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Regarding the function of Bail in the Criminal Justice System

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Good afternoon Chairman Jones, Chairwoman Bradford-Grey and Chairman Bethel. Thank you Councilman Jones for your invitation to present testimony before this esteemed committee as you navigate your course on improving the function of the criminal justice system to ensure that it is fair and just for all.

My name is Nicholas Wachinski, I am a licensed Pennsylvania attorney who has been studying the use of bail for the past nine years in Pennsylvania, I am an instructor at the Pennsylvania Supreme Court Minor Judiciary Education Board and I currently serve as the Chief Executive Officer for Lexington National Insurance Corporation who provides surety for bail. I, also, have been involved in the discussion of improved efficiency in the application of bail in the Philadelphia Criminal Justice System for several years, first serving on the First Judicial District Reform Initiative through the Pennsylvania General Assembly in 2009.

Conversations across our country are ongoing about the increased desire to improve the function of our criminal justice system and to reduce unnecessary biases that currently exist in the system, bias against both racial minorities and those who are considered to be indigent. This conversation has recently involved the reduced reliance or wholesale abandonment of the use of bail.

The conversation about the abandonment of bail centers on common themes:

- risk assessments and not wealth should determine the release of an accused;
- rather than using money bail to detain an accused person courts should be empowered to judicially detain an accused pending trial if that person is determined to be a risk to public safety; and
- government supervision of accused persons is more effective at assuring appearance and public safety while not risking unnecessary detention of racial minorities or indigent persons.

The motivation for this conversation is the perception that jails are overrun by those who simply cannot afford money bail.

No person should languish in jail pending trial merely because he or she cannot afford the money that is associated with his or her release. A report issued by the John Jay College of Criminal Justice stated that just because someone is in jail after bail is set does not mean they are there just because they cannot afford bail. In fact, in analyzing the issue of "who is in jail on bail" the State Court Administrator from Connecticut found that of the total number of inmates, 2,941, subject to bail services, 67% of all offenders had three or more prior convictions, and 65% had one of all offenders had one or more prior felony convictions. Of those offenders subject to bail services, only 442 were charged with misdemeanor offenses, and of the misdemeanants, 77% had three or more prior convictions.

Bail in its purest form is a measurement of risk. Under Pennsylvania law, an accused person is arrested and presented to the Court, after consideration of the individual circumstances of the accused, including in many instances a form of "risk assessment", a Judge or Magistrate will make a determination on conditions of release that are reasonably calculated to assure the return of the accused as required by the Court and to protect the public against any potential threat to its safety. The dollar amount of any money bail, or more importantly the potential loss of that dollar amount if the accused fails to appear as required, in Pennsylvania is designed solely as a motivation for the accused.

Risk assessment tools are bases on existing data collected from the system, and compiled in a computer based algorithm with the design to predict the likelihood of future failure to appear as required by the Court and future failure to commit acts against public safety. It was originally used in Philadelphia as a means to reduce the disparity in judicial decision making and to normalize the decisions of the Court, thereby resulting in a "more fair" result. In Philadelphia, risk assessment has been used by bail magistrates since 1984. A recommendation considers the past criminal record of the accused and the nature of the accused behavior when in the system. The magistrate is then tasked with weighing the nature of the offense committed against the recommendation.

In 2009, as reported by the Philadelphia Inquirer, 47,000 unserved arrest warrants had amassed in the system, with $1.1 billion in uncollected unenforced bail forfeitures outstanding. Philadelphia is not an island to itself in this regard, in 2014, USA Today reported that the FBI database reflected some 186,000 cases where local jurisdictions would not spend time or money to retrieve an accused from another state.

It is worth noting that earlier this year, Pro-Publica, an independent group of investigative reporters, did a study of some 7,000 cases over a 2 year period of criminal cases involving the use of risk assessment tools in Florida. Even when those conducting the study ran a statistical test that isolated the effect race from criminal history, recidivism, age and gender, black defendants were still 77 percent more likely to be assigned a higher risk for committing a future violent crime and 45 percent more likely to commit a crime of any kind. Simply put, if the data is biased, the result is biased. It should be also noted that once the risk is assessed

that a person is a likely risk to public safety, that risk can be potentially used for other purposes such as negotiating or offering terms for a guilty plea.

In 2014, Colorado was forced to advance legislative language that restricted the use of risk assessments for pretrial purposes only, because District Attorneys were tailoring plea offers based on the risk scores.

If bail is used properly, when an accused fails to appear as required by the Court, thus becoming a fugitive, then his or her bail should be declared forfeited, in other words the monetary amount associated with the risk posed becomes the property of the state. This loss is designed to either motivate the accused to return or more accurately to motivate the family, friends and loved ones who provided this security to help locate the accused and help the accused return to Court. In studies done by the University of Texas, the University of Chicago and the Bureau of Justice Statistics, these methods relating to the risk of financial loss relating to release have proven to be over 90% effective at either assuring appearance or aiding in the recapture of the accused.

Replacing the function of money bail with a governmental agency is not going to remove the potential racial bias and the potential negative impact upon the indigent. As seen from the Pro-Publica research, the use of the risk assessment tool even in assessing the level of supervision would thrust racial minorities into higher likelihood of being subjected to intensive governmental supervision while they await trial. This means a higher likelihood that their 4th amendment right against unnecessary search and seizure and their 5th amendment right prohibiting self incrimination are likely to be trampled. In absence of bail forfeiture, a civil sanction, the only measure of response for non-compliance is either to be held until trial, or to be charged with a new crime. In recent years, in the State of Colorado, pretrial supervision carries a fee, sometimes in excess of $750. Colorado has seen cases where a person is accused of a crime, ordered into pretrial supervision, ordered to pay the $750 fee, the underlying case was dismissed, the accused could not pay the remaining portion of the fee and was charged with a new crime: Failure to Comply with a Court Order. Only to be ordered into pretrial supervision again.

Improving the system in Philadelphia can and should be the focus, but not the jettisoning of our already working system. Improve the system by understanding the composition of the jail population on a daily basis, and understanding the details of that population, following the Pittsburgh model. Ensure that no person unnecessarily is detained merely for an inability to afford bail by instituting bail reviews at the preliminary hearing, arraignment and pretrial conference phases in the system. Preserve judicial discretion in the system by not surrendering totally to risk assessment. And finally, understand that there is more than just the voice of the accused when considering the release of accused persons pending trial, victims of crime and the public generally must be given a voice in this conversation on improving the practices in the criminal justice system.