarily denied release by a nonjudicial officer, i.e., a bail bondsman. 37/

37/ Every jurisdiction mandates that a judicial officer set bail and/or impose the appropriate conditions of pretrial release. However, when the judicial officer sets a surety bond, the hearing itself denegrates to a simple clerical function. The important "hearing" is yet to come. The defendant finds out that a bondsman makes the real decision as to release or detention. Judge Skelley Wright in his concurring opinion effectively stated the reality of this situation in the case of Pannell v. U. S. 320 Fed. 2d, 698, 699 (D.C. Circuit 1963): "...the effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety--who in their judgment is a good risk. The bad risks in the bondsmen's judgment and the ones who are unable to pay the bondsmen's fees remain in jail." In every other analogous criminal justice process, federal courts have determined that a decision of such importance requires due process safeguards. A defendant may not be detained without bail (U. S. v. Gilbert, 425 Fed. 2d, 490), held without a probable cause hearing solely on the basis of the prosecutor's information (Gerstein v. Pugh, 420 U. S. 103), have his/her probation revoked (Gagnon v. Scarpelli, 411 U. S. 78), have his/her parole revoked (Morrisey v. Brewer, 408 U. S. 471), or be civilly committed (Specht v. Patterson, 386, U. S. 605) without a hearing that includes minimal due process requirements. At least one writer has suggested that the surety bail system is so inherently inconsistent with due process value that, "It is analogous to a system of criminal justice dependent upon lay judges. In such circumstances the system is so prone to error and abuse that procedural safeguards are ineffectual and must be abandoned in favor of systemic change." See Appellant-Plaintiff's Brief filed before the Tennessee Court of Appeals in the case of Clark v. Thomas, heard March 22 and April 1, 1977.

b. Equal protection arguments exist in the case of indigents who are not allowed release solely because of their inability to meet financial requirements imposed by bail bondsmen. 38/

c. Due process arguments exist where pretrial confinement (or punishment) results from a nonjudicial determination. This "punishment without adjudication" argument will be reexamined no doubt in light of the recent Supreme Court decision in the case of Bell v. Wolfish. 39/

d. Arguments have been made and substantiated that defense is prejudiced by pretrial detention. 40/

e. Arguments have been made that the surety bond system is not the least restrictive alternative that the state can exercise to achieve defendant appearance at future court hearings. 41/

Other arguments have been introduced through case law reflecting the legislation and already-existing case law within the particular jurisdiction. Among those issues are: the constitutionality of bail schedules; 42/ initial bail hearings

38/ The Supreme Court has consistently struck down any practices in the criminal justice system which discriminate based on economic considerations. See Argersinger v. Hamlin, 407 U. S. 25 (1972); Tate v. Short, 401 U. S. 345 (1972); Griffin v. Illinois, 351, U. S. 12 (1956). Ironically the sole case to date which the Supreme Court has considered that dealt with a 10 percent bail system was a challenge raising this exact argument. In the case of Schilb v. Kuebel, 404 U. S. 369, appellants argued that the 1 percent administrative fee charged with the 10 percent bail system in Illinois constituted an undue hardship only applied to the poor since more affluent defendants could post the entire bond which would be returned to them without adminsitrative fee. The court found that the administrative fee did not violate the equal protection requirements, but stated, "The poor man-affluent man argument centers, of course, in Griffin v. Illinois...In no way do we withdraw from the Griffin principle. That remains steadfast."

39/ While the recent Supreme Court decision in the case of Bell v. Wolfish (441 U. S. ___, 1979) gives jailers some leeway in determining the minimal appropriate conditions for pretrial confinement, the court was careful to point out that under no circumstances could the conditions be so severe as to be termed punishment. In defining punishment, the court stated, "...If a particular condition or restriction of pretrial detention is not reasonably related to a legitimate goal--if it is arbitrary or purposeless--a court permissibly may infer that the purpose of the governmental action is punishment that may not be constitutionally inflicted upon detainees qua detainees."

40/ See Barker v. Wingo, 407 U. S. 514, 533 (1972); Bitter v. U. S., 398 U. S. 15 (1967); Stack v. Boyle, 342 U. S. 1 (1951); Smith v. Hooui, 393 U. S. 374 (1969). Also see the American Bar Association Standards Relating to the Administration of Criminal Justice: Pretrial Release, Second Edition, Standard 10-1.1; the National Association of Pretrial Services Agencies Performance Standards and Goals for Pretrial Release and Diversion: Release I, III(E).

41/ Case law has established in matters affecting personal liberty that the state must achieve its objectives by means that are the least restrictive of the personal liberty at stake. See, for example, Shelton v. Tucker, 364 U.S. 479, 488 (1960).

42/ In the case of Ackles v. Purdy, 322 Fed. Supp. 38, 42 (Southern District of Florida 1970) the Federal Court found that the bond schedule as applied in the State of Florida violated constitutional requirements of due process and equal protection.

occurring without defense counsel; 43/ and whether or not the actions of bail bondsmen are open to constitutional scrutiny, i.e., whether the act of bail bonding constitutes a "state action". 44/

To date, no case dealing with percentage deposit systems has reached the U. S. Supreme Court save one. In the case of Schilb v. Kuebel, 45/ the U. S. Supreme Court found that the 1% retention fee for administrative costs imposed does not violate constitutional requirements.

Court Rule

In some jurisdictions court rule has been the method chosen to implement percentage deposit systems. Here again, however, limitations are generally set by the state legislature. For example, in Pennsylvania, the legislative body has given the State Supreme Court wide latitude in establishing rules and procedures for local courts of the state. Among other decisions, the Court established the right of local courts to adopt a court rule allowing for a defendant-based ten percent deposit system. 46/ A similar supreme court rule exists in New Jersey. 47/ Where state legislatures have not given supreme courts such a wide latitude, one generally sees supreme courts delineating between procedural rules and substantive rules. In making the distinction that while they should deal with procedural rules the substantive rule-making power is constitutionally vested with the legislature. Unfortunately, the distinction is not always clear-cut. In Michigan, for instance, the Supreme Court, through enacted Rule 790, 48/ stopped short of outlawing bail bonding but indicated that a clear preference towards release on recognizance and percentage deposit system was preferable. Finally, in at least one jurisdiction, the local court has established a court rule that allows for a ten percent court-based option not extant elsewhere in the state. 49/

43/ A reading of Argersinger v. Hamlin (407 U. S. 29 1972) could be interpreted to include the initial bail hearing. This would certainly be true where the hearing leads to detention for a period of time prior to the trial.

44/ The argument most often used by bail bondsmen in arguing that their actions are not subject to judicial scrutiny is that they are not involved in a "state action", but rather in a one-to-one private contract with the individual defendants for whom they write bonds. While there is no concrete definition as to when a private action becomes a "state action", courts have generally looked at the extent to which the private corporation or individual is performing a recognized state function. For a history of the Supreme Court's decisions on this issue see, M. Goldstein, "The Hunters and the Hunted: Rights and Liabilities of Bail Bondsmen", Fordham Urban Law Journal, Volume VI, 1978, pp. 333-352.

45/ Schilb v. Kuebel, 404 U. S. 357 (1971).

46/ Pennsylvania Rules of Criminal Procedure 4006 (c) adopted July 23, 1973.

47/ New Jersey Criminal Practice Rules 3:26-4A 45.

48/ Michigan Supreme Court Rule 790.6(c)(1977).

49/ In an order dated February 8, 1978, the judges of the Cobb County, Georgia, judicial circuit amended the court rules to allow for a judicial-based 10 percent option. Under the rule a bondsman is prohibited from posting the deposit. The order makes it clear the Pretrial Services Agency of the county will first interview the defendants and make a determination as to "eligibility". This system is unique in the state.

Legislation

The most effective way to accomplish change in a legal system is to have that change legislatively mandated. Where such legislative mandate has been generated concerning percentage deposit systems, there has been no successful legal challenge. But bringing about such a change is difficult. Bail bondsmen lobby long and hard to stop passage of any percentage deposit bill because of its immediate effect on their livelihood. In many instances they have been successful. 50/ Bondsmen often are heavy contributors to state legislators' campaigns, a fact that may or may not influence an elected official. Even where no such influence exists, the well-intentioned legislator is often faced with contradictory statistics on rearrest and failure-to-appear rates as well as cost figures that may appear exorbitant. When faced with such contradictory statements, it is not surprising that a harried legislator might well conclude to let the status quo remain.

More information is becoming available, however. Besides the experiences which jurisdictions that have enacted such legislation can now report, prestigious national criminal justice groups, such as the President's National Advisory Commission on Criminal Justice Standards and Goals, the American Bar Association, the National District Attorneys Association, and the National Association of Pretrial Services Agencies, have all called for the abolition of bail bonding for profit. 51/ Accurate data-gathering mechanisms are now available to give elected officials a clearer picture of the current practice in their jurisdiction and what might be expected if a legislative change occurred. Finally, powerful groups not traditionally associated with pretrial concerns such as the American Correctional Association are calling for the increased use of pretrial release mechanisms as "viable components of a unified criminal justice system and as realistic and important alternatives to incarceration."52/

To date, legislative changes involving percentage deposit have been successful when:

a. modeled after a law successful in another jurisdiction; 53/

50/ California, which recently passed legislation allowing for a ten percent cash deposit in misdemeanor cases, has had similar legislation introduced for the past ten years. Despite the political influence of many of those backing the ten percent cash deposit legislation, the bill failed repeatedly to even pass the Policy Committee's scrutiny, the first of four committees whose approval was necessary. Similar difficulties were faced in Illinois. "When the Code of Criminal Procedure of 1963, containing the 10 percent provision was first introduced in the General Assembly, professional bail bondsmen, and insurance company representatives were down in full force attacking the bail provisions from all angles. They accused the joint committee of trying to put the State into the bail bond business and of destroying private enterprise (the bail bondsmen). They predicted the jumps under the proposed 10 percent provision would be as high as 90 percent since no defendant would bother to appear if he/she had no professional bondsman to fear." (From Professor Charges Bowman's testimony, June 15, 1965, supra 1.)

51/ American Bar Association Standards Relating to the Administration of Criminal Justice: Pretrial Release, Second Edition, Standard 10-5.4(d)(ii). National Prosecution Standards of the National District Attorneys Association, Standard 10.6, 1977; Performance Standards and Goals for Pretrial Release and Diversion: Release Standard V, July 1978. National Advisory Commission on Criminal Justice Standards and Goals: Courts Standard 4.6, 1973.

52/ From a policy statement of the ACA adopted at the 109 Congress of the ACA, August 1979.

53/ The states listed in Appendix A as having a judicial-based ten percent deposit system available by legislation all adopted wording virtually identical to the Federal Bail Reform Act of 1966.

b. a political force in the state adopts bail reform as his/her own cause; 54/ and/or

c. local scandals have led to a call for bail reform. 55/

While this section has covered some of the legal questions, problems, and solutions involving percentage deposit systems, it must be stressed that even if all legal issues are solved, the adoption of a percentage deposit system will not necessarily insure that the system will immediately improve by any measurement. The percentage deposit system is only a part of a continuum of options that should be available to the judicial officer at the initial court appearance. It is in that context that all national standards relating to pretrial state that a percentage deposit system is a viable alternative to the compensated surety system. 56/ Some national standards differ as to whether any financial conditions have a justifiable place in the pretrial decision; all agree that bail bonding for profit should be abolished and deposit systems be adopted, either as an interim step towards the abolition of all financial conditions of release or as an ongoing option available to the judicial officer. 57/

Summary

The following points can be made about legal concerns associated with percentage deposit system:

1. When legislation has been passed allowing for or mandating a percentage deposit system, there has been no successful challenge as to the constitutionality of such a change.

2. The surety bond system raises several questions of due process and equal protection that would not exist with a percentage deposit system.

3. Other due process and equal protection questions may be associated with any type of financial bond, including percentage deposit systems.

4. Certain jurisdictions have implemented percentage deposit through court rule in lieu of specific legislation.

54/ The bail reform legislation in the Commonwealth of Kentucky would have had little chance for successful passage if the bill had not been personally shepherded through the legislative process by Governor Julian Carroll.

55/ See Paul Wice and Rita James Simon, "Pretrial Release: A Survey of Alternative Practices" in Federal Probation, December 1970, Volume XXXIV, No. 4, pp. 60-63.

56/ Supra at 51.

57/ In their Standards and Goals, the ABA takes the position that in certain instances financial conditions of release are clearly appropriate. The NAPSA Standards and Goals, on the other hand, find no reason for financial conditions of release generically, suggesting the 10 percent option should only be an interim step towards the eventual abolition of any financial conditions of release imposed pretrial.

5. The one percent administrative fee often associated with percentage deposit systems has been challenged in court and the U. S. Supreme Court has upheld the practice.

6. The American Bar Association, the National District Attorneys Association, the President's National Advisory Commission on Criminal Justice Standards and Goals, and the National Association of Pretrial Services Agencies have all taken the position that a percentage deposit system is preferable to bail bonding for profit.

PRACTICAL CONSIDERATIONS IN IMPLEMENTING A PERCENTAGE DEPOSIT SYSTEM

Many practical questions must be resolved prior to implementing a percentage deposit system. Perhaps the most important is clearly defining what such a system should achieve. In many jurisdictions the biggest problem involved in the setting of bail is how to deal with the "dangerous defendant". Legislation in some states allows the judicial officer to consider the potential dangerousness of a defendant in setting bail, but the majority of states limit the judicial officer to flight-related considerations. 58/ Still, the "dangerous defendant" is a very real concern for the judicial officer and the community at large. It would be unrealistic, however, to expect this issue be resolved by implementing a percentage deposit system. The percentage deposit system should only be used in place of surety bond and to better insure an individual's appearance at court proceedings. 59/

Other practical considerations which must be examined by a jurisdiction predominantly revolve around the money: when it should be taken, who should take it, who can get it back, and what to do with it.

When the Option Should be Available

Most percentage deposit systems allow the option to be exercised anytime a surety bond release could previously be obtained. Some jurisdictions have chosen to make the option available only at the first court appearance or thereafter, i.e., not available to defendants between the time of arrest and that initial appearance. 60/ This decision will, of course, in large part be dictated by whether the system is a court-based or defendant-based option. Where the system is defendant-based, usually the option is available at the point of arrest and any point thereafter. Where it is a judicial option, the exercise of that option must obviously wait until a judicial determination. No matter which system is used, care should be taken to insure that "percentage overload" does not occur. If, as a result of the implementation of the percentage deposit system, judicial officers begin to use the percentage option where they would otherwise have released the person on his/her own recognizance or with minimal nonfinancial conditions, the percentage system will have a deleterious effect on the jail population. System officials should be careful to effectively guard against this tendency towards overuse of a new financial alternative. They should stress that the percentage option is an alternative to the surety bond system, not to release on recognizance.

58/ Alaska, Delaware, D.C. Hawaii, Maryland, Michigan, Pennsylvania, and South Carolina allow magistrates to consider danger in some form when setting bail.

59/ While the ten percent deposit process will not be a solution to the issue of danger, it may be an improvement. In many jurisdictions where there is a dependence on bail bondsmen, an assumption exists that a high bond detains defendants while a low bond insures their release. In fact, the opposite often occurs. Bondsmen will normally choose to write the larger bond (the more "dangerous" individual) over the smaller bond (the one the judge intended released) because of the greater return on his money for the same amount of risk. With a ten percent deposit system, no such misconception can occur.

60/ See, for example, Kentucky Rule of Criminal Procedure 424.

Who Should Take the Money

Traditionally, bail monies have been held by the clerk of the court or his/her designated deputy; and the percentage deposit system need not change that practice. From a practical standpoint it is extremely important that the clerk of the court in the jurisdiction be involved in all stages of implementation and, if possible, in the earlier discussions concerning the legal feasibility of such an option. The clerk traditionally has the best information as to practical implementation alternatives, including the forms designed, identification of the ideal location and time where the monies may or should be taken, receipts, and developing practical guidelines for returning the money.

Who Can Post the Money

Some legislation mandating percentage deposit systems simply indicate that at the disposition of a case the deposit will be returned to the defendant. 61/ Gedney makes an interesting point as to how this can, in fact, be detrimental to the system:

> "In most jurisdictions, when another party posts the percentage in a defendant's case, that person in fact turns the money over to the defendant. As such the funds may be used to defray or completely cover such expenses as fines, costs, or attorney's fees. It seems to me that if I were in a position to pay money to get someone out of jail I might be deterred if I found out that I were required to give funds to the defendant. In Philadelphia the money put out by the third party remains the property of the third party regardless of any other event or finding of guilt, unpaid attorney fees, etc." 62/

While Gedney does not suggest the defendant should be excluded from posting the percentage deposit him/herself, he does suggest that having a third party post the money gives the court an additional custodian of sorts to insure the defendant's appearance. The Commonwealth of Kentucky, in its most recent legislative session, enacted legislation to make it clear that monies posted in the percentage system do not become the defendant's but remain the property of the person who posted the money and, in fact, may only be returned to that person. 63/ Michigan's Court Rule 790, on the other hand, seems to indicate that if a defendant is adjudicated guilty with a sentence that includes fines or costs, the deposited monies will first be applied to court costs and fines with the remainder being returned. 64/ In Dorchester, Massachusetts, we see the other extreme, where judicial officers in some instances require that the percentage bond be posted only by the defendant. 65/ Jurisdictions then should be clear in their legislation, court rule, and practices who may post the money and who may receive the money at the end of the case.

61/ See Illinois Code of Criminal Procedure, Sections 110-7.(f); Oregon Rules of Criminal Procedure 135.265(2).

62/ Letter from Dewaine Gedney, April 9, 1979.

63/ See Kentucky KRS 431.532.

64/ Michigan GCR 1963.790.6(c).

65/ Getting Out of Jail, Boston Jail Project/Bail Funds, Cambridge, Massachusetts, p. 20.

What to do with the Money

Most legislation mandates that monies held by the court be deposited in a general county or city fund, available to either all parties in the criminal justice system or to the local government generally. As indicated earlier, the amounts of money involved may be substantial. In no instances should the monies received from a percentage deposit system be applicable only to the release agency or any screening agency, which might then be in the position of affecting their own budget by the numbers of people they recommend for conditional or percentage deposit release. Such an oversight, while done with no evil intent, would put the agency in an unnecessarily uncomfortable position.

The Money

So far in our discussions of pretrial percentage deposit systems, we have generally referred to a ten percent deposit accompanied by a retention fee. While this is the most predominant form of percentage systems now in use (see Appendix A), there are exceptions. Massachusetts, for example, has in the past experimented with a five percent deposit system. 66/ The State of Maine legislatively allows the court to impose a requirement of up to fifty percent deposit on the bond amount. 67/ Philadelphia, through local court rule, has increased the retention fee from the common 1% of the face value of the bail bond to 2%. 68/

Although the 1% administrative fee is most popular, some have questioned why the fee retained by the court should vary with the amount of the bond. After all, they would argue, the paperwork associated with a $250 bond is no different than necessary for a $2,500 bond; so why would one defendant who complies with all his/her court-imposed requirements lose $2.50 while the other loses $25? This legitimate argument receives qualified support from the National Association of Pretrial Services Agencies. 69/

No matter which variation is used, the deposit system that now exists in some cases involves substantial amounts of money. There are no clear answers, however, as to whether or not the amount accrued covers additional expenses incurred by the court for possible additional clerks, forms, receipts, etc. It is difficult to assess for a number of reasons: the percentage deposit, whether a court-based option or a defendant-based option, is still dependent upon the initial judicial decision, i.e., the bond amount imposed by the court official. Judicial officers can, where the percentage deposit system is a court option, simply not exercise that option. Where the option is defendant-based, the courts may impose bond at such high levels that detention of defendants is virtually insured. The courts might also choose to release more defendants on their own recognizance with or without specific conditions pending trial. All of these actions would obviously affect the amounts of money retained by the

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66/ John Conklin and Dermot Meagher, "The Percentage Deposit Bail System: An Alternative to the Professional Bondsmen", Pergamon Press, Journal of Criminal Justice, Volume 1, pp. 299-317 (1973).

67/ See Title XV, Section 942(2)(c), Maine Rules of Court Procedure - Criminal.

68/ Telephone conversation with Dewaine Gedney, director of the Philadelphia Pretrial Services Division.

69/ National Association of Pretrial Services Agencies, Performance Standards and Goals for Release, commentary to Standard V, pp. 25-28.

jurisdiction. It is difficult to say whether the monies received will represent a net gain for the system. Often those monies accumulated will not cover the costs incurred as a result of implementation of the new system. 70/ On the other hand, if one accomplishes a decrease in the pretrial detainee population as a result of this new system, the broader criminal justice system would achieve a net gain due to decreased detention costs. This is probably all that should be expected of such a system change. Certainly, no court would want "the solution" (a percentage deposit system) to become identical to the "problem" it attempts to solve, i.e., bail bonding for profit.

70/ Where defendant-based ten percent deposit option has been implemented, the experience has shown that costs involved seemed to vary in direct proportion to the size of the existing release agency; if none exists, the costs will not be offset by the administrative fee. If, on the other hand, a large pretrial release program is already extant, the costs of ten percent deposit program implementation are usually minimal. Obviously, local system quirks (and clerks) make this a less than hard and fast rule.

CONCLUSION

In summary, there are a number of statements that can be made about the percentage deposit system. First, two types of percentage deposit system exist; a defendant option system, where the defendant chooses the method of meeting the financial bond requirements, and a judicial or court option system, where the judicial officer must indicate that a percentage deposit will be acceptable in meeting the financial bond requirements. Where a system chooses to implement the former, bonding for profit will quickly disappear, failure-to-appear rates will not increase and jail populations may decrease. If the latter is chosen, the option will rarely be exercised by the judicial officers in the jurisdiction.

Second, a percentage deposit system is preferable to a surety bond system from a legal standpoint. Certain due process and equal protection questions associated with surety bond practices become moot. (The more basic question as to the relevance of financial bond in any form still remains, however.) Where legislatively mandated, percentage deposit has been challenged in the courts, but without success. Even the practice of retaining a portion of the deposit to cover administrative costs has been upheld in the U.S. Supreme Court case of Schilb v. Kuebel (404 US 357).

Third, a jurisdiction considering implementing a percentage deposit system should not necessarily anticipate making a profit as a result. Such a system change may or may not end up costing the jurisdiction money, depending on the pretrial systems already in existence, the ability of the clerk's office to absorb the new duties and the manner by which the judicial officers setting bond employ the option.

Finally, any jurisdiction implementing a percentage deposit system should also implement a monitoring system to insure that such a change does not lead to a decrease in the number of cases where nonfinancial conditions of release are imposed.

While a percentage deposit system is not the "final answer", its importance and applicability in jurisdictions which currently rely on bail bonding for profit cannot be overstated. It is a viable, practical, and legal alternative to a practice that seems to lack any saving graces. It is perhaps the strangest anomaly of our system of criminal justice that the decision as to detention or release of nonadjudicated defendants and the rationale on which that decision is based is not and has not been subject to either public or judicial scrutiny.

In testifying before the U. S. Senate in 1965, Professor Charles Bowman, quoted earlier, made comments which still accurately reflect the primary reason why a percentage deposit system should be carefully considered by jurisdictions:

> "The billions of dollars collected by the insurance companies and private professional bondsmen in this country as fees for liberty do not represent fines imposed by and collected for the benefit of society upon individuals tried and convicted of crimes against society. Instead they represent the profits of private individuals who are permitted by our state and federal governments to participate in the administration

of justice process solely for their personal profit without being elected, appointed, or responsible as public officers or employees. The extent to which we have abdicated our legislative, judicial, and legally professional responsibilities in the administration of criminal justice to these private, profit-motivated individuals is a national disgrace."

APPENDIX A

STATE BY STATE ANALYSIS OF PERCENTAGE DEPOSIT LEGISLATION

Percentage deposit is currently legislatively mandated by the states in two ways:

a. Defendant Option - In this system the defendant in the criminal case may post a percentage deposit of the bail bond amount set, usually 10%, with the courts. Upon satisfaction/adjudication of the case, the deposited monies are returned to the defendant or the third party who posted the deposit. In some jurisdictions an administrative fee, usually 1% of the face value of the bond, is retained by the court.

b. Court Option - This system, sometimes referred to as the "Bail Reform Act model", has a percentage deposit option available to the judicial officer imposing the conditions of release. The judicial officer is not bound to impose this alternative; he/she may specify a surety bond. In some cases the retention of an administrative fee as described above is allowed; in others it is not. The Bail Reform Act for example does not allow for the retention of any administrative fee by the court.

The listing below describes each state, which of the two categories it falls into, the appropriate legislative citation, and any particular qualifiers applicable to that state's legislation.

ALASKA	Court Option, no administrative fee. See Alaska Code §12.30.020(b)(4).
ALABAMA	No percentage deposit option appears in legislation.
ARIZONA	No percentage deposit option appears in legislation.
ARKANSAS	Court option, administrative fee. See Arkansas Rules of Criminal Procedure, Rule 9.2(b)(ii)(1976).
CALIFORNIA	Defendant option, administrative fee See California Penal Code, §1269d. California's recently enacted ten percent option is appicable only in misdemeanor cases and will not take effect until January 1, 1981.
COLORADO	No percentage deposit option appears in legislation.

In Colorado the state Supreme Court has specifically stated that the current legislation does not allow for any judicial discretion on this question. See State of Colorado v. District Court of the 18th Judicial District, 581 Pacific 2nd 300.

CONNECTICUT — Court option, no administrative fee. P.B.R. Crim. Proc. 1978 §664, 658.

The governing legislation in Connecticut may change within the year. The General Assembly of the state has established a pretrial commission to report back with proposed legislation that would improve the pretrial processes in the state.

DELAWARE — No percentage deposit option appears in legislation.

DISTRICT OF COLUMBIA — Court option, no administrative fee. Chapter 13 D.C. Code, §§23-1321(a)(3).

FLORIDA — No percentage deposit option appears in legislation.

GEORGIA — No percentage deposit option appears in legislation.*

HAWAII — No percentage deposit option appears in legislation.

IDAHO — No percentage deposit option appears in legislation.

ILLINOIS — Defendant option, administrative fee. Illinois revised Statute 36, §§110-7, 15.

INDIANA — No percentage deposit option appears in legislation.

While no legislative mandate exists for ten percent, court rule has mandated its existence in some jurisdictions such as Indianapolis.

IOWA — Court option, no administrative fee. Iowa Code, §811.2(1)(c).

KANSAS — No percentage deposit option appears in legislation.

* Although not mentioned in the state legislation, ten percent deposit as a court option does exist by local court rule in Cobb County, Georgia.

KENTUCKY — Court option, administrative fee.

While other states have accomplished virtually the same thing, i.e., the abolition of bail bondsmen, Kentucky is the only state to have made bail bonding for profit a crime. See Kentucky Revised Statute §§431.520-530.

LOUISIANA — No percentage deposit option appears in legislation.

MAINE — Court option, no administrative fee. Maine Code, Title 15, §942(2)(c).

MARYLAND — Court option, no administrative fee. Maryland Rules of Criminal Procedures 777.

MASSACHUSETTS — No percentage deposit option appears in legislation.

MICHIGAN — Defendant option and court option, administrative fee. Michigan Comp. Laws (annotated) §§765.1-765.31.

Michigan allows for a ten percent defendant option for misdemeanors and a judicial option in felony cases.

MINNESOTA — No percentage deposit option appears in legislation.

MISSISSIPPI — No percentage deposit option appears in legislation.

MISSOURI — Court option, no administrative fee. U.M.A.S. §544.455 (1979 Supp).

MONTANA — No percentage deposit option appears in legislation.

NEBRASKA — Defendant option, administrative fee. Nebraska Rules of Criminal Procedure, Article 9, §29-901 and Neb. Rev. Stat. §29-901(3)(a).

NEVADA — Court option, no administrative fee. Nevada General Provisions, §178.502.

NEW HAMPSHIRE — No percentage deposit option appears in legislation.

NEW JERSEY — Defendant option, administrative fee. Supreme Court Rule 3:26-4(a).

The defendant-based ten percent option does not exist throughout New Jersey. The Supreme Court rule allows local jurisdictions to choose such an option.

NEW MEXICO	No percentage deposit option appears in legislation.
NEW YORK	Court option, no administrative fee. New York Rules of Criminal Procedure, §520-10.
NORTH CAROLINA	No percentage deposit option appears in legislation.
NORTH DAKOTA	Court option, no administrative fee. North Dakota Rules of Criminal Procedure, Rule 46(a).
OHIO	Defendant option and court option, administrative fee. Ohio Rules of Criminal Procedure, Rule 46(c)(d). Ohio, similar to Michigan, has a ten percent defendant-based option for misdemeanors and court option in cases of a felony arrest.
OKLAHOMA	No percentage deposit option appears in legislation.
OREGON	Defendant option, administrative fee. Oregon Revised Statute, §135.265.
PENNSYLVANIA	Defendant option, administrative fee, Rule 4006c and Rule 4008. Pennsylvania Supreme Court Rules, similar to New Jersey, allow for local court jurisdictions to set up a defendant-based system.
RHODE ISLAND	Court option, no administrative fee. Rhode Island Rules of Criminal Procedure 12-13-10.
SOUTH CAROLINA	No percentage deposit option appears in legislation.
SOUTH DAKOTA	Court option, no administrative fee. §23A-43-3(3)(1979)
TENNESSEE	No percentage deposit option appears in legislation.
TEXAS	No percentage deposit option appears in legislation.
UTAH	No percentage deposit option appears in legislation.

VERMONT	Court option, no administrative fee. Vermont Rules of Criminal Procedure, Title 13, §7553(a).
VIRGINIA	No percentage deposit option appears in legislation.
WASHINGTON	Court option, no administrative fee. Washington Criminal Rule 3.2(a)(4) and JCrR2.09(a)(4).
WEST VIRGINIA	No percentage deposit option appears in legislation.
WISCONSIN	Court option, administrative fee/no administrative fee depending on whether the charge is a misdemeanor or felony. Wisconsin Rules of Criminal Procedure, Chapter 969, §§969.02 and 969.03. Wisconsin has just recently passed (October 1979) legislation which removes surety bonds (i.e., bail bonding for profit) as an option available to the court.
WYOMING	No percentage deposit option appears in legislation.

APPENDIX B

GENERAL QUESTIONS AND ANSWERS

1. If a defendant has to pay 10% of a bond to a bondsman now, how does the ten percent deposit system differ?

A. The most important difference between the bail bond system as it exists and the percentage deposit system extant in some jurisdictions is that with the deposit system most if not all of the monies the defendant turns over are returned to him/her when the case is over. This can work as an added incentive to insure that the defendant will not fail to appear when required by court.

There is also another key difference. The judge may assume that a $1,000 bond will be written by a surety bondsman, thereby insuring that the person will be released upon paying that bondsman the premium of 10%. But, in fact, the judge has no control over that decision. The bondsman may or may not decide to write it even when the defendant has the necessary money. As a result we have people in jail whom the judge had no intention of detaining pretrial. They remain in jail solely because there is no bail bondsman willing to write their bond for whatever reasons; be they race, age, sex, or others.

2. But some of those people in jail have no money. What will ten percent deposit do for them?

A. You're right--some of those in jail can't afford <u>any</u> money bail, and 10% of any amount is too much. That's one of the main reasons that ten percent deposit should only be used in a very small number of cases. Most people can be released with various non-financial conditions and will appear when required. But the key issue to remember is that when used in place of a surety bond, the percentage option allows the <u>court</u> to decide who gets out, not a bail bondsman.

3. It seems that a ten percent deposit system will make it easier for dangerous defendants/criminals to be released.

A. Just the opposite occurs. With a deposit system the judge can determine who will and will not be released. With the current situation and practices, a bondsman may write the bond for a defendant whom the judge would not want released. Or more likely, leave someone with a small bond in jail feeling that it's not worth the trouble. Again, the bail bondsman is in it for profit, not to insure that justice occurs. Also, in most jurisdictions where percentage deposit systems have been employed, there has been no increase in failures to appear for court when required.

4. But I had heard that where a ten percent deposit system is started defendants pay the 10% then never come to trial.

A. Actually, the opposite happens; and, when you think about it, that makes economic sense from the defendant's standpoint. When a defendant pays a premium to a bail bondsman (usually 10% of the bail bond), he/she knows that

he/she will not get that money back no matter what the disposition of the case, or if he/she appears at all his/her court hearings. Thus there is simply no financial incentive to come back--the money is gone. With the deposit system, however, the defendant realizes that no matter what the disposition of the case, if he/she appears at all court appearances, he/she will get the money back at the close of the case. Also, if friends or relatives of the defendant posted the money for him or her, these people, besides being more likely to post the money in the first place knowing they will get it back, can also act as "custodians" since they have a financial investment in the defendant's appearing as required. Finally, keep in mind that no matter what occurs, some defendants will fail to appear; whether it is a bail bond system, ten percent system, or own recognizance system, there is simply no way to predict human behavior with complete accuracy and thus insure that 100% of the people will show up for all scheduled court appearances. The only way to insure this would be detain everyone arrested; and this, of course, would fly in the face of our constitution.

5. Who is going to go after those defendants who fail to appear if no bail bondsmen are around?

A. The same people who go after them now--the police. Contrary to popular rumors, bail bondsmen do <u>not</u> bring back the people who fail to appear. In a few cases they do give police officers information which leads to the arrest; but, for the most part, defendants who fail to appear either (a) get rearrested on another charge or, (b) the local police go out and get them. Even if the bail bondsmen did go and get people who fail to appear, most people feel a lot more comfortable with a police officer, trained in legal requirements, making an arrest than a bail bondsman who has no training.

6. Isn't this going to cost me, the taxpayer, a lot of money?

A. It may cost a little more to implement a percentage deposit system or it may not. Some jurisdictions end up making money in the long run. This depends on the practices that already exist in your jurisdiction. But the decisions cannot be based on dollars and cents. We have to first decide what is fair. For example, it costs us, the taxpayers, money to insure that indigent persons who are arrested have attorneys to defend them adequately when they appear in court. Our sense of fair play mandates that no matter what the cost anyone charged have adequate legal assistance. The same qualitative versus quantitative arguments hold true for the ten percent deposit system.

7. What is the matter with the current system--it has worked for one hundred years. Why do we have to change now?

A. The presence of an idea for 100 years does not necessarily mean that it is good. We had slavery for over 200 years, and few would argue that it should have continued. Also, it really hasn't worked that well, particularly today. Our jails are all overcrowded with persons presumed innocent who can't meet a bondsman's requirements. The bottom line is that the institution of bail bonding for profit, besides being abusive, simply doesn't perform a useful function.

8. Some states now allow judges to choose between a ten percent deposit and setting a surety bond. Is that a good method?

A. It is good as a first step; that is, it is better than having no option at all. However, in the jurisdictions where the option has been left to the judiciary, we see the deposit system rarely used. Judges, like all of us, often stay with that with which they are familiar; in this case that is the surety bond system. The preferred system is where a judge imposes a financial bond and the determination as to how to meet those bond conditions lies with the defendant.

9. So in effect what you are saying is that the bail bond system should be abolished. Is that legal? Can we do away with an entire industry?

A. Yes, that is what is being suggested, and not just here. The American Bar Association, the National District Attorneys Association, the National Association of Pretrial Services Agencies, and numerous other criminal justice institutions have called for the abolition of bail bonding for profit over the years. As to whether it is legal to abolish an industry, courts have ruled that legislatures can make bail bonding illegal as was done in Kentucky. Other states, such as Illinois and Oregon, have passed legislation that has had the same effect. It is interesting that whenever such a challenge reached the courts, every state supreme court has ruled against the bondsmen.

APPENDIX C

BAIL REFORM ACT (1966)
18 U.S.C. §3146-3151

§3146. Release in Noncapital Cases Prior to Trial

(a) Any person charged with an offense, other than an offense punishable by death, shall at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

(1) place the person in the custody of a designated person or organization agreeing to supervise him;

(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 percentum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

(b) In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, and length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

APPENDIX D

OREGON REVISED STATUTE §§135.265-135.280

§135.265 Security release. (1) If the defendant is not released on his personal recognizance under ORS 135.255, or granted conditional release under ORS 135.260, or fails to agree to the provisions of the conditional release, the magistrate shall set a security amount that will reasonably assure the defendant's appearance. The defendant shall execute the security release in the amount set by the magistrate.

(2) The defendant shall execute a release agreement and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to 10 percent of the security amount, but in no event shall such deposit be less than $25. Upon depositing this sum the defendant shall be released from custody subject to the condition that he appear to answer the charge in the court having jurisdiction on a day certain and thereafter as ordered by the court until discharged or final order of the court. Once security has been given and a charge is pending or is thereafter filed in or transferred to a court of competent jurisdiction the latter court shall continue the original security in that court subject to ORS 135.280 and 135.285. When conditions of the release agreement have been performed and the defendant has been discharged from all obligations in the cause, the clerk of the court shall return to the accused, unless the court orders otherwise, 90 percent of the sum which has been deposited and shall retain as security release costs 10 percent of the amount deposited. The amount retained by a clerk of the court shall be deposited into the county treasury, except that the clerk of a municipal court shall deposit the amount retained into the municipal corporation treasury. However, in no event shall the amount retained by the clerk be less than $5 nor more than $100. At the request of the defendant the court may order whatever amount is repayable to defendant from such security amount to be paid to defendant's attorney of record.

(3) Instead of the security deposit provided for in subsection (2) of this section the defendant may deposit with the clerk of the court an amount equal to the security amount in cash, stocks, bonds, or real or personal property situated in that state with equity not exempt owned by the accused or sureties worth double the amount of security set by the magistrate. The stocks, bonds, real or personal property shall in all cases be justified by affidavit. The magistrate may further examine the sufficiency of the security as he considers necessary. [1973 c.836 §153]

§135.270 Taking of security. When a security amount has been set by a magis ate for a particular offense or for a defendant's release, any person designated by the magistrate may take the security and release the defendant to appear in accordance with the conditions of the release agreement. The person designated by the magistrate shall give a receipt to the defendant for the security so taken and within a reasonable time deposit the security with the clerk of the court having jurisdiction of the offense. [1973 c.836 §154]

§135.280 forfeiture and apprehension. (1) Upon failure of a person to comply with any condition of a release agreement or personal recognizance, the court having jurisdiction may, in addition to any other action provided by law, isssue a warrant for the arrest of the person at liberty upon a personal recognizance, conditional or security release.

(2) A warrant issued under subsection (1) of this section by a municipal officer as defined in subsection (6) of ORS 133.030 may be executed by any peace officer authorized to execute arrest warrants.

(3) If the defendant does not comply with the conditions of the release agreement, the court having jurisdiction shall enter an order declaring the security to be forfeited. Notice of the order of forfeiture shall be given forthwith by personal service, by mail or by such other means as are reasonably calculated to bring to the attention of the defendant and, if applicable, his sureties, the order of forfeiture. If the defendant does not appear and surrender to the court having jurisdiction within 30 days from the date of the forfeiture or within such period satisfy the court that appearance and surrender by the accused is impossible and without his fault, the court shall enter judgment for the state against the defendant and, if applicable, his sureties, for the amount of security and costs of the proceedings. At any time before or after judgment for the amount of security declared forfeited, the defendant or his sureties may apply to the court for a remission of the forfeiture. The court, upon good cause shown, may remit the forfeiture or any part thereof, as the court considers reasonable under the circumstances of the case.

(4) When judgment is entered in favor of the state, or any political subdivision of the state, on any security given for a release, the district attorney shall have execution issued on the judgment forthwith and deliver same to the sheriff to be executed by levy on the deposit or security amount made in accordance with ORS 135.265. The cash shall be used to satisfy the judgment and costs and paid into the treasury of the municipal corporation wherein the security release was taken if the offense was defined by an ordinance of a political subdivision of this state, or into the treasury of the county wherein the security was taken if thee effense was defined by a statute of this state. The provisions of this section shall not apply to:

(a) Money deposited pursuant to ORS 484.150 for a traffic offense.

(b) Money deposited pursuant to ORS 488.220 for a boating offense.

(c) Money deposited pursuant to ORS 496.905 for a fish and game offense.

(5) The stocks, bonds, personal property and real property shall be sold in the same manner as in execution saless in civil actions and the proceeds of such sale shall be used to satisfy all court costs, prior encumbrances, if any, and from the balance a sufficient amount to satisfy the judgment shall be paid into the treasury of the municipal corporation wherein the security was taken if the offense was a crime defined by an ordinance of a political subdivision of this state, or into the treasury of the county wherein the security was taken if the offense was a crime defined by a statute of this state. The balance shall be returned to the owner. The real property sold may be redeemed in the same manner as real estate may be redeemed after judicial or execution sales in civil actions. [1973 c.836 §155]

APPENDIX E

ILLINOIS CODE OF CRIMINAL PROCEDURE

§110-7. Deposit of Bail Security

(a) The person for whom bail has been set shall execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to 10% of the bail, but in no event shall such deposit be less than $25.

(b) Upon depositing this sum the person shall be released from custody subject to the conditions of the bail bond.

(c) Once bail has been given and a charge is pending or is thereafter filed in or transferred to a court of competent jurisdiction the latter court shall continue the original bail in that court subject to the provisions of Section 110-6 of this Code.

(d) After conviction the court may order that the original bail stand as bail pending appeal or deny, increase or reduce bail.

(e) After the entry of an order by the trial court allowing or denying bail pending appeal either party may apply to the reviewing court having jurisdiction or to a justice thereof sitting in vacation for an order increasing or decreasing the amount of bail or allowing or denying bail pending appeal.

(f) When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the cause the clerk of the court shall return to the accused, unless the court orders otherwise, 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited.

At the request of the defendant the court may order such 90% of defendant's bail deposit, or whatever amount repayable to defendant from such deposit, to be paid to defendant's attorney of record.

(g) If the accused does not comply with the conditions of the bail bond the court having jurisdiction shall enter an order declaring the bail to be forfeited. Notice of such order of forfeiture shall be mailed forthwith by the court to the accused at his last known address. If the accused does not appear and surrender to the court having jurisdiction within 30 days from the date of the forfeiture or within such period satisfy the court that appearance and surrender by the accused is impossible and without his fault the court shall enter judgment for the State against the accused for the amount of the bail and costs of the court proceedings. The deposit made in accordance with subsection (a) shall be applied to the payment of costs. If any amount of such deposit remains after the payment of costs it shall be applied to payment of the judgment and transferred to the treasury of the municipal corporation wherein the bond was taken if the offense was a violation of any penal ordinance of a political subdivision of this State, or to the treasury of the county wherein the bond was taken if the offense was a violation of any penal statute of this State. The balance of the judgment may be enforced and collected in the same manner as a judgment entered in a civil action.

(h) After a judgment for a fine and court costs or either is entered in the prosecution of a cause in which a deposit had been made in accordance with subsection (a) the balance of such deposit, after deduction of bail bond costs, shall be applied to the payment of the judgment.

APPENDIX F

COURT RULES - PHILADELPHIA COURT OF COMMON PLEAS

Rule 4007.1 -- Pretrial Services Division, Release on Recognizance.

For the administrative purposes of the Pretrial Services Division, any release on defendant's own recognizance shall be considered as release on nominal bail.

Where the bail has been set at nominal bail by the court or issuing authority, the Pretrial Services Division may be designated as surety for the defendant. In that event, the defendant shall be subject to the rules and regulations of the Pretrial Services Division. Where a defendant has failed to comply with the rules and regulations of the Pretrial Services Division, he may be brought before the court to determine if additional bail shall be set in his case.

Rule 4008.1 -- 10% (Ten Percent) Deposit of Bail.

Provided he executes a bail undertaking, the defendant or his private third party surety may furnish as bail with the issuing authority or clerk of court, a sum of money equal to 10% (ten percent) of the full amount of the bail, but in no event less than $25 (twenty-five dollars). Only the person for whom bail has been set, or the private person acting as a third party surety shall execute the bond. No surety or fidelity company or professional bail bondsman, or an agent thereof, shall act as a private third party surety. The court may designate for retention a percentage fee as set by General Court Regulation. The court, also by General Court Regulation, may set a minimum figure for retention. Monies retained by the court shall be considered as earned at the time the bail undertaking is executed.

Upon depositing a sum of money equal to 10% (ten percent) of the full amount of the bail, of $25 (twenty-five dollars), whichever is greater, the person shall be released from custody subject to the conditions of the bail bond. Where the defendant or private surety has deposited an amount of bail equal to 10% (ten percent) of the amount of bail, the court or issuing authority may designate the Pretrial Services Division as surety for the defendant. In that event, the defendant shall be subject to the rules and regulations of the Pretrial Services Division. Where a defendant has failed to comply with the rules and regulations of the Pretrial Services Division, he may be brought before the court to determine if additional bail shall be set in his case.

Rule 4009.1 -- Deposit Return.

When a defendant or his private third party surety has deposited a sum of money equal to 10% (ten percent) of the bail, but in no event less than $25 (twenty-five dollars), then upon full and final disposition of the case the deposit less the retention (in accordance with Rule 4008.1) shall be returned to the person who originally posted the money by the clerk of court or issuing authority. Notice of the full and final disposition shall be sent by the court to the person who originally posted the money at his address of record. Any monies not claimed within 180 days from the time of written notice sent to the last recorded address of the party posting bail, of the full and final disposition of the case shall be deemed as fees and shall be forfeited to the court. Any interest on escrow funds shall be deemed as earned by the court as of the close of the day upon which they were on deposit.

APPENDIX G

MICHIGAN SUPRREME COURT RULE GCR 1963, 790

On order of the Court, the notice requirements of GCR 1963, 933 having been complied with, and changes made after considering the comments received, the following new GCR 1963, 790 was adopted December 15, 1977, to be effective the date this order is certified:

Rule 790 Pretrial Release

.1 Right to Bail.

Except for one charged with murder or treason when the proof is evident or the presumption great, a person charged with a crime is entitled to:

(1) release on his own recognizance,

(2) conditional release, or

(3) release on money bail (surety 10 percent, or cash).

.2 Release on Defendant's Own Recognizance.

A defendant must be released on his own recognizance unless the court decides that a recognizance release will not assure his appearance.

.3 Conditional Release.

If the court decides that the defendant cannot be released on his own recognizance, the court may release him on any conditions necessary to assure his appearance.

.4 Money Bail; Satisfaction of Money Bail.

(a) If the court decides that the defendant cannot be released on his own recognizance or conditionally, then money bail with or without conditions may be required to assure his appearance.

(b) If the court finds that the defendant's appearance cannot otherwise be assured, it may require the defendant to post a surety bond. In making this finding, the court shall consider the factors listed in subrule .5 and state the reasons why a surety bond is necessary.

(c) Unless the court requires a surety bond, the defendant may satisfy the monetary requirement of bail under (1) or (2) at his option.

(1) The defendant may post a surety bond, written by a licensed surety bondsman, in the full amount of the bail set by the court.

(2) The defendant, or any person other than an attorney acting in his behalf or a surety referred to in (1), may deposit with the clerk or peace office having custody of the defendant, currency equal to 10 percent of the bail, but at least $10. The court may require additional security or other conditions of the defendant.

.5 Decision; Statement of Reasons.

In deciding which release to use and what terms and conditions to impose, the court shall consider available information on:

(1) the length of the defendant's residence in the community;

(2) his employment status and history and his financial condition;

(3) his family ties and relationships;

(4) his reputation, character, and mental condition;

(5) his prior criminal record, including any record of prior release on recognizance or on bail;

(6) his record of appearance or nonappearance at court proceedings or flight to avoid prosecution;

(7) the identity of responsible members of the community who would vouch for his reliability;

(8) the nature of the offense presently charged and the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of nonappearance; and

(9) any other factors indicating his ties to the community or bearing on the risk of willful failure to appear.

Unless the defendant is released on his own recognizance, the court must state the reason for its decision on the record. The court's statement need not include a finding on each of the enumerated factors.

.6 Termination of Money Bail.

(a) If the conditions of the bail are met and the defendant is discharged from all obligations in the case,

(1) when the defendant satisfied the bail requirement under subrule .4(c)(1), the court shall discharge the surety; or

(2) when the defendant satisfied the bail requirement under subrule .4(c)(2), the court shall return 90 perccent of the deposited money and retain 10 percent.

(b) If the defendant does not comply with the conditions of bail, the court may issue a capias for the arrest of the defendant and enter an order declaring the bail money deposited or the surety bond, if any, forfeited.

(1) The court must mail notice of the forfeiture order immediately to the defendant at his last known address and to the surety, if any.

(2) If the defendant does not appear and surrender to the court within 30 days from the forfeiture date or does not within the period satisfy the court that his surrender is impossible and without his fault, the court may enter judgment for the state or local unit of government against the defendant and the surety, if any, for the entire amount of the bail and costs of the court proceedings.

(3) The deposit made under subrule .4(c)(2) must be applied to the costs and, if any remains, to the balance of the judgment. The amount applied to the judgment must be transferred to the county treasury for a circuit court or recorder's court case, the treasuries of the governments contributing to the district control unit for a district court case, or to the treasury of the appropriate municipal government for a municipal court case. The balance of the judgment may be enforced and collected as a judgment entered in a civil case.

(c) If a sentence including a fine and costs is imposed and the defendant deposited bail money, the bail money must be first applied to the amount of the fine and costs and the balance, if any, returned, subject to the provisions of subrule .6(a)(2).

.7 Review.

(a) A magistrate's or arraigning judge's bail decision may be reviewed by motion filed in a court of general jurisdiction in criminal cases.

(b) A bail decision by a judge of a court of general jurisdiction may be reviewed by motion filed in the Court of Appeals.

(c) There is no fee for a motion under (a) and (b).

(d) The lower court's order setting bail remains in effect and may not be vacated, modified, or reversed except on a finding of an abuse of judicial discretion.

END