

**To: Alternatives to Bail Committee**  
**From: Josh Bowers & Sandy Mayson**  
**Date: November 25, 2020**  
**Re: Issues Memo for December Meeting**

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Hello, all. We look forward to our next meeting on December 6<sup>th</sup> and 7<sup>th</sup> in Washington, D.C.

We worked hard to revise the draft act, based upon the many excellent comments we received from the floor at the annual meeting in July. You should have received the most recent draft by email from Lucy Grelle on October 11<sup>th</sup>.

The purpose of this memo is: (1) to outline certain significant changes in that version of the draft act; and (2) to identify a set of outstanding issues for discussion at our December meeting. Of course, we invite a broader exchange about whatever relevant issues you would like to address. But we hope this memo will begin to focus our energies.

### **Significant Changes to the Draft:**

#### **1. Review Hearing Eliminated**

You will notice that we have streamlined the draft act's procedures. Specifically, we narrowed the hearings from three to two, by eliminating the "Review Hearing." Pursuant to the current draft, a court proceeds directly from a "Release Hearing" to a "Detention Hearing." Indeed, the court has the option to hold a Detention Hearing as part of the Release Hearing. Alternatively, the court must hold a Detention Hearing within 72 or 96 hours of the Release Hearing for any defendant who remains detained. We were pleasantly surprised that we were able to eliminate the Review Hearing with relative ease. We believe the simplification is more elegant and works well. But we invite your input.

#### **2. New Definitions**

We added a number of new definitions, some of which are discussed in the "Outstanding Issues" section below.

#### **3. Appearance of Citation or Summons to Appear**

We realized that the draft act failed to give adequate guidance to a court with respect to how to hand an individual who appears after release on a citation or summons to appear. We worked to fix the problem by adding provisions to Section 301 and inserting a new Section 302. We think these changes also work well.

## **Outstanding Issues**

### **1. Name Change?**

As you are aware, many of us have expressed squeamishness with the name of the draft act, “Alternatives to Bail.” After all, it seems odd to include the term “bail” in the title since we (purposefully) never use that term in the text of the act. There is, however, a process to be followed before a committee may change the name of a draft act. Thus, until now, we thought a name change was premature. But we plan to take up this question at our December meeting.

### **2. Definition of “Arrest”?**

As indicated, we have added and modified several definitions. We plan to discuss all of these changes, but one definition has proven particularly challenging. Based upon comments from the floor, we realized that we needed to define “arrest.” In the first instance, we wrestled with whether to define “arrest” as a noun or a verb. And, potentially problematically, the draft act currently uses the word both ways. It is somewhat unwieldy to define the term with reference to both parts of speech, but we have tried nevertheless.

The deeper challenge, however, is that the very concept of “arrest” is not wholly intuitive. It is generally assumed that no arrest occurs when a police officer merely detains a person briefly at the scene of an encounter to, say, issue a citation or summons to appear. Thus, we use the idiom “citation *in lieu of* arrest.” At the other end of the spectrum, all agree that arrest has occurred when a police officer has transported an individual handcuffed to a precinct for booking into a cell in advance of a judicial appearance. But which of these elements is necessary or sufficient to constitute arrest? Handcuffs would not seem to be essential? But is transport? Any significant movement of the individual? Any detention for a significant amount of time?

At present, we have defined arrest as taking a person into “custody” and transporting the person to a “law enforcement facility,” but we have deep reservations about this definition. Although we are confident that we can provide a coherent definition for the purposes of our act, we worry about unintentionally affecting existing state law. We would like to discuss how to proceed. Are there ways to improve upon our definition? Should we make relevant the officer’s subjective or stated intention? Some other consideration? Alternatively, should we revert to no arrest definition at all?

### **3. Enforcement Mechanism?**

One of the central ambitions of the act is to prohibit pretrial detention on money bail. To that end, the act directs courts to set secured financial conditions within a defendant’s ability to pay or to issue an order of detention, pursuant to the criteria and procedures for detention, temporary or otherwise. At present, however, the act sets time limits within which a court must take action. But it includes no enforcement mechanism if a court violates a time limit (intentional or not) or otherwise fails to abide by the act’s requirements and protections. One possibility is for the act to expressly require immediate release of a defendant held beyond a deadline, unless the court has granted a valid continuance.

#### **4. Timing for Issuance of Orders?**

As we just indicated, the act sets deadlines for a court to conduct hearings. However, it does not indicate by when a court must issue an order. At the hearing? Some time afterward? How long afterward? We imagine one or both parties may wish to make additional submissions or bring new information to the court prior to the issuance of an order. We have bracketed a provision in Section 301 for the addition of a time limit, but we have not resolved its content. We should discuss what language to add to the bracketed provision, and we should discuss also whether to add a similar provision to Section 401.

#### **5. Detention Eligibility Nets?**

Currently, the draft act limits detention on the basis of nonappearance to only a qualifying defendant facing a *felony* charge (Section 403(c)(1)). However, the draft act potentially permits detention of a defendant facing *any* type of charge, if the relevant risk is absconding, obstructing justice, violating an order of protection, or harming another person (Section 403(c)(2)). Query whether we should include a charge-based detention eligibility net, prohibiting detention for some types of low-level offenses? Or should we, at least, invite states to delineate a charge-based detention eligibility net? Here, again, we worry about affecting existing state law (particularly prevailing state constitutional provisions).