Testimony of Nicholas J. Wachinski
Chief Executive Officer, Lexington National Insurance Corporation

Pennsylvania Senate, Judiciary Committee
Public Hearing on Bail Reform Issues
March 22, 2016
Harrisburg PA

Good morning Chairman Greenleaf, Senator Leach and members of the Judiciary Committee. Thank you for convening this hearing to discuss this important issue and thank you for inviting me to take part in this discussion. My name is Nicholas J. Wachinski, I am the Chief Executive Officer of Lexington National Insurance Corporation, a company that deals almost exclusively in bail, has done so since the 1950's either as a bail agency or a bail insurance company, and is in its third generation of family ownership. Additionally, I have the pleasure of serving as the Executive Director, *Emeritus* of the American Bail Coalition, a non-profit dedicated to establishing best practices in assessing bail. Perhaps most importantly, I am a licensed attorney in Pennsylvania who has engaged in criminal defense practice and I enjoy serving as an instructor for the Pennsylvania Supreme Court, Minor Judiciary Education Board on the issue of bail.

Today we are together to discuss a proposal that allows judges the discretion to set money bails in cases where they determine it is appropriate but that there would be a mechanism to ensure that no accused person was caught in jail merely because he or she could not financially afford bail. The intent of this measure is good. The details and the language are important. However, I oppose the reduction in the use of bail, money bail or monetary conditions of bail as a judicial tool.

In Pennsylvania, bail is designed to assure that an accused person appears at all time required by the Court, refrains from any act that constitutes a crime or act of victim or witness intimidation and does not pose an unreasonable threat to the victim, witness or public, generally. In the event that the Court determines that a non-monetary condition, monetary condition or combination of conditions will not assure appearance or reasonably assure the protection of the public, then the Court has the ability to deny bail outright. Judges are not restricted in the conditions that they can put on a person, so long as those conditions are reasonably calculated to address a specific concern presented by the defendant.

Working with the five hundred sixty-seven (567) magisterial district judges and arraignment court judges on a yearly basis on the issues stemming from the assessment of bail has given me a unique perspective. While other jurisdictions are making changes to their bail systems because those systems do not judicially evaluate each defendant based on the merits of the defendant but rather opt to set bail based on criminal charge alone, Pennsylvania can proudly boast that we are at the cutting edge forefront of policies in the determination of bail.

Generally, within twenty-four hours following arrest, an accused is brought before a magisterial district judge or arraignment court magistrate. In most Pennsylvania jurisdictions, the accused has been interviewed by a court employee to determine the nature of the crime, the number of prior arrests, the number of prior failures to appear in other cases or the current case, the nature of the ties that the accused has with the community where he or she has been arrested and most importantly his or her financial condition. The interviewer then generally makes a recommendation to the judge as to conditions of bail, either monetary or non-monetary.

The judge is also generally armed with the affidavit of probable cause issued by the arresting officer or agency. This document summarizes the facts of the case so that the judge can properly assess whether non-monetary conditions of bail, monetary conditions of bail or no bail is justified due to the risk posed to public safety or risk of flight by the accused. Pursuant to the rules of criminal procedure already in place, the assessment of bail must rely on the least restrictive condition that the judge determines is necessary to address the circumstances of the accused.

Perhaps most imperatively, this is rarely the only time bail is addressed. Should the accused require a bail modification, for any reason, he or she can petition the magisterial district judge or the Court of Common Pleas immediately. The accused may address bail at the preliminary hearing (which is 7-10 days after bail is set), at the formal arraignment (generally 7-14 days after preliminary hearing), at the pretrial conference, or any time during the criminal court process. So long as the preliminary hearing has not yet concluded, the magisterial district judge may hear any request to modify bail. If the preliminary hearing has concluded or if the accused has decided to file a motion with the Court of Common Pleas, at any time, his or her concerns on bail will be heard by a judge. In fact, many counties such as Delaware and Philadelphia counties, have dedicated judges or judicial officers that hear bail modification petitions multiple times weekly as the caseload demands.

The simple truth is that bail has a role in our criminal justice system. Many of us testifying before you have addressed improving the efficiencies of the criminal justice for many years. In fact the Judiciary Committee of the Pennsylvania Senate, under the leadership of Senator Greenleaf, engaged in such a discussion in 2009 when the criminal justice system in Philadelphia was in need of immediate intervention. At that time, the committee who investigated the system was able to determine that some 47,000 outstanding failure to appear warrants were outstanding and some $1.1 billion in uncollected unsecured or deposit (10% to the Court) bail monies had gone unaddressed. These facts had led to a "culture of disrespect" in Philadelphia, where accused persons did not feel any level of accountability or responsibility to return to court to be adjudicated.

The solution was dedicating judicial resources to address the warrant problem and led to increased reliance on incarceration as a response to failure to appear or failure to comply. This was done largely because the warrants resulted from bails where money could not be forfeited because money was not used as a condition of release.

In the time since the committee examined that system, surety bail returned to Philadelphia. Of the cases that have been handled by surety bail, I am pleased to report that there has been no failure to appear that has been unaddressed for longer than one week, meaning that all defendants have been returned to Court.

In the past several years, discussions have been ongoing about the improvement of the criminal justice system and I have been involved in many of those discussions, nationally, on the issue of bail. From New York, to Colorado, to, now, Pennsylvania, decision makers are concerned with improving the efficiencies in our criminal justice system to reduce the unintended disparate impact that the systems may have on some. The difficulty in these conversations has been balancing the interests of increased efficiencies with the rights of the victims of the crimes and the communities in which crime has occurred. Specifically, in the bail discussion, conversation has shifted to an abandonment of money bail, emphasis on abandoning or lessening judicial discretion in preference for a risk assessment tool that makes a release determination for the accused and adopting alternative forms of release that are the equivalent of probation before a determination of guilt. These measures are not necessary in Pennsylvania.

Risk assessment tools are merely that, tools. To be used by qualified and trained individuals who understand their benefit but also recognize the potential for abuse or misuse if relied on too heavily. In fact, the Arnold Foundation, widely recognized as the nation's leading risk assessment developer, recently stated that risk assessment combined with independent judicial discretion yields the best results. Discretion that includes the continued use of money as a condition of release.

As relates alternatives to bail, these alternatives are already used in Pennsylvania based on the individual judge's discretion but it should be noted that these conditions are expensive and without a large influx of monies, such alternative programs risk more damage to an accused then the imposition of money bail. Recently, New Jersey altered its bail system, and since the passage of that measure in 2014, it has not yet been implemented and every headline discussing the change to the system, where alternatives are considered and judges set bail with monetary or non-monetary conditions within 48 hours of arrest, has discussed the tremendous costs of the change. It has been suggested by Towson University Regional Economics Studies Institute that those changes will cost in excess of $250,000,000, inclusive of any potential jail cost reduction.

Pennsylvania works. All systems could improve efficiencies. Dollars spent on criminal justice improvement could be rightly given to the district attorneys, public defenders and police departments to improve investigation capabilities, develop cutting edge charging units and improve the ability of those defending the accused to respond to the charges brought. Additionally, funds should be generated to create drug and alcohol abuse alternatives in all phases of the criminal justice process, including the uses of secured social impact bonds coupled with drug treatment protocols to the best outcomes. Pennsylvania works, with the best asset being the diligence, prudence and attention given to the bail decision by the magisterial district judges and arraignment court judges when they consider the circumstances of the person for whom bail is being set, not just the crime and the amount of money.