D R A F T

FOR DISCUSSION ONLY

ALTERNATIVES TO BAIL ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-TWENTY-EIGHTH YEAR
ANCHORAGE, ALASKA
JULY 12 – 18, 2019

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the drafting committee. They do not necessarily reflect the views of the Conference and its commissioners and the drafting committee and its members and reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

June 3, 2019

ALTERNATIVES TO BAIL ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

WILLIAM W. BARRETT, 600 N. Emerson Ave., P.O. Box 405, Greenwood, IN 46142, *Co-Chair*
JOHN J. MCAVOY, 3110 Brandywine St. NW, Washington, DC 20008, *Co-Chair*
MARK J. CUTRONA, Division of Research, 411 Legislative Ave., Dover, DE 19901
JACK DAVIES, 1201 Yale Pl., Minneapolis, MN 55403
W. MICHAEL DUNN, 179 Mountain Rd., Concord, NH 03301
GAIL HAGERTY, Burleigh County Court House, P.O. Box 1013, 514 E. Thayer Ave., Bismarck, ND 58502
NICOLE JULAL, 3525 Piedmont Rd., Bldg. 8- Suite 700, Atlanta, GA 30305
CLAIRE LEVY, 789 Sherman St., Ste. 300, Denver, CO 80203
JAMES OHRENSCHALL, P.O. Box 97741, Las Vegas, NV 89193
JACOB T. RODENBIKER, 2037 Rose Creek Blvd. S., Fargo, ND 58104
RODNEY W. SATTERWHITE, 441st District Court, 500 N. Loraine St., Suite 547, Midland, TX 79701
JOHN T. SHEPHERD, 200 N. Jefferson Ave., Suite 600, El Dorado, AR, 71730
JOSH BOWERS, University of Virginia School of Law, 580 Massie Rd., Charlottesville, VA 22903, *Reporter*
SANDRA G. MAYSON, University of Georgia School of Law, 225 Herty Dr., Athens, GA, 30602, *Associate Reporter*

EX OFFICIO

ANITA RAMASASTRY, University of Washington School of Law, William H. Gates Hall, Box 353020, Seattle, WA 98195-3020, *President*
CAM WARD, P. O. Box 1749, Alabaster, AL 35007, *Division Chair*
NORA WINKELMAN, Main Capitol Building, Room 620, Harrisburg, PA 17120, *Style Liaison*

AMERICAN BAR ASSOCIATION ADVISOR

MARGARET M. CASSIDY, 1775 I St. NW, Ste 1150, Washington, DC 20006, *ABA Advisor*

EXECUTIVE DIRECTOR

STEVEN L. WILLBORN, Uniform Law Commission, 111 N. Wabash Ave., Ste. 1010, Chicago, IL 60602, *Interim Executive Director*

Copies of this act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.uniformlaws.org

ALTERNATIVES TO BAIL ACT

TABLE OF CONTENTS

[ARTICLE] 1

GENERAL PROVISIONS AND DEFINITIONS

[ARTICLE] 2

ARREST AND ISSUANCE OF [CITATION] [SUMMONS TO APPEAR]

[ARTICLE] 3

RELEASE HEARING

[ARTICLE] 4

REVIEW HEARING

[ARTICLE] 5

DETENTION HEARING

[ARTICLE] 6

MODIFYING OR [VACATING] AN ORDER

[ARTICLE] 7

MISCELLANEOUS PROVISIONS

ALTERNATIVES TO BAIL ACT

[ARTICLE] 1

GENERAL PROVISIONS AND DEFINITIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the Alternatives to Bail Act.

SECTION 102. DEFINITIONS. In this [act]:

(1) "Abscond" means fail to appear as required with the intent to avoid or delay adjudication.

(2) ["Citation"] ["Summons to appear"] means a notice in a record issued by [an authorized official] requiring an individual to appear in court on a specified date and at a specified time and place in connection with a proceeding relating to an alleged offense.

(3) "Nonappearance" means failure to appear in court as required without the intent to avoid or delay adjudication.

(4) "Obstruct justice" means interfere with the criminal process, including by tampering with witnesses or evidence, with the intent to influence, impede, or attempt to influence or impede the administration of justice.

(5) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(6) "Secured appearance bond" means a promise by an individual to forfeit, if the individual fails to appear, a specified amount with specified collateral approved by the court in the form of a deposit, lien, [surety], or proof of access to collateral.

(7) "Unsecured appearance bond" means a promise by an individual to pay a specified amount if the individual fails to appear.

Legislative Note: *In subsection (2), a state should refer to the state's law as to the officials having authority to arrest and should insert the state's term for a summons to appear or its equivalent.*

In subsection (6), a state should refer to the state's law on forfeiture of a secured appearance bond and should insert the state's term for "surety."

Comment

Absconding versus nonappearance. One central challenge of crafting a pretrial release statute is to encourage courts to attend to the differences between pretrial risks. Often, pretrial statutes speak only in terms of "failure to appear." Nevertheless, there remains a conceptual difference between types of "failure to appear." Absconding is an intentional act with the purpose of evading justice, while nonappearance may be rooted in impediments—for example, in cognitive limitations or difficult social circumstances. These two distinct types of failure to appear may warrant distinct statutory responses. Thus, the act sometimes treats these risks separately. When it does so, it uses the individual terms "abscond" and "nonappearance." When the act treats these risks identically, it uses the collective term "failure to appear."

Bail. The act does not define the term "bail" (or, for that matter, even use it, except in the title). This is intentional. Many statutes and commentators use the term as a noun to signify a secured financial condition of release. TIMOTHY R. SCHNACKE, CENTER FOR LEGAL AND EVIDENCE-BASED PRACTICES, *"Model" Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention* 16 (Apr. 18, 2017) ("[M]ost of the confusion comes from the fact that many people (indeed, many courts and legislatures) define bail by one of its conditions—money."). Other statutes and commentators use the term according to its historical definition, as "a process of conditional release." *Id.*; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 294–96 (1769). Others use the term "bailable" as an adjective to signify the type of person or offense that qualifies for release. *See, e.g.*, ODonnell v. Harris Cnty., 892 F.3d 147, 166 (5th Cir. 2018) (describing "a state-created liberty interest in being bailable"). The act avoids confusion by using other more precise terms.

Obstruct justice. Obstruction of justice is not only a legal term of art but also a substantive crime. The act is not intended to disturb a state's statutory definition of the crime or otherwise impinge upon existing substantive criminal law. To the contrary, the act provides this definition of obstruction of justice for the purpose of the act only.

[ARTICLE] 2

ARREST AND ISSUANCE OF [CITATION] [SUMMONS TO APPEAR]

SECTION 201. AUTHORITY TO ARREST OR ISSUE [CITATION] [SUMMONS TO APPEAR].

(a) Except as provided in law of this state other than this [act], [an authorized official]

may arrest an individual only if:

(1) the individual is subject to an order of detention from any jurisdiction, including an arrest warrant or order of revocation of probation, parole, or release for a pending criminal charge or prior conviction or;

(2) subject to subsection (b), [the authorized official] has probable cause to believe the individual is committing or has committed an offense and a jail or prison sentence is authorized for the alleged offense by law of this state other than this [act].

(b) If [an authorized official] has authority to arrest under subsection (a)(2), but the alleged offense is [a misdemeanor or non-criminal offense] [an offense punishable by no more than [six months] in jail or prison], [the authorized official] may arrest only if:

(1) the alleged offense is an offense of [domestic violence, stalking, driving under the influence, or another specified offense];

(2) the individual fails to provide adequate identification or identifying information lawfully requested by [the authorized official];

(3) the individual is in violation of a condition or order of probation, parole, or release for a pending criminal charge or prior conviction;

(4) the individual poses a significant risk of failure to appear, or, before the individual appears in court, of obstructing justice or [causing bodily injury to] [harming] another;

(5) an arrest is necessary to:

(A) conclude the [authorized official's] interaction with the individual safely;

(B) carry out a lawful investigation; or

(C) obtain [biometric information, meaning fingerprints and other unique biological or physical characteristics of the individual] that a contributing justice agency is required by law other than this [act] to use for identification.

(c) If [an authorized official] does not have authority to arrest under this section but has probable cause to believe an individual is committing or has committed an offense, [the authorized official] may issue the individual a [citation] [summons to appear] or take another action authorized by law of this state other than this [act].

Legislative Note: *In subsection (a), a state should insert the state's term for an official authorized to make arrests.*

In subsection (b)(1), a state should insert the state's list of offenses sufficiently serious to authorize arrest.

In subsection (b)(5)(C), a state should insert the state's term and definition for "biometric information" or its equivalent.

Comment

Except as provided in law of this state other than this [act]. States may authorize officials to arrest for purposes other than initiating criminal prosecution; for example, for the purpose of keeping the peace or initiating civil commitment. The act does not disturb a state's arrest authority for purposes other than initiating prosecution.

Citations versus arrests. Given that the primary focus of this act is pretrial release and detention, the reason for including an article on citation versus arrest may not be immediately apparent. However, numerous jurisdictions and commentators have come to appreciate that the implementation of pretrial detention and release policy begins with the police officer on the beat. *See e.g.* BUREAU OF JUSTICE ASSISTANCE, NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: SUMMARY REPORT OF PROCEEDINGS (Washington, D.C., 2012), at 30; AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-2.2 (providing that, except in circumscribed situations, "a police officer who has grounds to arrest a person for a minor offense should be required to issue a citation in lieu of taking the accused to the police station or to court"); TENN. CODE ANN. §§ 40-7-118, 40-7-120 (providing for a presumption in favor of citations for misdemeanors); KY. REV. STAT. § 431.015 (2012) (same). More to the point, the Uniform Law Commission's mission statement for this project included the possibility of expanding the use of citations over arrest. UNIFORM LAW COMMISSION, *New ULC Drafting Committee on Alternatives to Bail* (Feb. 2, 2018) ("The drafting committee will be tasked with drafting state legislation that will provide policy solutions to mitigate the harmful effects of money bail. The drafting committee will review critical areas of pretrial justice, such as [*inter*

alia]: the encouragement of the use of citations in lieu of arrest for minor offenses.").

Section 201(b) limits authority to arrest for minor offenses. Each state may determine how to define the class of minor offenses subject to this provision; two options, included in brackets, are (1) all misdemeanors and non-criminal offenses, or (2) offenses punishable by no more than a specified term of incarceration. Within the designated class of offenses, 201(b)(1) through (5) enumerate the extenuating circumstances in which arrest is nonetheless permitted.

The individual poses a significant risk. Various provisions throughout the act use the term "significant" (and, more rarely, "extreme"). These modifiers account for the reality that almost any defendant poses *some* risk of failing to appear or even harming a person. As Justice Jackson observed: "Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as a price of our system of justice." Stack v. Boyle, 342 U.S. 1, 8 (1951) (Jackson, J., dissenting). The task for a pretrial statute, therefore, is to identify when a risk becomes serious enough to justify pre-adjudicative limitations on liberty.

SECTION 202. FORM OF [CITATION] [SUMMONS TO APPEAR].

(a) A [citation] [summons to appear] under Section 201(c) must state:

(1) the date, time and place an individual who is the subject of the [citation] [summons to appear] must appear in court;

(2) that the individual may not, before the individual appears, obstruct justice, violate a protective order, or commit an offense; and

(3) the possible consequences of violating the conditions of the [citation] [summons to appear].

Comment

What a citation or summons to appear must state. The terms of the [citation] [summons to appear] should be provided in words that the defendant can reasonably be expected to understand. This may require including language in a text other than English.

SECTION 203. RELEASE AFTER ARREST. [An authorized official] may release an individual who is the subject of an arrest under Section 201 before a hearing under [Article] 3 by issuing a [citation] [summons to appear]. The [authorized official] may require as a condition of release that the individual executes an unsecured appearance bond.

Legislative Note: *A state should insert the state's term and definition for an official authorized to release an individual after arrest and before court appearance.*

[ARTICLE] 3

RELEASE HEARING

SECTION 301. TIMING.

(a) Except as otherwise provided in subsection (b), if an individual who is the subject of an arrest under Section 201 is not released under Section 203, the court shall conduct a release hearing not later than [48] hours after the arrest.

(b) In extraordinary circumstances, the court on its own motion or on motion, may continue the hearing under subsection (a) for not more than [48] hours.

Comment

Extraordinary circumstances. In other places where the act imposes temporal limits, the provisions allow for multiple potential continuances, at least upon a showing of good cause. With respect to the release hearing, however, the act contemplates that the reasons for delay must be "extraordinary." The logic is that states already generally use a 48-hour timeline, pursuant to *Riverside v. McLaughlin*, 500 U.S. 44 (1991), which constitutionally guarantees a probable-cause hearing within 48 hours of warrantless arrest (and at which pretrial release decisions are often made). *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, *Pretrial Release Eligibility*, http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx (listing states that couple release decisions and pretrial hearings).

Furthermore, research suggests that the most damaging effects of pretrial detention—including disruption to an arrestee's employment, housing, and child custody or care arrangements—are triggered within three days. *See, e.g.*, *3DaysCount*, Pretrial Justice Institute, http://projects.pretrial.org/3dayscount; Will Dobbie, Jacob Goldin, & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 211-13 (2018) (finding that pretrial detention of more than three days "significantly increases the probability of conviction," increases the likelihood of post-adjudication criminal offending, and decreases formal sector employment); CHRISTOPHER T. LOWENKAMP *ET AL.*, ARNOLD FOUNDATION, THE HIDDEN COSTS OF PRETRIAL DETENTION 4 (2013) (finding that even "2 to 3 days" of detention increases the likelihood of future crime); *cf.* Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 753 (2017) (documenting effects of misdemeanor pretrial detention on case outcomes and future crime, and noting that first few days of detention are a "fairly critical period for making bail"). Time is therefore of the essence for this initial release hearing.

[SECTION 302. RIGHT TO COUNSEL. An individual who is the subject of an arrest under Section 201 has a right to counsel at the release hearing under Section 301. If the individual is unable to obtain counsel for the release hearing, [insert name of appropriate agency] must provide counsel for the release hearing. [The right to counsel is limited to the hearing.]]

Legislative Note: *A state should refer to the state's law on the provision of counsel and should insert the state's term for the state's agency that has financial responsibility for provision of counsel. A state should determine whether the state's law permits the bracketed limitation, which clarifies that counsel may be provided for the release hearing on a provisional basis.*

Comment

Right to counsel. The Supreme Court has held that the Sixth Amendment right to counsel "attaches" at a defendant's initial appearance, but has stopped short of holding that the Sixth Amendment guarantees a right to representation at that hearing. *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 194 & n.15 (2008) (clarifying that the right to counsel "attaches" at "the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty," but reserving judgment on "the scope of an individual's postattachment right to the presence of counsel"). *But cf. United States v. Salerno*, 481 U.S. 739 (1987) (suggesting that defendants have a right to representation by counsel at a detention hearing). The jurisprudential landscape is fast-moving, however, and may provide the committee with more clarity before its work is done. For now, the act only provides a provisional right to counsel for all hearings prior to a detention hearing. It should be noted that this provisional right to counsel is not limited to the indigent. The reason is that, because the release hearing happens so quickly, even an affluent individual might not be able to secure the presence of counsel.

Any fiscal burden of providing this provisional right to counsel may be offset by cost savings in other places; for example, the increased use of cheaper citations over costlier arrests. *See* JANE MESSMER, UNIFORM LAW COMMISSION, *Committee on Scope and Program: Project Proposal Form* (Dec. 13, 2013) ("The use of citations can contribute to lower jail populations and local cost savings. . . . Failing to provide counsel carries enormous costs—human and financial; far exceeding the expense of providing an advocate who can advocate viable and prudent alternatives." (citing studies)). Moreover, there would be no fiscal burden in the several states that already provide for counsel at release hearings. *See, e.g.*, 39 DEL CODE. § 4604 (requiring the appointment of counsel "at every stage of the proceedings following arrest"); *cf.*, BUREAU OF JUSTICE ASSISTANCE, NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: SUMMARY REPORT OF PROCEEDINGS (Washington, D.C., 2012), at 30 (deeming counsel's presence to be integral to release hearings).

SECTION 303. DETERMINATION OF RISK.

(a) The court, at a release hearing under Section 301, shall determine whether the individual who is the subject of the hearing poses a significant risk of nonappearance, absconding, obstructing justice, violating a protective order, or [causing bodily harm to] [harming] another.

(b) In making a determination under subsection (a), the court shall consider:

(1) the severity of the charge;

(2) the nature, seriousness, and circumstances of the alleged offense;

(3) the quality of the known evidence against the individual who is the subject of the release hearing under Section 301;

(4) the individual's:

(A) criminal history;

(B) place and length of residence and other community ties; and

(C) history of nonappearance or absconding;

(5) whether the individual has another pending criminal charge or is serving a criminal sentence; and

(6) other relevant information proffered by the individual, the [government], an alleged victim, [or a pretrial services agency].

(c) A determination by the court under subsection (a) that the individual who is the subject of the release hearing under Section 301 poses a significant risk must be based on [clear and convincing evidence] [a preponderance of the evidence].

Legislative Note: *In subsection (a), a state should insert the state's term for the type of harm the state concludes is relevant to a pretrial release decision.*

In subsection (b)(6), a state should insert the state's term for the state's prosecuting authority; and the state should insert the state's term for the state's pretrial services agency, but only if the state has a pretrial services agency or its equivalent.

In subsection (c), a state should choose between a standard of proof of clear and convincing evidence and preponderance of the evidence.

Comment

Severity of the charge versus the seriousness of the alleged offense. The difference between the "severity of the charge" and the "seriousness of the alleged offense" might not be obvious. The first criterion focuses on the charge in the abstract, whereas the second focuses on the immediate offense in its particulars. Because a sound release decision depends upon distinguishing between specific individuals and offenses, the act requires the court to consider not only the nature and seriousness of the statutory charge but also the particular circumstances alleged. *See* AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-5.3(e) (suggesting that a release or detention decision must be individualized). This reflects what courts do in many jurisdictions already.

Other provisions of the act use the terms "charge" and "offense" consistently with the usage in this Section. That is to say, except in contexts where an alternative meaning is otherwise apparent, the act uses the term "charge" to refer to the statutory charge that is the subject of the release decision, and it uses the term "alleged offense" to refer to the particular facts and allegations that support this charge.

Clear and convincing evidence versus preponderance of the evidence. As with the right to counsel, the Supreme Court has never articulated a constitutional burden of proof for initial release decisions. *But cf*. United States v. Salerno, 481 U.S. 739 (1987) (suggesting that the findings supporting detention decisions must be made by clear and convincing evidence). But here, too, the jurisprudential landscape is fast-moving and could provide the committee with more clarity before its work is done. For the time being, the act provides a choice of standards in proceedings prior to a detention hearing, at which hearing the act imposes a clear-and-convincing standard.

SECTION 304. ORDER OF PRETRIAL RELEASE.

(a) Except as provided under Section 305, if the court determines that an individual who is the subject of the release hearing under Section 301 poses a significant risk under Section 303(a), the court shall order pretrial release imposing the least restrictive measure reasonably necessary to reduce the risk to a level below a significant risk.

(b) Before issuing an order under subsection (a):

(1) If the court finds that the individual who is the subject of the release hearing under Section 301 poses a significant risk of nonappearance, the court shall determine whether practical or voluntary supportive services could be reasonably effective to address an impediment to appearance and manage the risk.

(2) If the court finds that the individual who is the subject of the release hearing under Section 301 poses a significant risk of absconding, obstructing justice, violating a protective order or [causing bodily injury to] [harming] a person, the court shall determine whether voluntary supportive services could be reasonably effective to manage the risk.

(c) If measures under subsection (b) are not sufficient to reduce the risk to a level below a significant risk, the court shall impose the least restrictive condition of release reasonably necessary to reduce the risk to a level below a significant risk, including:

(1) mandatory therapeutic treatment or social services;

(2) a requirement to seek or maintain employment or education;

(3) a restriction on possession or use of a weapon;

(4) a restriction on travel;

(5) a restriction on contact with a specified person;

(6) a restriction on a specified activity;

(7) supervision by a [pretrial services agency or] third party;

(8) electronic monitoring;

(9) house arrest;

(10) an unsecured appearance bond;

(11) subject to subsections (e) and (f), a secured appearance bond;

(12) a condition or combination of conditions proposed by the individual who is

the subject of the release hearing under Section 301;

(13) another condition that is reasonably necessary to reduce the risk to a level below a significant risk; or

(14) another non-financial condition required by law of this state other than this [act].

(d) Before the court requires a secured appearance bond or an unsecured appearance bond as a condition to issuing an order under subsection (a), the court shall consider the personal financial resources and burdens of an individual who is the subject of the release hearing under Section 301, including income, assets, expenses, liabilities, and dependents.

(e) The court may require a secured appearance bond as a condition of issuing an order under subsection (a) only if an individual who is the subject of the release hearing under Section 301 poses a significant risk of absconding or obstructing justice and a less restrictive measure is not available to reduce the risk to a level below a significant risk.

(f) The court may not require a secured appearance bond as a condition to issuing an order under subsection (a):

(1) to manage another risk or to keep detained an individual who is the subject of the release hearing under Section 301;

(2) for an alleged misdemeanor offense unless the individual has failed to appear [three or more] times in a criminal case or combination of criminal cases, as evidenced by information in a record provided to the court; or

(3) in an amount greater than the individual is able, within [24] [48] hours, to satisfy from personal financial resources.

(g) The court may not impose a condition that includes a fee in an amount greater than

the individual who is the subject of the release hearing under Section 301 is able, within [24] [48] hours, to satisfy from personal financial resources. If the individual is unable to satisfy the fee, the court shall waive or pay the fee or waive the condition that requires the fee.

(h) Before the court imposes a condition of release under subsection (c), the court shall permit the [government] and an individual who is the subject of the release hearing under Section 301 to be heard.

(i) The order issued under subsection (a) must be in a record. The order must state:

(1) the date, time and place an individual who is the subject of the order must appear in court;

(2) that the individual may not obstruct justice, violate a protective order, or commit an offense;

(3) any additional condition imposed by the court and the reason the court has determined the condition is the least restrictive measure for managing the risk identified by the court; and

(4) the possible consequences of violating the conditions of the order.

Legislative Note: *In subsection (b)(2), a state should insert the state's term for the type of harm the state concludes is relevant to a pretrial release decision.*

Comment

Least restrictive measure. A least-restrictive-measure requirement is in keeping with most existing state practice. Approximately twenty states either expressly or implicitly require that conditions of release—especially secured financial conditions—must be the least restrictive available measure to reasonably assure that a legitimate governmental purpose is served. *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, *Guidance for Setting Release Conditions*, http://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions.aspx; *see also, e.g.*, COLO. REV. STAT. §§ 16-4-103, 16-4-113; 11 DEL. CODE § 2101; AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-5.2 ("[T]he court should impose the least restrictive of release conditions necessary reasonably to ensure the defendant's appearance in court, protect the safety of the community or any person, and to safeguard the integrity of the judicial process."). At a somewhat higher level of abstraction, the

least-restrictive-measure requirement is likewise in keeping with the presumption that a defendant is entitled to pretrial release. Here, too, approximately twenty states make explicit a presumption of release on personal recognizance (or, at most, on an unsecured appearance bond). *See id.*; *see also*, *e.g.*, KY. REV. STAT. §§ 431.520, 431.066; COLO. REV. STAT. §§16-4-103, 16-4-113.

Practical or voluntary supportive services. Subsection (b) introduces the use of non-restrictive measures for a court to consider as an alternative to, or in addition to, the conditions of release provided by subsection (c). Just as the act seeks to distinguish between different forms of failure to appear, it seeks to distinguish also between different pretrial measures—here, between release "conditions" and "services." Non-restrictive measures fall into two categories: practical services and supportive services, each explained below.

Practical Services. Sometimes, when the relevant risk is merely nonappearance (as opposed to a risk of absconding), the least restrictive measure to assure the appearance of a defendant may be a practical service, not a mandatory condition. This is particularly true when the risk of nonappearance is based upon socioeconomic or cognitive inequities of the kind that historically have produced wealth-based and other arbitrary forms of disparity in pretrial release and detention. For instance, defendants may struggle to remember court dates, to get leave from work, or to procure affordable childcare or transportation. *See, e.g.*, Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677 (2018). Practical services may include sending electronic or other reminders of appearances, scheduling appearances on feasible dates and times, providing assistance with caregiving responsibilities, or providing subsidized transportation to and from court.

Voluntary Supportive Services. The act distinguishes between practical services and voluntary supportive services for the following reason: As indicated above, a practical service is intended to meet a socioeconomic or cognitive impediment to appearance. Thus, a practical service is most (and, for our statutory purposes, only) relevant to manage a risk of nonappearance. By contrast, a supportive service could help to manage any risk of release. Voluntary supportive services may include referrals to organizations that provide therapeutic treatment or social services, including educational, vocational, or housing assistance.

The least restrictive condition of release reasonably necessary to reduce the risk to a level below a significant risk. In listing conditions of release, the act does not rank conditions from least to most restrictive. However, it operates on the premise that a secured appearance bond often will be the most restrictive condition. *See, e.g.*, FLA. R. CRIM. P. RULE 3.131 ("[T]here is a presumption in favor of release on nonmonetary conditions for any person who is granted pretrial release."); *see also* AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-5.3(a) ("Financial conditions other than unsecured bonds should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court."). Moreover, a core purpose of the act is to minimize wealth-based disparities in pretrial release, and secured appearance bonds are the prime drivers of those disparities. Thus, it is important that a court ensure that no lesser (typically, non-financial) condition could manage the relevant risk.

Executing a secured appearance bond. Consistent with the Uniform Law Commission's charge to the committee, the act aims to "prohibit the use of money bail *as a mechanism to trigger preventative detention*." UNIFORM LAW COMMISSION, *New ULC Drafting Committee on Alternatives to Bail* (Feb. 2, 2018) (emphasis added). However, the act does not endeavor to eliminate entirely the use of secured bond conditions or to eliminate commercial bail bonds. (To date, only four states have prohibited commercial bail bonds outright. *See, e.g.*, WISCONSIN STAT.§ 969.12.) Instead, the act aims simply to limit the use of secured bond conditions to appropriate circumstances and purposes.

The court may not require a secured appearance bond as a condition to manage another risk [other than a significant risk of absconding or obstructing justice]. The logic is that it is inappropriate for a court to set a secured appearance bond to manage a defendant's dangerousness. If a defendant is sufficiently dangerous, he should be detained. By contrast, a court should rely upon a secured appearance bond only to manage risks of failure to appear or obstruction of justice. This is the position already of the American Bar Association and a number of jurisdictions. AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-5.3(b) ("Financial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person.").

Or to keep detained an individual. This limitation is necessary, because one of the principal purposes of the act is to prevent the use of a secured appearance bond as a functional detention mechanism—at least in circumstances where the defendant does not enjoy the procedural protections of a detention hearing. *Cf.* KANSAS STAT.§22-2801 (seeking to "assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance").

In an amount no greater than the defendant is able to satisfy. In keeping with the commentary immediately above, this provision minimizes the degree to which a secured appearance bond may functionally substitute for a detention order and the procedural protections that go with it. *See* AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-5.3(a) ("The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay.").

The court shall inquire into the personal financial resources and burdens of the defendant. The act leaves the shape of this inquiry to judicial discretion. However, some possible criteria include whether the defendant (i) was previously detained pretrial on a secured appearance bond, (ii) is the recipient of means-tested benefits, (iii) has an income below 200% of the federal poverty line, (iv) qualifies for indigent counsel, (v) is unemployed or homeless, or (vi) was recently released from an institutional setting (for example, a jail, prison, hospital, or other treatment facility). As to any of these inquiries or others, a court may also take an affidavit or testimony from a defendant under oath.

The court may not require a secured appearance bond for an alleged misdemeanor offense unless a record reveals that the defendant has failed to appear [three or more times] in any criminal case or combination of cases. In the literature, the substantive threshold at which

an act allows detention (or a particular condition of release) is called an "eligibility net." The act avoids setting too many eligibility nets. However, it is widely understood that a secured appearance bond is an inappropriate release condition in a trivial case. Thus, the act allows a court to set a secured appearance bond for a misdemeanor charge only if the defendant previously has failed to appear repeatedly in this or another criminal case. The act proposes three previous instances of failure to appear as the threshold.

The court may not impose a condition that includes a fee in an amount greater than the defendant is able to satisfy. Court-imposed conditions often carry mandatory fees, and the inability of an indigent defendant to satisfy such a fee may lead to detention just as readily as an inability to satisfy a secured appearance bond. Accordingly, the act requires a court to inquire into a defendant's ability to pay a fee.

The court shall permit the parties to be heard. Here, the act is purposefully ambiguous. The act seeks to leave to courts the shape and scope of a right to be heard. Often, release hearings do not feature formal presentations of testimony or evidence. At a detention hearing, the defendant enjoys a more robust set of procedural rights, including a right to testify, to present and cross-examine witnesses, to present evidence, and to proffer information. But the act contemplates that the release hearing occurs just too early (and too quickly) to require so much process. Still, the act does provide that the parties have opportunities to make arguments in some form.

What the order must state. The terms of the order should be provided in words that the defendant can reasonably be expected to understand. This may require including text in a language other than English.

SECTION 305. ORDER OF TEMPORARY PRETRIAL DETENTION.

(a) At a release hearing under Section 301, the court may issue an order of temporary pretrial detention and detain until a detention hearing an individual who is the subject of the release hearing if the court finds by [clear and convincing evidence] [a preponderance of the evidence] that:

(1) an individual charged with a felony poses an extreme risk of nonappearance and a less restrictive measure is not available to reduce the risk to a level below an extreme risk;

(2) the individual poses a significant risk of absconding, obstructing justice, violating a protective order, or [causing bodily injury to] [harming] another and a less restrictive measure is not available to reduce the risk to a level below a significant risk level; or

(3) the individual has violated a condition of an order of pretrial release for a pending charge.

(b) Before the court issues an order under subsection (a), an individual who is the subject of a release hearing under Section 301 has the right to be heard.

(c) If the court issues an order under subsection (a), the court shall state in a record findings of fact and the reason for the order. If the court issues the order on the basis of a risk of nonappearance or absconding, the court shall state why a less restrictive measure is not sufficient to reduce the risk of nonappearance to a level below an extreme risk or to reduce the risk of absconding to a level below a significant risk.

Legislative Note: *In subsection (a)(2), a state should insert the state's term for the type of harm the state concludes is relevant to a temporary detention decision.*

Comment

An individual charged with a felony poses an extreme risk of nonappearance. Here, the act sets a special detention eligibility net for circumstances where the relevant risk is only nonappearance, as opposed to absconding, obstructing justice, violating a protective order, or harming a person. The logic is that a court should almost always be able to manage inadvertent failures to appear with conditions of release or practical or voluntary supportive services. Further, the act contemplates that detention is never warranted in a misdemeanor case where the only risk is nonappearance.

The individual has violated a condition of an order of pretrial release for a pending charge. The act allows a court to issue a *temporary* detention order based only a showing that the defendant has violated a condition of pretrial release. However, as elaborated below, the act requires more before a court may issue a detention order that presumably lasts until adjudication. The latter order follows a procedurally robust detention hearing, at which the government has more opportunity to demonstrate that a defendant poses a sufficiently high and unmanageable release risk.

The court shall state why a less restrictive measure is not sufficient to reduce the risk of nonappearance to a level below an extreme risk or to reduce the risk of absconding to a level below a significant risk. It is generally accepted today that a risk of failure to appear in many instances may be managed effectively through monitoring (for instance, electronic ankle bracelets). As former Attorney General Eric Holder has observed, technology ensures that "[a]lmost all of these individuals could be released and supervised in their communities—and allowed to pursue and maintain employment and participate in educational opportunities and

their normal family lives—without risk of endangering their fellow citizens or fleeing from justice." BUREAU OF JUSTICE ASSISTANCE, NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: SUMMARY REPORT OF PROCEEDINGS (Washington, D.C., 2012), at 30. For this reason, the act requires the court to make a record as to the reason that it finds such methods insufficient to reduce the risk of nonappearance.

[ARTICLE] 4

REVIEW HEARING

SECTION 401. TIMING.

(a) Except as otherwise provided in subsection (b), if an individual subject to an order issued under Section 305(a) remains in detention because the individual has not satisfied a condition of release, the court shall conduct a review hearing not later than [48] [72] hours after the proceeding at which the condition was imposed.

(b) The court may continue a review hearing under subsection (a) for not more than [48] [72] hours:

(1) on motion of the individual subject to the order issued under Section 305(a); or

(2) for good cause, on the court's own motion or on motion of the [government].

Comment

Not later than [48] [72] hours. The need for speedy review is important when a defendant is ostensibly released but remains detained some days after the release decision. This is especially true considering recent studies finding that even short terms of detention may correlate with increases in recidivism and failure to appear. *See* sources cited in Comment to Section 301, *supra*; *see also* STATE OF UTAH OFFICE OF THE LEGISLATIVE AUDITOR GENERAL, *Report to the Utah Legislature: A Performance Audit of Utah's Monetary Bail System* 19 (Jan. 2017) ("Low-risk defendants who spend just three days in jail are less likely to appear in court and more likely to commit new crimes because of the loss of jobs, housing, and family connections."); PRETRIAL JUSTICE INSTITUTE, *Pretrial Justice: How Much Does It Cost?* 4-5 (Jan. 2017) (finding increases in re-arrest and conviction for those detained even a short time beyond first appearance); *cf.* ODonnell v. Harris Cnty., 892 F.3d 147, 165-66 (5th Cir. 2018) (providing for sequential hearings to review conditions of release that do not result in immediate release).

SECTION 402. RIGHT TO COUNSEL. An individual subject to an order issued under Section 305(a) has a right to counsel at a review hearing under Section 401. If the individual is indigent [insert name of appropriate agency] must provide counsel. [The right to counsel is limited to the hearing.]

Legislative Note*: A state should refer to the state's law on the provision of counsel and should insert the state's term for the state's agency that has financial responsibility for provision of counsel. A state should determine whether the state's law permits the bracketed limitation, which clarifies that counsel may be provided on a provisional basis.*

Comment

Right to Counsel. See supra Comment for Section 302.

SECTION 403. STANDARD. In a review hearing under Section 401:

(1) The court in determining whether to continue, amend, or eliminate a condition of release that results in detention, shall consider the same criteria and measures in Sections 303 and 304.

(2) The court may not continue a secured appearance bond that an individual subject to an order issued under Section 304 has been unable to satisfy. If a secured appearance bond is the only condition on which the individual remains detained, the court shall consider the fact of detention as evidence that the individual is unable to satisfy the secured appearance bond.

(3) The court may not continue a condition of release that results in detention of an individual subject to an order under Section 304 unless the court finds by [clear and convincing evidence] [a preponderance of the evidence]:

(A) an individual charged with a felony poses an extreme risk of nonappearance, and a less restrictive condition is not available to reduce the risk to a level below an extreme risk; or

(B) the individual poses a significant risk of absconding, obstructing justice,

violating a protective order, or [causing bodily injury to] [harming] another and a less restrictive condition is not available to reduce the risk to a level below a significant risk.

(4) If the court continues a condition of release that results in detention of an individual subject to an order under Section 304, or amends a condition in a manner that does not result in release of the individual within [24] hours, the court shall schedule a detention hearing under [Article] 5.

Legislative Note: *In subsection (3), a state should choose between a standard of proof of clear and convincing evidence and preponderance of the evidence.*

In subsection (3)(b), a state should insert the state's term for the type of harm the state concludes is relevant to a temporary detention decision.

Comment

The court may not continue a secured appearance bond that an individual has been unable to satisfy. This provision gets to the heart of wealth-based disparities in pretrial release. Again, the logic is not to eliminate reliance upon bond conditions, but rather to ensure that these conditions do not result in functional detention by another name. *Cf.* State v. Briggs, 666 N.W.2d 573, 583 (Iowa 2003) (noting that, in certain circumstances, when a defendant cannot satisfy a secured bond condition, "a court is constitutionally bound to accommodate the accused's predicament").

The court shall consider the fact of detention as evidence that the individual is unable to satisfy the secured appearance bond. The act contemplates that, when a defendant remains detained on a secured bond condition some days after a court imposed the condition, the most likely explanation is that the defendant cannot satisfy the condition. Other plausible explanations may exist, but the fact of detention still provides strong evidence of inability to pay.

If the court continues a condition of release that results in detention, the court shall schedule a detention hearing. This provision likewise addresses the concern that a condition of release could be used to impose detention without the procedural protections attendant to a detention hearing. The provision compels a court to treat a defendant who remains detained on a condition of release *as if* the defendant were detained formally and to provide the procedural protections of a detention hearing.

[ARTICLE] 5

DETENTION HEARING

SECTION 501. TIMING.

(a) Except as otherwise provided in subsection (b), if the court issues an order of temporary pretrial detention under Section 305 or continues a condition of release that results in detention of an individual subject to an order issued under Section 304, the court shall conduct a detention hearing not later than [72] [96] hours after the proceeding at which the court issued the order or continued the condition.

(b) The court may continue a detention hearing under subsection (a) for not more than [72] [96] hours:

(1) on motion of the individual who is the subject of the hearing; or

(2) for good cause, on its own motion or on motion of the [government].

SECTION 502. RIGHTS.

(a) At a detention hearing under Section 501, the individual who is the subject of the hearing has a right to:

(1) testify;

(2) present and cross-examine witnesses;

(3) present evidence; and

(4) proffer information.

(b) An individual who is the subject of a detention hearing under Section 501 has a right to counsel at the hearing. If the individual is indigent, [insert name of appropriate agency] must provide counsel.

Legislative Note: *A state should refer to the state's law on the provision of counsel and should insert the state's term for the state's agency that has financial responsibility for provision of*

counsel.

Comment

Rights. Section 502 prescribes rights and temporal limitations that are consistent with the procedural framework for detention hearings that the Supreme Court held constitutional (and, potentially, constitutionally required) in *United States v. Salerno*, 481 U.S. 739 (1987).

If the individual is indigent. In Sections 302 and 402, the act provides a provisional right to counsel at release and review hearings. There, the right does not require a finding of indigency. As explained earlier, the reason is that even an affluent individual might not be able to secure the appearance of counsel at a release or review hearing that happens so early in the process. By the time of a detention hearing, however, timing is no longer so pressing. Thus, subsection (b) adds the contingency of indigency. At the same time, the act contemplates that the right has now ripened into a full right to *trial* counsel. Thus, the right is no longer provisional, subject to a state's normal rules on waiver of counsel.

SECTION 503. STANDARD. In a detention hearing under Section 501:

(1) The court may not issue an order of pretrial detention or continue a condition of release that results in detention of an individual who is the subject of the hearing unless the court finds by clear and convincing evidence:

(A) an individual charged with a felony poses an extreme risk of nonappearance, and a less restrictive condition is not available to reduce the risk to a level below an extreme risk; or

(B) the court finds by clear and convincing evidence that the individual poses a significant risk of absconding, obstructing justice, violating a protective order, or [causing bodily injury to] [harming] another and a less restrictive condition is not available to reduce the risk to a level below a significant risk.

(2) The court in determining whether a less restrictive condition is available to reduce the risk to a level below a significant risk, shall consider the same criteria and measures as in Sections 303 and 304.

(3) If the court issues an order of pretrial detention or continues a condition of release that

results in detention of the individual who is the subject of the hearing, the court shall state in a record findings of fact and the reason for the order. If the court issues an order on the basis of a risk of nonappearance or absconding, the court shall state why a less restrictive measure or condition is not sufficient to reduce the risk of nonappearance to a level below an extreme risk or to reduce the risk of absconding to a level below a significant risk.

Legislative Note: *In subsection (1)(b), a state should insert the state's term for the type of harm the state concludes is relevant to a detention decision.*

Comment

Expedited trial. If a defendant is detained until adjudication, a court should expedite trial, and many states provide for such a right. However, the act leaves this question to the states and their speedy trial statutes.

[ARTICLE] 6

MODIFYING OR [VACATING] AN ORDER

SECTION 601. MODIFYING OR [VACATING] BY AGREEMENT. By agreement of the [government] and an individual who is the subject of an order under this [act], the court may:

(1) modify an order of pretrial release;

(2) [vacate] an order of pretrial detention and issue an order of pretrial release; or

(3) issue an order of pretrial detention.

Legislative Note: *In subsection 2, a state should insert the state's term for "vacate" or its equivalent.*

SECTION 602. MOTION TO RECONSIDER.

(a) On motion of an individual subject to an order of pretrial release, the court may reconsider the order using the same procedure and standards in [Article] 3, and modify the order by amending or eliminating a condition of release. The court may deny the motion summarily if

the motion includes no new relevant information.

(b) If new information is provided to the court that is relevant to an order of pretrial release, including evidence that the individual who is subject to the order has violated a condition of release, the court, on its own motion or on motion of the [government], may reconsider the order, using the same procedures and standards in [Article] 3, and may:

(1) modify the order by amending or adding a condition of release; or

(2) [vacate] the order and issue an order of temporary pretrial detention.

(c) If new information is provided to the court that is relevant to an order of pretrial detention, the court, on its own motion or on motion of the individual subject to the order or the [government], may reopen a detention hearing using the procedures and standards in [Article] 5.

Comment

By agreement of an individual, a court may issue an order of pretrial detention. It may not be obvious why a defendant would agree to a detention order. However, in circumstances where a defendant is already detained on another order, he may prefer a detention order in the immediate case (for instance, in order to receive credit for time incarcerated).

[ARTICLE] 7

MISCELLANEOUS PROVISIONS

SECTION 701. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 702. SAVINGS PROVISIONS. This [act] does not affect the validity or effect of a law other than this [act] regulating:

(1) forfeiture of a secured appearance bond; or

(2) arrests for the purpose of keeping the peace or initiating civil commitment.

Comment

The committee anticipates that the act may also need to include savings provisions for preexisting and potentially conflicting laws concerning domestic violence and victim's rights. Alternatively, a state may need to repeal or amend conflicting laws concerning domestic violence and victim's rights.

SECTION 703. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.

SECTION 704. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .

Comment

The committee anticipates that a state may need to repeal or amend acts that impose mandatory release conditions for specified charges or categories of charges—for instance, mandatory fees, secured bonds, or other financial conditions.

SECTION 705. EFFECTIVE DATE. This [act] takes effect . . . .