WARNKEN REPORT ON PRETRIAL RELEASE

BY THE
MARYLAND BAIL BOND ASSOCIATION

PREPARED BY

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I. Executive Summary

A. Introduction -- The Need for the Response

On September 12, 2001, Professor Douglas L. Colbert, of the University of Maryland School of Law, published "The Pretrial Release Project Study" (Colbert Report). On October 11, 2001, the Pretrial Release Project Advisory Committee, chaired by C. Carey Deeley, Jr., Esquire (Deeley Committee), published the "Report of the Pretrial Release Project Advisory Committee" (Deeley Report). The Maryland Bail Bond Association (Bail Association) has commissioned this Response, responding to both the Colbert Report and the Deeley Report (collectively Reports).

There should have been no need for the Bail Association to publish this Response, but for the fact that the bail bond industry was excluded from the information gathering process and substantive deliberations that gave rise to the reports, most particularly the Deeley Report. The exclusion of the bail industry seriously flawed not only the quality of the results and the recommendations, but also the credibility that flows from the appearance of neutrality in any study. Without belaboring the point in the body of this Response, the information contained in this Response -- whether totally persuasive, partially persuasive, or not persuasive at all -- should have been accumulated, digested, debated, and, as appropriate, integrated, at least, into the Deeley Report. App. A to this Response details the systematic exclusion of the bail bond industry from the studies and highlights the bias that permeates the Deeley Report and Colbert Report.

B. Goal of the Response -- To Set the Record Straight

The goal of this Response is to set the record straight, by providing facts and statistical data from the District Court of Maryland (District Court), the United States Department of Justice (Department of Justice), and other sources to counter myth, innuendo, and erroneous information. Towards that end, the Response sets forth accurate – and complete – factual information, including (1) failure to appear (FTA) rates, and (2) rates at which FTA's are returned to the Court's jurisdiction, along with an analysis of the Maryland statutes and rules, including the legislative history. The Response specifically examines and analyzes (1) the factual and legal predicates advanced by, and (2) the recommendations offered in the Colbert Report and the Deeley Report. In light of the findings in this Response, the recommendations of the Reports are then assessed from a legal, a practical, and an economic standpoint.

C. Findings of the Response

The primary finding of this Response is that, of all forms of pretrial release, Corporate Surety Bail is the most effective, the most cost efficient, and the most conducive to public safety. Its demonstrated efficacy, at no expense to taxpayers, aids in the orderly administration of justice, enhances public safety, and results in considerable cost savings to Maryland taxpayers. The following are the ten major findings of the Response.

1. Despite bonding defendants that have been judicially determined to be "least reliable," Corporate Surety Bail has outperformed all other forms of pretrial

release. District Court statistics for 1998 and 1999 reveal that the FTA rate for defendants released on their own recognizance (ROR) was 14.7%, which was 40% higher than for defendants released through a bail bondsman on Corporate Surety Bail (10.5%).

2. District Court statistics for 1998 and 1999 reveal that the FTA rate for defendants released on 10% Deposit Bail (14.1%) was 34.3% higher than defendants released, through a bail bondsman, on Corporate Surety Bail (10.5%). Additionally, the FTA rate for defendants released on Unsecured Bail (13.2%) was 25.7% higher than for defendants released through a bail bondsman on Corporate Surety Bail (10.5%).

3. A national study conducted by the Department of Justice in 1992 of the 75 largest counties found that Corporate Surety Bail had the highest appearance rate – thus, lowest FTA rate -- of any form of pretrial release for felony defendants. In fact, the Department of Justice Study disclosed that a defendant on a 10% Deposit Bail was 60% more likely to FTA than a defendant released on Corporate Surety Bail, and that a defendant released on Unsecured Bail was 180% more likely to FTA than a defendant released on Corporate Surety Bail.

4. Department of Justice Study substantiates that, for those defendants that do FTA, Corporate Surety Bail is far superior in locating and returning its bonded FTA defendants to the Court's jurisdiction. The Study found that only 3% of Corporate Surety Bail defendants ultimately remained fugitives after one year, a return rate that is 100% better than the rate for 10% Deposit Bond FTA defendants (6%), and 533.3% better than the rate for Unsecured Bail FTA defendants (19%).

5. By integrating family and friends into the "circle of responsibility," as guarantors on the bond, the Corporate Surety Bail process sufficiently "invests" – and, thus, instills financial incentive in – those guarantors, as well as the defendant and bondsman, to assure that the defendant appears, as required and, if he does FTA, there is active and concerted pursuit of the defendant until he is located and returned to the Court's jurisdiction.

6. The economic cost of FTA's – estimated by a Chicago Study to be $3,474 per re-arrest and by a California crime victims study to be between $1,109 and $1,270 in "budgetary costs" and between $8,319 and $11,105 in "total costs, including social costs" – is real and substantial.

7. As indicated by the District Court statistics, if the other forms of pretrial release within the criminal justice system could reduce their FTA rate to that of Corporate Surety Bail, there would have been 8,068 fewer District Court criminal defendant FTA in 1998 and 1999. Applying the Chicago Study cost of re-arrest ($3,474) to the 8,068 extra FTA's, the extra cost exceeded $28 million, which

could have been the savings realized through cost effective Corporate Surety Bail.

8. In November 2001, the Baltimore Sunpapers reported that Baltimore City alone had 98,000 open warrants. Expanded use of Unsecured Bail, 10% Deposit Bail, or expansive state agency supervision programs – inevitably resulting in increased FTA's, with greater cost and less accountability – will further burden police departments and impact public safety as those FTA's remain at large, exacting the economic and social costs to our citizenry, particularly to the new victims of crimes committed by FTA's.

9. For Corporate Surety Bail, the District Court bail forfeiture procedures impose accountability. If any bail forfeiture is not resolved or paid in accord with those procedures, the surety company that underwrote the bail is disqualified from doing business statewide until rectified.

10. The data, including the fact that statewide 50% of the arrested defendants (and 60% in Baltimore City) are ROR indicates that the Court Commissioners (Commissioners) and District Court Judges are making reasoned and able pretrial release decisions.

D. Conclusion

This Response concludes that Corporate Surety Bail is the most effective and most cost efficient form of pretrial release in assuring that defendants appear in court as required. Moreover, Corporate Surety Bail is the most effective in promptly locating and returning FTA's to the Court's jurisdiction. Despite the fact that Corporate Surety Bail bonds those defendants that have been judicially determined to be "least reliable," Corporate Surety Bail has outperformed all other forms of pretrial release -- all at no expense to taxpayers.

Indeed, as a direct result of its systems and processes, Corporate Surety Bail relieves taxpayers of enormous expenses. In addition, Corporate Surety Bail enhances the orderly administration of justice and enhances public safety. Increased use of other forms of pretrial release – specifically, Unsecured Bonds, 10% Deposit Bonds, or expansive state agency supervision programs, as urged by the Colbert Report and Deeley Report – are ill-advised. That approach would be expensive, inefficient, and not conducive to public safety. Instead of curtailing or eliminating Corporate Surety Bail, the evidence supports its expanded use.

II. An Overview of Bail in Maryland

Through the use of bail, the criminal justice system permits the release of a defendant from custody, pending trial, while, at the same time, attempting to (1) secure the defendant's appearance at all court proceedings, and (2) avoid criminal activity on the part of the defendant while released. The bail component of the pretrial release process attempts to balance (1) society's interest in (a) public safety, and (b) an efficient criminal justice system, and (2) the defendant's interest in release (a) because he has not been convicted of a crime, and (b) so that he can adequately prepare for trial.

"Bail in America began as a 'carry over' from the British practice as established in 1275 under the statute of Westminster where only certain offenses were bailable, developing into our Judiciary Act of 1789 which required bail for offenses not punishable by death, the progenitor of the U.S. Constitution's 8th Amendment: 'There shall be no excessive bail.'"[1] Despite evolving notions toward bail over the last 200 years, its primary objective has remained that of assuring the defendant's appearance at all required court proceedings. To aid the reader's understanding, this Response provides an explanation of (1) the pretrial release process in Maryland, (2) the relationships between the various parties in the bail process, and (3) the statutory and regulatory framework in which the parties operate.

A. The Pretrial Process and Types of Bail

A defendant is arrested by law enforcement based on probable cause to believe he has committed a crime. Under Md. Rule 4-212(f), the defendant is taken before a Commissioner, who is a judicial officer of the District Court, as soon as practicable, but in no event later than 24 hours. The Commissioner performs four tasks – (1) making a probable cause determination, (2) advising the defendant of his right to counsel, (3) advising the defendant of his right to a preliminary hearing, if applicable, and (4) making a pretrial release determination, if applicable. Md. Rule 4-213(a).

For the pretrial release determination, the Commissioner uses "information available or developed in a pretrial release inquiry," Md. Rule 4-216(e), and the factors under Md. Rule 4-216. Based on this information, if the defendant is eligible for pretrial release, the Commissioner either (1) grants the defendant ROR status, meaning released solely on the defendant's promise (a) to abide by all laws while released, and (b) to appear when required, or (2) makes the defendant eligible for release, subject to one or more conditions, which may include posting bail under Md. Rule 4-217.[2]

For any defendant not released through this process, there is an automatic bail review hearing the following day, before a District Court Judge, who reviews and, if appropriate, modifies the conditions of release, as determined by the Commissioner.[3] Although Md. Rule 4-216(f)(4)

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[1] The Law of Miscellaneous and Commercial Surety Bonds, American Bar Association, Tort and Insurance Practice (2001), ch. 8, at 127, Bail Bonds (Watson & Labe).

[2] Md. Rule 4-216(f).

[3] Md. Rule 4-217(g).

enumerates four forms of bail bond, they fall into three categories. The following explanation is offered, using a bail of $5,000 as an example.

1. Unsecured Bail

Under Md. Rule 4-216(f)(4)(A), unsecured bail is bail "without collateral security" (Unsecured Bail). Thus, Unsecured Bail is supported solely by the defendant's promise – though not ability -- to pay the full penalty amount. When using the $5,000 bail example for Unsecured Bail, the defendant is not required to "put up" any money at all. Instead, the defendant promises to pay $5,000 if he FTA's for any court proceeding. The defendant is not required to provide any security to back his promise. In essence, Unsecured Bail is the same as ROR. If a defendant would otherwise become an FTA, any notion that the defendant, having signed a bond, with no collateral security to back it, would appear for trial solely because of the fear of having to make good on his signature is not supported by reality. Moreover, the State does not even attempt to collect on Unsecured Bail if the defendant becomes an FTA.

2. 10% Deposit Bail

Under Md. Rule 4-216(f)(4)(B), deposit bail is bail "with collateral security . . . equal in value to the greater of $25.00 or 10% of the full penalty amount, or a larger percentage as may be fixed by the judicial officer" (10% Deposit Bail). Thus, when a defendant is subject to 10% Deposit Bail, the defendant (or a third party) deposits 10% (or, on rare occasion, a greater amount) of the full penalty amount to secure his release. When using the $5,000 bail example for 10% Deposit Bail, the defendant (or a third party) is required to "put up" only $500, and the remaining 90% of the bail is supported solely by the defendant's (or a third party's) promise to pay the remaining $4,500 if he FTA's for any court proceeding. The defendant (or a third party) is not required to provide any security to back the promise to pay the remaining $4,500. If the defendant appears in Court, as required, the $500 deposit is refunded.

Although bail secured by 10% is better than no security at all (as in the case of Unsecured Bail), as explained in this Response, the evidence demonstrates that 10% Deposit Bail is neither effective nor efficient. If a defendant would otherwise become an FTA, any notion that the defendant would appear for trial solely because of the fear that he (or his surety) would have to make good on the remaining 90% is not supported by reality. Moreover, the State does not even attempt to collect on the unsecured 90% if the defendant becomes an FTA.

3. Fully Secured Bail

Under Md. Rule 4-216(f)(4)(C) & (D), fully secured bail is bail "with collateral security . . . equal in value to the full penalty amount [or] with the obligation of a corporation that is an insurer or other surety in the full penalty amount" (Fully Secured Bail). For a defendant subject to Fully Secured Bail, the defendant, or someone on the defendant's behalf, posts with the Court, the full penalty amount to secure his release. This comes in the form of (1) 100% cash, (2) equity in real property deposited with, or pledged to, the Court, or (3) the obligation of an insurance company, which comes under the regulatory control of the Maryland Insurance Administration.

When using the $5,000 bail example for Fully Secured Bail, the defendant (or surety) is required to "put up" $5,000 in cash or equity in real property. If the defendant is unable or unwilling to post 100% in cash or equity in real property, the defendant may use the services of Corporate Surety Bail, which will act as surety on behalf of the defendant, in return for a premium equal to 10% of the fully penalty amount, which is $500 in the $5,000 bail example.

B. The Bail Transaction

Unfortunately, when examining the bail bond process, even in 2002, the history – and thus the image -- of the bail bond industry must be addressed. Historically, a bail bondsman was the Damon Runyon character with a large cigar, a diamond pinky ring, and a brogan. The reality is now far different. Today, bail bondsmen are men and women owning, operating, and managing small businesses within their communities. These men and women are diverse in race, gender, religion, and background. The vast majority are licensed insurance professionals, holding a property and casualty insurance producer's license, which is issued by the Maryland Insurance Administration.

In Maryland, there are two types of compensated surety bail bondsmen. By far, the predominant group is corporate surety bail bondsmen (Corporate Bondsmen). These individuals post bail in their capacity as licensed and appointed property and casualty insurance producers of an insurance company authorized to do business in Maryland. The much smaller group is composed of property bail bondsmen. These individuals post bail by pledging real estate. Because bail posted by Corporate Bondmen is, by far, the predominant form of bail in Maryland, this Response focuses on that format.

An understanding of the bail transaction requires an understanding of three different – and intertwined – relationships of the parties, as follows:

1. **Relationship #1: The State, the Defendant, and the Surety on the Actual Bail Bond;**

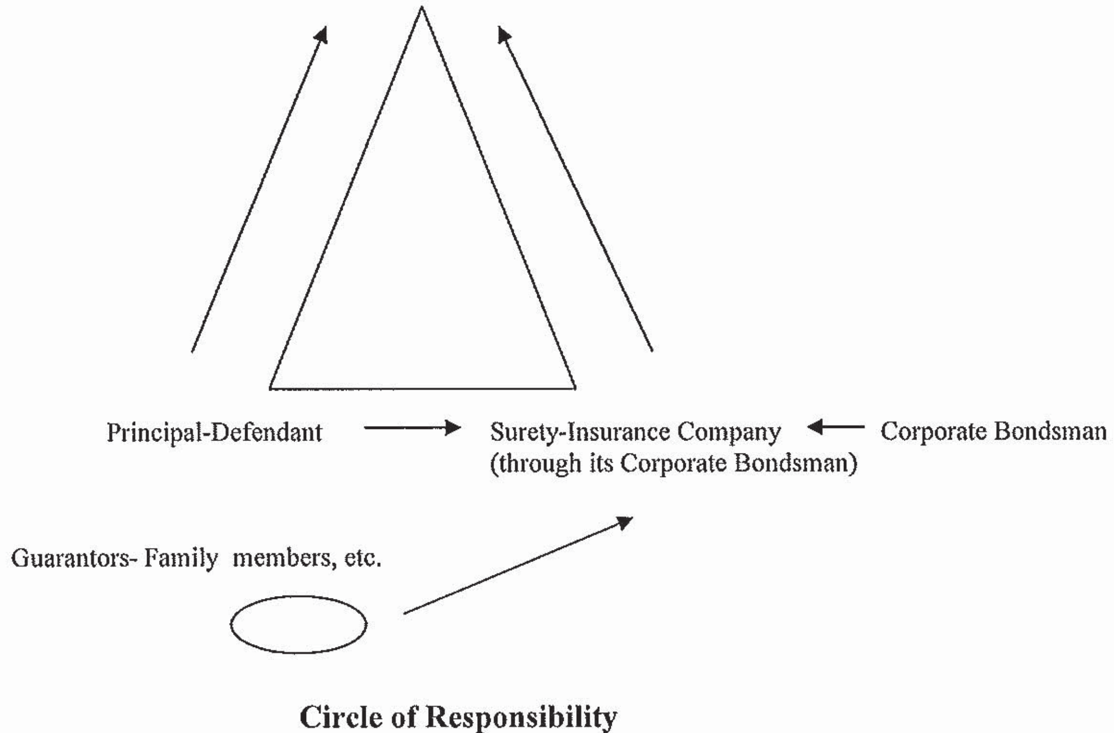
2. **Relationship #2: The Insurance Company (the Actual Surety on the Bail Bond), and the Corporate Bondsman (Who Executes the Bond As Agent or Attorney-in-Fact for the Insurance Company); and**

3. **Relationship #3: The Guarantors for the Defendant and the Surety.**

An understanding of those relationships may be aided by the following diagram:

Diagram of Relationships

Obligee-State of Maryland



1. **Relationship #1: The State, the Defendant, and the Surety on the Actual Bail Bond**

In relationship #1, a bail bond is a three-party contract to guarantee the defendant's appearance at all court proceedings. The State is the obligee, the defendant is the principal, and the insurance company is the surety. Md. Rule 4-217(i). The bail bond is executed by (1) the defendant, as the principal, and (2) the Corporate Bondsman, who has been given the authority to execute the bond, as agent or attorney-in-fact, on behalf of the insurance company, which is the surety.

If the defendant becomes an FTA, (1) a bail forfeiture is entered, (2) notice of the forfeiture is sent, and (3) if the defendant is not apprehended within 90 days (or within an additional 90 days, if extended for good cause shown), then the forfeiture "ripens" into a civil judgment, in favor of the State, against the defendant, as the principal, and against the insurance company, as the surety. The surety is required to ensure that the forfeiture is paid or stricken. Otherwise, the surety, i.e., the insurance company, is "shut down" and precluded from doing business statewide.

2. **Relationship #2: The Insurance Company (the Actual Surety on the Bail Bond), and the Corporate Bondsman (Who Executes the Bond As Agent or Attorney-in-Fact for the Insurance Company)**

In relationship #2, the Corporate Bondsman executes the bail bond, as agent or attorney in fact for the insurance company, which is liable to the State as the surety on the bail bond. The Corporate Bondsman is an independent contractor, contractually liable to the insurance company for any loss or loss adjustment expense on the bail bonds written by that Corporate Bondsman.

The Corporate Bondsman is, in effect, a retailer of the insurance policies called -- referred to as bail bonds. He underwrites the bail bonds, and he controls and monitors the defendants for court appearances. If a defendant becomes an FTA, it is the independent Corporate Bondsman who must (1) undertake to locate the FTA and return him to the Court's jurisdiction, or (2) failing to do so, pay the full penalty amount. Notwithstanding the contractual relationship, because the Corporate Bondsman executes the bail bond as "attorney in fact" for the surety, the "buck" stops with the insurance company, acting as surety. The insurance company must make sure that Corporate Bondsman resolves the FTA issue or pays the forfeiture, or the insurance company must do so.

3. **Relationship #3: The Guarantors for the Defendant and the Surety**

Relationship #3 is the actual process of underwriting the bail. Typically, following arrest and the setting of bail, the defendant contacts family or friends, who then contact a Corporate Bondman. The Corporate Bondsman will (1) obtain and verify the defendant's personal and arrest information, as provided by family, friends, and law enforcement authorities; (2) require sufficient guarantees from responsible family and/or friends, who become contractually obligated to indemnify the Corporate Bondsman if the defendant becomes an FTA and the bail is forfeited; and (3) charge the insurance premium equal to 10% of the bail amount, which may be paid in installments.

At the heart of underwriting a bail bond is the notion that those who are closest to the defendant – his family and friends – must be in the "circle of responsibility," as guarantors on the bond, so that the defendant knows that becoming an FTA will result in (1) the immediate issuance of a bench warrant for his arrest, (2) the immediate action of the Corporate Bondsman to "seek him out," and (3) adverse financial consequences to his family and friends. Between (1) the Corporate Bondsman's own financial incentive, and (2) the constant reinforcement of the "circle of responsibility" concept on the defendant and the guarantors, the bail bond process results in superior appearance rates, when compared with all other pretrial release systems.

Moreover, because of their "investment," family and friends, as guarantors on the bond, generally keep "a watchful eye" on the defendant, resulting in an additional – somewhat unexpected – benefit of reduced recidivism. The Corporate Bondsman ensures that the defendant and/or the guarantors are constantly made aware of the time and place of required court appearances and otherwise imposes any other conditions, e.g., telephone or personal check-in, that the Corporate Bondsman deems warranted under the circumstances. If the defendant becomes an FTA, there is an immediate and significant motivation, on the part of the Corporate Bondsman and the guarantors, which results in most bonded defendants being located and returned to the Court's jurisdiction.

C. The Licensing and Regulatory Framework

A comprehensive licensing and regulatory framework exists for Corporate Surety Bail in Maryland. Professor Colbert's assertions to the contrary are incorrect. Apparently relying on one footnoted telephone conversation with an employee of the Maryland Insurance Administration, Colbert Report, at 41 n.144, Professor Colbert maintains that the bail bond industry is

> largely unregulated [and t]he Maryland Department of Insurance [sic], responsible for licensing insurance companies and bail bond agents who are engaged in the insurance business within the State, provides no oversight of the bail bond industry, except that each licensed insurance company must file an annual financial statement of the total business transacted here.

Id. at 41. Professor Colbert relies on inaccurate and incomplete information. Had he (1) examined the Maryland Annotated Code and his case citations, or (2) contacted (a) more than one individual at the Maryland Insurance Administration, or (b) the Bail Association, he would have learned of the comprehensive statutory and regulatory framework that controls the bail bond industry.

Insurance companies that act as surety on bail bonds must be "admitted" insurers, who must satisfy financial and regulatory requirements, as a prerequisite to the issuance of a Certificate of Authority by the Maryland Insurance Administration. The list of requirements includes, at the front end, minimum capital stock and surplus requirements, depositing securities with the Maryland State Treasurer, and otherwise passing muster in the application process with the Commissioner of Insurance, including extensive background checks and fingerprinting, a review of planned operations, and an extensive review and analysis of its financial condition and affairs.

Once a Certificate of Authority is issued by the State, the insurer must comply with other requirements, including (1) submission of an annual audited financial statement, (2) the preparation of quarterly and annual statutory statements, (3) limitations on the investment of assets and risks undertaken, and (4) cooperation in audits conducted by the Maryland Insurance Administration. Moreover, if an insurance company, acting as a surety, does not satisfy, or cause to be satisfied, its bond forfeitures, in accordance with the District Court procedures, it immediately becomes disqualified from doing any bail bond business statewide, effectively putting "out of business" Both the insurance company and each Corporate Bondsman acting as an attorney in fact on its behalf.

Corporate Bondsmen are governed by the Maryland Insurance Administration and the Courts. A Corporate Bondsman must meet the same qualifications, and satisfy the same licensure process, as required for insurance agents that provide any form of property and/or casualty insurance coverage, e.g., automobile insurance, homeowners' insurance. To be eligible for the property and casualty producer's license, issued through the Maryland Insurance Administration, a Corporate Bondsman must (1) complete the 96-hour property and casualty pre-licensing course, (2) pass the state administered property and casualty insurance producer's examination, and (3) become associated with an "admitted" insurance company that underwrites bail. That insurance company must then file an appointment with the Maryland Insurance Administration and a Qualifying Power of Attorney

with the District Court before the licensee can act as a Corporate Bondsman.

All property and casualty insurance producers – including Corporate Bondsmen -- are governed by the statutory requirements in the Maryland Annotated Code,[4] the regulatory requirements in the Code of Maryland Regulations (COMAR), and the disciplinary rules of the Maryland Insurance Administration.[5] Additionally, as a Property and Casualty Insurance Producer, a Corporate Bondsman must satisfy continuing education requirements every two years. Further, a Corporate Bondsman is subject to any rules promulgated by the Circuit Court or the Judicial Circuit, Md. Crim. Proc. Code Ann. § 5-203, as well as the anti-solicitation provisions. Id. § 5-210.[6]

D. Bail Forfeitures for FTA's on Bail Through a Corporate Bondsman

If an insurance company does not resolve or satisfy all of its bail forfeitures, in accordance with the District Court's procedures, the insurance company and each Corporate Bondsman are immediately "cut off," i.e., disqualified from writing any business anywhere in this State until all bail forfeitures are satisfied. After a defendant becomes an FTA, a Corporate Bondsman has 90 days to either (1) return the defendant to the Court's jurisdiction, or (2) pay the forfeiture. Id. § 5-208(b). The 90-day period may be extended for an additional 90 days "for good cause shown." Id. § 5-208(b)(2)(i). As a matter of law, after 90 days (or, if extended, 180 days), if the forfeited bail has not been resolved or satisfied, the bail forfeiture ripens into a civil judgment.

To eliminate any errors that could result in an insurance company and its Corporate Bondsmen being wrongfully "cut off," the District Court circulates a quarterly "Absolute Forfeiture List," listing those bonds underwritten by that company that are in absolute forfeiture status, having ripened into civil judgments. The insurance companies are provided a 30-day "grace" period to either (1) provide documentation showing that all bond forfeitures on the Absolute Forfeiture List have been resolved or satisfied, or (2) resolve or satisfy all bond forfeitures. If not, at the end of the 30-day period, the insurance company is disqualified from writing any business statewide.

E. Bail Forfeitures for FTA's on Bail, But Not Through a Corporate Bondsman

Even though enforcement and collection of forfeited bail bonds underwritten by insurance

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[4] Md. Ins. Code Ann. § 10-101, et seq.; § 10-301, et seq., which are specifically applicable to Corporate Surety Bondsmen.

[5] Interestingly, Professor Colbert cites Insurance Commissioner v. Engelman, 345 Md. 402, 692 A.2d 474 (1997), Colbert Report at 18 n.68, involving an audit and resulting disciplinary proceedings against a bail agent, but, nonetheless, he maintains that the bail industry is "largely unregulated."

[6] In the Seventh Judicial Circuit (which includes Calvert, Charles, Prince George's, and St. Mary's Counties), comprehensive guidelines and rules have been promulgated and are set forth in Local Rules 714 and 714A. See Deeley Report at App. D-33 to D-41 for the complete local rules in place in the Seventh Judicial Circuit. The Seventh Judicial Circuit has the largest contingent of property bondsmen and, as provided by statute, has a governing Bail Commissioner, who is responsible generally for the administration of all bail related matters, including the regulation of the bail bondsmen conducting business in the Seventh Judicial Circuit. See Deeley Report at App. D-29 to D-41, setting forth the local rules in other Maryland Judicial Circuits.

companies are strictly enforced, the story is exactly the opposite for all forfeited bonds not posted by a Corporate Bondsman. In fact, as to (1) Unsecured Bail, (2) 10% Deposit Bail, and (3) Fully Secured Bail when secured by real property (and not by a Corporate Bondsman), enforcement and collection of bail forfeitures is almost non-existent.

As to Unsecured Bail, no effort is ever made to recover the 100% that is owed by the FTA defendant who posted nothing. As to 10% Deposit Bail, no effort is ever made to recover the 90% that is owed by the FTA defendant or the person who acted as his surety. As to posted real estate, there are two problems. First, there is frequent fabrication of the equity value of the property because a large percentage of individuals claim to have no mortgage, but this is never independently verified. Second, no effort is ever made to collect the 100% by foreclosing on the property.[7]

Under the various forms of pretrial release not involving Corporate Bondsmen, there is little or no incentive -- financial or otherwise -- for the defendant to comply. Moreover, once a defendant becomes an FTA, there is a disincentive, on the part of the family and friends, to locate and return the FTA defendant. Without "the stick" of enforcement, Unsecured Bail, 10% Deposit Bail, and Fully Secured Bail (when not secured through a Corporate Bondsman) are ineffective. In reality, the only bail that works to keep the FTA rate down is bail through a Corporate Bondsman.

III. Analysis of the Colbert Report and the Deeley Report.

A. An Overview of the Colbert Report and the Deeley Report

This Response, of necessity, analyzes the Colbert Report and the Deeley Report as if they were one document. First, the nine recommendations in the Colbert Report and the nine in the Deeley Report are substantially the same. Second, Professor Colbert (1) was the author of the Colbert Report; (2) as Chair of the Correctional Reform Section of the Maryland State Bar Association (MSBA), was the catalyst behind the creation of the Deeley Committee, which produced the Deeley Report; (3) served as the "main researcher and reporter" for the Deeley Committee, and (4) offered his research and data to the Deeley Committee, which apparently did not conduct independent research "in the field," but, instead, relied on his research to form the informational basis for the Deeley Report. With Professor Colbert as the "common thread," the Colbert Report and the Deeley Report are intrinsically and empirically linked together as one report.

Presumably, if there is the need for a study that leads to a report, there must have been a "problem." It appears that the principal problem, as perceived by Professor Colbert, is that bail is being set for many defendants with conditions that are, in his view, too onerous. First, his work starts with the assumption that Maryland's pretrial system is akin to the system used by the federal government between 1966 and 1984, which has long since been abandoned as ill-advised and

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[7] In fact, Haven Kodak, Esquire, Deputy State's Attorney for Baltimore City, who is responsible for bail forfeiture matters, advised the Bail Reform Subcommittee of the Baltimore City Criminal Justice Coordinating Council that foreclosure of a bail bond secured by property has been viewed as "against public policy," and, thus, the State's Attorney's Office has not, during his tenure, pursued enforcement of any bail bonds secured by real property. Bail Reform Subcommittee Minutes (January 28, 2002).

unworkable. Second, Professor Colbert suggests that Commissioners, when establishing pretrial release conditions, and District Court Judges, during bail review hearings, are not in compliance with the law. Deeley Report at App. B16-18. He comes to this conclusion because, in his view, the "overwhelming majority [of the defendants with full bail] should have been offered less onerous alternatives and been released without bondsmen." Colbert Report at ii.

Professor Colbert substitutes his judgment for that of Commissioners and District Court Judges when he concludes that Maryland's judicial officers make decisions "without essential information." He summarily concludes that there is "[n]o objective basis for believing bail bondsmen provide a greater assurance that defendants will appear in court." Relying on that conclusion, he then next concludes that alternatives, such as 10% Deposit Bail and Unsecured Bail, which he considers less onerous, should be used.

Professor Colbert states that "the overwhelming majority of Maryland defendants released pretrial returned to court when required," claiming that almost 95% of Maryland defendants appear for trial. The District Court provided to Professor Colbert, and subsequently to the Bail Association, statistics covering more than 280,000 defendants in 1998 and 1999. With a statistically valid sample exceeding a quarter of a million defendants, Maryland's appearance rate was 86.6%, according to the District Court statistics provided -- not 94.7% as asserted by Professor Colbert. Thus, Maryland's FTA rate was 13.4% -- not 5.3%. Had Professor Colbert's analysis been correct, Maryland would have had 22,656 fewer FTA's during 1998 and 1999 than Maryland actually had.

Professor Colbert concludes that, in the "vast majority of cases," it is the police who locate, apprehend, and return the FTA's to the Court's jurisdiction. **In the 500 trial days during 1998 and 1999, Maryland's criminal justice system experienced, on average, 75 new FTA's in the District Court every single day**. The Baltimore Sunpapers reported that Baltimore City has 98,000 open warrants – with no resources to "go after" the subjects of these warrants. A total of 98,000 open warrants means one warrant for every seventh man, woman, and child in Baltimore City.

The Deeley Report does not really set forth the nature of the problem that it sought to study. It appears that most – if not all – of the members of the Deeley Committee accepted the Colbert proposition that problems exist,[8] presumably, based on drafts of the Colbert Report or, perhaps, based on the notion that, because a committee was formed, there must be problems. Professor Colbert sets forth predicates that, if correct, might support some of what he recommends. The Deeley Committee, on the other hand, does not set forth predicates or offer empirical data or information to substantiate the problems it perceives, much less support the need for most of its recommendations, particularly as they relate to the bail system. The Deeley Committee appears to have accepted, without question, the Colbert "research" as accurate and complete and then uses that research as its factual foundation, despite indicators that it was flawed.[9]

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[8]At the Deeley Committee's initial meeting, committee member Scott Patterson, Esquire, State's Attorney for Talbot County, raised the point that the committee appeared to be "presupposing" problems. Deeley Report at App. B-2. The minutes do not reflect any further analysis of this comment.

[9] A detailed analysis of the fundamental factual inaccuracies in the Colbert Report is discussed throughout.

An analysis of the perceived problems -- and the factual predicates allegedly supporting those predicates -- shows that the Colbert "research" is incomplete and erroneous. As a result, some of the nine recommendations in the Colbert Report and the nine recommendations in the Deeley Report are ill-advised. Within each document, the nine recommendations greatly overlap each other. Among the two documents, the nine recommendations of one and the nine recommendations of the other are essentially the same, with one difference. The Colbert Report recommends the study of the elimination of the Corporate Surety Bail, Colbert Report at vii, but the Deeley Report makes no such recommendation regarding the elimination of Corporate Surety Bail,[10] although it does recognize that that would become a natural result of the adoption of all of the recommendations. The chart below sets forth the essence of the recommendations made in the Colbert Report and the Deeley Report:

Item	Type of Recommendation	Colbert Report #	Deeley Report #
1.	Expanded statewide pretrial release services (include information for pretrial release conditions and monitoring defendants)	#1, at vii	#1, #6, #8, & #9, at 2-3, 10-14, 17-18, 19
2.	Defense counsel at initial appearance and bail review hearings	#2, at vii	#2, at 3, 14-15
3.	Prosecutors at bail review hearings	#3, at vii	#3, at 3, 15-16
4.	Judicial education	#8, at vii	#7, at 3, 18-19
5.	Use of unsecured bonds over secured bonds	#5 & #6, at vii	#4, at 3, 16-17
6.	Use of automatic 10% refundable cash deposit bail	#4 & #9, at vii	#5, at 3, 17
7.	Eliminate bail bond industry	#7, at vii	

However, even from the Deeley Committee minutes, it is clear that several fundamental research "facts," which were compiled by Professor Colbert and his colleagues, were questioned by those that participated in the deliberations. For example, the assertion that Corporate Bondsmen were an important source of information -- in fact, the predominant source -- in determining whether to set bail for a defendant, as well as the FTA figures proffered by Professor Colbert, were questioned. Deeley Report at App. B-21 (Comment of Judge Oshrine).

[10] At its meeting on January 9, 2001, the Deeley Committee actually "voted that, on implementation of the recommendations on financial conditions, Maryland should study and assess the appropriateness of eliminating commercial surety." Deeley Report at App. B-36. At its meeting on July 19, 2001, after discussion, the Deeley Committee determined "that the recommendation was not necessary, in light of the *natural* effect of other recommendations, and would only be a distraction from implementation of those recommendations." Id. at App. B-57 (emphasis added).

B. The Faulty Predicates for the Specific Bail-Related Recommendations

The analysis in this Response is largely devoted to the specific bail-related recommendations, which are items 5., 6., and 7. above Following the primary analysis, some discussion of the other items is offered, particularly the viability and advisability of expanded statewide pretrial release services. In analyzing the recommendations 5., 6., and 7., it is necessary to examine the three erroneous factual predicates, as follows:

1. Faulty Predicate #1: 95% of Maryland Defendants Appear in Court When Required

The Colbert Report states that "[i]n fiscal year 1999, almost 95% of the 215,000 defendants charged with misdemeanor and felony offenses appeared at their scheduled District Court proceeding." Colbert Report at 46. Professor Colbert states that the "District Court statistics indicated that 5.3% failed to appear ('FTA') for their scheduled court date." Id. n.155. He argues that Maryland's "no-show rates are substantially less than national figures and those in other states." Id. at 46. On this basis, he then concludes that Maryland defendants are "extraordinarily" reliable, and thus worthy, in his view, of release, in the "vast majority of cases," without the need for Fully Secured Bail.

Despite the Colbert Report's repeated assertion of a nearly 95% appearance rate, i.e., a 5.3% FTA rate, even Professor Colbert discloses that he is unsure of the FTA rates. First, the Colbert Report cites the FTA rate in the text of the report at 5.3%. Id. Although he used the District Court raw data, he calculated the FTA rate at 5.3% only after eliminating "the cases that were ultimately dismissed or nolle prossed." Id. Then, he reports much higher FTA rates in the 10% to 30% range. Id. at 47 nn.159-61. Finally, in response to the dramatic increase in the FTA rate, Professor Colbert states that this data "is puzzling and requires additional study."

What is "puzzling" is the assertion by Professor Colbert of a FTA rate of 5.3%. At his request, the District Court apparently compiled FTA Statistics by Bail Type for 1998 and 1999. In preparation of this Response, the Bail Association contacted Judicial Information System (JIS) representatives and requested to be given the exact same data that had been given to Professor Colbert.[11] Because this data did not include "cumulative totals," a spread sheet, extrapolating and calculating the requisite totals from the data, has been prepared and included in App. B to this Response.[12]

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[11] Cookie Pollack, District Court Project Manager (JIS) and Cheryl Cogan, Criminal System Analyst, were contacted to obtain the same information that had been provided to Professor Colbert. The JIS representatives advised that a hard copy of the data, which had been provided to Professor Colbert, in February 2001, had not been maintained. However, they ran the identical program for the identical time periods and advised that, if there was a difference at all, it would be completely immaterial. On January 28, 2002, at a regularly scheduled meeting of the Bail Reform Subcommittee of the Baltimore City Criminal Justice Coordinating Counsel, Brian J. Frank, Esquire, requested that Professor Colbert produce the raw data to substantiate the statements on page 47 of the Colbert Report, but he declined to do so.

[12] Property bonds have been excluded from the Maryland data presentation in the body of this Response because

MARYLAND FTA RATES FOR SPECIFIC FORMS OF PRETRIAL RELEASE

Years	Released on Recognizance	Unsecured Bail	10% Deposit Bail	Full Cash Bail	Corporate Surety Bail
1998-99	14.7%	13.2%	14.1%	11.1%	10.5%

Notwithstanding having the FTA-specific information from the District Court, Professor Colbert analyzed a Criminal Filing and Disposition Statistics Report (set forth as App. F of the Colbert Report), from which he took the number in the FTA column (11,268), and divided it by the total of cases filed (213,343), to derive the 5.3% FTA rate. According to Charles Moulden, Assistant Chief Clerk for the District Court, the data in that report was not intended to measure FTA rates and, in fact, once a case is resolved in any fashion, any FTA that existed for that case is removed from the FTA column, with that case then counted in the applicable disposition column.

Professor Colbert even acknowledges, by footnote, that the 5.3% rate calculated by him from the data "does not include defendants who failed to appear for cases that were ultimately dismissed or nolle prossed." Colbert Report at 46, n.155. Thus, he recognizes that he eliminated from the numerator nearly 85,000 cases – 30% of all cases – because they were ultimately dismissed or nolle prossed. Nonetheless, this 30% of all defendants were deemed to be "non-FTA's," by being counted in the denominator at the same time that they were ineligible to be counted in the numerator. Professor Colbert's footnote does not address whether he eliminated from his calculation the other categories of cases that fell within the Total Untried column, but it seems quite probable that he did. In any event, this calculation method, in which at least 30% of all defendants were deemed to be "non-FTA's," naturally, produced an erroneously low FTA rate.

The statistics produced by the District Court for 1998 and 1999 include a total of 280,546 defendants. Those statistics reveal that the total number of FTA's within the release types was 37,525. Thus, the FTA rate was 13.4%. In sum, the Colbert analysis and recommendations are based, in large measure, on an incorrect – and greatly understated -- FTA rate. The Colbert Report claims Maryland's FTA rate to be 5.3%, when, in fact, Maryland's FTA rate is 13.4%. No FTA analysis in the Colbert Report can be accurate when the base number is in error by a factor of two and a half. For perspective, the actual Maryland FTA rate is 153% larger than the FTA rate reported in the Colbert Report. Stated alternatively, the Colbert Report FTA rate is only 39.6% of the actual FTA rate, having failed to count 22,656 of Maryland's 37,525 applicable FTA's.

2. Faulty Predicate #2: Corporate Surety Bail Does Not Provide a Greater Assurance That Defendants Will Appear in Court

the statistical information for that category consist of bonds posted by family members, etc., and by compensated Property Bondsmen, without distinction.

Professor Colbert is likewise incorrect when asserting that there is "[n]o objective basis for believing bail bondsmen provide a greater assurance that defendants will appear in court." Id. at vi. He states that "[b]ail bondsmen claim that defendants released on surety bail have a higher appearance rate than defendants released on nonfinancial conditions and on less onerous types of bail. There is no objective support for this contention." Id. at 46. The Colbert Report also suggests that "defendants' reliability is as good, if not better, when a bail bondsman is not involved." Id. at 2. He adds: "Reliance on professional sureties is based on the belief that bail bondsmen are the best guarantor for ensuring that defendants appear in court and for locating and apprehending those who fail to appear. There is no truth in such belief." Id. at 45.

The Colbert Report further states that "the Judicial Information System (JIS) for the Maryland District Court provided statistical data on the failure to appear rate for each type of pretrial release in Maryland [and the data] belie the bondsmen's claim that bonded defendants have a higher appearance rate." Id. at 46-47. The Colbert Report does not include the JIS data and merely offers a conclusory analysis of that data. As noted above, in preparation of this Response, the Bail Association contacted JIS representatives and obtained the data, which is set forth in App. B. The chart below further analyzes the pertinent results:

COMPARING MARYLAND FTA RATES
FOR
CORPORATE SURETY BAIL
VERSUS
UNSECURED BAIL AND 10% DEPOSIT BAIL

Years	Unsecured Bail	10% Deposit Bail	Corporate Surety Bail	Increased Likelihood of FTA for Unsecured Bail Versus Corporate Surety Bail	Increased Likelihood of FTA for 10% Deposit Bail Versus Corporate Surety Bail
1998-99	13.2%	14.1%	10.5%	25.7%	34.3%

During the two-year period of 1998 and 1999, there were 280,546 criminal defendants accounted for in the statistics provided by the District Court. Of that total, 37,525 defendants became FTA's at trial, producing an overall FTA rate of 13.4%. As demonstrated by the above chart, among the groups within the quarter-million plus defendant pool, Corporate Surety Bail outperformed all other forms of pretrial release. A defendant on Corporate Surety Bail was much more likely to appear for trial and was much less likely to become a FTA.

Professor Colbert urges Unsecured Bail and 10% Deposit Bail as being preferred means of

pretrial release when compared to Corporate Surety Bail. However, the FTA rate was 13.2% for defendants on Unsecured Bail and 14.1% for defendants on 10% Deposit Bail. At the same time, the FTA rate for defendants on Corporate Surety Bail was only 10.5%. Thus, the FTA rate was 25.7% higher for defendants on Unsecured Bail, when compared with defendants on Corporate Surety Bail. Even worse, the FTA rate was 34.3% higher for defendants on 10% Deposit Bail, when compared with defendants on Corporate Surety Bail. Incidentally, the 10.5% FTA rate for Corporate Surety Bail, based on the District Court data, is consistent with the Bail Association data.

Defendants on bail through a Corporate Bondsman are so much more likely to appear for trial, when compared with the defendants not associated with a Corporate Bondman. The reason is simple. Corporate Surety Bail – unlike the public sector – has the financial incentive and financial necessity – to do the job that it has been paid to do. Corporate Surety Bail has developed a system of integrating guarantors -- family and friends -- into the "circle of responsibility," with as many individuals as possible being "invested" in assuring the defendant's appearance in court. Corporate Surety Bail accomplishes this significantly lower FTA rate, even though Corporate Bondsmen bond those defendants who have been judicially determined to be the "least reliable."

To gain perspective on these numbers, if the rest of the criminal justice system in Maryland could reduce its FTA rate to the rate enjoyed by the Corporate Bondsmen, there would have been 7,567 fewer FTA's in Maryland in 1998 and 1999. Each one of these extra 7,567 FTA's burdened an already over burdened criminal justice system. In addition, there is probably no way to determine accurately what havoc was caused by an extra 7,567 "at large" FTA's, in terms of economic and non-economic harm to society.

DEPARTMENT OF JUSTICE STATISTICS ON NATIONAL FTA RATES

Year	Unsecured Bail	10% Deposit Bail	Full Cash Bail	Corporate Surety Bail	All Defendants
1992	42%	21%	22%	15%	25%

In November 1994, under the auspices of the National Pretrial Reporting Program, the Department of Justice issued a study, titled "Pretrial Release of Felony Defendants, 1992" (Department of Justice Study), which is its most recent published study analyzing FTA rates for various types of pretrial release. This Department of Justice Study, which is App. C to this Response, compiled FTA rates from the nation's 75 largest counties for 1992. Id. at 10 (table 14).

Both (1) the FTA rates overall, and (2) the FTA rates for Unsecured Bail and 10% Deposit Bail, when compared to the FTA rates for Corporate Surety Bail, is even more dramatic in this 1992 nationwide study than it is in the 1998-99 Maryland study. In the Department of Justice Study, the FTA rate for all defendants was 25%, compared to Maryland's 13.4% overall FTA rate. For defendants on Unsecured Bail, the FTA rate was 42%, compared to Maryland's 13.2% FTA rate for

Unsecured Bail. For defendants on 10% Deposit Bail, the FTA rate was 21%, compared to Maryland's 14.1% FTA's. The disparity may be explained, in part because the Department of Justice Study involved felony defendants, while the vast, vast majority of the Maryland defendants were misdemeanor defendants because the Maryland information involved District Court defendants.

Consistent with the Maryland statistics, the national statistics confirm that, in the comparative, the lowest FTA rate belongs to defendants on Corporate Surety Bail. Nationally, the FTA rate was 42% for defendants on Unsecured Bail and 21% for defendants on 10% Deposit Bail, yet the FTA rate was only 15% for defendants on Corporate Surety Bail. Thus, on a nationwide basis, among felony defendants, those on Unsecured Bail were 180% more likely to become an FTA when compared to defendants on Corporate Surety Bail. Nationally, a defendant on 10% Deposit Bail was 60% more likely to become an FTA than a defendant on Corporate Surety Bail.

In the Department of Justice Study, "all defendants" had a 66.7% increased FTA rate, when compared to defendants on Corporate Surety Bail. The 66.7% increased FTA rate would be even higher if Department of Justice compiled its statistics in a way to permit comparing "non-Corporate Bondsmen FTA's" and "Corporate Bondsmen FTA's," and not merely "total FTA's" and "Corporate Bondsmen FTA's." In conclusion, nationally, when measuring the vast, vast majority of jurisdictions that offer the services of Commercial Surety Bail, the Corporate Surety Bail results in significantly fewer FTA's.

FTA RATES FOR JURISDICTIONS THAT HAVE REPLACED CORPORATE SURETY BAIL WITH 10% DEPOSIT BAIL

Jurisdiction	Year	10% Deposit Bail
Philadelphia[13]	**1998**	**35%**
Chicago[14]	**1988**	**30% (male) 21% (female)**

In a very small number of jurisdictions, defendants charged with a crime do not have the option of using the services of a Corporate Bondsman. In the "non-Corporate Bail" jurisdictions, defendant are ROR or, if bail is set, they are released on either Unsecured Bail or 10% Deposit Bail. Those are the same two methods that Professor Colbert recommends. The two most notable cities

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[13] Data from the Department of Justice, Bureau of Justice Statistics, Felony Defendants – Court Appearance Record (table 20) for 1998 (Philadelphia County, Pennsylvania) (received by e-mail on December 12, 2001, from Brian A. Reaves, Ph.D. (Philadelphia Study).

[14] Cook County Pretrial Release Study at 82 (June 1992), issued by the Illinois Criminal Justice Information Authority (Chicago Study). This comprehensive 160-page report studied Cook County defendants in 1988.

that have eliminated Corporate Surety Bail are Philadelphia and Chicago. Their experience since eliminating Corporate Surety Bail provides a glimpse into what would likely develop in Baltimore were Maryland to eliminate Corporate Surety Bail.

The previously offered Maryland chart and the Department of Justice national chart permit the comparison of FTA rates for (1) non-Corporate Surety Bail, and (2) Corporate Surety Bail, in the vast, vast majority of jurisdiction offering Corporate Surety Bail. The addition of the Philadelphia/Chicago chart above permits a comparison of FTA rates for (1) non-Corporate Surety Bail in Corporate Surety Bail jurisdictions, and (2) non-Corporate Surety Bail in non-Corporate Surety Bail jurisdictions. The statistics demonstrate that the already higher FTA rate for non-Corporate Surety Bail in Corporate Surety Bail jurisdictions gets even worse in non-Corporate Bail jurisdictions. In the small number of jurisdictions that have eliminated Corporate Surety Bail, the FTA rate is much higher than in jurisdictions in which the Corporate Surety Bail plays a role in the pretrial release equation.

In the Chicago Study, the 1988 FTA rate was 34% for defendants who posted no security and 30% for defendants released on 10% Deposit Bail. The Chicago statistics show what Maryland might anticipate were it to eliminate Corporate Surety Bail and use only Unsecured Bail and 10% Deposit Bail, as urged by Professor Colbert. A "no security" defendant in Chicago (a non-Corporate Surety Bail jurisdiction) was almost two and a half times as likely to become an FTA than a "no security" defendant in Maryland (a Corporate Surety Bail jurisdiction). Specifically, the Chicago "no security" FTA rate was 158% higher than Maryland's ROR FTA rate and 131% higher than Maryland's Unsecured Bail FTA rate.

As for defendants released on 10% Deposit Bail, Chicago's FTA rate was more than twice that of Maryland. Assuming a 90-10 ratio of male defendants to female defendants, Chicago defendants on 10% Deposit Bail had a 106% increased likelihood to become an FTA, when compared with Maryland defendants on 10% Deposit Bail. In Philadelphia's 1998 study, the FTA rate for defendants on 10% Deposit Bail was 35%, which was even worse than the FTA rate for defendants on 10% Deposit Bail in Chicago. In fact, a Philadelphia defendant on 10% Deposit Bail was two and a half times as likely to become an FTA, when compared with Maryland defendants on 10% Deposit Bail.

These statistics are predictive of future FTA rates in Maryland, were Maryland to become one of those rare jurisdictions to eliminate Corporate Surety Bail by adopting the ill-advised, costly, and dangerous recommendations in the Colbert Report and the Deeley Report. The "street is wise." If a system is adopted that eliminates the most effective way of assuring the appearance of defendants at trial – the Corporate Bondsman – it will only be a matter of time before the FTA rates soar, just as they did in Chicago and later in Philadelphia. When Chicago and Philadelphia eliminated Corporate Surety Bail, it should have come as no surprise that FTA rates would – and did -- greatly accelerate in those cities.

If Maryland were to replace Corporate Surety Bail with Unsecured Bail and 10% Deposit Bail, Maryland would have two choices. One choice would be to become like Chicago and Philadelphia, tolerating a much higher FTA rate. The other choice would be to create an expensive

administrative agency to do what is already an integral component within the Corporate Surety Bail community, but which would be lost if Corporate Surety Bail were eliminated. That expensive administrative agency would be designed to take legal steps (1) to forfeit real property, and (2) to seek recovery against defendants and others who gave their "solemn promise" to pay if the defendant became an FTA.

Of course, one of the problems with creating such an administrative agency is that it could not fulfill its mission in any event. Currently, in Maryland, everyone receives the great benefit that flows from Corporate Surety Bail. One, there is an insurance company that backs the Corporate Bondsman's promise to pay. Two, there is a great incentive for the bail industry to pay timely all forfeitures – and, thus, for Corporate Surety Bail to strive for the fewest FTA's and fewest forfeitures possible -- because of the disqualification to do business that flows from non-compliance. The current effective system, offered at no expense to the taxpayers, would be replaced with an administrative agency's futile attempt to recover against "non-deep pocket" defendants and others, who lack both the resources and incentive to comply. Because such a system – doomed from its inception -- would likely produce only a few cents on a dollar, there would be no way to control FTA rates.

In addition to the fact that defendants on Corporate Surety Bail have a much lower FTA rate, they also appear to have a much lower rate of recidivism or misconduct while awaiting trial. The Department of Justice Study examined pretrial release defendants from two related standpoints – (1) re-arrested while awaiting trial, i.e., arrested for a new offense while in a pretrial release status pending trial; and (2) overall misconduct, including (a) those who were arrested for a new offense while in a pretrial release status pending trial, (b) those who violated a pretrial release condition resulting in revocation of their pretrial release status, and (c) those who became an FTA.

The Department of Justice Study showed that not only do defendants on Corporate Surety Bail appear for trial at a much higher rate, they "get into less trouble" while awaiting trial. The re-arrest rates were virtually identical for all groups other than for defendants on Corporate Surety Bail. Department of Justice Study at 11 (table 15). The re-arrest rates were 16% for defendants in all three of the other groups, and 9% for defendants on Corporate Surety Bail. Thus, defendants awaiting trial, but not associated with a Corporate Bondsman, were 78% more likely to be re-arrested while awaiting trial.

In addition, the Department of Justice Study showed that defendants on bail are less likely to get in trouble generally while awaiting trial, using the three categories of misconduct set forth below. The misconduct rates were virtually identical for all groups other than defendants on Corporate Surety Bail. Id. at 12 (table 16). The misconduct rates were 32% to 47% for defendants in the other three groups, and 23% for defendants on Corporate Surety Bail. Thus, defendants awaiting trial, but not associated with a Corporate Bondsman, were between 39% and 104% more likely to become involved in misconduct while awaiting trial.

DEPARTMENT OF JUSTICE STATISTICS OF DEFENDANTS ARRESTED FOR ANOTHER CRIME WHILE ON PRETRIAL RELEASE

Year	Unsecured Bail	10% Deposit Bail	Full Cash Bail	Corporate Surety Bail
1992	16%	16%	16%	9%

DEPARTMENT OF JUSTICE STATISTICS ON THE MISCONDUCT* RATE OF DEFENDANTS WHILE ON PRETRIAL RELEASE

Year	Unsecured Bail	10% Deposit Bail	Full Cash Bail	Corporate Surety Bail
1992	47%	32%	32%	23%

* Misconduct includes (1) arrested for another crime while awaiting trial, (2) violation of a release condition that results in a revocation of pretrial release, and (3) becoming a FTA.

The Colbert Report states that "[w]hen financial conditions are ordered, judicial officers should view the 10% cash deposit as at least as good an incentive for defendants reappearing in court as surety bond, since it permits families and individuals to recover their deposit at the conclusion of the case." Colbert Report at vii. It is clear that the evidence – from Maryland, from across the nation, from Chicago, and from Philadelphia – supports exactly the opposite conclusion than that suggested in the Colbert Report and the Deeley Report.

The national study by the Department of Justice demonstrated that no group of defendants performed better than those on Corporate Surety Bail, which had a national FTA rate of 15%. At the same time, nationally, defendants on 10% Deposit Bail and Full Cash Bail had FTA both had rates of 21% and 22% -- at least 40% higher. The data shows that appearance rates are not influenced by the amount of money that the defendant and his family has at risk. Instead, appearance rates are much more heavily controlled by whether the money was paid to a court or paid to a Corporate Bondman. This reflects the differing degrees of proactive posture of the Corporate Bondsman – who ensure that the defendant gets to court -- versus the government employee who accepts the money -- and that's the end of that.

Corporate Surety Bail defendants and 10% Deposit Bail defendants both pay 10% of the full

bond amount to obtain their release, while Full Cash Bail defendants pay ten times that amount, i.e., 100% of the full bond amount, in order to obtain their release. If the best predictor for appearance at trial was the amount of money that the defendant and his family had to place at risk to obtain release, then the FTA rate should be about the same for defendants on Corporate Surety Bail and for defendants on 10% Deposit Bail, both of whom have risked the same amount of money. At the same time, the FTA rate would presumably be much lower for defendants on Full Cash Bail, who have ten times the financial exposure.

With defendants on Full Cash Bail and with defendants on 10% Deposit Bail, Government's primary role is to hold the defendant's collateral, waiting to see whether the defendant appears for trial and receives a refund or becomes an FTA and forfeits the money. Despite the Colbert Report's assertion to the contrary, in these instances, it is the Government that is a "passive player," with no stake in the outcome and no "carrot/stick" approach. Regardless of whether defendants had 100% at risk or only 10% at risk, their FTA rate was virtually the same when the Government replaced the Corporate Bondsman.

In the Department of Justice Study, defendants on 10% Deposit Bail and defendants on Full Cash Bail both had FTA rates in the 21% to 22% range. However, that same study showed that the FTA rate was only 15% for defendants on Corporate Surety Bail. Thus, even when the defendant had 100% of the bail amount at risk, the defendant was still 47% more likely to become an FTA, when compared with a defendant with only 10% of the bail amount at risk, provided the "10% defendant" was on Corporate Surety Bail.

On first blush, it makes no sense that two groups of defendants – Full Cash Bail defendants with 100% of the bail amount at risk and 10% Deposit Bail defendants with only 10% of the bail amount at risk – would both have the same FTA rate. However, it does make sense when realizing that both of those groups were associated with the Government – and not with a Corporate Bondsman. Thus, for the two groups of defendants that deposited money with the Government, there was no Corporate Bondsman, and, thus, there was no one with the financial incentive to ensure that the defendants appeared for trial.

With these two groups virtually identical in their FTA rates – at 21% and 22% -- on first blush, it makes no sense that a third group of defendants would have a much lower FTA rate. However, it does make sense when realizing that the one group with the much lower FTA rate was also the only group associated with a Corporate Bondsman. Thus, even though that group had the minimum at risk -- 10% of the bail amount -- they had something else. They were the only group of defendants with a Corporate Bondsman to ensure that they appeared for trial. Thus, the amount of cash posted -- and subject to immediate forfeiture if the defendant became an FTA -- played no role in establishing FTA rates. To get a lower FTA rate, the system needs Corporate Bondsmen -- and not a government agency – getting the defendant to trial.

Similarly, in Maryland, there were defendants on 10% Deposit Bail and defendants on Corporate Surety Bail. On first blush, both groups had the same amount at risk if they became FTA's and should have had about the same FTA rate. On closer examination, the defendants on Corporate Surety Bail would not get a refund when they appeared for trial, but the defendants on

10% Deposit Bail would get a refund. Thus, it would seem that the defendants on 10% Deposit Bail should an even lower FTA rate. Of course, not only did the defendants on 10% Deposit Bail not have a lower FTA rate, they had a much higher FTA rate – 34.3% higher. The reason is the same as in the Department of Justice Study. A defendant on Corporate Surety Bail is much less likely to become a FTA because a "financially incentivized" Corporate Bondsman ensures the defendant's appearance – or at least ensures it at a much higher rate than among defendants on 10% Deposit Bail.

Some individuals will always do what they are supposed to do, and other individuals will never do what they are supposed to do. For the vast majority of human beings, the degree of incentive do perform appropriately, as well as the degree of incentive to not perform inappropriately, will play a major role in determining whether they do – or do not do -- what they are supposed to do. Because both the defendants and the individuals getting – or failing to get – the defendants to appear for trial are both human beings, they both work on incentives. The only dispositive variable in predicting the FTA rate for defendants who actually paid money to obtain their release was whether they paid that money to a Corporate Bondsman, who has a continuing stake in the outcome, or paid that money to the Government.

Once the government employee takes the defendant's money, the "lot in life" of that employee is no better – or no worse -- if the defendant appears at trial or becomes an FTA. The employee who takes the money never knows – and probably never even thinks about -- whether the defendant appears for trial or becomes an FTA. To the contrary, once a Corporate Bondsman takes the insurance premium from a defendant, the "lot in life" of that Corporate Bondsman is dramatically different if the defendant appears at trial than it is if the defendant becomes an FTA. It does not take too many FTA's to send a Corporate Bondsman into financial ruin. With each defendant's appearance at trial – or lack of appearance at trial – the Corporate Bondsman has his or her very livelihood at stake. In the private sector, the owner of every business knows where his or her margin is and takes the necessary steps to ensure economic success, if possible.

An economist can explain why the FTA rate is at least so much higher for defendants who deposit money with the Government, when compared with defendants for whom a Corporate Bondsman is responsible. Different considerations are at issue for Government, as juxtaposed to the private sector. For Government, the FTA rate is merely an agency statistic. The FTA rate does not influence whether the government employees who "wrote the bond" keeps his or her job or whether the government agency would be permitted to "remain open for business." There is a reason why, over the last two decades, more governmental functions have been "privatized" when either (1) the public sector cannot successfully accomplish an important governmental task, but the private sector can accomplish it, or (2) the public and private sector can both accomplish the task, but the private sector can accomplish it more economically, e.g., school systems, penal institutions.

In addition, there has been de facto "privatization" when individuals elect to purchase services from the private sector because Government is too slow or inefficient, e.g., trash removal, mediation rather than litigation, Federal Express or UPS rather than the United States Postal Service. Furthermore, where Government once absorbed all of the cost, there are now "user fees" paid by the individuals who take advantage of the services, e.g., parks. One additional downside to Unsecured Bail or 10% Deposit Bail, managed by Government, as opposed to Corporate Surety Bail, managed

by the bail industry, is that, under the former, taxpayers pay for defendants to be released pending trial, but, under the latter, only the recipients of the service pay. When defendants retain the services of Corporate Surety Bail, it is like a "user fee," in that it is funded by that portion of the population that takes advantage of the service and not by those who do not need or desire the service

3. Faulty Predicate #3: Police Locate, Apprehend, and Return FTA's to the Court's Jurisdiction

In his report, Professor Colbert states that, regarding the task of locating, apprehending, and returning FTA's to the Court's jurisdiction, "[i]n the vast majority of cases, it is the police, not bondsmen, who perform this role . . . [B]ondsmen are usually passive and far less effective than local law enforcement in procuring the presence of defendants who fail to appear in court." Colbert Study at vi, 2. He continues:

> Despite widespread beliefs to the contrary, bail bondsmen assume a less active role in securing the return of clients who failed to appear in court. Indeed, police catch absconders far more often than do bail bondsmen.

Id. at 49.

Not only is this statement incorrect and unsubstantiated, it demonstrates a misunderstanding of both the law and how the bail industry operates. It is the personnel within the bail industry alone who face a 100% forfeiture and who have the financial incentive to return the FTA to the Court's jurisdiction. The financial incentive has, of necessity, caused Corporate Surety Bail to develop a highly effective system for apprehending FTA's. When a Corporate Bondsman accomplishes this task, the FTA client is "turned over" to the police for processing through the criminal justice system. It is, at this time, that the police take credit -- statistically speaking -- for the re-arrest. Corporate Bondsmen (at least prior to the Colbert Report's attempt to eliminate them) had no need or desire to self-promote and to receive "credit" for the re-arrest. Corporate Surety Bail's "credit" comes in the form of being released from financial liability for the defendant.

In support of his proposition, Professor Colbert, citing the 1998 Commissioner's Report-Table 10(a), set forth in App. I of the Colbert Report, states that "[i]n 1998, corporate sureties surrendered only 245 Maryland defendants, one sixth of the bonded defendants who failed to appear and forfeited bail." Colbert Report at 49. He adds that "[i]n 1999, bondsmen apprehended only 211 defendants who had failed to appear in court." Id. n.169. With no authority cited, he also notes that "[t]his is comparable to the national rate." Id. David Weishert, the District Court Coordinator of Commissioner Activity, whose office compiled this data, confirmed that the figures advanced by Professor Colbert – "the 245 for 1998 and the 211 for 1999" – represent the Md. Rule 4-217(h) surrenders and have no correlation to apprehensions of FTA defendants.[15]

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[15] Telephone conversations with David Weishert in December 2001.

The concept of, and procedure for, "**surrendering**" a defendant is set forth in Md. Rule 4-217(h), establishing the process for a Corporate Bondsman to "surrender" a defendant and be "discharged" from liability prior to forfeiture. A "surrender" usually takes place when a Corporate Bondsman receives information -- usually from family members or guarantors -- that a defendant who is on Corporate Surety Bail is going to become an FTA. To "surrender" a bailed defendant, the Corporate Bondsman must deliver the defendant and must give up the 10% premium charged. Accordingly, "surrender" occurs when the Corporate Bondsman makes a decision that the risk of losing 90% of the bail amount outweighs the plus of earning 10% of the bail amount. Thus, an additional feature of Corporate Surety Bail is that the Corporate Bondsman has a financial incentive to "keep his ear to the ground" and prevent FTA's from happening.

Professor Colbert misinterprets the data because, apparently, he is not familiar with the factual and legal distinction between "recapture of FTA's" and "surrender of bailed defendants." From this misunderstanding, the Colbert Report incorrectly concludes that it must be the police -- and not Corporate Bondsmen -- who apprehend FTA's. In fact, the cited "surrender" statistics, when viewed in the context of the required "surrender" procedure, illustrates the prudence of Corporate Bondsmen -- who necessarily act on information in advance of the defendant becoming an FTA -- to avoid an FTA and a likely bond forfeiture.

Any notion that it is the police who have the time and opportunity to search for, to find, and to apprehend and re-arrest the "general population" of FTA's, and specifically FTA's on Corporate Surety Bail, is not supported by reality. Although the police encounter FTA's when processing persons arrested for unrelated crimes and when conducting a records check during traffic stops, on a day-to-day basis, the police lack the resources to intentionally find the general FTA population[16] for which a Judge has issued a bench warrant.

In Baltimore City alone, there are 98,000 outstanding arrest warrants -- one for every seven City residents. See "98,000 Warrants Gather Dust in City," The Baltimore Sunpapers (November 21, 2001) ("chaos and inefficiency reign"). In Prince George's County, according to Sheriff Alonzo Black, "[a] task force that arrested 322 felony suspects [in October 2001] -- an average of 12 a day – did not significantly reduce Prince George's County's backlog of outstanding felony warrants." See "PG's Warrant Sweep of 322 Barely Dents the Backlog," The Daily Record at 3B (November 24, 2001). According to the article, there are nearly 40,000 outstanding warrants in Prince George's County, even after a concerted effort to reduce the backlog.

The results -- namely, the number of forfeited bonds paid, as recited by Professor Colbert -- along with the statistics regarding outstanding arrest warrants, the "surrender" figures, and the other information cited above, demonstrate that it is the Corporate Bondsmen – and not the police – who locate, apprehend, and return to the Court's jurisdiction, with great efficiency, their bonded defendants that become FTA's, as well as those who are likely to become FTA's. Professor

[16] There are, of course, special police task forces that are specially assigned the responsibility of serving warrants. These task forces, which do an outstanding job, are generally geared toward serving warrants for violent crimes or other felonies.

Colbert's assertions to the contrary are incorrect.

DEPARTMENT OF JUSTICE STATISTICS ON PERCENTAGE OF FTA's RETURNED TO COURT'S JURISDICTION

Year	Unsecured Bail	10% Deposit Bail	Full Cash Bail	Corporate Surety Bail	All Defendants
1992	55%	71%	64%	80%	68%

PERCENTAGE OF FTA's RETURNED TO COURT'S JURISDICTION WHERE BAIL HAS BEEN ELIMINATED

Jurisdiction	Year	Unsecured Bail	10% Deposit Bail
Philadelphia	1998	74%	72%

The District Court data for Maryland does not include the "ultimate FTA rate," meaning the FTA rate after subtracting those FTA's who are returned to the Court's jurisdiction. However, as demonstrated by the above charts, both (1) the 1992 75-county Department of Justice Study, and (2) the Philadelphia Study in 1998 do include the "ultimate FTA rate."

As previously noted, the Department of Justice Study showed that defendants on Unsecured Bail (42% FTA's) and defendants on 10% Deposit Bail (21% FTA's) produce a greater percentage of FTA's than defendants on Corporate Surety Bail (15% FTA's). Moreover, an Unsecured Bail FTA and a 10% Deposit Bail FTA are more likely to remain an FTA – and not be returned to the Court's jurisdiction -- than a defendant on Corporate Surety Bail. In fact, for every 100 Unsecured Bail FTA's, only 55 are returned to the Court's jurisdiction, and for 10% Deposit Bail FTA's only 71 out of every 100 are returned to the Court's jurisdiction. By contrast, for every 100 FTA's who are the responsibility of a Corporate Bondsman, 80 are returned to the Court's jurisdiction.

This means that nationally (1) Unsecured Bail defendants had 125% more FTA's not returned to the Court's jurisdiction, when compared to FTA's who were the responsibility of a Corporate Bondsman, and (2) 10% Deposit Bail defendants had 45% more FTA's not returned to the Court's jurisdiction, when compared to FTA's who were the responsibility of a Corporate Bondsman. In Philadelphia – a jurisdiction that eliminated Corporate Surety Bail -- the percent of FTA's returned to the Court's jurisdiction was 74% for Unsecured Bail and 72% for 10% Deposit Bail. Thus, nationally, the "ultimate FTA rate" for defendants on Corporate Surety Bail, was 3%. In Maryland, the experience of Bail Association is consistent with the 1992 national statistics with an "ultimate

FTA rate" in the 2% to 3% range.

The Chicago Study determined that the cost of re-arrest for the alarmingly high number of FTA's was $3,474 per FTA, and it further noted that there was no way to determine the economic and non-economic societal costs when FTA's remain free in the population. Chicago Study at 74 (**"[T]his does not reflect the larger (and largely immeasurable) costs to victims of new crimes."** Id. at 89). In "A Study of the Effectiveness and Cost of Secured and Unsecured Pretrial Release" (Crime Victims Study), conducted by Crime Victims United of California, an advocacy group for public safety and victims rights, the research indicated that "[a]n average failure to appear . . . imposes budgetary costs of between $1,109 and $1,270 and total costs, including social costs, of between $8,319 and $11,105." The Crime Victims Study further found:

> A more aggressive use of Surety Bond could have saved taxpayers between $3.5 million and $40.8 million in California's largest 12 counties, depending on exactly how aggressive that use was over the [six year study] period. In addition, the savings in total cost, including social costs, could have been between $35.4 million and $403.4 million over the same time period.

C. Bail Recommendations in the Colbert Report and the Deeley Report: (1) The Use of Unsecured Bail, and (2) the Use of "Automatic" 10% Refundable Deposit Bail – While Eliminating Corporate Surety Bail

The Deeley Report and the Colbert Report both urge the use of Unsecured Bail and 10% Deposit Bail, in lieu of Corporate Surety Bail. In fact, express in the Colbert Report -- and implied in the Deeley Report – is the recommendation that Maryland should study the elimination of Corporate Surety Bail. As previously explained in this Response, the factual, practical, and legal predicates advanced by the Deeley Report and the Colbert Report, in support of their "bail reform" recommendations, are flawed. Not only does Maryland's pretrial release system not need to replace Corporate Surety Bail with Unsecured Bail and 10% Deposit Bail, to do so would be ill-advised. Implementation of the Colbert and Deeley recommendations (1) would be costly for taxpayers, (2) would escalate the already high level of administrative burden and inefficiency, as well as frustration for almost all personnel in the criminal justice system, and (3) would be dangerous to public safety.

Unsecured Bail consists of the defendant's promise to pay the full bail amount if the defendant becomes an FTA, but with no collateral required to support the promise. Thus, Unsecured Bail is the same as ROR. The Department of Justice Study showed that 42% of the defendants on Unsecured Bail became FTA's. Despite this data and Professor Colbert's recognition that "[b]onded defendants generally reappeared in court at a higher rate than defendants released on recognizance," Colbert Report at 47, both the Colbert Report and the Deeley Report urge expanding the number of defendants released on Unsecured Bail.

The Colbert Report and the Deeley Report place much weight on information and authority from the four states -- Kentucky, Illinois, Oregon, and Wisconsin -- that have abolished Corporate Surety Bail, but make little use of information and authority from the 45 states (not counting Maryland) that utilize Corporate Surety Bail as an effective means of pretrial release. The Reports

mention the so-called "model" 10% Deposit Bail in Illinois, referring to the Chicago Study, titled "Cook County Pretrial Release Study," prepared by the Illinois Criminal Justice Authority. However, the Colbert Report and the Deeley Report fail to mention that the Chicago Study with the "model" 10% Deposit Bail also includes the "model" system's FTA rates – 30% for male defendants and 21% for female defendants.

In theory, it would be natural to assume that underlying both the Colbert Report and the Deeley Report are legitimate studies, initiated from a neutral posture, and designed to go wherever the law and the evidence would lead them. However, that may not be the case. Both of the Reports may have actually started with a preconceived bias against Corporate Surety Bail. If so, that may explain both (1) the exclusion of the bail industry during the studies that led to the Reports, and (2) the extent of errors contained in the Reports.

1. The Colbert/Deeley Recommended Rules Change and the Alleged Legal Basis for Such a Rules Change

The Colbert Report expressly takes the position – and the Deeley Report implicitly takes the position – that Commissioners and District Court Judges are not in compliance with the law. Colbert Report at 1; Deeley Report at 2, 18. The Reports take the position that Md. Ann. Code art. 27, § 616-1/2(b)(2) (recodified in Md. Crim. Proc. Code Ann. art. 5, effective October 1, 2001), presumptively places all defendants on ROR. If ROR is insufficient, then the judicial officer may set bail, which presumptively should be Unsecured Bail. If that is insufficient, and the judicial officer requires security, the defendant has the option to either retain the services of a Corporate Bondsman or to go to the Court and deposit 10% of the full bail amount.

The Reports are of the position that the decision regarding the use of the services of a Corporate Bondsman, versus depositing with the Court, it, by law, at the option of the defendant. The Reports believe that satisfying the bail by only depositing 10% with the Court, and promising to pay the remaining 90% if the defendant becomes an FTA, is an "automatic" right of the defendant. The Colbert Report and the Deeley Report both misunderstand the law. Compounding this misunderstanding, both Reports recommend amending Md. Rule 4-216 to reflect this misunderstanding. Deeley Report at 3, 16-17; Colbert Report at vii, 54.

The Maryland General Assembly never has – and does not now – provide for an automatic right of the defendant to post a mere 10% of the bail amount set by the Commissioner or District Court Judge. The legislature vests in Commissioners and District Court Judges the power to determine, within their discretion, (1) whether the defendant shall be required to post bail as a condition of pretrial release, and (2) if so, whether such bail shall be in the form of Unsecured Bail, 10% Deposit Bail, or Fully Secured Bail. The Maryland General Assembly gives to Commissioners and/or District Court Judges – but not to defendants – the power to determine which of these various types of bail shall be required.

About 50% of Maryland defendants who are eligible for pretrial release – and about

60% in Baltimore City -- are ROR.[17] **Colbert Report at i, v.** This means that, in 50% to 60% of the cases, a judicial officer determines that the defendant is sufficiently trustworthy that the defendant's personal promise (1) not to commit a crime while awaiting trial, and (2) to appear for trial as mandated, is good enough. For the lesser trustworthy 40% to 50% of the defendant population eligible for pretrial release, many of whom already have a criminal record, judicial officers establish conditions -- including bail -- because the mere promise to appear for trial and not to commit crimes in the interim is insufficient.

Therefore, it makes sense that the Maryland General Assembly would not have intended to convert Commissioners and District Court Judges into mere technicians – with the defendants and not the judicial officers selecting the method of bail. Studies in Maryland and throughout the nation, and studies in both "Corporate Surety Bail" jurisdictions and jurisdictions that have eliminated "Corporate Surety Bail," are in agreement that (1) the use of Unsecured Bail and refundable 10% Deposit Bail increases both "initial" FTA's and "ultimate FTA's" and, thus, they also create a danger to society, and (2) the FTA rates for defendants on Unsecured Bail and 10% Deposit Bail are even higher in jurisdictions that have eliminated Corporate Surety Bail, such as Chicago and Philadelphia.

Neither the Colbert Report, nor the Deeley Report, offers any statutory analysis or legislative history to support its understanding of the law. This Response provides that missing analysis of Maryland's statutes and rules, as well as the legislative history behind them. The Deeley/Colbert recommended amendments to Md. Rule 4-216 (Pretrial release) are, in substantial part, as follows:

> (a) Construction of rule.
>
> This rule shall be construed liberally to carry out the purpose of relying on criminal sanctions instead of financial loss to ensure the appearance of a defendant in a criminal case before verdict or pending a new trial.
>
> (b) Release on personal recognizance.
>
> In accordance with this Rule and the Code, Criminal Procedure Article, § 5-101 and except as otherwise provided in Code, Criminal Procedure Article, §§ 5-201 and 5-202, a defendant is entitled to be released before verdict in conformity with this Rule on personal recognizance or with one or more conditions imposed.

2. <u>The Legislative History Behind – and the Intent of – Maryland's Pretrial Release Statutes and Rules of Court</u>

In drafting recommended language for Md. Rule 4-216, the Colbert Report and the Deeley

[17] Additionally, in Baltimore City, the State's Attorney has taken over, from the police, the responsibility of actually charging the suspects with the crimes. As a result, a substantial number of cases are being refused for prosecution. In fact, in 2001, state's attorneys "declined to prosecute 26 percent of the suspects who were arrested and brought to the Central Intake and Booking Center." See "Weeding Out Shaky Cases," The Baltimore Sunpapers at 1F (January 27, 2002).

Report borrow language from the new Md. Crim. Proc. Code Ann. § 5-101 ("Release on personal recognizance"), which became effective on October 1, 2001, when the Maryland General Assembly created Maryland's new Criminal Procedure Code. In section 5-101 of that code, the General Assembly addressed only personal recognizance, naming that section "Release on personal recognizance." Nonetheless, the Colbert/Deeley approach takes the legislature's "personal recognizance" language from section 5-101 and then erroneously applies it to all pretrial release scenarios – not just to personal recognizance.

Title 5 of the new Md. Crim. Proc. Code Ann. is named "Release." In total, the "Release" title contains 15 sections, which are derived from former Md. Ann. Code art. 27, §§ 638A & 616-1/2. The Special Reviser's Note states that the new law is a recodification of the old law and is adopted "without substantive change." The confusion and misunderstanding, reflected in both the Colbert Report and the Deeley Report, is probably explained as follows:

The former statutory scheme placed "release on personal recognizance" in section 638A and placed "release subject to conditions" in section 616-1/2(d). By contrast, new Title 5 of Md. Crim. Proc. Code Ann. "houses" both former section 638A (addressing "release on personal recognizance") and former section 616-1/2 (addressing "release subject to conditions") in the same title. However, in doing so, Title 5. correctly juxtaposes "release on personal recognizance" from "release subject to conditions" by placing "release on personal recognizance" in subtitle 1. and "release subject to conditions" in subtitle 2.

Subtitle 1. of Title 5. of the Md. Crim. Proc. Code Ann. begins with section 5-101 (Release on personal recognizance). Subsection (a) of section 5-101 provides: "Construction of section. – This section shall be construed liberally to carry out the purpose of relying on criminal sanctions instead of financial loss to ensure the appearance of a defendant in a criminal case before verdict." By express language, the legislature provided that this rule of "construction," as set forth in subsection (a) of section 5-101, applies only in this "section," i.e., only to section 5-101, which is titled "Release on personal recognizance."

In other words, when the judicial officer determines that the "personal recognizance" section is the appropriate pretrial release section, then "criminal sanction [should be relied on] instead of financial loss to ensure the appearance of a defendant." As indicated, the legislature did not provide that section 5-101(a) is a means of statutory construction to be applied to the entire title on "release," but rather it is a means of statutory when – but only when -- the "section" on "release on personal recognizance" is the applicable section.

In the pretrial release process, when a judicial officer makes a pretrial release determination, there are multiple steps, as follows: First, when a defendant appears before a particular judicial officer (the answer may be different if the judicial officer is a Commissioner or a District Court Judge), is the defendant (1) prohibited from being released, (2) rebuttably presumed not to be released, (3) granted pretrial release, but only if the judicial officer, in the exercise of discretion, makes a determination to grant pretrial release, or (4) entitled to a pretrial release determination? Second, in (2), (3), and (4) above, unless the defendant is prohibited from being released on personal recognizance, is the defendant to be released (1) on personal recognizance, or (2) subject to one or

more of the conditions of release set forth in Md. Rule 4-216(f)? Third, Md. Crim. Proc. Code Ann. § 5-101(a)-(b) provides that, if personal recognizance is sufficient "to ensure the appearance of a defendant, . . . the defendant may be released on personal recognizance."

As recommended by the Colbert Report and the Deeley Report, Md. Rule 4-216(a) would take the statutory construction language, as established by the legislature for personal recognizance cases, and incorrectly apply it to all cases. Reading proposed Md. Rule 4-216(a) and Md. Rule 4-216(b) together, the Colbert/Deeley recommendation appears to establish a rebuttable presumption for all defendants to be ROR. This could not be further from the legislative intent.

Ironically, even when ROR is sufficient to ensure a defendant's appearance at trial, section 5-101 does not mandate ROR, but rather provides that the defendant may be granted ROR. The reason for this is that "appearance at trial" is only one of three considerations that the judicial officer must address under Md. Rule 4-216(e)(3). The other two considerations are (1) "[p]rotect[ion of] the safety of the alleged victim," and (2) "[a]ssur[ance] that the defendant will not pose a danger to another person or to the community . . ." These two additional considerations may necessitate that the defendant not be released, or be released, but only subject to one or more conditions of release, including the threat of "financial loss."

The legislative history shows the interplay among (1) the intent of the Maryland General Assembly in enacting and rejecting bail and pretrial release legislation since 1968, (2) the intent of the Rules Committee and the Court of Appeals in promulgating rules governing bail and pretrial release since 1962, and (3) the intent of Congress in enacting the Bail Reform Act of 1966 and the Bail Reform Act of 1984, both of which heavily influenced the approach to bail and pretrial release taken by the states.

Maryland adopted the common law of England, as of July 4, 1776, through article 5 of the Maryland Declaration of Rights. By 1957, neither the Maryland General Assembly, nor the Court of Appeals, in its rule making power, had addressed bail and pretrial release. That year, the Court of Appeals decided Fischer v. Ball, 212 Md. 517 (1957), in which the Court surveyed – and relied on -- the common law regarding bail. The common law rule was that "[a]ll persons shall be bailable by sufficient sureties except for capital offenses where the proof is evident or the presumption great." Id. at 521. Regarding bail in a capital case, the Court stated:

> The common law rule in capital cases (to which this opinion is confined) is that bail is in the discretion of the trial court. We think that under Article 5 of the Maryland Declaration of Rights, this rule of the common law, in which no constitutional or statutory change has been made, remains in force in this State.

Id. at 523. Thus, the common law rule was that there is no right to bail in a capital case because the granting of release on bail is within the Court's discretion. As to defendants not charged with a capital offense, the defendant "shall be bailable," provided there is "sufficient sureties." In 1962, the Court of Appeals adopted Md. Rule 777(a), which adopted the common law rule, providing: "Prior to conviction an accused who is charged with an offense the maximum punishment for which is other than capital shall be entitled to be admitted to bail. In a capital case the accused may be

admitted to bail in the discretion of the court."

When Congress enacted the Bail Reform Act of 1966, Maryland still had no bail statute. The premise of the 1966 federal legislation was that (1) defendants should be released pending trial, and (2) their promise to appear should be sufficient and, if not, judicial officers should impose the least onerous conditions to ensure their appearance. Pretrial conditions were designed for one purpose – ensuring appearance at trial. In fact, the American Bar Association (ABA), at that time, recommended the elimination of bail.

In 1968, based on the federal legislation and the ABA recommendation, Maryland studied bail reform and the elimination of Corporate Surety Bail. The study led to proposed legislation. The Report of the Proposed Bills to the General Assembly of 1968 by the Legislative Council of Maryland Special Subcommittee on Bail Bonds provided: "The subcommittee recommended a procedure whereby bail is not necessary for persons who clearly will be available to answer charges at trial. [P]ersons may be released on their own recognizance or upon the execution of an appearance bond unless it is determined that some greater security is needed." However, in the "Report of the Subcommittee on Bail Bond Reform by the Maryland State Bar Association," this State's organized bar rejected both the ABA recommendation and the congressional scheme in enacting the Bail Reform Act of 1966. The proposed Maryland legislation was not enacted.

In 1969, during the following legislative session, the Maryland General Assembly did enact Maryland's first bail statute. Md. Ann. Code art. 27, § 616-1/2, Ch. 557 (H.B. 347), 1969 Md. Laws. The statute's purpose was to deny bail, in certain situations, for defendants charged with certain crimes while on bail. The preamble to House Bill 347 provides the following: "[P]ersons indicted and charged for committing a certain offense while on bail or recognizance for committing a certain offense shall be ineligible for release on bail or recognizance for the subsequent charge until the prior charge has been finally determined by the courts . . ."

Thus, at the same time that Congress and the ABA were urging that pretrial release be made easier, and that appearance at trial was the only factor for consideration in the pretrial release equation, the Maryland General Assembly went in the other direction. The legislature created a "no bail" status for recidivists, even when the defendant was not charged with a capital offense. With such an enactment, Maryland was already "ahead of the curve," by factoring in not only appearance at trial, but also factoring in concern for public safety. Thus, after defeating "bail reform" in 1968, the 1969 legislature enacted legislation providing for certain "no bail" scenarios, i.e., ineligibility for pretrial release for offenses less than capital offenses.

Three years later, in 1972, the Court of Appeals Rules Committee addressed bail, and rejected the position taken by the ABA to prohibit Corporate Surety Bail. The Rules Committee stated: "A.B.A. Standard 5.2 . . . recommended the prohibition of compensated sureties. This recommendation was not concurred in by the Joint Committees of the Maryland Bar and the Judiciary on ABA standards." Minutes of the Rules Committee (October 16, 1972). In 1977, the Rules Committee expressly recognized Corporate Surety Bail in the Maryland Rules, stating: "The suggested amendments to Rule 721 (pretrial release) . . . expand to include within the definition of bail bonds which may be taken pursuant to Rule 721(b)(4) an obligation of a corporation which is an

insurer." Minutes of the Rules Committee (November 18, 1977).

In 1978, Md. Rule 721b (Conditions of release) required Commissioners and Judges to "impose the first of the following conditions of release that will reasonably assure the appearance of the defendant as required . . ." The rule provided a list of conditions – bail and otherwise – substantially similar to the current list set forth in Md. Rule 4-216(f) (Conditions of release). When the 1978 rule was promulgated, bail laws were still influenced by the Bail Reform Act of 1966, and the only consideration in the pretrial release determination was the defendant's "appearance at trial."

The four previous paragraphs demonstrate Maryland's legislative and judicial handling of bail and pretrial release, as a supplement to Maryland's common law, from 1968 through 1978. At the national level, during the 18-year period, beginning with the enactment of the Bail Reform Act of 1966, the experience of the criminal justice system forced a complete re-thinking of some of the previous "givens." First, defendants were becoming FTA's at an alarming rate. Second, there was an alarming percentage of crimes committed by defendants awaiting trial on pretrial release. Third, the criminal justice system could not afford – in programs or personnel -- the kinds of resources it would take to (1) reduce the FTA rate, (2) recapture FTA's, and/or (3) reduce the amount of crime committed by defendants awaiting trial.

In response, Congress enacted the Bail Reform Act of 1984. The legislative thrust of the 1984 statute was significantly different than that of its 1966 predecessor. In 1984, although there was still a goal of not unnecessarily detaining defendants pretrial, an equal – if not greater -- legislative goal was public safety. Under the new law, the conditions to be imposed on a defendant charged with a crime and awaiting trial now had a two-fold purpose, i.e., not only the purpose of ensuring the defendant's appearance at trial, but also the purpose of ensuring that the defendant remained crime free -- and the public remained safe -- while the defendant awaited trial. The legislative history of the Bail Reform Act of 1984 is instructive.

> [The 1984 Act] substantially revises the Bail Reform Act of 1966 in order to address such problems as (a) the need to consider community safety . . . The adoption of the changes marks a significant departure from the basic philosophy of the Bail Reform Act [of 1966], which [was] that the sole purpose of bail laws must be to assure the appearance of the defendant at judicial proceedings.
>
> . . .
>
> The primary purpose of the [Bail Reform] Act [of 1966] was to de-emphasize the use of money bonds in the federal courts, a practice that was perceived as resulting in disproportionate and unnecessary pretrial incarceration of poor defendants, and to provide a range of alternative forms of release. These goals of the [Bail Reform] Act [of 1966] – cutting back on the excessive use of money bonds and providing for flexibility in setting conditions of release appropriate to the characteristics of individual defendants – are ones which are worthy of support. However, 15 years of experience with the Act have demonstrated that, in some respects, [the Act] does not provide for appropriate release decisions. Increasingly, the Act has come under

criticism as too liberally allowing release and as providing too little flexibility to judges in making appropriate release decisions regarding defendants who pose serious risks of flight or danger to the community.

S. Rep. No. 225, 98th Cong., 1st Sess., 1983, 1984 U.S.C.C.A.N. 3182, 1983 WL 25404.

The Bail Reform Act of 1966 was enacted during the pinnacle of both the Warren Court's judicial liberal activism and the partnership between the Johnson Administration and Congress on the "Great Society" programs. Influenced by both of these, the Act failed to strike the necessary balance between "too onerous" and "not onerous enough" in terms of requirements for pretrial release – at the expense of public safety.

Moreover, if the "carrot-stick" approach was imbalanced toward "too lenient" when the goal was simply "ensure that the defendant appears for trial," how much more of a problem might it be to both (1) "ensure that the defendant appears for trial," and (2) "ensure that the defendant does not pose too great a risk to the victim or society, if released pending trial." To address the public safety concerns, the Bail Reform Act of 1984 established preventive detention under certain circumstances when the judicial officer determines that the defendant poses a threat to the victim's safety or the safety of the public generally. In United States v. Salerno, 481 U.S. 739 (198), the Supreme Court upheld the constitutionality of the 1984 statute, against a challenge that detaining on the basis of future dangerousness violated substantive due process and punished a presumed innocent defendant.

Congress declared, through the Bail Reform Act of 1984, that its well-intended 1966 approach to managing the pretrial release component of the criminal justice system, at the federal level, had been a total failure. The Maryland General Assembly acknowledged this reality in the criminal justice system, through numerous enactments, that (1) mandated that judicial officers consider (a) appearance at trial. (b) victim safety, and (c) public safety, in making pretrial release decisions, and (2) "toughened" Maryland's pretrial release legislation, continually increasing those scenarios in which pretrial release would be more difficult to obtain.

By 2002, in Maryland, there is a large list of offenses and situations for which the legislature has prohibited Commissioners from granting pretrial release. For those offenses and those situations, only a District Court Judge may release a defendant, and, even then, there is a statutory presumption (1) that the defendant will become an FTA, and/or (2) that the defendant poses a danger to the community. As such, there is also a statutory presumption that the defendant shall be denied pretrial release. These crimes include drug kingpin and escape from confinement, even if it is a first offense. In addition, there are offenses for which there is no pretrial release as a matter of right, but only within the discretion of the judicial branch, e.g., crimes punishable by life in prison.

Moreover, for recidivists, the pretrial release picture is statutorily even more onerous. The presumption of non-release applies for all crimes of violence committed by defendants with a prior conviction for a crime of violence. Furthermore, the presumption of non-release applies for many offenses committed by defendants who, at the time of the offense, are on pretrial release, even though the defendant is presumed innocent, e.g., arson, burglary, child abuse, destructive devices, drug offenses, vehicular manslaughter, and all crimes of violence. This is the same for defendants

who are charged with violating ex parte orders or orders of protection. In addition, not only is there a presumption of becoming a FTA and being a "danger to the community," and, thus, a presumption of non-release, if the defendant attempts to rebut the presumption, the legislature provides guidance to District Court Judges, listing "suitable bail" as the first consideration.

From 1978 to 1998, Md. Rule 4-216 (and its predecessor) required the judicial officer to "impose the first of the following conditions of release that will reasonably assure the appearance of the defendant as required . . ." Consistent with the era and the tone of the Bail Reform Act of 1966, the 1978 rule reflected the only consideration in the pretrial release decision, i.e., would the defendant appear for trial? The Bail Reform Act of 1984 added preventive detention and required the pretrial release decision to consider not only whether the defendant would appear for trial, but also whether the defendant poses a danger to the victim and/or to society generally.

Consistent with the new reform era and the new tone, the Maryland General Assembly enacted, in various contexts, the requirement that judicial officers consider not only the issue of whether the defendant will appear at trial, but also whether the defendant poses a danger to the victim and/or to society generally. In 1998, the Court of Appeals amended Md. Rule 4-216(e)(3) to ensure that its rules reflected this legislative mandate, with the following language: "[T]he judicial officer shall impose on the defendant the least onerous condition or combination of conditions of release . . . that will reasonably: (A) Assure the appearance of the defendant as required; (B) protect the safety of the alleged victim . . . ; and (C) Assure that the defendant will not pose a danger to another person or the community . . . ."

According to the Honorable Joseph F. Murphy, Jr., Chair of the Court of Appeals Standing Committee on Rules of Practice and Procedure, the 1998 change to Md. Rule 4-216(e)(3) was designed to strike the appropriate balance in light of the legislative mandate. On the one hand, Commissioners and District Court Judges should consider not only the defendant's likelihood to appear at trial, but should also consider the danger that the defendant poses to society generally -- and to the victim, in particular -- if released. On the other hand, Commissioners and District Court Judges should impose conditions no greater than necessary to accomplish the three-fold consideration of (1) appearance at trial, (2) safety of the victim, and (3) public safety.

Thus, with the 1998 change, the mandate of Md. Rule 4-216, placed on Commissioners and District Court Judges, was no longer merely to impose "the first of the following conditions of release that will reasonably assure the appearance of the defendant as required . . ." Instead, the mandate on judicial officers expanded to require them to consider not only the appearance of the defendant at trial, but also consider the safety of both the victim and society generally. Because there may be different considerations regarding – and different conditions necessary to accomplish -- appearance at trial and the safety of the victim and society, the 1998 amendment to the rule authorized judicial officers to review all possible conditions, as a collective whole, and not merely the first condition, the second condition, etc., in seriatim. The 1998 rule change was designed to provide a greater flexibility, on a case-by-case approach, for judicial officers on the front lines.

In light of the Deeley Report's recommendation that the Maryland Rules be amended, the Rules Committee Criminal Subcommittee met on November 14, 2001. With four of the six

subcommittee members present, the Criminal Subcommittee recommended to the full Rules Committee the adoption of the recommendation in the Deeley Report. On January 4, 2002, for more than two hours, the Rules Committee heard from Mr. Deeley, on behalf of the Deeley Committee, and Professor Warnken, on behalf of the Bail Association. Professor Warnken urged the Rules Committee not to adopt the proposed rules change but, instead, to send this issue back to the Criminal Subcommittee in light of the presentations that the Rules Committee heard that day. The Rules Committee unanimously adopted a resolution consistent with Professor Warnken's recommendation.

3. Addressing Public Safety, Which Is Society's Number One Concern, in Light of the Increased FTA's That Would Result from More Unsecured Bail and More 10% Deposit Bail

Public safety is one of the – if not the -- most important concern of our citizenry. As demonstrated, Unsecured Bail and 10% Deposit Bail invariably lead to more FTA's. Moreover, FTA's are more likely to commit crimes while in their FTA status. Obviously, the sooner an FTA is apprehended, and returned to the Court's jurisdiction, the better.

Through Corporate Surety Bail, the private sector is "invested" in the defendant, and the family and friends are brought into the "circle of responsibility." As a result, once a bonded defendant fails to appear, the Corporate Bondsman is immediately taking steps to locate, apprehend, and return the FTA defendant, in order to discharge the financial liability. The family and friends who are guarantors on the bond are likewise motivated, due to their financial exposure.

To the contrary, for FTA's released through other methods, such as Unsecured Bail or 10% Deposit Bail, there is never the sense of urgency for return – not on the FTA's part and not on the part of the criminal justice system. FTA's who are not on Corporate Surety Bail come to know that they will simply join the ever growing list of warrants to be served, as the number of open warrants in Baltimore City reaches 100,000. Moreover, rarely is a defendant who fails to appear ever charged with the separate "FTA" charge. Thus, the FTA has unilaterally creates a continuance – maybe even a permanent continuance – for himself. The "street" is smart and acts accordingly.

For Baltimore City, which has made considerable strides in reducing violent crime under Mayor Martin O'Malley and Police Commissioner Edward Norris, the increased burden of FTA warrants resulting from Unsecured Bail and 10% Deposit Bail would thwart that progress and further burden a police force already confronting an enormous workload, including the 98,000 open warrants.

There are additional societal costs that are oftentimes overlooked. The foremost societal cost is best described in the Chicago Study as: "the larger (and largely immeasurable) costs to the victims of the new crimes." The California Crime Victims Study, in attempting to quantify the costs of FTA's, found that "[a]n average failure to appear . . . imposes . . . total costs, including social costs, of between $8,319 and $11,105." In addition to the "new victims," there is also the notion that, without the prospect of immediate consequence, there will be a wholesale contempt and disrespect for the entire criminal justice system.

4. **Addressing Increased Cost to Taxpayers, Which Is Society's Number Two Concern, and Which Would Result from Adoption of the Recommendations in the Colbert Report and the Deeley Report.**

The fiscal consequences of Unsecured Bail and 10% Deposit Bail are substantial. Although the defendant may deposit 10% of the bail amount with the Court, these programs are, nonetheless, largely taxpayer funded. The primary costs include (1) the measurable costs to administer the program, and (2) the cost of re-arrest following the FTA, which the Chicago Study determined to be $3,474 per FTA. Deeley Report at 12 (citing Chicago Study at 74). When multiplying $3,474, times each of 37,525 FTA's, the re-arrest cost alone exceeds $130 million.

If the FTA rate, in Maryland, for defendants not on Corporate Surety Bail was reduced to the FTA rate for defendants on Corporate Surety Bail, there would have been 7,567 fewer FTA's in1998 and 1999. The cost just to re-arrest those extra FTA's caused by the non-diligence in the criminal justice system for the defendants not on Corporate Surety Bail, when compared to defendants on Corporate Surety Bail, totals more than $26 million. Corporate Surety Bail has a demonstrated superior performance in procuring defendants' appearance at trial. However, when a defendant on Corporate Surety Bail becomes an FTA, the cost to the criminal justice system is less because much of the cost to re-arrest is most frequently absorbed by the Corporate Bondsman, who locates, apprehends, and returns the FTA to the Court's jurisdiction.

In addition, curtailment or elimination of Corporate Surety Vail would mean a loss of tax revenue that is currently generated by the insurance premium taxes[18] and income taxes paid by the insurance companies, the Corporate Bondsmen, and their employees, all of which inure to the benefit of the general treasury of the State.

5. **Increased Administrative Burdens**

Expansion of Unsecured Bail and 10% Deposit Bail would produce logistical, fiscal, and administrative burdens. When the Court system becomes the bail bond company, with many defendants paying in cash, there must be adequate controls when receiving, safeguarding, accounting for, and dispersing the funds. Thus, there will a need for increased staffing, as all of the bail bond agencies become, in essence, absorbed by the State. The failure to pursue collections on 10% Deposit Bail against the FTA's will foster disrespect for the criminal justice system, and may give rise to equal protection challenges.

6. **10% Deposit Bail Will Not Relieve Jail Overcrowding**

Some have suggested that Unsecured Bail and 10% Deposit Bail will relieve jail overcrowding. In fact, the opposite is true. Corporate bondsmen routinely allow for "installment"

[18] The premium tax rate in Maryland is 2% of the gross premiums, exclusive of any retaliatory tax that may be due. Additionally, in the Seventh Judicial Circuit, bondsmen pay a tax or license fee equal to 1% of the face amount of each bond written in that Circuit. Md. Crim. Proc. Code Ann. § 5-203(b).

payments of bail premiums, see Insurance Commissioner v. Engelman, 345 Md. 402, 692 A.2d 474 (1997), thus allowing defendants, who would otherwise remain incarcerated, to be released. Presumably, the Court system will not offer "no interest installment plans" on "10% Deposit Bail." Consequently, retaining the services of a Corporate Bondsman may result in release from incarceration sooner. While waiting for defendants to obtain all of the 10%, jail overcrowding will increase.

There is concern about the defendants being held at the Baltimore City Detention Center on smaller bonds. However, there are multiple reasons why defendants do not make bail, including other pending charges, detainers from other jurisdictions, time being served on other cases, and because family members who do not want the defendant on the street or are unwilling to help the defendant based on a "tough love" theory, etc.

The Maryland Association has been working with Commissioner Lamont Flanagan on initiatives to reduce the population at the Baltimore City Detention Center, particularly for those defendants with small bonds. One initiative offered by the bail industry, which is pending before Secretary of Public Safety and Corrections Stuart Simms, focuses on defendants charged with non-violent crimes and having bonds of $1,000 or less. The Bail Association's proposal could release many jail bed days per year. With an estimated daily incarceration cost of $55 per defendant, this initiative could save thousands of dollars.

In sum, Unsecured Bail and 10% Deposit Bail cannot -- and do not -- operate with the same level of efficiency or effectiveness as Corporate Surety Bail. This manifests in terms of "assuring appearance" at all required court dates, and in terms of locating, apprehending, and returning FTA's. There is the tremendous cost, plus the risks to public safety. By producing a lower FTA rate, and by actively seeking to apprehend FTA's, Corporate Surety Bail aids the orderly administration of the criminal justice system and reduces economic and societal non-economic costs that come with each criminal act that is perpetrated by an at-large FTA defendant.

D. Other Recommendations in the Colbert Report and the Deeley Report

1. A Statewide Pretrial Release Program at an Annual Cost of $20 Million

Professor Colbert asserts that, in his view, Commissioners and District Court Judges are making decisions "without essential information." This predicate apparently serves, in large part, as the basis for items 1. through 3. in the Types of Recommendations. It could hardly be contended that Commissioners and Judges should make decisions "without essential information," just as it could hardly be contended that a committee studying pretrial release and the bail system should do so "without essential information." Professor Colbert proffers the Commissioner Survey Report of Professor Ray Pasternoster, Colbert Report at App. E, as support for the assertion that the Commissioners and Judges are acting "without essential information."

There are at least two different Pasternoster Reports distributed as App. E to the Colbert

Report.[19] The first Pasternoster Report, which appeared in the Colbert Report, as originally released on September 12, 2001, is included as App. D1 to this Response. The second Pasternoster Report (apparently, the correct version) is included as App. D2 to this Response (Pasternoster Reports). The original Pasternoster Report stated "that bondman [sic] are an important source of information" – the most important source of information -- to Commissioners in determining whether to set bail for a defendant. App. D1 at 10. The Bail Association's legislative counsel brought this allegation to light by letter, dated September 24, 2001, to Mr. Deeley and to Professor Colbert, who retracted the statement, advising that while assembling the Report for duplication, he "included a much earlier draft of App. E [the original Pasternoster Report], which contained a coding error."[20]

Although the actual source data was not included in the Colbert Report, and thus not subject to analysis here, even a cursory review of the Pasternoster Reports indicates that, like the "coding" error in the original Pasternoster Report, other errors ("coding" or otherwise) likely exist in the "corrected" Pasternoster Report. The underlying survey used to compile the data and the Pasternoster Reports was confusing at best.[21] Even assuming the accuracy of the data collected and reported, the conclusion that Professor Colbert draws -- namely, that the Commissioners and Judges are acting "without essential information" -- is conclusory and unsupported.

In all decision making processes, including the setting and reviewing of bail, there is necessarily a balance that must be struck. The costs would be too great -- in terms of efficiency, cost, and otherwise -- to require that all conceivable information be obtained and verified. Even then,

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[19] Oddly enough, there appears also to be several versions of the Colbert Report. As noted, the original Colbert Report was released on September 12, 2001 (with the original Pasternoster Report). However, there appears to a version with a "July 2001" cover, thus making two original versions. The next -- or third version – appears to be the "corrected" Colbert Report, with the corrected Pasternoster Report, which has the curious notation of "REV: 10/02/01." It is unclear at what point prior to Mr. Cooke's letter, dated September 24, 2001, that the "coding error" was discovered. Based on the Deeley Committee minutes, it must have been sometime after October 25, 2000. Indeed, according to the Deeley Committee minutes, the accuracy of the "bondsmen as an important source of information" statement was questioned at least twice. Commissioner Elmore questioned it during the meeting on August 22, 2000, Deeley Report at App. B-6 to B-7, and during the meeting on September 12, 2000, reference was made to a letter from (former) Chief Judge Rasin, advising that the statement "simply cannot be correct." Id. at App. B-12. Professor Colbert thereupon promised to have Professor Pasternoster review the data to ensure against error, and, during the subcommittee meeting on October 25, 2000, he reported that Professor Pasternoster had **"double checked the figures"** and affirmed their accuracy. Id. at App. B-22. The minutes of the remaining four meetings do not disclose when the "triple check" apparently took place, resulting in the discovery of the "coding error," and no reference is made to the Deeley Committee being so informed.

[20] While retracted in his letter, dated October 3, 2001, to Mr. Deeley, with copies to the other Deeley Committee members, to Chief Judge Bell, and to Mr. Cooke, apparently the Colbert Report, with the original Pasternoster Report, had been – *and, until at least January 31, 2002, continued to be* -- publicly released and disseminated. Although it is unknown whether the retraction was likewise disseminated to all other recipients, it appears unlikely, as this inaccurate comment, coupled with the tone of the Colbert Report, apparently lead one editor of the Baltimore Sunpapers to opine that "court commissioners and Judges . . . are in ***cahoots*** with bail bond firms." See "Serving Jail Time for Lack of Money," Baltimore Sunpapers at F2 (October 28, 2001) (emphasis added).

[21] The Minutes of the Deeley Committee reflect that some confusion may have existed with the survey. In fact, in response to certain results from the survey, Mr. Elmore queried "whether commissioners correctly understood the survey question as to source of information . . . " Deeley Report at App. B-6.

because the process necessarily includes a human subjective element, the decision can never be perfect. Indeed, the bail determination and review process is an "art" rather than a "science." Despite Professor Colbert's belief to the contrary, the results within the criminal justice system suggest that, on balance, both Commissioners and Judges are doing a capable job in making rational pretrial release determinations to reasonably (1) ensure the appearance of the defendant at trial, (2) safeguard the victim, and (3) safeguard society. If anything, the statistical data indicates that the Commissioners and Judges in Maryland are giving the "benefit of the doubt" to the defendants, given the number of defendants released without security and the FTA rates.

About 60% of the Baltimore City defendants (and about 50% on a statewide basis) who are eligible for pretrial release are granted ROR status. Colbert Report at i, v. This means that a judicial officer determined that this half of the defendant population was sufficiently trustworthy that their promise (1) not to commit a crime while awaiting trial, and (2) to appear for trial as mandated, was good enough. For the lesser trustworthy 40% to 50% of the defendants who are eligible for pretrial release, many of whom already have a criminal record and prior FTA's, judicial officers established conditions, including requiring the posting of bail, because the mere promise to appear for trial and not to commit crimes in the interim were deemed insufficient.

Among fiscal priorities -- at any time, but particularly now—it would be ill-advised to expend unprecedented public funds to establish and implement a fully effective system of (1) pretrial services and supervision, (2) appearance at trial, and (3) immediate re-arrest of FTA's. Recommendation #1 of the Deeley Report addresses the establishment of a statewide pretrial release agency. The recommendation calls for a 24-hour-a-day framework in which Government would "do it all."

Under this recommendation, the statewide pretrial release agency would (1) conduct a pretrial release investigation into the background of every defendant; (2) provide verified information to judicial officers, prosecutors, and defense attorneys as to each of the pretrial considerations under Md. Rule 4-216, including employment status and history, family ties, financial circumstances, and residence; (3) provide information to victims, witnesses, and the defendant's family regarding scheduling, procedures, pretrial release conditions, etc.; (4) monitor defendants regarding pretrial release conditions, home detention, work release, treatment, and other programs; (5) communicate with employers, family members, treatment facilities, victims, and witnesses, both to gather information for the defendant's compliance with pretrial release conditions and to provide information regarding changes in pretrial status and trial dates; and (6) monitor release eligibility of detained defendants and inform judicial officers, prosecutors, and defense attorneys of changes in status. Deeley Report at 10.

The Deeley Report recognized that the key issue is funding. Id. at10. The cost, based on 1990 dollars, was almost $5.5 million annually for 19 counties that excluded the so-called "Big 5" -- Anne Arundel County, Baltimore City, Baltimore County, Montgomery County, and Prince George's County. The cost for Baltimore City alone was $2.4 million. Id. at 11. If the 19 small counties would have cost $5.5 million, and Baltimore City would have cost $2.4 million, the other four large counties would probably have cumulatively cost at least another $5.5 million. At about 3% per year increase, the cost in 2002 would be about $20 million. Presumably, one of the many reasons for

such a program would be to reduce the cost of pretrial detention. At a per diem median cost of about $50, id. at 11-12, a reduction of even 10,000 bed days would only reduce the $20 million projected cost by about half a million dollars.

There has always been the notion that if Government simply "throws" enough money at a problem, Government can solve the problem. However, even if there were unlimited funding for the statewide pretrial services envisioned, there remains serious question as to Government's ability to accomplish the necessary tasks, as effectively as the current system. Many government programs have invested enormous amounts of money – and failed. Moreover, the statistical data shows that Corporate Surety Bail is the most effective method of release.

It is realistic to believe that (1) Government cannot properly supervise the conduct of those defendants who are released awaiting trial so as to reduce the number of crimes committed by defendants on pretrial release; (2) Government cannot properly accomplish, with an ever-increasing defendant population, an FTA rate as favorable the current FTA rate; and (3) Government cannot efficiently locate, re-arrest, and return to the Court's jurisdiction the FTA's, as indicated by the current backlog of unserved warrants in the two most active venues -- Baltimore City and Prince George's County. Thus, there will be the enormous – and virtually certain -- cost in dollars and human and societal terms because of the "at large" FTA's.

2. Attorneys at Initial Appearances and Bail Review Hearings

Regarding Recommendation #2 (defense counsel at initial appearances and bail review hearings) and Recommendation #3 (prosecutors at bail review hearings), this Response neither opposes nor supports either, but it does note the issue of cost and efficacy. The presence of public defenders and prosecutors makes the process adversarial and, as (former) Chief Judge Rasin informed the Deeley Committee, "may result in higher bails, as occurred to the consternation of Public Safety in Baltimore City when prosecutors and defense attorneys began attending bail reviews in person." Deeley Report at App. B-21.

With regard to Recommendation # 2, Professor Colbert relies on the results of his "Lawyers at Bail Project" (LAB) to support the recommendation. He asserts that "[p]roviding legal representation to indigent defendants at the bail review hearing would significantly reduce Maryland's pretrial jail population [and that] the popular stereotype of arrestees is inaccurate: most arrestees had strong ties within the community and were good risks to return to court." Colbert Report at 26. Although a critique of the LAB project and resulting report, authored by Professor Ray Paternoster and Professor Shawn Bushway (LAB Report), is not within the scope of this Response, certain observations are noteworthy:

The LAB control group consisted of 300 subjects, with 175 assigned to LAB attorneys and 125 in the control group. **The typical LAB client reportedly "had been with their current employers an average of four years."** Id. n.95. Experience makes it hard – if not impossible to believe -- that this would be a typical Baltimore City defendant. Moreover, a defendant with that employment status (1) would be unlikely to qualify as "indigent," and (2) would most likely be granted ROR by a Commissioner or District Court Judge, with or without an attorney present,

particularly when charged with a non-violent crime, to which the LAB project was limited. State Public Defender Stephen Harris, Esquire, indicated that the LAB project sample of participants was "skewed." See "Little Hope for State Wide Bail Bill," The Daily Record (March 16, 2000).

In addition, it is unclear whether the law provides indigent defendants with public defenders for initial appearances before Commissioners. From a constitutional standpoint, the Sixth Amendment right to counsel applies to preliminary hearings, under Coleman v. Alabama, 399 U.S. 1 (1970), and Green v. State, 286 Md. 692, 695 (1980), and arraignments, under White v. Maryland, 373 U.S. 59, 60 (per curiam), and Hamilton v. Alabama, 368 U.S. 52, 54 n.4 (1961), because they are adversarial trial-like confrontations. However, the Sixth Amendment right to counsel does not apply to initial appearances, under Gerstein v. Pugh, 420 U.S. 103 (1975), and Hebron v. State, 13 Md. App. 134, 138 (1971), because that is a non-adversarial, non-critical stage proceeding.

However, the analysis cannot stop there because for Maryland defendants, "'the right to counsel under the Public Defender Act is significantly broader than the constitutional right to counsel." McCarter v. State, 363 Md. 705, 713, 770 A.2d 195, 200 (2001) (quoting State v. Flansburg, 345 Md. 694, 700, 694 A.2d 462, 465 (1997)). Md. Ann. Code art. 27A, □ 6(b), provides that "[r]epresentation . . . shall extend to all stages in the proceedings, including custody, interrogation, preliminary hearing, arraignment, trial, . . . and appeal."

In McCarter, the defendant prayed a jury trial in District Court, and the case was transferred to the Circuit Court. 363 Md. at 707, 770 A.2d at 196. The issue in McCarter arose at the defendant's Circuit Court arraignment, which the Court noted is now called an "initial appearance." Id. at 716, 770 A.2d at 201. The Court held that the defendant had a statutory right to counsel at his initial appearance before the Circuit Court because that appearance was an "arraignment," which is an enumerated proceeding in section 4(d) of the Public Defender's Act. 363 Md. at 715-16, 770 A.2d at 201. Moreover, "regardless of whether the . . . proceeding was an 'arraignment,' within the meaning of the statute, the statutory right to counsel 'extends to all stages in the proceedings.' 'All' means 'all' . . . The specific types of proceedings listed in the statute and rules are for purposes of illustration only." Id. at 716, 770 A.2d at 201.

The language of section 6(b), and the dicta of McCarter, seem to require counsel at the initial appearance before a Commissioner. This is supported by the statutory language "all stages in the proceedings" and the McCarter Court's broad interpretation of this language. Moreover, even though the laundry list of counsel occasions does not include the initial appearance before a Commissioner, the list starts with "including" and is only for illustration purposes. Furthermore, section 4(b)(1) may be read to mean that counsel is provided at all stages once the defendant reaches "presentment before a commissioner or judge." In addition, Md. Rule 4-213(a)(3) requires the Commissioner to make a pretrial release determination, which, under Md. Rule 4-216(f), includes "[i]nformation presented by defendant's counsel."

The counter argument is that the statements in McCarter are mere dicta as to whether the defendant has a right to statutory counsel before a Commissioner. Because McCarter addressed the right to counsel at a Circuit Court arraignment, which is constitutionally and statutorily mandated, its dicta may not resolve the issue. The expression of one is the exclusion of others. "Initial

appearance" before a Commissioner, under Md. Rule 4-213, "preliminary hearing," under Md. Rule 4-221, and "arraignment" (or "initial appearance" in the Circuit Court) are terms of art, reflecting three distinct steps in the pretrial phase.

In section 6(b), the legislature expressly included "preliminary hearing" and "arraignment," as stages for which a public defender would be provided. However, there is a striking change of expression, as the legislature excluded "initial appearance" from its otherwise all-inclusive laundry list. In addition, when a defendant appears before a Commissioner for an initial appearance, one of the Commissioner's duties, under Md. Rule 4-213(a)(2), is to inform the defendant of the right to counsel, which sounds like a future event.

Even if the statute provides for public defenders at initial appearances, such representation is problematic in light of the requirement to verify indigency. An attorney is only provided, at taxpayer expense, to individuals who are indigent. Md. Ann. Code art. 27A, § 7(a), provides:

> Eligibility . . . shall be determined on the basis of the need of the person seeking legal representation. Need shall be measured according to the financial ability of the person to engage and compensate competent private counsel . . . Such ability shall be recognized to be a variable depending on the nature, extent and liquidity of assets; the disposable net income of the defendant; the nature of the offense; the effort and skill required to gather pertinent information; the length and complexity of the proceedings; and any other foreseeable expenses.

The Public Defender's Office must promulgate administrative regulations, establishing the eligibility criteria. See 79 Op. Md. Atty Gen. 354 (1994). Section 7(b) requires "[t]he Office of the Public Defender [to] make such investigation of the financial status of each defendant . . ." Section 7(a) provides:

> In the event that a determination of eligibility cannot be made before the time when the first services are to be rendered, the office may undertake representation of an indigent person provisionally, and if it shall subsequently determine that the person is ineligible, it shall so inform the person, and the person shall thereupon be obliged to engage his own counsel and to reimburse the office for the cost of the services rendered to that time.

Section 7(d) provides that "[t]he reasonable value of the services rendered to a defendant pursuant to this article shall constitute a lien on any and all real property or personalty in which the defendant shall have or acquire an interest, except for the residence of the defendant." Section 7(d)-(h) establishes (1) a mechanism for perfecting the lien, (2) an adversarial hearing for the defendant to contest the State's entitlement to the lien and the value of the services rendered, (3) a mechanism for separately indexed books for the recordation of the liens, (4) the collection of the moneys due to the State, and (5) court orders of reimbursement, both in context of the criminal case and other than in the context of the criminal case.

Regarding Recommendation #3, seemingly, the presence of an assistant state's attorney at a

bail review hearing should be at the discretion of the State's Attorney,[22] as opposed to being compulsory. Again, it is a cost and efficacy issue, which the State's Attorney in each venue is necessarily best suited to determine, whether as to a particular case or as to policy, taking into account all considerations, including fiscal considerations.

3. Judicial Education

As regards Recommendation #4 (judicial education), one could hardly discourage the notion of educating Commissioners and Judges. This Response supports the proposition. Indeed, Commissioners and Judges should be educated as to the effectiveness of Corporate Surety Bail, particularly the statistical data, as well as the public safety and fiscal considerations, all of which suggest that, if anything, greater utilization of fully secured bail -- and a reduction in ROR, Unsecured Bail, and 10% Deposit Bail -- is warranted.

IV. A Summary of the Colbert Report Inaccuracies

From a review of the materials giving rise to, and included in, the Colbert Report and the Deeley Report, it appears that both Reports were actually multiple steps in Professor Colbert's goal of eliminating Corporate Surety Bail in Maryland. If philosophical differences were all that were at issue, this section of the Response would be unnecessary. Of course, as noted earlier, had the appropriate fact gathering and deliberative process been undertaken, this entire Response would have been unnecessary. Many of the inaccuracies, omissions, and internal inconsistencies in the Colbert Report have been covered, but a recapitulation of the most significant errors may be helpful.

A. Bail Bondsmen Are the Primary "Source of Information" for Commissioners in Determining Whether to Set Bail

B. Corporate Surety Bail Is Largely Unregulated

C. The FTA Rate in Maryland is 5.3%, with Almost 95% of Defendants Appearing As Scheduled in the District Court

D. There Is No Objective Basis for Believing Corporate Bondsmen Provide a Greater Assurance That Defendants Will Appear in Court

E. Corporate Bondsmen Apprehended Only 245 FTA Defendants on Corporate Surety Bail in 1998 and Only 211 Such FTA's in 1999, and the Police Apprehended the Rest of the Defendants on Corporate Surety Bail

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[22] According to the Deeley Committee minutes, this practice exists in Harford County. Deeley Report at App. B-14. Robert Dean, Esquire, a Deeley Committee member, remarked that "if pretrial services are present, an assistant state's attorney would have nothing to add." Id.

One additional aspect of the Colbert Report -- the discussion of the revenues of Corporate Surety Bail, as estimated by Professor Colbert -- merits discussion because it presents incorrect information that either has the effect of unfairly and incorrectly casting the bail industry in an unfavorable light.

The Colbert Report estimates annual revenue in Maryland of Corporate Surety Bail to be between $42.5 million and $170 million – a range of $127.5 million, which lacks credibility by establishing a range for which the "high" is four times the low, i.e., $42.5 million x 4 = $180.0 million. It appears that Professor Colbert derived his revenue estimate by examining the financial statements filed by the various insurance companies that are authorized by the Maryland Insurance Administration and that have qualified, with the District Court, to write bail bonds in Maryland. Colbert Report at 45.

Despite an acknowledgment that the "Department of Insurance [sic, Maryland Insurance Administration] and the District Court personnel suggested contacting the surety company and individual bail bondman to obtain the revenue information," Professor Colbert gathered the names of surety companies from the District Court list, obtained annual statements, and compiled, with limited exceptions, each company's entire surety line premiums, without regard for how much, if any, of its premiums were for bail bonds. To compound the error, the Colbert Report, apparently without any further inquiry, and based solely on one permitted method of accounting and reporting of bail premiums, applied a factor of ten to the number he erroneously compiled, as constituting premiums. Because those companies authorized to write bail bonds had reported total surety premiums of $17 million, he decided that as much as $170 million in bail premium may have been generated.

Professor Colbert apparently did not check with District Court personnel or JIS, which is the readily available and accessible District Court's computer information system, to see which companies had appointed bail agents and were writing bail bonds. He could have learned that several of the companies whose premiums he included did not have any appointed agents, and that some he included have either (1) never written a bail bond, such as Atlantic Bonding Company, or (2) if they ever did write bail, they are – and were for the year he studied -- inactive, such as National Surety Corporation of Chicago and St. Paul Mercury Insurance Company.

Although cognizant that companies may write other types of surety bonds other than bail bonds, Professor Colbert did not inquire as to what portion, if any, of the reported Corporate Surety Bail premiums for each company was attributable to bail bonds. Moreover, many companies write not only bail bonds, but other types of surety bonds, e.g., contractor's performance bonds, supersedeas bonds, probate bonds, and the inclusion of all Maryland surety premiums would greatly affect any estimate.

Professor Colbert used a methodology that would result in a greatly exaggerated estimate. Although he apparently recognized that there are two appropriate accounting methods for bail premiums ("Amwest, too, reporting only net premiums received." Colbert Report, at 42 n.147). He nonetheless multiplied the "so-called" reported revenue of $17 million by 10, which sharply distorted upward the estimates. He ignored the absence of a Supplemental Schedule of Premiums Written, as existed for those companies reporting "net." Moreover, Professor Colbert failed to – even though

urged to -- contact individuals within the Corporate Surety Bail community.

Lastly, but importantly, Professor Colbert apparently made no attempt to reconcile the number of Corporate Surety Bail defendants for whom bonds were written. According to App. I of the Colbert Report, in 1998, 35,925 defendants used the services of a Corporate Bondsmen. Let's assume that additional bail bonds posted at the Circuit Court would add 10%, there would be nearly 40,000 Corporate Surety Bail defendants purporting to generate up to $170 million in premiums – from $1.7 billion in the total face value. That would mean that the average bail was about $42,500, by dividing $1.7 billion by 40,000 bail bonds. Thus, for the revenue estimate to be accurate, the average bail would have to be $42,500 and not $8,239 (which was the Baltimore City average as explained in Colbert Report). Colbert Report at 44, n.151. To further complicate this, industry information reveals that the average bail in Maryland, in 1998, was below $7,000, which is 15% percent less than the average reported by Professor Colbert.

V. Pressing Priorities

The truly "pressing priorities" within the criminal justice system need addressing.

A. The Need for Substance Abuse Treatment

"'The crisis that's killing our city' is how Baltimore City Mayor Martin O'Malley refers to drug addiction." Smart Steps: Treating Baltimore's Drug Problem 1 (2000). In the criminal justice system in Maryland – and, in particularly in Baltimore City -- the most pressing need is for substance abuse treatment. Repeatedly, the call has been for increased funding to combat substance abuse, including expanding the capacity and accessibility of the treatment system. One of the many goals is to reduce crime. Id. at 34-35; see "Baltimore's Drug Problem: It's Costing Too Much Not To Spend More On It" (Abell Foundation, October 1993).

A study of arrestees conducted at Central Booking Center in Baltimore City confirmed the significant correlation between drug abuse and crime, with almost three-quarters of the study's sample testing positive for at least one drug. Findings from the 2001 Baltimore City Substance Abuse: Need for Treatment Among Arrestees (SANTA) Project, Wish & Yacoubian (November 14, 2001) (Wish Study). Further, Baltimore City has a long standing opiate-positive rate for arrestees that is more than double that of arrestees in other Northeast cities. Id. at 6 (urinalysis results). Meaningfully addressing the substance abuse problem has been shown to result in significant reductions in crime. See "Report: Drug Treatment Works," The Daily Record at 1A (January 31, 2002).

B. Parole and Probation Needs

In conjunction with the need for substance abuse treatment, there is the need for comprehensive parole and probation services to minimize or prevent repeat offenders. The value of parole or probation, at least in terms of taxpayer expenditure, is supposed to be the savings resulting from not having to imprison offenders. The savings are, however, a "fiction" if the convict is not adhering to the conditions of parole or probation and not getting meaningful supervision or, even

worse, victimizing others by committing additional crimes. The Division of Parole and Probation is understaffed to supervise and address the needs of those they supervise, and is lacking necessary automation to improve supervision. See "Probation Overhaul its Money Snags," The Baltimore Sunpapers at 2F (November 18, 2001).

C. Juvenile Crime

There are grave concerns with juvenile crime. The concepts of prevention, early intervention, and rehabilitation are fundamental to the juvenile justice system, as numerous studies have shown the likely progression from juvenile offender to adult offender. Although recent articles have focused on certain abuses that have occurred at several juvenile facilities, it is clear that resources must be devoted to early intervention, counseling, and alternatives to avoid the ascension of juvenile offenders -- particularly regarding violence and drugs -- to adult offenders. According to a report by the Violence Policy Center, Maryland has the highest rate of youth handgun killings in the country, with many of the killings directly linked to drug dealing, robberies, and aggravated assaults. See "State Worst in Gun Study," The Baltimore Sunpapers at 1B (November 29, 2001). Moreover, education regarding the effects of substance abuse must be a priority, as the Wish Study showed that the pivotal intervention point is prior to age 26.

D. Overburdened Police

As indicated by the discussion on "open warrants," police departments -- particularly Baltimore City -- are overburdened. Although Baltimore was ranked the fourth most violent city, according to the FBI's 2000 Uniform Crime Report, significant progress -- including double digit decreases in the murder rate and violent crime -- has been made. This is due, in large measure, to the steps taken by Mayor O'Malley and Commissioner Norris. Nonetheless, there is a significant amount of work to be done to continue the reduction in crime in Baltimore City and throughout the State. Recent events and concerns stemming from the September 11th terrorist attack, including anthrax scares, have only served to further burden our police forces. As things "normalize" -- if they ever can truly "normalize" again -- police resources must be committed to reducing crime, particularly violent and drug related crimes.

VI. Conclusion

This Response concludes that Corporate Surety Bail is the most effective and cost efficient form of pretrial release in assuring that defendants appear in court, as required. Moreover, if they fail to appear, Corporate Surety Bail is the most effective at promptly locating and returning FTA's to the Court's jurisdiction. The clients of Corporate Surety Bail are those defendants that have been judicially determined to be "least reliable." Even with that handicap, Corporate Surety Bail has outperformed all other forms of pretrial release.

Moreover, Corporate Surety Bail has accomplished its mission with no expense to the taxpayers. In fact, Corporate Surety Bail has saved countless tax dollars by producing lower FTA rates and by returning to the Court's jurisdiction a higher percentage of its FTA's. This has also promoted the orderly administration of the criminal justice system and enhanced public safety.

Any suggestion that the criminal justice system should expand the use of other forms of pretrial release – specifically, Unsecured Bail and 10% Deposit Bail are ill-advised. Any suggestion to crate a $20 million a year administrative agency makes no sense when the mission of that agency is already being accomplished (1) better than it would be accomplished by a governmental agency, and (2) with the users of the services – and not the taxpayers – paying for the services. Instead of curtailing or eliminating Corporate Surety Bail, the evidence supports its expanded use.