

## COMMERCIAL BAIL - Criminal Justice Partners

### *Benefits of Commercial Bail to the Texas Criminal Justice System*

This document will address the implications of modifying and/or replacing the Commercial Bail Industry of Texas with a massive expansion of statewide Personal Recognizant Bond ("PR Bond") Programs. This document is meant to assist lawmakers in better understanding the complexities of Commercial Bail as an integral part of the Criminal Justice System and demonstrate the ramifications of reducing or eliminating its current use. To effectively evaluate the Commercial Bail Industry and its viability within the Criminal Justice System it's important to understand how it works.

### The Current Bail System in the State of Texas

The Commercial Bail Industry is a for-profit industry that employs thousands of people statewide directly related to the release, supervision and recovery of individuals on Commercial Bail. That equates to a lot of tax revenue for the state and, as will be explained throughout this document, a lot of revenue for all levels of government including both county government and state government.

In Texas, Commercial Bail Bondsmen are made up of men and women across the state who either write bonds based upon their own personal property or they are designated agents for a corporate insurance company. The Texas Commercial Bail Industry is regulated by one of two distinct regulatory scheme. In counties with a population over 110,000 residents or smaller counties which have opted into the act are regulated by the Texas Occupations Code. Commercial Bail Bondsmen are licensed and monitored through county level Bail Bond Boards and are required to deposit a minimum of \$50,000 with the county treasurer to secure the bonds executed.

In smaller counties, Commercial Bail Bondsmen, though not licensed by the county, are regulated by Chapter 17 of the Texas Occupations Code which is generally monitored through the Sheriff's Office and are required to present annual financial statements to determine their financial solvency. Given this emphasis on county level authority, a change to PR bonds would place the counties throughout the state in the most vulnerable position. It is the individual counties that will incur the most expense and lose the most revenue when shifting from our current Commercial Bail System. The larger the county, the greater the effects of change.

A Commercial Bail Bondsman will charge a small premium (usually 10% or less of the face amount of the bond) to execute a bond. In most cases, the Commercial Bondsman will accept a small down payment for the premium and allows the defendant or his family to make payments for the remainder. From this premium all release, supervision and recovery costs are paid with **no expense to the taxpayers**. It is the Commercial Bail Bondsman's responsibility to ensure the defendant performs on his/her promise to appear for a court hearing. It is the Commercial Bail Bondsman who notifies a defendant of his/her court date, often gives rides to court, provides needed counseling and marshals the family to assure the defendant appears for the required court hearings.

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The Commercial Bail Industry in Texas provides the same supervision, arguably superior supervision, as taxpayer funded programs, but **costs nothing to the** taxpayers, the counties and/or the State. Additionally, Commercial Bail has advantages over PR Bond Programs because Commercial Bail has a financial incentive to return the defendant to court as soon as possible when they fail to make a court appearance. This motivation simply does not exist in PR Bond Programs funded by the State and produces a lower failure to appear rate for defendants released on Commercial Bail. Additionally, no other pre-trial program used or under consideration, other than Commercial Bail, provides an incentive to quickly return the defendant to the Criminal Justice System after a failure to appear. This ensures that criminal cases will not become backlogged as the Criminal Justice System awaits the defendants' return to court after a failure to appear.

In any given year hundreds of thousands of cases are added to the Criminal Justice System for resolution. In 2014 alone the number was 744,281 new criminal cases. In that same year, the Commercial Bail Industry executed approximately 480,000 bonds. These cases are not resolved immediately. If it takes on average 1 to 2 years to resolve a case, then it's easy to calculate that the Commercial Bail Industry of Texas supervised 750,000 to 1,000,000 individuals at any given time. **Most importantly, this is done at no cost to the taxpayers of the State of Texas.**

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### **COMMERCIAL BAIL - Criminal Justice Partners**

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##### **Financial Impact**

The Commercial Bail Industry provides many benefits to the State by supervising the criminally accused while they are awaiting trial at no cost to the taxpayers. These are material facts that need to be included in the calculation when determining the true costs of PR Bond Programs.

- Every time a Commercial Bail Bond is executed a posting fee of \$15 is paid to the State. It is estimated this total annual revenue is \$7 million. Since 2003, this posting fee has generated approximately \$100 million in revenue for the State of Texas. These funds are distributed as follows: 10% is retained by the County collecting the fee; two-thirds (2/3) of the funds are deposited into the Assistant Prosecutor Supplement Fund to give additional pay to assistant district attorneys and assistant county attorneys across the State; and one-third (1/3) of the funds are deposited into the Fair Defense Fund to provide criminal representation for the poor.
- When a defendant is released on a Commercial Bail Bond and fails to appear for a court appearance the Commercial Bail Bondsman is subject to pay the face amount of the bond into the general fund of the County where the charge(s) originated. It is estimated that approximately \$25 million is collected annually by all counties across the State of Texas. Since 2003, this total is more than \$325 million.
- When a defendant is released on a Commercial Bail Bond and fails to appear for a court appearance the bond is forfeited. When this occurs the Commercial Bail Bondsman is required to pay court costs even if the defendant returns quickly. These fees, in-part, provide supplemental pay for judges across the State. It is estimated this "costs of court" totals more than \$3 million annually collected by the counties and are forwarded to the State. Since 2003, more than \$39 million has been paid in total.
- When a defendant flees the jurisdiction and is rearrested in another County, State or Country, the county must pay for the extradition costs to return the defendant to answer the charges pending. The Commercial Bail Industry reimburses the County for these costs on any bond that they posted. When a PR Bond is used the county will bear this expense.

These revenue streams for the State, as well as the Counties, will be lost if PR Bond Programs are used exclusively to secure the release of the criminally accused from custody. At the very least, these revenue streams will diminish proportionately with the increased use of PR Bond Programs.

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#### The Cost to Implement a Statewide PR Bond Program

Proponents for implementing this massive shift to a PR Bond Program estimate the cost to be approximately \$75 million a year. However, the actual cost would be much more, as other states have discovered, and when factoring the lost revenue stream currently provided by the Commercial Bail Industry, it creates unattainable funding issues across the state that taxpayers of Texas cannot afford without a tax increase.

- In New Jersey, the state legislature recently imposed a mandate on its counties to create a Pre-trial Bond Program in each county. The New Jersey Association of Counties has now filed suit seeking to set aside the requirements of this new legislation due to its overwhelming costs. The initial estimate to implement the new program was \$16 million and \$75 million to operate year to year. The counties in New Jersey have now determined the actual cost to be substantially higher and are unaffordable.
- In Maryland, the state legislature is reviewing proposals to implement a State-Facilitated Pre-trial Supervision Program which costs the State between \$102 million to \$200 million annually. The population of Texas is approximately 4 ½ times that of Maryland. All factors remaining the same, this program would cost between \$459 million to \$900 million annually to implement in Texas.
- In Kentucky, which has a population approximately the same as Harris County, Texas, the state legislature has adopted a State-Facilitated Pre-trial Supervision Program that costs around \$300 million a year and produces one of the highest recidivism rates anywhere in the nation. If used in Texas, this program would cost potentially billions of dollars to operate and based upon the recidivism rates being produced in Kentucky, would cause further jail over-crowding because of its proven ineffectiveness in deterring crime.

The current Commercial Bail Industry in Texas costs nothing to the taxpayers, the counties and/or the State. Additionally, Commercial Bail has advantages over PR Bond Programs because private industry has a financial incentive to return the defendant to Court as soon as possible. By returning the Defendant to Court quickly, the county saves money in preventing a further backlog of criminal cases, providing justice to victims and by enhancing public safety and the Commercial Bail Industry saves money by not having to pay the full amount of the bond to the county if the defendant returns by a certain deadline. This motivation simply does not exist in PR Bond Programs funded by the State causing a higher failure to appear rate than defendants released on Commercial Bail.

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##### **Commercial Bail is Constitutional**

The System of Bail in Texas is deeply rooted in American legal traditions. The operation of our current Commercial Bail Industry has developed from the founding days of our State. The Texas Constitution states that all prisoners, except when charged with certain offenses listed in the Constitution, are eligible for bail with sufficient sureties. The Commercial Bail Industry is the only release tool that is backed by sureties as required by the constitution. If a defendant fails to make a court appearance, the State is financially compensated to off-set the expenses involved in that individual's future apprehension. Also, the Commercial Bail Industry is given a financial incentive to return the defendant to court as soon as possible to get the criminal case back on track.

- Bail Schedules are commonly used to establish appropriate bond ranges for individuals being criminally charged and are rationally related to a legitimate government interest of ensuring appearance for court and public safety. The schedules take into account the current charge(s) and any prior criminal history of the individual being magisterated to assure everyone is granted equal treatment under the law regardless of race, sex or financial ability. Bond Schedules vary from county to county based on the local judicial rational and economy.
- Bail Schedules assist jail over-crowding issues by providing the opportunity of timely release, in most cases avoiding the need of extended stays in custody while awaiting magistration.
- Commercial Bail continues to be statistically proven the most effective and efficient means to balance the interest of supervised release from custody and appearance in court. "Defendants released on a surety bond are 28 percent less likely to fail to appear than similar defendants released on their own recognizance, and if they do fail to appear, they are 53 percent less likely to remain at large for extended periods of time." Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J. L. & Econ. 93 (2004).
- Plaintiffs in various litigation suits throughout the nation are challenging the use of Commercial Bail as unconstitutional under the Equal Protection Clause. However, defendants concede that Commercial Bail does not violate the 8<sup>th</sup> Amendment of the US Constitution which addresses excessive bail. Therefore, the issue that is being litigated arises from the Equal Protection Clause. In October of last year, the United States District Court of California addressed this issue and found the current system constitution. The court held there is a rational basis for the use of Commercial Bail to ensure that a defendant appears for all court hearings and trial.. *Welchen v.*

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*Sacramento County*, No. 2:16-cv-00185-TLN-KJN (U.S. Dist. Ct. Eastern Dist. California October 10, 2016).

- Some constitutional scholars have stated that the 14<sup>th</sup> Amendment cannot be employed to invalidate bail procedures that the 8<sup>th</sup> Amendment allows. These experts cite case law which states where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of “substantive due process” must be the guide for analyzing these types’ claims. *Albert v. Oliver*, 512 U.S. 266, 273, 114 S.Ct. 807, 813 (1994) (plurality) (quoting *Graham v. Connor*, 490 U.S.386, 295, 109 S.Ct. 1865, 1871 (1989)).

In Harris County, Texas, the PR Bond and Pre-Trial Bond Programs have been utilized to some degree over the last 30 years. The laws are already in effect to allow this. As of January 2017, there are well over \$100 million in uncollected PR Bond and Pre-Trial Bond forfeitures outstanding. Therefore, when a defendant fails to appear for a court hearing as promised, the county and state will not be able to proceed to collect anything on this broken promise or contract.

In 2009, it was reported in Philadelphia, Pennsylvania, there was over \$1 Billion dollars in uncollected forfeitures under a Pre-Trial Program where defendants broke their promises to appear. These broken promises create problems at all levels: the courts have a backlog of cases awaiting the defendant’s return; the counties do not recover any of their expenses in not being able to go forward with the case; justice is delayed and sometimes lost because of the delay; and public safety is at greater risk when the defendant must commit another crime to be return into the Criminal Justice System. Commercial Bail is constitutional and financially beneficial for the State of Texas.

The recent 5th Circuit opinion confirmed that Bail Schedules are constitutional, but a defendant who claims poverty must have a meaningful opportunity to ask for a deviation from the schedule. This means that the court must afford the defendant a hearing (not release).

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##### **Public Safety: Jail Population & The Poor**

The System of bail in Texas balances the needs of the county between ensuring the criminally accused appear in court with the need for public safety. Any changes to this system must continue to seek a balance between these interests. Proponents for changing this system to a state-wide Pre-Trial System claim it will resolve jail over-crowding and will generate enough savings to off-set the cost of creating the new agencies needed to replace the Commercial Bail Industry. Check the math. Their calculations do not follow established precedents and are factually inaccurate when reviewing how these very same programs performed when put into operation in other states around the nation.

- According to the Texas Judicial Council Report to the Texas Legislature, approximately 75% of the population of County Jails across the State are pre-conviction. It's important to recognize there is a constant flow of individuals entering the system at the same time individuals are exiting the system. Therefore, this 75% is not the same group of individuals day to day.
- It is also worth noting the number of individuals listed with serious felony offenses may have additional charges from other jurisdictions which would complicate, if not completely deny their release making any arguments which include that statistic skewed and invalid. This group of inmates comprises 88% of the individuals who make up the 75% quoted in the report.
- 53% of the individuals who make up the 75% of the defendants in question are detained in twelve heavily populated counties in the State. This indicates an inner-city crime issue, not a state-wide jail over-crowding problem. That is a separate discussion altogether and is not being addressed in this document.
- Additionally, in some misdemeanor cases, defendants have lost any incentive to receive probation and instead choose spending a couple of days in jail as a better option than probation and, as such, choose not to secure bail (of any sort) as a selection of least resistance. For these defendants it is not a matter of cost, it is their preference.

Further, the report fails to disclose that ONLY 12% of the 75% of individuals in question are misdemeanor cases (without consideration of whether there are other reasons they are being held

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without a bond). Therefore, any proposal that attempts to address jail over-crowding through misdemeanors alone cannot and will not resolve jail over-crowding issues. It becomes an all or nothing scenario (misdemeanors and felonies) to attempt to use jail over-crowding as the justification for the creation of a state-wide PR Bond Program. As has been found in other attempts, those costs will far surpass the cost of our current system.

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Studies have found Commercial Bail performs better than taxpayer funded Pre-Trial Release Programs in the State of Texas. PR Bond Programs create a larger backlog of criminal cases that forfeit, adding time and expense to the Criminal Justice System.

- In 2008, the Honorable Cynthia Stevens Kent, judge of the 114<sup>th</sup> Judicial District Court in Smith County, Texas conducted a study to see what would happen if she used only PR Bonds for defendants in her court. She ordered PR Bonds exclusively over the course of several months. The judge wrote an article about the experience and she stated, “. . . within months the problems of not requiring surety bonds became obvious.” The judge found more than half of the defendants granted PR Bonds failed to appear for their initial court hearing. Further, the judge found that the problem intensified the longer the PR Bond program was used. The number of failure to appears sharply increased. As a result, further charges were presented to the grand jury for indictment based upon these failures to appears. Consequently, the court’s dockets became backlogged.
- In her study, Judge Kent concluded the use of a PR Bond program had numerous negative impacts to the Criminal Justice System. She found that jail over-crowding was not reduced, but instead, increased. When the defendants returned to the Criminal Justice System, they were held in jail with higher bonds which Corporate Surety Bondsmen would not post. Judge Kent determined her case load doubled with the increase of new cases filed arising from the failures to appear. She also found that there were substantial delays in resolving her criminal cases as a result. She found that the role of the Commercial Surety Bondsman was a critical part of the protection of public safety and insuring that cases stayed on track by getting defendants to appear for hearings and/or trial.
- In 2013, a study entitled Pretrial Release Mechanisms in Dallas County, Texas was conducted by Robert G Morris. Ph.D. on behalf of The Center for Crime and Justice Studies at the University of Texas at Dallas. The study found, amongst other valuable determinations, the Commercial Bail Industry was more conducive to appearance in court amongst similar defendants. The report stated that Commercial Sureties are 39% more effective than state-

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facilitated Pre-Trial Release Programs. These types of findings are consistent from study to study, state to state. Commercial Bail produces a higher appearance rate. A higher appearance rate reduces further backlogs of cases, ensures that the defendants appear so that justice can be had and increases public safety by keeping the criminal case on track.

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- There are other considerations as well. Issuing PR bonds for all misdemeanor cases would be the worst possible option for monitoring defendants. Not only would it cost more than our current system, but the Criminal Justice System would lose the supervision and recovery services provided by the Commercial Bail Industry ensuring the criminally accused appear in court. Commercial Bail Bondsman are given financial incentives to get defendants back into custody as quickly as possible. No other system, including PR Bond Programs, have this incentive.
- With PR Bonds, the defendant makes a promise to appear, nothing more. If a defendant breaks his/her promise to appear, a warrant is issued and is added to the workload of the Sheriff's Office with all the other thousands of warrants. Even when taken back into custody, seldom is money ever collected by the State. The bond amounts associated with PR Bonds mean nothing and are in application just made up numbers. They don't really have any value. In addition, data shows the defendant will most likely not return until the defendant commits another crime. A PR Bond program is NOT an effective method for ensuring public safety.

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