

# SENTENCED BY TRADITION: THE THIRD-PARTY CUSTODIAN CONDITION OF PRETRIAL RELEASE IN ALASKA

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## ABSTRACT

*In Alaska, a third-party custodian is frequently required as a condition of pretrial release. Under this system, a defendant must provide a third party, to be approved by a judge, who will agree to stay with the defendant and take responsibility for the defendant's appearance in court. In this Note, the Author critiques Alaska's use of the third-party custodian requirement. First, she explains the constitutional and statutory requirements that regulate pretrial release. Next, she examines the past and present usage of pretrial release in Alaska, focusing on the original rationale behind the third-party custodian requirements and the impact that the third-party custodian requirement has on defendants. Ultimately, the Author proposes that Alaska develop an independent pretrial services agency that would enable judges to make more effective bail decisions by providing them with relevant information.*

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## INTRODUCTION

If you are charged with a felony in Alaska, it is likely that before you will be released on bail you will need to find a person or organization willing to supervise you for twenty-four hours a day.<sup>1</sup> This person<sup>2</sup> must be approved by a judicial officer, which means that he or she cannot have a recent criminal record, must have a home where you can also live, and must otherwise appear responsible enough to report you if you violate the conditions of your release.<sup>3</sup> While most state statutes allow courts to place defendants in the custody of a person or

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1. ALASKA JUDICIAL COUNCIL, ALASKA FELONY PROCESS: 1999 116 (Feb. 2004) [hereinafter ALASKA FELONY PROCESS], available at <http://www.ajc.state.ak.us/reports/Fel99FullReport.pdf>.

2. ALASKA STAT. § 12.30.020(b)(1) (2008). The statute can be interpreted to allow more than one third-party custodian. Though many judges will approve more than one custodian, they may be hesitant to allow a defendant to have multiple third-party custodians because of the risk that the third parties will lose track of who is responsible for watching the defendant at what time. *See* On the other hand, judicial officers occasionally, either deliberately or accidentally, will approve a single third-party custodian for multiple defendants. *Release of a Criminal Defendant: Hearing on H.R. 368 Before the Judiciary H. Comm.*, 21st Leg. Reg. Sess., no. 1750 (Alaska Feb. 25, 2000) (comment by Lauree Hugonin, Director, Alaska Network on Domestic Violence and Sexual Assault).

3. Judicial officers have broad authority to impose various conditions of release on defendants. ALASKA STAT. §§ 12.30.020(b)(1)-(6) (2008). Additionally, (b)(7) is a catchall provision allowing judicial officers to “impose any other condition considered reasonably necessary to assure the defendant’s appearance as required and the safety of the alleged victim, other persons, or the community.”

organization,<sup>4</sup> the practice is not used as much elsewhere in the country.<sup>5</sup> In Alaska this is called the third-party custodian condition of pretrial release. It is an onerous requirement that is not being used for its intended purpose. Most people working in the criminal justice system agree that too many defendants are required to have a third-party custodian, and that the third-party custodian system usually fails to serve its intended purpose.<sup>6</sup>

The Alaska bail statute is plainly written to create a presumption of personal-recognizance release.<sup>7</sup> If a judicial officer finds that personal-recognizance is not appropriate because of concerns that the defendant will fail to appear at future court dates or that he poses a threat to the community's safety, then, and only then, can the judicial officer impose further conditions of release upon the defendant.<sup>8</sup> However, the conditions of release must only be those that the judicial officer reasonably believes are necessary to ensure the defendant's appearance and the safety of the community.<sup>9</sup> As will be shown, the third-party condition of release so burdens the defendant, as well as his family and friends, that its use should be decreased. This heavy burden should be considered every time the third-party custodian condition is imposed.

When a defendant is required to find a third-party custodian before he can be released on bail, he will likely spend more time in predisposition incarceration than he would without the third-party

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4. See, e.g., ARIZ. REV. STAT. ANN. § 13-3967(E)(1) (2001); 725 ILL. COMP. STAT. ANN. 5/110-10(b)(13)(2006); MASS. GEN. LAWS ANN. ch. 276 § 58 (2002); MO. ANN. STAT. § 544.455 (1)(1)(2002); N.C. GEN. STAT. ANN. § 15A-534(a)(3) (2009); VA. CODE ANN. § 19.2-123(A)(1) (2008).

5. Antonia Moras, *The Felony Case Process in Alaska: The Judicial Council Analysis*, Alaska Justice Forum (2004); see also Joseph Van De Mark, Supervisor, Office of Public Advocacy, Remarks at the Review of Bail Reviews Public Forum (Sept. 16, 2008) (summary of Public Comment on file with author).

6. John Novak, Department of Labor, Remarks at the Review of Bail Reviews Public Forum (Sept. 16, 2008) (summary of Public Comment on file with author); see also comments at the same Public Forum by John Murtaugh, criminal defense attorney; Adrienne Backman, Anchorage District Attorney; Bill Miller, Anchorage Police Department; Rex Butler, criminal defense attorney; Marjorie Allard, Pub. Defender Agency; and Ben Hofmeister, Anchorage District Attorney. *But see* Malcolm Roberts, Remarks at the Review of Bail Reviews Public Forum (Sept. 16, 2008) (arguing that the third-party custodian requirement does work in some instances).

7. ALASKA STAT. § 12.30.020(a) (2008). Under a "personal recognizance release," the court "takes the defendant's word that he or she will appear for a scheduled matter . . . ." BLACK'S LAW DICTIONARY 1054 (8th ed. 2004).

8. ALASKA STAT. § 12.30.020(b) (2008).

9. ALASKA STAT. §§ 12.30.020(a), (b)(7) (2008).

requirement.<sup>10</sup> This is problematic because studies clearly show that increased pretrial incarceration often leads to higher conviction rates and longer sentences for the same crimes.<sup>11</sup> Longer pre-disposition incarceration rates raise constitutional questions because a defendant is legally presumed innocent and has a right to bail.<sup>12</sup> Furthermore, incarcerating defendants merely because they cannot find a third-party custodian is an added expense to the State, and exacerbates the problem of prison overcrowding in Alaska.<sup>13</sup> When an accused is incarcerated before trial, he is unable to be as helpful to his attorney in preparing his defense and in helping with any pretrial investigations.<sup>14</sup> In addition, incarcerated individuals typically have lower morale and less energy to fight the charges against them.<sup>15</sup> This has caught the attention of the Alaska Legislature,<sup>16</sup> though at the time of publication no legislation to change the third-party custodian requirement had been introduced.

The bail system must be overhauled to protect accused individuals who have a constitutional right to be released before trial<sup>17</sup> with added statutory protection providing that any conditions of release must be the least restrictive means possible to ensure both the defendant's appearance at future court hearings and the safety of the community.<sup>18</sup> Part I of this Note examines the current pretrial release statutes in Alaska and the State's current practices regarding bail. Part II explores the statutory history of the bail statute and the historical use of third-party custodians, and argues that what began as an avenue for providing pretrial release for indigent defendants is now being used as a

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10. See *infra* Part I.B. (describing a study by the Alaska Judicial Council regarding the effects of the third-party custodian condition on incarceration rates).

11. See *id.*

12. ALASKA CONST. art. I, § 11. This section contains an exception allowing judicial officers to hold defendants in pretrial detention without bail if they have been accused of a crime punishable by death. However, since no crimes are punishable by death in Alaska, the exception is currently moot. See H.R. 9, 26th Leg., 1st Sess. (Alaska 2009).

13. TERI CARNS, ET AL., ALASKA JUDICIAL COUNCIL, FINAL REPORT OF THE ALASKA CRIMINAL JUSTICE ASSESSMENT COMMISSION 20 (2000) (the prison population in 1999 exceeded the State's capacity by approximately 2400 people).

14. See *infra* Part II.C.

15. *Id.*

16. See *Criminal Law/Sentencing/Probation/Parole: Hearing on H.R. 244 Before the H. Judiciary Standing Comm.*, 23d Cong. at 31 (Alaska Apr. 7, 2004) (the House Judiciary Standing Committee adopted a letter of intent that judicial officers, when making bail decisions, should consider the purpose of bail statutes of allowing bail to indigent defendants); *id.* at 51-55 (the House Judiciary Standing Committee unanimously agreed that third-party custodians are used too often).

17. ALASKA CONST. art. I, § 11.

18. ALASKA STAT. § 12.30.020 (2008).

regular condition of release, thereby stifling defendants' rights to equal protection under the laws. Finally, Part III recommends reforms to bail practice in Alaska. In particular, it advocates that Alaska develop a pretrial services program whose employees will interview defendants and make impartial bail recommendations to judicial officers prior to the defendants' arraignment. The employees could also serve supervisory roles to monitor defendants during pretrial release and to remind them of future court dates. Pretrial services offices already operate around the country and have proven enormously successful at effectively reforming pretrial release practices.<sup>19</sup>

## I. PRETRIAL RELEASE: LAWS AND PRACTICES

### A. Requirements Under Alaska Law

#### 1. Constitutional Requirements

Bail in Alaska is regulated pursuant to the United States Constitution,<sup>20</sup> the Alaska Constitution,<sup>21</sup> Alaska State Statutes,<sup>22</sup> and the Alaska Rules of Criminal Procedure.<sup>23</sup> The Eighth Amendment to the United States Constitution reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>24</sup> In *Stack v. Boyle*,<sup>25</sup> the Supreme Court defined excessive bail as an amount that is above and beyond what is "reasonably calculated" to ensure the presence of the accused at pretrial court hearings.<sup>26</sup> In *Stack*, twelve people were accused of conspiring to commit an illegal act of fraud against the United States under the Smith Act.<sup>27</sup> All defendants were required to post bail bonds before their release from prison, but the

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19. See BARRY MAHONEY, ET AL., PRETRIAL SERVICES PROGRAMS: RESPONSIBILITIES AND POTENTIAL, ISSUES AND PRACTICES IN CRIMINAL JUSTICE 8 (National Institute of Justice, Washington D.C.) (2001) (as of publication in 2001 there were pretrial services programs operating in 300 counties in the United States and in all of the districts in the Federal Court system); *id.* at vi ("Well-designed and well-managed pretrial services programs have the potential to help justice systems function more fairly and more effectively for all citizens.").

20. U.S. CONST. amend. VIII.

21. ALASKA CONST. art. I, §§ 11, 12.

22. ALASKA STAT. § 12.30 (2008).

23. ALASKA R. CRIM. P. 41.

24. U.S. CONST. amend. VIII.

25. 342 U.S. 1 (1951).

26. *Id.* at 4-5 ("The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty.... Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment.").

27. See *id.* at 3.

bond amounts varied greatly, from \$2500 to \$100,000.<sup>28</sup> Petitioners challenged the bail amounts on the grounds that they were excessive.<sup>29</sup> The Court held that bail *was* excessive as applied to some of the defendants because it was set above the normal bail based on the crime, and the State provided no evidence as to why a higher bail was necessary for those particular defendants to ensure their future presence in court.<sup>30</sup>

The Alaska Constitution contains the same language found in the United States Constitution.<sup>31</sup> The Alaska Constitution also guarantees the right of every accused to be released on bail pending trial, unless he or she is accused of a capital offense, "when the proof is evident or the presumption great."<sup>32</sup> Since Alaska currently does not recognize any crimes as punishable by death, the exception to the right to bail does not currently apply to any defendants in the State.<sup>33</sup> The right of defendants to be released before trial is not one recognized by the United States Constitution, as interpreted by the Supreme Court in *Carlson v. Landon*.<sup>34</sup> The United States Supreme Court in *Carlson* was asked to interpret the Eighth Amendment to include an enumerated right for all defendants to be released on bail pending trial.<sup>35</sup> The Court declined to do so, reasoning that the language in the Eighth Amendment was lifted from the English Bill of Rights Act and that the clause had been interpreted in England as applying only to cases where it was appropriate to grant bail, but not necessarily to every case.<sup>36</sup> Pretrial detention remains standard practice in the federal criminal system.<sup>37</sup>

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28. *Id.*

29. *Id.*

30. *Id.* at 5 ("[T]he fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."). The current federal bail statute, as amended in 1988, along with most state statutes, *supra* note 4, require that judicial officers also set bail to ensure the safety of the community. 18 U.S.C. § 3146 (2006).

31. ALASKA CONST. art. I, § 12. This section of the Alaska Constitution states, in addition to the language found in the Eighth Amendment of the United States Constitution, that "Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation." *Id.*

32. ALASKA CONST. art. I, § 11.

33. The "capital offense" exception may become more relevant in the future, as legislation introduced in the 2009 Alaska legislative session would reinstate the death penalty for some murder offenses. H.R. 9, 26th Leg., 1st Sess. (Alaska 2009).

34. *Carlson v. Landon*, 342 U.S. 524 (1952).

35. *Id.* at 544.

36. *Id.* at 545.

37. *See* 18 U.S.C. § 3142(e) (2006).

In Alaska, the right to bail is absolute.<sup>38</sup> The Alaska Supreme Court, however, has made clear that this does not guarantee every defendant the right to have bail set at an amount that he or she can afford.<sup>39</sup> The ability of a defendant to pay is a factor considered by the judicial officer responsible for setting bail, but an inability to pay does not necessarily entitle a defendant to have his or her bail decreased.<sup>40</sup>

## 2. *Statutory Requirements*

Bail procedures are further regulated by statute<sup>41</sup> and by Rule 41 of the Alaska Court Rules of Criminal Procedure.<sup>42</sup> The statutory language creates a presumption that a defendant should be released on his own recognizance, unless charged with a Class A or unclassified felony.<sup>43</sup> However, if the judicial officer setting bail determines that the defendant poses a danger to the community or is a flight risk, then the officer can impose conditions of release that are “reasonably necessary” to ensure the community’s safety or the defendant’s appearance in court.<sup>44</sup> The statute lists various conditions of release that the judicial officer shall consider, including a catch-all provision allowing the judicial officer to impose any restriction that he believes will reasonably ensure the community’s safety and the defendant’s appearance.<sup>45</sup> The remaining enumerated conditions of release include different types of bonds to address both appearance and performance concerns; restrictions on travel, association, and living arrangements; and lastly, what has come to be known as the third-party custodian requirement.<sup>46</sup> Under this requirement, “[t]he judicial officer may . . . place the person in the

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38. ALASKA CONST. art. I, § 11.

39. *See* *Reeves v. State*, 411 P.2d 212, 214 (Alaska 1966) (“We hold that an indigent defendant does not have an absolute right to pretrial release on his own recognizance.”); *Fesolai v. State*, No. A-10169 (Alaska Ct. App. Apr. 17, 2008) (“[U]nder Alaska law, indigent defendants have no right to demand that the court set monetary bail in an amount that they can post.”) (citing *Gilbert v. State*, 540 P.2d 485, 486 n.12 (Alaska 1975)).

40. *Reeves*, 411 P.2d at 212.

41. ALASKA STAT. § 12.30 (2008).

42. ALASKA R. CRIM. P. 41.

43. ALASKA STAT. § 12.30.020(a) (2008) (“A person charged with an offense shall . . . be ordered released pending trial on the person’s personal recognizance . . . unless the offense is an unclassified felony or class A felony or unless the officer determines that the release of the person will not reasonably assure the appearance of the person as required or will pose a danger to the alleged victim, other persons, or the community.”).

44. ALASKA STAT. § 12.30.020(b)(7) (2008). The enumerated conditions of release include various types of bonds, restrictions on travel, association, and living arrangements, and allow the person to be placed in the “custody of a designated person or organization . . . .” ALASKA STAT. § 12.30.020(b)(1) (2008).

45. ALASKA STAT. § 12.30.020(b)(7) (2008).

46. ALASKA STAT. § 12.30.020(b)(1)-(6) (2008).

custody of a designated person or organization agreeing as a custodian to supervise the person.”<sup>47</sup> Identical or substantially similar language appears in the statutes of thirty-three additional states and Washington, D.C.,<sup>48</sup> but the practice is not used elsewhere with the same frequency as it is in Alaska.<sup>49</sup>

If a person “remains in custody 48 hours after appearing before a judicial officer because of inability to meet the conditions of release,” he is “entitled to have the conditions reviewed” by a judicial officer.<sup>50</sup> Upon review, if the judicial officer declines to change the conditions imposed (meaning the defendant will likely remain in custody), then the judicial officer is required to “set out in writing the reasons for requiring the conditions imposed.”<sup>51</sup> After this second review, the person in custody does not have an absolute right to another bail review.<sup>52</sup> However, after another week, if the detained individual can demonstrate that “new information not considered at the previous review will be presented,” and gives the prosecuting attorney forty-eight hours notice, he can request another bail review.<sup>53</sup>

## B. Current Pretrial Release Practices

Despite the fact that many states have the same or similar language in their bail statutes allowing courts to place defendants in the custody of another person or organization, the third-party custodian condition of release is imposed more often in Alaska than in other states. In Alaska this condition of pretrial release was initially thought to provide protection for indigent defendants by giving them access to pretrial release with little or no monetary bail.<sup>54</sup> Instead, imposing a third-party custodian has become the norm in some Alaskan jurisdictions for all types of defendants, and this imposition is often coupled with the

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47. ALASKA STAT. § 12.30.020(b)(1) (2008).

48. *See supra* note 4.

49. *See generally* Van De Mark, *supra* note 5.

50. ALASKA STAT. § 12.30.020(f) (2008).

51. *Id.*

52. ALASKA STAT. § 12.30.020(j) (2008).

53. *Id.* All requirements that the defendant must meet for a subsequent review can be waived by the prosecuting attorney. *Id.* Also, if the defendant “has been incarcerated for a period equal to the maximum sentence for the most serious charge for which the defendant is being held,” he can request an immediate bail review. *Id.*

54. *See infra* Part II.A (describing that the initial theory behind the third-party custodian requirement was that more people could be released without posting a financial bond if judges were able to release them to the custody of another citizen or an organization).

requirement that the defendant also post significant monetary bail.<sup>55</sup> Some judicial officers impose the condition simply as added insurance that the defendant will follow his conditions of release, and often the implications of that decision are not carefully considered.<sup>56</sup>

In 1997, the Advisory Committee to the Alaska Supreme Court on Fairness and Access<sup>57</sup> issued a report concluding that there was a perception among legal practitioners “that the criminal justice process [in Alaska] is unfair to minorities.”<sup>58</sup> The Committee recommended that the Alaska Judicial Council<sup>59</sup> conduct a study of the criminal justice system to determine whether minorities were in fact being treated unfairly on account of their race.<sup>60</sup> The Council followed the Committee’s recommendation and broadened its scope to include an investigation of whether there were other “unwanted disparities” in the criminal justice system in Alaska, such as whether the system was biased based on gender, location, or the defendant’s type of attorney.<sup>61</sup> Its report is the only comprehensive study of release practices available and as such is relied on heavily in this Note.

The Council focused its study on felony cases filed in 1999 only.<sup>62</sup> About 2300 cases were selected, representing about two-thirds of those filed.<sup>63</sup> Of the people charged with a felony in 1999 whose cases were examined, 54% statewide were required to have a third-party custodian.<sup>64</sup> In some geographic areas, the requirement was imposed much more frequently than in others. In Dillingham, for example, 95% of felony defendants were required to have third-party custodians,

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55. See ALASKA FELONY PROCESS, *supra* note 1, at 75 (“The requirement for a third party custodian usually was in addition to the requirement for monetary bail.”).

56. Telephone Interview with a District Court Judge, State of Alaska Dist. Ct. (Feb. 3, 2009). All of the judges interviewed for this Note requested anonymity and are thus distinguished by date of interview and court. This judge was very frank about the use of third-party custodians in the judge’s court solely for the purpose of supervising the defendant’s other conditions of release.

57. This committee was created in 1995 by the Alaska Supreme Court. ALASKA FELONY PROCESS, *supra* note 1, at 4.

58. ALASKA COURT SYSTEM, REPORT OF THE ALASKA SUPREME COURT ADVISORY COMMITTEE ON FAIRNESS AND ACCESS 25, 43 (1997).

59. The Alaska Judicial Council is a commission of three attorneys, three non-attorneys, and the Chief Justice of the Alaska Supreme Court, and was created by the Alaska Constitution to “conduct studies for improvement of the administration of justice, and make reports and recommendations to the supreme court and to the legislature at intervals of not more than two years,” among other duties assigned by law. ALASKA CONST. art. IV, §§ 8-9.

60. ALASKA FELONY PROCESS, *supra* note 1, at 1.

61. *Id.*

62. *Id.* at 23.

63. *Id.*

64. *Id.* at 116 fig.24.

while in Kotzebue the figure was only 35%.<sup>65</sup> Furthermore, 44% of those defendants released to a third-party custodian also posted some type of monetary bond in order to be released before trial.<sup>66</sup> Conversely, 60% of the defendants who posted a monetary bond were also required to have a third-party custodian.<sup>67</sup>

Overall, the Council reported that the Alaskan justice system is not biased based on unwanted factors.<sup>68</sup> However, the Council found that “[t]he requirement for a third-party custodian was one of the most important influences on the length of time that defendants spent incarcerated before the disposition of their cases.”<sup>69</sup> The Council compared many different characteristics with the amount of time that a defendant remained in jail before his case was finally resolved.<sup>70</sup> Considering predisposition incarceration rates in relation to the type of offense, the third-party custodian requirement was the only factor “that was significantly associated with an estimated change in predisposition incarceration days for every type of offense.”<sup>71</sup> When pretrial incarceration is considered for all offenses combined as a statewide average, defendants with the third-party custodian requirement spent eighteen *additional* days incarcerated, compared to defendants without the third-party custodian requirement.<sup>72</sup> For drug offenses, this increased to twenty-five *additional* days incarcerated, and six more additional days for violent offenses.<sup>73</sup> In the Anchorage area, when all offenses were combined, a defendant with a third-party custodian requirement spent an additional twenty-two days incarcerated.<sup>74</sup> Examining only sexual offenses, the difference rose to an additional fifty-five days incarcerated.<sup>75</sup> This finding was unexpected and led to the Judicial Council’s recommendation that the third-party custodian requirement be reviewed to determine its effectiveness.<sup>76</sup>

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65. *Id.* The rates vary in different communities throughout Alaska: Unalaska, 80%; Kenai, 70%; Valdez, 68%; Kodiak, 62%; Anchorage, 58%; Juneau, 55%; Bethel, 45%; Nome, 42%; Fairbanks, 41%; and Homer, 36%. *Id.*

66. *Id.* at 75.

67. *Id.*

68. *Id.* at 3. Data were collected by the Council from a number of different sources “about defendant’s characteristics, the nature of the charges and court processes, the type of attorney, and the outcomes of each case.” *Id.* at 5.

69. *Id.* at 176–77.

70. *Id.* at 52.

71. *Id.* at 176.

72. *Id.*

73. *Id.*

74. *Id.* at 179 tbl.35b.

75. *Id.*

76. *Id.* at 284 (“The court system and other agencies should review predisposition practices in other communities and states to determine whether

## II. ORIGINALLY ANOTHER MECHANISM TO ENSURE EQUAL PROTECTION FOR INDIGENT DEFENDANTS, NOW DISCRIMINATES AGAINST THEM

### A. Statutory History of Section 12.30.020 of the Alaska Statutes, Release Before Trial

Shortly after the United States Congress passed the Bail Reform Act of 1966,<sup>77</sup> a bill was introduced in the Alaska Legislature<sup>78</sup> to replace all previous bail statutes.<sup>79</sup> This bill was “taken almost exactly from a congressional bill to revise existing bail practices in United States courts.”<sup>80</sup> This statute was a drastic change from previous statutes because it emphasized non-financial release conditions.<sup>81</sup> The Report of the Alaska House Judiciary includes an excerpt from the Congressional record stating that this new bail legislation will “assure that all persons, *regardless of their financial status*, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest[.]”<sup>82</sup> On February 7, 1966, the bill passed the Alaska State House of Representatives, twenty-seven to one.<sup>83</sup> The bill passed in the Senate, seventeen to one, on February 24, 1966.<sup>84</sup> Part of the original statute as passed in 1966 reads as follows:

- (a) A person charged with an offense shall, at his first appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an *unsecured appearance bond* in an amount specified by the judicial officer *unless* the officer determines that the release of the person will not

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less restrictive practices can protect the public and ensure the appearance of defendants . . . effectively.”).

77. Bail Reform Act of 1966, 18 U.S.C. § 3146 (current version at 18 U.S.C. § 3144 (2006)).

78. H.B. 317, 4th Leg., 2d Sess. (Alaska 1966).

79. H.R. 4-317, 2d Sess., at 110 (Alaska 1966). In this report, the House Judiciary Committee explained that “present law contains four sections on bail for persons accused of crimes (ALASKA STAT. §§ 12.30.010-12.30.040 (2008)) and two sections on release of material witnesses (ALASKA STAT. §§ 12.50.090-12.50.100 (2008)).” Alaska House Bill 317 “replaces that law with a detailed procedure for release of accused persons and material witnesses.” *Id.*

80. *Id.* (citing Bail Reform Act of 1966, 18 U.S.C. § 3146 (current version at 18 U.S.C. § 3144 (2006))).

81. See H.B. 317, 4th Leg., 2d Sess. (Alaska 1966).

82. H.R. 4-317, 2d Sess., at 110-11 (Alaska 1966) (emphasis added).

83. *Id.* at 136.

84. *Id.* at 260.

reasonably assure the appearance of the person as required.

- (b) If a judicial officer determines under (a) of this section that the release of a person will not reasonably assure the appearance of the person, the judicial officer may
  - (1) Place the person in the custody of a designated person or organization agreeing to supervise him . . . .<sup>85</sup>

In 1967, the Alaska Legislature amended section 12.30.020 of the Alaska Statutes to include provisions requiring that the judicial officer setting bail consider whether the defendant “will pose a danger to other persons and the community.”<sup>86</sup> Shortly after these amendments, the State attempted to hold defendants with no bail on the basis “that these amendments permit the detention of defendants without bail when the judicial officer determines that the defendant ‘will pose a danger to other persons and the community.’”<sup>87</sup> However, the Alaska Supreme Court held that the 1967 amendment only requires that judicial officers consider danger to the community—the Legislature cannot “infringe upon the constitutional right of bail.”<sup>88</sup>

By 2000, the use of third-party custodians was widespread; however, there was little that a judge could do if someone acting as a third party failed to report when the defendant violated his conditions of release. In response to concerns that third-party custodians were not taking their duties seriously, the legislature amended section 12.30.020(b)(1) of the Alaska Statutes to allow judicial officers to hold third-party custodians in contempt of court for failing to report a defendant’s violations.<sup>89</sup> The amended statute read as follows:

- (1) [P]lace the person in the custody of a designated person or organization agreeing as a custodian to supervise the person; the court shall, personally and in writing, inform

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85. ALASKA STAT. § 12.30.020(a) (1966) (emphasis added); *see also* *Martin v. State*, 517 P.2d 1389, 1395 (Alaska 1974).

86. *Martin*, 517 P.2d. at 1396. Since 1967, the statute has again been amended, and currently the relevant section reads: “(b) If a judicial officer determines under (a) of this section that the release of a person will not reasonably assure the appearance of the person, or will pose a danger to the alleged victim, other persons, or the community, the judicial officer may . . . .” ALASKA STAT. § 12.30.020(b). Most states and the federal statute also include a provision that the judicial officer setting bail should consider both the defendant’s appearance and community safety. John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 15 (1985).

87. *Martin*, 517 P.2d at 1396.

88. *Id.* at 1397.

89. H.R. 368, 21st Leg., 2d Sess. § 4 (Alaska 2000) (bold text in original document indicates the language adopted during the 21st Legislature).

the custodian about the duties required of a custodian, and that failure to report immediately in accordance with the terms of the order that the person released has violated a condition of release may result in the custodian's being held in contempt under AS 09.50.010. . . .<sup>90</sup>

Just four years after the legislature made it possible to hold a third-party custodian in contempt of court, it changed the statute again, making failure to report a defendant's violations a Class A misdemeanor crime.<sup>91</sup> A new section was also added to the statute requiring that judicial officers issue written findings every time they require a defendant be released to a third-party custodian, demonstrating why the imposition of the third-party custodian requirement was necessary.<sup>92</sup> When this new legislation was discussed by the legislature, it was widely accepted among the House Judiciary Standing Committee that the third-party custodian requirement was overused.<sup>93</sup> This committee discussed changing the statute more drastically, but no one had proposals about how to do so and a major change to the statute was not

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90. *Id.*

91. H.R. 244, 23d Leg., 2d Sess. (Alaska 2004). If convicted on a misdemeanor charge, the third-party custodian faces up to a \$10,000 fine and up to a year in prison. Representative Gara suggested this amendment as a small fix: "I think it will minimize the number of sort of lazy third-party custodian orders that courts issue. . . . I think this is not a perfect fix to the problem, [but] my understanding from the [Alaska] Judicial Council is that they and the court system are going to sit down and talk about the problems of third-party custody and over-ordering of it, and I hope that discussion leads to maybe a long-term resolution." *Criminal Law/Sentencing/Probation/Parole: Hearing on H.R. 244 Before the H. Judiciary Standing Comm.*, 23d Leg., 2d Sess. 30 (Alaska 2004) (statement of Rep. Les Gara, Member, House Judiciary Standing Comm.); see also Press Release from Gregg Renkes, Attorney Gen., Dep't of Law, State of Alaska, Third-Party Custodians Face Prosecution Over Failure to Watch Criminal Defendants Left in their Care (Aug. 30, 2004) (on file with author). This news release describes the first months with the revised statute in place from the prosecutor's perspective. *Id.* Prosecutors in Anchorage filed five misdemeanor charges against third-party custodians who allegedly failed to notify authorities when the defendant violated conditions of release. *Id.*

92. ALASKA STAT. § 12.30.020(i) (2008).

93. See *Criminal Law/Sentencing/Probation/Parole: Hearing on H.R. 244 Before the H. Judiciary Standing Comm.*, 23d Leg., 2d Sess. 31 (Alaska Mar. 30, 2004). In the hearing, Chair McGuire "expressed curiosity about discovering why third-party custodians are increasingly being required in addition to bail, even in misdemeanor cases, and suggested that should be the problem that is focused on." *Id.* at 39. Similarly, "Representative Gara agreed that third-party custodians are overused," *id.* at 40, whereas "Representative Gruenberg said he'd like to see both sides—prosecutors and defense attorneys—come up with some guidelines regarding when a judge or magistrate is to appoint a third-party custodian." *Criminal Law/Sentencing/Probation/Parole: Hearing on H.R. 244 Before the H. Judiciary Standing Comm.*, 23d Leg., 2d Sess. 54 (Alaska Mar. 31, 2004).

expected to pass during the session.<sup>94</sup> Perhaps as a quick fix, the legislature adopted a letter of intent that read:

The Alaska Legislature acknowledges the findings contained in the Alaska Judicial Council's study "Alaska Felony Process: 1999" that the use of third-party custodians was initially intended to give indigent defendants an equal opportunity for predisposition release, that this bail condition was one of the most important influences on the length of time that defendants spent incarcerated before disposition of their cases, and that this bail condition has resulted in substantially longer terms of predisposition incarceration in non-violent type cases. Given the right to bail guaranteed by Article I, Section 11 of the Alaska Constitution, it is the intent of the Legislature that judicial officers more rigorously apply the framework set out in A.S. 12.30.010-029 for pretrial release. It is the intent of the Legislature that judicial officers will appoint third-party custodians in a manner that will further the intent of the statute.<sup>95</sup>

This is powerful language but carries little weight or concrete alternatives for judicial officers.

## B. History of the Third-Party Custodian Requirement in Alaska

When talking to judges and practitioners, no one seems to know exactly when judicial officers started regularly requiring that defendants be released to third-party custodians.<sup>96</sup> The requirement was originally thought to be a replacement for monetary bail, and it began mainly in rural Alaska.<sup>97</sup> In fact, while most criminal attorneys in Anchorage believe that the requirement does not work in the city,<sup>98</sup> many think that

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94. *Criminal Law/Sentencing/Probation/Parole: Hearing on H.R. 244 Before the H. Judiciary Standing Comm.*, 23d Leg., 2d Sess. 51-55 (Alaska Mar. 31, 2004).

95. *Criminal Law/Sentencing/Probation/Parole: Hearing on H.R. 244 Before the H. Judiciary Standing Comm.*, 23d Leg., 2d Sess. 30-31 (Alaska Apr. 7, 2004) (letter of intent proposed and read by Rep. Max Gruenberg).

96. One judge who has been practicing law in Alaska since 1978 reports that third-party custodians were widely used when that judge began practice. Telephone Interview with a Superior Court Judge, Alaska Super. Ct. (Feb. 5, 2009).

97. Telephone Interview with a District Court Judge, Alaska Dist. Ct. (Feb. 3, 2009); Telephone Interview with a Superior Court Judge, Alaska Super. Ct. (Feb. 5, 2009); Telephone Interview with a District Attorney, State of Alaska (Feb. 29, 2009).

98. Telephone Interview with a District Attorney, State of Alaska (Feb. 29, 2009); Novak, *supra* note 6.

it is much more effective in the rural communities.<sup>99</sup> One judge posits that the third-party custodian requirement works better in rural Alaska because of the relative lack of commerce in those areas.<sup>100</sup> This means that defendants generally have less money to post bail, and third-party custodians may be looked on as a favorable alternative.

Further, cultural differences may also indicate that the third-party custodian requirement may be more useful in rural Alaska. Many Alaska Native communities enjoy very strong family ties.<sup>101</sup> These family ties may often mean that third-party custodians can be very effective in assuring that the defendant follows through with his or her conditions of release. In fact, one district court judge in Anchorage believes that third-party custodians, particularly in rural communities, are used more to supervise release conditions than to assure appearance and community safety.<sup>102</sup> Such ties are less prevalent in the cities. In fact, rumors abound of a black market for third-party custodians in Anchorage.<sup>103</sup> There is also simply a size-of-community difference that greatly impacts the effectiveness of third-party custodians. In a small community, neighbors know when a defendant is supposed to be with a third-party custodian, and while there may only be one community safety officer,<sup>104</sup> he will know which defendants are supposed to be with which custodians. One prosecutor sounded rather shocked, reporting that he actually saw third-party custodians with defendants in the grocery store in Dillingham.<sup>105</sup> This was during his two year stint at the

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99. Telephone Interview with a Superior Court Judge, Alaska Super. Ct. (Feb. 5, 2009); Telephone Interview with a District Attorney, State of Alaska (Feb. 29, 2009); Ben Hofmeister, Anchorage District Attorney, Remarks at the Review of Bail Reviews Public Forum (Sept. 16, 2008).

100. Telephone Interview with a Superior Court Judge, Alaska Super. Ct. (Feb. 5, 2009); *see also* CHASE RIVELAND, ET AL., ALASKA CRIMINAL JUSTICE ASSESSMENT COMM'N, A PRELIMINARY REPORT TO THE CRIMINAL JUSTICE ASSESSMENT COMM'N 32 (1999) (in a discussion of interview results, the authors reported that the Department of Correction Spokesperson expressed a belief that third-party custodian use has increased and is being used for less serious crimes, and a superior court judge estimated that she requires third-party custodians for about one-half of all the felony defendants for whom she sets bail).

101. Telephone Interview with a Superior Court Judge, Alaska Super. Ct. (Feb. 5, 2009).

102. Telephone Interview with a District Court Judge, Alaska Dist. Ct. (Feb. 3, 2009).

103. *Id.*; Telephone Interview with a Superior Court Judge, Alaska Super. Ct. (Feb. 5, 2009).

104. Public Safety Officers in Alaska fulfill a role similar to that of police officers and are trained in crime prevention and basic law enforcement. *See, e.g., Village Public Safety Officer Program*, <http://www.dps.state.ak.us/AST/vpso/> (last visited Dec. 1, 2009).

105. Telephone Interview with a District Attorney, State of Alaska (Feb. 29, 2009).

Dillingham District Attorney's office. Presumably he was jaded after time in Anchorage, where it is widely believed that third-party custodians often do not constantly stay with their assigned defendants during the entire pretrial release period.<sup>106</sup>

### C. The Impact of the Third-Party Custodian Requirement

The Alaska Judicial Council has found the third-party custodian requirement to be the most important factor in determining the length of predisposition incarceration. This is likely because of the difficulty that some people have in finding a suitable third party to act as a custodian. When a defendant is required to have a third-party custodian, that person must find a family member or a friend who is willing to remain with them for twenty-four hours a day, seven days a week.<sup>107</sup> The rule imposed is generally that the third-party custodian must be within sight or sound of the defendant at all times.<sup>108</sup> This is a huge commitment for anyone, made even more burdensome by the fact that a third party exposes himself to liability, as he could be charged with a misdemeanor for failing to report a violation. While third-party custodian responsibilities may sound straightforward, potential third parties may fear the responsibility because of worry about making a mistake and subsequently facing misdemeanor charges.<sup>109</sup> Further, some defendants are surrounded by people who also have criminal histories and simply would not be approved as third-party custodians.<sup>110</sup>

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106. *Id.*; Telephone Interview with a District Court Judge, Alaska Dist. Ct. (Feb. 3, 2009).

107. Defendants can have multiple third-party custodians, at the judicial officer's discretion. The assignment of two custodians is fairly common, though judges seem unwilling to allow more than three because of the confusion that can arise about who is responsible for the defendant at what times. Telephone Interview with a Superior Court Judge, Alaska Super. Ct. (Feb. 5, 2009). Sometimes a single person has acted as a third-party custodian for multiple defendants at the same time. *Release of a Criminal Defendant: Hearing on H.R. 368 Before the H. Judiciary Comm.*, 21st Leg. Reg. Sess. 1750 (Alaska Feb. 25, 2000) (comment by Lauree Hugonin, Director, Alaska Network on Domestic Violence and Sexual Assault).

108. *See Criminal Law/Sentencing/Probation/Parole: Hearing on H.R. 244 Before the H. Judiciary Standing Comm.*, 23d Leg., 2d Sess. 31 (Alaska Mar. 30, 2004) (Third-party custodians "most often promise the judge to watch the person 24 hours a day").

109. Additionally, third-party custodians often have no past history of violating the law and likely want to avoid the risk of potentially blemishing their records if they fail to report misconduct by their assigned defendants.

110. Fueled in part by the presence of defendants who do not know anyone who a judge would approve, it is widely believed that there is a market for third-party custodians, which works to undermine the system in place. *See, e.g.*, John Novak, Department of Labor, Remarks at the Review of Bail Reviews

The fact that the third-party custodian requirement leads to longer predisposition incarceration rates is important for a number of reasons. First, incarcerating predisposition defendants represents an increased expense for the State. When defendants remain incarcerated awaiting trial, they require extra resources, including jail space and all other incarceration costs, as well as the added cost of transportation to and from the courthouse.<sup>111</sup>

Second, when a defendant is released, he has a greater ability to help his attorney prepare for his case.<sup>112</sup> The importance of this fact cannot be underestimated—it has been found that defendants who are detained pretrial are more likely to be found guilty and to receive a harsher sentence than defendants in the same situation who are released pretrial.<sup>113</sup> When a defendant is incarcerated prior to trial it “interferes with [his] ability to defend himself; it compromises his ability to work and deprives his family of emotional and economic support.”<sup>114</sup>

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Public Forum (Sept. 16, 2008) (“We’ve all heard stories about the defendant meeting the [third-party custodian] at the courthouse steps.”); Telephone Interview with a District Court Judge, Alaska Dist. Ct. (Feb. 3, 2009) (acknowledging that there is probably third-party custodian trafficking, where people are paid for their services as third parties).

111. See ALASKA FELONY PROCESS, *supra* note 1, at 157.

112. See MAHONEY, ET AL., *supra* note 19, at 4 (“An incarcerated defendant cannot look for friendly witnesses and, in some jurisdictions, is unlikely to have much contact with a defense lawyer.”).

113. *Id.* at 5 (“Statistically, defendants detained prior to trial plead guilty more often, are convicted more often, and are more likely to be sentenced to prison than are defendants who are released prior to trial.”); Arthur R. Angel, et al., *Preventative Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 289, 347 (1970) (“Several recent studies indicate that defendants incarcerated before trial are more likely to be found guilty and committed to prison than those released.”). These statistics are likely explained in part by the fact that higher bail amounts and more restrictive bail conditions are required of defendants who are more likely to be guilty. After all, one of the factors in the bail statute that a judge must consider is the weight of evidence against the defendant. However, detention itself may also contribute to the number of guilty pleas, especially if a suitable third-party custodian cannot be obtained. See MAHONEY, ET AL., *supra* note 19, at 4-5 (“Defendants held in detention often have a heightened incentive to plead guilty, even though they may have a valid defense, simply to gain their freedom—particularly if they can receive a sentence of ‘time served’ or receive credit for their jail time against a relatively short jail or prison sentence.”).

114. Rachel King, *Criminal Defense in Rural Alaska*, 15 ALASKA JUSTICE FORUM 5, 6 (1998); see also *Bandy v. United States*, 81 S. Ct. 197, 198 (1960) (“Imprisoned, a man may have no opportunity to investigate his case, to cooperate with his counsel, [or] to earn money that is still necessary for the fullest use of his right to appeal.”); Angel, et al., *supra* note 113, at 353 (“Any detention before trial imposes severe economic disruption on the defendant, his family and the community.”); MAHONEY, ET AL., *supra* note 19, at 4 (“The defendant who remains in jail may have difficulty participating in his or her own defense.”); John Scalia, Bureau of Justice Statistician, FEDERAL PRETRIAL RELEASE AND

Attorneys tend to be busy and often have difficulty visiting clients in jail.<sup>115</sup> In the main Anchorage jail there are only three visiting rooms and limited visiting hours.<sup>116</sup> Attorneys complain that it is not only hard to find the time to get out to the jail, but when they get there, they might face delays before they can even meet with their client because there are limited visiting rooms available.<sup>117</sup> There is also less privacy in prison, making it more difficult for defense counsel to establish the trust necessary for an effective attorney-client relationship.

Third, a defendant's morale is diminished when he is incarcerated and is unable to continue to care for his family or work in his community.<sup>118</sup> Finally, the presumption of innocence is deeply rooted in our country's history.<sup>119</sup> When a defendant is denied release because he cannot find someone able to watch him twenty-four hours a day, seven days a week, he is forced to live as though he were already convicted.

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DETENTION, 1996, at 5 (Feb. 1999) (writing that release "permits a defendant to more fully assist in the preparation of a defense.").

115. Particularly affected are attorneys with the Public Defender Agency who face large, sometimes overwhelming, case loads. Eighty percent of defendants studied by the Alaska Judicial Council qualified for court-appointed counsel. CHASE RIVELAND, ET AL., ALASKA CRIMINAL JUSTICE ASSESSMENT COMM'N, A PRELIMINARY REPORT TO THE CRIMINAL JUSTICE ASSESSMENT COMM'N 25 (1999). The Public Defender Act requires that counsel be appointed for any indigent person who is charged with a serious crime. ALASKA STAT. § 18.85.100 (2008). An "indigent person" is "[a] person who, at the time need is determined, does not have sufficient assets, credit, or other means to provide for payment of an attorney and all other necessary expenses of representation without depriving the party or the party's dependents of food, clothing, or shelter and who has not disposed of any assets since the commission of the offense with the intent or for the purpose of establishing eligibility for assistance under this chapter." ALASKA STAT. § 18.85.170(4); *see also* ALASKA R. CRIM. P. 39, 39.1 (procedures for courts to appoint counsel and determine a defendant's eligibility).

116. Telephone Interview with a District Attorney in Anchorage, Alaska (Feb. 29, 2009).

117. *Id.*

118. *See, e.g., King, supra* note 114, at 6 (the author, a former employee with the Alaska Public Defender Agency in a rural community, recounts from personal experience that defendants are generally disadvantaged by pretrial incarceration).

119. *See MAHONEY, ET AL., supra* note 19, at 5 (noting that this "core value of American society" means that when making pretrial release decisions "all defendants should have the same opportunity for consideration for release without invidious discrimination based on race, sex, or economic status").

### III. RECOMMENDATIONS

#### A. Assistance for the Decision Maker: An Introduction to Pretrial Services Programs

The following recommendations are not simple. The problem examined in the first part of this Note is also not simple, but larger justice concerns are implicated. The use of third-party custodians is supposed to ensure defendants' equal protection. Its current form, however, is working to stifle defendants' rights. Third-party custodians have become the norm for felony defendants in too many parts of Alaska, and they are often required without considering the consequences for defendants who cannot find a suitable third-party custodian. Thus, an alternative means of protecting defendants' rights is required. Although reforming such a long-standing tradition is no easy task, it provides an opportunity to examine the broader pretrial release scheme in Alaskan communities. The proposal that follows is for Alaska to start a pretrial services agency, which will give judges much more information to make their initial bail determinations. These programs exist in many other jurisdictions throughout the country, and the information provided to judges has been shown to lead to more defendants being released on their own recognizance with fewer conditions imposed, while at the same time decreasing the number of defendants failing to appear at their court dates. The proposal that follows will still allow judicial officers to assign third-party custodians when the defendant makes the request and has a suitable third party to whom they would rather be released instead of remaining incarcerated.

Criminal defense attorneys, particularly public defenders with heavy case loads, often have only a few minutes to talk to their client before making a bail argument.<sup>120</sup> Additionally, defense attorneys often can only report what their clients tell them without the time or resources to corroborate that information before repeating it to the judicial officer.

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120. Many criminal defendants are issued citations to appear at their arraignment at a later date, and they are not held in custody pending their arraignment. Such situations are not included here and, in these cases, it is rare for a district attorney to ask for bail conditions other than standard conditions, such as requiring the defendant to appear at all future court dates. Because these defendants are not in custody, pretrial services employees would not interview them. Based on the Author's personal experience in Anchorage and Juneau, once a defendant is assigned to the Public Defender Agency, an argument must be made almost immediately, with only moments to confer with the Agency's new client, or it may be postponed for twenty-four hours if the defense attorney needs more time to talk to the client to make the strongest bail argument possible.

Similarly, prosecutors generally make bail arguments based solely on the charging documents and the past criminal record of the accused. In contrast, if the jurisdiction has a pretrial services office, then an employee from the office (who is independent from both the prosecution and the defense) will interview the defendant prior to the bail arguments about the factors the judicial officer is required to consider when making bail decisions.<sup>121</sup> Ideally, the employee will also have a chance to corroborate what the defendant tells him, by calling family or friends, going to visit the defendant's home, or even interviewing potential third-party custodians.<sup>122</sup> Because the pretrial services office is not part of either side of the litigation, they will be able to provide the judicial officer with unbiased evidence and a recommendation that can be trusted.<sup>123</sup>

Current pretrial services offices vary in their structure and services. Services range from conducting initial interviews of defendants, often before they are assigned or have hired an attorney, to more extensive interviews and information gathering that is used to prepare a report for

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121. In Alaska these factors are enumerated in ALASKA STAT. § 12.30.020(c) (2008). A judicial officer must consider:

- (1) the nature and circumstances of the offense charged, including the effect of the offense upon the alleged victim;
- (2) the weight of the evidence against the person;
- (3) the person's family ties;
- (4) the person's employment;
- (5) the person's financial resources;
- (6) the person's character and mental condition;
- (7) the length of the person's residence in the community;
- (8) the person's record of convictions;
- (9) the person's record of appearance at court proceedings;
- (10) the flight of the accused to avoid prosecution or the person's failure to appear at court proceedings; and
- (11) threats the person has made, and the danger the person poses, to the alleged victim.

ALASKA STAT. § 12.30.020(c)(1)-(11) (2008).

122. This aspect of the pretrial services office could be particularly useful to judicial officers. Even if a defendant finds a suitable third-party custodian, it does not mean that the person lives in a suitable place. A superior court judge stated that he tries to question every potential third party about their living situation, hoping to learn whether they live with people who he does not want the defendant around. Telephone Interview with a Superior Court Judge, Alaska Super. Ct. (Feb. 5, 2009). The judge spoke of one particular instance in which it was clear that the third-party custodian lived in a house with drug dealers. *Id.*

123. In Anchorage, most initial bail hearings in district court are done by interns (when the defendant requests and qualifies for a court-appointed attorney), with the Public Defender Agency practicing under an intern practice permit pursuant to ALASKA CT. BAR R. 44 (2008). In an interview with a long-term District Court Judge, the judge expressed anguish with this system. Since interns do not have the experience that senior attorneys do, interns often fail to make best argument available, and fail to address many factors that a judge must consider. Telephone Interview with a District Court Judge, Alaska Dist. Ct. (Feb. 3, 2009).

the judicial officer.<sup>124</sup> Certain agencies also supervise some of the defendants who are released pretrial.<sup>125</sup> Agencies have found “homes in probation departments, court offices, and local jails and as independent county contractors.”<sup>126</sup> Sometimes recommendations are based on objective criteria alone, while others include some level of subjective decision making on the part of the pretrial services staff member.<sup>127</sup> Some agencies have the capacity to monitor released defendants, while others do not.<sup>128</sup> Others simply provide phone calls prior to court appearances.<sup>129</sup> Most agencies also provide follow-up services if a defendant fails to appear at a scheduled court date.<sup>130</sup>

## B. The Manhattan Bail Project

The use of pretrial services offices started with an experiment in 1961 called the Manhattan Bail Project.<sup>131</sup> This three-year experiment changed bail in this country, leading to the Federal Bail Reform Act of 1966<sup>132</sup> and the establishment of Federal Pretrial Services Offices, and

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124. California Ass’n of Pretrial Services, PRETRIAL SERVICES: A HISTORY, [http://pretrialservicesca.org/about\\_CAPS.html](http://pretrialservicesca.org/about_CAPS.html) (last visited Dec. 1, 2009) [hereinafter CAPS].

125. *Id.*

126. John Clark & D. Alan Henry, Bureau of Justice Assistance, PRETRIAL SERVICES PROGRAMMING AT THE START OF THE 21ST CENTURY 1 (July 2003).

127. *Id.* at vii.

128. *See* CAPS, *supra* note 124.

129. *Id.*

130. *Id.*

131. *See* MAHONEY, ET AL., *supra* note 19, at 8; Bernard Botein, *The Manhattan Bail Project: Its Impact on Criminology and the Criminal Law Processes*, 43 TEXAS L. REV. 319 (1965) (providing an in-depth discussion of the Manhattan Bail Project).

132. Bail Reform Act of 1966, 18 U.S.C. § 3146(a). This legislation is widely known as “the most significant legislation . . . in the bail reform effort[.]” WAYNE H. THOMAS, JR., BAIL REFORM IN AMERICA 161 (1976). Change came about largely because of growing concerns about the commercial bail bondsman industry having too much power to exploit defendants and concerns that defendants were being unfairly detained because they could not afford bail, John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 CRIM. L. & CRIMINOLOGY 1, 3–4 (1985), and because studies proved that there were viable ways to solve those issues. The most influential study in this regard is the Manhattan Bail Project. Botein, *supra* note 131, at 326. When Congress passed the Bail Reform Act of 1966, own recognizance release was made a priority for the first time in history. *See* 18 U.S.C. § 3144 (current version at 18 U.S.C. § 1346 (2006)). Further, if own recognizance release was deemed inappropriate, then the judicial officer was directed to make a pretrial release decision selecting the least restrictive means possible to ensure the defendant’s future appearance at scheduled court hearings. *Id.* Finally, statutorily defined conditions of release included not only financial bail, but a number of non-financial conditions, including the third-party custodian condition. *Id.*

state, county, and city pretrial services offices across the country.<sup>133</sup> The Vera Foundation started the Manhattan Bail Project exclusively to study bail in Manhattan.<sup>134</sup> The Vera Foundation partnered with the New York University School of Law and the Institute of Judicial Administration to start a three-year project.<sup>135</sup> Their goal was to test the hypothesis that “more persons can successfully be released on [bail] if verified information concerning their character and roots in the community is available to the court at the time of bail determination.”<sup>136</sup>

To test this hypothesis, evening students at the New York University School of Law spent their mornings interviewing defendants being held in detention rooms before their bail hearings in Part 1A of the Criminal Court of the Borough of Manhattan.<sup>137</sup> Students interviewed all defendants except those “charged with, or having a previous record of, narcotics offenses, homicide, forcible rape, sodomy involving a minor, corrupting the morals of a child, carnal abuse, and assault on a police officer . . . because of the special problems they pose.”<sup>138</sup> After an initial set of questions, students decided whether there was a good chance the defendant would be recommended for release on his or her own recognizance.<sup>139</sup> If so, then the defendant was interviewed in more depth, and the student attempted to verify information provided by the defendant.<sup>140</sup> This process lasted about an hour.<sup>141</sup> After gathering information about the defendant, the student weighed a number of different factors and decided whether or not to recommend him or her to the judge for release in exchange for a promise to appear in court.<sup>142</sup> The purpose of bail is to assure defendants’ future appearance in court.<sup>143</sup> The students calculated the number of defendants who failed to appear at their court hearings to determine the project’s success.<sup>144</sup> The factors that the students used to decide whether to recommend

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133. MAHONEY, *supra* note 19, at 8–9 (at the time of this 2000 publication, ninety-four federal districts operated pretrial services programs, and there were offices in over 300 counties).

134. Botein, *supra* note 131, at 326.

135. See Charles E. Ares, Anne Rankin & Herbert Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole*, 38 N.Y.U. L. REV. 67, 71–72 (1963).

136. *Id.* at 68.

137. *Id.* at 72.

138. *Id.*

139. *Id.* at 74.

140. *Id.* at 72–73.

141. Botein, *supra* note 131, at 327.

142. Ares, et al., *supra* note 135, at 67.

143. *Id.* at 68. In 1984, Congress amended federal bail laws to require that bail also be set to ensure the safety of the community. Bail Reform Act of 1984, 18 U.S.C. § 3142 (1988).

144. Ares, et al., *supra* note 135, at 72.

defendants for release on their own recognizance included ties to the community, such as employment, proximity of the defendant's family, length of local residence, and whether someone agreed to help the defendant get to court.<sup>145</sup> They also considered the penalty for the present charge and the defendant's prior record.<sup>146</sup>

Information gathered was sent to the arraignment court for half of the defendants.<sup>147</sup> The other half served as a control group.<sup>148</sup> From October 16, 1961 to April 8, 1964, 13,000 defendants were detained in Part 1A of the Criminal Court of the Borough of Manhattan.<sup>149</sup> Of these, 3000 were excluded from the interview process because of their current charge or previous record.<sup>150</sup> Of the 10,000 interviewed for the project, 4000 were recommended for release on their own recognizance.<sup>151</sup> The court granted own recognizance release to 2195 of these individuals.<sup>152</sup> Only fifteen of these failed to show up, or about one-half of one percent.<sup>153</sup>

Over the course of the project, staff members grew increasingly more comfortable recommending people for own recognizance release, stemming from the success their recommendations were having. At the beginning, staff members recommended 28% of defendants for their own recognizance release.<sup>154</sup> This gradually increased to 65% by the end of the project.<sup>155</sup> Perhaps even more importantly, throughout the course of the project, prosecutors initially agreed with the Project recommendations only about 50% of the time, but this increased to about 80% of the time by the end of the project.<sup>156</sup>

The Project "demonstrated that judges would release more defendants on their own recognizance if they had information regarding defendants' housing arrangements, family ties, and employment,"<sup>157</sup> rather than the traditional snippets of unverified information from a defense attorney, information about the charge, and the defendant's criminal record. State and city governments responded to the success of the Manhattan Bail Project by starting their own bail projects.<sup>158</sup> The

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145. *Id.* at 72.

146. *Id.*

147. *Id.* at 74.

148. *Id.*

149. Botein, *supra* note 131, at 327.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. MAHONEY, ET AL., *supra* note 19, at 8.

158. See CAPS, *supra* note 124.

Speedy Trial Act of 1974 “created 10 pilot pretrial services agencies in the Federal Courts . . . designed to provide judges with the information necessary to make conditional release decisions.”<sup>159</sup> This pilot project proved highly successful,<sup>160</sup> and in 1982, Congress established pretrial services agencies in all federal district courts except Washington, D.C.<sup>161</sup> Additionally, as of 2001, 300 local jurisdictions had established pretrial services programs.<sup>162</sup> “While individual pretrial service[s] offices vary in their policies, and philosophies, their common goals are: (1) to prepare objective, concise, and thorough pretrial services reports, (2) to reduce unnecessary detention and crime committed while on bail, and (3) to provide effective supervision for individuals while on pretrial release.”<sup>163</sup>

### C. The Viability of a Pretrial Services Program in Alaska

Creating a pretrial services office is a viable option for the Alaskan criminal justice system. Judicial officers need more information than they currently receive to make good predisposition release decisions. It is well-documented that judicial officers with more information are more likely to release a defendant on their own recognizance, or at least to impose fewer conditions of release.<sup>164</sup> While Representative

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159. MAHONEY, ET AL., *supra* note 19, at 6.

160. *See id.* “In the early 1980s, when Congress was considering expansion of pretrial services into all Federal courts, Federal magistrates testified that neither defense lawyers nor prosecutors were able to provide them with the requisite information for an informed bail decision.” *Id.* In the words of Judge Gerald B. Tjoflat of the Eleventh Circuit: “[T]he administration of justice is far better served when a magistrate or judge setting conditions of bail under the Bail Reform Act of 1966 has sufficient accurate and objective information regarding the defendant, his background, the offense and all other evidence that relates to the question of whether he will appear for trial. The system is far better served when the judge can make an informed decision, and pretrial services has made a major step in this direction.” *Extend the Operations of the Pretrial Services Agencies: Hearing Before the Subcomm. on Crime of the House Committee on the Judiciary*, 97th Cong. 12 (1981) (statement of Gerald Tjoflat, judge in the Eleventh Circuit).

161. *See, e.g.*, Thomas Bak, *Pretrial Detention in the Ninth Circuit*, 35 SAN DIEGO L. REV. 993, 995 (1998). The common name for this legislation is the “Pretrial Services Act of 1982.” *Id.* The Act was also the first piece of federal legislation that “required dangerousness to be a factor considered for pretrial inquiry. . . .” Betsy Wanger, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 YALE L.J. 320, 329 (1987). However, the Federal Bail Reform Act of 1984 expanded the consideration of dangerousness as a factor considered in pretrial release decisions in federal courts.

162. MAHONEY, ET AL., *supra* note 19, at iii.

163. Bak, *supra* note 161, at 996.

164. *See, e.g.*, MAHONEY, ET AL., *supra* note 19, at 3 (“As pretrial services programs have evolved since the 1960s, they have increasingly demonstrated

Gruenberg said in the House Judiciary Committee on March 31, 2004 that “[w]e need more guidance in the statute,”<sup>165</sup> the guidance is already there. Judicial officers are, by statute, supposed to impose the least restrictive conditions necessary when setting bail. Yet, the imposition of a third-party custodian, perhaps the most restrictive bail condition, is required much of the time.<sup>166</sup> With more reliable, unbiased information about the accused, judicial officers will have the proper tools and necessary encouragement to follow the statute.

The Alaska Criminal Justice Assessment Commission reports that the information systems used in Alaska’s criminal justice system “are inadequate, inflexible, difficult to use, and isolated from one another. Data are frequently not trusted and therefore not used. Because they are not used, their quality is not controlled . . . .”<sup>167</sup> Establishing pretrial services offices throughout the state will help provide more information to judicial officers. A carefully designed program can lead to an increase in the number of defendants released on their own recognizance, while also decreasing failure-to-appear rates through simple monitoring programs and managing the risk that a defendant released pretrial will commit a violent crime.<sup>168</sup> Some judicial officers in Alaska are already familiar with these services and believe that the services would help them make better decisions.<sup>169</sup>

Once information is gathered for a pretrial release decision, most pretrial services agencies analyze the information to determine a risk classification or risk assessment of the defendant.<sup>170</sup> This assessment focuses on whether the particular defendant poses a risk of either

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their capacity to provide information about defendants and about available supervised release options that is relevant to assessing both the risk of flight and the risk to public safety. In some jurisdictions, programs have also developed a capacity to supervise defendants and to help minimize both types of risk.”)

165. H.B. 244, 23d Leg., 2d Sess. 54 (Alaska 2004) (statement of Rep. Les Gara).

166. *See infra*, Part I.B.

167. RIVELAND ET AL., *supra* note 100, at 68. The Commission also found that APSIN (the main criminal history database in Alaska) “has an unacceptably high rate of missing or inaccurate data.” *Id.* at 66. *But see id.* at 66–68 for a more thorough description of the information systems used in Alaska and improvements that have been made since 1993.

168. *See* MAHONEY, ET AL., *supra* note 19, at 39–40. In response to high failure-to-appear rates, the San Mateo, California Pretrial Services Program changed their procedures, which “led to immediate and dramatic improvements.” *Id.* at 39. The director of that program said that after the change in procedure there was “a significant decrease in the failure to appear rate and subsequent incarceration of defendants on bench warrants.” *Id.*

169. Telephone Interview with a Superior Court Judge, Alaska Super. Ct. (Feb. 5, 2009).

170. John Clark & D. Alan Henry, Bureau of Justice Assistance, PRETRIAL SERVICES PROGRAMMING AT THE START OF THE 21ST CENTURY 31 (July 2003).

willfully failing to appear in court or presenting a danger to the community.<sup>171</sup> Agencies employ both subjective assessments and the use of objective criteria, such as point systems, to make recommendations.<sup>172</sup> Different criteria may lead to more accurate results in different jurisdictions, and thus each pretrial services agency is encouraged to “develop its own risk assessment instrument based on local research related to risks in the jurisdiction.”<sup>173</sup> A recommendation for this process in Alaska is outside the scope of this Note; however, it should be noted that the National Association of Pretrial Services Agencies “maintains that use of objective criteria is ‘the only way to remove arbitrariness and approach equal treatment for all defendants.’”<sup>174</sup>

### CONCLUSION

In the 1960s, Alaska adopted bail laws similar to those in the federal government and many other states. The laws create a presumption that defendants charged with a crime will be released from jail on their own recognizance. However, if the judicial officer thinks that the defendant is either a flight risk or a danger to the community, then the judicial officer can impose conditions of release to the extent necessary to ensure appearance and community safety. Despite this presumption of using the least restrictive means to ensure appearance and safety, judicial officers throughout Alaska require that defendants be released to a third-party custodian in most felony cases.<sup>175</sup> This is an extremely onerous requirement and often means that the defendant will spend more time incarcerated, that he might have a more difficult time presenting his defense, and that he is thus more likely to be convicted and to receive a longer sentence than if he spent less time incarcerated pretrial. While the third-party custodian requirement has its roots in equal protection, it is no longer serving this goal. The requirement was originally designed to allow indigent defendants to be released without monetary bail, since they could not afford to pay, but its currently widespread use indicates that it no longer serves merely this narrow purpose. This is especially evident given that most defendants with a third-party custodian requirement also have to post significant monetary bail. The requirement is now being used by judicial officers to provide an added assurance that the defendant’s conditions of release

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171. *Id.* at 15.

172. *Id.* at 32.

173. *Id.* at 15.

174. *See id.* (citing NATIONAL ASS’N OF PRETRIAL SERVICES AGENCIES (NAPSA), PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL RELEASE, Standard XI (1978)).

175. ALASKA FELONY PROCESS, *supra* note 1, at 116 fig.24.

are being monitored. The root of this problem lies partially in the insufficient information presented to the judicial officer when he must make a bail decision. To provide more reliable information to decision makers, to prevent defendants from being subjected to unnecessarily onerous bail requirements, and to ensure defendants' equal protection while still protecting the community, Alaska should develop an independent pretrial services agency. While this program may be expensive, this expense will be offset at least in part by the money saved through lower predisposition incarceration rates. Further, the community should feel comforted knowing that important bail decisions are being made with better, more reliable information provided by an independent agency.