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# MEMORANDUM

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Date: August 24, 2020

To: The Honorable Chairman and Members  
Pima County Board of Supervisors

From: C.H. Huckelberry  
County Administrator

A handwritten signature in black ink, appearing to be "CHH", is written over the printed name "C.H. Huckelberry".

Re: **Community Bond Program**

I am attaching a report prepared by Public Defense Services Director Dean Brault, including a memorandum from Farhang & Medcoff, PLLC regarding Permissibility of Pima County's Funding of a Non-Profit Bonding Agency. The report discusses the possibility of the County implementing a Community Bond Program (CBP) to help reduce the number of individuals who are held in the Adult Detention Complex because of the inability to pay for a bond or cash bail.

I understand that some in the reform community prefer a system that eliminates cash bail or bonds all together. Such is desirable but not permitted because of current Arizona law. Reform and/or modification to Arizona Law will have to occur by approval of the legislature and governor. Until that time occurs, the CBP may be a reasonable substitute.

It should also be noted that the Criminal Justice Reform Advisory Commission has ranked as one of its top reform priorities, the elimination of cash bail or bonding.

CHH/lab

Attachment

c: Wendy Petersen, Assistant County Administrator for Justice and Law Enforcement  
Dean Brault, Director, Public Defense Services

# Safely Reducing the Jail Population Using Pre-trial Risk Assessments and a Community Bond Program



By Dean Brault



August 2020

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## List of Abbreviations

ADCRR	Arizona Department of Corrections Rehabilitation and Reentry
COR	Conditions of Release
IA	Initial Appearance
PCAO	Pima County Attorney's Office
PDS	Public Defense Services
PSA	Public Safety Assessment
PTS	Pre-Trial Services
RFP	Request for Proposal
ROR	Release on Own Recognizance

## Abstract

The vast majority of inmates at the Pima County Adult Detention Complex are held pending resolution of a criminal case. At initial appearances, Pretrial Services makes recommendations of Conditions of Release to the court for each defendant on felony cases. Those recommendations are followed about 86% of the time in Pima County. Data from 2017 shows that almost one in 10 defendants are held on a bond despite a recommendation for release from Pretrial Services. Over 76% of these defendants were subsequently released while their case was pending, but only after spending days, weeks or months in jail. This paper proposes funding a Community Bond Program as a solution that will stabilize the lives of these defendants by releasing them quickly, which will prevent tens of thousands of unnecessary days in jail and the millions of dollars of related expenses every year.

## Statement of the Problem

Individuals who are incarcerated pre-trial are mostly confined not because they were denied bail or were a flight risk or a were a danger to the public, but rather because they could not muster the financial resources needed to secure their freedom<sup>1</sup>. An individual's inability to afford monetary bail is not an indicator of that individual's guilt, an accurate predictor of the risk of danger that individual poses to others, or an indicator of whether that individual will show up for a scheduled court proceeding. The incarceration of individuals who cannot afford money bail without meaningful consideration of other alternatives is a violation of due process and equal protection.

Individuals who are incarcerated pre-trial are more likely to plead guilty, be convicted of a felony, receive longer sentences, and be offered less attractive plea agreements<sup>2</sup>. Indigent defendants who cannot post a cash bond are especially prone to losing employment, housing, vehicles, and even their children without adequate community support and resources, even if jailed for a relatively short period of time<sup>3</sup>.

Evidence-based pre-trial assessment of a defendant's likelihood to appear in court and remain arrest-free while awaiting trial can increase successful pre-trial release outcomes and diminish racial disparities without imposing unnecessary financial conditions, impairing the judicial process, or jeopardizing public safety<sup>4</sup>. Despite these facts, the court often does not follow recommendations for release utilizing evidence-based pre-trial assessments and holds many defendants on bonds that they cannot afford.

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<sup>1</sup> Reaves, Brian A., U.S. Dep't of Justice, *Felony Defendants in Large Urban Counties*, 2009, at 15 (2013).

<sup>2</sup> Lowenkamp, Christopher T., et al., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (2013); Phillips, Mary T., N.Y. City Criminal Justice Agency, *A Decade of Bail Research in New York City*, 115-17 (2012).

<sup>3</sup> *Pretrial Justice: How Much does it cost?*, 2 (Pretrial Justice Inst. 2017); Melissa S. Kearney et al., *Ten Economic Facts about Crime and Incarceration in the United States*, THE HAMILTON PROJECT 13 (2014).

<sup>4</sup> Arifuku, Isama, National Council on Crime & Delinquency, *Racial Disparities at Pretrial and Sentencing and the Effect of Pretrial Services Programs* (2013).

## Background

Pretrial Services (PTS) is a division of the Pima County Superior Court that screens defendants at the Pima County Adult Detention Complex and makes recommendations to the Tucson City Court Magistrates who conduct initial appearances (IAs) and set conditions of release (COR). IAs happen at 9 a.m. and 8 p.m. every day of the year. Data has consistently shown that in Pima County the agreement rate between PTS's recommendation and the court's COR is approximately 86%.

Defendants who cannot post their bond remain in jail until their charges are dismissed, their case is resolved, or the court modifies their COR which requires defense counsel to file a motion and a hearing. Such motions are usually heard four weeks or more after the arrest. Even a short time in jail can have profound impacts on the lives of defendants with pending cases, all of whom are constitutionally presumed to be innocent. Indigent defendants who cannot post their bond can lose their job, their housing, their vehicle, as well as their children if they do not have adequate financial or community support. These impacts are especially frustrating in cases where the pre-trial assessment suggests the defendant may be successfully released on personal recognizance or be supervised, and yet the court set a bond. Most of these defendants are ultimately released, but only after being in custody for several days, weeks, or months.

### Initial Proposal

In June of 2018, staff at Public Defense Services (PDS) approached me with an idea to reduce the population of the Pima County Adult Detention Complex. The idea was that Pima County could reduce its jail population by posting bonds for any individuals that received a release recommendation from PTS.

In researching the feasibility of this idea, I first noted that it is possible for an agency to use secured bonds, which do not require the movement of money, if licensed as a professional bondsman per Rule 7.1(h) of the Arizona Rules of Criminal Procedure. This is required if the agency concurrently posts five or more secured bonds.

I then explored the possibility of Pima County creating a professional bonding agency. After weeks of research, I concluded that Pima County does have the legal capacity to create a department that could become a surety and employ professional bondsmen. My original proposal was to create such a department that would hire employees who would become professional bondsmen. They would contract with defendants and then post a bond in all cases where PTS recommended release and the court set a bond, excluding homicide, sex, and child exploitation cases and cases with a bond over a set amount. Defendants with a hold from any jurisdiction would also be excluded. My proposal for the bond amount limit was \$30,000, which would cover the vast majority of cases and prevent the court from moderately increasing the

bond amounts in order to further detention. The \$30,000 limit would also exclude cases with charges sufficiently serious that would warrant a bond exceeding that amount.

Based on my experience reviewing PTS reports when assigning cases, my knowledge of when Motions to Modify Conditions of Release are typically heard, and the frequency of those motions being successful, I initially estimated that this plan would save more than 20,000 jail bed days per year. Given the known cost of second and subsequent jail bed days, this initial estimate showed potential savings of approximately \$2,000,000 per year. I also confirmed that there would be no risk of the County losing the bonds that are posted because all bond forfeitures are ultimately deposited into the County's general fund. While researching other community bond foundations, I learned that no other jurisdiction has a program similar to this proposal.

On June 22, 2018, I presented this idea to Chuck Huckelberry, Pima County Administrator, at a meeting with the Criminal Justice Reform Unit. On July 2, 2018, I followed up with a memorandum to the County Administrator, outlining the details of this proposal and suggesting the appointment of outside counsel to advise on its feasibility. On July 10, 2018, I met with many of the relevant stakeholders. At that meeting, the group expressed interest in the project, but believed that a non-profit it should administer it. At that meeting, then Deputy County Administrator Tom Burke disagreed that outside counsel was necessary and indicated he would obtain legal advice from the Civil Division of the Pima County Attorney's Office (PCAO). At that meeting, Pima County Superior Court Administrator Ron Overholt approved of a data request I made to quantify the actual impact of such a program.

At a meeting on August 24, 2018 to follow up on the progress of this proposal, I learned that the PCAO had declared that they did have a conflict of interest. On October 3, 2018, Andy Flagg, Chief Civil Deputy of the PCAO, indicated in an email that to obtain outside counsel, a request was first needed to be made for the PCAO to review the project. Once the PCAO received the request, he confirmed that it would then be referred to outside counsel because he confirmed that a conflict did exist. Assistant County Administrator Wendy Petersen began exploring the proper procedure to obtain outside counsel.

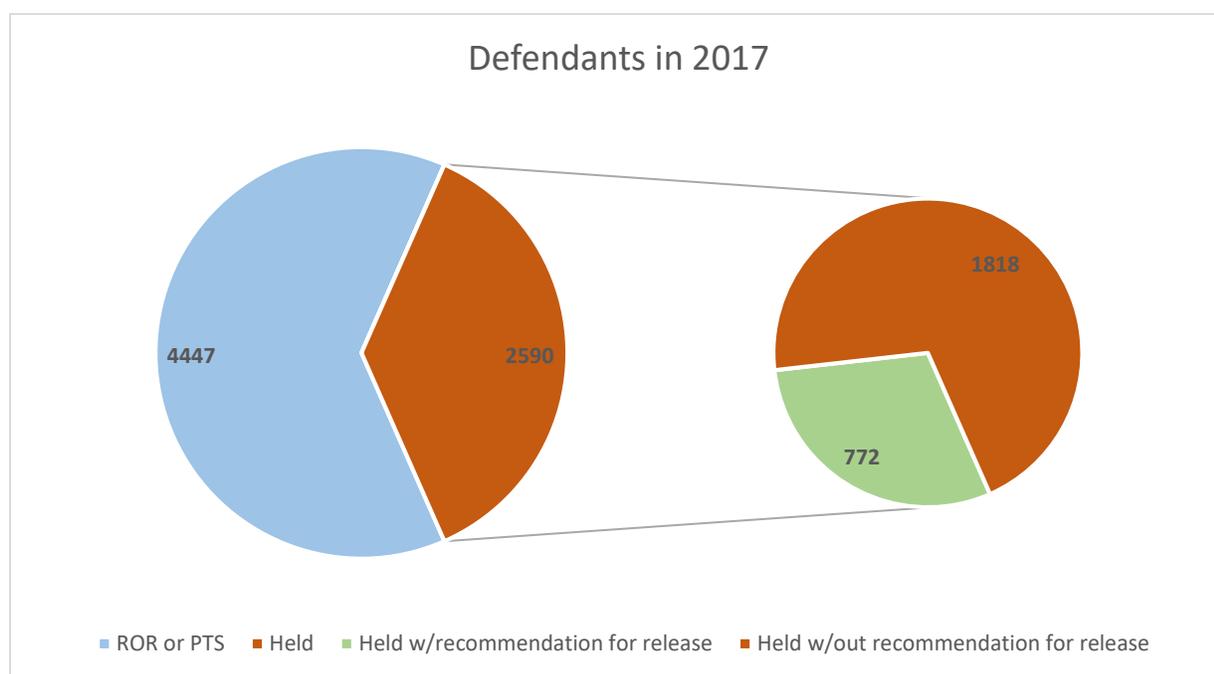
### *Data Analysis*

In the following months, PDS obtained data from PTS for the calendar year of 2017 to calculate the impact of this proposal to fund a non-profit community bond agency. Multiple queries needed to be run to obtain the necessary data. It then took several months to process the data to avoid making improper assumptions to ensure accurate results.

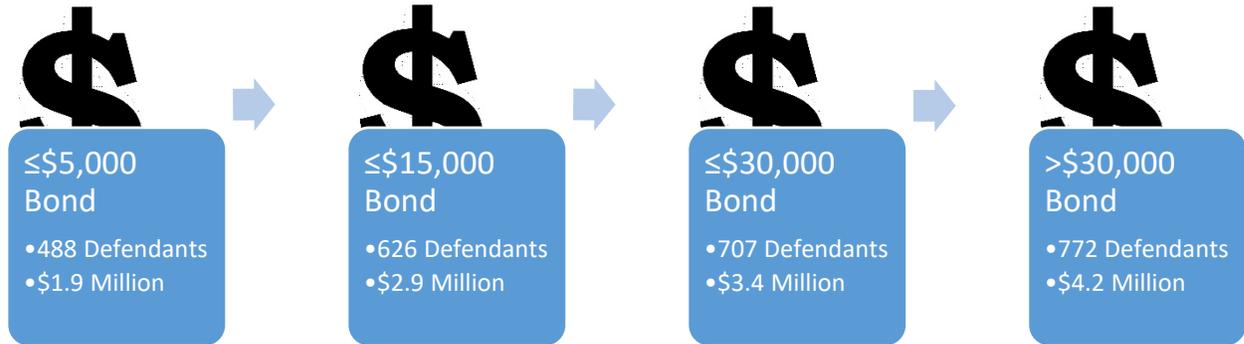
On February 27, 2019, I sent an email to Assistant County Administrator Wendy Petersen and Deputy County Administrator Tom Burke with final numbers of the impact a Community Bond

Program would have had on the 2017 calendar year for their review. On March 13, 2019, I met with Mr. Burke, who accepted the validity of the data after reviewing the results.

PDS analyzed the data released by PTS to determine the exact number of days that defendants who would be eligible to participate in the Community Bond Program actually spend in jail before being removed from the jail in any manner. The PTS data indicated that in calendar year 2017, there was a total of 7,037 defendants. Of these, 4,447 were Released on Recognizance (ROR) or to the third-party custody of PTS and 2,590 were held in custody. There were 772 people held on bond despite a PTS recommendation for release, which comprised 11.0% of the total number of defendants who had an initial appearance that year. Of those held on bond with a recommendation for release, 29.5% of those cases were dismissed prior to indictment.



We analyzed this data to identify cases that had a PTS recommendation for release that had bonds set at \$5,000 or less, \$15,000 or less, \$30,000 or less, and over \$30,000. The number of people released that year under a Community Bond Program with those limits would have been 488, 626, 707 and 772, respectively. Jail bed day savings on those cases would have been collectively, 19,420, 28,709, 34,124 and 41,962, respectively. Using the current rate that the jail charges agencies other than Pima County for second and subsequent days of incarceration, these jail bed days would represent collective savings of \$1,937,922, \$2,864,871, \$3,405,234 and \$4,187,388, respectively. The jail population would have decreased by 2.9%, 4.4%, 5.2%, and 6.4%, respectively. The average number of days these defendants spent in jail after the day of their initial appearance was 39.8, 45.9, 48.3 and 54.4, respectively.



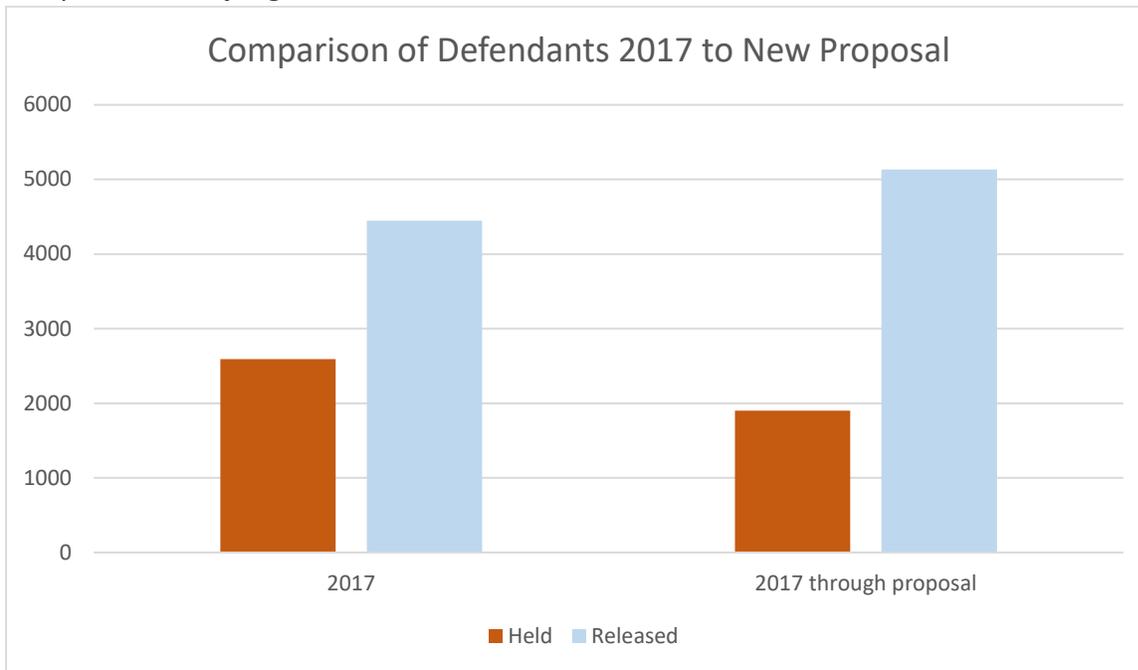
Analysis of the 2017 PTS data showed that of the 772 defendants who were held on a bond despite a recommendation by PTS for release, 228 had their charges dismissed pre-indictment, of which 130 did not post the bond that was set and 98 did post their bond. There were 214 defendants who were indicted that posted their bond at some point. There were 141 defendants who were indicted and filed a Motion to Modify Conditions of Release that was granted by the court. The data also showed that there was a total of 189 defendants who either never filed a Motion to Modify Conditions of Release, or that motion was denied. Of this total, there were 161 that had bonds set at \$30,000 or less that initially appeared to meet the proposed requirements of the Community Bond Program.

Because this number seemed to be higher than expected, I subsequently researched every eligible case where no motion was filed or one was not granted. I discovered that seven of these cases would not meet the requirements of the program due to the type of charges. Another six would have been excluded because of existing holds placed on the defendant. There were also six cases that were erroneously included in this category because they were released after posting a bond or having a Motion to Modify Conditions of Release granted, and for some reason were not properly identified. This reduced the number of defendants eligible for the program who did not file a successful Motion to Modify Conditions of Release from 161 to 142.

These new figures would reduce the total number of defendants released under this program from 707 to 694. This reduction of 1.8% would impact the calculation of the number of bed days and the associated estimated savings. This would still result in a savings of approximately 33,497 bed days at an estimated cost of \$3,342,620 under the proposed conditions. The original calculation of bed days saved was 34,124 with a calculated cost of \$3,405,234.

The 694 defendants that would have been released under this program would constitute a 26.8% reduction in the total number of defendants who were ordered to be held in the jail at initial appearances. These defendants who would be eligible for this program represent 9.9% of the

total number of defendants in 2017 who had an initial appearance on felony charges in Pima County. Analysis of this data also showed that the overall success rate of Motions to Modify Conditions of Release on these cases was 93.0%, which confirmed anecdotal evidence that the vast majority of defendants with recommendations for release are getting released after seeing a Superior Court judge.



Further analysis of this group of 142 defendants who did not file a Motion to Modify Condition of Release showed that 10 of them had their charges dismissed post-indictment. It also showed that only 1.1% of the total number of defendants in 2017 would have been released under the program and then need to go back into custody after being sentenced to the Arizona Department of Corrections Rehabilitation and Reentry (ADCRR). Despite the fact that defendants who are sentenced to ADCRR and get credit for the time they serve, the County is required to pay for any pre-sentence incarceration. It is also important to note that defendants get community supervision credit of one day of every seven days of their sentence once they are sentenced to ADCRR. Defendants do not earn such credit for pre-sentence incarceration, which means that defendants who get sentenced to ADCRR ultimately spend more time in custody if they have been incarcerated pre-trial.

After the initial analysis of this data, on May 2, 2019, the County Administrator requested that the Board of Supervisors appoint outside counsel. Pima County appointed the law firm of Farhang and Medcoff as outside counsel to provide a legal analysis of the permissibility of funding a non-profit bonding agency. On July 2, 2019, Kristen Wendler, a partner at Farhang and Medcoff, drafted a memorandum concluding that this program is not prohibited by current federal and state law. See Attachment 1.

## *Modified Proposal Adjusting Supervision and Including Misdemeanors*

Since July 10, 2018, the plan was for the agency administering the Community Bond Program to supervise all the defendants released under that program. The intent was to have PTS share their standards of supervision with the non-profit agency, who would attempt to mirror the level of supervision of PTS. I frequently discussed this program with Domingo Corona, the Director of Pretrial Services, and encouraged him to explore the idea of PTS providing the supervision of the program participants.

On May 5, 2020, Domingo Corona notified me that Pima County Superior Court Administration had agreed that Pretrial Services could perform the supervision portion of the Community Bond Program. The non-profit would still be the agency running the program, but the contract that participants would sign with them would be to follow the conditions of release established by PTS.

Having PTS conduct the supervision was a significant development that has many advantages. First, it will mean that the program has lower expenses. The non-profit will only need funding for a director and a very small staff to get the contracts with the participants reviewed, signed, and processed instead of needing additional staff to perform the supervision of the participants. The County could incur a minimal expense for additional PTS staff if needed because of a higher than expected the number of program participants. This modification would also create a consistent and uniform level of supervision, which will strengthen the data collected when measuring performance and effectiveness. It will also be neutral regarding judicial decision making, which could have been impacted if there was any actual or perceived differential in the quality of supervision.

In meetings with Procurement, I learned that we cannot limit a Request for Proposal (RFP) to be available to only non-profit agencies. However, given that there will be no opportunity to profit from administering this program, the reality is that only non-profits are likely to respond to the RFP. The conditions in the RFP would be tailored to prioritize the organizational structure of a non-profit that serves our community. Nonetheless, I have and will refer to the community bond agency as the non-profit for simplicity. It is also worth noting that, as part of the RFP process, PDS cannot be the administrator of the program because of a conflict of interest, hence my suggestion that Grants Management and Innovation administer the program. It is also possible to select another department of the County.

On June 22, 2020, I was asked by the County Administrator to address the impact of the Community Bond Program on the misdemeanor population at the jail. The Community Bond Program, as originally proposed, would have no impact on the misdemeanor population because it requires the use of PTS reports that are based on Public Safety Assessment (PSA) scores and other structured factors used by PTS to arrive at a release recommendation. Notwithstanding that, I explored potential changes to the program where misdemeanors could be included.

On June 25, 2020 I met with Ron Overholt, the Pima County Superior Court Administrator, and Domingo Corona and Michelle Moore from PTS where we discussed options that could make the Community Bond Program applicable to misdemeanor cases.

On misdemeanor cases, by administrative order, PTS now releases many defendants charged with misdemeanors prior to booking into the jail. On the misdemeanor cases that are booked into the jail, PTS does not calculate a PSA score or draft the same kind of report as generated for felonies. On these misdemeanors, PTS currently only provides a report to the court that makes a recommendation for or against Release on Recognizance (ROR), which includes recommended conditions, any status, any holds, and identifies the current charges.

There are several types of misdemeanor cases that are ineligible for pre-booking release. Defendants charged with Domestic Violence are statutorily required to be seen by a judge at an initial appearance. Some defendants with prior failure(s) to appear after having been released pre-booking will be seen by a judge. Cases where a misdemeanor court issues a suggested bond of \$999, which is a signal that the court issuing the warrant wants to set stricter conditions of release that will secure the defendant's presence in court, will always be seen by a judge. Defendants who are unwilling or unable to interact with PTS are also ineligible for pre-booking release.

PTS had been exploring for some time the possibility of using the PSA and filing reports on misdemeanor cases. PTS is now interested in making that transition, which would then allow misdemeanor cases to be included in the Community Bond Program.

Currently, for multiple reasons, PTS does not provide supervision for any misdemeanor cases. I propose that the program requirement that all defendants released under the program be supervised by PTS be changed to all defendants be supervised at the release level recommended by PTS. This proposal would also have the benefit of eliminating over-supervision in felony cases, which would have happened in some cases under the initial proposal. This would also prevent additional days in jail for defendants who would prefer to wait to post their bond in order to not be required to report to PTS.

Because PTS does not provide supervision on misdemeanor cases, their recommendation would continue to only be either ROR or No ROR on misdemeanor cases. There would be no loop hole that would result in having misdemeanor defendants be supervised by PTS, and hence no excessive strain on the supervision resources of PTS. This proposal would also increase the number of felony defendants who are ROR, which would decrease the stress on PTS supervision staffing. This would also eliminate the criticisms that this program would lead to any over-supervision as expressed by local and national community bond organizations.

On June 26, 2020, I drafted a memorandum to the County Administrator addressing the impact of the Community Bond Program on the misdemeanor population as originally proposed. I included the proposed change to use the supervision level recommended by PTS, which would address over-supervision and allow the program to include misdemeanor cases.

## **Solution**

Pima County can fund an organization to operate a Community Bond Program. That organization would offer, at no charge, to bond out any defendant who was held on a bond of \$30,000 or less when Pretrial Services recommended release on any case except those with homicide, sex, or child exploitation charges or if the defendant has a hold from any jurisdiction. The defendant would agree to be released on whatever conditions of release were recommended by Pretrial Services.

The organization, which would almost certainly be a non-profit, would likely create a sub-entity that would act as the community bonding agency. They could rely on the parent non-profit for organizational structure and support. The director and other relevant employees would need to take the course offered by the Arizona Department of Insurance in order to be certified as a professional bondsman. There is a \$166 fee to register and the agency would be required to post a \$10,000 bond with the State of Arizona. A Memorandum of Understanding would need to be executed between the non-profit and the Superior Court establishing that the non-profit would post the bonds in eligible cases where the defendant signed the contract and that PTS would provide the supervision for those defendants where they recommended release to PTS.

The assets necessary to secure any bonds posted would be a grant of funds that, by contract with the non-profit, could only be used to cover any bond forfeitures or to post cash bonds for program participants. The RFP would require strict accounting protocols and regular reporting.

Part of the proposal would fund a separate operational account to cover the expenses of the director and employees who administer the contracts with participants. This expense, as stated earlier, will be much smaller without needing to staff to supervise defendants given that PTS will be supervising them.

The contract with the non-profit and the participants would be relatively simple. In exchange for posting the bond for individuals who have a bond set of \$30,000 or less, who are not charged with homicide, sex, or child exploitation charges, and who does not have any kind of hold on them, the participant would agree to abide by whatever conditions of release that were recommended by PTS.

The method of administering these contracts would be for the non-profit to have staff located in the lower level of the jail to work with PTS and jail staff to identify those eligible for participation in this program at initial appearances. Mark Napier, the Pima County Sheriff, has indicated that the non-profit agency will have access to the clients in the lower level. This will greatly expedite releases and reduce the number of defendants being fully booked into the jail.

The Clerk of the Superior Court will facilitate the processing of the bonding agency credentials for the non-profit's employees.

The way professional bonding agencies operate is that when posting secured bonds, no money is actually transferred at the time a bond is posted. With proper credentials issued by the Clerk of the Court, the department at the jail that processes the posting of bonds accepts forms that avow that the agency has the funds to cover the bond in the event of a forfeiture. The paperwork or electronic document is accepted and the defendant is released.

In the event that the defendant fails to appear at court, the judge makes a referral for the forfeiture of the bond. A different judge then makes a determination of whether the defendant failed to appear, considers any reasons for the failure to appear, and then orders that either none, part, or all of the bond posted be forfeited. The bonding agency is then responsible for depositing whatever amount forfeited with the Superior Court. The Superior Court then deposits those funds with the County, which then places them into the general fund. If the defendant appears at all of their hearings, when the case is resolved, the bond is exonerated and that obligation to cover that bond amount is removed.

The benefits of using a bonding agency are that the process is faster and has far fewer administrative costs to the jail and the Superior Court. This project could be accomplished with only posting cash, but the process would be somewhat slower and involve a larger amount of funding to be distributed to the Community Bond Program.

The process detailed above covers secured bonds, which apply to almost all bonds set. Judges, however, have the ability to set "cash-only" bonds. If a judge sets such a bond, the bond must be posted using cash or a cashier's check. The Pima County Jail utilizes a system with professional bonding agencies that allows them to remotely post both secured and cash-only bonds. That system securely links the bank account of the professional bonding agency to the account of the Pima County Jail.

If the system is unavailable or ineffective for some reason, there is an alternative available to address cash-only cases. The Community Bond Program could maintain a supply of cashier's checks in various denominations made payable to the Pima County Adult Detention Complex along with a supply of cash and coins sufficient to post to the exact cent any bond set because the jail will only accept the exact amount of a bond set by a judge. With access to the lower level, a safe would be installed there. Otherwise, the new PTS building would be an alternative location. The cashier's checks would be replaced approximately every 80 days due to expiration dates. This process will ensure rapid releases and not be subject to bank operational hours.

The plan for the RFP is to fund the non-profit's bond fund with a set amount of funding. The mechanism for maintaining that fund would be to have a floor amount, that if reached, would trigger the County distributing an additional set amount. There would also be a ceiling amount where that same set amount would be sent back to the County if the exoneration of cash bonds

increased the balance above that set amount. The transfer of these funds to the Community Bond Program is contingent on bonds being forfeited and the Superior Court continuing to refer Community Bond Program cases for forfeiture, which may be deemed an administrative waste of time given the mechanism of this program.

Since there would be no loss of any money on bonds that are forfeited under this program and the operational expenses would be relatively small, initiation of a Community Bond Program is likely to save Pima County a substantial amount of money. It would meaningfully reduce the population of the jail by saving an average of 48.3 days in jail, which is just short of 7 weeks, per participant.

## **Conclusion**

With approval from the Pima County Board of Supervisors, Pima County can generate a Request for Proposal to establish a Community Bond Program that would rely on an evidence-based pre-trial assessment of a defendant's likelihood to appear in court and remain arrest-free while awaiting trial and diminish racial disparities without imposing unnecessary financial conditions, impairing the judicial process, or jeopardizing public safety. This program would not result in any defendants being subject to an increased level of supervision. It would apply to both felony and misdemeanor cases. The creation of a Community Bonding Program would save Pima County money. More importantly, it would also improve the lives of defendants who would otherwise be unnecessarily incarcerated in jail.

# Attachment 1

**MEMORANDUM**

**TO:** Dean Brault, Pima County Public Defense Services  
**FROM:** Farhang & Medcoff, PLLC  
**DATE:** July 2, 2019  
**RE:** Permissibility of Pima County's Funding of a Non-Profit Bonding Agency

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This memorandum analyzes whether a political subdivision of the State of Arizona can legally make a grant to a non-profit organization for the purposes of funding a bail bond agency to serve indigent persons. In completing our research, we identified and analyzed four areas which could raise concern: (1) Arizona's Gift Clause; (2) regulations and licensing requirements for surety and bail bond agents; (3) restrictions on a government's ability to make grants to non-profit organizations; and (4) powers afforded to a county under state law.

Based on our comprehensive review and analysis below, we conclude that Pima County's proposed program is not prohibited under our interpretation of current federal and state law.

**Summary of Background Information**

Pima County currently conducts initial appearances for criminal cases twice a day. Pretrial Services ("PTS"), under the direction of the Pima County Superior Court, utilizes an evidence-based, nationally accepted risk assessment tool to evaluate the risk of non-appearance and re-offending. Based on this risk assessment, PTS makes one of four recommendations for an individual: (1) to be released on his or her own recognizance; (2) to be released to the third-party custody of PTS; (3) to be released to the third-party custody of PTS with enhanced supervision; or (4) not to be released on his or her own recognizance. The rate at which the initial appearance judge adopted the PTS recommendation was approximately 86% in 2017.<sup>1</sup>

If the initial appearance judge requires that an individual post a bond as a condition of release and the individual is unable to do so, the individual's attorney will often file a motion to modify the client's conditions of release and seek an accelerated hearing. If an individual is indicted, an average of 24 days or more pass between the date of arrest until the assigned judge may hear the motion to modify. Such motions to modify are almost always granted in cases where PTS recommended some form of release. Individuals whose charges are dismissed pre-indictment and who are unable to post bond, usually remain in jail for an average of 10 days.<sup>2</sup>

This inability to pay the bond has led to an estimated \$2.4 million in unnecessary bed days (assuming a second and subsequent rate of \$95.00 per day). To address this financial burden, Pima County is considering funding

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<sup>1</sup> Brault Memorandum, dated July 2, 2018.

<sup>2</sup> *Id.*

a program in which one or more non-profit organizations would serve as a bail bond agency to post bond for individuals (without collateral) who meet certain criteria. Pima County proposes that individuals would be eligible to participate in the program if they have agreed to be bound by PTS's conditions to release and they meet the following criteria: (i) the bond is set at \$30,000 or less, and (ii) the charges were not under A.R.S. Title 13, Chapters 11, 14, or 35.1 (homicide, sex and child pornography cases).<sup>3</sup> By implementing such a program, Pima County estimates that it could save over \$2 million dollars and reduce the jail population by 5.2% (based on 2017 figures).<sup>4</sup>

### **Gift Clause**

Arizona's Gift Clause (the "Gift Clause") provides that "neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." Ariz. Constr. Art. 9, §7.

Arizona's long-standing jurisprudence holds that "a government body may disburse funds only for a public purpose." *Wisturber v. Paradise Valley Unified School District*, 141 Ariz. 346, 348, 687 P.2d 354, 356 (1984) (citing *Proctor v. Hunt*, 43 Ariz. 198, 201, 29 P.2d 1058, 1059 (1934)). The *Wisturber* Court determined that the transfer of public funds to a private entity does not violate the Gift Clause if (i) the transfer of funds serves a public purpose, and (ii) the consideration paid through public funds far exceeded the public benefit received. 141 Ariz. at 348-50, 687 P.2d at 356-58.

The Arizona Supreme Court upheld the *Wisturber* two-prong test in 2010, confirming that "the primary determination of whether a specific purpose constitutes a 'public purpose' is assigned to the political branches of government, which are directly accountable to the public." *Turken v. Gordon*, 223 Ariz. 342, 349, 224 P.3d 158, 165 (2010) (citing *Wisturber*, 141 Ariz. at 349, 687 P.2d at 357). In so holding, *Turken* clarified that a public purpose would only be found absent in "those rare cases in which the governmental body's discretion has been 'unquestionably abused.'" *Id.* at 349, 224 P.3d at 165 (citing *Glendale v. White*, 67 Ariz. 231, 237, 194, P.2d 435, 439 (1948)).

However, the *Turken* Court clarified that, for all future interpretations of the Gift Clause, the second prong of the *Wisturber* test requires that only direct benefits to the public be included in determining whether proportionate value was received by the public compared to the public funds expended. 223 Ariz. 342, 351-52, 224 P.3d 158, 167-68 (2010) (rejected the inclusion of projected future sales tax revenue and other indirect benefits when calculating value of benefit received).

In analyzing Pima County's proposed program under the *Wisturber* two-prong test, as clarified by *Turken*, it is not likely that the program violates the Gift Clause. Pima County has proposed to make a grant to a non-profit

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<sup>3</sup> *Id.*

<sup>4</sup> Brault Memorandum, dated March 11, 2019.

organization operating a bail bond agency in order to assist its indigent citizens. In making its proposal, Pima County has determined that a public purpose is to prevent the loss of jobs, homes, custody of children, and personal property, which may result from an extended stay in jail.<sup>5</sup> Under the broad discretion afforded the executive branch of the government in *Turken*, we do not believe a court could determine that Pima County “unquestionably abused” its discretion by creating a program which could prevent its constituents from spending unnecessary time in jail as a result of their indigent status. Thus, it is likely a court would find that Pima County’s proposed program meets the first prong of the *Wisturber* test.

The second prong of the *Wisturber* test requires Pima County to receive adequate consideration for its expenditure in order to pass muster under the Gift Clause. In making its proposal, Pima County has quantified actual costs to the public totaling \$2.4 million as a result of unnecessary bed days in jail. These costs, however, are the permissible, direct costs to the public, quantifiable through PTS and jail occupancy records, and do not include any of the indirect costs to the County and the individuals (e.g., prevention of loss of jobs, housing, and personal property as well as preventing custody issues for children who must become wards of the court or who otherwise must enter into the system when their primary caregiver cannot post bond to get out of jail). Even under this more restrictive *Turken* analysis, unless Pima County’s grant to a non-profit agency operating a bail bond company under the proposed program greatly exceeds the demonstrated direct benefit, it would not violate the Gift Clause.

Furthermore, the purpose of Pima County’s proposed disposition of public funds is to fund a non-profit operated bail bond company which would use the public funds as collateral for bond securing an individual’s appearance in court. If the individual appears in court as required, the bond will be exonerated and there will be no loss of public funds. If the individual fails to appear as required, then the bond will be forfeited to the court, but it will remain the property of Pima County, thereby resulting in no loss of public funds.

Although no loss of public funds will actually occur under either scenario, if anyone challenges Pima County’s proposed program, we foresee that challenge arising under the Gift Clause prohibition against a public entity loaning its credit in the aid of a private person or entity. However, this challenge would be governed by the same analysis described above, *i.e.*, was the loan used for a public purpose, as determined by Pima County, and did the loan of public funds greatly exceed the benefit to the public resulting from the loan.

### **Bail Bond Agent Requirements and Liability**

In Arizona, a criminal defendant who is released on bond may employ a surety to post an appearance bond on that individual’s behalf. A surety is “a person or company, other than the defendant, who executes an appearance bond and agrees to pay the amount of the bond if the defendant fails to comply with its conditions.” 16A A.R.S. Rules Crim. Proc., Rule 7.1(g). A surety is liable for the amount of the bond if the defendant does

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<sup>5</sup> Brault Memorandum, dated July 2, 2018.

not appear in court; however, a surety is not responsible for the actions of the defendant, other than his/her obligations to appear.

A bail bond agent is “any person who engages in a bail transaction on behalf of a surety insurer or representative thereof.” ARIZ. ADMIN. CODE R20-6-601(B)(2). Bail bond agents are regulated by the Arizona Department of Insurance. Under A.R.S. § 20-340 and A.R.S. § 20-281, *et seq.*, a bail bondsmen must meet the following criteria: (i) be at least 18 years old, (ii) be an Arizona state resident, (iii) pass the state licensing exam, (iv) possess sufficient funds to pay the licensing fee and fingerprint processing fee, (v) provide proof of citizenship, work permit, or permanent residency, (vi) have no felony crime convictions, (vii) possess sufficient funds to satisfy surety obligations, (viii) not have violated any rules involving court orders within the past two years, and (ix) agree to maintain regular contact with defendants as a service to the court. A “professional bondsman” is “any person who is a surety simultaneously on more than 4 appearance bonds.” 16A A.R.S. Rules Crim. Proc., Rule 7.1(h).

Under the proposed program, neither Pima County (nor any of its employees) would be acting as a bail bond agent (or even a surety). Instead, the non-profit would be responsible for compliance with all Arizona Department of Insurance licensing requirements, on behalf of itself and any bail bond agents it employs. In other words, even though Pima County would be funding the non-profit bail bond agency through a grant, Pima County would not qualify as nor be a bail bondsman. Nonetheless, and in an abundance of caution, we recommend that Pima County independently review and verify the bail bondsmen licensing compliance of any non-profit entity before making a grant to such entity.

### **Restrictions on Grants by Government Entities to Non-Profit Corporations**

We have been unable to locate any federal prohibitions or restrictions on government entities making grants or donations to non-profit organizations. To the contrary, our research indicates that many non-profits rely on grants from federal, state, or local government grants to fund their programs, especially for human service and healthcare.<sup>6</sup> The federal government has created [www.grants.gov](http://www.grants.gov) for organizations to apply for and monitor federal grants. There are currently 26 federal grant-making agencies and more than 900 federal programs within the federal government.<sup>7</sup>

### **County Powers Under State Law**

State law affords counties, through their respective boards of supervisors, officers and agents, broad powers to serve their inhabitants, such as:

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<sup>6</sup> Joanne Fritz, How Nonprofits Generate Revenue Streams (Updated February 10, 2019), <http://www.thebalancesmb.com/where-do-nonprofits-get-their-revenue-2502011>.

<sup>7</sup> Heather Stombaugh, Important Steps to Finding Government Grants for Nonprofits (Updated April 12, 2019), <http://www.thebalancesmb.com/government-grants-for-nonprofits-2502170>.

- The power to dispose of or use its property as the interests of the county inhabitants require (A.R.S. § 11-201(A)(4));
- The power to levy and collect taxes for purposes under [their] exclusive jurisdiction as are authorized by law (A.R.S. § 11-201(A)(5)); and
- The power to make and enforce all local, police, sanitary and other regulations not in conflict with general law (A.R.S. § 11-251(31)).

We have been unable to locate any state prohibitions or restrictions on a county making grants or donations to non-profit organizations (aside from our analysis of the Gift Clause, addressed above). Under A.R.S. § 11-201, Pima County is authorized to collect taxes from inhabitants, and use those tax dollars (its property) “as the interests of the inhabitants require.”

Here, Pima County has determined that the “interests of its inhabitants” include providing grants which will be used to support a bail bond agency to assist indigent persons with posting bond. Furthermore, Pima County’s proposed program may have the added benefit of maintaining the tax income of Pima County as individuals may be protected from an extended jail stay and, thus, may be able to maintain jobs (and pay taxes). While this analysis may not pass muster under the Gift Clause analysis because it involves indirect benefits, it can be included within Pima County’s determination to use its tax dollars to further the interests of its inhabitants.

### **Conclusion**

Beyond the legal analysis discussed above, we have not analyzed the possible non-legal concerns raised by the proposed program, including:

- Is there public and/or political support for such a program?
- Could there be negative publicity for Pima County if program participants who are released on bond commit subsequent crimes?
- Will there be an expensive legal challenge to the proposed program by the bail bond industry?
- Will the program cause animosity between Pima County and its local judges whose may feel that their judgment is being overridden through the proposed program?

These questions raise legitimate business determinations as opposed to the legal issues addressed in this memorandum. In summary, based on the legal analysis above, we conclude that Pima County’s proposed program is not prohibited by our interpretation under current federal and state law. We are available to address any additional questions or concerns arising from your reading or interpretation of this memorandum. We are also available to discuss or present our findings to the appropriate people at Pima County, keeping in mind our desire to preserve and protect the attorney-client privilege to the full extent of the law (to that end, please do not forward this memorandum to anyone without consulting with us first or ensuring the recipient does not waive the privilege).