Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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WHY YOUR STATE SHOULD ADOPT THE UNIFORM PRETRIAL RELEASE AND DETENTION ACT (2020)

The Uniform Pretrial Release and Detention Act responds to the need for a comprehensive and balanced statute to guide courts in making pretrial release and detention decisions for the hundreds of thousands of persons charged with crimes, many of which are minor, each year in state courts. The Act provides a comprehensive procedural framework for release and detention determinations. The Act contains several distinct provisions aimed at protecting the liberty of accused individuals, including:

- ***Abscond versus not appear***. Although many pretrial statutes speak only in terms of "failure to appear," there is a conceptual difference between the different types of failure to appear. The term "abscond" involves an effort to evade justice, whereas the term "not appear" (or the corresponding term "nonappearance") involves a failure to appear that may result from impediments to appearance: for example, a person who skips a court date because she would otherwise lose her job has intentionally failed to appear, but this failure is an instance of nonappearance rather than absconding.

- ***Citation versus arrest.*** Although the Act primarily focuses on release and detention policy following arrest, the implementation of pretrial detention and release policy begins with the police officer on the beat. Hence, Article 2 of the Act provides an option to the states to enact a provision requiring citations in lieu of arrest in certain circumstances. Section 201(c) limits authority to arrest for certain classes or types of minor offenses. However, each state may determine how to define the classes or types of minor offenses that are subject to this provision.

- ***Release after arrest and without a release hearing.*** Section 203 of the Act permits policies and practices of "stationhouse release"—or release directly from a police station, booking facility, jail, or other law enforcement facility—without the need for a judicial hearing. The Act authorizes the imposition of an unsecured appearance bond as a condition of stationhouse release. Many jurisdictions have relied on secured-bond "schedules" to enable release for those able to afford the pre-set bond amounts immediately after arrest, but the constitutionality of that practice is in question, because it produces arbitrary wealth-based disparities in post-arrest pretrial release. To minimize wealth-based disparities, the Act does not permit the use of secured bond schedules for stationhouse release.

- ***Order of pretrial release on recognizance.*** Section 204 of the Act specifies that, if an individual appears as required by a citation (or the equivalent), the court shall issue an order of pretrial release that is conditioned only on the individual's promise to appear again as required by the court and abide by generally applicable laws—or "release on recognizance."

- ***48-hour timeline for pretrial release decisions.*** The Act requires a prompt judicial hearing for release determinations for any individual who was arrested and was not given a "stationhouse release." Section 301 of the Act proposes a 48-hour timeline for pretrial release decisions. The logic behind a 48-hour timeline is threefold:

- ***First***, many courts already make pretrial release decisions at the same time as the probable-cause determination, which, under *Riverside v. McLaughlin*, 500 U.S. 44 (1991), is constitutionally required within 48 hours of a warrantless arrest.
- ***Second***, a number of courts have recently taken up constitutional challenges to the timing of pretrial release decisions and have held that a 48-hour window satisfies due process. *See, e.g., Walker v. City of Calhoun*¸901 F.3d 1245 (11th Cir. 2018), *cert. denied sub nom. Walker v. City of Calhoun*¸139 S. Ct. 1446 (2019); *ODonnell v. Harris Cty.,* 892 F.3d 160-61 (5th Cir. 2018).
- ***Third***, research suggests that the most damaging effects of pretrial detention—including disruption to an arrestee's employment, housing, or child custody or care arrangements, as well as an increased likelihood of conviction—are often triggered within three days.

For all these reasons, promptness is of the essence. Nevertheless, the Act brackets this requirement in recognition that a 48-hour timeline may be less practical in some jurisdictions. Thus, a state may adopt a different timing requirement, with the possibility that a longer duration may have constitutional risks.

- ***Right to counsel.*** The existence of a Sixth Amendment right to counsel turns on two questions: (1) whether the constitutional right has "attached," and (2) whether the proceeding in question constitutes a "critical stage" of prosecution. The Supreme Court has held that the right to counsel does "attach" at a defendant's initial appearance before a judicial officer, but the Court has not yet determined whether a release hearing is a "critical stage" of the prosecution. *Rothgery v. Gillespie Cty.,* 554 U.S. 191, 194 & n.15 (2008). This doctrine is evolving, and many jurisdictions do not currently provide counsel at initial appearances where release and detention determinations are made. The Act, by bracketing Section 302(b), offers states the choice of whether to codify a right to counsel at the release hearing. This Act does not limit this right to the indigent.

- ***Release hearing versus detention hearing.*** The Act requires that an arrested individual be brought before a court within 48 hours of arrest for an initial appearance, called a "*release hearing*" in the Act. At the release hearing, the court must determine by clear and convincing evidence whether the accused is likely to engage in certain behaviors that would unduly threaten public safety or the administration of justice. If not, the court must release the defendant on recognizance. If the court determines that there is such a likelihood, the court must impose the least restrictive means to address the identified risk. In limited circumstances, the Act allows a court to issue an order to detain the arrested individual temporarily until a detention hearing. The Act anticipates that a small fraction of defendants may present a great enough risk to justify pretrial detention. In those circumstances, the Act authorizes a court to temporarily detain an arrested individual only if it finds that certain substantive and procedural criteria are met. The Act requires that the individual be brought before a court within 72 hours after an order of temporary pretrial detention of an arrested individual is issued, called a "*detention hearing*" in the Act. The Act adopts three core procedural guarantees that the Supreme Court endorsed in *United States v. Salerno*, 481 U.S. 739 (1987): the court must provide counsel to an indigent defendant; the court must conduct an adversarial hearing; and the court must find by clear and convincing evidence that continued detention pending trial is necessary.

For more information on the Uniform Pretrial Release and Detention Act, please contact ULC Legislative Counsel Libby Snyder at (312) 450-6619 or lsnyder@uniformlaws.org or Legislative Counsel Jane Sternecky at jsternecky@uniformlaws.org.