Touro Law Review

Volume 29
Number 4 *Annual New York State Constitutional Issue*

Article 27

March 2014

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Recommended Citation
Wynne, Maureen (2014) "McManus v. Horn: The Legality of Setting a Single Form of Bail," *Touro Law Review*: Vol. 29: No. 4, Article 27.
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Cover Page Footnote
29-4

This article is available in Touro Law Review: http://digitalcommons.tourolaw.edu/lawreview/vol29/iss4/27

MCMANUS V. HORN: THE LEGALITY OF SETTING A SINGLE FORM OF BAIL

COURT OF APPEALS OF NEW YORK

People ex rel. McManus v. Horn[1]
(decided March 22, 2012)

I. INTRODUCTION

In March 2012, the New York Court of Appeals came down with a decision that clarified the options given to a court in setting bail.[2] The case, *People ex rel. McManus v. Horn*, was an appeal for the court to consider whether New York Criminal Procedure Law ("CPL") section 520.10(2)(b) "prohibits a court from designating only one form of bail."[3] Both McManus and the District Attorney relied on the language of the statute to argue their opposing points.[4] McManus argued that a single form of bail is illegal under the New York law, while the government argued that the law allows a judge to designate a single form of bail.[5] This stark difference in statutory interpretation required the court provide some clarification.

In a 2007 case, the court stated that its "primary goal is to interpret a statute by determining, and implementing, the Legislature's intent."[6] This analysis begins with looking to the language chosen by the legislature in drafting the statute.[7] Then, the court should look to the "purposes underlying the legislative scheme," or in other words, legislative intent.[8] The entire analysis should be conducted with historical considerations in mind.[9] While the surrounding circumstances

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1 18 N.Y.3d 660 (2012).
2 *Id.* at 666.
3 *Id.* at 662.
4 *Id.* at 664-65.
5 *Id.* at 664.
6 People v. Litto, 8 N.Y.3d 692, 697 (2007).
7 *Id.* at 697.
8 *Id.*
9 N.Y. STAT. LAW §124 (McKinney 2012).

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will not control the plain, unambiguous text of the statute, it cannot simply be ignored.[10] Additionally, the textual discussion should be followed by review of the litigation on the statute.[11]

This Note on the recent Court of Appeals' holding in *McManus* will examine how the court came to hold that New York law prohibits a court from fixing only one form of bail.[12] Statutory language and legislative intent, considered in light of the extensive history of bail reform, help clarify how the court arrived at the conclusion it did. This analysis will be followed by a review of the division between several other states on the issue of allowing their courts to set a solitary form of bail. Finally, a review of the implications of this decision, or lack thereof, will be discussed.

II. *MCMANUS V. HORN*

"Petitioner Shaun McManus was on parole . . . when he was arrested for arson . . . and related offenses stemming from two separate incidents" against a common victim.[13] McManus was accused of assaulting an individual and setting the same individual's two cars on fire.[14] "Bail was set at $5,000, cash or bond, . . . [and t]he victim was granted a temporary order of protection."[15] McManus posted bail, but subsequently violated the order of protection by verbally abusing the victim and threatening him with weapons.[16] He was arraigned on new charges and bail was set at $1500, cash or bond, for each offense, but he was not released on bail because the Division of Parole filed a violation warrant with the Department of Corrections.[17] Based on the original incidents of arson and assault, McManus was indicted for two counts of arson, four counts of aggravated harassment, two counts of criminal mischief, and one count of assault.[18] The "Supreme Court ordered that bail be set at $20,000, 'CASH ONLY.' "[19]

"When the Division of Parole [withdrew] its hold on [peti-

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[10] *Id.*
[11] U.S. v. Alvarez-Hernandez, 478 F.3d 1060, 1065-66 (2007).
[12] *McManus*, 18 N.Y.3d at 666.
[13] *Id.* at 662.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 663.
[17] *McManus*, 18 N.Y.3d at 663.
[18] *Id.*
[19] *Id.*

tioner], he tried to secure a bail bond but was" unsuccessful due to the fact that the court required bail be in the form of cash only.[20] McManus sought an alteration of his bail ruling, arguing that setting a single form of bail is not allowed under CPL section 520.10(2)(b), but the Supreme Court stuck to its bail determination.[21] Petitioner then initiated a proceeding for a writ of habeas corpus.[22] The Supreme Court held that CPL 520.10(2)(b) does not preclude a judge from setting a single form of bail and the Appellate Division affirmed on the same grounds.[23]

Before the Court of Appeals analyzed the merits of the case, it had to decide if the issue became moot when McManus entered a guilty plea to the arson and as to other charges.[24] Petitioner's pretrial detention was terminated upon this plea, so the legality of the detention was technically a non-issue.[25] However, the court found that a mootness exception applied because the issue of cash-only bail is important, likely to reoccur, and will typically evade review.[26] As such, the case was not dismissed on mootness grounds, and the court proceeded with its interpretation of the statute.[27]

The court first turned to the language used in the statute at issue.[28] In the first section of the statute, nine categories of bail are permitted.[29] The second section of the statute "specifies two distinct 'methods of fixing bail.' "[30] The first method allows the court to designate the monetary amount of bail without specifying the form in which it may be posted.[31] If this option is employed, the accused can post the amount in any of the nine forms listed in the first section of the statute.[32] The second method of fixing bail states that a "court may direct that the bail be posted in any one of two or more of the forms specified in subdivision one, designated in the alternative, and

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[20] *Id.*
[21] *Id.*
[22] *McManus*, 18 N.Y.3d at 663.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at 663-64.
[27] *McManus*, 18 N.Y.3d at 664.
[28] *Id.*
[29] *Id.*
[30] *Id.* (quoting N.Y. CRIM. PROC. LAW § 520.10(2)(b) (McKinney 2012)).
[31] *Id.*
[32] *McManus*, 18 N.Y.3d at 664.

may designate different amounts varying with the forms."[33]

McManus argued that a single form of bail, such as cash-only bail, is illegal under the statute because subdivision (2)(b) "requires that at least two forms of bail be" set.[34] He relied on the language, "any one of two or more of the forms" to support his contentions.[35] The government countered by arguing that a single form of bail is permissible under CPL 520.10 because (2)(a) uses the word "form" not "forms," and the word "may" and not "must" is used in both (a) and (b) of subdivision (2).[36] The court conceded that both parties' arguments had "some degree of linguistic merit," and thus a legislative intent analysis would help decide which argument should prevail.[37] It held that McManus' argument better conformed with the "overall statutory structure and legislative purpose" that impelled the enactment of the statute in question.[38]

The word "may" was employed to categorize the two permissible methods of fixing bail in subdivision (2).[39] "The Legislature could not have used the word 'must' " because that would have limited the court's discretion in choosing between the two enumerated options.[40] It was the intention of the legislature "to reform the restrictive bail scheme that existed [prior to the current statute] in order to improve the availability of pre-trial release."[41] In order to improve such availability, the legislature provided flexible bail alternatives to presumptively innocent pretrial detainees.[42]

The court ended its decision by stating that the other forms of bail that must be set imposed no undue restriction on a court because the two forms of bail may be virtually indistinguishable from one another.[43] The court subsequently provided examples of how the court could have determined proper bail for McManus in conformity of CPL section 520.10.[44] Along with the $20,000 cash option, the judge

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[33] *Id.* (quoting N.Y. CRIM. PROC. LAW § 520.10(2)(b)).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *McManus*, 18 N.Y.3d at 665.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.* (citations omitted).
[42] *McManus*, 18 N.Y.3d at 665.
[43] *Id.* at 665-66.
[44] *Id.* at 666.

could have ordered a $200,000 partially secured appearance bond requiring a monetary deposit of 10%, or a $20,000 secured appearance bond that could be satisfied with, among other things, $20,000 in cash.[45] Therefore, the court concluded that there was no compelling reason for the legislature to allow a single form of bail in the statute.[46] The judgment was reversed and the proceeding was converted to declaratory judgment declaring that CPL 520.10(2)(b) prohibits the designation of one form of bail.[47]

III. STATUTORY ANALYSIS OF CPL 520.10

In its decision on McManus' writ of habeas corpus, the Bronx County Supreme Court pointed out that "[t]here are no reported cases holding either that a court must set two forms of bail, or that setting one form is permissible."[48] However, it did acknowledge that in *People v. Imran*,[49] the court stated that CPL 520.10(2)(b) allows a court to "delimit the options [for posting bail] by specifying at least two forms of bail."[50] Because the issue in *Imran* was whether a real estate bond posted by the defendant had to satisfy the double equity requirement for a secured bond set out in CPL 500.10(17)(b), and not whether two forms of bail is required under CPL 520.10(b)(2), the statement of the court is simply dicta.[51] In order to discern whether the Court of Appeals was justified in overturning the lower court's interpretation of the statute, an analysis of the history, language used, and legislative intent is necessary.

A. Text of CPL section 520.10(2)

New York Criminal Procedure Law section 520.10(2) reads:

> 2. The methods of fixing bail are as follows:
> (a) A court may designate the amount of the bail without designating the form or forms in which it may be

[45] *Id.*
[46] *Id.*
[47] *McManus*, 18 N.Y.3d at 666.
[48] People *ex rel.* Meis v. Horn, 888 N.Y.S.2d 392 (2009).
[49] People v. Iman, 754 N.Y.S.2d 159 (2002).
[50] *Horn*, 888 N.Y.S.2d at 394 (quoting *Imran*, 888 N.Y.S.2d at 161) (internal quotation marks omitted) (alteration in original).
[51] *Id.*

> posted. In such case, the bail may be posted in either of the forms specified in paragraphs (g) and (h) of subdivision one;
> (b) The court may direct that the bail be posted in any one of two or more of the forms specified in subdivision one, designated in the alternative, and may designate different amounts varying with the forms[.][52]

This language has been read in two very distinct ways.[53] The decisions of the three courts that ruled on the *McManus* case exemplify the distinction.[54]

The difference of opinion starts with the interpretation of the introductory text of subdivision two.[55] One way of reading "[t]he methods of fixing bail are as follows[]" is that the two subdivisions that follow are the only options available to a court in setting bail.[56] Another way of reading the text is that the court can set bail in the two methods described in the subdivisions, but taking into account the permissive language used in those subdivisions, they are not the only ways bail may be set.[57] The proponents of this latter view propose that if the legislature intended the subdivisions to be the only means of setting bail, they would have used language such as "when fixing bail, a court *must* do so" in either manner set out in subdivision (a) or (b), or alternatively, "the only methods of fixing bail permitted are" those in the following subdivisions.[58] However, the Court of Appeals held that "inclusion of the word 'may' in both subdivisions was the simplest way for the legislature to codify the two permissible methods for fixing bail[.]"[59] If the legislature had chosen to use the word "must" instead of "may," the statute would have eliminated the discretion given to the court, which it did not want to do.[60]

Subdivision (a) includes the words "form or forms," suggest-

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[52] N.Y. CRIM. PROC. LAW § 520.10(2).

[53] *Compare McManus*, 18 N.Y.3d 660, *with Horn*, 888 N.Y.S.2d 392. In *McManus*, the Court of Appeals found the statute required the court to set a minimum of two forms of bail while in *Horn*, the Supreme Court, Bronx County, found that the statute permitted the court to set one form of bail if it so choses.

[54] *Id.*

[55] *Horn*, 888 N.Y.S.2d at 394.

[56] *Id.* (first alteration in original) (quoting N.Y. CRIM. PROC. LAW § 520.10(2)).

[57] *Id.*

[58] *Id.* at 395 (internal quotation marks omitted).

[59] *McManus*, 18 N.Y.3d at 665.

[60] *Id.*

ing that it is permissible for a court to designate a single form.[61] This language can also be read as allowing the court to designate a single amount of bail, but not a single form of bail attached to that single amount.[62]

The opposing views of the nature of the text underlie these interpretations of the language chosen by the legislature. If the language is taken as being permissive, a single form and amount of bail may be set, but conversely if the language is read as being restrictive of the discretion of the court, a single form of bail is precluded. Thus, the plain language is not definitive enough for an analysis to rest upon. As the Court of Appeals stated over a decade ago, "Where the language of a statute is susceptible of two constructions, the courts will adopt that which avoids injustice, hardship, constitutional doubts or other objectionable results."[63] In order to distinguish which view would avoid injustice, the text of the statute must be interpreted in light of conditions existing at the time of its enactment so as to decipher the intentions of the legislature in using the words chosen.[64]

B. Historical Perspective

The Eighth Amendment of the United States Constitution demands that excessive bail not be ordered.[65] However, nowhere in the Constitution is there a specified right to bail.[66]

The English law concerning bail undoubtedly influenced the drafters of the Constitution.[67] The Petition of Right predetermined which crimes were bailable and which crimes were not.[68] This statute took away from the sheriffs the discretion, which was often abused, of determining in which situations to set bail.[69] With no penalty for the violation of the statute in place, discriminatory practices

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[61] *Id.*

[62] *Id.*

[63] *In re* Jacob, 86 N.Y.2d 651, 667 (1995) (quoting Kauffman & Sons Saddlery Co. v. Miller Harness Co., 80 N.E.2d 322, 325 (N.Y. 1948)) (internal quotation marks omitted).

[64] *Litto*, 8 N.Y.S.2d at 697.

[65] U.S. CONST. amend. VIII.

[66] Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 968 (1965).

[67] *Id.*

[68] *Id.* at 967.

[69] *Id.*

continued.[70] In response, the Habeas Corpus Act of 1679 provided the procedures for proceedings that would hold violators subject to penalties.[71] The principles of the Act influenced Article I, section 9 of the Constitution, which sets forth the principle of habeas corpus.[72] A decade later, the English Bill of Rights set a prohibition against excessive bail.[73] The language used in this bill of rights can be seen today in the Eighth Amendment.[74] However, notably missing is the influence of the Petition of Right.[75]

Bail rights developed entirely separately from English influence as well. One such influence was the development of the Judiciary Act of 1789, enacted by the first Congress.[76] The Act specified that all non-capital offenses are bailable, but bail determinations for capital offenses are left to the discretion of the presiding judge.[77] Congress later enacted the Bail Reform Act of 1966 that grants a statutory right to non-capital defendants of pretrial release on their own recognizance or personal bond.[78] However, if there is a determination that these measures will not assure appearance at trial, alternative conditions such as travel constraints may be placed on the defendant.[79] A highly controversial part of the act was that a judge was not allowed to consider the accused's danger to society in non-capital cases; only flight risk could be considered.[80] This changed in 1984 when Congress replaced the Bail Reform Act of 1966 with United States Code, title 18, sections 3141-3150, allowing courts to detain pretrial defendants if it is determined they pose a danger to the community through clear and convincing evidence.[81] The United States Code did not do away with the Bail Reform Act's attempt "to de-emphasize the use of monetary bail and to encourage judges to consider nonmonetary release conditions."[82]

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[70] *Id.*
[71] Foote, *supra* note 66, at 967.
[72] *Id.* at 968.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] Foote, *supra* note 66, at 971.
[77] Kenneth Frederick Berg, *The Bail Reform Act of 1984*, 34 EMORY L.J. 685, 687 (1985).
[78] U.S. v. Leathers, 412 F.2d 169, 170 (1969).
[79] *Id.* at 170-71.
[80] *Id.* at 171.
[81] Ray Del Castillo & Gihan Fernando, *Bail*, 77 GEO. L.J. 786, 787-88 (1989).
[82] State v. Brooks, 604 N.W.2d 345, 350 (Minn. 2000).

The Constitution of New York State codified its own law against excessive bail in article I, section 5,[83] but just as the Federal Constitution grants no affirmative right to bail, the state constitution does not either.[84] Criminal Procedure Law section 510.30(2) requires a court to consider aspects such as the individual's character, reputation, employment, financial resources, criminal record, residency, weight of evidence against him, and possible sentence upon conviction, when determining bail.[85] The law also provides that if the offense charged is a misdemeanor, bail must be set, but if the offense is a felony, the court has the discretion of choosing between setting bail or detaining the individual after the district attorney is notified and the court has reviewed the criminal record of the individual.[86] However, if the felony is a class A felony or the individual has two prior felony convictions, bail is not permitted.[87]

When a change to the language of a statute is made, a change in the law is presumed.[88] Due to confusion and inadequate awareness of the proper scheme in setting bail, the state legislature enacted CPL Article 500 in 1971.[89] The provisions discussed above, the one at issue in the *McManus* case, and several others were codified through this legislation.[90] There have been two modifications of section 520.10 subsequent to the 1971 enactment. When first enacted, section 520.10(2)(a) was read to limit the defendant's selection of the form of bail he or she wished to post when the court failed to specify itself.[91] The defendant could only select the forms in paragraphs (a) through (d) of subdivision one, which were the most burdening forms.[92] In 1972, the legislature amended subsection (2)(a) by replacing the choice between the forms stipulated in (a), (b), (c), or (d) to the choice of either form (g) or (h).[93] Then in 1986, the legislature added the option of posting bail through "credit card or similar de-

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[83] People *ex rel.* Shapiro v. Keeper of City Prison, 49 N.E.2d 498, 500 (N.Y. 1943).

[84] *Id.*

[85] People *ex rel.* Klein v. Krueger, 255 N.E.2d 552, 555 (1969).

[86] *Id.* at 554.

[87] *Id.*

[88] N.Y. STAT. LAW §124.

[89] Robert Webster Oliver, *Bail and the Concept of Preventative Detention*, 69-Oct. N.Y. ST. B.J. 8, 9 (1997).

[90] Peter Preiser, *Practice Commentaries*, N.Y. CRIM. PROC. LAW § 520.10.

[91] *Id.*

[92] *Id.*

[93] *Id.*

vice" as the ninth authorized form of bail.[94]

C. Legislative Intent

In light of the plain language as well as historical and legislative development of bail schemes both in the country and in New York State, the legislative intent behind the statutes can begin to be construed. It was recognized that the Bail Reform Act of 1966 "was an effort by Congress to give meaning to some of our highest ideals of injustice. It was, by common consent, a legislative intervention in a field where reform was badly needed."[95] One of the highest ideals of injustice Congress was concerned with was the idea that the accused are considered innocent until proven guilty.[96] If this is to be true, imprisoning the accused before trial may be hard to justify.

The 1972 amendment to CPL 520.10 relaxed the restrictions on the forms of bail that could be posted.[97] The legislature adopted this amendment in order to "provide a method of release somewhere between bail . . . and release on one's own recognizance."[98] The legislature was hoping to reduce the number of imprisoned individuals who are not convicted.[99] The Mayor of New York, John V. Lindsay, wrote to the Governor, Nelson A. Rockefeller, urging him to approve the amendment.[100] Lindsay believed the amendment would create a presumption in favor of pretrial release and reduce the role of bondsmen, thus making it possible for more defendants to obtain pretrial release.[101] Through adopting the amendments, it can be viewed as the legislature intending to provide more feasible opportunities to the accused in meeting their bail requirements and obtaining pretrial release.[102] This in turn would help the government with the problem of overcrowded prisons and large caseloads.[103]

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[94] *Id.*

[95] *Leathers*, 412 F.2d at 170.

[96] *McManus*, 18 N.Y.3d at 665.

[97] Bellamy v. Judges in N.Y. City Crim. Ct., 41 A.D.2d 196, 202 (1973).

[98] *Id.*

[99] *Id.*

[100] Letter from John V. Lindsay, Mayor of New York, to Nelson A. Rockefeller, Governor of the State of New York (May 24, 1972).

[101] *Id.*

[102] *Bellamy*, 41 A.D.2d at 202.

[103] Letter from John H. Hughes, Chairman, Committee on Judiciary, to Michael Whiteman, Executive Chamber (May 18, 1972).

The second revision in 1986 added section 520.10(1)(i), which is the ninth form of authorized bail forms.[104] The provision allowed the use of credit cards for bail payments.[105] However, a year later it was amended to apply only in vehicular and traffic law violations.[106] This restriction remained in place until 2005, when it was removed from the statute.[107] Presently, the ninth form of bail, the use of credit cards, is authorized for any violation, not just traffic and vehicular offenses.[108] It should also be noted that CPL section 520.15 grants the defendant the option of posting cash bail, even when the form of cash was not specified as acceptable when bail was set.[109]

The removal of restrictions on forms of bail, the additions of more forms of bail, including less onerous forms of bail, and the separate legislation always permitting cash bail tend to show that the legislature intended to grant the accused as many feasible opportunities as possible to meet bail. If the legislature was truly unconcerned about the accused getting adequate and feasible opportunities of posting bail, it would not have continued to enact legislation in three out of the past four decades.[110]

IV. OTHER JURISDICTIONS' HOLDINGS ON CASH-ONLY BAIL

In 2002, a criminal court in Kings County held that CPL section 520.10(1) gives the court many bail options, and the court may "delimit the options by specifying at least two forms of bail."[111] Also, in a Commission on Judicial Conduct in 2004, the committee found that a town judge committed misconduct, among other things, by sending a defendant to jail for two weeks because he could not meet the set bail of $500 cash.[112] The commission declared that the "Criminal Procedure Law requires that bail be set in more than one form."[113] Other than these few comments on the permissibility of cash-only, there have been few decisions on the permissibility of

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104 Preiser, *supra* note 90.
105 *Id.*
106 *Id.*
107 *Id.*
108 N.Y. CRIM. PROC. LAW § 520.10(1)(i).
109 *Id.* at § 520.15.
110 *Id.* at § 520.10.
111 *Imran*, 754 N.Y.S.2d at 160.
112 N.Y. Comm'n Jud. Cond., 2004 WL 2213862, at *3.
113 *Id.*

courts to set cash-only bail. Therefore, it is useful to look to other states and see how they have dealt with the issue. While each state has the freedom to enact their own statutory scheme of setting bail, the whole country adheres to the fundamental concept that individuals are innocent until proven guilty.[114] As such, the different interpretations of the fundamental fairness and legality of cash-only bail setting in other states is meaningful to New York State.

A. States that Found Cash-Only Bail Permissible

Arizona,[115] Alabama,[116] and Iowa[117] have held that cash only bail is permissible. Iowa was the first of these states to determine the legality of the single form bail determination in the 2003 case of *State v. Briggs*.[118] The court followed the same statutory interpretation method as the court in *McManus* did by looking to the language used in light of historical background and legislative intent.[119] However, the Iowa statute is broader than New York's, only guaranteeing the accused the right to "sufficient sureties" and non-excessive bail.[120] The court held that the purpose of the "sufficient sureties" clause was to "guarantee a bailable individual access to a surety of some form"[121] and not necessarily *any* form.[122] It was conceded that it was conceivable for cash-only bail to violate the clause prohibiting excessive bail, but because the defendant had been charged with the same offense four times in one year and previously failed to show up for court, the imposition of cash-only bail was found to be non-excessive in reasonably assuring the defendant's presence at trial.[123] The dissent was very concerned that if the judges were given the discretion to set a single form of bail, they could in effect detain the accused.[124] If a defendant has no real estate and the judge can require putting up real estate to secure release, the effect is a denial of sufficient sure-

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114 Estelle v. Williams, 425 U.S. 501, 503 (1976).
115 Fragoso v. Fell, 210 Ariz. 427, 429 (2005).
116 *Ex parte* Singleton, 902 So.2d 132, 134 (Ala. 2004).
117 State v. Briggs, 666 N.W.2d 573, 574 (Iowa 2003).
118 *Id.*
119 *Id.* at 578.
120 *Id.* at 577.
121 *Id.* at 581.
122 *Briggs*, 666 N.W.2d at 582.
123 *Id.* at 584.
124 *Id.* at 586.

ties.[125] The same can be said for cash-only bail determinations when the defendant has no cash.[126]

Two years later, the Arizona Court of Appeals in *Fragoso v. Fell*[127] interpreted its own "sufficient sureties" clause in the same way as the Iowa court did in *Briggs*.[128] The court held that the term "sufficient" gives the judge discretion to impose conditions necessary to ensure the defendant's appearance at trial.[129] However, the court concluded with a cautionary statement emphasizing that "nothing in this decision should be interpreted as blanket authority for cash-only bail."[130] The judge is still under the obligation to set the least burdensome condition that will reasonably guarantee the accused's presence at trial.[131]

The Alabama Court of Appeals in *Ex parte Harold Singleton*[132] relied heavily on the *Briggs* decision when it decided that "sufficient sureties" allowed a judge to set cash-only bail.[133] In fact, the court quoted the *Briggs* decision in almost all of its discussion on why it cannot hold that the Alabama Constitution prohibits a judge from setting cash-only bail.[134] It held that it had the same views as the Iowa court on the discretion that should be given to the judges.[135]

B. States that have Found Cash-Only Bail Impermissible

Montana,[136] Ohio,[137] Tennessee,[138] Minnesota,[139] and Vermont[140] have all held that courts cannot set cash-only bail. The way

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[125] *Id.*
[126] *Id.*
[127] 210 Ariz. 427 (2005).
[128] *Id.* at 432.
[129] *Id.* at 433.
[130] *Id.* at 434.
[131] *Id.*
[132] 902 So.2d 132 (Ala. 2004).
[133] *Id.* at 135.
[134] *Id.* at 134-35.
[135] *Id.* at 134.
[136] State v. Rodriguez, 192 Mont. 411, 418-19 (1981).
[137] State *ex rel*. Jones v. Hendon, 66 Ohio St.3d 115, 117 (1993).
[138] Lewis Bail Bond Co. v. Gen. Session Ct. of Madison County, No. C-97-62, 1997 WL 711137, at *5 (Tenn. Ct. App. Nov. 12 1997).
[139] State v. Brooks, 604 N.W.2d 345, 346 (2000).
[140] State v. Hance, 180 Vt. 357, 358 (2006).

in which some of these courts interpret the historical background and intention of setting pretrial bail differs from the courts in Iowa, Arizona and Alabama.[141] This difference in interpretation lead to different conclusions on the permissibility of cash-only bail.

In *State v. Hance*,[142] the Vermont court looked to the history of "sufficient sureties" and concluded that the clause's primary purpose is to protect the liberty interest of the accused while also serving the court's interest in securing the appearance of the individual at trial.[143] The inclusion of the accused's interest in pretrial liberty is markedly absent from the Arizona court's interpretation of the purpose of bail in *Fragroso*.[144] When considering the interests of the accused and the interests of the government, the court found that the distinction between cash-only bail and a secured appearance bond only affects the accused's interests, and not the government's, because both forms of bail serve the court's interest in securing the accused's appearance.[145] In *Hance*, the court also had a similar argument as that of the dissent in *Briggs*, stating, "permitting cash-only bail would increase government power to engage in pre-trial confinement."[146] That argument proved relevant again in the Tennessee court's opinion of *Lewis Bail Bond Company v. General Sessions Court of Madison County*[147] and the Minnesota court's opinion in *State v. Brooks*.[148]

The Supreme Court of Ohio in *State ex. Rel. Jones v. Hendon*[149] also took up the issue of state and individual interests in setting cash-only bail.[150] The court held that because the judge has the discretion to impose conditions on a bond, there is no legitimate purpose for designating the form in which it may be posted.[151] It went on to conclude that "the only apparent purpose in requiring a 'cash-only' bond to the exclusion of other forms . . . is to restrict the accused's access to surety, and thus, to detain the accused" which would be a

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141 *Id.* at 365-66.
142 180 Vt. 357.
143 *Id.* at 363.
144 *Id.* at 366.
145 *Id.* at 360-61.
146 *Id.* at 364.
147 *Lewis Bail Bond Co.*, 1997 WL 711137, at *5.
148 *Brooks*, 604 N.W.2d at 353.
149 66 Ohio St.3d 115.
150 *Id.* at 117-18.
151 *Id.* at 118.

violation of state law.[152] This conclusion that the only interest in setting cash-only bail is an unlawful one left the legislature to clarify the discretion of judges in setting bail.

In 1998, the Ohio legislature amended the state's constitution, making two major changes.[153] First, the amendment allowed the court to deny bail to an individual charged with a felony where there is great proof or assumption of guilt and the individual poses a serious risk of harm to the community.[154] Second, the amendment allowed the court to determine "at any time the type, amount, and conditions of bail" when an individual is charged with an offense they can be imprisoned for.[155] The Supreme Court of Ohio in *Smith v. Leis*[156] found that the amendment did not change the determination that cash-only bail is impermissible.[157] While the amendment did expand the court's discretion in denying bail in certain circumstances, it did not limit the forms of bail an individual can post when bail is granted.[158]

The court in *McManus* used much of the same logic as the Ohio court did in *Hendon*.[159] The existence of other alternative methods of ensuring the accused's presence at trial leads to the conclusion that the only interest being affected by a decision to not allow single-form bail setting is the accused's interest in pretrial liberty.[160] When conducting an analysis and making a determination on the interpretation of a law it is important for courts to consider the effect their decision will have on the government, individuals and society as a whole.

V. EFFECT OF *MCMANUS*

The pretrial stage of litigation has been recognized by the Supreme Court as the "most critical period" for the accused.[161] The ability of a defendant to prepare for his or her defense is very differ-

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[152] *Id.*
[153] Smith v. Leis, 106 Ohio St.3d 309, 315-16 (2005).
[154] *Id.* at 316.
[155] *Id.*
[156] 106 Ohio St.3d 309.
[157] *Id.* at 318.
[158] *Id.* at 319-20.
[159] *Compare McManus*, 18 N.Y.3d at 665-66, *with Hendon*, 66 Ohio St.3d at 118.
[160] *Hendon*, 66 Ohio St.3d at 118.
[161] Powell v. Alabama, 287 U.S. 45, 57 (1932).

ent if they are detained rather than free. Thus, it seems that the *McManus* decision will have the most notable effect on defendants who are unable to post bail and must remain incarcerated until their trial due to a lack of financial means.

Defendants will now have the option of posting bail in a minimum of two forms. If the judge declares a monetary amount for bail but does not specify a form, the defendant may choose to post that amount through an unsecured surety bond, an unsecured appearance bond, or cash.[162] If the judge chooses to specify the form and amount of bail, he or she must do so by designating two alternative forms;[163] a judge may no longer specify one amount and one form.[164] The court believes the options given to the defendant in choosing the form to post will help further the legislature's intent of improving the availability of pretrial release.[165] However, the prohibition on single-form bond determinations may not improve a defendant's ability to obtain pretrial release as much as the court hopes because the two forms of bail may be equally unattainable.

The *McManus* decision makes it clear that if a court decides that $20,000 cash bail is what it will take to secure the defendant's presence at trial, it may set bail in accordance with §520.10(2)(b) by requiring either $20,000 cash or in the alternative a $200,000 partially secured appearance bond requiring a monetary deposit of 10%, which equates to $20,000.[166] Thus, if a defendant does not have $20,000 in cash, he or she will not be able to post either of the alternative forms. Allowing courts to set such "virtually indistinguishable" forms of bail, it can hardly be seen as serving the underlying purpose of section 520, which is "providing flexible bail alternatives to pretrial detainees—who are presumptively innocent until proven guilty beyond a reasonable doubt."[167]

The inability to provide sufficient collateral to secure a bail bond is just one of the problems a defendant may face when trying to secure pretrial release.[168] Another problem will occur when bail is set

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[162] N.Y. CRIM. PROC. LAW§ 520.10(2)(a).

[163] *Id.* § 520.10(2)(b).

[164] *McManus*, 18 N.Y.3d at 666.

[165] *Id.* at 665.

[166] *Id.* at 666.

[167] *Id.* at 665-66.

[168] Andrea Clisura, *None of Their Business: The Need for Another Alternative to New York's Bail Bond Business*, 19 J.L. & POL'Y 307, 310-11 (2010).

low.[169] A bondsperson will profit "approximately $345 on a $5,000 bond, $150 on a $2,000 bond, and $75 on a $1,000 bond."[170] While defendants may be able to provide enough collateral to secure a bond, they may have trouble finding a bondsperson willing to put in the time, effort and risk for such little profit.[171]

Shaun McManus is fortunate that his case came before the Court of Appeals when it did, because less than a month later the State Senate passed legislation that gave judges more factors to consider when setting bail.[172] The legislation, known as "Jilly's Law," would allow the judge to consider the safety of the victim, severity of offense and severity of injuries suffered through the offense.[173] The bill was sent to the Assembly on April 18, 2012, after the Senate approved it. Had "Jilly's Law" been passed before McManus was arraigned, the judge could have considered the safety of the victim he threatened and the severity of his offense.[174] The judge could also have considered the fact that McManus previously violated a court order of protection.[175] Section four, subdivision five of the proposed law gives the court the discretion to deny bail if there is substantial evidence to support the charge and clear and convincing evidence that the defendant is a danger to the victim, community, or themselves.[176] Under these considerations, McManus could have been detained and the determination of cash-only bail would still be undetermined in the New York courts.

The decision in *McManus v. Horn*, the possibility of "Jilly's Law" becoming effective, and the overcrowding of New York state and county prisons[177] are all indicators that the state's bail scheme is becoming an issue that needs to be addressed sooner rather than later. The Court in *McManus* believes its decision will help alleviate some

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169 *Id.* at 310.

170 *Id.*

171 *Id.* at 310-11.

172 *Senate Passes Legislation Giving Courts Greater Criteria for Granting Bail*, MAJORITY PRESS (Apr. 18, 2012), http://www.nysenate.gov/press-release/senate-passes-legislation-giving-courts-greater-criteria-granting-bail.

173 *Id.*

174 *Id.*

175 S. 259, 2011 Sess., *available at* http://open.nysenate.gov/legislation/bill/S259-2011.

176 *Id.*

177 *Ritchie to Host Special Meeting on Jail Overcrowding* (Oct. 12, 2012), NEW YORK SENATE, *available at* http://www.nysenate.gov/press-release/ritchie-host-special-meeting-jail-overcrowding.

of the issues in the scheme by providing flexible bail alternatives.[178] However, setting alternative forms of bail in certain circumstances can be just as restricting as setting a single form of bail.[179] What the *McManus* decision leaves for future legislation and judicial proceedings to deal with is whether a choice between two unattainable bail forms is really a choice at all.

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[178] *McManus*, 18 N.Y.3d at 665.

[179] *Id.* at 666.

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