

S.27 – Supplement to Department of State’s Attorneys and Sheriffs Testimony

Summary

While the opinions amongst individual State’s Attorneys may vary, the Department of State’s Attorneys and Sheriffs does not support this bill as presently drafted.¹

With respect to Section 1, cash bail remains a needed tool to ensure appearance in the limited cases and circumstances where conditions of release are unable to secure future appearances or to mitigate risk of flight. This consideration is especially important in **listed misdemeanor offenses** (e.g. domestic assault, violation of abuse prevention orders, or reckless endangerment) where the collateral consequences of a conviction may increase the motivation of an offender to avoid accountability and the court process.

The Department of State’s Attorneys and Sheriffs appreciates that further efforts to reduce the use of cash bail are appropriate, as well as other efforts to ensure cases wherein an individual is held are promptly adjudicated and sufficiently prioritized within the judicial system.

Turning to Section 2, proposing a study, the initial question begins with the premise that cash bail should be eliminated – not the broader question of “what is the most effective means by which to assure future court appearances by offenders, or to mitigate their risk of flight.” At the heart of this discussion are questions concerning accountability and judicial economy. Further, another concern is the already substantial number of standing commissions and committees that the stakeholder groups are committed to and are cautious about another dedicated forum or group drawing upon a limited membership pool. The Department also believes that the Department of Corrections should be party to the study – especially since potential alternatives are likely to include or impact them.

The Department of State’s Attorneys and Sheriffs takes no position on Section 3, but believes the Department of Corrections may collect and maintain demographic data on incarcerated or detained individuals.

Finally, with respect to Section 4 the Department of State’s Attorneys and Sheriffs is not opposed to further investigation of this effort, but defers to the judiciary on technical feasibility and implementation. There is concern, however, that the existing obligation to provide and keep up to date contact information with the court is not a consistent practice among offenders with a higher risk of non-appearance at court proceedings. While this may be helpful, it is not uncommon for defense counsel to report to the court that communication has broken down because of changed phone numbers, mailing addresses, or non-response to electronic communications.

¹ There is a diversity of views on the current use and future of cash bail within Vermont’s criminal justice system. Notably, Chittenden County prosecutors no longer seeks cash bail. Other offices have emphasized reduced use of cash bail, without an outright prohibition on such use.

Background Information

What type of offenses are resulting in imposition of cash bail?

Recent data from the Department of Corrections indicates that 34 of 428, or 8% of those detained are detained based on a misdemeanor offense. Of this group, three-quarters of the individuals are detained based upon commission of crimes against a person (e.g. domestic assault, simple assault, etc.):

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VT Department of Corrections: Population Report 12/31/2022 *

1244 VT in-state population
110 VT out-of-state population
1354 Total VT incarcerated population

Crime Type by Booking Status | N= 1354

Crime Type	Detained	Hold	Sentenced	Total
01:Fel./Serious	284		535	819
02:Fel./Person	26	1	82	109
03:Fel./Property	43		119	162
04:Fel./Drug	21	1	30	52
05:Fel./MotorV	8		27	35
06:Fel./Other	12		16	28
07:Misd./Person	23		33	56
08:Misd./Property	2		1	3
09:Misd./Drug	1		1	2
10:Misd./MotorV	3	1	7	11
11:Misd./Other	5			5
Uncategorized		72		72
Total	428	75	851	1354

Crime Type Examples:

01:Fel./Serious: Aggravated Assault, Aggravated Sexual Assault, Murder
02:Fel./Person: Assault and Robbery, Lewd and Lascivious
03:Fel./Property: Burglary Occupied, Grand Larceny, Arson
04:Fel./Drug: Dealing, Trafficking, Possession and Sale
05:Fel./MotorV: DUI3 or more
06:Fel./Other: Obstruction of Justice, Fugitive

07:Misd./Person: Domestic Assault, Simple Assault
08:Misd./Property: Unlawful Trespass, Retail Theft
09:Misd./Drug: Possession of drugs
10:Misd./MotorV: Careless and Negligent Operation
11:Misd./Other: Violations Conditions of Release

Note: All Uncategorized Crime Types have a Hold Status

*Note: Daily Counts are accurate as of 10pm on the date listed

The data available does not delineate between **when** bail was imposed during the course of a case –whether imposed at arraignment or subsequently – and does not capture circumstances where bail was posted and then a higher bail amount was set based on non-appearance.²

In any event, the data demonstrates that the majority of individuals detained are not just felony cases, but they are serious crimes of violence (more than 300 of the 428 detained individuals).

² There are also circumstances where bail may be imposed in a misdemeanor docket concurrent to felony bail, or where an individual is held for another purpose (furlough hold on an existing case, detainer for an out of state or federal matter, etc.). Nominal bail is, at times, imposed in these circumstances to ensure an individual receives credit toward a sentence – although this may have been remedied through Department of Corrections rulemaking and sentence computation practices.

Current Offenders with Bail Amounts - 02/14/2023

Facility Where Held	0	<1000	1Ks	10Ks	100Ks	HWOB	Grand Total
CRCF	3	3	7	12	6	13	44
MVRCF	2	2	8	11	1	39	63
NECC	11	3	6	8	1	24	53
NSCF	9	5	14	18	5	63	114
NWSCF	6	1	15	11	2	34	69
SSCF	5	5	13	19		60	102
Grand Total	36	19	63	79	15	233	445

The table above represents the spread of bail and those held without bail – 176 of 445 individuals from this data set were held for lack of bail. 233 are noted as held without bail (which is limited to serious felony offenses, and only maintained after an evidentiary hearing). The other 36 individuals held with 0 bail are attributable to lack of a responsible adult or other circumstances not involving setting of cash bail by a court.

In summary, there was a total of 3 women and 16 men on bail in amounts less than \$1,000 as of February 14, 2023. These may entail misdemeanor or felony offenses. In context, in FY 2021 a total of 11,822 criminal cases were filed – 9,179 of those were misdemeanor offenses. **The December 21, 2022 snapshot of 34 individuals held on misdemeanors constitutes 0.3% of that total number** – signifying a very small percentage of total cases, even if the total number for the year is greater versus that moment in time.³

What does a court consider when imposing cash bail?

Pursuant to *State v. Hance*, 2006 VT 97, ¶ 17, the Vermont Supreme Court emphasized that “[t]he bail statutes themselves assume that a defendant will be released on personal recognizance or an unsecured appearance bond unless a finding is made that such measures will be insufficient.” The sole constitutionally legitimate purpose of monetary conditions of release is to provide additional assurance of the presence of an accused.

The present \$200 limit for expungable misdemeanor offenses serves as a significant restraint on the degree of cash bail that may be imposed – and is in most cases substantially less than the maximum fine for a misdemeanor offense.

Further, while a court need not make a finding as to ability to pay the amount of bail imposed, **“in light of our caselaw on the subject, bail requirements at a level a defendant cannot afford should be rare.”** *State v. Pratt*, 2017 VT 9, ¶.

Courts consider the following factors when imposing bail:

- (1) Seriousness and number of offenses;
- (2) the nature and circumstances of the offense charged;
- (3) the weight of the evidence against the accused;
- (3) **the accused’s**

³ The number almost certainly changes daily – as multiple individuals are apprehended on warrants each day, and may be held overnight or count toward the population and be released the next day. Others will post bail after a period of time or resolve their cases.

employment; financial resources, including the accused's ability to post bail; (4) prior failures to appear; (5) record of convictions; (5) character and mental condition of the accused; (6) the length of residence in the community; and (7) record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

Selected Field Notes / Input from Prosecutors

- The “heat of the moment” after a domestic dispute (which are overwhelmingly misdemeanor cases) judges may conclude that the person is a flight risk given that they’re removed from their home and their closest personal relationship is disrupted.
- Unavailability of bail under emergency arrest situations may lead to other attempts to hold an individual perceived as dangerous or presenting mental status suggesting risk of non-appearance – screening as incapacitated person, etc.
- In practice, bail is requested more sparingly in misdemeanor cases, and judges frequently do not impose or maintain bail even if requested. This includes situations where a person has repeatedly refused to come to court proceedings, including for arraignment, jury trials, jury draws, change of plea events, motion hearings, and status conferences etc.
- When individuals do not appear it grinds the system to a halt and impairs a delicate and already painfully slow process.
- Bail can motivate individuals and counsel to be creative in mitigating risk of flight, for example, applying to residential treatment or engaging in services they previously declined. Some judges strike bail to allow attendance at Valley Vista or because they secure a new residence/housing. DOC case workers are adept at assisting with intakes, etc. Judges respond favorably to changes in circumstance and usually want to strike bail or get the parties to discuss resolution of the case. In most misdemeanor cases where bail has been requested by arrest warrant, once the person appears, the bail is again struck.
- State’s Attorneys frequently have out-of-state defendants charged with serious offenses, and if we don’t have a way to assure their appearance then they can just stay out of Vermont and never face responsibility.
- Bail is a tool in our toolbox and the less tools we have, the less effective we are at our jobs.
- We hear over and over from the public that it’s the “revolving door” of the courthouse. There is often confusion among community members concerning how and what bail is really for. It is not unusual (especially lately) to have a defendant rack up 10+ charges and many “failures to appear” in court.

- The pandemic seemed to increase the frustrating cycles of noncompliance when defendants repeatedly violate conditions, don't appear, commit new crimes, are arrested on a warrant or application for warrant, and are then released again on the same conditions with no bail. Frequently, when arrested on a warrant the cases are handled out of county and without their assigned counsel present – meaning no progress is made on open cases and the critical connection between defendant and counsel still does not take place.
- It is important to remember that while the prosecutor may request bail, it is the Court that imposes bail. Courts may even do so without a request from the State.

Hypothetical / Vignette

Joseph and Jennifer are in a long-term intimate relationship. Jennifer lives in Brattleboro, Vermont. Joseph is from Florida, and has lived in Worcester, Massachusetts, for two-years. He works as a trucker or day laborer. He frequently spends nights or weekends with Jennifer based on his schedule, but has no other ties to Vermont.

He has a past criminal history in Massachusetts, Connecticut, and Florida. He has five misdemeanor convictions, including assault, resisting arrest, unlawful mischief, and driving under the influence. In Connecticut, he has two failures to appear, and his Florida record shows a non-extraditable warrant for “bail jumping” and an open domestic assault case relating thereto.

After a night of arguing, Joseph assaults Jennifer by punching her and threatens to kill her. He is arrested following a traffic stop by Vermont State Police on I-91 after he left Jennifer’s residence. Joseph is taken into custody and processed at the barracks.

Issue 1

- (1) What conditions should be imposed for (a) public safety and (b) to mitigate risk of flight?
- (2) If bail is not imposed, what is an adequate substitute?
- (3) Now, assume Joseph makes a comment “I am not going to court for this nonsense” during processing: should this representation that he will not appear change the analysis?

Jennifer contacts her local domestic violence advocacy group and seeks help in securing an afterhours relief from abuse order. Meanwhile, Joseph is released on a citation to appear in Windham Superior Court, Criminal Division at 12:30pm the next day. The court grants a temporary relief from abuse order, but Joseph cannot be located and is not served notice of the contents of the order. The criminal case is filed, and the next day Joseph fails to appear for his arraignment. The court issues an arrest warrant in the amount of \$5,000.

Issue 2

Assume that Joseph is apprehended in Pennsylvania and is extradited back to Vermont. He is arraigned and is then released on conditions of release since bail cannot be imposed in misdemeanor cases. Joseph misses his next court hearing and refuses to return his public defender’s calls. Mail to the address he provided the court is returned as undeliverable. Another \$5,000 warrant is issued.

- (1) What now? If he is apprehended, what other conditions are available, if any?
- (2) Is it an acceptable alternative to create a potentially *de facto* hold without bail situation by imposing a “responsible adult” condition in lieu of cash bail? Is there any enforcement mechanism for contempt against an out-of-state “responsible adult” if one is imposed?