D R A F T

FOR DISCUSSION ONLY

ALTERNATIVES TO BAIL ACT

[PROPOSED NEW TITLE: PRETRIAL LIBERTY ACT]

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

March 1-2, 2019 Drafting Committee Meeting

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February 21, 2019

ALTERNATIVES TO BAIL ACT

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ALTERNATIVES TO BAIL ACT

ARTICLE 1

GENERAL PROVISIONS AND DEFINITIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the [Pretrial Liberty Act].

Discussion Notes

Pretrial Liberty Act? Our committee was formed to draft an "Alternatives to Bail Act." The problem is that the term "bail" has come to mean different things. Some statutes and commentators use the term as a noun to signify a secured financial condition of release.[1] Other statutes and commentators use the term according to its historical definition, as "a process of conditional release" from state custody.[2] Still others build on this definition and use the term "bailable" as an adjective to signify the type of offender or offense that qualifies for release.[3] This draft act attempts to sidestep the confusion by using less ambiguous terms. During our November meeting, we wrestled with whether to use the term "bail" at all. We still define the term "bail" (see below), in the event that the committee chooses to use the term. As a title, though, "Alternatives to Bail Act" is nonsensical if bail is understood to have its historical meaning—which is still codified in many state statutes and constitutions—as the process of release after arrest. Therefore, we propose "Pretrial Liberty Act" as a title that clearly articulates the act's central objective: to provide a framework that protects pretrial liberty from wealth-based or other unnecessary incursions while enabling the efficient and fair administration of justice.

SECTION 102. DEFINITIONS.

(1) "Abscond" means failure to appear as the court requires with the demonstrated purpose of avoiding or delaying adjudication.

(2) "Obstruct justice" means interference with the criminal process with the demonstrated purpose of influencing, impeding, or endeavoring to influence or impede the due administration of justice.

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[1] 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.).

[2] SCHNACKE, *supra*, at 16 (contrasting bail with "no bail," which is "a process of detention with a purpose to provide a mechanism for pretrial detention").

[3] *See, e.g.*, O'Donnell v. Harris City, 2018 WL 2465481, at *12–13 (5th Cir. June 1, 2018) (describing "a state-created liberty interest in being bailable"); *see also* SCHNACKE, *supra*, at 20-21 (discussing individuals "detained in Prison, in such cases where by Law they were bailable") (quoting The Habeas Corpus Act, 31 Car. 2, c.2 (1679)).

(3) “Nonappearance” means failure to appear as the court requires without the demonstrated purpose of avoiding or delaying adjudication.

(4) “Bail” means release of a person from state custody during the adjudication period, either on personal recognizance or with conditions imposed, as provided by the [act].

(5) “Adjudication period” means the timeframe from the first appearance of the defendant until the resolution of charges.

(6) “Citation” means a written order, issued by a peace officer or other authorized official, requiring an individual to appear in a designated court at a specified time.

(7) “Summons to appear” means a written order, issued by a court, requiring an individual to appear in a designated court at a specified time.

(8) “Bench warrant” means a written order, issued by a court, authorizing a peace officer to arrest an individual.

(9) “Chief law enforcement officer” means an official who leads a police department or police force, including but not limited to a chief of police or county sheriff.

(10) “Peace officer” means a law-enforcement official authorized to make an arrest.

(11) “Defendant” means an individual currently facing a charge in criminal court.

(12) “Bond schedule” means a document or policy that recommends or requires a bond in a specified amount for an offense or offender type.

(13) “Unsecured appearance bond” means an agreement between a court and defendant in which the defendant agrees to forfeit to the court a specified sum, or collateral of a specified nature, if the defendant absconds.

(14) “Secured appearance bond” means an agreement between the court and the defendant in which the defendant agrees to forfeit to the court a specified sum, or collateral of a

specified nature, if the defendant absconds as the court requires; and which the defendant or a third party secures by providing to the court a deposit, a lien, or proof of access to collateral that the court deems sufficient to secure the bond.

(15) "Validated Risk Assessment Instrument" means an actuarial tool that assesses the statistical likelihood of a specified future event occurring during the adjudication period, and that satisfies the following criteria:

(A) the instrument must specify the future event that is the subject of its assessment with precision;

(B) the instrument must specify the data on which its assessment depends, such that the individual assessed may challenge the assessment;

(C) the instrument must either communicate the likelihood of the future event in numerical terms or state clearly that the likelihood cannot be quantified;

(D) not less than once every five years, an independent expert must subject the instrument to a validation study that evaluates the effectiveness of the instrument on a population dataset that is substantially similar to the population of defendants in the state; and

(E) the validation study must be made publicly available within one month of completion.

Discussion Notes

Bail as a process of release? As noted in the Discussion Note to Section 101, this is the historical meaning of the term "bail," and one that remains prevalent in caselaw and in statutory text. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 294–96 (1769); TIMOTHY R. SCHNACKE, NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, FUNDAMENTALS OF BAIL 29–36 (2014). In contemporary public discourse, "bail" is sometimes used to signify a secured appearance bond, but this not accurate. To sidestep confusion, this act largely avoids use of the word "bail" in favor of less ambiguous language. But we think it important to clarify the meaning of the term nonetheless.

Absconding versus nonappearance. One central challenge of crafting a pretrial release and detention statute is to encourage courts to attend to the difference between intentional absconding and failure to appear for more prosaic, and more manageable, reasons. (For instance, defendants may struggle to remember court dates, to get leave from work, to procure childcare or transportation; or may just be intimidated by the prospect of coming to court. *See, e.g.*, Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677 (2018). As commentators have noted, and as we discussed at the fall meeting, these two different brands of failure-to-appear warrant different responses. We have tried to capture the differences through the terms "abscond" and "nonappearance."

Validated risk assessment. We are aware that the definition of this term may be too substantive for the definitions section, but—for the time being, at least—this seemed like the most natural home for the criteria we believe are essential to a "validated" instrument.

ARTICLE 2

CITATION AND ARREST

SECTION 201. CITATION.

(a) Except as provided in Section 202 paragraph (b), a peace officer may not make an arrest for [an offense for which a jail or prison sentence is unauthorized by statute] [a misdemeanor or non-criminal offense] [an offense for which a jail or prison sentence of more than six months is unauthorized by statute]. Nothing in this paragraph shall preclude a court from issuing a standing order or a legislature from enacting a statute, enumerating additional offenses of categories of offenses for which a peace officer may not make an arrest.

(b) If a peace officer has probable cause to believe an individual is committing or has committed an offense for which arrest is unauthorized, or if arrest is otherwise unauthorized, a peace officer may issue a citation. The citation must specify in plain written language:

(1) the time and place the individual shall appear; and

(2) subject to subparagraph (d), the consequences of failing to appear as the citation requires, obstructing justice prior to appearance, or committing a criminal offense prior to appearance.

(c) If a peace officer has probable cause to believe an individual is committing or has committed an offense for which arrest is authorized, a peace officer may arrest, issue a citation, or take another action authorized by law.

(d) If an individual appears as the citation requires, the defendant shall remain at liberty on an order of pretrial release, as described in Section 301 paragraph (d).

(e) If an individual fails to appear as a citation requires, or if a court has probable cause to believe that the individual has obstructed justice or committed a criminal offense prior to appearance, the court may issue a bench warrant or summons to appear. Nothing in this paragraph shall interfere with or prevent arrest, charge, conviction, or punishment for contempt or another criminal or noncriminal offense.

Discussion Notes

A peace officer may not make an arrest? Paragraph (a) describes a set of offenses for which citation is mandatory and arrest is unauthorized (with three alternatives proposed: citations for non-jailable offenses, for misdemeanor or non-criminal offenses, or for offenses punishable by less than six-months jail). As we discussed during our November meeting, the connection might not be apparent between citations and our focus, which is pretrial release during the adjudication period. However, numerous jurisdictions and commentators have come to appreciate that the question of pretrial release begins with police officers on the beat.[4] More to the point, the Uniform Law Commission's mission statement for this project includes the possibility of expanding reliance on citations in lieu of arrests.[5]

[4] For instance, the Bureau of Justice Assistance has expressly endorsed expanding use of citations in lieu of custodial arrest. BUREAU OF JUSTICE ASSISTANCE, NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: SUMMARY REPORT OF PROCEEDINGS (Washington, D.C., 2012), at 30. Likewise, several statutes and model standards permit or require the use of citations in some cases. 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) (providing that, except under enumerated circumstances, a peace officer or other authorized official shall issue a citation instead of making an arrest for a misdemeanor committed in his or her presence, if there are reasonable grounds to believe that the person being cited will appear to answer the charge. The citation shall provide that the defendant shall appear within a designated time."); Cal. Pen. Code § 853.6 (requiring citations for misdemeanors, subject to delineated exceptions). According to the National Conference of State Legislatures, indicating that ten states have such presumptions in favor of citations and the overwhelming majority of states permit citations in some types of cases. NATIONAL CONFERENCE OF STATE LEGISLATURES, *Citation in Lieu of Arrest*, http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.

[5] 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

A peace officer may arrest? Paragraph (c) describes a category of offenses for which a peace officer's decision as to arrest or citation is made discretionary. In other words, the paragraph recognizes the authority of a peace officer to issue a citation even when arrest is authorized. At present, several states provide for such discretion not to arrest—extending that discretion sometimes even to some felony offenses.[6] We think it's right to recognize the peace officer's discretion, here. If limits are set to such discretion, we believe those limits are best left to police department policy or practice.

Plain written language? We use this term throughout the act. Obviously, this is a call for the use of clear and precise prose. But, depending on the demographic composition of the jurisdiction, it could demand also that the citation or other order convey the necessary information in multiple languages.

Or if arrest is otherwise unauthorized? With this language, we are just emphasizing the noncontroversial point that an arrest may be unauthorized for other reasons, beyond the absence of probable cause or the triviality of the offense. For instance, an arrest may be unauthorized by departmental, local, or state policy or law; federal constitutional equal protection doctrine; or lots more in between.

Fails to appear? As we discussed, in the "definitions" section, the draft act typically takes pains to distinguish between absconding and nonappearance. However, we use the term "fails to appear" here, rather than absconding or nonappearance, because—for present purposes only—we intend to capture both types of failures to appear, not one or the other.

SECTION 202. ARREST.

(a) Except as prohibited by statute or standing order, as described in Section 201 paragraph (a), if a peace officer has probable cause to believe an individual is committing or has committed [an offense for which a jail or prison sentence is authorized by statute] [a felony offense] [an offense for which a jail or prison sentence of more than six months is authorized by statute], and if arrest is otherwise authorized, the peace officer may make an arrest.

(b) A peace officer may make an arrest for [an offense for which a jail or prison sentence is unauthorized by statute] [a misdemeanor or non-criminal offense] [an offense for which a jail or prison sentence of more than six months is unauthorized by statute], if the peace officer has

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 . . . .").

[6] NATIONAL CONFERENCE OF STATE LEGISLATURES, *Citation in Lieu of Arrest*, http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.

probable cause to believe an individual is committing or has committed the offense, and if arrest is otherwise authorized; and

(1) the offense involves domestic violence, as defined by [state] law;

(2) the offense involves driving under the influence, as defined by [state] law;

(3) the individual fails to provide adequate identification or identifying information when lawfully requested by a peace officer;

(4) the individual is violating a court order or condition of probation, parole, or release for a criminal charge or conviction;

(5) the individual is facing an open order of detention from any jurisdiction, including but not limited to an arrest warrant or order of revocation of probation, parole, or release for a criminal charge or conviction;

(6) the individual poses an [articulable] [substantial] risk of nonappearance, absconding, obstructing justice, or harming a person prior to appearance; or

(7) an arrest is necessary to conclude the interaction safely or to carry out a lawful investigation.

(c) Nothing in paragraph (b) shall preclude a chief law enforcement officer or an authorized delegate from releasing an arrestee prior to a first court appearance, as described in Section 301. The chief law enforcement officer or authorized delegate may release the arrestee:

(1) by issuing a citation, as described in Section 201; or

(2) by issuing a citation, as described in Section 201, and by requiring the arrestee to execute an unsecured appearance bond, set pursuant to a bond schedule.

Discussion Notes

A peace officer may make an arrest for an offense for which arrest is otherwise unauthorized? These enumerated exceptions—under which a peace officer or other authorized

official retains discretion to arrest, even for typically non-arrestable offenses—largely align with the exceptions specified in prevailing statutes.[7]

[Articulable] [substantial] risk of nonappearance, absconding, obstructing justice, or harming a person? We believe it is important to include the modifier "articulable" (or, alternatively, "substantial" or some other modifier) here and elsewhere. The reality is that almost any suspect poses *some* risk of flight, obstruction, or even harming a person.[8] As Justice Jackson observed: "Admission to bail always involves a risk that the accused will take flight. This is a calculated the risk that the law takes as a price of our system of justice."[9] In a social order committed to the principle of legality and a presumption of liberty, detention—either by arrest or bail decision—ought to demand articulable (and sometimes significant) risks whenever liberty is compromised prior to criminal conviction.

Or an authorized delegate? We are not wedded to this formulation. But we hope to convey that a department has the discretion to empower any officer to release an arrestee prior to a first appearance. As we discussed at our November meeting, the consequences are often profound of even a brief period of confinement post-arrest.

Bond Schedule? In the world of bail reform, bond schedules are rightly frowned upon (and even made the subject of litigation) for failing to provide for a sufficiently individualized release decision. However, we anticipate that bond schedules (with their rough-and-ready ease of use) could effectively and fairly play a very limited role—that is, providing an opportunity for immediate release prior even to the first court appearance, as long as that opportunity is not contingent on up-front payment of cash or provision of other collateral. Again, our core goal is to eliminate wealth-based disparities in pretrial release.

ARTICLE 3

HEARINGS AND MOTIONS ON PRETRIAL LIBERTY

SECTION 301. FIRST APPEARANCE.

(a) *Timing.* If a peace officer has arrested a defendant and the chief law enforcement officer or an authorized delegate has not released the defendant, the court shall conduct a first appearance hearing not later than [24 hours] [48 hours] after arrest, except, in extraordinary

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[7] *Id*.

[8] TIMOTHY R. SCHNACKE, CENTER FOR LEGAL AND EVIDENCE-BASED PRACTICES, *"Model" Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention* 13, 25 (Apr. 18, 2017) ("[O]ne can literally go out on the streets of any city and show that 100 random pedestrians are all risky. . . . [S]ince everybody is already risky . . . where do we draw the line? . . . [R]isk is inherent to bail . . . . [W]e cannot, consistent with fundamental American principles, be risk averse.").

[9] Stack v. Boyle, 342 U.S. 1, 8 (1951) (Jackson, J., dissenting).

circumstances, the court may grant a single continuance of not more than [24 hours] [48 hours], upon oral or written motion of the government or by the court *sua sponte*.

(b) *Right to Representation*. A defendant has a right to representation at the first appearance. The court shall provide representation for a defendant who has not secured counsel for the first appearance. The court may provide provisional representation for the first appearance only. If the court fails to provide and make present representation for a defendant who has not secured counsel, and the defendant has not waived the right to representation, the court shall release the defendant on an order of pretrial release, as described in paragraph (d).

(c) *Least Restrictive Means Requirement.* A defendant is presumed innocent until proven guilty beyond a reasonable doubt. A court may not impose punishment before conviction for an offense. A defendant has a presumptive right to pretrial liberty and against undue wealth-based disparities in release and conditions on pretrial liberty. At the first appearance, the court shall evaluate whether the defendant presents an [articulable] [substantial] risk of failing to appear, obstructing justice, or [seriously] harming a person during the adjudication period. If the court finds that the defendant presents such a risk, it shall identify, subject to subparagraphs (c)(2) and (c)(3) and paragraph (e), the least restrictive means to address the risk.

(1) The court shall evaluate the following considerations to evaluate the risks described in paragraph (c):

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

(B) the weight of the evidence against the defendant;

(C) the likely sentence for the defendant if convicted;

(D) the history or pattern of criminal activity of the defendant;

(E) the history of nonappearance or absconding of the defendant;

(F) a threat made by the defendant;

(G) whether, at the time of the alleged offense, arrest, or charge in the current case, the defendant had a pending criminal charge or was serving a criminal sentence;

(H) an assessment of the defendant by a validated risk assessment instrument; and

(I) other relevant information offered by the defendant, prosecutor, or a pretrial services agency.

(2) If the court finds that a defendant poses an [articulable] [substantial] risk of nonappearance, the court shall consider whether the risk is a product of cognitive or social [logistical] barriers to appearance. If the risk of nonappearance of the defendant is the product of cognitive or social [logistical] barriers to appearance, the court must provide practical services to manage the risk. Practical services may include, but are not limited to, sending electronic or other reminders of appearances, scheduling appearances on mutually convenient dates and times, or providing subsidized transportation to and from court.

(3) If the court finds that a defendant poses a risk described in paragraph (c), the shall consider whether the risk can be managed adequately by offering the defendant voluntary supportive services. Voluntary supportive services may include, but are not limited to, referrals to organizations that provide therapeutic treatment or educational, vocational or housing assistance.

(4) Subject to paragraph (c), the court shall decide whether to impose an order of pretrial release, subject to paragraph (d); an order of pretrial restraint, subject to paragraph (e); or a temporary order of pretrial detention, subject to paragraph (f).

(d) *Pretrial Release Order.*

(1) Except as provided by paragraphs (e) and (f), a court shall issue an order of pretrial release.

(2) An order of pretrial release may not impose a condition on pretrial liberty of the defendant other than the conditions that the defendant shall appear as the court requires and must not obstruct justice or commit a criminal offense during the adjudication period. An order of pretrial release must specify in plain written language:

(A) the time and place the individual shall appear next;

(B) the conditions of an order of pretrial release; and

(C) the consequences of violating the order of pretrial release, as described in paragraph (g).

(e) *Pretrial Restraint Order.* Except as provided in paragraph (f), if the court finds by clear and convincing evidence that a defendant poses an [articulable] [substantial] risk of failing to appear, obstructing justice, or [seriously] harming a person during the adjudication period, and practical or voluntary supportive services are unavailable to manage the risk adequately; the court shall issue an order of pretrial restraint and release the defendant subject to the conditions described in paragraph (d) and the least restrictive additional condition or combination of conditions reasonably necessary to reduce the risk to an [acceptable] [insubstantial] level.

(1) Subject to this paragraph, the court may impose the following conditions:

(A) mandatory therapeutic or social services;

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

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

(D) a restriction on travel;

(E) a restriction on contact with a specified person or persons;

(F) a restriction on a specified activity;

(G) supervision by a pretrial services agency or third party;

(H) a curfew;

(I) electronic monitoring;

(J) house arrest;

(K) an unsecured appearance bond;

(L) an appearance bond secured by cash, property, or surety;

(M) a condition or combination of conditions proposed by the defendant;

(N) another condition that is reasonably necessary to reduce an [articulable] [substantial] risk, as defined in paragraph (d), to an insubstantial level.

(2) The court may impose an appearance bond only if a defendant poses an [articulable] [substantial] risk of absconding or obstructing justice during the adjudication period, and no less restrictive condition is available to reduce the risk to an [acceptable] [insubstantial] level. A court may not impose a bond for another purpose.

(A) Before the court imposes an appearance bond, the court shall inquire into the personal financial resources and burdens of the defendant, including but not limited to income, assets, liabilities, or dependents. The court shall not impose an appearance bond greater than necessary to reduce the risk of absconding or obstruction of justice to an [acceptable] [insubstantial] level.

(B) The court shall not impose a secured appearance bond that a defendant is unable to satisfy from immediately available personal financial resources. Based upon an inquiry as described in subparagraph (2)(A), the court may not impose a secured appearance

bond in an amount greater than the defendant is able to satisfy personally within [24 hours] [48 hours].

(C) [Based upon an inquiry as described in subparagraph (2)(A), the court may not impose a mandatory fee on a defendant in an amount greater than the defendant is able to satisfy immediately. If the defendant is unable to satisfy a mandatory fee immediately, the court shall waive or pay the fee, or shall waive a condition that requires a mandatory fee.]

(D) Except as provided in subparagraph (e)(4)(E), the court may not impose a secured appearance bond for a misdemeanor offense.

(E) Subject to subparagraphs (e)(4)(A)-(B), the court may impose a secured appearance bond for a misdemeanor offense if the defendant has a history of absconding one or more times or nonappearance three or more times.

(3) Before the court imposes an order of pretrial restraint, the defendant has a right to present arguments against a condition of release. The defendant has no right to testify at a first appearance, but, if the defendant testifies, the court may not admit the testimony of the defendant at trial on the question of guilt for a charge in the current case or a related case. The court may admit the testimony of the defendant at trial for the purposes of impeachment, or may admit the testimony of the defendant in a subsequent prosecution for perjury.

(4) If the court imposes an order of pretrial restraint, the order must articulate in plain written language:

(A) the time and place the individual shall appear next;

(B) the conditions of the order of pretrial restraint;

(C) the conditions described in paragraph (e); and

(D) the consequences of violating the order of pretrial restraint.

(f) *Temporary Detention Order.*

(1) Upon oral or written motion of the government, the court may impose a temporary order of pretrial detention and detain the defendant until a detention hearing, as described in Section 303, if the defendant is eligible for pretrial detention pursuant to subparagraph (f)(4) and the court finds by clear and convincing evidence that:

(A) the defendant is charged with a felony offense that provides for a maximum penalty of death or term of imprisonment for life;

(B) the defendant poses an acute risk of absconding, obstructing justice, or [seriously] harming a person during the adjudication period; and no condition or set of conditions of release is available to reduce the risk to a non-acute level;

(C) the defendant poses an acute risk of nonappearance; no condition or set of conditions of release is available to reduce the risk to a non-acute level; the defendant is addicted to alcohol or drugs or is incompetent to stand trial; and the court detains the defendant for the purpose of psychological, medical, or therapeutic examination or treatment; or

(D) the defendant faces a felony charge in the current case involving violence or possession or use of a firearm; the defendant poses an [articulable] [substantial] risk of absconding, obstructing justice, or [seriously] harming a person during the adjudication period; no condition or set of conditions of release is available to reduce the risk to an [acceptable] [insubstantial] level; and at the time of the alleged offense, arrest, or charge in the current case, the defendant was released:

(i) pending trial for a prior criminal charge;

(ii) pending imposition, execution, or completion of a sentence or appeal of a sentence or conviction for a criminal offense; or

(iii) on probation or parole for a criminal conviction.

(2) Before the court imposes a temporary detention order, the defendant has a right to present arguments against temporary detention. The defendant has no right to testify, but, if the defendant testifies, the court may not admit the testimony of the defendant at trial on the question of guilt for a charge in the current case or a related case. The court may admit the testimony of the defendant at trial for the purposes of impeachment, or may admit the testimony of the defendant in a subsequent prosecution for perjury.

(3) If the court imposes a temporary order of pretrial detention, the court must articulate in plain written language findings of fact and a statement of reasons that support the order by clear and convincing evidence. If the court imposes a temporary order of pretrial detention on the bases of risk of nonappearance or absconding, the findings of fact and statement of reasons must articulate why other measures, including but not limited to electronic monitoring, are insufficient to reduce the risk to an [acceptable] [insubstantial] level.

(4) Subject to paragraph (f) and Section 303, a defendant is eligible for pretrial detention unless the constitution or laws of this state provide otherwise.

(g) *Violation of Conditions of Release.* If the court finds by clear and convincing evidence that the defendant has failed to appear as the court requires but has not absconded, the court shall issue a summons to appear and shall provide the defendant at least [48 hours] [72 hours] to appear voluntarily. If the defendant fails to appear after the opportunity to appear voluntarily, the court may consider the continued nonappearance of the defendant to constitute evidence that the defendant has absconded. If the court finds by clear and convincing evidence that the defendant has absconded, obstructed justice, committed a criminal offense, or violated a condition of release during the adjudication period, the court may issue a bench warrant or

summons to appear and may reopen a first appearance hearing to reconsider the order of pretrial release or restraint.

Discussion Notes

Not later than [24] [48] hours after the arrest? The timeframe for a first appearance is intended to expedite the release decision by coupling it with (or even drawing it within) the timeframe for the probable cause hearing, which the Fourth Amendment requires not later than 48 hours after the arrest.[10] At least a dozen states specify similar time frames.[11]

Extraordinary circumstances? For other later hearings (*e.g.*, the potential review and detention hearings), the draft act allows for multiple potential continuances upon a showing of good cause. With respect to this first appearance, however, we think there would need to be genuinely extraordinary circumstances for a court to fail to honor a timeline already widely followed, pursuant to *Riverside v. McLaughlin* and state and local rules. And, even in those jurisdictions where such a timeline is not currently followed, it would seem that a court should be able to abide by the timeline once it is formalized by the model act and implemented. By contrast, review and detention hearings seem somewhat different: not every defendant is made subject to either or both of these later hearings; and the hearings themselves seem likelier to raise unique issues, circumstances, or evidentiary hurdles that might merit a good-cause continuance.

Right to representation? There is a balance to be struck between the benefits of extending a right to counsel to pretrial release hearings[12] and the practicalities and costs of extending the right. We take something of a compromise approach, guaranteeing a right to representation by only provisional counsel for this hearing and the review hearing, as described in Section 302. As we make plain in the "definitions" section, we foresee a difference between the lesser "right to representation" that would attach here and at the review hearing, and the greater "right to trial counsel" that would attach at the detention hearing. Indeed, we might even be open to the notion that this right to representation could be fulfilled by a paralegal or other non-attorney advocate. But, of course, if we were to do that, then the act would almost certainly run into problems of unauthorized practice of law. In any event, a court could avoid even the obligation (and costs) of appointing provisional counsel by simply ensuring that the defendant is released at the first appearance. By this and other cost-saving mechanisms, we hope to eliminate the need for a fiscal note to attach to the act. That is to say, we anticipate that any financial burden (from a right to representation) would be offset by cost savings in other places (*e.g.*, the increased use of citations).[13]

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[10] *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

[11] NATIONAL CONFERENCE OF STATE LEGISLATURES, *Pretrial Release Eligibility*, http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx.

[12] The Bureau of Justice Assistance has deemed the right integral, as applied to release hearings. BUREAU OF JUSTICE ASSISTANCE, NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: SUMMARY REPORT OF PROCEEDINGS (Washington, D.C., 2012), at 30.

[13] 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

Wealth-based disparities? The regressive economic impact of bail is well known. And the inequalities correlate not only with class but also with race.[14]

A right to pretrial liberty, a presumption of innocence and a rebuttable presumption of pretrial release? Obviously, the presumption of innocence is foundational and well known.[15] Likewise, forty-eight states expressly provide for some form of presumption of pretrial release.[16] As the Supreme Court has observed: "In our society, liberty is the norm, and detention prior to trial or without trial is the *carefully limited exception*."[17] In fact, approximately twenty states provide for some presumption in favor of release on personal recognizance—or, at most, an unsecured appearance bond.[18] Kentucky, for example, takes a particularly strong presumption in favor of pretrial release on personal recognizance.[19] By these presumptions, release is made the default. We believe a presumptive right cannot be stated too forcefully, especially considering rising rates of detention pretrial over the past several decades. Indeed, despite reform efforts, many jurisdictions have come to rely even more on the use of (prohibitively high) financial bonds.[20] Finally (and perhaps it goes without saying), detention tends to make guilty pleas likelier and sentences longer.[21]

Practical services/voluntary supportive services? As we discussed during our November

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who can advocate viable and prudent alternatives." (citing studies)). In a number of states, counsel is already guaranteed at release hearings. *Cf. See, e.g.*, 39 DEL CODE. § 4604 (requiring the appointment of counsel "at every stage of the proceedings following arrest"). In these jurisdictions, the question of resources is obviously immaterial.

[14] COUNCIL OF ECONOMIC ADVISERS, *Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor* 6 (Dec. 2015); *see also* U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, *Investigation of the Ferguson Police Department* 60 (Mar. 4, 2015).

[15] Coffin v. United States, 156 U.S. 432, 453 (1895) (describing the presumption of innocence as "axiomatic and elementary").

[16] Only two states (and Washington, D.C.) have failed to expressly provide for a presumption of pretrial release (constitutional, statutory, or both). NATIONAL CONFERENCE OF STATE LEGISLATURES, *Pretrial Release Eligibility*, http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx; *see, e.g.*, FLA. R. CRIM. P. RULE § 3.131 ("Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions.); KY. CONST. § 16; MINN. CONST. ART. 1, § 7; COLO. REV. STAT. §§ 16-4-103, 16-4-113; KY. REV. STAT. §§ 431.520, 431.066.

[17] United States v. Salerno, 481 U.S. 739, 755 (1987) (emphasis supplied); *accord* Stack v. Boyle, 342 U.S. 1, 4 (1951) ("This traditional right to freedom before conviction . . . serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."); *see also Stack*, 342 U.S. at 7-8 (Jackson, J., concurring) ("[T]he spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this . . . even those wrongly accused are punished by a period of imprisonment while awaiting trial.").

[18] *Id*.

[19] KY. REV. STAT. §§ 431.520, 431.066; *see also* COLO. REV. STAT. §§16-4-103, 16-4-113.

[20] BUREAU OF JUSTICE ASSISTANCE, NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: SUMMARY REPORT OF PROCEEDINGS (Washington, D.C., 2012), at 30 (indicating a fifty percent increase over the preceding decade); *see also* COUNCIL OF ECONOMIC ADVISERS, *supra*, at 6 (showing a two-decade increase in reliance upon money bail from 53% of felony cases to 72%).

[21] *See e.g.*, CRIMINAL JUSTICE POLICY PROGRAM AT HARVARD LAW SCHOOL, *Moving Beyond Money Bail: A Primer on Bail Reform* 7 (Oct. 2016) ("[T]he inability to post money bail may induce innocent people accused of relatively low-level crimes to plead guilty, simply so they can be released."); *see also* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 4 (2011).

meeting, there is a need to distinguish between (i) conditions of release and (ii) services that a court might provide to facilitate appearance and other objectives (particularly in the face of the kinds of cognitive, social, and logistical inequities that have produced wealth-based and other arbitrary forms of disparity in pretrial release). As a means to address existing problematic disparities, we have developed the idea of practical and voluntary supportive services (and a court's obligation, in some circumstances, to provide them). As we see it, limitations on the use of secured bonds only get us some of the way toward eliminating arbitrary disparities in pretrial release. The draft act can do more by prescribing also positive interventions, like practical and supportive services.

The nature, seriousness, and circumstances of a charge and alleged offense? Because a sound release decision depends upon distinguishing between specific offenders and offenses, the draft act directs the court to consider not only the nature and seriousness of the statutory charge but also the circumstances that describe the particular alleged offense.[22]

The alleged offense or charge? These terms appear in several places throughout the draft act. We are careful to use each term according to its own meaning. Except in contexts where a different meaning is otherwise apparent, we use "charge" to refer to a current statutory charge. We use "alleged offense" to refer to the particular facts and allegations that support a current charge. That said, we do not include these terms in the "Definitions" section, because, as stated, the term "charge" sometimes may take on a different meaning in its particular context (e.g., "prior criminal charge"). However, we are open to adding these terms to the "Definitions" section, if warranted.

Validated risk assessment instrument? One of the most difficult set of questions is when, whether, and to what degree pretrial release should depend upon risk assessment instruments. These instruments are products of reform efforts.[23] But there is an emerging concern that they may unnecessarily widen the net of defendants who are subject to detention and onerous conditions of release.[24] One thing is certain, however: validated risk assessment instruments are far superior to preset bond schedules, which are over-inclusive and meaningfully fail to distinguish between offenders and offenses. For this reason, the American Bar Association and the Bureau of Justice Assistance have endorsed risk assessment instruments and have cautioned against using preset bond schedules.[25] Ultimately, we believe not only that a well-constructed

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[22] AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-5.3(e) (suggesting that a release or detention decision must be individualized).

[23] Fifteen states currently require courts to use risk assessment instruments in at least some cases. 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 e.g.*, KY. REV. STAT. §§ 431.520, 431.066; *see also* COLO. REV. STAT. §§16-4-103, 16-4-113.

[24] Indeed, a number of reformers have rejected the use of these tools altogether. *See, e.g.*, HUMAN RIGHTS WATCH, PRESERVING THE PRESUMPTION OF INNOCENCE: A NEW MODEL FOR BAIL REFORM (on file with reporters) (rejecting use of risk assessment instruments).

[25] BUREAU OF JUSTICE ASSISTANCE, NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: SUMMARY REPORT OF PROCEEDINGS (Washington, D.C., 2012), at 30; *see also* AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-5.3(e) ("Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the defendant's flight risk, and *should never be set by reference to a predetermined schedule of amounts fixed*

risk assessment instrument can provide worthwhile guidance, but also that human evaluation remains indispensable.[26] Thus, we believe it is best practice for a court to consider both empirical actuarial tools and traditional qualitative considerations. We understand, however, that not all jurisdictions have access to well-constructed risk assessment instruments. Accordingly, we do not require their use, but rather merely suggest that they may be taken into consideration.

Pretrial services agency? Although we believe all states should establish ad properly fund pretrial services agencies, the draft act does not require their creation, because such a requirement would obviously demand the attachment of a fiscal note. Instead, we only mention compliance with a pretrial services agency as one available condition of release (should such an agency exist already).

Whether the defendant has proposed a practical condition or combination of conditions of release? This is a consideration of our own innovation, but we think it is advisable and has little to no downside. Already, courts do and should consider defense proposals (like proposals to utilize therapeutic or social services) that are designed to address flight risk or dangerousness. We see no harm in instructing courts to at least consider these proposals as they arise.

The court shall inquire into the personal financial resources and burdens of the defendant? As drafted, the model act does not specify what this inquiry should look like. Perhaps, we should specify. Perhaps, we should include something in the commentary. Or perhaps, we should just leave it to state and local rules or judicial discretion. Some possible lines of inquiry include, but need not be limited to: taking an affidavit and/or testimony from the defendant; or considering whether the defendant: (i) was previously detained pretrial on a financial condition, (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, and/or (vi) was recently institutionalized in some capacity (*e.g.*, hospitalized, jailed, imprisoned, or civilly committed).

Executing an appearance bond, secured by cash, property, or solvent surety? Consistent with the Uniform Law Commission's mission statement, we think it is appropriate to "prohibit the use of money bail *as a mechanism to trigger preventative detention*."[27] However, as we all agreed at our November meeting, we do not think it is necessary to eliminate the use of secured bond conditions altogether. Nor do we think it is practical to eliminate the use of commercial bail bonds. The bail bond industry is powerful, and, to date, only four or five states have prohibited their practice.[28] Instead, our aim is to regulate the use of bond conditions by limiting

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according to the nature of the charge." (emphasis supplied)).

[26] TIMOTHY R. SCHNACKE, CENTER FOR LEGAL AND EVIDENCE-BASED PRACTICES, *"Model" Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention* 27 (Apr. 18, 2017) ("[T]he answer is . . . not as simple as using actuarial pretrial risk assessment instruments alone to release all 'low risk' defendants and to detain all 'high risk' ones. In fact, the answer lies somewhere in the middle.").

[27] UNIFORM LAW COMMISSION, *New ULC Drafting Committee on Alternatives to Bail* (Feb. 2, 2018) (emphasis added).

[28] Wisconsin Stat. § 969.12; Oregon Stat. §§ 135.255, 136.260, 135.265; Ky. Rev. Stat. § 431.510; 725 Ill. Stat. §§ 5/103-9, 5/110-7, 5/110-8. However, as is well known, judges in Washington, D.C, have effectively eliminated the use of money bail. Likewise, litigation brought by a nonprofit has effectively "brought an end to money bail" in SEVEN DIFFERENT JURISDICTIONS IN ALABAMA, LOUISIANA, MISSISSIPPI, MISSOURI, AND KANSAS. EQUAL JUSTICE

the valid purposes for setting bond conditions, restricting the kinds of cases and circumstances in which secured bonds may be imposed, and practically eliminating the use of secured bonds in lieu of detention and detention hearings.

No less restrictive condition is available to reduce the risk to an [acceptable] [insubstantial] level? We think it extremely important to include the limitation that a bond condition may be imposed only if "no less restrictive condition is available." A core purpose behind the draft act is to minimize wealth-based disparities in pretrial release, and bond conditions are the prime drivers of those disparities. Moreover, in prevailing statutes, the requirement is fairly conventional that "no less restrictive condition" be available before a bond condition may be imposed. Around twenty states either expressly or implicitly require that conditions of release—especially secured financial conditions—must be evaluated to determine whether they are the least restrictive to reasonably assure that a legitimate governmental purpose is served.[29] Finally, we think it relevant that, as former Attorney General Eric Holder has observed, with technological developments, "[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."[30]

A court may not impose a bond for another purpose? It is inappropriate for a court to set a financial condition of release as a means of addressing a defendant's dangerousness. If a defendant is sufficiently dangerous, he should be detained. Financial conditions should be reserved for addressing flight risk and/or obstruction of justice. This is the position already of the American Bar Association and a number of jurisdictions.[31]

In an amount no greater than the defendant is able to satisfy? This provision is critical to minimize the degree to which even secured bond conditions may substitute for a detention order and the procedural protections that go with it.[32]

UNDER LAW, *Ending the American Money Bail System*, https://equaljusticeunderlaw.org/money-bail-1/.

[29] 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, e.g.*, COLO. REV. STAT. §§ 16-4-103, 16-4-113; 11 DEL. CODE § 2101; 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."); *see also* 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.").

[30] BUREAU OF JUSTICE ASSISTANCE, NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: SUMMARY REPORT OF PROCEEDINGS (Washington, D.C., 2012), at 30.

[31] 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.").

[32] 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."); *cf*. Kansas Stat. § 22-2801 (seeking to "assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance").

SECTION 302. REVIEW HEARING

(a) *Timing.* If a defendant remains detained on a condition of release, pursuant to Section 301 paragraph (e), the court shall conduct a review hearing not later than [48 hours] [72 hours] after the first appearance or another appearance at which the condition was imposed, except the court may grant a continuance upon oral or written motion of defendant; or, with good cause, the court may grant a single continuance of not more than [48 hours] [72 hours] upon oral or written motion of the government or by the court *sua sponte*.

(b) *Right to Representation*. A defendant has a right to representation at the review hearing. The court shall provide representation for a defendant who has not secured counsel for the review hearing. The court may provide provisional representation for the review hearing only. If the court fails to provide and make present representation for a defendant who has not secured counsel, and the defendant has not waived the right to representation, the court shall amend, by mitigating or eliminating, all existing conditions of release that result in detention; and may not continue or impose a condition that results in detention.

(c) *Outcome.* At the review hearing, the court shall decide whether to continue or amend, by mitigating or eliminating, a condition of release that results in detention; and shall impose:

(1) an order of pretrial release, subject to Section 301 paragraph (d);

(2) an amended order of pretrial restraint, subject to Section 301 paragraph (e); or

(3) a temporary order of pretrial detention, subject to Section 301 paragraph (f).

(d) *Standard*. To determine whether to continue or amend a condition of release that results in detention, the court shall evaluate the considerations described in Section 301 subparagraphs (c)(1) and (e)(1).

(1) The court may not continue a secured bond that the defendant is unable to

satisfy. If a secured bond remains the only condition on which the defendant is detained at the time of the review hearing, the court shall take a rebuttable presumption that the defendant is unable to satisfy the bond.

(2) The court may not continue a condition of release that results in detention unless the defendant is eligible for pretrial detention pursuant to subparagraph (f)(4) of Section 301 and the court finds by clear and convincing evidence that no less restrictive condition or combination of conditions of release is available to reduce an [articulable] [substantial] risk to an [acceptable] [insubstantial] level. If the court continues a condition of release that results in detention, or amends the condition but does not release the defendant immediately, the court shall impose a temporary order of pretrial detention and schedule a detention hearing, subject to Section 303 subparagraph (f)(2)-(3).

Discussion Notes

Not later than [72 hours] [48 house] after the conclusion of a first appearance, the court shall conduct a review hearing for any defendant who remains detained on a condition of release? A number of jurisdictions provide for review of release conditions for defendants who remain detained some days after the release decision.[33] The need for speedy review is all the more important, considering recent studies that have found that even short terms of detention may correlate with increases in recidivism and failure to appear.[34]

Or another appearance at which the condition was imposed? This terminology might seem a bit confusing. Under what circumstances might a court impose a condition of release at a hearing other than a first appearance? One answer is, for instance when (subject to Section 303) the court does not impose a permanent order of pretrial detention at a detention hearing, but instead imposes a new condition of release that results in the defendant's detention.

[33] *See, e.g.*, O'Donnell v. Harris City, 2018 WL 2465481, at *12–13 (5th Cir. June 1, 2018) ("If a misdemeanor defendant has executed an affidavit showing an inability to pay prescheduled money bail and has not been released . . . then the defendant is entitled to a hearing within 48 hours of arrest in which an impartial decision-maker conducts an individual assessment of whether another amount of bail or other condition provides sufficient sureties. . . . To enforce the 48-hour timeline, the County must make a weekly report to the district court of misdemeanor defendants identified above for whom a timely individual assessment has not been held.").

[34] 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).

The court may not continue a secured bond that the defendant is unable to satisfy? This provision gets to the heart of wealth-based disparities in pretrial release. The idea, here, is not to eliminate reliance upon bond conditions, but rather to ensure that these conditions do not result in preventative detention by another name (but without attendant procedural protections). This provision largely tracks the approach of Washington, D.C.[35]

If the court continues a condition of release that results in detention, . . . the court shall impose a temporary order of pretrial detention and schedule a detention hearing? This provision likewise addresses the concern that secured bond conditions might be used to effect detention without attendant procedural protections. The logic is simple: if a defendant remains behind bars some days after a secured bond condition is imposed, then we think it fair to conclude that, for him, the secured bond condition is tantamount to remand. As such, the bond condition should translate to a temporary detention order and should be made subject to the same procedural hurdles.

If a secured bond remains the only condition on which the defendant is detained at the time of the review hearing, the court shall take a rebuttable presumption that the defendant is unable to satisfy the bond? The possibility exists that a defendant might voluntarily wait out a bond that he has the resources to satisfy. But, in the main, we think this is unlikely. In our experiences, a paramount concern of recently charged defendants is to get home as soon as possible. When, after some number of days, a defendant remains detained on a secured bond condition, the most likely explanation is that he is unable to satisfy that condition. In any event, the presumption is rebuttable. When a solvent defendant plays games, the court can deny his motion and order a temporary order of pretrial detention. And notice what happens thereafter: subject to paragraph (a) of Section 303, the defendant *must* remain detained until at least the detention hearing, five days later (or more, in the event of a valid continuance). And, at the detention hearing, the possibility exists that, following the presentation of evidence at the hearing, the court might impose additional conditions or even a permanent order of pretrial detention. The circumstances are minimal under which the games-playing defendant would end up worse off, but not satisfying an affordable bond condition is a dangerous game to play.

SECTION 303. DETENTION HEARING.

(a) *Timing.* Subject to paragraph (f) of Section 301 and paragraph (d) of Section 302, if a defendant is detained on a temporary order of pretrial detention, the court shall conduct a detention hearing not later than [72 hours] [96 hours] after the appearance at which the order was imposed, except the court may grant a continuance upon oral or written motion of defendant; or, with good cause, the court may grant a single continuance of not more than [72 hours] [96 hours]

[35] . . . *see also* State v. Briggs, 666 N.W.2d 573, 583 (Iowa 2003) (noting that, in certain circumstances, where a defendant cannot satisfy a secured bond condition, "a court is constitutionally bound to accommodate the accused's predicament").

upon oral or written motion of the government or by the court *sua sponte*.

(b) *Rights.* A defendant has a right:

(1) to testify;

(2) to present witnesses and cross-examine witnesses;

(3) to present evidence and proffer information, subject to evidentiary rules for pretrial proceedings; and

(4) to be represented by trial counsel.

(A) If the defendant is financially unable to obtain adequate trial counsel, the court shall appoint counsel.

(B) If the court fails to appoint counsel, as required, or to grant a continuance, the court shall issue an order of pretrial release or restraint, subject to paragraphs (d)-(e) of Section 301; and may not impose a condition of release that results in detention.

(C) If the defendant testifies, the court may not admit the testimony of the defendant at trial on the question of guilt for a charge in the current case or a related case. The court may admit the testimony of the defendant at trial for the purposes of impeachment, or may admit the testimony of the defendant in a subsequent prosecution for perjury.

(c) *Outcome.* At a detention hearing, the court shall decide whether to impose:

(1) an order of pretrial release, subject to Section 301 paragraph (d);

(2) an order of pretrial restraint, subject to Section 301 paragraph (e); or

(3) an order of pretrial detention, subject to Section 301 paragraph (f).

(d) *Standard*.

(1) The court may not issue an order of pretrial detention or continue a condition of release that results in detention unless the defendant is eligible for pretrial detention

pursuant to Section 301 subparagraph (f)(4) and the court finds by clear and convincing evidence that:

(A) the defendant purposefully violated conditions of release three or more times in the current case;

(B) subject to Section 301 paragraph (c), the defendant faces a felony charge and poses an [imminent] [articulable] [substantial] [grave] [acute] and unmanageable risk of nonappearance during the adjudication period; or

(C) subject to Section 301 paragraph (c), the defendant poses an [imminent] [articulable] [substantial] [grave] [acute] and unmanageable risk of obstructing justice or [seriously] harming a person during the adjudication period; and

(D) no less restrictive condition or combination of conditions of release or practical or voluntary supportive services are available to eliminate an imminent risk or reduce an [articulable] [substantial] [grave] [acute] risk to an [acceptable] [insubstantial] level.

(2) To determine whether a less restrictive condition or combination of conditions of release or practical or voluntary supportive services are available to eliminate an [imminent] risk or reduce an [articulable] [substantial] [grave] [acute] risk to an [acceptable] [insubstantial] level, the court shall evaluate the considerations and conditions described in Section 301 paragraphs (c) and (e), and shall weigh the burdens of detention against the risks of release.

(3) If the court does not issue an order of pretrial detention, the court may not impose or continue a condition of release that results in detention.

(4) If the court issues an order of pretrial detention, the court must articulate in plain written language findings of fact and a statement of reasons that support the order by clear and convincing evidence. If the court issues an order of pretrial detention on the basis of

nonappearance or absconding, the findings of fact and statement of reasons must articulate why no condition or combination of conditions of release or practical or voluntary supportive services, including but not limited to electronic monitoring or sending electronic or other reminders of appearances, are insufficient to eliminate an [imminent] risk or reduce an [articulable] [substantial] [grave] [acute] risk to an [acceptable] [insubstantial] level.

(e) [*Expedited Trial.* If the court issues an order of pretrial detention, the court shall expedite the trial of the defendant. The government must try the defendant not later than [45] days after the date of conclusion of the detention hearing, except the court may grant one or more continuances, each of which may not exceed [30] days, upon oral or written motion of defendant or, with good cause, upon oral or written motion of the government or by the court *sua sponte*.]

Discussion Notes

Unmanageable risk of nonappearance? As we discussed at the November meeting, it seems hard to conceptualize the set of circumstances where a risk of nonappearance (as opposed to absconding) would justify detention. Put differently, it seems to us that such a risk—no matter how acute—can almost always be managed by virtue of a mix of practical and voluntary supportive services and conditions of release. To the extent we have consensus on this point, we could make it plain in the text of the act or discuss it in the commentary.

Standard? You may notice that the draft act provides no statutory threshold for detention (that is, no "detention eligibility net"), except with respect to detention for a risk of nonappearance (which cast the net at felonies). Conceivably, even a misdemeanor defendant could be detained pursuant to the draft act's scheme (though the circumstances under which that could happen should be exceedingly rare). The reason that we have not articulated a broader detention eligibility net is that the proper scope of the net is among the most contentious points of debate in ongoing bail reform efforts—and, on this score, we think the matter is best left to the states. Moreover, states not only constitutionally cast a wide range of eligibility nets, but also codify substantive crimes differently. In one state, all felony charges constitutionally might be eligible for detention; in another state, only capital charges. In one state, a particular offense might be a felony; in another state, a misdemeanor. Any detention net we write into the statute would conflict with at least some state constitutions and draw criticism from some stakeholders involved in bail reform efforts. Instead, we have simply provided that "any defendant is eligible for pretrial detention unless the constitution or laws of the state provide otherwise." See Section 301, subparagraph (f)(4). The intent is for the statutory detention scheme to apply to whatever classes of defendants a state deems eligible for pretrial detention. But this does not seem like it

gets us quite past the problem. Our detention schema does presume, after all, that defendants who pose certain kinds of acute risks will in fact be eligible for detention (and that those defendants who pose no such risks will be released). This presents a dilemma for states that currently prohibit direct orders of detention except for defendants charged with capital or other very serious offenses.[36] These states have been able to limit detention in these ways because secured bond conditions remain available (problematically) as a workaround. (It is no surprise that Washington, D.C.—a jurisdiction that has practically eliminated secured bond conditions—has a more expansive detention provision.[37]) For some such states, a constitutional amendment is probably the best way for the model act to do its work meaningfully. However, there is a practical alternative. The draft act could supplement all references to an "order of pretrial detention" with "or continue a condition of release that results in detention." By doing that, the draft act would end up providing the same procedural protections to conditions of release that function as detention. In this way, the act could address disparities in *functional* pretrial detention without forcing states to also constitutionally reset their detention eligibility nets. This approach is certainly contentious (and also potentially confusing); we should discuss it at our March meeting.

Weigh the burdens of detention against the risks of release? There are genuine human, social, and financial costs to detention, and these costs should be weighed against the risks of release. Typically, pretrial liberty statutes ask courts only to evaluate the risks in a vacuum. We believe this one-sided approach is misguided.

Expedited Trial? We are ambivalent about this provision. It makes moral and prudential sense to fast-track trials for detained defendants. However, every state provides for its own speedy-trial rules. For now, we just offer the provision as a modular component that states may take or leave.

SECTION 304. MOTION TO REOPEN AND APPEAL.

(a) At any time, upon oral or written motion of the defendant, the court may reopen a first appearance and amend an order of pretrial restraint, subject to Section 301 paragraph (e), by mitigating or eliminating a condition of release.

(b) If new information is discovered that has a material bearing upon a condition of release, upon oral or written motion of the government or by the court *sua sponte*, the court may reopen a first appearance hearing and:

(1) amend an order of pretrial release or restraint, by supplementing or adding a

[36] S*ee, e.g.*, Alabama Const. art I § 16; Alaska Const. art I § 11.

[37] D.C. CODE § 23-1322.

condition of release, subject to Section 301 paragraphs (c)-(e); or

(2) issue a temporary order of pretrial detention, subject to Section 301 paragraph (f).

(c) If new information is discovered that has a material bearing upon an order of pretrial detention or a condition of release that results in detention, upon oral or written motion of a defendant or the government or by the court *sua sponte*, the court may reopen a detention hearing, subject to Section 303 and:

(1) issue or vacate an order of pretrial detention;

(2) issue or amend an order of pretrial release or restraint, by mitigating, supplementing, adding, or eliminating, a condition of release; or

(3) both.

(d) If a different judicial officer reopens a restraint or detention hearing, the court shall apply a *de novo* standard.

(e) At any time, a defendant or the government may appeal the decision of the court at a detention hearing. The appellate court shall expedite review and shall apply an abuse of discretion standard.

Discussion Notes

At any time, a defendant or the government may appeal? The opportunity for interlocutory appeal is especially important in situations where the harm of an erroneous decision is experienced immediately.[38]

[38] *See, e.g.*, ALASKA STAT. (providing for interlocutory appeals of pretrial release decisions).