D R A F T

FOR DISCUSSION ONLY

ALTERNATIVES TO BAIL ACT

[Proposed new name: PRETRIAL RELEASE AND DETENTION ACT]

NATIONAL CONFERENCE OF COMMISSIONERS

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~~January 2~~May 27, 2020

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[Proposed new name: PRETRIAL RELEASE AND DETENTION ACT]

[ARTICLE] 1

GENERAL PROVISIONS

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

[Proposed new name: Pretrial Release and Detention Act]

Comment

~~.~~]*Pretrial Release and Detention.* This Act presents a framework to guide judicial determinations about whether and how to restrict the liberty of individuals accused of crime during the pretrial phase. The Act responds to widespread recognition that high arrest rates and reliance on secured bonds ("money bail") have resulted in unjust and untenable rates of pretrial detention of individuals who lack the means to satisfy bonds. Conversely, individuals with ample resources may purchase freedom even if they pose high flight risks or other relevant threats.

The Act offers an approach to pretrial release and detention determinations that synthesizes points of consensus among contemporary courts, legislatures, pretrial policy experts, scholars, and advocates. Its core animating principle is that the state may restrict an accused person's liberty only to the extent necessary to satisfactorily protect the state's relevant interests during the pretrial period: the appearance of the accused at court proceedings, public safety, and the integrity of the judicial process. Article 2 deals with the officer on the beat. It offers a template for limiting arrest to situations in which a custodial seizure is necessary to initiate prosecution. Article 3 provides courts with a framework for release determinations of those individuals who are arrested and not released from stationhouses. Article 4 details the process and standards for authorizing continued detention pending trial. At each step, the Act requires that any restraint on the accused person's liberty be the least-restrictive measure necessary to adequately protect the state's relevant interests.

In drafting the Act, the Drafting Committee has drawn on the American Bar Association's PRETRIAL RELEASE STANDARDS (2007); the National Association of Pretrial Services Agencies' PRETRIAL RELEASE STANDARDS (2020 Edition); the current statutory regimes in the District of Columbia, New Jersey, New Mexico, and the federal system; and the work of countless scholars and advocacy organizations.

The term "bail". The Act does not use the word "bail" because that term creates needless confusion. For centuries, "bail" referred to the process of release after arrest, typically conditioned on an unsecured pledge of a personal surety. *Holland v. Rosen*, 895 F.3d 272, 291 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 440 (2018); *see also* Timothy R. Schnacke, FUNDAMENTALS OF BAIL 114 (2014). As American jurisdictions came to rely more heavily on

secured bonds and commercial sureties, the process of bail became so closely associated with secured bonds that many courts and stakeholders now use the word "bail" to signify a secured bond (or "money bail" or "cash bail"). But that usage is far from universal. The Supreme Court's jurisprudence still sometimes uses "bail" to refer to the process of pretrial release, and several appellate courts and experts continue to use this broader definition. *See, e.g. Rosen*, 895 F.3d 272 at 291. The Act avoids confusion by using other more precise terms.

SECTION 102. DEFINITIONS. In this [act]:

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

(2) "Charge", used as a noun, means allegation of an offense ~~alleged~~ in a complaint, information, indictment, [citation~~],~~] or similar record.

~~([~~(3) ["Citation"] means a record issued by [an authorized official] alleging an offense~~,~~ ~~which may require an individual to appear in court.~~]

(4) "Covered offense" means [~~enumerated~~ offenses for which pretrial detention or the imposition of a financial condition that cannot be paid within the time prescribed in Article 3 is authorized].

(5) "Detention hearing" means a hearing held under Section 401.

(6) "~~Nonappearance~~Not appear" means fail to appear in court as required without ~~the~~ intent to avoid or delay adjudication. ~~"Does not appear", "not appear", and "not to appear" have~~ "Nonappearance" has a corresponding ~~meanings~~meaning.

(7) "Obstruct justice" means interfere with the criminal process with ~~the~~ intent to influence or impede the administration of justice. The term includes tampering with a witness or evidence.

(8) "Offense" means conduct proscribed by statute.

~~(9) "Plain language" means words and phrases in a record that an individual to whom the~~

~~record is directed can reasonably be expected to understand, which may include a language other than English.~~

~~(10~~(9) "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(10) "Plain language" means words that the individual to whom a record is directed can reasonably be expected to understand. The term includes words in a language other than English.

(11) "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.

(12) "Release hearing" means a hearing ~~held~~ under Section 301.

(13) "Secured appearance bond" means a person's promise ~~by a person to forfeit a specified sum that is~~, secured by ~~collateral approved by the court in the form of a~~ sufficient [surety], deposit, lien~~, [surety],~~ or proof of access to collateral, to forfeit a specified sum if the individual whose appearance is the subject of the ~~collateral, if the individual fails to~~ bond absconds or does not appear.

(14) "Unsecured appearance bond" means a person's unsecured promise ~~by a person~~ to ~~pay~~forfeit a specified sum ~~that~~if the individual whose appearance is ~~not secured by collateral, if~~ the ~~individual fails to~~subject of the bond absconds or does not appear.

Legislative Note: *In ~~paragraphs~~paragraph (2~~) and (3), insert~~), include the state's term for a citation~~, summons to appear,~~ or the equivalent if the state adopts Article 2.*

Only include paragraph (3) if the state adopts Article 2.

In paragraph (4), insert the ~~state's~~ list of offenses or offense classes or types for which detention or ~~unaffordable bail may~~the imposition of a financial condition that cannot be paid within the time prescribed in Article 3 is authorized ~~under Articles 3 and 4~~.

In ~~paragraphs~~paragraph (13~~) and (14~~), insert the state's term for "surety".

Comment

Absconding versus nonappearance. This ~~act~~Act encourages 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 different types of failure to appear. "Absconding" ~~is an intentional act with~~has the purpose of evading justice, whereas "nonappearance" may result from impediments to appearance—for example, from cognitive limitations or difficult social circumstances. ~~.~~*See generally* Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677 (2018). ~~These two distinct types~~The difference between absconding and nonappearance turns on the presence of ~~"~~a particular purpose. A person who must choose between attending a court date or maintaining her job may be said to have intentionally failed to appear in court, but this failure ~~to appear" sometimes warrant distinct statutory responses. Thus, the act treats these risks separately in places. Elsewhere,~~is an instance of nonappearance rather than absconding. Absconding entails the ~~act uses the term "failure to appear" (or its equivalent) to treat these risks identically.~~ particular purpose of avoiding or delaying adjudication.

~~*Bail.* The act does not define or use the term "bail." 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 charge that qualifies for release. *See, e.g.*,~~The reason for distinguishing between a risk of absconding and a risk of nonappearance is that these two distinct risks call for different responses. Supportive measures like court-date reminders, flexible scheduling, and assistance with transportation or childcare may be sufficient to manage a risk of nonappearance. On the other hand, a serious risk of absconding may justify greater restrictions on pretrial liberty. Because these two distinct risks sometimes warrant distinct statutory responses, the Act treats them separately in places. Elsewhere, the Act uses the term "failure to appear" (or the equivalent) to indicate any failure to appear at a required court date, whatever the purpose of the accused person in missing court.

Citation. States use different terms to designate an accusatory instrument used to initiate criminal proceedings without arrest. The Act uses the stand-in term "citation", but many jurisdictions may use another term, like "summons", to signify the same. *See, e.g.*, N.Y. CRIM. PROC. LAW § 130.10 ("A summons is a process issued by a local criminal court directing a defendant designated in an [accusatory instrument] to appear before it at a designated future time in connection with such accusatory instrument."). A state should insert whichever term it uses.

Covered offense. This Act provides for each state to specify the offenses, or offense classes or types, for which a person may be held in custody pending trial (whether on the basis of a

detention order or on the basis of a financial condition of release that the accused person cannot satisfy). *See* Section 308 and Article 4, *infra*. Each state should enumerate these offenses or offense classes or types in the definition of "covered offense", *supra*. Some possibilities include: (i) violent felonies; (ii) all felonies; (iii) all felonies and violent misdemeanors; or (iv) all felonies, violent misdemeanors, and misdemeanors involving domestic violence, stalking, driving under the influence, unlawful firearms possession or use, or contempt. Each state should consult its constitution and case law interpreting relevant state-constitutional provisions when determining what offenses to include as "covered offenses". For further discussion, *see* the ~~*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.~~

~~*Covered Offense.* See~~ Comment to Section 308, *infra*.

Obstruct justice. "Obstruction of justice" is not only a legal term of art but also a substantive crime. The ~~act~~Act does not intend to disturb a state's statutory definition of the crime or otherwise impinge upon a state's existing crime definitions. To the contrary, the ~~act~~Act provides a definition of "obstruction of justice" for the ~~purpose~~purposes of the ~~act~~Act only.

Offense. The definition of this term leaves some ambiguity as to whether the term signifies an individual's particular alleged conduct that is proscribed by statute, or the abstract conduct that is proscribed by statute. For the purposes of this ~~act~~Act, nothing turns on the distinction, except in ~~Sections~~subsections 202(1) and 303(b)(1), *infra*, wherein the ~~act references~~Act is specific as to its criteria, referencing the abstract "nature" ~~or~~and the particular "circumstances" of the alleged offense.

The definition of "offense" intentionally avoids reference to "criminal" laws or penalties, because state and local codes frequently contain offenses that are not officially designated as criminal but that nonetheless may subject violators to arrest or similar pretrial restraints on liberty. *See* Josh Bowers, *Annoy No Cop*, 166 U. PA. L. REV. 129, 151 (2017) ("Consider . . . the officer's arrest authority . . . . , the police officer needs only probable cause to believe the arrestee has committed an offense—any offense, including even a noncriminal violation~~);~~."); Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism's Limits*, 24 CORNELL J. L. & PUB. POL'Y 319, 338-339 (2014) (collecting cases~~).~~ of authorized arrest for noncriminal offenses). Indeed, some noncriminal offenses even authorize imposition of a postconviction jail sentence. *See, e.g.*, N.Y.P.L. § 70.15 (2019) ("A sentence of imprisonment for a [noncriminal] violation shall be a definite sentence. When such a sentence is imposed the term shall be fixed by the court, and shall not exceed fifteen days."). Consequently, this ~~act~~Act applies to any offense—criminal or otherwise—that authorizes arrest or similar pretrial restraints on liberty.

SECTION 103. SCOPE~~; APPLICABILITY.~~

~~(a).~~ This [act] does not affect the validity or effect of a law of this state other than this [act] regarding:

(1) forfeiture of a secured appearance bond;

~~an arrest~~(2) a seizure for the purpose of involuntary civil commitment;

(3) a right of a crime victim;

~~(1) a right of appeal.~~

~~(b) This [act] applies to an arrest made [or [a citation] issued] after the effective date of this [act] and to any motion for release or detention filed after the effective date of this [act].~~

~~***Legislative Note:*** *~~In subsection (b), insert the state's term for a citation, summons to appear, or the equivalent.~~*

(4) appellate review; or

(5) release pending appeal.

Comment

Does not affect the validity. This Section clarifies that the ~~act~~Act does not displace or preempt existing state law regarding the subjects listed. The list is not exhaustive; it merely addresses subjects ~~closely~~potentially related to this ~~act~~Act in order to clarify the ~~act's~~Act's precise scope. Although the ~~act~~Act does not displace or preempt laws regarding these subjects, it is important for each jurisdiction to consider the interplay of the ~~act~~Act with existing law in these areas and, if necessary, to address conflicts or ambiguity.

[[ARTICLE] 2]

~~***Legislative Note:*** *~~Adopt Article 2 if the state intends for the act to regulate citation and arrest.~~*

[CITATION] AND ARREST

Legislative Note: *A state should include Article 2 if the state wishes to include an article on citation versus arrest.*

SECTION 201. AUTHORITY ~~TO [CITE~~FOR [CITATION] OR ARREST.

(a) If [an authorized official] has probable cause to believe an individual is committing or has committed an offense, [the authorized official] may issue the individual a [citation] or take

~~other~~another action authorized by law ~~of this state other than this [act].~~.

~~———~~(b) Except as otherwise provided by 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 charge or prior conviction~~; or

(2) subject to subsection (c), [the authorized official] has probable cause to believe the individual is committing or has committed an offense for which a jail or prison sentence is authorized.

(c) If ~~the~~an offense under subsection (b)(2) is [a misdemeanor or non-criminal offense] [punishable by not more than [six months] in jail or prison], [an authorized official] may not arrest ~~an~~the individual unless:

(1) the offense is [domestic violence, stalking, driving under the influence, unlawful firearms possession or use, contempt, a sexual offense, or other listed ~~offenses or~~ offense ~~types~~];

~~———~~(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 charge or prior conviction~~; or

(4) [the authorized official] reasonably believes arrest is necessary to:

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

~~———~~(B) carry out a lawful investigation;

(C) protect a person from significant harm;

(D) prevent the individual from fleeing the jurisdiction; or

~~———~~(E) obtain information that a [contributing justice agency] is required by law other than this [act] to use for identification.

Legislative Note: ~~*Insert the state's term for a citation, summons to appear, or the equivalent.*~~

In each subsection, insert the state's term for an official authorized to issue a citation~~, summons to appear,~~ or the equivalent.

In ~~subsections (a)(1) and (c)(3), insert the state's term for parole, supervised release, community supervision, or the equivalent.~~

~~In~~ the introduction to subsection (c), insert the ~~state's list of~~offenses or offense classes or types for which arrest is not authorized except as provided in ~~subsections (c)(~~paragraphs (1) through (4).

In subsection (c)(1), insert the ~~state's list of~~ offenses or offense classes or types sufficiently serious to authorize an arrest.

In subsection (c)(4), insert the state's term for the agency authorized to collect reportable events under the state's Criminal Records Accuracy Act or comparable statute.

Comment

Citation ~~and~~versus arrest. Although this ~~act~~Act focuses primarily on release and detention policy following arrest, the implementation of pretrial detention and release policy begins with the police officer on the beat. ~~*See e.g.*~~Hence, Article 2 of the Act provides an option to the states to enact a provision requiring citations over arrests in certain circumstance. *See, e.g.*, Bureau of Justice Assistance, NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: SUMMARY REPORT OF PROCEEDINGS ~~(Washington, D.C., 30 (~~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). ~~For that reason, 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."). Nevertheless, the act~~Nevertheless, the Act contemplates that a state may decide not to include an article on citation

versus arrest. Thus, the entire ~~article~~Article 2 is bracketed.

Arrest. The term "arrest" "has no standard definition in the law.~~"~~". Rachel A. Harmon, *Why Arrest?,* 115 MICH. L. REV. 307, 309-10 (2016) ("There is no standard definition of an arrest and no shared nomenclature for the various police practices that start the criminal process and deprive people of their freedom.~~")~~.".). Nor does this ~~act require a standard definition of~~Act undertake to define "arrest.~~" For present purposes,~~"; it is enough for a state to differentiate between a citation (or the equivalent) and an arrest, however the state defines the latter.

Except as otherwise provided by law ~~of this state other than this act~~. A state may authorize officials to arrest for purposes other than initiating criminal prosecution, including for the purpose of keeping the peace or initiating civil commitment. The ~~act~~Act does not disturb a state's arrest authority for purposes other than initiating prosecution. For further discussion, *see* the Comment to Section 303, *infra* ("*Significant harm to another person*").

~~*Classes of offenses for which*~~*May not arrest ~~is generally unauthorized.~~* ~~Section~~*the individual unless.* Subsection 201(c) limits authority to arrest for certain classes or types of minor offenses. Each state may determine how to define the classes or types of minor offenses that are subject to this provision. Two options, included in brackets, are (1) all ~~misdemeanors and non-criminal~~sub-felony offenses, or (2) offenses punishable by no more than a specified term of incarceration. Within the designated classes or types of offenses, 201(c)(1) through (4) enumerate the extenuating circumstances in which arrest is nonetheless permitted.

SECTION 202. FORM OF [CITATION]. A [citation] must state in plain language:

(1) the circumstances of the alleged offense and the provision of law that it violates;

(2) if appearance is required:

(A) when and where the individual must appear; and

(B) how to request a change in the appearance date; and

(3) the possible consequences of violating the requirements of the [citation] or committing another offense before the individual's first court appearance.

~~***Legislative Note:*** *Insert the state's term for a citation, summons to appear, or the equivalent.*~~

SECTION 203. RELEASE AFTER ARREST. [An authorized official] may release an individual after arrest and without a release hearing by issuing a [citation] under Section

201. (a). [The authorized official] may require ~~that~~ the individual to execute an unsecured appearance bond as a condition of release.

Legislative Note: *Insert the state's term for an official authorized to release an individual after arrest but before the individual's first court appearance.*

Comment

Release after arrest and without a release hearing. This provision 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 bond requirement as a condition of stationhouse release. It does not authorize the use of a secured bond requirement. 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. *ODonnell v.* ~~*Insert the state's term for a citation, summons to appear, or the equivalent.*~~ *Harris Cty.*, 892 F.3d 147, 163 (5th Cir. 2018) (affirming on equal protection and due process grounds the district court's preliminary injunction, preventing Harris County from imposing secured appearance bonds based upon a misdemeanor bail schedule); *but see Walker v. City of Calhoun*, 901 F.3d 1245, 1272 (11th Cir. 2018), *cert. denied sub nom. Walker v. City of Calhoun*, 139 S. Ct. 1446 (2019) (holding that use of a secured bond schedule did not violate equal protection or due process where indigent arrestees were guaranteed an individualized hearing and release within forty-eight hours of arrest). To err on the side of constitutional caution and to minimize wealth-based disparities, the Act does not permit the use of secured bond schedules for stationhouse release.

SECTION 204. APPEARANCE ON [CITATION].

(a) If an individual appears as required by a [citation], the court shall issue an order of pretrial release ~~and issue an order including only~~ in the case for which the citation was issued. The order shall include the information required under Section 304(a).

(b) If an individual ~~fails to~~absconds or does not appear as required by ~~the~~a [citation], the court may issue [a summons or an arrest warrant].]

Legislative Note: *In subsection (*~~*a), insert the state's term for a citation, summons to appear, or the equivalent.*~~

~~*In subsection (*~~*b), insert the judicial action or actions that* *the state chooses to authorize if an individual fails to appear.*

Comment

Order of pretrial release. The intent of this provision is to specify that, if an individual appears as required by a citation (or the equivalent), the court should 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—what is commonly termed "release on recognizance".

[ARTICLE] 3

RELEASE HEARING

SECTION 301. TIMING.

(a) Unless an arrested individual is released after arrest [under Section 203,], the ~~arrested~~ individual is entitled to a hearing ~~for the purpose of releasing the individual~~to determine release pending trial. Except as otherwise provided in subsection (b), the court shall hold the hearing not later than [48] hours after the ~~individual is arrested~~arrest.

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

(c) At the conclusion of ~~the~~a release hearing, the court shall issue an order of pretrial release or ~~an order of~~ temporary pretrial detention.

Legislative Note: *In the first sentence of subsection (a), insert the bracketed words if the state adopts Article 2.*

In subsections (a) and (b), insert the deadlines the state ~~chooses~~designates for a release hearing and continuance of the hearing.

Comment

Hearing to determine release. Section 301 requires a prompt judicial hearing for release determinations of those persons who have been arrested and not released from stationhouses pending trial. Section 302 articulates the rights of the arrested person at that hearing. Sections 303 through 308 guide the judicial evaluation necessary in order to impose restrictive conditions of release or, in rare cases, detain the individual. Section 303 requires the court to determine, first, whether there is clear and convincing evidence that the individual is likely to engage in

conduct that unduly threatens the state's relevant interests during the pretrial period. If not, Section 304(a) requires that the court release the individual on recognizance. If the court determines that there is a sufficient relevant risk under Section 303, the court then determines the least-restrictive method of release to satisfactorily address the risk under Sections 305, 306, and 307. The court should first consider under Section 305 whether a non-restrictive measure—practical assistance or a supportive service—could satisfactorily address the risk. If not, the court should consider under Section 306 what restrictive condition or set of conditions is necessary, abiding by the limits on financial conditions under Section 307. Finally, if the individual is charged with a "covered offense" and certain other criteria are met, the court may, under Section 308, order temporary detention or impose a release condition that the individual cannot immediately satisfy.

Extraordinary circumstances. ~~In other places where the act imposes temporal limits, the act~~Under Section 401, the Act allows for ~~multiple continuances, at least upon a showing of~~ continuance of a detention hearing merely for good cause. With respect to the release hearing, however, the ~~act~~Act contemplates that the reasons for delay must be "extraordinary~~."~~". The logic is that many states already ~~generally~~ follow a 48-hour timeline, ~~pursuant to~~under *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~~http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx (listing states that couple release decisions and pretrial hearings); *see ~~also~~, e.g.*, N.J. STAT. ANN. § 2A:162-16 ("[T]he court . . . shall make a pretrial release decision for the eligible defendant without unnecessary delay, but in no case later than 48 hours after the eligible defendant's commitment to jail~~)~~.");

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 as well as likelihood of conviction—are often triggered within three days. *See, e.g.*, ~~*3DaysCount*,~~ Pretrial Justice Institute, ~~http://projects.pretrial.org/3dayscount;~~3DAYSCOUNT, 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 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 the first days of detention are a "fairly critical period for making bail"); sources cited in the Comment to Section 401, *infra*. ~~Time~~Therefore, time is ~~therefore~~ of the essence for the release hearing.

SECTION 302. RIGHTS OF ~~THE~~ ARRESTED INDIVIDUAL.

~~([(a)~~)] An arrested individual has a right to be heard at a release hearing before the court issues an order.

[(b) An arrested individual has a right to counsel at a release hearing. If the individual is unable to obtain counsel for the hearing, [an authorized agency] shall provide counsel. [The scope of representation under this section may be limited to the subject matter of the hearing.]]

Legislative Note: *Include subsection (b) if the state chooses to codify a right to counsel at the release hearing. Insert the state's term for the agency that is authorized to provide counsel. If the authorized agency varies ~~by county~~locally, insert "an authorized agency.~~"~~". Include the last bracketed sentence if the state chooses to permit limited-scope representation.*

Comment

~~———~~*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 the 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) (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~~post-attachment right to the presence of counsel"). Given the jurisprudential ~~ambiguity~~uncertainty, the ~~act~~Act, by bracketing subsection 302(b), offers states the choice of whether to codify a right to counsel at the release hearing. The ~~act~~Act does not limit this right to the indigent. ~~The reason~~That is ~~that,~~ because the release hearing often happens so quickly~~,~~ that even an affluent individual ~~might~~may not yet be able to secure the presence of counsel.

~~———~~A state may choose not to codify a right to counsel at the release hearing, if, for instance, resource constraints prove prohibitive. It should be noted, however, that any fiscal burden of providing counsel at a release hearing may be offset by cost savings in other places~~;~~ ~~—~~ for example, by 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.*, 29 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 30

(Washington, D.C., 2012~~), at 30~~) (deeming counsel's presence ~~to be~~ integral to release hearings).

If a state chooses to codify a right to counsel at the release hearing, an arrested individual retains the right to waive counsel. In some circumstances, for instance, an individual may wish to waive counsel to facilitate speedier release.

Rights of ~~the~~arrested individual versus powers of ~~the~~ prosecutor. Article 3 prescribes only the rights of the arrested individual. ~~A separate question entails~~It does not address the procedural powers of the prosecutor—for instance, to present evidence, make arguments, or cross-examine defense witnesses. The ~~act is~~Act does not ~~intended to serve as a comprehensive evidence manual. Rather,~~establish any required procedures for the ~~act limits its scope to the individual who is its subject~~release hearing and thereby leaves ~~other~~ matters other than the rights of the arrested individual to existing state law and court rules.

SECTION 303. JUDICIAL DETERMINATION OF RISK.

At a release hearing, the court shall determine ~~whether an~~, by clear and convincing evidence, if the arrested individual is likely to abscond, not appear, obstruct justice, violate ~~a~~an order of protection ~~order~~, or cause significant harm to another person. The court shall ~~make this determination of risk by [clear and convincing evidence] [a preponderance of the evidence] and shall~~ consider:

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

(2) ~~(2)~~ the weight of the evidence against the individual;

(3) ~~(3)~~ the individual's:

(A) ~~(A)~~ criminal history;

(B) ~~(B)~~ history of absconding or nonappearance;

(C) ~~(C)~~ place and length of residence;

(D) ~~(D)~~ community ties; and

(E) ~~(D)~~ employment and education commitments;

(4) ~~(4)~~ whether the individual has ~~another~~a pending ~~criminal~~ charge in another matter or is under criminal justice supervision, including probation or [parole]; and

(5) ~~(5)~~ other relevant information, including information provided by the individual, the [~~government~~prosecuting authority], [or] an alleged victim[, or a [pretrial services agency]].

Legislative Note: ~~*Insert the burden of proof the state chooses for judicial determinations of risk.*~~

In ~~subsection (4~~paragraph (5), insert the state's term for ~~parole, supervised release, or the equivalent.~~

~~*In subsection (5), insert*~~ *the state's ~~term for the state's~~ prosecuting authority.* ~~-~~ *Insert the state's term for the state's pretrial services agency or the equivalent, if applicable.*

~~**Comment**~~

Comment

~~*"Abscond" versus "not appear."*~~

~~*Significant harm.*~~

~~*Standard of proof.*~~

Risk. The Act, like other comprehensive frameworks for pretrial release and detention, requires a judicial officer to assess whether the accused person presents a risk and, if so, to determine the least-restrictive method for managing that risk. But not all kinds and degrees of risk justify infringements on pretrial liberty. Section 303 thus requires the court to determine whether the accused person presents a risk of a particular kind ("absconding, not appearing, obstructing justice, violating an order of protection, or causing significant harm to another person") and of a particular degree ("likely"). If the court does *not* find clear and convincing evidence that one of these events is likely to occur in the absence of intervention, subsection 304(a) requires release on recognizance. If the court *does* find clear and convincing evidence that one of these events is likely to occur, Sections 305 through 308 direct the court to determine the least-restrictive measures to satisfactorily address the risk, with the options ranging from non-restrictive assistance and support (Section 305) to temporary detention (Section 308). For further discussion, *see* the Comment to Section 305, *infra* ("*Satisfactorily address the risk*").

Abscond versus not appear. For the reasons discussed in the Comment to Section 102, *supra*, the Act draws a distinction between a risk of nonappearance versus a risk of absconding. As indicated in subsection 102(6), *supra*, the term "not appear" corresponds in meaning with "nonappearance", which is defined as "fail to appear in court as required without the intent to avoid or delay adjudication".

Significant harm to another person. The Act anticipates that not only physical injury and

death but also property loss may constitute "significant harm to a person". This intended reading is supported by the Uniform Law Commission's conventional definition of "person", which is adopted in subsection 102(9), *supra*: "'Person' means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity." Given the breadth of the meaning of "person", the term "significant harm" is believed to adequately guide the court regarding the risks to be considered. The Act does not allow a court to consider whether an individual is likely to cause significant harm to self, because jurisdictions already have other legal regimes for involuntary civil commitment should a person present an acute risk of harm to self, and this Act does not disturb those regimes. For further discussion, *see* the Comment to Section 201, *supra* ("*Except as otherwise provided by law*").

Clear and convincing evidence. The Supreme Court has never sanctioned a lower standard than clear and convincing evidence when a fundamental liberty is at stake. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 750-52 (1987) (rejecting a due process challenge to the Federal Bail Reform Act's preventive detention provisions in part because the Act required the government to "prove its case by clear and convincing evidence"); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (invalidating a law that permitted confinement of an insanity acquittee without clear and convincing evidence of dangerousness and mental illness); *Addington v. Texas*, 441 U.S. 418 (1979) (requiring a clear and convincing standard for involuntary civil commitment); *Santosky v. Kramer*, 455 U.S. 745, 745 (1982) (noting that clear and convincing evidence is required when "the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money'"); *see also Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 282 (1990) (discussing "particularly important" interests, including deportation, denaturalization, civil commitment, and termination of parental rights).

The Act operates on the premise that pretrial liberty is a "particularly important" interest that demands a heightened evidentiary standard, including at a release hearing when a court may issue an order of temporary pretrial detention, as Section 308 permits. *See Salerno*, 481 U.S. at 750 (recognizing "the importance and fundamental nature" of pretrial liberty); *id.* at 755 ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."). As discussed in the Comment to Section 301, *supra*, many of the most serious negative consequences of confinement come to pass over the first three days of pretrial detention. Although the Supreme Court has not explicitly held that pretrial detention requires a finding of necessity by clear and convincing evidence, a number of lower courts have. *See, e.g. Valdez-Jimenez v. Eighth Judicial District Court in and for County of Clark*, 460 P.3d 976, 980 (Nv. 2020) (holding that a court may impose bail that may result in detention "only if the State proves by clear and convincing evidence that it is necessary to ensure the defendant's presence at future court proceedings or to protect the safety of the community"); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 313 (E.D. La. 2018) (requiring proof by clear and convincing evidence that pretrial detention is necessary because of "the vital importance of the individual's interest in pretrial liberty recognized by the Supreme Court"); *Schultz v. Alabama*, 330 F. Supp. 3d 1344, 1372 (N.D. Ala. 2018) ("[B]efore ordering an unaffordable secured bond, a judge must find by clear and convincing evidence that pretrial detention is necessary to secure the defendant's appearance at trial or to protect the public."). Moreover, a number of existing statutes governing pretrial detention require a finding of necessity by clear and convincing evidence. *See, e.g.*, 18

U.S.C. § 3142(e)(1), (f); D.C. CODE § 23-1322 (B)(1), (D); MASS. GEN. LAWS. ANN. CH. 276, § 58A(3); N.J. STAT. ANN. § 2A:162-18(A)(1); N.J. STAT. ANN. § 2A:162-19 (E)(2), (3); N.M. R. CRIM. P. DIST. CT. 5-409(A), (F)(4); WIS. STAT. § 969.035(5), (6)(b); *see also* FLA. R. CRIM. P. 3.132 ("The state attorney has the burden of showing beyond a reasonable doubt the need for pretrial detention pursuant to the criteria in section 907.041, Florida Statutes.").

Risk assessment instruments. One of the most controversial questions in pretrial policy is when, whether, and to what degree pretrial release should depend upon actuarial risk-assessment instruments. *See generally* Sarah L. Desmarais & Evan M. Lowder, PRETRIAL RISK ASSESSMENT TOOLS: A PRIMER FOR JUDGES, PROSECUTORS, AND DEFENSE ATTORNEYS (2019). 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; COLO. REV. STAT. §§16-4-103, 16-4-113. In particular, hundreds of jurisdictions have used the Public Safety Assessment (PSA) tool created by Arnold Ventures. *See* Advancing Pretrial Policy & Research, WHERE THE PSA IS USED, https://advancingpretrial.org/psa/psa-sites/. There is widespread concern, however, that the use of actuarial risk assessment instruments may unnecessarily widen the net of defendants who are subject to detention and unnecessary conditions of release. *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). Risk assessment tools have also generated fierce resistance on racial-equity grounds. *See, e.g.*, The Leadership Conference for Civil Rights, THE USE OF PRETRIAL RISK ASSESSMENT INSTRUMENTS: A SHARED STATEMENT OF CIVIL RIGHTS CONCERNS (2019); David G. Robinson & Logan Koepke, CIVIL RIGHTS AND PRETRIAL RISK ASSESSMENT INSTRUMENTS (2019).

This Act neither requires nor prohibits the use of actuarial risk assessment instruments. Jurisdictions may decide not to use such tools, or they may use actuarial instruments and direct or authorize courts to consider statistical risk assessments as "other relevant information" under Section 303(5). However, courts should note that, at present, few tools are competent to assess the specific risks included in the Section 303 inquiry, *supra*. Moreover, even if an actuarial tool places an individual into a "high risk" category, it does not necessarily follow that any of the relevant events listed in Section 303 is "likely" to occur. Lastly, the Act does not allow an actuarial assessment alone to serve as a basis for detention or imposition of a restrictive condition.

Pretrial services agencies. Since the 1960s, pretrial services agencies have played a crucial role in assessing and managing pretrial risk, as well as in providing the kind of supportive services and practical assistance contemplated by Section 305, *infra*. The U.S. Department of Justice includes pretrial services as an "essential" element of an effective state or federal pretrial system. National Institute of Corrections, A FRAMEWORK FOR PRETRIAL JUSTICE (2017); *cf.* NAPSA, NATIONAL STANDARDS ON PRETRIAL RELEASE (2020) (offering comprehensive recommendations for the creation and operation of such agencies). Nevertheless, in many jurisdictions—particularly rural jurisdictions—pretrial services agencies do not exist. This Act does not mandate the creation of a pretrial services agency. But it does contemplate that in a jurisdiction where such an agency exists already, the pretrial services agency will play a

significant role in supporting the court's assessment of relevant risks under Section 303 and the determination of the least-restrictive measures to manage a relevant risk under Sections 305 through 308.

SECTION 304. ~~ORDER OF~~ PRETRIAL RELEASE.

(a) ~~(a)~~ Except as otherwise provided in subsection (b), ~~the court~~ at a release hearing, the court shall issue an order of pretrial release of the individual. The order must state in plain language:

(1) ~~(1)~~ when and where the individual must appear; and

(2) ~~(2)~~ the possible consequences of violating the conditions of the order or committing an offense while the charge is pending.

(b) ~~-~~ If the court determines under subsection 303(a) that ~~a sufficient~~ the arrested individual poses a risk ~~exists under Section 303~~, the court shall determine under Sections 305, 306, and 307 whether pretrial release of the individual is appropriate ~~under Sections 305, 306, and 307.~~ .

(c) If the court determines under subsection (b) that pretrial release is appropriate, the court shall issue an order of pretrial release ~~of the individual.~~ . The order must state in plain language the information required ~~by~~under subsection (a) and any restrictive condition ~~or conditions~~ imposed by the court.

Comment

~~**Comment**~~

The court at a release hearing shall order pretrial release of the individual. ~~Subsection (a) contemplates the equivalent~~If a court has not found clear and convincing evidence of a relevant risk under Section 303, the court shall issue an order of release on personal recognizance ~~in the absence of a risk sufficient to authorize imposition of a restrictive condition or temporary pretrial detention.~~under subsection 304(a). This requirement is consistent with the law in the approximately twenty states~~, which~~ that have codified 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. If the court has found clear and convincing evidence of a relevant risk under Section 303, the court is required, under subsections 304(b) and (c), to impose only the least restrictive measures to manage that risk under Sections 305 through 307, except as otherwise provided under Section 308.

SECTION 305. PRACTICAL ASSISTANCE; VOLUNTARY SUPPORTIVE SERVICES. If the court determines ~~that a sufficient risk exists~~ under ~~Section~~subsection 303(a) that the arrested individual poses a risk, the court shall determine whether practical assistance or a voluntary supportive ~~services are available to~~ service is sufficient to satisfactorily address the risk.

Comment

Practical assistance or a voluntary supportive ~~services.~~ ~~Section 305 introduces~~*service.* In determining the ~~use~~least restrictive measure necessary to satisfactorily address a risk under Section 303, a court should begin with the possibility of non-restrictive measures ~~for a court~~ designed to address the circumstances that have contributed to the relevant risk. Under Section 305, therefore, a court is first required to consider ~~as an alternative to, or in addition to,~~whether practical assistance or voluntary supportive services are available to manage the risk, before the court may consider restrictive conditions of release under Section 306, *infra*. ~~Just as the act seeks to distinguish between different forms of failure to appear (that is, between absconding and nonappearance), it also seeks to distinguish between restrictive and nonrestrictive~~ For further discussion, *see* the Comment, *infra* ("*Satisfactorily address the risk*"). Many pretrial ~~measures (here, between release "conditions" and practical "assistance" or supportive "~~services~~", described immediately below).~~ agencies already provide such assistance and services.

Practical assistance. - When the relevant risk is merely nonappearance (as opposed to absconding), the least restrictive measure to assure appearance may be a form of practical assistance. This is particularly true when the risk of nonappearance arises from 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 assistance may include sending electronic or other reminders of appearances, scheduling appearances with attention to the most feasible dates and times, offering assistance with caregiving responsibilities, or providing subsidized transportation to and from court. There is increasing evidence that court-date reminders and other measures that reduce logistical barriers to appearance can dramatically improve appearance rates. *See, e.g.*, Brice Cooke *et al.*, USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES: PREVENTING FAILURES TO APPEAR IN COURT (2018).

Voluntary supportive ~~services~~service. The ~~act~~Act distinguishes between practical assistance and voluntary supportive services for the following reason: As indicated above, practical assistance is intended to address a socioeconomic or cognitive impediment to appearance. By contrast, a supportive service could help to manage any risk of release. Voluntary supportive services may include referrals to organizations that provide voluntary therapeutic treatment or social services, including educational, vocational, or housing assistance.

~~*Address*~~*Satisfactorily address the risk.* ~~With respect~~It is impossible to ~~risk, the act purposefully avoids the term "~~eliminate~~" or its equivalent.~~ risk. 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 is to distinguish between the kinds of risks endemic to social interaction in a liberal state, and the kinds of risks serious enough to justify pre-adjudicative limitations on liberty.~~ The difficult task is to specify what degree of risk is tolerable in a free society. This Act takes the position that the state may justifiably restrict an individual's liberty during the pretrial phase only if there is clear and convincing evidence that one of the adverse events enumerated in Section 303 is likely. Moreover, the state may only restrict the individual's liberty to the extent reasonably necessary to reduce the risk below that threshold—to the point where the adverse event is no longer likely. Once the risk is reduced to that extent, further restriction is unjustified, even if it remains possible (but unlikely) that the adverse event will occur. If a voluntary supportive service can reduce the risk to that point, no restrictive condition of release is justified. If supportive services and practical assistance *cannot* reduce the risk below that threshold but a restrictive condition can, the restrictive condition is justified—but detention is not. If no non-restrictive measure or restrictive condition or conditions can reduce the risk below that threshold, detention is justified. The phrase "satisfactorily address the risk" is intended to mean just that: "reduce the risk to such an extent that the relevant adverse event under Section 303 is no longer likely".

Just as it is impossible to eliminate risk altogether, it is likewise impossible to know in advance precisely what effect a non-restrictive supportive measure or restrictive condition will have. Given this uncertainty, the Act intends for courts to consider not only the relevant risks but also the potential collateral consequences of restrictive conditions, like impairment of a defendant's ability to maintain employment. This concern provides another reason for courts to consider non-restrictive measures first: such measures may more readily address risk without imposing undue collateral consequences.

SECTION 306. RESTRICTIVE CONDITION OF RELEASE.

(a) ~~(a) If~~If the court determines under Section 305 that practical assistance or voluntary supportive services are not sufficient to satisfactorily address ~~a~~the risk ~~that the court has identified~~ under Section 303~~,~~(a), the court shall issue an order of pretrial release of the

individual and impose the least restrictive condition or conditions ~~of release~~ reasonably necessary to satisfactorily address the risk.

~~(a)~~(b) Restrictive conditions under subsection (a) may include:

(1) ~~(1)~~ mandatory therapeutic treatment or social services;

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

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

(4) ~~(4)~~ a restriction on travel;

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

(6) ~~(6)~~ a restriction on a specified activity;

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

(8) ~~(8)~~ active or passive electronic monitoring;

(9) ~~(9)~~ house arrest;

(10) ~~(10)~~ subject to Section 307, a secured ~~or~~appearance bond or an unsecured appearance bond;

(11) ~~(11)~~ a condition proposed by the arrested individual;

(12) ~~(12)~~ any other non-financial condition required by law of this state other than this [act]; or

(13) ~~(13)~~ another condition to satisfactorily address the risk~~.~~ under Section 303(a).

~~(b)~~(c) ~~(b)~~ The court shall state in a record why the restrictive condition or ~~set of~~ conditions imposed ~~is~~ under subsection (a) are the least restrictive ~~condition or set of conditions~~

reasonably necessary to satisfactorily address the risk the court has identified under Section 303.(a).

~~***Legislative note:*** *Insert the state's term for the state's pretrial services agency or the equivalent, if applicable.*~~

Comment

Least restrictive condition. ~~A least-restrictive-condition requirement is in keeping with prevailing 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~~measures to reasonably meet a legitimate governmental interest. *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; *cf.* 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-condition requirement is likewise in keeping with the presumption that a defendant is entitled to pretrial release.~~

The least-restrictive-condition requirement is in keeping with a presumption of pretrial release, as discussed in the Comment to Section 304, *supra*. The idea is simply that the state may not punish people before they have been convicted. To the contrary, the state must justify any governmental infringement on pretrial liberty by demonstrating that the state's interests clearly outweigh the individual's liberty interests. The state should bear this considerable burden because physical liberty "lies at the heart of the liberty [the due process clause] protects". *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

In listing conditions of release, the ~~act~~Act does not rank conditions from least to most restrictive. However, as suggested in Section 307 and its Comment, *infra*, the ~~act~~Act 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~~Act is to minimize wealth-based disparities in pretrial release, and secured appearance bonds are ~~the prime drivers~~a principal cause of those disparities. Thus, it is important that a court first ensure that no lesser (typically, non-financial) restrictive condition could manage the relevant risk.

Satisfactorily address the risk. In determining whether a condition is reasonably necessary, courts should consult research on the efficacy of particular restrictive conditions at mitigating specific relevant risks. This can be challenging. At the time of this writing, for instance, the existing research suggests that mandatory drug-testing and frequent "reporting in"

requirements—obligations that have often been considered useful to support behavior modification—have very limited utility and may be counterproductive. *See, e.g.*, Megan T. Stevenson and Sandra G. Mayson, *Pretrial Detention and Bail*, *in* ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM (Erik Luna ed., 2017) (reviewing research); *cf.* Jennifer L. Doleac, *Study After Study Shows Ex-Prisoners Would Be Better Off Without Intense Supervision*, Brookings.edu/blog (July 2, 2018). For further discussion, *see* the Comment to Section 305, *supra* ("*Satisfactorily address the risk*").

In a record. As defined in ~~Section~~subsection 102~~,~~(11), a "record" includes an audio recording. A court may therefore satisfy the requirement to "state in a record" by articulating orally its reasons for imposing a restrictive condition, provided that the oral statement is recorded. In courts that do not record or transcribe proceedings, subsection (~~b~~c) requires the court to document its reasoning in some other form that is "retrievable in perceivable form~~.~~"". *See* ~~Section~~subsection 102(11). For instance, a court may include a brief recitation of its reasoning in its order of pretrial release.

SECTION 307. FINANCIAL CONDITION OF RELEASE.

(a) ~~Except under sections~~Subject to Sections 308 and 403, the court may not impose a restrictive condition under Section 306 that requires initial payment of a fee in a sum greater than the individual is able to ~~satisfy~~pay from personal financial resources within [24] hours. If the individual is unable to ~~satisfy~~pay the fee, the court shall waive or modify the fee, if possible, or waive or modify the restrictive condition that requires payment of the fee, to the extent necessary to release the individual. If the individual is unable to ~~satisfy~~pay a recurring fee, the court shall waive or modify the recurring fee, if possible, or waive or modify the restrictive condition that requires ~~the recurring fee, to the extent necessary to allow the individual to remain released~~payment of the fee.

(b) Before imposing a secured appearance bond or an unsecured appearance bond as a condition of release, the court shall consider the individual's personal financial resources and obligations, including income, assets, expenses, liabilities, and dependents.

(c) ~~The~~Subject to Sections 308 and 403, the court may not impose a secured appearance bond as a condition of release ~~only if~~unless the court ~~has determined~~determines, by clear and

convincing evidence, that the arrested individual is likely to ~~fail to appear or~~ obstruct justice, violate an order of protection, abscond or not appear.

(d) ~~The~~ Subject to Sections 308 and 403, the court may not impose a secured appearance bond:

~~———~~(1) to keep the individual detained~~, except under Sections 308 and 403~~;

~~———~~(2) for a ~~misdemeanor~~non-felony charge, unless the individual has ~~failed to~~absconded or did not appear [three or more] times in a criminal case or combination of criminal cases, evidenced by information in a record provided to the court; or

~~———~~(3) in an amount greater than the individual is able to ~~satisfy~~pay from personal financial resources within [24] hours~~, except under Sections 308 and 403~~.

Comment

~~*Financial conditions.* 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.~~ *Financial condition of release.* Secured financial conditions of release are the principal focus of contemporary pretrial reform efforts. These conditions are the primary source of wealth-based disparities in pretrial release. They result in the unnecessary (and sometimes unintentional) detention of individuals whom the state is not authorized to detain directly. *See* Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643-1680 (2020). The problem is not only with secured bond conditions but also with other conditions of release that may result in detention. Such conditions include restrictive conditions that carry fees or impose other requirements that an individual may not easily be able to satisfy (*e.g.*, a co-signor requirement). Some jurisdictions and proposed laws have responded to this problem by endeavoring to eliminate entirely secured bond conditions. *See, e.g.*, CALIFORNIA SENATE BILL NO. 10 (2018) (stayed pending referendum); Andrea Woods & Portia Allen-Kyle, American Civil Liberties Union, A NEW VISION FOR PRETRIAL JUSTICE (2019); Timothy R. Schnacke, "MODEL" BAIL LAWS: RE-DRAWING THE LINE BETWEEN PRETRIAL RELEASE AND DETENTION (2017). Four states have prohibited commercial bail bonds altogether. 725 ILL. COMP. STAT. ANN. 5/103-9, 5/110-13; KY. REV. STAT. ANN. § 431.510; WIS. STAT. § 969.12; *State v. Epps*, 585 P.2d 425, 429 (Or. 1978).

This Act does not go that far. Instead, Section 307 limits the use of secured bonds to the purposes enumerated in subsection (c) and prohibits a court from imposing a secured bond or other release condition that the individual is unable to satisfy, thereby resulting in continued

detention. The Act excepts from this general prohibition, however, those instances when the charge is one for which detention is permissible (a "covered offense", *see* Section 102(4), *supra*), and the court determines that the condition is necessary pursuant to the same criteria and standards that govern direct orders of detention, *see* Sections 308 and 403, *infra*.

A restrictive condition that requires payment of a fee. Court-imposed restrictive 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.

~~*Only if an individual is likely to fail to appear or obstruct justice.* The logic of prohibiting financial conditions for dangerousness is that it is inappropriate for a court to set a secured appearance bond to manage this risk. If a defendant is sufficiently dangerous, the defendant 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 taken already by the American Bar Association and a number of jurisdictions.~~*Likely to obstruct justice, violate an order of protection, abscond or not appear.* Subsection (c) enumerates the permissible grounds for imposing a secured appearance bond. That is to say, it authorizes a court to use a secured bond to manage only some of the relevant risks under Section 303, *but not* a risk that the individual will cause significant harm to another person. The idea behind this limitation is that it is inappropriate for a court to set a secured appearance bond to prevent harm to others. There are several reasons for this. Historically, the purpose of secured bonds was only to assure appearance. *See Stack v. Boyle*, 342 U.S. 1, 3-4 (1951); National Institute of Corrections, *Money as a Criminal Justice Stakeholder* 13-21 (2014). Jurisprudentially, the Supreme Court has held that "the function of bail is limited" and a secured bond amount "must be based upon standards relevant to the *purpose of assuring the presence of that defendant*"; accordingly, "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment". 342 U.S. at 3-4 (emphasis added. Rationally, it is not logical to impose a financial condition for purposes of public safety. Indeed, in many states, bonds cannot even be forfeited for new criminal activity; rather, forfeiture is tied only to court appearance. *See, e.g.*, *Reem v. Hennessy*, 2017 WL 6539760, slip op. at 7-8 (N.D. Ca. Dec. 21, 2017) (noting that setting a financial condition of release for purposes of public safety is "illogical" in a state where forfeiture is only allowed for failure to appear). Finally, even if a state were to permit re-arrest to trigger forfeiture, there is no robust empirical evidence that financial conditions *do* deter crimes. To the contrary, a number of recent studies have found that dramatic reductions in the use of secured bonds were not associated with any significant increase in rates of pretrial re-arrest. *Cf.* Claire M.B. Brooker, YAKIMA COUNTY PRETRIAL JUSTICE IMPROVEMENTS 6, 16 (2017); Aurelie Ouss & Megan T. Stevenson, BAIL, JAIL, AND PRETRIAL MISCONDUCT: THE INFLUENCE OF PROSECUTORS 24 (Jan. 17, 2020), https://ssrn.com/abstract=3335138; New Jersey Judiciary, 2018 REPORT TO THE GOVERNOR AND THE LEGISLATURE 5, 13-14 (2018).

If a court determines under Section 303 that an individual is likely to cause significant harm to another person, the court should look to other measures that target the risk more directly. And if an individual is shown to be sufficiently dangerous, the individual should be detained after a detention hearing under Article 4. This is the position codified by the American Bar Association, the federal government, the District of Columbia, and a number of other jurisdictions. *See, e.g.*, 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~~.")~~."); 18 U.S.C. § 3142(c); D.C. CODE § 23-1321(c)(2); WIS. STAT. § 969.01(4); N.M RULE CRIM. P. 5-401.

~~*The court may*~~*For a non-felony charge, unless the individual has absconded or did not* ~~*impose*~~appear *multiple times.* The Act contemplates that the need for imposition of a secured appearance bond ~~*or fee*~~ is rare in a misdemeanor case. Thus, subsection (d) allows a court to ~~*keep an individual detained*~~set a secured appearance bond for a misdemeanor charge only if the defendant previously has failed to appear repeatedly in this or ~~*in an*~~another criminal case.

An amount greater than the individual is able to ~~*satisfy*~~*pay from personal financial resources.* ~~These subsections promote~~Subsection (d) promotes the ~~act's~~Act's principal purpose by preventing a court from using a secured appearance bond (or other financial condition or fee) as a functional detention mechanism ~~(at least in circumstances where an individual has not yet enjoyed the procedural protections of a detention hearing, as described in Article 4, *infra*).~~ ~~UNIFORM LAW COMMISSION, *New ULC Drafting Committee on Alternatives to Bail* (Feb. 2, 2018) (noting that the mission of the proposed act is to "prohibit the use of money bail *as a mechanism to trigger preventative detention*" (emphasis added)); *cf.*~~ unless the criteria for detention under Section 308 and Article 4 are satisfied. *See e.g.*, 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."); 18 U.S.C § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person."); D.C. CODE ANN. § 23-1321 (only authorizing a court to impose "a financial condition to reasonably assure the defendant's presence at all court proceedings that does not result in the preventive detention of the person", unless criteria for detention are met); KANSAS STAT.§22-2801 (seeking to "assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance").

~~To satisfy these subsections,~~Under subsection (d), a court ~~not only~~ is forbidden, except under Sections 308 and 403, from relying upon a secured appearance bond or initial or recurring fee as a means "to ~~detain, but also~~keep the individual detained". Also, the court necessarily must inquire into the individual's ability to satisfy a secured appearance bond or initial or recurring fee. That said, the ~~act~~Act leaves the precise scope and shape of ~~the~~this inquiry to judicial discretion. ~~Some possible criteria~~The inquiry might 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). ~~To satisfy~~In conducting this inquiry, the court may take an affidavit or testimony from a defendant under oath.

~~*The court may not impose a secured appearance bond for a misdemeanor charge unless the individual has failed to appear multiple times in a criminal case or combination of criminal cases.* The act contemplates that the need for imposition of a secured appearance bond is rare in a misdemeanor case. Thus, it 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.~~

SECTION 308. ~~ORDER OF~~ TEMPORARY PRETRIAL DETENTION.

(a) At the conclusion of a release hearing, the court may issue an order ~~of temporary pretrial~~ to temporarily detain the arrested individual until a detention hearing, or impose a financial condition of release in an amount greater than the individual is able to ~~satisfy~~pay from personal financial resources within [24] hours, only if the individual is charged with a covered offense and the court determines, by ~~[~~clear~~-~~ and~~-~~ convincing evidence~~] [a preponderance of the evidence]~~, that:

~~———~~(1) it is likely that the individual will abscond, obstruct justice, violate ~~a~~an order of protection ~~order~~, or cause significant harm to another person and no less restrictive condition is sufficient to satisfactorily address the risk;

(2) ~~if~~ the individual ~~is charged with~~has violated a ~~felony;~~condition of an order of pretrial release for a pending criminal charge in another matter; or

(3) it is extremely likely that the individual will not appear, and no less restrictive condition is sufficient to satisfactorily address the risk~~; or~~[, in a case in which the individual is charged with a felony].

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

(b) If the court issues an order under subsection (a), the court shall state its reasons in a record, including why no less restrictive condition or combination of conditions is sufficient ~~to address the risk the court has identified under subsection (a).~~.

Legislative ~~note:~~Note: *In subsection (a~~), insert~~)(3), include the ~~burden of proof~~bracketed language only if the state ~~chooses for issuance of an order of temporary pretrial detention.~~*

~~Comment~~

~~If the individual is charged with a~~ defines "covered offense~~. This provision requires states~~ " to ~~specify the~~include a non-felony offense ~~classes~~.

Comment

Covered offense. As explained in the Comment to Section 102, *supra*, the Act requires that a state enumerate the offenses or offense classes or types for which pretrial detention or unaffordable bail ~~is authorized. Each state should include these~~are available—which is to say, the state must designate the charges on which a person may be held in jail pending trial if the person presents a relevant risk under Section 303 that no less restrictive measure can adequately reduce. The Act leaves to states the determination of which offenses or offense classes ~~in the definition of~~ or types to designate as "covered ~~offense" in Section 102.~~offenses". The intention of this provision, though, is to limit the pool of defendants for whom detention or unaffordable bail may be imposed.

Historically, most state constitutions authorized pretrial detention without bail ~~only~~ in capital cases only. Wayne LaFave *et al.*, 4 CRIM. PROC. § 12.3(b) (4th ed.). A number of states expanded their detention-eligibility nets in the 1980s and 1990s. John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 56 (1985). Many states, however, still limit detention~~-~~ eligibility to a relatively narrow class of charges. LaFave *et al.*, § 12.3(b); *see also* National Center for State Legislatures, PRETRIAL DETENTION, http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-detention.aspx (June 7, 2013~~) (last visited Jan. 1, 2020).~~). It may even be the case that due process requires states to limit the offenses eligible for pretrial detention ~~in this way~~. The Supreme Court has affirmed that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception~~.""~~". *United States v. Salerno*, 481 U.S. 739, 755 (1987). In *Salerno*, the Supreme Court held that the preventive detention provisions of the federal Bail Reform Act satisfied due process in part because the Act limited detention~~-~~ eligibility to "a specific category of extremely serious offenses~~.""~~". *Id.* at 750. The Court did not ~~specify~~specifically say whether due process required this limitation ~~or not~~. But this feature of the federal pretrial detention regime ~~(as it existed in 1987)~~ contributed to the Court's conclusion that the statutory framework struck an appropriate balance between managing pretrial risk and protecting individual liberty. ~~Adopting~~*Id.* at 548-55. Due process may additionally require states to specify the charges on which a person may be held in jail pending trial in order to provide fair notice to individuals and to appropriately constrain judicial discretion. *Scione v. Commonwealth*, 114 N.E.3d 74, 85 (Mass. 2019) (holding a portion of Massachusetts pretrial detention statute in violation of Massachusetts' state-constitutional due process provision on vagueness grounds for failure to adequately specify the offenses eligible for detention). A narrow and clearly defined detention-eligibility net can ~~thus~~ help to ensure that pretrial liberty ~~defines~~remains the norm and that detention ~~remains~~is a constitutional and "carefully limited exception~~." *Id.*~~". *Salerno*, 481 U.S. at 755.

~~Section 308(a) also~~

Amount greater than the individual is able to pay. Subsection 308(a) permits a court to impose a ~~financial~~secured bond condition ~~of release~~ that a defendant cannot immediately meet if the criteria for temporary detention are otherwise satisfied. ~~This aspect of the provision~~Section

308 thus acknowledges that, in some ~~states, state constitutional provisions or binding case law may prohibit pretrial detention without bail; yet there may be rare~~ circumstances ~~in which no immediately attainable~~, such a condition ~~of release~~ may be the least-restrictive measure that is sufficient to satisfactorily address a ~~serious~~relevant risk~~.~~ under Section 303. In these circumstances, the ~~act~~Act simply ~~holds~~subjects an unaffordable financial condition to the same ~~criteria~~substantive and ~~standards~~procedural requirements as detention.

~~*The individual is charged with a felony and is extremely likely not to appear.* Here, the act~~*See, e.g.*, Brangan v. Commonwealth, 80 N.E.3d 949, 963 (Mass. 2017) ("[W]here a judge sets ~~a special detention eligibility net where the relevant risk is only nonappearance, as opposed~~bail in an amount so far beyond a defendant's ability to ~~absconding, obstructing justice, violating an order of protection, or dangerousness. The logic is that a court should almost always be able to manage inadvertent failures to appear through conditions of release, practical assistance or voluntary supportive services. The act does not authorize detention~~ pay that it is likely to result in ~~a misdemeanor case where the only risk is nonappearance (unless the individual has violated a condition of release for a pending charge).~~

~~*The individual has violated a condition*~~ long-term pretrial detention, it is the functional equivalent of an order ~~*of*~~for pretrial detention, and the judge's decision must be evaluated in light of the same due process requirements applicable to such a deprivation of liberty."); Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643 (2020) (arguing "that an order that functionally imposes detention must be treated as an order of detention" and collecting legal authority).

Significant harm to another person. Under subsection 307(c), a court is prohibited from imposing a secured bond condition where the relevant risk is "harm to another person". By its terms, however, that subsection is made subject to this section and to Section 403. The exception here is in recognition that—notwithstanding the general rule of subsection 307(c)—some states may be compelled, under certain circumstances, to rely upon secured bond conditions to address an otherwise-unmanageable risk of harm to another person. The logic is discussed immediately above. *See* the Comment to Section 308, *supra* ("*Only if the individual is charged with a covered offense*"). That is, in some states, constitutional provisions or binding case law may prohibit detention for broad offense classes or types, leaving those states to rely upon secured bond conditions as functional equivalents for detention. In those states, a court may impose a secured bond condition to address a sufficient risk of harm to another person, *if and only if* the court complies with Sections 308 and 403.

A condition of an order of pretrial release for ~~any~~a pending ~~criminal~~ charge. The ~~act~~Act allows a court to issue ~~a~~an order of *temporary pretrial detention* ~~order~~ based only on a showing that the defendant has violated a condition of pretrial release in a pending case. However, as elaborated~~, *infra*,~~ in Article 4, the ~~act~~Act requires more before a court may issue ~~a~~an order of pretrial 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, and the defendant has the opportunity to contest that showing.

~~*The court shall state*~~*Extremely likely that the individual will not appear* *in a* ~~*record why no less restrictive condition*~~ *case in which the individual* *is* ~~*sufficient*~~*charged with a felony.* As indicated in subsection 102(6), *supra*, the term "not appear" corresponds in meaning with "nonappearance", which is defined as "fail to ~~*address the*~~appear in court as required without the intent to avoid or delay adjudication". Here, the Act limits a court's ability to detain when the relevant risk is nonappearance, as opposed to a risk of absconding, obstructing justice, violating an order of protection, or dangerousness. The logic is that a court should almost always be able to rely upon practical assistance, voluntary supportive services, or conditions of release to minimize the likelihood of failures to appear that lack an intent to avoid or delay adjudication ("nonappearance," as defined subsection in 102(6), *supra*). Therefore, the Act does not authorize detention in a sub-felony case where the risk is nonappearance (unless the individual has violated a condition of release for a pending charge, under subsection 308(a)(2)). In sum, this provision permits the court to detain, but only in felony cases where the defendant is *extremely* likely to not appear. (In states that already prohibit detention in non-felony cases, the bracketed language in subsection 308(a)(2) is unnecessary.)

In a record. This requirement mirrors the requirement in Section 306 that the court articulate why a ~~restriction~~ restrictive condition on the individual's pretrial liberty is necessary. As in Section 306, ~~a verbal~~an oral statement is sufficient if the proceedings are audio-recorded or transcribed. *See* the Comment to Section 306~~.~~, *supra*.

[ARTICLE] 4

DETENTION HEARING

SECTION 401. TIMING.

(a) If the court issues an order of temporary pretrial detention under Section 308, or ~~an order~~ of pretrial release under Section 304 and imposes a condition that results in continued detention of the individual, the court shall hold a hearing to consider ~~whether~~continued detention of the individual ~~should continue to be detained~~ pending trial. The hearing must be held not later than [72] hours after ~~the~~ issuance of the order.

(b) The court on its own motion or on motion of the [prosecuting authority] may for good cause continue ~~a~~the detention hearing for not more than [72] hours.

~~———~~(c) The court shall continue a detention hearing on motion of the detained individual.

~~———~~(d) At the conclusion of the detention hearing, the court shall issue an order of pretrial release or ~~an order of pretrial~~ detention.

Legislative Note: *In subsections (a) and (b), insert the deadlines the state ~~chooses~~designates for a detention hearing and continuance of the hearing.*

~~*In subsection (b), insert the state's term for the state's prosecuting authority.*~~

Comment

Not later than [72] hours. The need for speedy review is important (and probably constitutionally required) when an individual is detained without the procedural safeguards of a detention hearing. The need is even greater when the individual ostensibly was released but remains detained on restrictive conditions of pretrial release some days after the release decision. Indeed, recent studies have found that even short terms of detention may correlate with increases in criminality and failure to appear. *See* sources cited in the 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~~Cty., 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).

Some jurisdictions may wish to conduct detention determinations at the initial hearing when an arrested person appears before a judicial officer. In such cases, there will not be a distinct "release hearing" and "detention hearing"—they will simply occur simultaneously. Even in such circumstances, though, the procedural and substantive requirements of Article 4 govern the detention determination.

SECTION 402. RIGHTS OF ~~THE~~ DETAINED INDIVIDUAL.

(a) At a detention hearing, the detained individual has a right to counsel. If the individual is indigent, [the authorized agency] shall provide counsel. [The scope of representation under this section may be limited to the subject matter of the hearing.]

(b) At a detention hearing, the detained individual has a right to:

(1) review evidence to be introduced by the [prosecuting authority] before its

introduction at the hearing;

———(2) present evidence and provide information;

———(3) testify; and

———(4) cross-examine witnesses.

~~***Legislative Note:*** *In subsection (a), insert the state's term for the agency that is authorized to provide counsel. If the authorized agency varies by county, insert "an authorized agency." Include the last bracketed sentence if the state chooses to permit limited-scope representation.*~~

~~*In subsection (b)(1), insert the state's term for the state's prosecuting authority.*~~

~~**Comment**~~

Comment

Rights of detained individual. Section 402 prescribes rights 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). As indicated~~, *supra,*~~ in the ~~commentary~~Comment to Section 302, *supra*, the ~~act~~Act prescribes only the rights of the individual, not the procedural powers of the prosecutor. Again, the ~~act~~Act limits its scope to the individual who is its subject and leaves other evidentiary matters to existing state law and court rules.

———*If the individual is indigent.* In Section 302, the ~~act~~Act provides ~~a~~an optional and potentially provisional right to counsel at a release hearing. There, the right does not require a finding of indigency. As explained earlier, the reason is that even an affluent individual ~~might~~may not be able to secure the ~~appearance~~presence of counsel at a release ~~or review~~ hearing ~~that~~, which happens ~~so early~~earlier in the process. By the date of a detention hearing, however, timing is no longer so pressing. Thus, subsection (b) adds the contingency of indigency.

———*The detained individual has a right to testify*. Consistent with ~~most~~a number of states' preventative detention statutes, the ~~act~~Act contemplates that ~~an individual's~~a defendant's testimony will not be admissible in subsequent proceedings on questions of guilt. *See, e.g.*, FLA. STAT. ANN. § 907.041(4)(H); N.M. R. CRIM. PRO. DIST. COURT 5-409(F)(3); WIS. STAT. ANN. § 969.035 (6)(e). However, the ~~act~~Act leaves the question to existing state law and court rules.

SECTION 403. ~~ORDER OF~~ PRETRIAL DETENTION.

(a) At a detention hearing, the court shall consider the criteria and restrictive conditions in Sections 303~~, 306, and~~ through 307 to determine whether to issue an order of pretrial detention

or ~~to~~ continue, amend, or eliminate a restrictive condition that has resulted in continued detention of the arrested individual. If failure to satisfy a secured appearance bond or pay a fee is the only reason the individual continues to be detained, the ~~court shall consider the~~ fact of detention ~~as~~is prima facie evidence that the individual is unable to satisfy the bond or pay the fee.

(b) The court at a detention hearing may not issue an order of pretrial detention or continue a condition of release that results in detention unless the individual is charged with a covered offense and the court determines, by clear~~-~~ and~~-~~ convincing evidence, that:

~~———~~(1) it is likely that the individual will abscond, obstruct justice, violate ~~a~~an order of protection ~~order~~, or cause significant harm to another person and no less restrictive condition is sufficient to satisfactorily address the risk; or

~~(2) if the individual is charged with a felony,~~(2) it is extremely likely that the individual will not appear, and no less restrictive condition is sufficient to satisfactorily address the risk~~-~~[, in a case where the individual is charged with a felony].

(c) If the court issues an order ~~of pretrial detention or continues a condition of release that results in detention,~~under subsection (a) or (b), the court shall state in a record why no less restrictive condition is sufficient ~~to address~~.

Legislative Note: *In subsection (b)(2), include the ~~risk that the court has identified under subsection (b).~~bracketed language only if the state defines "covered offenses" to include misdemeanor offenses.*

Comment

~~*The*~~ *Covered offense; significant harm to another person; extremely likely that the individual will not appear in a case in which the individual is charged with a ~~covered offense.~~felony.* *See* the Comment to Section 308, *supra*.

~~*The court shall state in a record why no less restrictive condition is sufficient to address the risk.* This requirement mirrors the requirement in Section 306 that the court articulate why a restriction on the individual's liberty is necessary. As in Section 306, a verbal statement is sufficient if the proceedings are audio-recorded or transcribed. *See*~~ *In a record. See* the

Comments to Sections 306 and 308, *supra*.

~~**Comment** to Section 306.~~

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~~Act leaves this question to the states and their existing speedy trial statutes.

[ARTICLE~~]~~ 5[

MODIFYING OR VACATING ORDER

SECTION 501. MODIFYING OR VACATING BY AGREEMENT. By agreement of the [prosecuting authority] and the individual subject to an order issued under [Article] 3 or 4, 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:** Insert the state's term for the state's prosecuting authority.*~~

Comment

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

SECTION 502. MOTION TO MODIFY.

On its own motion or on motion of a party, the court may modify an order of pretrial release or detention using the procedures and standards in [~~Article~~Articles] 3 and ~~[Article]~~ 4. The court may consider new information relevant to the~~ release or detention~~ order, including information that the individual has violated a condition of release. The court may ~~summarily~~ deny the motion summarily if it is not supported by new information.

[ARTICLE] 6

MISCELLANEOUS PROVISIONS

SECTION 601. 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 ~~603~~602. 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.]

Legislative Note: *Include this section only if the state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.*

SECTION 603. TRANSITION. This [act] applies to an arrest made[, [a citation] issued,] or a motion filed on or after [the effective date of this [act]].

[SECTION 604. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .]

Legislative Note: ~~**Comment**~~

~~*Appeal or conform.*~~ *A state may need to repeal or amend a statute that imposes mandatory release conditions for an offense or* ~~type of~~ *offense* ~~for instance,~~ *class or type such as a mandatory fee, a secured bond*~~,~~ *or another financial condition.*

SECTION 605. EFFECTIVE DATE. This [act] takes effect . . . .

Comment

Effective date of this Act. Some states may need more time to prepare for implementation of the Act. The amount of lead time is, therefore, left to the enacting state's discretion.