WYOMING LEGISLATIVE SERVICE OFFICE

# Memorandum

**DATE** April 6, 2017

**TO** Joint Judiciary Committee

**FROM** Torey Racines, Legislative Counsel

**SUBJECT** Evidence Based Pretrial Release Policies

## Interim Topic as Approved by Management Council

Priority #: 3 Evidence Based Pretrial Release Policies

The Committee will examine current pretrial release policies and practices, including risk assessment practices.

## Concerns

When an individual is accused of a crime, the criminal justice system does not instantly determine guilt or innocence. Months elapse from the time of arrest until trial. During this time the State has an interest in ensuring the defendant appears at trial. Detention of a defendant until trial is the most assured method in getting a defendant to attend trial. But at the same time, pretrial detention poses significant consequences to a defendant's liberty interest and often jeopardizes a defendant's employment, income and familial relationships. Since colonial times, courts have used bail systems to mitigate the friction caused by these competing interests.

There exists a concern that money bail systems can unfairly detain the poor while allowing wealthier defendants to be released -- even when they pose a high risk for flight or danger to the community. Reformers suggest utilizing individualized evidence-based risk assessment to determine appropriate pretrial release conditions that are not financially based and the elimination of rigid bond schedules which set bail amounts strictly by offense. Wyoming is perhaps ahead of the curve nationally on some of these issues.

## Introduction to Bail and Pretrial Release

Bail is money or property that a defendant posts with the court along with the promise to return for all court proceedings. If a defendant appears at all court proceedings, the bail is returned to

the defendant regardless of whether the defendant is found guilty or not guilty of the charge. If, however, the defendant fails to appear for court, the money or property posted as bail may be forfeited to the state.

Generally, a judge will set the amount of money required as bail after considering a number of factors including the nature of the offense charged, the defendant's previous history and ties to the community. By constitutional mandate, the amount of bail may not be excessive. That is, it must be the minimum amount that is required to assure that the defendant appears for trial and to assure community safety.

Bail systems vary by state. Many states have alternatives to posting cash or property belonging to the defendant. Many states, including Wyoming, allow surety companies to post bond for a defendant. These companies charge a fee to the defendant for the service, thereby generating profit. The company stands to lose the bond amount should the defendant fail to appear.

Wyoming allows release of a defendant on "personal recognizance" or "unsecured" bond. That is, the bail amount set by the judge does not have to be produced by the defendant in order to be released. The defendant's promise to appear suffices. In fact, by Wyoming court rule, a judge **shall** release a defendant on unsecured bond **unless** the judge determines that such bond will not reasonably assure the person's appearance for trial.

Some states and counties have created agencies that act akin to a pretrial probation office. These "pretrial service offices" investigate newly arrested defendants, collect information relating to bail risk and make recommendations to the court for bail amounts and other conditions for pretrial release. These agencies are often tasked to monitor or supervise defendants. These tasks include call-in requirements, job verification, treatment program attendance verification, and drug testing. Most agencies send court date reminders.

**General Principles of Bail in Wyoming**

In Wyoming, questions of criminal bail are controlled by three sources of law: the constitution, statute and court rule.

**A. Wyoming Constitution, Article 1, Section 14**

The Wyoming Constitution guarantees that any person arrested for a non-capital crime is entitled to post bail while waiting for trial. Article 1, Section 14 states:

> All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishment be inflicted.



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While a judge may not constitutionally set an "excessive bail," the mere fact that a defendant is unable to meet the bail set by a judge does not make it excessive.

### B. Wyoming Statutes §§ 7-10-101 through 7-10-106

The Legislature addresses pretrial release in Wyoming Statutes §§ 7-10-101 through 7-10-106. (Attachment 3-2). The six sections establish that all persons may be admitted to bail; carve out a limited exception for capital defendants if the proof is evident; give the judge discretion to admit to bail a convicted defendant pending appeal; provide that bail continue when a defendant is bound over to district court; define who may set bail as a judicial officer; provide for the disposition of any forfeited bail to the county public school fund; and address the impact of technical errors in proceedings to enforce or force bail.

Perhaps most significant to this interim topic is Wyoming Statute § 7-10-102, which reflects the legislature's long standing deference to the Wyoming Supreme Court to govern matters relating to bail. In full it reads:

> **7-10-102. Matters governed by rules.**
>
> The rules promulgated by the Wyoming supreme court shall govern in all matters relating to the terms, amount and conditions of bail, justification of sureties and procedures for forfeiture, enforcement and exoneration upon breach or default of the conditions of bail.

### C. Wyoming Rules of Criminal Procedure

The Supreme Court responded robustly, promulgating Criminal Procedure Rule 46.1. (Attachment 3-3). Rule 46.1(a) requires jailers to inform arrested persons within 4 hours of arrest of the right to petition the court for pretrial release. The judge must consider the petition without unnecessary delay, but in no event later than 72 hours.

Rule 46.1(b) requires the judge to release a defendant on personal recognizance or unsecured bond **unless** the judge determines such release will not reasonably assure the defendant's appearance at trial or will endanger the safety of another person or the community.

If a defendant is not released on unsecured bond, Rule 46.1(c) requires the judge to determine the least restrictive conditions that will reasonably assure the defendant's appearance at trial and the safety of the community. Rule 46.1(c) sets out 15 conditions that may be imposed by the judge, including money or property bail or bail bond.

Rule 46.1(d) sets out the factors the judge must consider in deciding what conditions of release to impose including the nature of the offense, the weight of evidence, the history of the defendant



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including ties to the community, financial resources, prior crimes and appearance history and danger to other persons or the community.

### D. Suggestions for committee consideration

The Committee should identify problems existing in pretrial release practice in Wyoming, gaps that exist in Wyoming's pretrial release law and what tools are needed to fix any gaps, e.g., creating pretrial service agencies, employing risk assessment tools, amending statutes, amending court rules, and/or training for the judiciary, prosecutors, and defense bar.



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