SHANE'S

AARECORP BONDING
BAIL BOND AGENCY
405 E. Santa Fe
Olathe, KS 66062

February 11, 2013

My name is Shane Rolf, I have been a bail bondsman in Olathe, Kansas, for the past 27 years. In that time I have posted bonds for tens of thousands of criminal defendants. I have been a constant observer of the pre-trial release process in Johnson County. I would like to speak in support of House Bill 2070.

There are three changes that this bill seeks to implement, only one of which is likely to be considered controversial.

1) Felony Convictions: The bill would require that no bondsman or bounty hunter may have a felony conviction. The current standard is that only personal felony convictions within the past ten years would disallow someone from working as a bondsman or bounty hunter.

2) Out of State Bounty Hunters: The bill would require that a bail bond surety from another state would have to contract with a locally authorized bonding firm in order to effect an apprehension within the state of Kansas. This will help ensure that the notification requirements of K.S.A. 22-2809a are maintained, and that law enforcement officials are aware of bounty hunting activity within their jurisdictions.

3) Objective Standards for Own Recognizance bonds: The bill would establish certain minimal qualifications regarding the use of O.R. Bonds to ensure that only low-risk defendants are being granted unsecured release.

The Nature of Bail - Maintaining Balance

The primary purpose of bail is to ensure that an accused individual appears to answer the charges against him. In doing so, bail seeks to balance two competing interests. The first being the defendant's right to the presumption of innocence, the second being the rights of the people to have the defendant present to answer the charges against him. The sound administration of justice demands that these competing interests be reconciled. Appropriately set and properly secured bail is that balance.

The New Mexico Supreme Court explained it thus:

> The purpose of the bond or security is to secure a trial, its object being to combine the administration of justice with the convenience of a person accused, but not proved, to be guilty. If the accused does not appear the bail may be forfeited, not as a punishment to the surety or to enrich the Treasury of the State, but as an incentive to have the accused return or be returned to the jurisdiction of the court.
>
> The release of a defendant on bail bond is an accommodation of competing interests; it gives not lip service, but full fealty to the basic principles of freedom, inherent in our system, that an accused is presumed to be innocent until his guilt is established by the evidence beyond a reasonable doubt, [and] it reconciles a sound administration of justice with the rights of the accused to be free from harassment and confinement, unhampered in the preparation of his defense and not subjected to punishment prior to conviction.

Often those who argue for more lenient, or non-financial, forms of release place a greater precedence on the presumption of innocence than the rights of the State and the People to have the accused present for trial. As with most things in life, the key is finding the appropriate balance between these competing interests.

Type of Bail in Kansas

K.S.A. 22-2802 currently allows for four distinct types of appearance bonds (bail bonds) in Kansas.

1. Surety bond. Most commonly this is posted by a professional bail bondsman[1] who - for a fee - agrees to act as surety for the full amount of the bail. If the accused does not appear in court as ordered, the surety will have an opportunity to return him to the custody of the State or else pay the full amount of the bond. This provides a powerful financial incentive for the bondsman to make sure that the defendant appears, or return that defendant in the event of a failure to appear. The fee the bondsman charges for this service is not refunded. National studies have shown that, along with full cash bonds, this is the most effective bail method for securing future appearances in court.

2. Full cash deposit. The accused, or someone else, may deposit the full amount of the bail in cash with the Clerk of the Court. If the accused makes all of his scheduled court appearances, then the full amount of the cash bail is refunded to the depositor. If the defendant fails to appear, there will be an opportunity to return the defendant to custody to attempt to prevent losing the full cash deposit.

---

[1] Less commonly, a private person may petition the court to be allowed to act as the surety for a particular defendant.

[2] Taken from *Bureau of Justice Statistics: Special Report on Pretrial Release of Felony Defendants 1990-2004.* Excludes Property bonds and Emergencies releases which accounted for less than 2% of total releases

[3] Bail Decision Making in Philadelphia, Goldkamp, John (1978)

3. O.R.C.D. Bonds. In 2007, the legislature created a special bond for defendants who met certain qualifications (Seriousness of the charges, criminal history, history of appearance, etc). The defendants who qualify are allowed to make a deposit of cash in the amount of 10% of the full bail and sign an unsecured promise to pay the remaining 90% in the event of failure to appear. While we refer to this as an ORCD bond in Kansas, this type of bond is most often called a "deposit bond." If the defendant appears as ordered, then this 10% amount is refunded. If the defendant fails to appear, then - in theory - the defendant loses the 10% on deposit and owes the State the remaining 90%. However, in practice, this remaining 90% is never collected.

4. Unsecured Bond (O.R. Bond). For this type of bond, the accused is allowed to sign an unsecured promise to appear indicating that he will be responsible for the full amount of the bond in the event he absconds. Neither the accused, nor anyone else, is required to deposit any sort of funds or security with the Clerk in association with this type of bond. In the event the defendant fails to appear, the State may seek to obtain a judgment against the defendant for the full amount of the bond. Again, in practice, this is rarely done and is often considered to be a waste of resources as the potential obligors are fugitives and often functionally "Judgment-proof." There are currently no parameters defining who may be considered eligible for this type of bond. National studies have shown that (with the exception of Court Mandated Emergency Release programs) this is the least effective mechanism for ensuring future court appearances. As such, this is typically considered by most judges to be a form of bail limited to low risk defendants.

The Differences Between a Surety Bond and an O.R.Bond

There are stark differences between surety bonds and O.R. Bonds, for example:

	Surety Bond	O.R. Bond
Bond Amount	Full Bond Completely Secured	Completely Unsecured
FTA?	A warrant is issued AND the surety actively attempts to locate and return the fugitive	A warrant is issued
Effectiveness	Most Likely to Appear	Least Likely to Appear
Effectiveness[2]	Lowest Fugitive* Rate	Highest Fugitive* Rate

* Fugitive Rate is defined as the percentage of defendants still missing after one year.

Another way to look at this is to consider the difference between a Mortgage loan and a Credit Card loan. The surety bond is completely secured, just like a mortgage, whereas the O.R. bond is completely unsecured, like a credit card. The default rate for credit cards is twice that of

[2] Taken from *Bureau of Justice Statistics: Special Report on Pretrial Release of Felony Defendants 1990-2004.* Excludes Property bonds and Emergencies releases which accounted for less than 2% of total releases

mortgages, and much like a mortgage, even if there is a default, there is something there to collect, i.e. the surety bond. Similarly, the Failure to Appear rate for O.R. Bonds is substantially higher than that of surety bonds.

LOW RISK?

Even those opposed to this bill will agree that unsecured O.R. bonds should be limited to low risk defendants. The real question then becomes: Who is a low risk defendant? As with many decisions, this is left largely to the sound discretion of the Court. However, this does not mean that the Legislature has no role in shaping how this decision is made.

This bill would establish objective parameters defining who is NOT a low risk defendant.

1) Non-state residents. An individual's contact with the community is an important factor in determining future appearance. There is no reason that a non-Kansas resident should be granted an unsecured bond.

2) Non-citizens in the country illegally. Individuals who are not in the country legally cannot be considered low risk. Even if they may be able to temporarily challenge deportation for various reasons, once convicted, most will be subject to deportation by virtue of the conviction. This provides a powerful incentive to abscond.

3) Defendants with a prior history of failure to appear. Studies conducted by the Bureau of Justice Statistics indicate that defendants with a history of failure to appear are twice as likely to abscond as those without such a history.

4) Higher level felony charges. Individuals charged with higher level felony charges, including personal felonies (*especially* personal felonies) should not be considered to be low-risk defendants.

5) Bonds in excess of $2,500. If the Court feels that more than $2,500 is necessary to secure the defendant's future court appearances, then clearly the court does not - truth be told - think that this individual is "low risk." This restriction would also prevent the courts from releasing individuals on extraordinarily high unsecured bonds (in the tens of hundreds of thousands of dollars) simply for the purpose of making the public, the media or the crime victim (who likely will not understand that an unsecured bond is a meaningless promise from an accused criminal) feel better about the fact that their victimizer is out of custody.

I am certainly not advocating, simply because one falls within these parameters, that an accused should automatically be granted an unsecured bond. There are many other factors that the Court is statutorily bound to consider when setting bond. Factors such as the accused criminal history, mental state, likelihood that the defendant will reoffend or threaten the victim,

as well as whether or not the defendant in on parole or probation, are all factors that the court is supposed to take into consideration when setting bond currently. There is no proposal to eliminate consideration of those factors. However, the bill does specify that if an accused falls outside of any of the five parameters listed above, they should not be considered a low-risk defendant and as such, cannot be granted an unsecured bond.

PROBLEMS INHERENT WITH UNSECURED O.R. BONDS

Unsecured OR bonds (and to a lesser extend ORCD bonds) have certain fatal flaws, flaws that render them essentially meaningless as a guarantee or an incentive for appearance. The criminal defendant, with no additional backing, guarantees to pay the full amount of the bond in the event he fails to appear. However, if he fails to appear, then he is not around to make good on that guarantee. The old axiom that "you can't get blood from a stone" is exponentially more accurate when the proverbial "stone" is missing.

Additionally, these criminal defendants are often charged with crimes such as theft, lying to the police, escape from custody, forgery, welfare fraud, making false writing, criminal non-support, etc. Individuals who are willing to steal from others, lie to and flee from the police, abandon and fail to support their own children and commit a host of additional offenses wherein they have victimized other people, sometimes violently so, generally have no real compunction about stealing – in essence – from the government by dishonoring their bond agreements.

Finally, in practice, even when the State actually pursues and obtains a Judgment on an O.R. bond, it is never enforced. This judgment is often uncollectable. This renders the amount of bond set meaningless. The criminal defendant who flees doesn't care if his O.R. bond is $1,000 or $100,000; he isn't planning on paying either one (and it is unlikely that he ever will be required to do so).

As an example, The City of Philadelphia, Pennsylvania essentially did away with its private bail bondsmen in the early 1970s, relying instead on OR and ORCD bonds. It was hailed a "model" program[3], an example of how the Criminal Justice System could move away from the use of commercial bail and suffer no ill effects. However, in 2009, the Philadelphia Inquirer began looking into the efficacy of this "model program[4]." In its expose, the newspaper revealed that criminal defendants owed the city over **$1 BILLION** in forfeited bail. The authors wrote: "It is a system that renders meaningless the threat of seizure of bail money, fueling a massive fugitive problem and leading to an astronomical amount of uncollected debt." As an example of how farcical this "model program" had become in Philadelphia, it was revealed in the Philadelphia Inquirer On March 2nd of last year – that over six hundred *current* City employees owed over a million dollars in forfeited bail and costs.

In addition, the City of Philadelphia has one of the highest fugitive rates in the country which is directly related to the ridiculously low conviction rate. Among large urban counties, Philadelphia has the nation's lowest felony conviction rate.

[3] Bail Decision Making in Philadelphia, Goldkamp, John (1978)
[4] Philadelphia Inquirer, Feb 8, 2009, Phillips, N and McCoy, C., "Fugitives owe the city $1 Billion"

The City of Philadelphia is now considering bringing professional bail bondsmen back into the mix of their releases[5]. The expert hired by the Pennsylvania Supreme Court was quoted in the Enquirer:

"In many ways, pretrial release was a house of cards built on some sort of misconception."

<u>EFFECTIVENESS</u>

In November 2007, the Bureau of Justice Statistics released a Special Report on Pretrial Release of Felony Defendants in State Courts, 1990-2004. Table 7 from that study indicates failure to appear rates for various types of bonds. The definitions in the study would classify O.R. bonds as "Unsecured Bonds."

Type of Pretrial Release	FTA Rate	Fugitive[6] Rate
Property Bond	14%	4%
Surety Bond	18%	3%
Full Cash Bond	20%	7%
Conditional Release	22%	6%
Deposit Bond	22%	7%
Release on Recognizance	26%	8%
Unsecured Bond	30%	10%
Emergency Release	45%	10%

As you can see, the only method of release less secure than an O.R. bond is to simply open the doors to the jail and push people out.

In short, an OR bond is truly a “get out of jail free card,” and, as such, should only be used in limited circumstances, such as the guidelines set forth in this bill.

Revolving Door - Emblematic Example of O.R. Overuse

A while back, I received a phone call from an inmate at the Johnson County jail trying to post bond. His situation was illustrative of the overuse of OR Bonds. Richard Hughes [Case # 04CR2114] was arrested in 2004 for writing two bad checks. This case, a relatively minor misdemeanor, remained unresolved for almost 7 years, due to repeated failures to appear and repeated OR bonds. This is a synopsis of his case:

9/7/04 Arrested, bond set at $250 Cash or Surety
9/7/04 Bond modified to $250 OR – Posted
10/8/04 Defendant Fails to Appear, Bond Forfeited
2/10/05 Arrested on bench warrant, bond $500 Cash or Surety

[5] Philadelphia Enquirer, April 12, 2012, McCoy, C. "Courts take action to stem tide of no-shows"
[6] The Fugitive Rate is defined as a defendant who fails to appear and remains missing for at least one year.

3/4/05 Bond modified to $1,000 OR
4/26/05 OR Bond posted[7]
5/27/05 Defendant Fails to Appear, Bond Forfeited
2/10/06 Judgment on Bond granted
10/11/07 Arrested on bench warrant, bond $3,000 Cash or Surety
10/19/07 Bond modified to $1,000 OR – Posted
12/21/07 Defendant Fails to Appear, Bond Forfeited
9/30/08 Judgment on Bond granted
2/25/11 Arrested on Bench warrant, bond $1,500 Cash or Surety
3/4/11 Request for Discovery filed (by defense counsel)
3/7/11 Bond Modified to $750 OR – Posted
4/1/11 Attorney Appears, Defendant does not – case continued
6/13/11 Case Dismissed

While there is an indication that Mr. Hughes probably should not have been granted the first OR bond[8], common sense tells us that the next three should not even have been considered. I asked Mr. Hughes why he had waited so long to call us about posting bond (it had been 9 days since he was arrested), he told me that he waited to go to court to see if the judge would give him a signature bond. When I pointed out that he had already missed court several times and asked him why he would have thought that the Court would even consider giving him a PR bond, he replied: "Well, they've done it before." And, as it turned out, they did it again.

Note that one of the last entries is a request for discovery. The defense attorney realizes that this has become a very old case and a conviction may now be difficult to obtain. (As indeed was the case) As a result, Mr. Hughes has beaten this charge by his repeated failures to appear. Additionally, he now has two separate $1,000 bond judgments against him[9], which will never be paid and which provided absolutely no incentive for him to appear as ordered.

This is simply one minor misdemeanor case, but sadly, it is not unique. We see this sort of thing every day. It is very demonstrative of how the overuse of OR bonds can lead to a revolving door scenario.

POTENTIAL ARGUMENTS AGAINST RESTRICTIONS ON O.R. BONDS

Various arguments against the passage of this bill have been made known to us, and I will address certain of those argument and explain why they should be discounted.

[7] Mr. Hughes had been serving a sentence from the Olathe Municipal Court, which was the reason for the delay in posting the PR bond

[8] A review of Johnson County Court records shows earlier failures to appear in 1999 and 1994 criminal cases
[9] Note that the accounting system does not reflect these judgments at all – i.e. no effort is being made to collect these forfeited bonds.

NO NEW/ADDITIONAL HEARING REQUIRED

It has been postulated that the courts will need to hold additional hearings and take up additional judicial resources to comply with this bill. This is not accurate. There will not be a need for additional court hearings to make these determinations on bond. The statute, as it is written now, *already requires* the court to consider all of the factors the bill specifies. In other words, the Court is already *supposed* to have this information when it makes the initial bond setting decision. This bill simply clarifies which factors would disqualify a defendant from receiving an O.R. bond.

This also does not prevent any court system from using a pre-set bond schedule. The factors set out in this bill would simply need to be incorporated into that schedule. All of the factors set out in this bill (See box below) are easily discernable to any law enforcement officer with access to an NCIC terminal. So the argument that additional court resources would need to be expended is simply inaccurate.

The following boxes demonstrate current considerations and how the proposed changes are already supposed to be factored into the bond setting decision.

Current Considerations

1. The nature and circumstance of the crime charged,
2. The weight of the evidence against the defendant,
3. Whether the defendant is lawfully present in the US,
4. The defendant's family ties,
5. Employment,
6. Financial resources,
7. Character,
8. Mental Condition,
9. Length of residence in the community,
10. Record of convictions,
11. Record of appearance of failure to appear at court proceedings or of flight to avoid prosecution
12. The likelihood or propensity of the defendant to commit crimes while on release, including whether the defendant will be likely to threaten, harass or cause injury to the victim of the crime or any witnesses thereto,
13. And, whether the defendant is on probation or parole from a previous offense at the time of the alleged commission of the subsequent offense.

HB 2070 O.R. Restrictions

1. The most serious charge against the person is a misdemeanor, a severity level 8, 9, or 10 nonperson felony or a drug severity level 4 felony, **[1]**
2. Is a resident of the state of Kansas, **[9]**
3. Has no prior history of failure to appear for any court appearances in the state, **[11]**
4.Has and appearance bond set at $2,500.00 or less, **[All]**
5.Is lawfully present in the U.S, **[3 - Lawful presence]**

NOT THE END OF JUDICIAL DISCRETION

It has been argued that these changes will be the end of judicial discretion in setting bonds. I think that this is hyperbole. While there would be common sense limitations on who can be released on O.R. bonds, every other aspect of judicial discretion is retained.

The Court is not *required* to set an O.R. bond.

The Court retains all authority in setting the conditions of release.

The Court retains all discretion in determining the *amount* of bond.

If there is a defendant who falls outside the parameters, but whom the Court feels, for whatever reason, is a good risk to appear and abide by other conditions of release, the Court clearly retains the discretion to set an exceedingly low cash/surety bond, thereby effectively ensuring that the defendant will secure his release. Further, I would put forth that requiring a defendant to posted a cash/surety bond of $50 or $100 actually provides more tangible security than some ridiculously inflated, financially meaningless O.R. Bond.

Further, some of the arguments being put forth - particularly surrounding the use of a preset bond schedule - seem to complain that the Courts would be required to actually exercise that discretion. If the Courts are going to delegate that discretion to a bond schedule, then they are not really exercising individual discretion, and the Legislature should step in and set some broad parameters.

Judicial discretion is a vital aspect of setting bond, however that discretion is not without limits. The current statute requires that discretion to be exercised through the prism of paragraph 8 and the factors set out therein. The changes proposed herein simply further refine that prism.

INDUSTRY DRIVEN BILL

Judge Fleetwood, from Sedgwick County, was quoted in the Wichita Eagle last year and indicated that O.R. Bonds are only granted for "**low-level offenders who represent a minimal flight risk**." Since all this bill does is limit O.R. bonds to Low-Risk, Non-Violent Offenders, one wonders why there would be any opposition. The bill will certainly not prevent low-risk, non-violent offenders from being granted O.R. bonds.

If the argument is that this is an industry-driven bill, whose sole purpose is to generate extra revenue for the bail bondsmen, then that argument is *directly contradicted* by the claim that only Low-Risk, Non-Violent Offenders are given O.R. bonds. This bill does not prevent those defendants from being granted O.R. bonds, so then where are we lining our pockets? If this Low-Risk, Non-Violent scenario is accurate, then passage of this bill shouldn't impact the Courts at all. Nothing will change. ***Opponents of this bill cannot reasonably argue that the bill would benefit the bonding industry unless they acknowledge that unsecured bonds are being granted to high-risk, violent offenders***.

If, however, that quote in the Eagle is false and O.R. bonds are, in fact, being granted to riskier, more violent offenders, then perhaps the bonding industry stands to benefit financially. However, if high-risk, violent offenders are being granted "Get out of Jail Free" cards by the Courts, then I think the question is not "are the bondsmen going to make money?" but rather

"Why are these hihg-risk, violent offenders being released without anything to secure their appearance?"

CONCERNS ABOUT JAIL OVERCROWDING

When it became obvious that pre-trial release programs that did not utilize surety bail were not as effective at securing appearance as those which did, "taxpayer supported bail" advocates (most specifically the Pretrial Justice Institute) changed their approach and argued that it was necessary to provide more lenient release so that jails did not become overcrowded. The argument was that it was more cost-effective to release defendants than to incarcerate them. Most advocates of overuse of unsecured OR bonds point to this fact – it is cheaper to release criminal defendants than to incarcerate them, at least in terms of the immediate financial cost[10]. However, there are societal costs – such as deterrence, the existence of real and tangible consequences for misbehavior, public safety, and a general respect for the Law – that are not served by making a "mockery of the system" (to use the words of the Philadelphia Inquirer).

Furthermore, I am not aware of any large scale empirical data that suggests that releasing criminal defendants on OR bonds results in any *long term* reduction in jail population[11]. Rather, by looking at states wherein commercial jail has been abolished, such as Illinois or cities like Philadelphia, one finds that their jails are among the most crowded in the country (on a per capita basis), with excessively long Average Length of Stay times. In short, in real-world implementation, lenient forms of non-financial release have not resulted in any long term reduction in jail populations. Rather, the revolving door scenario usually results in multiple failures to appear until the Court gets tired of the repeated failure to appear and simply sets the bond at level too high to post, thus filling up the jail.

CHANGES TO 22-2809a

This bill also proposes certain changes to 22-2809a. Since I was one of the original conferees on the bill that enacted that statute, I would like to touch briefly on these proposed changes.

Paragraph c), as currently proposed, would simply remove both the "person" qualifier and the "ten year" qualifier, meaning that no one with a prior felony conviction would be able to act as a bondsman or a bounty hunter.

Just as a historical note, when the bill left the Senate originally, the "person" qualifier was not present. When the bill arrived at the House, two bondsmen appeared and indicated that this restriction would apply to them and would effectively put them out of business. To accommodate those individuals, the House inserted the "person" qualifier. However, as another

[10] I would argue that this is only true when a jail exceeds its capacity. Until that time, the operation costs of a jail facility, which is mostly manpower, are largely fixed. Food and medical care would fluctuate with population changes, but these are not the predominant expenses.

[11] There are small scale, shorter term studies, such are those conducted by the Vera Institute, which have had positive results. However, those have been unsuccessful in large scale implementation. And simply opening the doors to the jail will naturally result in a temporary drop in jail population, until those defendants are rearrested for either failure to appear or for new crimes.

example of past behavior indicating future performance (much like prior FTA's), both of those individuals ran afoul of the law again and are now out of business.

The other change to 22-2809a would require a bondsman or bounty hunter coming from out of state to contract with and be accompanied by a locally approved bonding agent. This type of restriction, in one form or another, is in place in several states. The language for this was borrowed from a similar statute in Arizona. Roughly half of the states have requirements that bounty hunters either be licensed in-state, be accompanied by someone who is, or reciprocally recognize other states' bounty hunter licenses.

This will probably have the most impact in areas like Johnson and Wyandotte Counties that are population centers close to the state line. Often times, bounty hunters from Missouri will show up in Kansas City, Kansas, ignore the Police Department's protocols, create a ruckus and leave the fall-out for us to absorb. By requiring local involvement - as many states do - these types of problems can be avoided and we can work better with law enforcement.

Since this has been introduced along with the O.R. restrictions, it has been held out as an example of "just another way to line our pockets." It is, however, an attempt to prevent people coming in from other places and creating problems in the areas and with the police departments that we have to interact with on a regular basis.

Eventually, we would like to reach a point where Kansas has a "Fugitive Apprehension License." In our association, we are studying various ways of implementing such a change. However, until the details of such a licensing can be worked out, we believe that this is a good first step.

Thank you for your time and consideration. I hope that you will agree that the Legislature should be involved in establishing certain parameters around the issuing of OR bonds, as well as adopt the proposed changes to 22-2809a.

Shane Rolf