ABA Standards for Criminal Justice

Third Edition

Pretrial Release

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The commentary contained herein does not necessarily represent the official position of the ABA. Only the text of the black-letter standards has been formally approved by the ABA House of Delegates as official policy. The commentary, although unofficial, serves as a useful explanation of the black-letter standards.

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Dedication

The Task Force on Pretrial Release dedicates its work on these Standards to Task Force Member William McGee. Mr. McGee, Minneapolis Chief Public Defender, contributed significantly to the drafting process from its beginning in the summer of 1999 until the Standards were submitted to the Standards Committee in the fall of 2000. He died in November 2000.

Note on Abbreviations

References to related standards in text and footnotes are by initials of the drafting organization. The date in parentheses refers to the publication date.

ABA (American Bar Association), Criminal Justice Standards:
- Collateral Sanctions and Discretionary Disqualification of Convicted Persons (2004)
- Defense Function (1993)
- Discovery (1996)
- Mental Health (1989)
- Pleas of Guilty (1999)
- Pretrial Release (2007)
- Prosecution Function (1993)
- Providing Defense Services (1992)
- Sentencing (1994)
- Special Functions of the Trial Judge (2000)
- Speedy Trial (1980)
- Trial by Jury (1996)
- Urban Police Function (1980)

ALI (American Law Institute), Model Code of Pre-Arraignment Procedure (1975)

NAC (National Advisory Commission on Criminal Justice Standards and Goals), Corrections (1973)

NAC (National Advisory Commission on Criminal Justice Standards and Goals), Courts (1973)

NAPSA (National Association of Pretrial Services Agencies), Standards on Pretrial Release (2004)

NCCUSL (National Conference of Commissioners on Uniform State Laws), Uniform Rules of Criminal Procedure (1987)

NDAA (National District Attorneys Association), National Prosecution Standards (1991)

Note on Use of Brackets

The Standards call for setting specific time periods for certain events. Brackets around a time period, e.g., [six hours], [90 days], indicate that the time period is generally appropriate but may not apply to all situations or jurisdictions. When the bracketed time period does not apply, the Standards anticipate substitution of an appropriate time period.

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ABA PRETRIAL RELEASE STANDARDS

BLACK LETTER

PART I

GENERAL PRINCIPLES

Standard 10-1.1 Purposes of the pretrial release decision

The purposes of the pretrial release decision include providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses and the community from threat, danger or interference. The judge or judicial officer decides whether to release a defendant on personal recognizance or unsecured appearance bond, release a defendant on a condition or combination of conditions, temporarily detain a defendant, or detain a defendant according to procedures outlined in these Standards. The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support. These Standards limit the circumstances under which pretrial detention may be authorized and provide procedural safeguards to govern pretrial detention proceedings.

Standard 10-1.2 Release under least restrictive conditions; diversion and other alternative release options

In deciding pretrial release, the judicial officer should assign the least restrictive condition(s) of release that will reasonably ensure a defendant's attendance at court proceedings and protect the community, victims, witnesses or any other person. Such conditions may include participation in drug treatment, diversion programs or other pre-adjudication alternatives. The court should have a wide

array of programs or options available to promote pretrial release on conditions that ensure appearance and protect the safety of the community, victims and witnesses pending trial and should have the capacity to develop release options appropriate to the risks and special needs posed by defendants, if released to the community. When no conditions of release are sufficient to accomplish the aims of pretrial release, defendants may be detained through specific procedures.

Standard 10-1.3 Use of citations and summonses

The principle of release under least restrictive conditions favors use of citations by police or summons by judicial officers in lieu of arrest at stages prior to first judicial appearance in cases involving minor offenses. In determining whether an offense is minor, consideration should be given to whether the alleged crime involved the use or threatened use of force or violence, possession of a weapon, or violation of a court order protecting the safety of persons or property.

Standard 10-1.4 Conditions of release

(a) Consistent with these Standards, each jurisdiction should adopt procedures designed to promote the release of defendants on their own recognizance or, when necessary, unsecured bond. Additional conditions should be imposed on release only when the need is demonstrated by the facts of the individual case reasonably to ensure appearance at court proceedings, to protect the community, victims, witnesses or any other person and to maintain the integrity of the judicial process. Whenever possible, methods for providing the appropriate judicial officer with reliable information relevant to the release decision should be developed, preferably through a pretrial services agency or function, as described in Standard 10-1.9.

(b) When release on personal recognizance is not appropriate reasonably to ensure the defendant's appearance at court and to prevent the commission of criminal offenses that threaten the safety of the community or any person, constitutionally permissible non-

financial conditions of release should be employed consistent with Standard 10-5.2.

(c) Release on financial conditions should be used only when no other conditions will ensure appearance. When financial conditions are imposed, the court should first consider releasing the defendant on an unsecured bond. If unsecured bond is not deemed a sufficient condition of release, and the court still seeks to impose monetary conditions, bail should be set at the lowest level necessary to ensure the defendant's appearance and with regard to a defendant's financial ability to post bond.

(d) Financial conditions should not be employed to respond to concerns for public safety.

(e) The judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay.

(f) Consistent with the processes provided in these Standards, compensated sureties should be abolished. When financial bail is imposed, the defendant should be released on the deposit of cash or securities with the court of not more than ten percent of the amount of the bail, to be returned at the conclusion of the case.

Standard 10-1.5 Pretrial release decision may include diversion and other adjudication alternatives supported by treatment programs

In addition to employing release conditions outlined in Standard 10-1.4, jurisdictions should develop diversion and alternative adjudication options, including drug, mental health and other treatment courts or other approaches to monitoring defendants during pretrial release.

Standard 10-1.6 Detention as an exception to policy favoring release

These Standards limit the circumstances under which pretrial detention may be authorized and provide procedural safeguards to govern pretrial detention proceedings. They establish specific criteria and procedures for effecting the pretrial detention of certain defendants after the court determines that these defendants pose a

substantial risk of flight, or threat to the safety of the community, victims or witnesses or to the integrity of the justice process. The status of detained defendants should be monitored and their eligibility for release should be reviewed throughout the adjudication period. The cases of detained defendants should be given priority in scheduling for trial.

Standard 10-1.7 Consideration of the nature of the charge in determining release options

Although the charge itself may be a predicate to pretrial detention proceedings, the judicial officer should exercise care not to give inordinate weight to the nature of the present charge in evaluating factors for the pretrial release decision except when, coupled with other specified factors, the charge itself may cause the initiation of a pretrial detention hearing pursuant to the provisions of Standard 10-5.9.

Standard 10-1.8 Pretrial release decision should not be influenced by publicity or public opinion

The judicial officer should not be influenced by publicity surrounding a case or attempt to placate public opinion in making a pretrial release decision.

Standard 10-1.9 Implication of policy favoring release for supervision in the community

The policy favoring pretrial release and selective use of pretrial detention is inextricably tied to explicit recognition of the need to supervise safely large numbers of defendants in the community pending adjudication of their cases. To be effective, these policies require sufficient informational and supervisory resources.

Standard 10-1.10 The role of the pretrial services agency

Every jurisdiction should establish a pretrial services agency or program to collect and present the necessary information, present risk assessments, and, consistent with court policy, make release recommendations required by the judicial officer in making release decisions, including the defendant's eligibility for diversion, treatment or other alternative adjudication programs, such as drug or other treatment courts. Pretrial services should also monitor, supervise, and assist defendants released prior to trial, and review the status and release eligibility of detained defendants for the court on an ongoing basis. The pretrial services agency should:

(a) conduct pre-first appearance inquiries;

(b) present accurate information to the judicial officer relating to the risk defendants may pose of failing to appear in court or of threatening the safety of the community or any other person and, consistent with court policy, develop release recommendations responding to risk;

(c) develop and provide appropriate and effective supervision for all persons released pending adjudication who are assigned supervision as a condition of release;

(d) develop clear policy for operating or contracting for the operation of appropriate facilities for the custody, care or supervision of persons released and manage a range of release options, including but not limited to, residential half-way houses, addict and alcoholic treatment centers, and counseling services, sufficient to respond to the risks and problems associated with released defendants in coordination with existing court, corrections and community resources;

(e) monitor the compliance of released defendants with the requirements of assigned release conditions and develop relationships with alternative programs such as drug and domestic violence courts or mental health support systems;

(f) promptly inform the court of all apparent violations of pretrial release conditions or arrests of persons released pending trial, including those directly supervised by pretrial services as well as those released under other forms of conditional release, and recommend appropriate modifications of release conditions according to approved court policy. The pretrial services agency should avoid supervising defendants who are government

informants, when activities of these defendants may place them in conflict with conditions of release or compromise the safety and integrity of the pretrial services professional;

(g) supervise and coordinate the services of other agencies, individuals or organizations that serve as custodians for released defendants, and advise the court as to their appropriateness, availability, reliability and capacity according to approved court policy relating to pretrial release conditions;

(h) review the status of detained defendants on an ongoing basis for any changes in eligibility for release options and facilitate their release as soon as feasible and appropriate;

(i) develop and operate an accurate information management system to support prompt identification, information collection and presentation, risk assessment, release conditions selection, compliance monitoring and detention review functions essential to an effective pretrial services agency;

(j) assist persons released prior to trial in securing any necessary employment, medical, drug, mental or other health treatment, legal or other needed social services that would increase the chances of successful compliance with conditions of pretrial release;

(k) remind persons released before trial of their court dates and assist them in attending court; and

(l) have the means to assist persons who cannot communicate in written or spoken English.

PART II

RELEASE BY LAW ENFORCEMENT OFFICER ACTING WITHOUT AN ARREST WARRANT

Standard 10-2.1 Policy favoring issuance of citations

It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. This policy should be implemented by statutes of statewide applicability.

Standard 10-2.2 Mandatory issuance of citation for minor offenses

(a) Except as provided in paragraph (c), 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. In determining whether an offense is minor, the police officer should consider whether the alleged crime involved the use or threatened use of force or violence, possession of a weapon, or violation of a court order protecting the safety of persons or property.

(b) Except as provided in paragraph (c), when a person in custody has been taken to a police station and a decision has been made to charge the person with a minor offense, the responsible officer should be required to issue a citation in lieu of continued custody.

(c) The defendant may be detained when an otherwise lawful arrest or detention is necessary to ensure the safety of any person or the community, or when the accused:

(i) is subject to lawful arrest and fails to identify himself or herself satisfactorily;

(ii) refuses to sign the citation after the officer explains to the accused that the citation does not constitute an admission of guilt and represents only the accused's promise to appear;

(iii) has no ties to the jurisdiction reasonably sufficient to ensure the accused's appearance in court and there is a substantial likelihood that the accused will refuse to respond to a citation;

(iv) previously has failed to appear in response to a citation, summons, or other legal process for an offense;

(v) is not in compliance with release conditions in another case, is subject to a court order or is on probation or parole; or

(vi) poses a substantial likelihood of continuing the criminal conduct if not arrested.

(d) When an officer fails to issue a citation for a minor offense, but instead takes a suspect into custody, the law enforcement agency should be required to indicate the reasons in writing.

(e) Notwithstanding the issuance of a citation, a law enforcement officer should be authorized to transport or arrange transportation for a cited person to an appropriate facility if the person appears mentally or physically unable to care for himself or herself.

Standard 10-2.3 Permissive authority to issue citations in all cases

Each law enforcement agency should promulgate regulations designed to increase the use of citations to the greatest degree consistent with public safety. Except when arrest or continued custody is necessary, the regulations should require such inquiry as is practicable into the accused's place and length of residence, family relationships, references, present and past employment, criminal record, and any other facts relevant to appearance in response to a citation.

Standard 10-2.4 Lawful searches

When an officer makes a lawful arrest, the defendant's subsequent release on citation should not affect the lawfulness of any search incident to the arrest.

PART III

ISSUANCE OF SUMMONS IN LIEU OF ARREST

Standard 10-3.1 Authority to issue summons

All judicial officers should be given statutory authority to issue a summons rather than an arrest warrant in all cases in which a complaint, information, or indictment is filed or returned against a person not already in custody. Judicial officers should liberally utilize this authority unless a warrant is necessary to prevent flight, to ensure the safety of the defendant, any other person or the community, to prevent commission of future crimes or to subject a defendant to the jurisdiction of the court when the defendant's whereabouts are unknown. If a judicial officer issues a summons rather than an arrest warrant in connection with an offense, absent exigent circumstances, no law enforcement officer may arrest the accused for that offense without obtaining a warrant.

Standard 10-3.2 Mandatory issuance of summons

A summons rather than an arrest warrant should be mandatory in all cases involving minor offenses unless the judicial officer finds that:

(a) the accused is subject to lawful arrest and fails to identify himself or herself satisfactorily;

(b) the whereabouts of the accused are unknown and the issuance of an arrest warrant is necessary to subject the accused to the jurisdiction of the court;

(c) an otherwise lawful arrest or detention is necessary to ensure the safety of any other person or the community;

(d) the accused has no ties to the community reasonably sufficient to ensure appearance and there is a substantial likelihood that the accused will refuse to respond to a summons;

(e) the accused previously has failed to appear without just cause in response to a citation, summons, or other legal process;

(f) the accused is not in compliance with release conditions in another case or is subject to a court order or is on probation or parole; or

(g) the accused poses a substantial likelihood of continuing the criminal conduct if not arrested.

Standard 10-3.3 Application for an arrest warrant or summons

(a) Time permitting, in those cases in which the judicial officer has discretion to issue a summons instead of an arrest warrant, the judicial officer should consider:

(i) the accused's ties to the community, including factors such as age, residence, employment and family relationships, reasonably sufficient to ensure appearance;

(ii) the nature of the alleged offense and potential penalty;

(iii) the accused's past history of response to legal process;

(iv) the accused's past criminal record;

(v) whether the case involves a juvenile or adult offense; and

(vi) whether the accused is in compliance with release conditions in another case or subject to a court order or on probation or parole.

(b) The judicial officer ordinarily should issue a summons in lieu of an arrest warrant when the prosecutor so requests.

(c) In any case in which the judicial officer issues a warrant, the judicial officer should state the reasons in writing or on the record for failing to issue a summons.

PART IV

RELEASE BY JUDICIAL OFFICER AT FIRST APPEARANCE OR ARRAIGNMENT

Standard 10-4.1 Prompt first appearance

(a) Arrests should not be timed to cause or extend unnecessary pretrial detention.

(b) Unless the defendant is released on citation or in some other lawful manner, the defendant should be taken before a judicial officer without unnecessary delay. The defendant should be presented at the next judicial session within [six hours] after arrest. In jurisdictions where this is not possible, the defendant should in no instance be held by police longer than 24 hours without appearing before a judicial officer. Judicial officers should be readily available to conduct first appearances within the time limits established by this Standard. Where a crime of violence is implicated, an assessment of the risk posed by the defendant to the victim(s) and community should be completed prior to the first appearance; but a defendant's first appearance should not ordinarily be delayed in order to conduct in-custody interrogation or other in-custody investigation. A defendant who is not promptly presented should be entitled to immediate release under appropriate conditions unless pretrial detention is ordered as provided in Standards 10-5.8 through 10-5.10.

Standard 10-4.2 Investigation prior to first appearance: development of background information to support release or detention determination

(a) In all cases in which the defendant is in custody and charged with a criminal offense, an investigation to provide information relating to pretrial release should be conducted by pretrial services or the judicial officer prior to or contemporaneous with a defendant's first appearance.

(b) Pretrial services should advise the defendant that:

(i) the pretrial services interview is voluntary;

(ii) the pretrial services interview is intended solely to assist in determining an appropriate pretrial release option for the defendant;

(iii) any responsive information provided by the defendant during the pretrial services interview will not be used in the current or a substantially-related case either to adjudicate guilt or to arrive at a sentencing decision; but

(iv) the voluntary information provided by the defendant during the pretrial services interview may be used in prosecution for perjury or for purposes of impeachment.

(c) Release may not be denied solely because the defendant has refused the pretrial services interview.

(d) The pretrial services interview should include advising the defendant that penalties may be imposed for providing false information.

(e) The pretrial services interview of the defendant should carefully exclude questions relating to the events or the details of the current charge.

(f) The pretrial services investigation should include factors related to assessing the defendant's risk of flight or of threat to the safety of the community or any person, or to the integrity of the judicial process. Information relating to these factors and the defendant's suitability for release under conditions should be gathered systematically and considered by the judicial officer in making the pretrial release decision at first appearance and at subsequent stages when pretrial release is considered.

(g) The pretrial services investigation should focus on assembling reliable and objective information relevant to determining pretrial release and should be organized according to an explicit, objective and consistent policy for evaluating risk and

identifying appropriate release options. The information gathered in the pre-first appearance investigation should be demonstrably related to the purposes of the pretrial release decision and should include factors shown to be related to risk of flight or of threat to the safety of any person or the community and to selection of appropriate release conditions, and may include such factors as:

(i) the nature and circumstances of the charge when relevant to determining release conditions, consistent with subsection (e) above;

(ii) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings;

(iii) whether at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense;

(iv) the availability of persons who agree to assist the defendant in attending court at the proper time and other information relevant to successful supervision in the community;

(v) any facts justifying a concern that a defendant will fail to attend court or pose a threat to the safety of any person or the community; and

(vi) factors that may make the defendant eligible and an appropriate subject for conditional release and supervision options, including participation in medical, drug, mental health or other treatment, diversion or alternative adjudication release options.

(h) The presentation of the pretrial services information to the judicial officer should link assessments of risk of flight and of public safety threat during pretrial release to appropriate release options designed to respond to the specific risk and supervision needs identified. The identification of release options by pretrial services for the consideration of the judicial officer should be based on detailed agency guidelines developed in consultation with the judiciary to assist in pretrial release decisions. Suggested release options should be supported by objective, consistently applied criteria contained in the guidelines. The results of the pretrial services investigation and recommendation of release options should be promptly transmitted to relevant first-appearance participants

before the hearing, including information relevant to alternative release options, conditional release treatment and supervision programs, or eligibility for pretrial detention, so that appropriate actions may be taken in a timely fashion.

Standard 10-4.3 Nature of first appearance

(a) The first appearance before a judicial officer should take place in such physical surroundings as are appropriate to the administration of justice. Each case should receive individual treatment, and decisions should be based on the particular facts of the case and information relevant to the purposes of the pretrial release decision as established by law and court procedure. The proceedings should be conducted in clear and easily understandable language calculated to advise defendants effectively of their rights and the actions to be taken against them. The first appearance should be conducted in such a way that other interested persons may attend or observe the proceedings.

(b) At the defendant's first appearance, the judicial officer should provide the defendant with a copy of the charging document and inform the defendant of the charge and the maximum possible penalty on conviction, including any mandatory minimum or enhanced sentence provision that may apply. The judicial officer should advise the defendant that the defendant:

(i) is not required to say anything, and that anything the defendant says may be used against him or her;

(ii) if represented by counsel who is present, may communicate with his or her attorney at the time of the hearing;

(iii) has a right to counsel in future proceedings, and that if the defendant cannot afford a lawyer, one will be appointed;

(iv) if not a citizen, may be adversely affected by collateral consequences of the current charge, such as deportation;

(v) if a juvenile being treated as an adult, has the right, where applicable, to the presence of a parent or guardian;

(vi) if necessary, has the right to an interpreter to be present at proceedings; and

(vii) where applicable, has a right to a preliminary examination or hearing.

(c) Unless the defendant is released at the first appearance, if the defendant is not represented, counsel should be appointed

immediately. The next judicial proceeding should occur promptly, but not until the defendant and defense counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived the right to be represented by counsel.

(d) The defendant should be provided an opportunity to communicate with family or friends for the purposes of facilitating pretrial release or representation by counsel.

(e) A record should be made of the proceedings at first appearance. The defendant also should be advised of the nature and approximate schedule of all further proceedings to be taken in the case.

(f) The judicial officer should decide pretrial release in accordance with the general principles identified in these Standards.

(g) If, at the first appearance, the prosecutor requests the pretrial detention of a defendant under Standards 10-5.8 through 10-5.10, a judicial officer should be authorized, after a finding of probable cause to believe that a defendant has committed an offense as alleged in the charging document, to order temporary pretrial detention following procedures under Standard 10-5.7 or to conduct a pretrial detention hearing under Standard 10-5.10.

PART V

THE RELEASE AND DETENTION DECISIONS

Standard 10-5.1 Release on defendant's own recognizance

(a) It should be presumed that defendants are entitled to release on personal recognizance on condition that they attend all required court proceedings and they do not commit any criminal offense. This presumption may be rebutted by evidence that there is a substantial risk of nonappearance or need for additional conditions as provided in Standard 10-5.2, or by evidence that the defendant should be detained under Standards 10-5.8, 10-5.9 and 10-5.10 or conditionally released pending diversion or participation in an alternative adjudication program as permitted under Standard 10-1.5.

(b) In determining whether there is a substantial risk of nonappearance or threat to the community or any person or to the integrity of the judicial process if the defendant is released, the judicial officer should consider the pretrial services assessment of the defendant's risk of willful failure to appear in court or risk of threat to the safety of the community or any person, victim or witness. This may include such factors as:

(i) the nature and circumstances of the offense when relevant to determining release conditions;

(ii) the defendant's character, physical and mental condition, family ties, employment status and history, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings;

(iii) whether at the time of the current offense or arrest, the person was on probation, parole, or other release pending trial, sentencing, appeal, or completion of sentence for an offense;

(iv) availability of persons who agree to assist the defendant in attending court at the proper time and other information relevant to successful supervision in the community;

(v) any facts justifying a concern that the defendant will violate the law if released without restrictions; and

(vi) factors that may make the defendant eligible and an appropriate subject for conditional release and supervision options, including participation in medical, drug, mental health or other treatment, diversion or alternative adjudication release options.

(c) In the event the judicial officer determines that release on personal recognizance is unwarranted, the officer should include in the record a statement, written or oral, of the reasons for this decision.

Standard 10-5.2 Conditions of release

(a) If a defendant is not released on personal recognizance or detained pretrial, the court should impose conditional release, including, in all cases, a condition that the defendant attend all court proceedings as ordered and not commit any criminal offense. In addition, the 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. The court may:

(i) release the defendant to the supervision of a pretrial services agency, or require the defendant to report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(ii) release the defendant into the custody or care of some other qualified organization or person responsible for supervising the defendant and assisting the defendant in making all court appearances. Such supervisor should be expected to maintain close contact with the defendant, to assist the defendant in making arrangements to appear in court, and, when appropriate, accompany the defendant to court. The supervisor should not be required to be financially responsible for the defendant nor to forfeit money in the event the defendant fails to appear in court. The supervisor should promptly report a defendant's failure to comply with release conditions to the pretrial services agency or inform the court;

(iii) impose reasonable restrictions on the activities, movements, associations, and residences of the defendant, including curfew, stay away orders, or prohibitions against the defendant going to certain geographical areas or premises;

(iv) prohibit the defendant from possessing any dangerous weapons and order the defendant to immediately turn over all firearms and other dangerous weapons in defendant's possession or control to an agency or responsible third party designated by the court. Prohibit the defendant from engaging in certain described activities, or using intoxicating liquors or certain drugs;

(v) conditionally release the defendant pending diversion or participation in an alternative adjudication program, such as drug, mental health or other treatment courts;

(vi) require the defendant to be released on electronic monitoring, be evaluated for substance abuse treatment, undergo regular drug testing, be screened for eligibility for drug court or other drug treatment program, undergo mental health or physical health screening for treatment, participate in appropriate treatment or supervision programs, be placed under house arrest or subject to other release options or

conditions as may be necessary reasonably to ensure attendance in court, prevent risk of crime and protect the community or any person during the pretrial period;

(vii) require the defendant to post financial conditions as outlined under Standard 10-5.3, execute an agreement to forfeit, upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to ensure the appearance of the defendant, and order the defendant to provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial officer may require;

(viii) require the defendant to return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(ix) impose any other reasonable restriction designed to ensure the defendant's appearance, to protect the safety of the community or any person, and to prevent intimidation of witnesses or interference with the orderly administration of justice.

(b) After reasonable notice to the defendant and a hearing, when requested and appropriate, the judicial officer may at any time amend the order to impose additional or different conditions of release.

Standard 10-5.3 Release on financial conditions

(a) Financial conditions other than unsecured bond should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court. 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.

(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.

(c) Financial conditions should not be set to punish or frighten the defendant or to placate public opinion.

(d) On finding that a financial condition of release should be set, the judicial officer should require the first of the following

alternatives thought sufficient to provide reasonable assurance of the defendant's reappearance:

(i) the execution of an unsecured bond in an amount specified by the judicial officer, either signed by other persons or not;

(ii) the execution of an unsecured bond in an amount specified by the judicial officer, accompanied by the deposit of cash or securities equal to ten percent of the face amount of the bond. The full deposit should be returned at the conclusion of the proceedings, provided the defendant has not defaulted in the performance of the conditions of the bond; or

(iii) the execution of a bond secured by the deposit of the full amount in cash or other property or by the obligation of qualified, uncompensated sureties.

(e) Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the defendant's flight risk, and should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge.

(f) Financial conditions should be distinguished from the practice of allowing a defendant charged with a traffic or other minor offense to post a sum of money to be forfeited in lieu of any court appearance. This is in the nature of a stipulated fine and, where permitted, may be employed according to a predetermined schedule.

(g) In appropriate circumstances when the judicial officer is satisfied that such an arrangement will ensure the appearance of the defendant, third parties should be permitted to fulfill these financial conditions.

Standard 10-5.4 Release order provisions

In a release order, the judicial officer should:

(a) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the defendant's conduct; and

(b) advise the person of:

(i) the consequences of violating a condition of release, including the immediate issuance of a warrant for the defendant's arrest and possible criminal penalties;

(ii) the prohibitions against threats, force, or intimidation of witnesses, jurors and officers of the court, obstruction of criminal investigations and retaliation against a witness, victim or informant; and

(iii) the prohibition against any criminal conduct during pretrial release.

Standard 10-5.5 Willful failure to appear or to comply with conditions

The judicial officer may order a prosecution for contempt if the person has willfully failed to appear in court or otherwise willfully violated a condition of pretrial release. Willful failure to appear in court without just cause after pretrial release should be made a criminal offense.

Standard 10-5.6 Sanctions for violations of conditions of release, including revocation of release

(a) A person who has been released on conditions and who has violated a condition of release, including willfully failing to appear in court, should be subject to a warrant for arrest, modification of release conditions, revocation of release, or an order of detention, or prosecution on available criminal charges.

(b) A proceeding for revocation of a release order may be initiated by a judicial officer, the prosecutor, or a representative of the pretrial services agency. A judicial officer may issue a warrant for the arrest of a person charged with violating a release condition. Once apprehended, the person should be brought before a judicial officer. To the extent practicable, a defendant charged with willfully violating the condition of release should be brought before the judicial officer whose order is alleged to have been violated. The judicial officer should review the conditions of release previously ordered and set new or additional conditions.

(c) The judicial officer may enter an order of revocation and detention, if, after notice and a hearing, the judicial officer finds that there is:

(i) probable cause to believe that the person has committed a new crime while on release; or

(ii) clear and convincing evidence that the person has violated any other conditions of release; and

(iii) clear and convincing evidence, under the factors set forth in Standard 10-5.8, that there is no condition or combinations of conditions that the defendant is likely to abide by that would reasonably ensure the defendant's appearance in court and protect the safety of the community or any person.

(d) When a defendant has been charged with a new offense or violations of any conditions of release, he may be temporarily detained pending hearing after notice of the charges for a period of not more than [five calendar days] under this Standard.

Standard 10-5.7 Bases for temporary pretrial detention for defendants on release in another case

(a) The judicial officer may order the temporary detention of a defendant released in another case upon a showing of probable cause that the defendant has committed a new offense as alleged in the charging document if the judicial officer determines that the defendant:

(i) is and was at the time the alleged offense was committed:

(A) on release pending trial for a serious offense;

(B) on release pending imposition or execution of sentence, appeal of sentence or conviction, for any offense; or

(C) on probation or parole for any offense; and

(ii) may flee or pose a danger to the community or to any person.

(b) Unless a continuance is requested by the defense attorney, the judicial officer may order the detention of the defendant for a period of not more than [three calendar days], and direct the attorney for the government to notify the appropriate court, probation or parole official, or Federal, State or local law

enforcement official to determine whether revocation proceedings on the first offense should be initiated or a detainer lodged.

(c) At the end of the period of temporary detention, the defendant should have a hearing on the release or detention of the defendant on the new charged offense. If such a hearing is not conducted [within five calendar days], the defendant should be released on appropriate conditions pending trial.

Standard 10-5.8 Grounds for pretrial detention

(a) If, in cases meeting the eligibility criteria specified in Standard 10-5.9 below, after a hearing and the presentment of an indictment or a showing of probable cause in the charged offense, the government proves by clear and convincing evidence that no condition or combination of conditions of release will reasonably ensure the defendant's appearance in court or protect the safety of the community or any person, the judicial officer should order the detention of the defendant before trial.

(b) In considering whether there are any conditions or combinations of conditions that would reasonably ensure the defendant's appearance in court and protect the safety of the community and of any person, the judicial officer should take into account such factors as:

(i) the nature and circumstances of the offense charged;

(ii) the nature and seriousness of the danger to any person or the community, if any, that would be posed by the defendant's release;

(iii) the weight of the evidence;

(iv) the person's character, physical and mental condition, family ties, employment status and history, financial resources, length of residence in the community, including the likelihood that the defendant would leave the jurisdiction, community ties, history relating to drug or alcohol abuse, criminal history, and record of appearance at court proceedings;

(v) whether at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense;

(vi) the availability of appropriate third party custodians who agree to assist the defendant in attending court at the

proper time and other information relevant to successful supervision in the community;

(vii) any facts justifying a concern that a defendant will present a serious risk of flight or of obstruction, or of danger to the community or the safety of any person.

(c) In cases charging capital crimes or offenses punishable by life imprisonment without parole, where probable cause has been found, there should be a rebuttable presumption that the defendant should be detained on the ground that no condition or combination of conditions of release will reasonably ensure the safety of the community or any person or the defendant's appearance in court. In the event the defendant presents information by proffer or otherwise to rebut the presumption, the grounds for detention must be found to exist by clear and convincing evidence.

Standard 10-5.9 Eligibility for pretrial detention and initiation of the detention hearing

(a) The judicial officer should hold a hearing to determine whether any condition or combination of conditions will reasonably ensure the defendant's appearance in court and protect the safety of the community or any person. The judicial officer may not order the detention of a defendant before trial except:

(i) upon motion of the prosecutor in a case that involves:

(A) a crime of violence or dangerous crime; or

(B) a defendant charged with a serious offense on release pending trial for a serious offense, or on release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence; or on probation or parole for a serious offense involving a crime of violence, a dangerous crime; or

(ii) upon motion of the prosecutor or the judicial officer's own initiative, in a case that involves:

(A) a substantial risk that a defendant charged with a serious offense will fail to appear in court or flee the jurisdiction; or

(B) a substantial risk that a defendant charged in any case will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate a prospective witness or juror.

(b) If the judicial officer finds that probable cause exists, except for a defendant held under temporary detention, the hearing should be held immediately upon the defendant's first appearance before the judicial officer unless the defendant or the prosecutor seeks a continuance. Except for good cause shown, a continuance on motion of the defendant or the prosecutor should not exceed [five working days]. Pending the hearing, the defendant may be detained.

(c) A motion to initiate pretrial detention proceedings may be filed at any time regardless of a defendant's pretrial release status.

Standard 10-5.10 Procedures governing pretrial detention hearings: judicial orders for detention and appellate review

(a) At any pretrial detention hearing, defendants should have the right to:

(i) be present and be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed;

(ii) testify and present witnesses on his or her own behalf;

(iii) confront and cross-examine prosecution witnesses; and,

(iv) present information by proffer or otherwise.

(b) The defendant may be detained pending completion of the pretrial detention hearing.

(c) The duty of the prosecution to release to the defense exculpatory evidence reasonably within its custody or control should apply at the pretrial detention hearing.

(d) At any pretrial detention hearing, the rules governing admissibility of evidence in criminal trials should not apply. The court should receive all relevant evidence. All evidence should be recorded. The testimony of a defendant should not be admissible in any other criminal proceedings against the defendant in the case in chief, other than a prosecution for perjury based upon that testimony or for the purpose of impeachment in any subsequent proceedings.

(e) In pretrial detention proceedings under Standard 10-5.8 or 10-5.9, where there is no indictment, the prosecutor should establish probable cause to believe that the defendant committed the predicate offense.

(f) In pretrial detention proceedings, the prosecutor should bear the burden of establishing by clear and convincing evidence that no

condition or combination of conditions of release will reasonably ensure the defendant's appearance in court and protect the safety of the community or any person.

(g) A judicial order for pretrial detention should be subject to the following limitations and requirements.

(i) Unless the defendant consents, no order for pretrial detention should be entered by the court except on the conclusion of a full pretrial detention hearing as provided for within these Standards.

(ii) If, on conclusion of a pretrial detention hearing, the court determines by clear and convincing evidence that no condition or combination of conditions will reasonably ensure the appearance of the person as required, and the safety of any other person and the community pursuant to the criteria established within these Standards, the judicial officer should state the reasons for pretrial detention on the record at the conclusion of the hearing or in written findings of fact within [three days]. The order should be based solely upon evidence provided for the pretrial detention hearing. The court's statement on the record or in written findings of fact should include the reasons for concluding that the safety of the community or of any person, the integrity of the judicial process, and the presence of the defendant cannot be reasonably ensured by setting any conditions of release or by accelerating the date of trial.

(iii) The court's order for pretrial detention should include the date by which the detention must be considered *de novo*, in most cases not exceeding [90 days]. A defendant may not be detained after that date without a pretrial detention hearing to consider extending pretrial detention an additional [90 days] following procedures under Standards 10-5.8, 10-5.9 and this Standard. If a pretrial detention hearing to consider extending detention of the defendant is not held on or before that date, the defendant who is held beyond the time of the detention order should be released immediately under reasonable conditions that best minimize the risk of flight and danger to the community.

(iv) Nothing in these Standards should be construed as modifying or limiting the presumption of innocence.

(h) A pretrial detention order should be immediately appealable by either the prosecution or the defense and should receive expedited appellate review. If the detention decision is made by a judicial

officer other than a trial court judge, the appeals should be *de novo*. Appeals from decisions of trial court judges to appellate judges should be reviewed under an abuse of discretion standard.

Standard 10-5.11 Requirement for accelerated trial for detained defendants

Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice. These accelerated time limitations should be shorter than current speedy trial time limitations applicable to defendants on pretrial release. The failure to try a detained defendant within such accelerated time limitations should result in the defendant's immediate release from detention under reasonable conditions that best minimize the risk of flight and danger to the community pending trial, unless the delay is attributable to or agreed to by the defendant.

Standard 10-5.12 Re-examination of the release or detention decision: status reports regarding pretrial detainees.

(a) Upon motion by the defense, prosecution or by request of the pretrial services agency supervising released defendants alleging changed or additional circumstances, the court should promptly reexamine its release decision including any conditions placed upon release or its decision authorizing pretrial detention under Standards 10-5.8 through 10-5.10. The judicial officer may, after notice and hearing when appropriate, at any time add or remove restrictive conditions of release, short of ordering pretrial detention, to ensure court attendance and prevent criminal law violation by the defendant.

(b) The pretrial services agency, prosecutor, jail staff or other appropriate justice agency should be required to report to the court as to each defendant, other than one detained under Standards 10-5.8, 10-5.9 and 10-5.10, who has failed to obtain release within [24 hours] after entry of a release order under Standard 10-5.4 and to

advise the court of the status of the case and of the reasons why a defendant has not been released.

(c) For pretrial detainees subject to pretrial detention orders, the prosecutor, pretrial services agency, defender, jail staff, or other appropriate agency should file a report with the court regarding the status of the defendant's case and detention regarding the confinement of defendants who have been held more than [90 days] without a court order in violation of Standards 10-5.10(g)(iii) and 10-5.11.

Standard 10-5.13 Trial

The fact that a defendant has been detained pending trial should not be allowed to prejudice the defendant at the time of trial or sentencing. The court should ensure that the trial jury is unaware of the defendant's detention.

Standard 10-5.14 Credit for pre-adjudication detention

Every convicted defendant should be given credit, against both a maximum and minimum term or a determinate sentence, for all time spent in custody as a result of the criminal charge for which a sentence of imprisonment is imposed.

Standard 10-5.15 Temporary release of a detained defendant for compelling necessity

Upon a showing by defense counsel of compelling necessity, including for matters related to preparation of the defendant's case, a judicial officer who entered an order of pretrial detention under Standards 10-5.8 through 10-5.10 may permit the temporary release of a pretrial detained person to the custody of a law enforcement or other court officer, subject to appropriate conditions of temporary release.

Standard 10-5.16 Circumstances of confinement of defendants detained pending adjudication

Defendants detained pending adjudication should be confined in facilities separate from convicted persons awaiting sentencing or serving sentences or held in custody pending appeal. The rights and privileges of defendants detained pending adjudication should not be more restricted than those of convicted defendants who are imprisoned. Detained defendants should be provided with adequate means to assist in their own defense. This requirement includes but is not limited to reasonable telephone rates and unmonitored telephone access to their attorneys, a law library, and a place where they can have unmonitored meetings with their attorneys and review discovery.

PART VI

NOTICE TO VICTIMS OF CRIME

Standard 10-6.1 Judicial assurance of notice to victims

As part of the pretrial release process, the judicial officer should direct the appropriate office or agency to provide victim(s) of the crime with notice of any crime charged, any conditions imposed on the defendant including those related to possession or purchase of firearms, and methods of seeking enforcement of release conditions.

ABA CRIMINAL JUSTICE STANDARDS
PRETRIAL RELEASE

BLACK LETTER WITH COMMENTARY

INTRODUCTION

In any criminal case, the decision of a court concerning the defendant's pretrial status is a crucially important part of the adjudicatory process. The judicial officer who makes this decision determines whether the person is to be at liberty (though perhaps subject to some conditions of release) or held in secure detention pending resolution of the case. There is considerable evidence that pretrial custody status is associated with the ultimate outcomes of cases, with released defendants consistently faring better than defendants in detention.[1] At the same time, however, there is also evidence that some persons on release fail to return for scheduled court appearances and behave in ways that threaten public safety.[2] Any pretrial release system must seek to strike an

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[1] *See, e.g.*, Caleb Foote, "Compelling Appearance in Court: Administration of Bail in Philadelphia," 102 *University of Pennsylvania Law Review* 1031 (1954) at 1048-1049; Anne Rankin, "The Effect of Pretrial Detention," 39 *New York University Law Review* 641 (1964); Stevens H. Clarke and Susan T. Kurtz, "The Importance of Interim Decisions to Felony Trial Court Dispositions," 74 *Journal of Criminal Law and Criminology* (1983); Michael R. Gottfredson and Donald M. Gottfredson, *Decision Making in Criminal Justice: Toward a Rational Exercise of Discretion* (New York: Plenum Press, 1988); Marian Williams, "The Effect of Pretrial Detention on Imprisonment Decisions," 28 *Criminal Justice Review* 299-316 (Autumn 2003). *Cf.* John S. Goldkamp, "The Effects of Detention on Judicial Decisions: A Closer Look," 5 *Justice System Journal* 234 (1980), a multi-variate analysis of relationships between detention decisions and case outcomes in Philadelphia in the 1970s. Goldkamp found that when variables such as charge seriousness and number of prior arrests were controlled for, detention had no significant effect on whether the defendant was acquitted or convicted. However, for those defendants who were convicted, pretrial custody significantly increased the likelihood of a custodial sentence.

[2] *See, e.g.*, Thomas H. Cohen and Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2002* (Washington, D.C.: Bureau of Justice Statistics, February 2006), pp. 16-22. This publication, analyzing data from 40 urban

appropriate balance between the societal interests in personal liberty and public safety, and do so in a fashion that is workable and that comports with fundamental principles of due process of law.

These Third Edition Standards on Pretrial Release build upon prior editions of the Standards[3] and also draw upon state and federal experience in setting forth a framework for striking the necessary balance and developing viable alternatives to the traditional surety bail system. As in previous editions, these Standards aim to minimize unnecessary pretrial detention in a variety of ways including encouraging the use of citations and summonses in cases involving minor offenses, articulating a presumption in favor of release on personal recognizance, and—in cases where release on personal recognizance is inappropriate—providing for use of the least restrictive conditions necessary to assure the defendant's appearance for scheduled court proceedings and minimize the risk of danger to public safety. The Standards also set out a framework for considering detention in appropriate cases and for ordering detention when it is shown that no condition or combination of conditions of release will reasonably assure a defendant's attendance at court proceedings and protect the community and individual persons. The approach is one that makes the decision to detain an open one, based on clear criteria and limited to situations in which there is a clear showing of a substantial risk of flight or danger to public safety.

Previous editions of the Standards had emphasized that money bail should be used only to ensure the defendant's appearance in court and only when no other conditions could reasonably assure appearance, and recommended that compensated sureties be abolished. The Third Edition Standards adhere to this position, recognizing that the problems with the traditional surety bail system undermine the integrity of the criminal justice system and are ineffective in achieving key objectives of the release/detention decision. The views expressed in the opening

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counties, found that 22 percent of defendants released prior to case disposition failed to make a scheduled court appearance (though only 6 percent remained a fugitive at the conclusion of the one-year study period) and that 18 percent were re-arrested for a new offense allegedly committed while on some form of pretrial release. The study did not analyze the extent of failure to appear or re-arrest by the type of supervision (if any) provided for released defendants.

[3] The initial ABA Standards on Pretrial Release were approved by the ABA House of Delegates in 1968. Second Edition Standards, approved in 1979, were revised in 1985, primarily to establish criteria and procedures for preventive detention in limited categories of cases. The Third Edition Standards contained herein were approved in February 2002.

paragraph of the Introduction to the First Edition Standards published in 1968 are still applicable in the early years of the twenty-first century:

> The bail system as it now generally exists is unsatisfactory from either the public's or the defendant's point of view. Its very nature requires the practically impossible task of transmitting risk of flight into dollars and cents and even its basic premise—that risk of financial loss is necessary to prevent defendants from fleeing prosecution—is itself of doubtful validity. The requirement that virtually every defendant must post bail causes discrimination against defendants and imposes personal hardship on them, their families, and on the public which must bear the cost of their detention and frequently support their dependents on welfare. Moreover, bail is generally set in such a routinely haphazard fashion that what should be an informed, individualized decision is in fact a largely mechanical one in which the name of the charge, rather than the facts about the defendant, dictates the amount of bail.[4]

Beginning with the pioneering efforts of the Vera Institute of Justice through its Manhattan Bail Project in the early 1960s, a number of jurisdictions have developed alternatives to the traditional money bail system.[5] While practices vary widely, it is now common for many courts

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[4] American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Pretrial Release – Approved Draft, 1968* (New York: American Bar Association, 1968) at 1. Other critiques of the American bail system have catalogued numerous abuses and miscarriages of justice associated with traditional surety bail practices, including exercise of unfettered judicial discretion, economic and racial bias, overcrowded local jails, substandard jail conditions, and lengthy delays in resolution of cases, as well as the disadvantages that detained defendants face in preparing a defense and seeking to maintain employment and family responsibilities. See the sources cited in the commentary accompanying Standard 10-1.4, *infra.*

[5] For description of the early bail reform efforts, *see, e.g.,* Charles E. Ares, Anne Rankin, and Herbert Sturz, "The Manhattan Bail Project: An Interim Report on the Use of Pre-trial Parole," 38 New York University Law Review 67 (1963); *Proceedings and Interim Report of the [1964] National Conference on Bail and Criminal Justice* (Washington, D.C.: U.S. Department of Justice and the Vera Foundation, Inc., 1965); Wayne H. Thomas, Jr., *Bail Reform in America* (Berkeley: University of California Press, 1976), esp. pp 3-27; Wayne H. Thomas, Jr. et al., *Pretrial Release Programs* (Washington, D.C.: National Institute of Law Enforcement and Criminal Justice, April 1977).

to release some defendants on non-financial conditions.[6] However, further improvements are unquestionably needed, because in most states and localities significant problems persist. The problems include continued reliance on financial bail and the accompanying characteristics of unbridled judicial discretion, imprecise and covert goals for judicial decision-making processes, inadequate information for judicial decision-makers, and de facto reliance on bondsmen to decide who will get released in many instances. The results of flawed processes include often unacceptably high rates of failure to appear and other types of pretrial misconduct, as well as unnecessary detention of many defendants.

The Revised Second Edition Standards, like the District of Columbia statute governing pretrial release and detention and the federal Bail Reform Act of 1984, called for careful consideration, by a judge or other court officer, of information related to the risk that a defendant will fail to appear or pose a significant threat to public safety. However, although many states have revised their bail statutes to allow consideration of risk to public safety, no states have yet adopted a system that calls for the type of careful scrutiny of information about the defendant's background and financial circumstances that was recommended in the Revised Second Edition Standards. On the contrary, it is common in many jurisdictions—especially ones that have no pretrial services program—for decisions about pretrial detention or release to be made with little or no information about the financial circumstances of the defendant or other factors relevant to assessing the nature of any risk presented by the defendant's release. Often, the decisions are made in hurried initial appearance proceedings in which the defendant is without counsel.

The results of decisions made under these circumstances can be serious, and are especially likely to have adverse impact on poor defendants and on racial and cultural minorities. Confinement during the pretrial period places detainees at a disadvantage in preparing a defense by making it difficult for the defendant to consult with counsel, locate

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[6] *See, e.g.*, Cohen and Reaves, *supra* note 2, p. 43 (Appendix Table E). That table shows that, nationally, 62 percent of felony defendants in large urban counties in 2002 were released pending disposition of their case—approximately 28 percent on non-financial conditions and 35 percent on surety bond or other type of financial conditions. However, it is clear from the same table that surety bondsmen continue to play a prominent role in most jurisdictions. The table shows that in 24 of the 40 counties participating in the study, more persons were released on surety bond than on non-financial conditions.

witnesses, and gather evidence. Pretrial detention also strains the defendant's family relations and is likely to result in loss of employment. The negative consequences of unnecessary detention are not limited to defendants and their families. Such detention, often very lengthy, leads directly to overcrowded jails and ultimately to large expenditures of scarce public resources for construction and operation of new jail facilities.

Major improvements in pretrial processes are needed and are clearly feasible. A number of jurisdictions have established systems for gathering relevant and objective information about defendants' backgrounds and about the appropriateness of particular conditions for individual defendants, making release decisions based on such information, and successfully managing defendants on release through comprehensive pretrial services. In four states and the District of Columbia, bail bonding for profit has been completely or substantially eliminated.

Pretrial services agencies now exist in more than 300 jurisdictions in the United States.[7] If well-designed and well-managed, pretrial services agencies and programs can be extremely valuable contributors to a greatly improved pretrial process.[8] They are key components of the approach to pretrial release that is set forth in these Standards.

The Third Edition Standards are intended to provide a foundation for renewed efforts to make lasting improvements in pretrial release and detention practices. Drawing from previous editions of the ABA Pretrial Release Standards, current laws (especially relevant federal and District of Columbia statutes governing detention and release decision-making), and operational practices, the Standards address two interrelated needs: the need to foster safe pretrial release of defendants whenever possible, and the need to provide for pretrial detention of those who cannot be safely released.

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[7] *See* John Clark and D. Alan Henry, *Pretrial Services Programming at the Start of the 21st Century: A Survey of Pretrial Services Programs* (Washington, D.C.: Bureau of Justice Assistance, 2003), p.2.

[8] *See* Barry Mahoney et al., *Pretrial Services Programs: Responsibilities and Potential* (Washington, D.C.: National Institute of Justice, 2001). The National Association of Pretrial Services Agencies (NAPSA) has adopted standards, modeled in part on these Third Edition ABA Standards, that include fairly detailed guidelines for the organization and operation of pretrial services programs, *See* National Association of Pretrial Services Agencies, *Standards on Pretrial Release, Third Edition* (2004), esp. Part III, Standards 3.1 – 3.8.

The Standards articulate a well-grounded presumption in favor of release, set forth procedures for determining whether and under what conditions defendants can be released, and outline procedures for limited and fair use of pretrial detention when necessary. They stress the importance of relevant, accurate, and timely information to support the release/detention determination and to promote greater accountability in the pretrial release process. The Standards call for effective monitoring and supervision of released defendants, while also recognizing that many local systems currently lack the pretrial monitoring and supervision capabilities that are needed to manage a large population of defendants released to the community pending adjudication of charges against them. These capabilities can be developed through thoughtful re-allocation of resources, imaginative use of modern information and communications technology, and effective leadership.

The Third Edition Standards emphasize that pretrial services programs, with professional pretrial services officers responsible for critically important information gathering and supervision functions, are vital for an effectively functioning criminal justice process. To justice systems confronting the difficult challenges of jail crowding and large numbers of released defendants in the community, whether in a large urban county or a sparsely populated rural area, effective pretrial services cannot be considered a luxury. Rather, well-designed and well-run pretrial services programs constitute a core component of a just pretrial release and detention system—a major resource needed by the judiciary to exercise its responsibility for fair and effective decision-making concerning the pretrial status of accused persons and needed by communities to provide essential monitoring and supervision of released defendants.

PART I

GENERAL PRINCIPLES

The introductory Standards in Part I set out the purposes of the pretrial release/detention decision and outline basic principles that should guide the decision-making process. These general principles provide an overall framework for the specific standards contained in subsequent Parts. They emphasize the public and defendant rights and interests at stake in release/detention decision-making, and also distinguish the pretrial release decision contemplated by these Standards from the traditional financial bail decision.

In practice, the decision to detain or release a person arrested for a criminal offense is often made under difficult conditions. It is common for the initial (and often only) decision to detain or release a defendant to be made in a cursory proceeding at the earliest stage of the adjudicatory process. In many places, the decision is made on the basis of insufficient or even inaccurate information, and without the defendant's having the benefit of advice and representation by an attorney. Two kinds of mistakes can easily be made at this stage: a defendant who could safely be released may be detained or a defendant who requires confinement may be released. Thus, the stakes for both the defendant and the community are high.

As articulated in the general principles that follow, these Standards view the decision to release or detain as one that should be made in an open, informed, and accountable fashion, beginning with a presumption (which can be rebutted) that the defendant should be released on personal recognizance pending trial. The decision-making process should have defined goals, clear criteria, adequate and reliable information, and fair procedures. When conditional release is appropriate, the conditions should be tailored to the types of risks that a defendant poses, as ascertained through the best feasible risk assessment methods. A decision to detain should be made only upon a clear showing of evidence that the defendant poses a danger to public safety or a risk of non-appearance that requires secure detention. Pretrial incarceration should not be brought about indirectly through the covert device of monetary bail.

The strong presumption in favor of pretrial release is tied, in a philosophical if not a technical sense, to the presumption of innocence. It also reflects a view that any unnecessary detention is costly to both the individual and the community, and should be minimized. However, the Standards make it clear that under certain circumstances the presumption of release can be overcome by a showing that no conditions of release can appropriately and reasonably assure attendance in court or protect the safety of victims, witnesses, or the general public.

Standard 10-1.1 Purposes of the pretrial release decision

The purposes of the pretrial release decision include providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses, and the community from threats, danger, or interference. The judge or judicial officer should decide whether to release a defendant on personal recognizance or unsecured appearance bond, release a defendant on a condition or combination of conditions, temporarily detain a defendant, or detain a defendant according to procedures outlined in these Standards. The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support. These Standards limit the circumstances under which pretrial detention may be authorized and provide procedural safeguards to govern pretrial detention proceedings.

History of Standard

This Standard broadens the language in Second Edition, Revised Standard 10-1.1 to enumerate three purposes of the pretrial release decision and to outline a range of possible actions that a judicial officer can take in making the release/detention decision. It also deletes a reference in the former Standards to conditional release pending diversion.

Related Standards

NAPSA, Standards on Pretrial Release (2004), 1.1
NDAA, National Prosecution Standards (1991), 45.1(a)

Commentary

This Standard introduces the general principles that provide the foundation for subsequent standards. It articulates three main purposes of the release/detention decision, sets forth the principal options open to the judicial officer making the decision, and lists several reasons why pretrial detention should be ordered only in limited circumstances. Two of the purposes—providing due process for the accused and maintaining the integrity of the judicial process by assuring the defendant's attendance at court proceedings—have historically been recognized as integral to decision-making regarding release or detention. The third—protecting victims, witnesses, and the community from threats, danger, or intimidation by a released defendant—has become a recognized purpose of the release/detention in many jurisdictions during the past thirty years. It is now common for jurisdictions to provide by statute for consideration of risks to public safety as well as risk of nonappearance in pretrial release decision-making.[9] These Standards, like the Revised Second Edition Standards, take the forthright position that concern for public safety (including victims and witnesses, as well as the community more generally) should be addressed in pretrial release determinations.[10]

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[9] By one count, at least 44 states now have statutes that include public safety as well as risk of failure to appear as being appropriate considerations in the release/detention decision. *See* Evie Lotze *et al.*, *The Pretrial Services Reference Book* (Washington, D.C.: Pretrial Services Resource Center, 1999) at 6. The first legislation explicitly addressing the issue was the District of Columbia's release and pretrial detention statute enacted in 1970 (D.C. Code Ann. § 23-1321 *et seq.* (1970)). Beginning in the 1980s, there was a movement in a growing number of jurisdictions to recognize a public safety exception to the presumption of pretrial release, culminating in the enactment of the Federal Bail Reform Act of 1984 (18 U.S.C. §§ 3141-56 and further amendments to the District of Columbia laws initially enacted in 1970. The preventive detention provisions of the District of Columbia statute were upheld by the U.S. Court of Appeals for the District of Columbia Circuit in United States v. Edwards, 430 A.2d 1321 (D.C. 1981), *cert. denied,* 455 U.S. 1022 (1982), and similar provisions in the Federal Bail Reform Act of 1984 were upheld by the U.S. Supreme Court in United States v. Salerno, 481 U.S. 739 (1987). *See also* Schall v. Martin, 467 U.S. 253 (1984), holding that the pretrial detention of an accused juvenile delinquent based on a finding that there was a "serious risk" that the juvenile would commit another crime if released did not violate due process.

[10] Explicit recognition of public safety as a factor in pretrial release determinations was a topic of discussion at the 1964 National Conference on

Standard 10-1.1 delineates four options for the pretrial release decision: (1) release of the defendant on personal recognizance or unsecured bond; (2) release under conditions set by the court (as described in Standards 10-1.2 and 10-5.2); (3) detention of the defendant temporarily, under certain circumstances (see Standard 10-5.7); or (4) detention of the defendant pending adjudication of the charges according to clearly specified criteria and procedures (see Standards 10-5.8 – 10-5.10). As developed in subsequent standards and related commentary, the thrust of these Standards is toward release of the defendant unless there are strong reasons for detention. The statement that "the law favors the release of defendants pending adjudication of charges" is consistent with Supreme Court opinions emphasizing the limited permissible scope of pretrial detention.[11]

Bail and Criminal Justice, and was addressed by the drafters of the First Edition of the ABA Standards on Pretrial Release. The Introduction to those Standards notes that the practice of setting high bail in order to deny release to persons thought to be risks of committing further crime was "generally regarded as a distortion of the bail system" and makes it clear that the drafters gave serious consideration to a proposal that would provide for open consideration of the issue of dangerousness, rather than leave it "masked behind manipulations of bail amounts." The preventive detention proposal was not included in the approved First Edition Standards, but was reproduced as Appendix C to the Standards in order to provide a basis for further consideration and debate. See the First Edition Standards, supra note 4, pp. 5-6, 66-70 (commentary accompanying Standard 5.5), and 83-88 (Appendix C). Further discussion of the public safety rationale for pretrial detention can be found in the Second Edition, Revised Pretrial Release Standards, commentary to Standard 10-5.4, at 103-08. *See also* Daniel Richman, "*United States v. Salerno:* The Constitutionality of Regulatory Detention" in Carol S. Steiker, ed., *Criminal Procedure Stories* (New York: Foundation Press, 2006), at 413, 414-19.

[11] *See, e.g.*, Stack v. Boyle, 342 U.S. 1 (1951) at 4-5 (noting the "traditional right to freedom before conviction" for persons arrested for non-capital offenses); also United States v. Salerno, 481 U.S. 739 (1987) at 755.

Standard 10-1.2 Release under least restrictive conditions; diversion and other alternative release options

In deciding pretrial release, the judicial officer should assign the least restrictive condition(s) of release that will reasonably ensure a defendant's attendance at court proceedings and protect the community, victims, witnesses, or any other person. Such conditions may include participation in drug treatment, diversion programs or other pre-adjudication alternatives. The court should have a wide array of programs or options available to promote pretrial release on conditions that ensure appearance and protect the safety of the community, victims, and witnesses pending trial and should have the capacity to develop release options appropriate to the risks and special needs posed by defendants, if released to the community. When no conditions of release are sufficient to accomplish the aims of pretrial release, defendants may be detained through specific procedures.

History of Standard

This Standard is a new general principle relevant to the substantive provisions of Standards 10-5.1, 10-5.2, and 10-5.3.

Related Standards

NAC, Corrections (1973), 4.4
NAC, Courts (1973), 4.6
NAPSA, Standards on Pretrial Release (2004), 1.2
NDAA, National Prosecution Standards (1991), 45.1(c)(2); 45.5(a)(1); 45.5(b)

Commentary

This Standard's presumption that defendants should be released under the least restrictive conditions necessary to provide reasonable assurance they will not flee or present a danger is tied closely to the presumption favoring release generally. It has been codified in the Federal Bail Reform Act[12] and the District of Columbia release and

[12] 18 U.S.C. § 3142(c)(1)(B) (1984) ("If the judicial officer determines that the release . . . will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person . . . subject to the least restrictive further condition, or combination of conditions, that such

pretrial detention statute,[13] as well as in the laws and court rules of a number of states.[14] The presumption constitutes a policy judgment that restrictions on a defendant's freedom before trial should be limited to situations where restrictions are clearly needed, and should be tailored to the circumstances of the individual case. Additionally, the presumption reflects a practical recognition that unnecessary detention imposes financial burdens on the community as well as on the defendant.

In many instances, a defendant can be released on a simple promise to appear on the next scheduled court date. Other times it will be desirable to impose some conditions on the defendant's release, in order to help assure the defendant's appearance in court and to help minimize the risk of danger to the community. This Standard emphasizes the desirability of the court having a wide range of possible options other than detention that can be used to achieve these objectives, while at the same time stressing that the conditions imposed by the court should be the *least restrictive* necessary to accomplish the aims of assuring the defendant's return to court and protecting public safety.

As Chief Justice Rehnquist noted in his opinion for the Supreme Court in *United States v. Salerno,* "In our society liberty is the norm and detention prior to trial is the carefully limited exception."[15] This Standard provides that, when a judicial officer determines that no conditions of release will suffice to accomplish the aims of pretrial

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judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community . . . .").

[13] D.C. Code Ann § 23-1321(c)(1)(B) (2001 Edition, 2003 Supp.).

[14] At least twelve states have established a statutory presumption that defendants charged with bailable categories of offenses should be released on their own recognizance or on unsecured bond, unless the judicial officer determines that the defendant presents a risk that calls for more restrictive conditions or for detention. *See, e.g.,* Alaska Stat. Sec. 12.30.020; DE Code Ann. Tit. 11 Sec. 2105; IA Code Sec. 811.2; KY Rev. Stat. 431.520; Ma. Gen. Laws Ann. ch. 276, § 58A; ME Rev. Stat. Tit. 58 Sec 1026; NC Gen Stat. Sec. 15A-534 (a) and (b); OR Rev. Stat. Sec. 135.245 (3); SC Code Ann. Sec. 17-15-10; SD Comp Laws Ann. Sec. 23A-43-2; TN Code Ann. Tit 13 Sec. 7554; WI Stat. 961.01. Additionally, six states have established a similar presumption by court rule. *See* AZ Rule of Crim. Proc. 7.2 (a); MN Rule of Crim. Proc. 6.10; ND Rule of Crim. Proc. 46 (a); NM Rule of Crim. Proc. 22 (a); WA. Crim. Rule 3.2; WY Rule of Crim. Proc. 8 (c) (1). For discussion of such laws and rules, *see* John S. Goldkamp, "Danger and Detention: A Second Generation of Bail Reform," 6 Journal of Criminal Law & Criminology 1 (1985) at 14.

[15] United States v. Salerno, 481 U.S. 739 (1987) at 755.

release, a defendant may be detained only if specific procedures—set forth *infra*, in Standards 10-5.7 – 10-5.10—are followed.

Standard 10-1.3 Use of citations and summonses

The principle of release under least restrictive conditions favors use of citations by police or summons by judicial officers in lieu of arrest at stages prior to the first judicial appearance in cases involving minor offenses. In determining whether an offense is minor, consideration should be given to whether the alleged crime involved the use or threatened use of force or violence, possession of a weapon, or violation of a court order protecting the safety of persons or property.

History of Standard

This Standard is new as a general principle. However, related Standards in Parts II (Release by Law Enforcement Officer Acting Without an Arrest Warrant) and III (Issuance of Summons in Lieu of Arrest) draw on Second Edition, Revised Standards.

Related Standards

ALI, Model Code of Pre-Arraignment Procedure (1975), 120.2; 120.4; 130.3

NDAA, National Prosecution Standards (1991), 45.1(c)(1); 45.2; 45.3

Commentary

This Standard extends the principle that courts should impose the least restrictive restraint on a defendant's liberty necessary by encouraging the use of citations or summonses in lieu of arrest for minor offenses and violations.

The term "minor offenses" is used rather than "misdemeanor" since the latter term is defined differently from jurisdiction to jurisdiction. Generally, "minor offenses" are the equivalent of lower-level misdemeanors. However, when the alleged offense involves danger or weapons – as, for example, is often the case in domestic violence misdemeanors – the Standard allows jurisdictions to determine that the offense is not "minor" regardless of its statutory designation.

Standard 10-1.4 Conditions of release

(a) Consistent with these Standards, each jurisdiction should adopt procedures designed to promote the release of defendants on their own recognizance or, when necessary, unsecured bond. Additional conditions should be imposed on release only when the need is demonstrated by the facts of the individual case reasonably to ensure appearance at court proceedings, to protect the community, victims, witnesses, or any other person, and to maintain the integrity of the judicial process. Whenever possible, methods for providing the appropriate judicial officer with reliable information relevant to the release decision should be developed, preferably through a pretrial services agency or function, as described in Standard 10-1.10.

(b) When release on personal recognizance is not appropriate reasonably to ensure the defendant's appearance at court and to prevent the commission of criminal offenses that threaten the safety of the community or any person, constitutionally permissible non-financial conditions of release should be employed consistent with Standard 10-5.2.

(c) Release on financial conditions should be used only when no other conditions will ensure appearance. When financial conditions are imposed, the court should first consider releasing the defendant on an unsecured bond. If unsecured bond is not deemed a sufficient condition of release, and the court still seeks to impose monetary conditions, bail should be set at the lowest level necessary to ensure the defendant's appearance and with regard to a defendant's financial ability to post bond.

(d) Financial conditions should not be employed to respond to concerns for public safety.

(e) The judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay.

(f) Consistent with the processes provided in these Standards, compensated sureties should be abolished. When financial bail is imposed, the defendant should be released on the deposit of cash or securities with the court of not more than ten percent of the amount of the bail, to be returned at the conclusion of the case.

History of Standard

This Standard is an expanded version of Second Edition, Revised Pretrial Release Standard 10-1.3. It contains a new provision explicitly precluding the use of financial conditions in response to concerns for public safety.

Related Standards

ABA, Standards for Criminal Justice, Defense Function Standard (3d ed. 1993), 4-3.5(j)

NAC, Corrections (1973), 4.4

NAC, Courts (1973), 4.6

NAPSA, Standards for Pretrial Release (2004), 1.4

NCCUSL, Uniform Rules of Criminal Procedure (1987), 341

NDAA, National Prosecution Standards (1991), 45.1(c)(2); 45.1(c)(3); 45.5; 45.6

Commentary

Standard 10-1.4(a)

This Standard calls upon jurisdictions to make a reality of the presumption in favor of release on personal recognizance by establishing procedures that will promote such release. It also recognizes that there are circumstances when release on personal recognizance may not be appropriate and emphasizes the desirability of jurisdictions developing methods to ensure that judicial officers have reliable information relevant to the release decision. The Standard recommends that jurisdictions use pretrial services programs to acquire and present the information to the judicial officer, as described in more detail in Standard 10-1.10.

Standard 10-1.4(b)

If the judicial officer determines that outright release on the defendant's own recognizance is not appropriate, consideration should next be given to release on non-financial conditions. Standard 10-5.2 sets forth a wide range of non-financial conditions that may be imposed depending on the circumstances of a particular case.

Standard 10-1.4(c)

This Standard greatly restricts, though it does not entirely eliminate, recourse to financial conditions of release. It authorizes such conditions only when non-financial conditions are insufficient to provide reasonable assurance of the defendant's appearance in court. When financial

conditions are warranted, the least restrictive conditions principle requires that unsecured bond be considered first. If the court finds that unsecured bond is not sufficient, it may require the defendant to post bail; however, the bail amount must be within the financial reach of the defendant and should not be at an amount greater than necessary to assure the defendant's appearance in court.

Standard 10-1.4(d)

This Standard strongly emphasizes the principle that financial bail is not an appropriate response to concerns that the defendant will pose a danger if released. Such concerns are appropriately addressed through a special hearing process to determine whether a person will be detained, pursuant to Standards 10-5.8 through 10-5.10. Money bail should not be used for any reason other than to respond to a risk of flight. The practice of setting very high bail in situations where the defendant is regarded as posing a risk of dangerousness is explicitly proscribed by this Standard.

Standard 10-1.4(e)

This Standard prohibits the imposition of financial conditions that the defendant cannot meet.[16] The intent behind this limitation is to ensure that financial bail serves only as an incentive for released defendants to appear in court and not as a subterfuge for detaining defendants. Detention should only result from an explicit detention decision, at a hearing specifically designed to decide that question, not from the defendant's inability to afford the assigned bail.

Standard 10-1.4(f)

The plain language of the First Edition and Second Edition, Revised Pretrial Release Standards that "compensated sureties should be abolished" is retained and included here as an important principle relating to the determination of pretrial release for reasons that are basically similar to those articulated in previous editions.[17] However,

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[16] *Cf.* 18 U.S.C. § 3142(c)(2) (stating that "the judicial officer may not impose a financial condition that results in the pretrial detention of the person"); D.C. Code Ann. § 23-1321(c)(3) (stating that the judicial officer may not impose a financial condition to assure the safety of a person or the community but "may impose such 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").

[17] The First Edition Pretrial Release Standard 10-5.4 commentary noted that "the professional bondsman is an anachronism in the criminal process.

additional language in those earlier editions concerning regulation of sureties "pending abolition" has been deleted so as to leave no doubt as to the imperative nature of the recommendation that they be abolished.

There are at least four strong reasons for recommending abolition of compensated sureties. First, under the conventional money bail system, the defendant's ability to post money bail through a compensated surety is completely unrelated to possible risks to public safety. A commercial bail bondsman is under no obligation to try to prevent criminal behavior by the defendant. Second, in a system relying on compensated sureties, decisions regarding which defendants will actually be released move from the court to the bondsmen. It is the bondsmen who decide which defendants will be acceptable risks—based to a large extent on the defendant's ability to pay the required fee and post the necessary collateral. Third, decisions of bondsmen—including what fee to set, what collateral to require, what other conditions the defendant (or the person posting the fee and collateral) is expected to meet, and whether to even post the bond—are made in secret, without any record of the reasons for these decisions. Fourth, the compensated surety system discriminates against poor and middle-class defendants, who often cannot afford the non-refundable fees required as a condition of posting bond or do not have assets to pledge as collateral. If they cannot afford the bondsman's fees and are unable to pledge the collateral required, these defendants remain in jail even though they may pose no risk of failure to appear in court or risk of danger to the community.[18]

Close analysis of his role indicates he serves no major purpose that could not be better served by public officers at less cost in economic and human terms." The commentary for the Second Edition, Revised, Pretrial Release Standard 10-5.5 states that "the commercial bond business has been one of the most tawdry parts in the criminal justice system. . .. Even if bonding agents were effective in returning absconding defendants, however, it is questionable policy for the criminal justice system to rely heavily on them."

[18] There have been numerous critiques of the compensated surety system, dating back to at least the 1920s. *See, e.g.*, Roscoe Pound and Felix Frankfurter, eds., *Criminal Justice in Cleveland: Reports of the Cleveland Foundation Survey of the Administration of Criminal Justice in Cleveland, Ohio* (Cleveland: The Cleveland Foundation, 1922; reprinted, Montclair, NJ: Patterson Smith, 1968), pp. 290-292; Arthur L. Beeley, *The Bail System in Chicago* (Chicago: University of Chicago Press, 1927); Caleb Foote, "Compelling Appearance in Court: Administration of Bail in Philadelphia," 102 *University of Pennsylvania Law Review* 1031 (1954); Note, "A Study of the Administration of Bail in New York City," 106 *University of Pennsylvania Law Review* 693 (1958); Daniel J. Freed and Patricia M. Wald, *Bail in the United States: 1964* (Washington, D.C.:

The experience of jurisdictions in which bondsmen have been completely or substantially eliminated—including Kentucky, Wisconsin, Oregon, Illinois, and the District of Columbia—demonstrates that the replacement of professional bondsmen with responsible pretrial services programs and pretrial release decision-making can produce a fairer and more effective pretrial release process.[19] Although there may be political and practical difficulties associated with eliminating compensated sureties, their role is neither appropriate nor necessary and the recommendation that they be abolished is without qualification.

The deposit bail system, which has been used in Kentucky, Illinois, and Oregon for many years, requires a defendant to deposit cash or securities equal to a fixed percentage of the bond amount (usually ten percent) with the court. If, at the conclusion of the case, the defendant has made the required court appearances, the deposit is returned

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U.S. Department of Justice and The Vera Foundation, Inc., 1964); Ronald Goldfarb, *Ransom: A Critique of the American Bail System* (New York: John Wiley and Sons, 1968); Paul Wice, *Freedom for Sale: A National Study of Pretrial Release* (Lexington, MA: D.C. Heath and Co., 1974); John S. Goldkamp, *Two Classes of Accused: A Study of Bail and Detention in American Justice* (Cambridge, MA: Ballinger, 1979); M.L. Kaufman, "An Analysis of the Powers of Bail Bondsmen and Possible Routes to Reform," 15 *New York Law School Journal of Human Rights* 287 (1999); F.E. Devine, *Commercial Bail Bonding: A Comparison of Common Law Alternatives* (New York: Praeger, 1991). Devine has noted that many countries with a common law tradition have acted to prevent the development of a commercial bail system, adopting either civil or criminal remedies to obstruct its development, viewing compensated bail as "perverting the course of justice." *Id.* at 201.

[19] The states of Kentucky and Wisconsin have prohibited the use of compensated sureties. See KY Rev. Stat. 431.510; WI Stat. 969.12. In Illinois and Oregon there is simply no statutory authorization for release on surety bail, but the statutes of these states do authorize deposit bail. *See* IL Stat. Ch. 725/110-7; WI Stat. 961.01. The D.C. statute (D.C. Code Ann. Tit 11 sec. 2105) does not explicitly prohibit compensated surety bail, but it provides for a very broad range of conditions of release and—like these Standards—allows detention only after a showing by the prosecution that release of the defendant would pose a substantial risk of flight or threat to community safety or to the integrity of the court process that cannot be met through imposition of conditions on the defendant's release. Additionally, the District of Columbia has a strong and effective pretrial services agency that provides supervision of defendants who are conditionally released.

(possibly reduced by the amount of a small service charge).[20] If the defendant has not made the required appearances, the deposit is forfeited and the balance is due.

Standard 10-1.5 Pretrial release decision may include diversion and other adjudication alternatives supported by treatment programs

In addition to employing release conditions outlined in Standard 10-1.4, jurisdictions should develop diversion and alternative adjudication options, including drug, mental health, and other treatment courts or other approaches to monitoring defendants during pretrial release.

History of Standard

This Standard incorporates a reference to pretrial diversion from Second Edition, Revised Standard 10-1.1. However, rather than providing for conditional release pending diversion "to further the rehabilitation needs of some defendants and to divert them from criminal prosecution," it encourages development of diversion and alternative adjudication options as "approaches to monitoring defendants during pretrial release."

Related Standards

ABA, Standards for Criminal Justice, Prosecution Function (3d ed. 1993), 3-3.8

ABA, Standards for Criminal Justice, Pleas of Guilty (3d ed. 1999), 14-4.1

NDAA, National Prosecution Standards (1991), 45.1(c)(2)

Commentary

This Standard calls upon jurisdictions to take advantage of the growing numbers and types of alternatives to adjudication that

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[20] Imposition of a small service charge on the amount of the deposit was upheld by the U.S. Supreme Court in Schilb v. Kuebel, 404 U.S. 357 (1971). In that case, the amount of the service charge was ten percent of the deposit (or one percent of the total bail amount), as provided under the Illinois statute authorizing use of deposit bail.

complement pretrial release conditions. These alternatives include specialized courts to deal with problems frequently associated with defendants entering the criminal justice system. Drug courts, domestic violence courts, mental health courts, and related treatment-oriented court programs have demonstrated their utility in many places across the nation.[21]

The Pretrial Release Standards historically have placed great importance on diversion as a logical complement to pretrial release options. Part VI in the Second Edition, Revised Standards was devoted exclusively to diversion and its connection with conditional release. However, after preliminary work on revising and updating that part of the Standards, the Task Force and the Standards Committee decided the topic required independent treatment in a Standards volume dedicated solely to diversion and diversion-like alternatives to formal adjudication that have emerged widely in the United States in the past several decades. Standard 10-1.5 therefore urges jurisdictions to develop adjudication alternatives supported by treatment programs as an important means of managing and assisting defendants in the community and reserves for a separate, new Standards volume full discussion of relevant procedures, policies, and issues.

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[21] *See, e.g.*, Denise C. Gottfredson *et al.*, "Effectiveness of Drug Treatment Courts: Evidence From a Randomized Trial," 2 *Criminology and Public Policy* 171-196 (March 2003); John S. Goldkamp, "The Impact of Drug Courts," *2 Criminology and Public Policy* 197-206 (March 2003); Adele Harrell, "Judging Drug Courts: Balancing the Evidence," 2 *Criminology and Public Policy* 207-212 (March 2003); E.P. Deschenes *et al*, "Drug Courts" in Sorensen, Guydish and Zweben (eds.), *Drug Abuse Treatment through Collaboration, Practice and Research Partnerships That Work* (Washington, D.C.: American Psychological Association, 2003); Steven Belenko, "Research on Drug Courts: A Critical Review 2001 Update" (The National Center on Addiction and Substance Abuse, Columbia University, June 2001); John S. Goldkamp, "The Drug Court Response: Issues and Implications for Justice Change," 63 *Albany Law Review* 923-961 (2000).

Standard 10-1.6 Detention as an exception to policy favoring release

These Standards limit the circumstances under which pretrial detention may be authorized and provide procedural safeguards to govern pretrial detention proceedings. They establish specific criteria and procedures for effecting the pretrial detention of certain defendants after the court determines that these defendants pose a substantial risk of flight, or threat to the safety of the community, victims or witnesses or to the integrity of the justice process. The status of detained defendants should be monitored and their eligibility for release should be reviewed throughout the adjudication period. The cases of detained defendants should be given priority in scheduling for trial.

History of Standard

This Standard is new, but draws from Second Edition, Revised Standard 10-1.1.

Related Standards

ABA, Standards for Criminal Justice, Special Functions of the Trial Judge (3d ed. 2000), 6-1.11

ABA, Standards for Criminal Justice, Speedy Trial and Timely Resolution of Criminal Cases (3d Ed., 2006), 12-1.3 (b), 2.1(b)

NAC, Courts (1973), 4.6

NDAA, National Prosecution Standards (1991), 45.1

Commentary

By requiring special procedures prior to and subsequent to its imposition, this Standard underscores the status of pretrial detention as an exception to the general policy of pretrial release. Restrictions and safeguards relative to detention follow logically from two implicit premises: first, the vast majority of defendants, including those who might represent unacceptable risks if released on their own recognizance, can be managed safely in the community if released under appropriate conditions; and second, pretrial detention is the most restrictive pretrial option and should be used only as a last resort.

This Standard articulates a principle that is fundamental: the decision to detain a defendant should be made only through an open process that

provides due process to the defendant. Standards 10-5.7 – 10-5.10, *infra* set forth a framework for judicial decision-making in cases where there appears to be a significant risk of flight or danger that can only be addressed by holding the defendant in detention until the case has reached a conclusion.

The Standard highlights the importance of monitoring the circumstances and case status of pretrial detainees. Factors that may have been relevant to the initial detention decision may change, e.g., charges may be reduced or dismissed, better housing arrangements may be made, or third party supervision may become available. This recognition also underlies Standard 10-5.10 (g), *infra*, which provides for the detention decision to be considered *de novo* after ninety days. In addition, monitoring the status of detainees' cases will help ensure that they are given priority in scheduling trials and that the charges against them are adjudicated in a timely fashion.

Standard 10-1.7 Consideration of the nature of the charge in determining release options

Although the charge itself may be a predicate to pretrial detention proceedings, the judicial officer should exercise care not to give inordinate weight to the nature of the present charge in evaluating factors for the pretrial release decision except when, coupled with other specified factors, the charge itself may cause the initiation of a pretrial detention hearing pursuant to the provisions of Standard 10-5.9.

History of Standard

This is a new general principle relevant to Standards 10-4.2(e), 10-5.1(b)(i), and 10-5.8(b)(i).

Related Standards

NDAA, National Prosecution Standards (1991), 45.4(b)(3)(f); 45.5 (a)(2)(i).

Commentary

This Standard acknowledges that the nature of the charges can in some instances provide a basis for setting aside the presumption of release on personal recognizance and initiating proceedings to determine

whether conditional release or detention is appropriate. For example, in some instances, the nature of the crime charged may place the defendant within the threshold eligibility criteria for detention. See Standard 10-5.8, *infra*, which provides that only defendants charged with dangerous or violent crimes or, in certain cases, with other serious crimes, may even be considered for detention. Other examples arise in the setting of release conditions: it may, for example, be appropriate to consider the imposition of a "stay-away" order in the case of a defendant charged with domestic violence. Similarly, imposition of a requirement for drug testing or for participation in a drug abuse counseling or treatment program may be appropriate for a defendant charged with drug use or possession.

In cautioning judicial officers against giving inordinate weight to the nature of the charges, the Standard recognizes that there is a long history of courts setting money bail on the basis of the charge alone in many instances. The effect is to make it impossible for some poor but low-risk defendants to obtain pretrial release because it is impossible for them to post the requisite bail. When bail amounts are fixed solely on the basis of the charge, information relevant to assessing the real risk of non-appearance or pretrial crime is never considered. This Standard reinforces the principle that judicial officers should consider a broad range of factors relevant to risks of possible non-appearance and threats to community safety in making release decisions and crafting appropriate release conditions.

Standard 10-1.8 Pretrial release decision should not be influenced by publicity or public opinion

The judicial officer should not be influenced by publicity surrounding a case or attempt to placate public opinion in making a pretrial release decision.

History of Standard

This Standard is new.

Related Standards

None.

Commentary

Some cases result in tremendous pressure on courts to detain or, less frequently, to release certain defendants. Examples include cases involving high-profile victims or defendants and cases involving particularly violent or unusual circumstances. Standard 10-1.8 expresses the important principle that such pressures, whether blatant or subtle, have no place in pretrial release decisions. These decisions should be based solely on facts bearing on the defendant's risk of nonappearance, dangerousness, or threat to the integrity of the justice system.

Standard 10-1.9 Implication of policy favoring release for supervision in the community

The policy favoring pretrial release and selective use of pretrial detention is inextricably tied to explicit recognition of the need to supervise safely large numbers of defendants in the community pending adjudication of their cases. To be effective, these policies require sufficient informational and supervisory resources.

History of Standard

This Standard is new.

Related Standards

NAC, Corrections (1973), 4.2
NDAA, National Prosecution Standards (1991), 45.1(c)(2); 45.5(b)

Commentary

This Standard focuses on key policy and financial management issues that must be faced by every jurisdiction. With limited resources available for detention or community-based supervision of defendants during the pretrial period, hard decisions must be made about whether to simply invest in building and operating ever-larger jails or to shift resources toward the development and use of effective community supervision strategies.

The thrust of these Standards is toward limited and focused use of pretrial detention, with defendants who pose no significant risk of flight or dangerousness released on their own recognizance or under appropriate conditions that provide for some type of supervision. For such an approach to work, however, many jurisdictions will have to

either reallocate existing resources (away from sole or near-exclusive reliance on jails and toward non-incarcerative alternatives to detention) or find new resources to support viable community-based supervision of released defendants. The types of community-based alternatives appropriate for defendants who do not require secure detention but are not suitable for release on personal recognizance are outlined in Standard 10-5.2, *infra*, and include drug treatment, mental health treatment, and a variety of other services.

Community-based supervision is less costly than secure detention. However, public support for the approach of these Standards is likely to be tied closely to the perception of the level of risk associated with such supervision. Perceptions that defendants are unsupervised, or not supervised well enough to ensure the safety of the community or their appearance at trial, will undoubtedly increase pressures for increased use of detention. It is therefore critical that adequate resources be available to ensure that defendants adhere to the conditions of their release.

As noted in this Standard, two types of resources are especially important for the approach recommended by these Standards to succeed. First, informational resources are needed, both to enable sound initial release/detention decision-making and to enable effective on-going monitoring and supervision of defendants who are released under conditions set by the judicial officer. Second, supervisory resources—including personnel skilled in providing community-based supervision of accused persons who pose differing types and degrees of risk, plus technological innovations that can support and enhance community supervision—will be essential for implementation of the policies called for by these Standards.

In many instances, a shift toward the system set forth in these Standards will require funding outlays in new areas. However, the savings that will result from reducing jail construction and operation eventually should substantially outweigh the costs of pretrial services. Effective community supervision of defendants who are released under specified conditions, following careful consideration of relevant information about the defendant and the available supervisory options, should also help reduce the overall pretrial costs—including costs related to non-appearance and public safety that result when defendants are released without conditions from overcrowded jail facilities under emergency release or population-reduction measures.

Standard 10-1.10 The role of the pretrial services agency

(a) Every jurisdiction should establish a pretrial services agency or program to collect and present the necessary information, present risk assessments, and, consistent with court policy, make release recommendations required by the judicial officer in making release decisions, including the defendant's eligibility for diversion, treatment, or other alternative adjudication programs, such as drug or other treatment courts. Pretrial services should also monitor, supervise, and assist defendants released prior to trial, and review the status and release eligibility of detained defendants for the court on an ongoing basis.

(b) The pretrial services agency should:

(i) conduct pre-first-appearance inquiries;

(ii) present accurate information to the judicial officer relating to the risk defendants may pose of failing to appear in court or of threatening the safety of the community or any other person and, consistent with court policy, develop release recommendations corresponding to risk;

(iii) develop and provide appropriate and effective supervision for all persons released pending adjudication who are assigned supervision as a condition of release;

(iv) develop clear policy for operating, or contracting for the operation of, appropriate facilities for the custody, care, and supervision of persons released and manage a range of release options, including but not limited to, residential half-way houses, addict and alcoholic treatment centers, and counseling services, sufficient to respond to the risks and problems associated with released defendants in coordination with existing court, corrections and community resources;

(v) monitor the compliance of released defendants with the requirements of assigned release conditions and develop relationships with alternative programs such as drug and domestic violence courts or mental health support systems;

(vi) promptly inform the court of all apparent violations of pretrial release conditions or arrests of persons released pending trial, including those directly supervised by pretrial services as well as those released under other forms of conditional release, and recommend appropriate modifications

of release conditions according to approved court policy. The pretrial services agency should avoid supervising defendants who are government informants, when activities of these defendants may place them in conflict with conditions of release or compromise the safety and integrity of the pretrial services professional;

(vii) supervise and coordinate the services of other agencies, individuals or organizations that serve as custodians for released defendants, and advise the court as to their appropriateness, availability, reliability and capacity according to approved court policy relating to pretrial release conditions;

(viii) review the status of detained defendants on an ongoing basis for any changes in eligibility for release options and facilitate their release as soon as feasible and appropriate;

(ix) develop and operate an accurate information management system to support prompt identification, information collection and presentation, risk assessment, release conditions selection, compliance monitoring and detention review functions essential to an effective pretrial services agency;

(x) assist persons released prior to trial in securing any necessary employment, medical, drug, mental or other health treatment, legal or other needed social services that would increase the chances of successful compliance with conditions of pretrial release;

(xi) remind persons released before trial of their court dates and assist them in attending court; and

(xii) have the means to assist persons who cannot communicate in written or spoken English.

History of the Standard

This Standard is an expanded version of Second Edition, Revised Standard 10-1.4.

Related Standards

ABA, Criminal Justice Standards, Pretrial Release (3d ed. 2003), 10-4.2; 10-5.2(a)(i), 10-5.12

NAPSA, Standards for Pretrial Release (2004), 1.3, 3.1 – 3.5

NCCUSL (1987), 342

NDAA, National Prosecution Standards (1991), 45.5(b)(3)

Commentary

Standard 10-1.10(a)

These Standards emphasize the central role of pretrial services agencies in pretrial release and detention determinations both as a matter of principle and in recognition of their growing practical importance in the judicial process. In local justice systems, pretrial services may operate under the auspices of the courts, corrections, or probation departments, or they may be separate nonprofit organizations. They range in size from small offices located in rural sheriffs' departments to major departments in large urban court systems. Regardless of institutional location, pretrial services agencies should perform an information collection and analysis function, a recommendation function, and monitoring and supervisory functions.

In the early days of the bail reform movement, pretrial services often were viewed as advocacy-oriented programs for defendants. The concept of pretrial services under these Standards is different: the pretrial services function is considered an integral part of a process to promote and implement fair and effective judicial decisions resulting in the release or detention of defendants. Because pretrial services are designed to support this judicial decision-making process, by definition they cannot "compete" with or somehow work against it.

Standard 10-1.10 (b)(i)

The goal of the pre-first-appearance inquiry is to gather information about all newly arrested defendants who are held in custody pending first appearance, in order to assist the court in making fair and effective pretrial release decisions. The challenge is to gather the information in a relatively short period of time.

Relevant information may be derived from a variety of sources, including the defendant's prior criminal history records, court attendance records, and outstanding warrants, as well as interviews with the defendant and the defendant's family members and employers. The scope of the inquiry, however, must be limited to the risks of flight or danger posed by the defendant and to release conditions responsive to such risks. To the extent possible, it should include attributes of the defendant relevant to factors that have been determined empirically to be related to flight or crime during the pretrial period and information the

court believes is relevant based on its experience in assessing risk and choosing release options.[22]

Standard 10-1.10(b)(ii)

In calling on pretrial services agencies to provide judicial officials information about risks associated with releasing a defendant, the Standard recognizes that these agencies are in a unique position to analyze objective individual and circumstantial factors likely to impede the defendant's appearance in court or to pose a threat to the safety of the community or individual members of the community.

The Standard also recognizes that pretrial services agencies are in an excellent position to recommend release options that address specific risk

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[22] Since the 1920's, researchers have attempted to identify predictors of defendant performance during pretrial release. Among those they have found empirically related to rates of pretrial misconduct are the following: prior history of bench warrants, prior history of drug abuse; fugitive status at the time of arrest; prior criminal history (both the number of arrests and convictions and the type of offense, with property, public order and drug offenses predicting relatively high rates); and type or nature (but not seriousness) of the current offense (with property offenses, nuisance offenses and public order offenses predicting relatively high rates). *See, e.g.*, Arthur Beeley, *The Bail System in Chicago* (Chicago: University of Chicago Press, 1927); Arthur Angel *et al.*, "Preventive Detention: an Empirical Analysis," 6 *Harvard Civil Liberties Civil Rights Law Review* 310-396 (1971); Michael Gottfredson, "An Empirical Analysis of Pretrial Release Decisions," 2 *Journal of Criminal Justice* 287 (1974); Stevens H. Clarke *et al.*,"Bail Risk: A Multivariate Analysis," 5 *Journal of Legal Studies* 341 (1976); Jeffrey A. Roth and Paul B. Wice, *Pretrial Release and Misconduct in the District of Columbia*, (Washington, D.C.: Institute for Law and Social Research, 1980); John S. Goldkamp *Two Classes of Accused* (Cambridge: Ballinger Publishing, 1979), John S. Goldkamp, "Questioning the Practice of Pretrial Detention: Some Empirical Evidence from Philadelphia, 74 *Journal of Criminal Law and Criminology* 1556(1983), Goldkamp and Gottfredson, *Policy Guidelines for Bail*, Philadelphia: Temple University Press (1985); Steven Belenko and I. Mara-Drita, "Drug Use and Pretrial Misconduct: The Utility of Pre-Arraignment Drug Tests as a Predictor of Failure to Appear," (New York: Criminal Justice Agency, 1987); John S. Goldkamp *et al.*. *Personal Liberty and Community Safety: Pretrial Release in the Criminal Court* (New York: Plenum Publishing, 1995), D. Smith *et al.*, "Drug Use and Misconduct in New York City," 5 *Journal of Quantitative Criminology* 101 (1989); Marie VanNostrand, *Assessing Risk Among Pretrial Defendants in Virginia* (Richmond: Virginia Department of Criminal Justice Services, April 2003).

factors. In requiring that these recommendations be "consistent with court policy," the Standard emphasizes a key concept contained in Standard 10-4.2 (h), *infra*: identification of release options should be based on guidelines developed by the pretrial services program in consultation with the judiciary. If there is no court policy, or only limited court policy, on which to base recommendations, the pretrial services agency should at least provide the court with risk information and corresponding information about relevant release options. The Standard's emphasis on presentation of accurate information and development of release recommendations that are consistent with court policy precludes recommendations based on subjective opinions or personal preferences and biases of pretrial services staff.

Information about risk should be tailored to individual defendants and include both defendant-specific information (such as substance abuse, recent long-term institutionalization, and immigration status) and—when available to the agency from the charging document or other record provided to the agency—case-specific information such as a relationship between the victim and the defendant and the defendant's living situation and proximity to the alleged victim. Recommendations should match these risk factors with appropriate release options. For example, lack of job skills, medical problems, or drug addiction might be matched to recommended release options providing job training, medical care, and substance abuse treatment. If the charge is one involving domestic violence, the recommendations might include requiring the defendant to live in a separate residence and refrain from any contact with the domestic partner during the pendency of the case. While recommendations should not rely solely on predictive estimates of risk to determine release options, experiential and statistical information about the effectiveness of particular forms of pretrial release for different risks may be useful, particularly if based on the jurisdiction's experience over a significant period of time.

It is important to note that the pretrial services agency is not expected to be the only source of information for the court in making the release/detention decision. Both the prosecution and the defense are likely to have information (including information about the circumstances of the case and the weight of the evidence) that is not available to the pretrial services agency but very relevant to the judicial officer's determination concerning the defendant's pretrial custody status.

Standard 10-1.10(b)(iii)

Just as the purposes of the pretrial release decision set forth in Standard 10-1.1 extend beyond the initial release decision, the role of the pretrial services agency extends beyond information collection, risk assessment and making recommendations. A number of pretrial services agencies have developed supervision strategies that have been effective for released defendants posing different types of risks.[23] The Standard does not specify the elements of supervision, but rather leaves it to individual jurisdictions to experiment and develop effective strategies.

Standard 10-1.10(b)(iv)

Jurisdictions differ in how supervisory services are provided. In some, the pretrial services agency or program itself provides the services; in others, the agency or program arranges for the services to be provided through other governmental agencies or private entities in the community. This Standard expresses three important principles: First, the pretrial services program has the responsibility for managing the supervision of released defendants, whether the supervision is provided directly by the agency or pursuant to a contract with another agency of organization. Second, when contractual arrangements are made for provision of supervisory services (e.g., drug testing, drug treatment, halfway house, assisted living) such arrangements should be guided by clear and reviewable policies, so that responsibilities are clear and do not conflict with judicial functions and expectations. Third, the development and operation of supervisory services and facilities should be undertaken in coordination with entities that already provide similar resources. Implicit in the Standard is the presumption that duplication of services should be minimized and that cooperation and coordination among public agencies and private providers should be maximized.

Standard 10-1.10(b)(v)

Pretrial services agencies are responsible for monitoring the performance of individual defendants to ensure that they are meeting the conditions of their release. The responsibility includes establishing cooperative relationships with other programs offering services that will facilitate defendants' compliance with the conditions of their release. Such monitoring is critical, whether the pretrial services agency itself is providing the supervision or supervision is provided through cooperative relationships with other programs or agencies.

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[23] *See* Mahoney et al., *supra note* 8, at 37-48.

Standard 10-1.10(b)(vi)

Pretrial services agencies or programs should notify the court of apparent violations of release conditions and make recommendations for responding to such violations. Recommendations should generally involve modification of the terms of release but, if no other conditions are appropriate, could be for revocation of pretrial release.[24]

The last sentence of this Standard acknowledges that a pretrial services agency could have a conflict of interest in supervising defendants who have special agreements with law enforcement that call for them to act as government informants. It recommends that the agency avoid supervising defendants under these circumstances because of the risk that the defendants' conduct as informants (for example, making undercover drug "buys") could place the defendants in conflict with the conditions of release and could place agency personnel in an awkward and potentially dangerous situation. Implementation of this Standard may be difficult, however, because it is unlikely that either the court or the pretrial services agency would be made aware of confidential law enforcement actions involving informants. If the pretrial release agency becomes aware that certain defendants are informants or law enforcement agents, it should decline to supervise them.

Standard 10-1.10(b)(vii)

This Standard builds on the themes of collaboration and accountability in pretrial services embedded in Standards 10-1.10 (b) (iv) and (v) above. It is not expected that pretrial services programs will have the capacity or resources to provide direct supervision of all released defendants. They should, however, develop cooperative relationships with other entities that provide supervision. By charging the agency with overseeing, coordinating and advising the court about pretrial services provided by other individuals or organizations, the Standard attempts to ensure the court is aware of the totality, adequacy and conformity with court policy of all services for pretrial defendants.

Standard 10-1.10(b)(viii)

The role of pretrial services agencies does not end when a defendant is ordered to be detained pending adjudication under procedures outlined in Standards 10-5.6 through 10-5.10. Pretrial services agencies should also assume responsibility for reviewing the status and release eligibility

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[24] *See* Standard 10-5.6, ***infra*** (relating to revocation of release).

of detainees to safeguard against unnecessary pretrial detention and to ensure prompt consideration of pretrial release for defendants for whom circumstances affecting release options have changed. Such changed circumstances may involve the identification of appropriate and acceptable release conditions, dropped charges, or revocation proceedings relating to provisional release in another case. Pretrial services agencies should play a proactive role in monitoring detainees' circumstances and should bring changed circumstances to the attention of the court if it appears that they could affect the individual's custody status.

Standard 10-1.10(b)(ix)

Perhaps the most critical element of the pretrial services function is its informational role. In order to conduct the background investigation prior to the defendant's first appearance, to link release options with defendants, and to monitor the compliance of released defendants and the status of detainees, the pretrial services agency must have the ability to collect, assess, and present information promptly and accurately to the court. The revolution in computerized management information systems that has taken place in the late twentieth century and early years of the this century makes it technologically feasible to obtain and analyze information about newly arrested individuals, and to transmit it to the judicial officer and other participants in the first appearance proceeding, far more rapidly than in the early years of pretrial services programs.

Standard 10-1.10(b)(x)

This Standard recognizes defendants' needs for treatment, employment, housing, and social services can adversely affect their ability to comply with release conditions. Its call for pretrial services to help defendants meet those needs does not impart to the pretrial services agency a general responsibility for helping defendants address all life problems associated with their having entered the court system. Rather it calls for pretrial services programs to take responsibility for helping released defendants address obstacles that can impair their ability to attend scheduled court proceedings and comply with other conditions of their release.

Standard 10-1.10(b)(xi)

The importance of defendants' presence at required court appearances is a fundamental premise of these Standards. Whether failure to appear is intentional or because of other reasons such as

negligence or forgetfulness, inability to find the courthouse, or transportation difficulties, non-appearance adversely affects the justice process. This Standard imposes on the pretrial services agency a duty to undertake specific efforts to reduce the incidence of non-appearance by reminding defendants of their court dates and providing other essential assistance in meeting scheduled court appearances.

Standard 10-1.10(b)(xii)

This Standard recognizes the increasing diversity of populations in many jurisdictions and emphasizes the need to communicate directly and effectively with defendants in carrying out pretrial services functions. The inability of the pretrial services agency to communicate with defendants who cannot speak, write, or understand English should not be grounds for detaining or placing restrictive conditions on the defendants. It is the agency's responsibility to ensure adequate communication. Generally this will require translation services so that background investigations and other pretrial release tasks can be completed.

PART II

RELEASE BY LAW ENFORCEMENT OFFICER ACTING WITHOUT AN ARREST WARRANT

Standard 10-2.1 Policy favoring issuance of citations

It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. This policy should be implemented by statutes of statewide applicability.

History of the Standard

This Standard is unchanged.

Related Standards

ABA, Criminal Justice Standards, Pretrial Release (3d ed. 2007), 10-1.3

ALI, Model Code of Pre-Arraignment Procedure (1975), 120.2; 120.4; 130.3

NAC, Corrections (1973), 4.3

NAC, Courts (1973), 4.2

NCCUSL, Uniform Rules of Criminal Procedure (1987), 211; 221

NDAA, National Prosecution Standards (1991), 45.2

Commentary

In the historical context of the 1960's, the First Edition's recommendation that law enforcement agencies issue citations rather than make arrests whenever possible represented a fairly dramatic new direction in arrest practices.[25] However, emphasis on citation release (as

[25] For historical background concerning arrests for minor offenses, *see* Wayne LaFave, *Arrest* (1965); Arthur L. Beeley, *The Bail System in Chicago*, *supra* note 17 at 154; Warner, "The Uniform Arrest Act", 28 Virginia Law Review 315, 346 (1942). By the late 1980's, many states had passed legislation relating to police arrest powers for minor offenses, but the majority retained the broad discretion of police officers to arrest, even for traffic offenses. *See*

well as "stationhouse" release) was a logical extension of bail reform presumptions favoring pretrial release and release under least restrictive alternatives as well as encouraging diversion from the justice system altogether. Bail reform activists argued that unnecessary detention was intrusive and unnecessary to secure the person's appearance at court. Moreover, it strained the capacity of police lock-ups and jails.

What was innovative in the 1960's had become a fairly widespread practice by the mid-1980s[26] and is fairly routinely practiced in many

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Barbara C. Salken, "The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses", 62 Temp. L. Rev 221, 249-50 and notes.187-192 (1989) (collecting statutory and rule authority and finding that 28 states had no limitations on police discretion to arrest for traffic offenses and that of 22 states with limitations, many retain broad discretion or only "require the issuance of a citation in a small class of offenses."). As of the first decade of the twenty-first century, it appears that a significant number of states require or at least encourage the use of citations for traffic and other minor offenses. Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. Lago Vista*, 71 Fordham L. Rev. 329, 414 n. 497 (2002). The issue has received renewed interest in the wake of the Supreme Court decision in *Atwater v. Lago Vista*, 532 U.S. 318 (2001). There the Supreme Court held in a 5-4 decision that the Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine. *Id.* at 323. The Court noted, however, that although the Constitution did not restrict such arrests, many jurisdictions have chosen to impose more restrictive safeguards through statutes limiting warrantless arrests for minor offenses. *Id.* at 352. The Court also made clear that its ruling was not an endorsement of Atwater's arrest for a seat belt violation. Rather, in its view, state legislatures were the means to deal with the problem:

> It is of course easier to devise a minor-offense limitation by statute than to derive one through the Constitution, simply because the statute can let the arrest power turn on any sort of practical consideration without having to subsume it under a broader principle. It is, in fact, only natural that States should resort to this sort of legislative regulation, for, as Atwater's own *amici* emphasize, it is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason. *Id.*

State supreme courts are also free to interpret their own constitutions differently, and the Ohio Supreme Court has rejected the *Atwater* rationale and construed the Ohio Constitution to prohibit warrantless arrests for minor misdemeanors in the absence of specified circumstances. See *State v. Brown*, 792 N.E.2d 175 (2003).

[26] *See* Debra Whitcomb *et al.*, *Citation Release* (Washington, D.C., National Institute of Justice, 1984).

jurisdictions across the United States at the turn of the new century. This Third Edition Standard is consistent with previous editions in calling for use of citations to avoid unnecessary police custody when the requirements of prosecution and adjudication will be met without it.

There are several components to an effective citation release system that can help minimize the risk that a defendant may fail to appear in court on the return date specified in the citation. These include (1) accurate and reliable information about the background and living situation of the person whose release is being considered; (2) workable criteria for release or detention, with a presumption of release that is consistent with these Standards; (3) qualified decision-makers making the release decision (for example, trained police officers); (4) a short time period between the issuance of the citation and the date of the individual's scheduled court appearance as shown on the citation; and (5) the capacity for rapid follow-up in the event of non-appearance in court.[27]

Standard 10-2.2 Mandatory issuance of citation for minor offenses

(a) Except as provided in paragraph (c), 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. In determining whether an offense is minor, the police officer should consider whether the alleged crime involved the use or threatened use of force or violence, possession of a weapon, or violation of a court order protecting the safety of persons or property.

(b) Except as provided in paragraph (c), when a person in custody has been taken to a police station and a decision has been made to charge the person with a minor offense, the responsible officer should be required to issue a citation in lieu of continued custody.

(c) The defendant may be detained when an otherwise lawful arrest or detention is necessary to ensure the safety of any person or the community or when the accused:

(i) is subject to lawful arrest and fails to identify himself or herself satisfactorily;

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[27] *Id.* at 43-50; also Mahoney *et al. supra* note 8 at 61-63.

(ii) refuses to sign the citation after the officer explains to the accused that the citation does not constitute an admission of guilt and represents only the accused's promise to appear;

(iii) has no ties to the jurisdiction reasonably sufficient to ensure the accused's appearance in court and there is a substantial likelihood that the accused will refuse to respond to a citation;

(iv) previously has failed to appear in response to a citation, summons, or other legal process for an offense;

(v) is not in compliance with release conditions in another case, is subject to a court order or is on probation or parole; or

(vi) poses a substantial likelihood of continuing the criminal conduct if not arrested.

(d) When an officer fails to issue a citation for a minor offense, but instead takes a suspect into custody, the law enforcement agency should be required to indicate the reasons in writing.

(e) Notwithstanding the issuance of a citation, a law enforcement officer should be authorized to transport or arrange transportation for a cited person to an appropriate facility if the person appears mentally or physically unable to care for himself or herself.

History of the Standard

This Standard is based on Second Edition, Revised Standard 10-2.2. Subsection (a) substitutes the term "minor offense" for "misdemeanor" and provides guidance for determining whether an offense is minor. Safety concerns are given a new prominence in subsection (a) and in the introductory clause of subsection (b) that replaces former (c)(iii). Subsections (c)(v) and (vi) are new. Subsection (e) replaces Second Edition, Revised Standard 10-2.5.

Related Standard

ABA, Criminal Justice Standards, Mental Health (1986, 1989), 7-2.1; 7-2.3-2.6

ABA, Criminal Justice Standards, Pretrial Release (3d ed. 2003), 10-1.3

ABA, Criminal Justice Standards, Urban Police Function (2d ed. 1980), 1-1.1(b); 1-2.2(f); 1-3.4(b)

NAC, Corrections (1973), 4.3

NAC, Courts (1973), 4.2

NCCUSL, Uniform Rules of Criminal Procedure (1987), 211, 221

NDAA, National Prosecution Standards (1991), 45.2(b)

Commentary

Standard 10-2.2(a)

This Standard calls for policies requiring police officers to issue citations (rather than to arrest the offender) for minor offenses, except in circumstances specified in subsection (c).[28] It parallels Standard 10-3.2 requiring judicial officers to employ summonses rather than arrest warrants for minor offenses.

The term "minor offense" is used rather than the term "misdemeanor" because, in many jurisdictions, "misdemeanors" encompass violent or potentially violent crimes that do not, under the Standard, require citation release. For example, domestic violence has been criminalized by statute in many jurisdictions and classified as a misdemeanor in some places. Until the early 1980's, police made relatively few arrests in these cases. Over the past several decades, however, a number of jurisdictions have adopted domestic violence "mandatory-arrest" policies. Since then, there has been an ongoing debate about the wisdom of such policies.[29] Standard 10-2.2 neither precludes nor mandates arrest in domestic violence cases.

Standard 10-2.2(b)

This Standard's prohibition against continued police custody of a person who is arrested and then charged with only a minor offense is a logical extension of the prohibition in subsection (a) against taking a person into police custody for a minor offense. Both reflect the principle that pretrial custody by police is generally unwarranted for minor offenses.

Standard 10-2.2(c)

This Standard recognizes that a bright-line rule prohibiting arrests for minor offenses is not appropriate, and that exceptions to the citation presumption sometimes are warranted. However, rather than allowing police officers broad discretion to determine when exceptions should be made, this Standard provides a narrow list of circumstances under which police officers may exercise discretion. It permits police to temporarily detain a person in police custody when necessary to ensure the safety of

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[28] *Cf.* Standard 10-1.3 and commentary, *supra* (defining minor offenses).

[29] For a discussion of the history and research about domestic violence mandatory arrest policies, *see* Joel Garner and Jeffrey Fagan, "Victims of Domestic Violence" in Robert C. Davis *et al.*, *Victims of Crime* (Thousand Oaks, CA: Sage Publications, Inc., 1997).

any person or the community. It also permits such temporary detention when individuals fail to identify themselves, refuse to sign the citation, do not show evidence of local ties that are reasonably likely to ensure response to the citation, or have previously failed to appear in court in response to a citation, summons, or other legal process. Moreover, custodial arrests are allowed when the individual is not in compliance with release conditions in another case, is subject to a court order, or is on probation or parole, or when the individual is involved in criminal activity that is likely to continue or to repeat itself.

The list of specific circumstances under which temporary detention in police custody (pending prompt initial appearance before a judicial officer as provided in Standard 10-4.1) is not mandatory. Rather, it is permissive, leaving the decision whether to arrest or issue a citation in these situations to the discretion of the police officer.

Standard 10-2.2(d)

This Standard is aimed at ensuring accountability in adhering to the policy regarding use of citations for most minor offenses. It requires the law enforcement agency to state in writing the reasons for not issuing a citation any time an arrest is made for a minor offense. Written records provide a basis for subsequent review of citation practices to ascertain whether arrest exceptions are made on an appropriate and even-handed basis.

Standard 10-2.2(e)

This Standard distinguishes between the police officers' law enforcement function and community care-taking function.[30] It clarifies that a police decision to issue a citation to an individual who appears in

[30] Courts generally distinguish between the police investigative function (apprehension of criminals) and the caretaking function (protecting the public and coming to the aid of those in distress). *See e.g.* Stanberry v. State, 684 A.2d 823 (Md. 1996) (citing State v. Carlson, 548 N.W.2d 138, 141 (Iowa 1996). As one federal appellate court commented, a police officer is "expected to aid those in distress; combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect community safety." United States v. Rodriguez-Morales, 929 F.2d 780 at 784-85 (1st Cir. 1991). In Cady v. Dombrowski, 413 U.S. 433 (1973), the Supreme Court noted that police officers often "engage in what for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* at 441.

need of mental or physical assistance does not preclude a decision to take or have the person taken to a care giving facility.

Standard 10-2.3 Regulations concerning citations

Each law enforcement agency should promulgate regulations designed to increase the use of citations to the greatest degree consistent with public safety. Except when arrest or continued custody is necessary, the regulations should require such inquiry as is practicable into the accused's place and length of residence, family relationships, references, present and past employment, criminal record, and any other facts relevant to appearance in response to a citation.

History of the Standard

This Standard closely tracks subsection (b) of Second Edition, Revised Standard 10-2.3.

Related Standards

ABA, Criminal Justice Standards, Pretrial Release (3d ed. 2003), 10-1.3

ABA, Criminal Justice Standards, Urban Police Function (2d ed. 1980), 1-4.1; 1-4.2

NAC, Corrections (1973), 4.3

NAC, Courts (1973), 4.2

NCCUSL, Uniform Rules of Criminal Procedure (1987), 211; 221

NDAA, National Prosecution Standards (1991), 45.2(c)

Commentary

This Standard calls for law enforcement agencies to promulgate regulations on the use of citations that are consistent with other standards in this Part. The regulations should provide specific guidance to officers on when citations are mandatory and when arrest may be appropriate. They should assist the officer in determining whether or not release poses a danger. Finally, the regulations should require that whenever police issue citations, they should seek specific types of information relevant to the released individuals' likelihood of appearing in court in response to the citation.

Standard 10-2.4 Lawful searches

When an officer makes a lawful arrest, the defendant's subsequent release on citation should not affect the lawfulness of any search incident to the arrest.

History of the Standard

This Standard is unchanged.

Related Standards

NAC, Corrections (1973), 4.3

Commentary

The Fourth Amendment to the United States Constitution permits the police to perform warrantless searches of defendants incident to lawful arrest.[31] This Standard simply makes clear that there is no retroactive impact on the validity of such searches when the police subsequently determine that continued custody is not needed and accordingly release the defendant on citation.

[31] *See e.g.,* Illinois v. Lafayette, 462 U.S. 640 (1983); United States v. Chadwick, 433 U.S. 1 (1977); Gustafson v. Florida, 414 U.S. 260 (1973); *United States v. Robinson*, 414 U.S. 218 (1973). Of course, even though the Fourth Amendment permits searches incident to arrests that do not result in the detention of the arrested person in a police or correctional facility, once a citation is issued the police officer has no authority to search unless a basis other than incident to arrest is apparent (e.g., plain view). *See* Knowles v. Iowa, 525 U.S. 113 (1998), in which the Supreme Court invalidated a search when a police officer issued a citation on the scene instead of making an arrest for a traffic infraction.

PART III

ISSUANCE OF SUMMONS IN LIEU OF ARREST

Standard 10-3.1 Authority to issue summons

All judicial officers should be given statutory authority to issue a summons rather than an arrest warrant in all cases in which a complaint, information, or indictment is filed or returned against a person not already in custody. Judicial officers should liberally utilize this authority unless a warrant is necessary to prevent flight, to ensure the safety of the defendant, any other person or the community, to prevent commission of future crimes or to subject a defendant to the jurisdiction of the court when the defendant's whereabouts are unknown. If a judicial officer issues a summons rather than an arrest warrant in connection with an offense, absent exigent circumstances, no law enforcement officer may arrest the accused for that offense without obtaining a warrant.

History of the Standard

This Standard is based on Second Edition, Revised Standard 10-3.1. The phrase "to ensure the safety of the defendant, any other person, or the community" replaces the previous language "to prevent imminent bodily harm to the defendant or another . . ." The phrase "absent exigent circumstances" is added to the last sentence.

Related Standards

ABA, Criminal Justice Standards, Pretrial Release (3d ed. 2003), 10-1.3

ABA, Criminal Justice Standards, Special Functions of the Trial Judge (3d ed. 2000), 6-1.10

Federal Rules of Criminal Procedure, 4, 9

NAC, Corrections, 4.3

NAC, Courts, 4.2

NCCUSL, Uniform Rules of Criminal Procedure (1987), 221

NDAA, National Prosecution Standards (1991), 45.3(a)

Commentary

This Standard calls for jurisdictions to ensure that judicial officers have statutory authority to issue a summons to initiate a criminal case against a defendant who is not already in custody if reasons supporting custodial arrest are lacking. For example, use of a summons rather than issuance of an arrest warrant would be appropriate if there is no apparent risk of flight or nonappearance, imminent bodily harm to another person, or danger to the community or to the administration of justice.

A judicial determination that custodial arrest is inappropriate should not be circumvented by police, even if a warrantless arrest would have been lawful had police not first sought judicial intervention. Therefore, the last sentence of this Standard makes it clear that, unless there are truly extraordinary new facts that demonstrate a need for immediate arrest of an individual, police should not make a warrantless arrest after a judicial officer has denied a request for an arrest warrant.

Standard 10-3.2 Mandatory issuance of summons for minor offenses

A summons, rather than an arrest warrant, should be mandatory in all cases involving minor offenses unless the judicial officer finds that:

(a) the accused is subject to lawful arrest and fails to identify himself or herself satisfactorily;

(b) the whereabouts of the accused are unknown and the issuance of an arrest warrant is necessary to subject the accused to the jurisdiction of the court;

(c) an otherwise lawful arrest or detention is necessary to ensure the safety of any other person or the community;

(d) the accused has no ties to the community reasonably sufficient to ensure appearance and there is a substantial likelihood that the accused will refuse to respond to a summons;

(e) the accused previously has failed to appear without just cause in response to a citation, summons, or other legal process;

(f) the accused is not in compliance with release conditions in another case, is subject to a court order, or is on probation or parole; or

(g) the accused poses a substantial likelihood of continuing the criminal conduct if not arrested.

History of the Standard

This Standard is an expanded version of Second Edition, Revised Standard 10-3.2. Subsections (a), (f), and (g) are new, and subsection (c) replaces former subsection (d).

Related Standards

ABA, Criminal Justice Standards, Pretrial Release (3d ed. 2007), 10-1.3

ABA, Criminal Justice Standards, Special Functions of the Trial Judge (3d ed. 2000), 6-1.10

Federal Rules of Criminal Procedure, 4, 9

NAC, Corrections (1973), 4.3

NAC, Courts (1973), 4.2

NCCUSL, Uniform Rules of Criminal Procedure (1987), 221

NDAA, National Prosecution Standards (1991), 45.3

Commentary

This Standard closely parallels Standard 10-2.2 concerning the mandatory issuance of citations in cases involving minor offenses.[32] Both standards provide for exceptions to mandatory use of a summons or citation when the accused fails to provide satisfactory identification, has insufficient community ties, or has previously failed to respond to a citation or summons. Both also allow exceptions when the accused "poses a substantial likelihood of continuing the criminal conduct if not

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[32] *Cf.* Standards 10-1.3 and 10-2.2 and accompanying commentary, *supra* (discussing "minor offenses"). Other standards generally have provided for the mandatory issuance of summonses in circumstances closely paralleling those in which law enforcement officers should use citations. *See* National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, Standard 4.3 (1973) (recommending that jurisdictions enumerate minor offenses for which summonses must be used, unless defendants previously have failed to respond to a citation or summons, lack ties to the community and there is a reasonable likelihood that they will not respond, the whereabouts of defendants are not known, an arrest is necessary to subject defendants to a court's jurisdiction, or an arrest is needed to carry out a legitimate investigative action); *Id.*, *Courts* Standard 4.2; NDAA National Prosecution Standards, Standard 10.3 (B)(1) (National District. Attorneys Association, 1991) (endorsing a policy to issue a summons in all cases unless there is reasonable cause to believe that a defendant will flee or fail to respond, or presents a risk of harm to himself, herself, or others).

arrested." However, this Standard on mandatory issuance of a summons permits an additional exception when the judicial officer finds that "an otherwise lawful arrest or detention is necessary to ensure the safety of any other person or the community." This difference acknowledges that the judicial officer is likely to have more information about subsequent threatening circumstances than the officer on the scene. Because the Standard applies only to minor cases, the exception should be rare as, by definition, minor cases are generally unlikely to involve defendants who pose a safety threat. One potential circumstance where the exception may be relevant is in cases involving charges of domestic violence, where the court or judicial officer may have knowledge of a longstanding problem or known pattern of abusive activity in the household.

Standard 10-3.3 Application for an arrest warrant or summons

(a) Time permitting, in those cases in which the judicial officer has discretion to issue a summons instead of an arrest warrant, the judicial officer should consider:

(i) the accused's ties to the community, including factors such as age, residence, employment and family relationships, reasonably sufficient to ensure appearance;

(ii) the nature of the alleged offense and potential penalty;

(iii) the accused's past history of response to legal process;

(iv) the accused's past criminal record;

(v) whether the case involves a juvenile or adult offense; and

(vi) whether the accused is in compliance with release conditions in another case, subject to a court order, or on probation or parole.

(b) The judicial officer ordinarily should issue a summons in lieu of an arrest warrant when the prosecutor so requests.

(c) In any case in which the judicial officer issues a warrant, the judicial officer should state the reasons in writing or on the record for failing to issue a summons.

History of the Standard

This Standard expands Second Edition, Revised Standard 10-3.3 by adding the factors contained in subsections (v) and (vi) to the issues to be considered by the judicial officer.

Related Standards

ABA, Criminal Justice Standards, Pretrial Release (3d ed. 2003); 10-1.3
Federal Rules of Criminal Procedure, 4, 9
NAC, Corrections (1973), 4.3
NAC, Courts (1973), 4.2
NCCUSL, Uniform Rules of Criminal Procedure (1987), 221
NDAA, National Prosecution Standards (2d ed. 1991), 45.3(b)

Commentary

Standard 10-3.3(a)

This Standard sets out criteria that a judicial officer should use in deciding whether to issue a summons or an arrest warrant when there is discretion to make that choice. The Standard implicitly calls on law enforcement officials or prosecutors to provide relevant information to the judicial officer that parallels in many respects the types of information that a pretrial services program will obtain and provide following an arrest and prior to the defendant's first appearance. Ordinarily, this information will be generated during the course of investigations that result in the filing of complaints and requests for arrest warrants and, if time permits, should be considered prior to the decision about whether to proceed by summons or arrest.

Standard 10-3.3(b)

In most instances, judicial officers have no reason to issue arrest warrants if prosecutors are content with summonses. However, whereas the First Edition of these Standards required the judicial officer to accede to a prosecutor's request for a summons in lieu of an arrest warrant, subsequent Editions' addition of the qualifier "ordinarily" recognizes there may be circumstances when an arrest warrant would be appropriate even if the prosecutor has requested a summons. An example would be if the defendant previously had disobeyed orders issued by the judicial officer.

Standard 10-3.3(c)

Paralleling Standard 10-2.2(d) relating to police use of citations, this Standard requires a judicial officer who issues an arrest warrant to state "in writing or on the record" the reasons for the exception to the preferential summons policy. The requirement is intended to provide the basis for a subsequent review, thereby promoting accountability in implementation of the policy.

PART IV

RELEASE BY JUDICIAL OFFICER AT FIRST APPEARANCE OR ARRAIGNMENT

Standard 10-4.1 Prompt first appearance

(a) Arrests should not be timed to cause or extend unnecessary pretrial detention.

(b) Unless the defendant is released on citation or in some other lawful manner, the defendant should be taken before a judicial officer without unnecessary delay. The defendant should be presented at the next judicial session within [six hours] after arrest. In jurisdictions where this is not possible, the defendant should in no instance be held by police longer than 24 hours without appearing before a judicial officer. Judicial officers should be readily available to conduct first appearances within the time limits established by this Standard.

Where a crime of violence is implicated, an assessment of the risk posed by the defendant to the victim(s) and community should be completed prior to the first appearance, but a defendant's first appearance should not ordinarily be delayed in order to conduct in-custody interrogation or other in-custody investigation. A defendant who is not promptly presented should be entitled to immediate release under appropriate conditions unless pretrial detention is ordered as provided in Standards 10-5.8 through 10-5.10.

History of the Standard

This Standard is derived from Second Edition, Revised Standard 10-4.1 but has been changed in several significant ways. Subsection (a) is new. The former Standard called for "immediate release" of a defendant not promptly presented to a judicial officer, which it defined as "generally within [six] hours after arrest." This new Standard makes two important changes, calling for "immediate release," but under "appropriate conditions" if the defendant is not presented "within [six hours]" and extending to twenty-four hours the maximum permissible period of detention before presentment in jurisdictions where presentment in [six hours] is not possible. The Second Edition, Revised

Standard recognized "no circumstances" under which the first appearance could be delayed in order to conduct in-custody interrogation or investigation. This Standard, which calls for a risk assessment when a violent crime is implicated, provides that first appearance in such cases should "not ordinarily" be delayed for interrogation and investigation purposes.

Related Standards

ALI, Model Code of Pre-Arraignment Procedure (1975), 310.1; 310.2
Federal Rules of Criminal Procedure, 5(a)
NAC, Corrections (1973), 4.5
NAC, Courts (1973), 4.5
NAPSA, Standards on Pretrial Release (2004), 2.1
NCCUSL, Uniform Rules of Criminal Procedure (1987), 311
NDAA, National Prosecution Standards (1991), 45.4(a); 46.1

Commentary

In a great many criminal cases, the defendant's first court appearance after arrest is an extremely important event. This is the point at which the defendant is formally informed for the first time of the charges, and it is at this stage that the first (and often only) determination is made about the defendant's release or detention while awaiting disposition of the charges. This Standard emphasizes the importance of promptly presenting arrestees before a judicial officer for a pretrial release decision.

Standard 10-4.1(a)

Recognizing that a defendant's right to prompt appearance before a judicial officer should not depend on the day of the week of the arrest, this Standard addresses an aberrant practice that is occasionally followed in some places—effectuating arrests immediately before a weekend or holiday, even though there is no urgency requiring the arrest to be made at that time. In jurisdictions with no court session or arrangement for making a judicial officer available during these periods, the result can be to leave the arrested person in custody for an unnecessarily extended period of time. Defendants' right to prompt presentment before a judicial officer should not depend upon the day of the week they are arrested.[33]

[33] In County of Riverside v. McLaughlin, 500 U.S. 44 (1991), the Supreme Court held that a probable cause determination must be made within 48

Standard 10-4.1(b)

Enforcement of the right to prompt presentment can be problematic in jurisdictions where the only guidance provided in the relevant statute or court rule is in ambiguous terms like "promptly" or "without unnecessary delay."[34] Therefore, in addition to calling for presentment "without unnecessary delay," this Standard recommends there be a fixed six hour time limit within which an arrested person should be produced before a judicial officer. However, this time period is bracketed in recognition of the reality that some jurisdictions, particularly those in rural areas, may need a longer period.[35] According to the Standard,

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hours as a prerequisite to further pretrial detention following a warrantless arrest. In many jurisdictions, the probable cause determination is often combined with a first appearance proceeding at which the defendant is formally advised of the charges and advised about his or her rights. In these jurisdictions, the practical effect is to establish an outer limit of 48 hours on the time within which the defendant must be brought before a judicial officer for the initial appearance and probable cause determination.

[34] Although some states have adopted a fixed period within which a defendant must be brought before a judicial officer following arrest, the federal courts and many states continue to require that presentment simply be "prompt" or "without unnecessary delay." *See, e.g.,* Fed. R. Crim. Procedure 5 (a); KY Crim. Rule 3.02 (requiring arrested person be taken before judge without unnecessary delay but not forthwith); MD Rule 4-212 (requiring presentment "without unnecessary delay and in no event later than 24 hours after arrest"). Both the Uniform Rules of Criminal Procedure and the National District Attorneys' Association's National Prosecution Standards recommend against "unnecessary delay," but neither sets a time limitation on "necessary" delays. *See* Uniform Rules of Criminal Procedure, Rule 311 (NCCUSL 1987); NDAA National Prosecution Standards, Standard 10.4(A) (National District Attorneys Association, 1991). The Commentary to Uniform Rule 311 explains: "No specific number of hours is specified, because there seems reason to fear that a maximum time would become *the* time and because some flexibility appears necessary". Standard 10-4.1 is clear that *any* delay is impermissible if unnecessary, but otherwise permits flexibility within a recommended six-hour period.

[35] The American Law Institute's provides:

> [A]ny person who has been arrested and has not been released . . . shall be brought before a court at the earliest time after the arrest that a judicial officer of such court is available and in any event within 24 hours after the arrest. If such appearance has not taken place within 24 hours after . . . arrest, such person shall be released with a citation or on bail.

however, no jurisdiction should allow more than twenty-four hours of police custody, regardless of where and when the arrest takes place. This time frame is briefer than the forty-eight hour time period (inclusive of weekends) that the United States Supreme Court accepted as constitutionally permissible for making a probable cause determination in *County of Riverside v. McLaughlin*.[36] In that case (which involved a procedure for conducting a probable cause determination in conjunction with the defendant's first appearance), the Supreme Court rejected a proposed thirty-six-hour rule for making the probable cause determination, noting that it was not constitutionally required and would "compel countless jurisdictions to speed up their criminal justice mechanisms substantially."[37] Standard 10-4.1(b) takes the position that, even though a longer time period may be constitutionally permissible, a period no longer that 24 hours (and optimally closer to the six hours recommended in brackets) is desirable. The Standard states explicitly that "judicial officers should be readily available to conduct first appearances within the time limits established by this Standard." The Standard contemplates that judicial officers will be available for a sufficient number of hours on weekends and legal holidays, as well as on regular business days, to make the production of arrestees truly prompt.

Whatever time period is chosen should be considered the maximum, rather than the usual, period a person can be detained before first appearance. Booking procedures, other administrative processes, and

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American Law Institute Model Code of Pre-Arraignment Procedure § 310.1 (1975)

The National Advisory Commission on Criminal Justice Standards and Goals ("NAC") recommended in 1973 that "when a defendant has been arrested and a citation has not been issued, the defendant should be presented before a judicial officer within 6 hours of the arrest." The Commentary to NAC Standard 4.5 states that "six hours should be the maximum limit for bringing an arrestee before a judicial officer." NAC, *Courts,* Commentary at 77. *See also* the NAC volume on *Corrections* Standard 4.5: "A person in the physical custody of a law enforcement agency on the basis of an arrest, with or without a warrant, should be taken before a judicial officer without unnecessary delay. In no case should the delay exceed 6 hours." (NAC, *Corrections,* 1973).

[36] 500 U.S. 44 (1991). The Supreme Court opinion in this case addressed only the timing of the probable cause determination and did not discuss the timing of the initial appearance other than to note that the practice in Riverside County was to conduct the probable cause proceeding in conjunction with the defendant's first appearance.

[37] *Id.* at 57.

court congestion should not be used as routine excuses for justifying police custody beyond this period.

A requirement of prompt presentment is meaningless if judicial officers are not available to conduct initial proceedings within the prescribed period. The Standard contemplates that sufficient means exist to ensure such availability. Such means may include utilizing "on-call" or "back-up" judges, commissioners or magistrates; may involve flexible scheduling of the time of judicial officers, and may make use of recent technology such as interactive video or computer-assisted pretrial services interviews and background investigations. Use of commissioners or magistrates to determine probable cause and to make pretrial release decisions is fairly common in jurisdictions across the United States.[38] Video arraignments have been used for a number of years by some jurisdictions to overcome problems posed by geography and the cumbersome logistics of transportation from police or jail custody to the courts.[39] In light of these advances, the Standard no longer has the exception, contained in prior editions, for arrests during nighttime hours.

The last paragraph of this Standard envisions that pre-first appearance investigations (such as those called for under Standard 10-4.2) will generally take place within the time frame fixed for the first appearance. In this connection, it should be noted that pretrial services programs in a number of jurisdictions routinely complete their investigations and provide reports to the court within the 24 hour maximum period called for by the Standard.[40]

The Standard includes a narrow exception to the general rule that the first appearance should not be delayed for interrogation or investigative

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[38] These officials should be lawyers and be employed by the court system as judicial officers. The decisions of commissioners should be reviewable *de novo* by a judge as soon as one is available. *See* Standard 10-5.10(h), *infra*.

[39] A 1995 study identified 26 states where at least one jurisdiction was using interactive video for arraignments, initial appearances, or bail hearings. Legal authority for such use was by court rule in eight of these states, by legislation in seven, and by case law in one. Two other states had legislation authorizing such use and one other had a court rule. *See* LIS, Inc., *Use of Interactive Video for Court Proceedings: Legal Status and use Nationwide* (Longmont, CO: National Institute of Corrections 1995). In the years since 1995, the use of interactive video for initial proceedings in criminal cases has markedly increased.

[40] *See, e.g.*, the descriptions of the operations of pretrial services programs in the District of Columbia, Philadelphia, Monroe County (FL), and the state of Kentucky in Mahoney *et al., supra* note 8, pp 11-17.

purposes, providing that in cases involving crimes of violence a defendant's first appearance should not "ordinarily" be delayed in order to conduct in-custody interrogation or other in-custody investigation." [41] The exception is meant to permit only evidence-gathering necessary for a neutral judicial officer to determine whether there was probable cause for the arrest—for example, conducting a line-up.[42] It is generally improper to delay presentment for evidence-gathering having other purposes. Courts in several jurisdictions have permitted the use of statements obtained from defendants who have knowingly waived their right to prompt presentment, but there is substantial skepticism about the practice of using such evidence.[43]

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[41] Brief detention on reasonable suspicion to investigate felonious activity has been held to be permissible under the Fourth Amendment. *See* United States v. Sharpe, 470 U.S. 675 (1985); United States v. Hensley, 469 U.S. 221 (1985). The Supreme Court, in *Mallory v. United States*, 354 U.S. 449 (1957), commented that brief delays in production to verify statements by a person in detention might be justified. *See* Mallory, 354 U.S. at 455.

[42] *See, e.g.,* Hayes v. Florida, 470 U.S. 811 (1985); Dunaway v. New York, 442 U.S. 200 (1979); Davis v. Mississippi, 394 U.S. 721 (1969); *see also* Mallory, 354 U.S. at 456; Upshaw v. United States, 335 U.S. 410, 412-13; Willis v. Chicago, 999 F.2d 284, 289 (7th Cir. 1993); *United States v. Miller*, 449 F.2d 974 (D.C. Cir. 1971) (upholding an eyewitness identification of the defendant for another crime made prior to presentment because it did not take place after an "unnecessary delay"); United States v. Thurman, 436 F.2d 280, 283 n.14 (D.C. Cir. 1970) (holding that a delay in presentment before a commissioner for a lineup related to the offense for which the accused was arrested did not violate the requirement of prompt presentment); Williams v. United States, 419 F.2d 740 (D.C. Cir. 1969) (holding that a brief delay for a lineup related to the offense for which the accused was arrested was not a *per se* violation of the prompt presentment requirement); Sanders v. Houston, 543 F. Supp. 694, 700-01 (S.D. Tex. 1982) (permitting the police to delay presentment of an arrestee, within the mandatory twenty-four hour time limit prior to a judicial determination of probable cause, in order to stage a lineup, as a permissible "administrative step"). *But cf.* Commonwealth v. Futch, 290 A.2d 417, 419 (Pa. 1972) (holding that a fourteen-hour delay between a suspect's arrest and his presentment to the magistrate, during which time he was identified in a lineup, constituted "unnecessary delay" and suppressing identifications obtained during the delay).

[43] *See* Williams v. State, 825 A.2d 1078 (Md 2003) (suggesting use of waiver forms as "a fair and practical way . . . to allow the police to make a sufficient preliminary investigation necessary to determine what charges, if any, should be brought against an accused, to complete any necessary administrative 'booking' procedures, and to determine whether the accused is willing to

The Second Edition, Revised Standards provided that defendants who are not promptly presented should be released.[44] That policy is continued under these Standards with the important qualification that the release is to be under "appropriate conditions," to protect against flight from court or threat to the safety of the community. Delay in production on the part of law enforcement officers should not result in the unrestricted return of dangerous individuals to the community.[45]

Standard 10-4.2 Investigation prior to first appearance: development of background information to support release or detention determination

(a) In all cases in which the defendant is in custody and charged with a criminal offense, an investigation to provide information relating to pretrial release should be conducted by pretrial services or the judicial officer prior to or contemporaneous with a defendant's first appearance.

(b) Pretrial services should advise the defendant that:

(i) the pretrial services interview is voluntary;

(ii) the pretrial services interview is intended solely to assist in determining an appropriate pretrial release option for the defendant;

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undergo interrogation, and yet to make meaningful the important protections afforded by [presentment before a judicial officer]."); United States v. Berkovich, 932 F. Supp 582 (S.D.N.Y. 1996) (refusing to suppress statement where defendant knowingly and voluntarily waived right to prompt presentment). *But see* Greenwell v. United States, 336 F.2d 962, 968 (D.C. Cir. 1964) (finding waiver permissible in the circumstances of that case but warning that "courts look with great suspicion" on evidence that an arrested person, during a period of unnecessary delay, consented voluntarily to cooperate with the police).

[44] *See also* American Law Institute, *Model Code of Pre-Arraignment Procedure* § 310.1 (1975) which provides that, if the first appearance does not occur within a 24 hour period following arrest, the defendant must be released on citation or bail.

[45] Unwarranted delays in presentment may also result in evidentiary sanctions. Most of the controversies arising from the prompt presentment requirement have arisen in the context of efforts to suppress statements made during a period of unnecessary delay. The admissibility of confessions or inculpatory statements obtained under such circumstances lies beyond the ambit of these standards.

(iii) any responsive information provided by the defendant during the pretrial services interview will not be used in the current or a substantially-related case either to adjudicate guilt or to arrive at a sentencing decision; but

(iv) the voluntary information provided by the defendant during the pretrial services interview may be used in prosecution for perjury or for purposes of impeachment.

(c) Release may not be denied solely because the defendant has refused the pretrial services interview.

(d) The pretrial services interview should include advising the defendant that penalties may be imposed for providing false information.

(e) The pretrial services interview of the defendant should carefully exclude questions relating to the events or the details of the current charge(s).

(f) The pretrial services investigation should include factors related to assessing the defendant's risk of flight or of threat to the safety of the community or any person, or to the integrity of the judicial process. Information relating to these factors and the defendant's suitability for release under conditions should be gathered systematically and considered by the judicial officer in making the pretrial release decision at first appearance and at subsequent stages when pretrial release is considered.

(g) The pretrial services investigation should focus on assembling reliable and objective information relevant to determining pretrial release and should organize it according to an explicit, objective and consistent policy for evaluating risk and identifying appropriate release options. The information gathered in the pre-first-appearance investigation should be demonstrably related to the purposes of the pretrial release decision and should include factors shown to be related to the risk of flight, threat to the safety of any person or the community and to selection of appropriate release conditions and may include such factors as:

(i) the nature and circumstances of the charge when relevant to determining release conditions, consistent with subsection (e) above;

(ii) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings;

(iii) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense;

(iv) the availability of persons who agree to assist the defendant in attending court at the proper time and other information relevant to successful supervision in the community;

(v) any facts justifying a concern that a defendant will fail to attend court, pose a threat to the safety of any person or the community; and

(vi) factors that may make the defendant eligible and an appropriate subject for conditional release and supervision options, including participation in medical, drug, mental health, or other treatment, diversion or alternative adjudication release options.

(h) The presentation of the pretrial services information to the judicial officer should link assessments of risk of flight and of public safety threat during pretrial release to appropriate release options designed to respond to the specific risk and supervision needs identified. The identification of release options by pretrial services for the consideration of the judicial officer should be based on detailed agency guidelines developed in consultation with the judiciary to assist in pretrial release decisions. Suggested release options should be supported by objective, consistently applied criteria contained in the guidelines. The results of the pretrial services investigation and recommendation of release options should be promptly transmitted to relevant first-appearance participants before the hearing, including information relevant to alternative release options, conditional release treatment and supervision programs, or eligibility for pretrial detention, so that appropriate actions may be taken in a timely fashion.

History of the Standard

This Standard draws upon Second Edition, Revised Standard 10-4.4 but is significantly more detailed. Subsection (a) broadens the requirement for an investigation when the defendant is in custody from felony cases to all cases; the judicial officer, as well as the pretrial services agency, is authorized to conduct the investigation. New subsections (b) and (d) specify the advice to be given to the defendant about the investigation. The explicit prohibition in subsection (c) against denying release solely because of the defendant's refusal to be

interviewed is new. Subsection (g) expands the list of information to be gathered and requires that it "be demonstrably related to the purposes of the pretrial release decision" and "include factors shown to be related to risk of flight, threat to the safety of any person or the community, and the selection of appropriate release conditions." A new provision in subsection (h) provides that the information provided to the judicial officer "should link assessments of risk of flight and of public safety threat during pretrial release to appropriate release options designed to respond to the specific risk and supervision needs identified."

Related Standards

NAC, Corrections (1973), 4.5
NAC, Courts (1973), 4.6
NAPSA, Standards on Pretrial Release (2004), 2.2 (a) and (b); 3.3, 3.4
NCCUSL, Uniform Rules of Criminal Procedure (1987), 321(a); 341(c); 341(d)
NDAA, National Prosecution Standards (1991), 45.4(b)

Commentary

Standard 10-4.2(a)

This Standard provides for one of the core elements of an effective first appearance proceeding: the conduct of an investigation, following the arrest and before the first appearance proceeding, to provide a basis for the court's decision about pretrial release or detention. These Standards as a whole call for every jurisdiction to establish a pretrial services agency or program (see, *e.g.,* Standard 10-1.10, *supra*), and are structured to make extensive use of pretrial services programs in order to achieve the goals of the Standards. However, the drafters recognize that it may take considerable time for such programs to be organized and funded in some places.[46] In the absence of a pretrial services agency or

[46] Although by no means universal, the adoption of independent pretrial services programs has been increasing. As noted in a recent survey of pretrial services programs:

> Since their inception in the 1960s, pretrial services programs have been providing bail-setting judicial officers with information and options for release or detention of persons accused of criminal offenses. Over the ensuing four decades, hundreds of pretrial programs have been established in rural, suburban, and urban jurisdictions.

program, the Standard charges the judicial officer presiding at first appearance with responsibility for developing the information, through inquiries of the prosecution, defense counsel, the defendant, and others present at the first appearance proceeding who may be able to provide information relevant to the release/detention decision.

This Standard makes it clear that investigations to provide information relevant to the pretrial release determination should be conducted in *all* cases where the defendant is in custody—not just those traditionally viewed as "serious." The investigations are to be undertaken within a very limited time frame—between the arrest and the first appearance, a period that Standard 10-4.1 calls for taking place within [six] hours and in any event not more than 24 hours—and should provide information needed by the judicial officer for the pretrial release determination to be made at the first appearance. [47] The information may be assembled from a variety of sources. In well-functioning pretrial services agencies, these sources typically include the interview of the defendant; follow-up contacts with persons identified by the defendant as references; criminal history data bases maintained by local law enforcement agencies, state criminal history repositories, and the FBI's National Crime Information Center (NCIC); motor vehicle department records; records of probation and corrections agencies; and the pretrial services program's own files.

It may not always be possible for a pretrial services agency to collect all the information envisioned by later subsections of this Standard within the limited time period between arrest and first appearance. However, there are many examples of pretrial services agencies across the nation that function efficiently enough to provide important and

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Clark and Henry, *supra* note 7, at 1-2. The same survey, however, found that the programs varied widely in the type and degree of services provided.

> [F]rom the early years the development of [pretrial] programs has not been uniform. In some jurisdictions programs were introduced solely to reduce the jail population; in others, their primary purpose was to provide supervision of those ordered released by the courts pending trial. Some programs targeted limited groups of defendants for their services, while others interviewed everyone arrested. *Id.* at 6.

[47] According to the 2003 survey of pretrial services programs, it appeared that roughly one out of every four pretrial services programs did not conduct an initial interview until after the defendant's first appearance in court. Even where an initial interview preceded the first appearance, 84% of the programs reviewed reported having at least one category of defendants that was automatically excluded from the program's interviews and investigation. *Id.* at 16-17.

timely background information to the judicial officer in time for the defendant's first judicial appearance.[48]

Standard 10-4.2(b)

By requiring that the defendant be advised of the voluntary nature and limited purpose of the pretrial services interview, this Standard attempts to encourage the defendant's cooperation and thereby maximize information relevant to the release decision.[49] However, fairness dictates, and Standards 10-4.2(b) through (d) require, that the defendant also be advised of the possible risks associated with participating.

The assurance that information derived from the interview cannot be used in a "current or substantially related case," either to adjudicate guilt or for consideration at sentencing, can be based on legislation relating to the pretrial services function, or achieved through state or local court rule, or by local memorandum of understanding among court, defense and prosecution agencies. This limited confidentiality "protection," is necessary to make the defendant comfortable that the interview is not a disguised attempt to assist in the prosecution of the criminal charges. Without some assurance that the information will be protected and segregated from the adjudicatory and punishment process, the defendant is likely to decline, delay, or discontinue the interview. With no defendant interview, the pretrial services agency is unlikely to be able to obtain sufficient information to support a reasoned pretrial release determination by the judicial officer.

Even under this approach, however, the protection of certain information obtained in the interview is not (or, under existing law, cannot be) absolute. For this reason, Standard 10-4.2(b)(iv) calls for advising the defendant that information obtained during the interview can be used in prosecution for perjury or for the purposes of impeachment In some jurisdictions, statements made to the pretrial officer can be used for such purposes in the event that the defendant takes the stand at trial and testifies about material facts in a fashion that differs from what he or she said during the pretrial services interview. The Standard is intended to discourage defendants from lying or

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[48] See Mahoney *et al.*, *supra* note 8, at 11-17.

[49] The number of pretrial services programs advising defendants of the voluntariness of interviews has risen in recent years, from 78% in 1989 to 86% in 2001. Clark and Henry *supra* note 7, at 63. Similarly, defendants are advised on the potential uses of the information disclosed in 85% of programs, as compared to 75% in 1989. *Id.*

withholding information in hopes of gaining pretrial release, and thus enhance the integrity of the interview.

Standard 10-4.2(c)

This Standard seeks to ensure the voluntariness of pretrial services interviews by prohibiting informal or formal court policies that coerce defendants into participating by threatening, implicitly or explicitly, to withhold release if they decline to be interviewed.

Standard 10-4.2(d)

Standard 10-4.2(d) is related to the admonition in 10-4.2(b)(iv) that the defendant's pretrial services interview is not protected from use in a perjury prosecution or for impeachment. Defendants are encouraged to participate in pretrial services interviews, but they ought to be aware of the risks when they do, which may include prosecution for providing false information. [50]

Standard 10-4(e)

Since the purpose of the pretrial services interview with the defendant is to determine the defendant's suitability for release, not to develop information relevant to determining guilt or innocence, this Standard cautions the interviewer to avoid questioning the defendant about the "events or details of the pending charge(s)." [51] Implicit in the Standard are related responsibilities to discourage the defendant from spontaneously offering voluntary explanations of the charged offense(s). Note, however, that the Standard does not preclude the pretrial services agency from providing the court with information about the charge that is obtained from sources other than the interview of the defendant and is relevant to the pretrial release decision. See commentary accompanying Standard 10-4.2(g)(i), below.

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[50] *See e.g., United States v. Benitez*, 34 F.3d 1489 (9th Cir. 1994) (affirming application of sentencing enhancement for obstruction of justice where defendant gave false information to pretrial services by not disclosing an outstanding warrant).

[51] See Mahoney *et al.*, *supra* note 8, at 29 (noting that a number of pretrial services agencies instruct staff members to refrain from discussing information about the offense charged because "this is a subject for discussion between the defendant and counsel, or for the police or prosecutor to address").

Standard 10-4.2(f)

This Standard provides general instructions on the scope of the pretrial services investigation. The investigation should be shaped by the judicial officer's need at first appearance (and throughout the pretrial period) for information related to the specific aims of the pretrial release decision – i.e., determining what (if any) restrictions are necessary to prevent flight, protect individuals and the community, and maintain the integrity of the judicial process. This Standard emphasizes the importance of a systematic approach to gathering information, and seeks to limit the scope of information-gathering to facts or factors demonstrably related to these pretrial release goals. Potential sources of relevant information are noted above in the commentary accompanying Standard 10-4.2 (a).

Standard 10-4.2(g)

Pretrial services agencies may face formidable challenges in assembling "reliable and objective information" during the short period of time between the defendant's arrest and the first appearance. However, the soundness and integrity of the information produced by the pre-first appearance investigation are fundamental to the judicial officer's ability to make fair and effective pretrial release decisions.

The types of information listed in subsections (i) through (vi) as factors to be addressed in the pretrial services investigation are similar to types of information listed in the federal and District of Columbia pretrial detention statutes as factors to be considered by the judicial officer in deciding upon release or detention.[52] Subsection (i) indicates that there can be situations when information related to the charged offense can be addressed by the pretrial services agency because such information is relevant to determining release conditions (for example, in a case involving charges of domestic violence). However, the Standard makes it clear that such information should be gathered in a fashion that is consistent with Standard 10-4.2 (e)—i.e., without asking the defendant any questions about the events that led to the charge.

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[52] *See* 18 U.S.C. § 3142(g) (1984); D.C. Code Ann. § 23-1322(e) (2001 Edition, 2003 Supp.). Note, however, that these statutes include "the weight of the evidence against the person" as a factor to be considered by the court. Assessment of the weight of the evidence is not within the scope of the pretrial services investigation, but can be addressed by the prosecution and the defense at the first appearance proceeding.

For information to be of maximum use to the judicial officer, it should be well-organized in a standard format that facilitates highlighting specific objective factors relevant to the release decision. The framework for assembling information and assessing risk should reflect a consistent policy for evaluating risk, and should not leave the organization and presentation of information to the unguided discretion of pretrial services officers. The emphasis on objective and reliable information directs the background investigation away from speculative data or subjective interpretations of factors that may be influenced by rumor, innuendo, or interviewer bias. Fair release procedures should avoid relying on unsubstantiated, speculative, or highly interpretive kinds of information.

Pretrial services agencies may need to develop policies for interviewing and gathering information about defendants charged as repetitive drunk-driving offenders, as well as those charged with domestic violence, drug, or other offenses that may call for special release options such as no-contact orders or substance abuse or mental health treatment. Clear agency policy and a strong staff training program are invaluable in helping pretrial services interviewers recognize the important distinction between appropriate and inappropriate pretrial services information-gathering.

Standard 10-4.2(h)

This Standard instructs the pretrial services agency to present assessments of the risk of flight and threat to public safety in a fashion that links such assessments to specific release options that can respond to the risks and supervision needs identified by the agency. It emphasizes that the identification of release options should be based on "detailed agency guidelines developed in consultation with the judiciary." This provision makes it clear that there should be a close working relationship between the judiciary and the pretrial services program in developing criteria for assessing risks and recommending specific release options.

The Standard provides for the report on the results of the pretrial services investigation to be transmitted to the court and to the defense and prosecution in advance of the first appearance proceeding. With the information available prior to the first appearance, it is possible to take account of the information and recommendations at that proceeding.

Standard 10-4.3 Nature of first appearance

(a) The first appearance before a judicial officer should take place in such physical surroundings as are appropriate to the administration of justice. Each case should receive individual treatment, and decisions should be based on the particular facts of the case and information relevant to the purposes of the pretrial release decision as established by law and court procedure. The proceedings should be conducted in clear and easily understandable language calculated to advise defendants effectively of their rights and the actions to be taken against them. The first appearance should be conducted in such a way that other interested persons may attend or observe the proceedings.

(b) At the defendant's first appearance, the judicial officer should provide the defendant with a copy of the charging document and inform the defendant of the charge and the maximum possible penalty on conviction, including any mandatory minimum or enhanced sentence provision(s) that may apply. The judicial officer should advise the defendant that the defendant:

(i) is not required to say anything, and that anything the defendant says may be used against him or her;

(ii) if represented by counsel who is present, may communicate with his or her attorney at the time of the hearing;

(iii) has a right to counsel in future proceedings and that, if the defendant cannot afford a lawyer, one will be appointed;

(iv) if not a citizen, may be adversely affected by collateral consequences of the current charge, such as deportation;

(v) if a juvenile being treated as an adult, has the right, where applicable, to the presence of a parent or guardian;

(vi) if necessary, has the right to an interpreter to be present at proceedings; and

(vii) where applicable, has a right to a preliminary examination or hearing.

(c) If the defendant is not released at the first appearance and is not represented, counsel should be appointed immediately. The next judicial proceeding should occur promptly, but not until the defendant and defense counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived the right to be represented by counsel.

(d) The defendant should be provided an opportunity to communicate with family or friends for the purposes of facilitating pretrial release or representation by counsel.

(e) A record should be made of the proceedings at first appearance. The defendant also should be advised of the nature and approximate schedule of all further proceedings to be taken in the case.

(f) The judicial officer should decide pretrial release in accordance with the general principles identified in these Standards.

(g) If, at the first appearance, the prosecutor requests the pretrial detention of a defendant under Standards 10-5.8 through 10-5.10, a judicial officer should be authorized, after a finding of probable cause to believe that a defendant has committed an offense as alleged in the charging document, to order temporary pretrial detention following the procedures under Standard 10-5.7 or to conduct a pretrial detention hearing under Standard 10-5.10.

History of the Standard

This Standard is derived from Second Edition, Revised Standard 10-4.2. New provisions require that the defendant be provided a copy of the charging document and be informed of any mandatory minimum or enhanced sentence that may apply. Other new provisions require the judicial officer to provide advice to the defendant about the right to an interpreter, the possible collateral consequences of a conviction for a non-citizen, and, for a juvenile, the right to the presence of a parent or guardian. A previous requirement of "forthwith" appointment of counsel for an unrepresented defendant if the defendant cannot financially afford counsel and the nature of the charges so requires has been revised. The Standard now makes it clear that the defendant has a right to counsel in future proceedings and that a lawyer will be appointed if the defendant cannot afford one. A requirement that the prosecutor's request for pretrial detention be in writing has been deleted. Under this Standard, temporary detention may be ordered, or a pretrial detention hearing may be conducted after a finding of probable cause to believe that a defendant has committed "an offense" [rather than "a felony"] as alleged in the charging document. A provision exhorting prosecuting attorneys to have policies encouraging the release of defendants upon their own recognizance has been deleted.

Related Standards

ABA, Criminal Justice Standards, Collateral Sanctions and Disqualification of Convicted Persons, adopted August 2003

ABA, Criminal Justice Standards, Defense Function (3d ed. 1993), 4-2.1; 4-3.6

ABA, Criminal Justice Standards, Prosecution Function (3d ed. 1993), 3-3.10

ABA, Criminal Justice Standards, Providing Defense Services (3d ed. 1992), 5-6.1; 5-8.1

ABA, Criminal Justice Standards, Special Functions of the Trial Judge (3d ed. 2000), 6-1.1(b)

ABA, Criminal Justice Standards, Pleas of Guilty (3d ed. 1999), 14-1.4(c)

ALI, Model Code of Pre-Arraignment Procedure (1975), 310.1; 310.2

Federal Rules of Criminal Procedure, 5(c)

NAC, Courts (1973), 4.5

NAPSA, Standards on Pretrial Release (2004), 3.4

NCCUSL, Uniform Rules of Criminal Procedure (1987), 321

NDAA, National Prosecution Standards (1991), 46.1

Commentary

Standard 10-4.3(a)

The first stage of the judicial process in a criminal case is generally the initial appearance, at which a judicial officer determines whether the defendant will face the charges while in confinement or while at liberty in the community. This decision has serious implications for the quality and circumstances of the defendant's life prior to trial as well as for the defendant's ability to defend against criminal charges. As one author has observed, the initial release/detention decision divides defendants into classes of accused persons: those who will face charges while in confinement and those who will remain at liberty during the pretrial process.[53]

Unfortunately, proceedings to determine pretrial release often are conducted under circumstances that would not be tolerated at trial. Courtrooms may be noisy and overcrowded, and cases may be treated hurriedly in order to dispose of a large volume of cases in a short period

[53] John S. Goldkamp, *Two Classes of Accused*, *supra* note 18.

of time.[54] This Standard emphasizes that first appearances should not be conducted in a perfunctory manner. Rather, reflecting the importance of the decisions made at this stage, the proceedings should be held in physical facilities that are appropriate for the administration of justice and conducted with the dignity and decorum to be expected of a court proceeding. Each case should be treated individually, with attention to the information about the case that has been developed by the prosecutor, defense counsel, and pretrial services.

Defendants who have been held in a jail or police lock-up for some period may be anxious, confused, frightened, or physically unwell. They may have language or cultural difficulties or suffer from disabilities, mental illness, or emotional upset. Given this reality, the judicial officer should attempt to ensure that defendants understand what is going on. To that end, this Standard instructs the judicial officer to conduct proceedings in "clear and understandable language calculated to advise defendants effectively of their rights and the actions to be taken against them."

Finally, the Standard seeks to promote both the perception of fairness and actual fairness of the first appearance by allowing "interested parties" to attend. Such parties can include victims as well as family members and friends of the defendant. Access can either be in person in the courtroom or by video if that is how first appearances in a particular jurisdiction are conducted.

Standard 10-4.3(b)

This Standard provides the judicial officer an outline for orienting defendants to the first appearance and to subsequent proceedings in the case. By requiring that defendants be given a copy of the charging document, informed of the maximum possible penalty upon conviction, and advised of their rights during the proceedings, the Standard seeks to enhance their ability to understand the criminal justice process and intelligently participate in it.

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[54] For descriptions of "assembly line" processes observed in some American criminal courts, *see, e.g.,* Edward L. Barrett, Jr., "Criminal Justice: The Problem of Mass Production" in Harry W. Jones, ed., *The Courts, the Public, and the Law Explosion"* Englewood Cliffs, NJ: Prentice-Hall, Inc., 1965, pp. 85, 111-115; President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (Washington, D.C.: U.S. Government Printing Office, 1967), p. 128; Paul Hoffman, *Courthouse* (New York: Hawthorne Books, Inc., 1979), pp. 5-7.

Subsections (ii) and (iii) provide for the judicial officer to inform the defendant about rights to representation by counsel. In some jurisdictions, defendants are represented by counsel, at least provisionally, at their first appearance, but this is not a universal practice.[55] ABA policy, however, clearly recommends that provision of counsel at first appearance should be standard in every court. Thus, the *Providing Defense Services Standards* call for counsel to be provided to the accused "as soon as feasible and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs first."[56]

Provision of counsel at the first appearance is especially important if consideration is going to be given to detention or to release on conditions that involve a significant restraint on the defendant's liberty. If the case is one in which the defendant meets the eligibility criteria for pretrial detention specified in Standard 10-5.9, then the judicial officer should follow the steps set forth in Standard 10-5.10. These include making a determination concerning probable cause, appointing counsel if the defendant is unable to afford counsel, and subsequently conducting a hearing at which the government must show by clear and convincing evidence that no condition or combination of conditions will reasonable ensure the appearance of the defendant for future court proceedings and the safety of other persons and the community.

There are some cases in which the defendant may not be eligible for pretrial detention but in which the judicial officer may consider imposing any of the array of conditions of release provided for in Standard 10-5.2(a). Some of these conditions—including electronic monitoring, regular drug testing, participation in a treatment or supervision program, and house arrest—would obviously involve significant restrictions on a defendant's liberty. If the judicial officer is going to consider imposition

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[55] One author has found that eight states and the District of Columbia provide a right to counsel at first appearance and that another twenty-six states provide first appearance representation in some counties. See Douglas C. Colbert *et al.*, "Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail," 32 *Cardozo L. Rev.* 1719 (2002).

[56] *See* ABA Criminal Justice Standards, Providing Defense Services, Standard 5-6.1 (3d ed. 1992), Standard 5-6.1. In 1998, the ABA's House of Delegates adopted a resolution recommending that "all jurisdictions ensure that defendants are represented by counsel at their initial judicial appearance when bail is set" and that "each jurisdiction provide adequate resources to support effective implementation of such representation by counsel for indigent defendants."

of such conditions, then sound practice would call for two predicate steps. First, the prosecution should be required to make a showing of probable cause to believe that the defendant committed the offense(s) charged.[57] Second, if the defendant is unrepresented and cannot afford an attorney, an attorney should be appointed to represent the defendant, at least for purposes of a hearing to consider the possible imposition of conditions of release.[58]

Adequate representation at a first appearance proceeding involving possible imposition of conditions that would significantly restrict a defendant's pretrial freedom requires that counsel have some knowledge

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[57] The probable cause determination does not have to be made in an adversary proceeding (Gerstein v. Pugh, 420 U.S. 103, 119-126 [1975]), but it does have to be made by a neutral magistrate, in a timely fashion, in order to meet the requirements of the Fourth Amendment. *Id.* 114, 126. Part II of Mr. Justice Powell's opinion for the Court in the *Gerstein* case (a part in which all of the justices joined) noted the significant adverse effects of pretrial confinement on a defendant and went on to state that:

> "Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty. See, e.g., 18 U.S.C. 3146(a)(2), (5). When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Id.* at 114.

The timeliness requirement of the *Gerstein* opinion was subsequently refined by the Court in County of Riverside v. McLaughlin, 500 U.S. 44 (1991) to place a maximum limit of 48 hours on the time that a person can be held in custody before a probable cause determination is made by a judicial officer.

[58] The United States Supreme Court has not recognized a general right to counsel at a defendant's first court appearance, although it has held that counsel is required if the proceeding is one that can significantly affect the accused's basic right to a fair trial. *See, e.g.*, White v. Maryland, 373 U.S. 59 (1963); Coleman v. Alabama, 399 U.S. 1 (1970). At least eight states and the District of Columbia require the appointment of counsel for unrepresented defendants who cannot afford an attorney prior to the commencement of any proceeding that could result in imposition of conditions of release. *See* Douglas C. Colbert *et al.*, "Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail," *supra* note 55, p. 1724; *also* Lavallee v. Justices in the Hampden Superior Court, 442 Mass 228 (2004), in which the Massachusetts Supreme Judicial Court ruled that "Neither a bail hearing nor a preventive detention hearing may proceed unless and until a defendant is represented by counsel."

of a defendant's background, community ties, and prior record. Hence, a hearing focused on possible conditions of release should not commence until counsel has had an opportunity to review the charges, the report of the pretrial services agency, and any other relevant documents, and to consult with the client. Jurisdictions should also seek to ensure that there is appropriate space available in the courthouse so that counsel can have meaningful confidential communication with the client.

Subsection (iv) requires the judicial officer to advise defendants that if they are not citizens they may be subject to collateral consequences of arrest, conviction, or plea, including the possibility of deportation.[59] The requirement that the advice be given to all defendants avoids the difficulty in trying to discern so early in the process which defendants might be in jeopardy, perhaps based solely upon their appearances, names, accents, or other observable features.

Subsection (v) requires the judicial officer to advise a juvenile charged as an adult of the right "where applicable" to have a parent or guardian present at the initial appearance. The language of the Standard recognizes that jurisdictions vary widely in the age at which they define a person as an adult or as a juvenile subject to being treated as an adult, and in the protections they afford to such persons.

Subsection (vi) recognizes that non-English-speaking defendants cannot fully participate in the first appearance if they do not understand what the judicial officer and others at their proceedings are saying. It therefore requires the judicial officer to notify them of their right to an interpreter. Of course, language problems may also hinder giving this notice. Preprinted forms with this information in all languages common in the geographic area should be available for the judicial officers to give defendants at the first appearance.[60]

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[59] *See* ABA Criminal Justice Standards, Collateral Sanctions and Discretionary Disqualification of Convicted Persons, approved August 2003.

[60] Defendants in federal criminal cases who speak only or primarily a language other than English are entitled to interpreters certified or otherwise recognized as qualified by the Administrative Office of the U.S. Courts. *See* Federal Court Interpreters Act, 28 U.S.C. § 1827 and § 1828. Several states have similar statutes or constitutional amendments. *See, e.g.,* NM Constitution, Article II, § 14; VA Criminal Code, ch. 402, § 19.2-164; and Washington Code, ch. 2.43. In addition, courts receiving federal funds from the U.S. Department of Justice may be required to provide meaningful access to persons with limited English proficiency. *See* Executive Order 13166, 65 FR 50121 (August 16, 2000) and final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited

Subsection (vii) provides that "where applicable" defendants have a right to a preliminary examination or hearing. Not all jurisdictions require a preliminary examination or hearing to determine probable cause, either to hold defendants for trial or for action of a grand jury. Although preliminary hearings are not constitutionally mandated, where held, defendants are entitled to counsel at that significant stage. See *White v. Maryland*, 373 U.S. 59 (1963), *Coleman v. Alabama*, 399 U.S. 1 (1970).

Standard 10-4.3(c)

This Standard provides for immediate appointment of counsel for indigent unrepresented defendants not released at the first appearance. This is essential so that counsel and the defendant have adequate opportunity to confer meaningfully before the pretrial detention hearing, which is to occur "promptly."

Standard 10-4.3(d)

Because of the presumption favoring release adopted in these Standards, it is appropriate for the court to provide the defendant an opportunity to communicate with family or friends who may assist in arranging acceptable circumstances for pretrial release and in securing representation by counsel. However, the opportunity to communicate with friends or family for these purposes is subject to security and logistical concerns. Moreover, such communications should not be permitted to delay otherwise timely proceedings.

Standard 10-4.3(e)

Decisions made at the first appearance may be subject to later review in the course of ensuing pretrial, trial, or appellate proceedings.[61] It is thus essential to preserve the factual and legal bases for the determinations reached at the initial appearance.

Standard 10-4.3(f)

This standard focuses on the actual decision-making of the judicial officer presiding at the defendant's first appearance. It emphasizes that

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English Proficient Persons (DOJ Recipient LEP Guidelines) 67; FR 41455 (June 18, 2002).

[61] *See* 18 U.S.C. § 3145 (1984) (providing for review and appeal of a release or detention order); *see also* United States v. Dominguez, 783 F.2d 702, 705-06 (7th Cir. 1986) (noting that district courts are required to review magistrates' detention orders under § 3145 (b)).

the decision made at the initial appearance should be made in accordance with the general principles set forth in these Standards.

Standard 10-4.3(g)

This Standard recognizes that pretrial detention may be appropriate under certain circumstances and provides the judicial officer guidance in responding to prosecutorial requests for either temporary or permanent detention during the adjudication of the case. The Standard requires the judicial officer to find probable cause that the defendant committed the crime alleged in the charging document as a prerequisite for considering detention.[62] If probable cause is established, the Standard authorizes the judicial officer to follow procedures for temporary detention of defendants on release in another case under in Standard 10-5.7 or to conduct a pretrial detention hearing pursuant to Standards 10-5.8 through 10-5.10.

[62] A timely finding of probable cause is a constitutional requirement for continued detention. Gerstein v. Pugh, 420 U.S. 103 (1975); County of Riverside v. McLaughlin, 500 U.S. 44 (1991).

PART V

THE RELEASE AND DETENTION DECISIONS

Standard 10-5.1 Release on defendant's own recognizance

(a) It should be presumed that defendants are entitled to release on personal recognizance on the condition that they attend all required court proceedings and that they do not commit any criminal offense. This presumption may be rebutted by evidence that there is a substantial risk of nonappearance or need for additional conditions as provided in Standard 10-5.2, or by evidence that the defendant should be detained under Standards 10-5.8, 10-5.9 and 10-5.10 or conditionally released pending diversion or participation in an alternative adjudication program as permitted by Standard 10-1.5.

(b) In determining whether there is a substantial risk of nonappearance or threat to the community or any person or to the integrity of the judicial process if the defendant is released, the judicial officer should consider the pretrial services assessment of the defendant's risk of willful failure to appear in court or risk of threat to the safety of the community or any person, victim or witness. This may include such factors as:

(i) the nature and circumstances of the offense when relevant to determining release conditions;

(ii) the defendant's character, physical and mental condition, family ties, employment status and history, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings;

(iii) whether, at the time of the current offense or arrest, the person was on probation, parole, or other release pending trial, sentencing, appeal, or completion of sentence for an offense;

(iv) availability of persons who agree to assist the defendant in attending court at the proper time and other information relevant to successful supervision in the community;

(v) any facts justifying a concern that the defendant will violate the law if released without restrictions; and

(vi) factors that may make the defendant eligible and an appropriate subject for conditional release and supervision options, including participation in medical, drug, mental health or other treatment, diversion or alternative adjudication release options.

(c) In the event that the judicial officer determines that release on personal recognizance is unwarranted, the officer should include in the record a statement, written or oral, of the reasons for this decision.

History of the Standard

This Standard is based on Second Edition, Revised Standard 10-5.1. Subsection (b) has been broadened to make safety risks, as well as nonappearance risks, matters to be determined and considered by the judicial officer. The list of factors for the judicial officer to consider has been expanded to include: drug or alcohol abuse history, release status, availability of persons who agree to assist the defendant in appearing in court, facts justifying a concern that the defendant will violate the law if released without restrictions, and factors that may make the defendant eligible and an appropriate subject for conditional release and supervision options. Subsection (c) has added the phrase "written or oral" in describing the statement to be included in the record if the judicial officer determines that release on personal recognizance is unwarranted.

Related Standards

Federal Rules of Criminal Procedure, 46(a)
NAC, Corrections (1973) 4.4
NAC, Courts (1973), 4.6
NAPSA, Standards on Pretrial Release (2004), 2.3
NCCUSL, Uniform Rules of Criminal Procedure (1987), 341(a); 341(e)
NDAA, National Prosecution Standards (1991), 45.1(c)(2); 45.5(a)

Commentary

Standard 10-5.1(a)

The presumption that defendants are entitled to release on personal recognizance is one of the core principles of these Standards. It is closely

linked to the principle that an accused person is presumed innocent until proven guilty and to basic notions of due process—a decision to restrict liberty should be made only after a judicial officer has determined that there is probable cause to believe that the defendant has committed the offense charged and that and that there is evidence justifying any restriction on liberty.

This Standard, consistent with the Federal Bail Reform Act of 1984 and laws in the District of Columbia and a number of states, articulates the presumption of release on personal recognizance.[63] It makes the presumption a starting point for release/detention decision-making while also providing that the presumption may be rebutted by evidence that there is a substantial risk of nonappearance or danger to public safety that requires additional conditions (Standard 10-5.2) or secure detention (using the criteria and procedures set forth in Standards 10-5.8 – 5.10).

Standard 10-5.1(b)

This Standard provides guidance to the judicial officer in considering whether conditional release or secure detention may be necessary. It calls on the judicial officer to consider the pretrial services agency's assessment of the risks posed by the defendant and outlines a number of factors to be considered in determining whether the risks of nonappearance or danger rebut the presumption of release. The factors listed in subparagraphs (i) through (vi) of the standard are similar to the factors listed in the Federal and D.C. statutes, except that they do not include the weight of the evidence against the defendant.[64] The factors listed mirror those to be covered in the pretrial services agency's investigation during the period between arrest and first appearance.[65]

Traditionally, judicial practice—often grounded in laws or court rules—has relied on the seriousness of the criminal charges against the

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[63] *See* the federal Bail Reform Act of 1984, 18 U.S.C. § 3142(b) (1984) (creating presumption in favor of release on recognizance); D.C. Code Ann. § 23-1321(a) (2001 Edition, 2003 Supp.) (prioritizing release on recognizance). A 1985 study of bail laws in the United States identified twenty-one states, in addition to the federal government and the District of Columbia, that have laws expressing a presumption favoring personal recognizance release. *See* Goldkamp, *supra* note 13, at 10, 62.

[64] *See* U.S.C. §3142(g); D.C. Code Ann. §23-1322(e). At the initial appearance stage, it can be extremely difficult to gauge the weight of the evidence. However, if the case is one in which detention is to be considered, the weight of the evidence will be considered at a detention hearing. See Standard 10-5.8 (b), *infra.*

[65] *See* Standard 10-4.2(g), *supra.*

defendant as the principal (and sometimes only) factor determining pretrial release decisions, typically by increasing the amount of the bail required as the seriousness of the charge increases.[66] This traditional practice has been well-documented in observational and empirical studies of the bail process, and strongly criticized over many decades.[67] Subsection (i) of this Standard, which provides that the court may take account of "the nature and circumstances of the offense when relevant to determining release conditions," recognizes that there are times when facts concerning the charge are relevant but rejects a flat correlation between charge seriousness and a determination concerning release.

Empirically, there is some evidence that the risk of non-appearance or criminal behavior may actually be greater for persons charged with relatively minor non-violent offenses (e.g., prostitution, retail theft, numbers-running, small-scale drug possession) than for some persons charged with more serious crimes.[68] However, if a person charged with a serious offense does in fact commit a similar offense while on release, the costs to society of the subsequent offense are much greater than if a defendant charged with a minor offense commits another minor offense. In directing judicial officers to consider the nature and circumstances of the offense "when relevant to determining release conditions," subsection (i) seeks to avoid generalized reliance on the seriousness of the charge and instead focus attention on what conditions (if any) are appropriate in the specific case of the individual before the court.

Standard 10-5.1(b)(ii) recognizes the potential relevance of a number of defendant characteristics commonly listed in laws intended to guide pretrial release decision-making. They include the defendant's character, mental and physical health, family ties, employment status, length of residence in the community, history of drug or alcohol abuse, criminal history, and record of appearance at prior court proceedings. Each of these factors has been widely regarded as providing some indication of defendants' relative stability and reliability. However, the Standard does not specify the weight to be accorded them, either individually or together, and contemplates that they be considered in the overall context of other available information, thereby leaving considerable discretion to the judicial officer.

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[66] See John S. Goldkamp, *Two Classes of Accused; A Study of Bail and Detention in American Justice, supra* note 18; Goldkamp *et al.*, *Personal Liberty and Community Safety* (New York: Plenum Press, 1995),

[67] *See* the publications cited in note 18, *supra.*

[68] *See* John S. Goldkamp, *Two Classes of Accused, supra* note 18; also Goldkamp et al., *Personal Liberty and Community Safety*, *supra* note 66.

Under Standard 10-5.1(b)(iii), the fact that a defendant may be on provisional release—such as probation, parole, or pretrial release pending trial in another case—at the time of the current arrest may be taken into consideration when the judicial officer considers whether to allow release on personal recognizance or impose specific release conditions. (Similar factors can trigger a "temporary detention" pursuant to Standard 10-5.7, in contemplation of a full-scale detention hearing within three days.)

Standard 10-5.1(b)(iv) advises the judicial officer to consider information relevant to the likelihood of successful community-based supervision, specifically including the availability of persons who will agree to assist the defendant in making required court appearances. The Standard recognizes that the incidence of non-appearance can be reduced when defendants have someone to remind them of court dates and times and perhaps to accompany them to court. Such individuals also may assist the defendant in complying with other terms of the release.

Standard 10-5.1(b)(v) authorizes the judicial officer to consider any facts that raise concern about possible violations of the law if the defendant is released on personal recognizance. This provision relies on judicial officers' sound exercise of discretion in considering evidence suggestive of potential unlawful behavior—for example, the existence of an existing protective order in a case where a defendant is charged with domestic violence—in determining whether a defendant poses a specific risk that precludes release on personal recognizance.

Standard 10-5.1(c)

Consistent with earlier Standards dealing with citation and summons policies (Standards 10-2.2 (d) and 3.3 (c)), this Standard requires the judicial officer to provide reasons, on the record, for a decision to deny release on personal recognizance. The reasons may be provided in writing or orally. The purposes of the requirement are to encourage rational and fair decision-making, foster accountability for release/detention decisions made, and provide a record for review of the decision at later stages of the case.

Standard 10-5.2 Conditions of release

(a) If a defendant is not released on personal recognizance or detained pretrial, the court should impose conditional release, including, in all cases, a condition that the defendant attend all court proceedings as ordered and not commit any criminal offense. In addition, the 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. The court may:

(i) release the defendant to the supervision of a pretrial services agency, or require the defendant to report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(ii) release the defendant into the custody or care of some other qualified organization or person responsible for supervising the defendant and assisting the defendant in making all court appearances. Such supervisor should be expected to maintain close contact with the defendant, to assist the defendant in making arrangements to appear in court, and, when appropriate, accompany the defendant to court. The supervisor should not be required to be financially responsible for the defendant nor to forfeit money in the event the defendant fails to appear in court. The supervisor should promptly report a defendant's failure to comply with release conditions to the pretrial services agency or inform the court;

(iii) impose reasonable restrictions on the activities, movements, associations, and residences of the defendant, including curfew, stay-away orders, or prohibitions against the defendant going to certain geographical areas or premises;

(iv) prohibit the defendant from possessing any dangerous weapons and order the defendant to immediately turn over all firearms and other dangerous weapons in the defendant's possession or control to an agency or responsible third party designated by the court; and prohibiting the defendant from engaging in certain described activities or using intoxicating liquors or certain drugs;

(v) conditionally release the defendant pending diversion or participation in an alternative adjudication program, such as drug, mental health or other treatment courts;

(vi) require the defendant to be released on electronic monitoring, be evaluated for substance abuse treatment, undergo regular drug testing, be screened for eligibility for drug court or other drug treatment program, undergo mental or physical health screening for treatment, participate in appropriate treatment or supervision programs, be placed under house arrest or subject to other release options or conditions as may be necessary reasonably to ensure attendance in court, prevent risk of crime and protect the community or any person during the pretrial period;

(vii) require the defendant to post financial conditions as outlined under Standard 10-5.3, execute an agreement to forfeit, upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to ensure the appearance of the defendant, and order the defendant to provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial officer may require;

(viii) require the defendant to return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(ix) impose any other reasonable restriction designed to ensure the defendant's appearance, to protect the safety of the community or any person, and to prevent intimidation of witnesses or interference with the orderly administration of justice.

(b) After reasonable notice to the defendant and a hearing, when requested and appropriate, the judicial officer may at any time amend the order to impose additional or different conditions of release.

History of the Standard

This Standard is based on Second Edition, Revised Standard 10-5.2. Although implicit in previous Standards, the explicit requirement of a condition that the defendant attend all court proceedings is new. The third purpose of release conditions is now phrased as "to safeguard the integrity of the judicial process" rather than "to prevent intimidation of witnesses and interference with the orderly administration of justice."

The former provision authorizing the court to release the defendant to a pretrial services agency has been broadened to give the court the option of requiring the defendant to report on a regular basis to a designated agency. Subsection (a) (2), providing for the defendant's release into the custody or care of an agency other than a pretrial services agency now also requires the supervisor promptly to report the defendant's failure to comply with release conditions. Rather than authorizing "prohibitions against the defendant approaching or communicating with particular persons or classes of persons," the revised Standard authorizes curfews and no-contact orders. The release condition prohibiting the defendant from possessing dangerous weapons has been expanded to include ordering the defendant to turn over immediately all firearms and dangerous weapons to a party designated by the court. Subsections (a) (v) through (viii) are new. Subsection (b) authorizing amendment of the release order is also new.

Related Standards

ABA, Criminal Justice Standards, Pretrial Release Standards (3d ed. 2003), 10-1.4

Federal Rules of Criminal Procedure, 46(a)

NAC, Corrections (1973), 4.4

NAC, Courts (1973), 4.6

NAPSA, Standards on Pretrial Release (2004), 1.4, 2.4

NCCUSL, Uniform Rules of Criminal Procedure (1987), 321; 341(e), (f)

NDAA, National Prosecution Standards (1991), 45.5(b); 45.7(a)

Commentary

Standard 10-5.2(a)

Following a determination that release on personal recognizance is not appropriate, the judicial officer must determine which conditions of release, if any, are appropriate. Any condition imposed on a defendant will restrict the defendant's liberty to some extent, and the Standard emphasizes that conditions imposed should be the *least restrictive* conditions needed to provide reasonable assurance that the defendant will return to court and refrain from behavior that would threaten public safety or impair the integrity of the judicial process.

Subsections (i) through (ix) of this Standard set out a number of types of conditions that the judicial officer may consider imposing (alone or in combination) on the defendant. This enumeration of conditions is

drawn from existing statutes addressing the use of conditional release and reflects practices used in a number of jurisdictions. Subsections (i) and (ii) provide a basic structure for the monitoring and supervision of defendants on pretrial release, by authorizing release either to the supervision of a pretrial services agency [subsection (i)] or to some other "qualified agency or person" who will be responsible for supervising the defendant [subsection ii]. The types of conditions enumerated in subsections (iii) through (viii) are intended to provide a "menu" of possible release options, use of which should be tailored to the needs and risks posed by an individual defendant. For example, prohibitions against possessing dangerous weapons, as in Standard 10-5.2 (a)(iv), may be appropriate in cases in which there is a concern about a threat to the public, a victim, or a witness. Treatment conditions authorized in subsections (v) and (vi) are to be used as means of assisting the defendant in returning to court and protecting the community, and may be appropriate for use in minimizing specific risks brought to the attention of the court. The financial conditions authorized under subsection (a)(vii) are to be imposed only to ensure appearance and under the limits described more fully in Standard 10-5.3. The amount of bond should take into account the assets of the defendant and financial conditions imposed by the court should not exceed the ability of the defendant to pay.

As discussed in the commentary accompanying Standard 10-4.3(b), before consideration is given to possible imposition of conditions that could be regarded as a *significant* restraint of the defendant's liberty, there should be a probable cause determination and the court should ensure that the defendant is represented by counsel.

Standard 10-5.2(b)

Standard 10-5.2(b), which provides for amendment of a release order in order to impose additional or different conditions, reflects the fact that circumstances may change significantly during the pretrial period. For example, if the pretrial services agency reports that drug tests indicate that the defendant has been using illegal drugs, the court may choose to impose more stringent testing requirements, require the defendant to participate in a drug treatment program, prohibit the defendant from going to certain areas, or even order a detention hearing. Conversely, if the pretrial services agency reports a succession of drug tests that indicate no usage, the judicial officer may reduce previously imposed drug testing requirements or other conditions initially imposed. This Standard establishes a general framework for ordering changes in

conditions: any such change should be made after notice to the defendant and a hearing at which both the prosecution and the defense can participate.

Standard 10-5.3 Release on financial conditions

(a) Financial conditions other than unsecured bond should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court. 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.

(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.

(c) Financial conditions should not be set to punish or frighten the defendant or to placate public opinion.

(d) On finding that a financial condition of release should be set, the judicial officer should require the first of the following alternatives thought sufficient to provide reasonable assurance of the defendant's reappearance:

(i) the execution of an unsecured bond in an amount specified by the judicial officer, either signed by other persons or not;

(ii) the execution of an unsecured bond in an amount specified by the judicial officer, accompanied by the deposit of cash or securities equal to ten percent of the face amount of the bond. The full deposit should be returned at the conclusion of the proceedings, provided that the defendant has not defaulted in the performance of the conditions of the bond; or

(iii) the execution of a bond secured by the deposit of the full amount in cash or other property or by the obligation of qualified, uncompensated sureties.

(e) Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the defendant's flight risk, and should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge.

(f) Financial conditions should be distinguished from the practice of allowing a defendant charged with a traffic or other minor offense to post a sum of money to be forfeited in lieu of any

court appearance. This is in the nature of a stipulated fine and, where permitted, may be employed according to a predetermined schedule.

(g) In appropriate circumstances, when the judicial officer is satisfied that such an arrangement will ensure the appearance of the defendant, third parties should be permitted to fulfill these financial conditions.

History of the Standard

This Standard is based on Second Edition, Revised Standard 10-5.3. The explicit prohibitions of financial conditions that result in pretrial detention because of the defendant's inability to pay or that are intended to prevent criminal conduct or to protect the safety of the community or any person are new. The provision allowing fulfillment of financial conditions by third parties is new.

Related Standards

ABA, Criminal Justice Standards, Defense Function (3d ed. 1993), 4-3.5(j)

ALI, Model Code of Pre-Arraignment Procedure (1975), 310.1(7); 310.2(3)

Federal Rules of Criminal Procedure, 46(a), (e)

NAC, Corrections (1973), 4.4

NAC, Courts (1973), 4.6

NAPSA, Standards on Pretrial Release (2004), 2.5

NCCUSL, Uniform Rules of Criminal Procedure (1987), 341(g)

NDAA, National Prosecution Standards (1991), 45.1(c)(3); 45.6

Commentary

Standard 10-5.3(a)

The Third Edition continues the philosophy of restricting the use of financial conditions of release. The policy reasons underlying this philosophy have been discussed above in the commentary accompanying Standards 10-1.4(c) – (f). In brief, they include the absence of any relationship between the ability of a defendant to post a financial bond and the risk that a defendant may pose to public safety; the conviction that courts, not bondsmen, should make the actual decision about detention or release from custody; the unhealthy secrecy of the bondsmens' decision-making process; and the need to guard against undermining basic concepts of equal justice. As two leading scholars

familiar with pretrial processes noted over forty years ago, "[i]n a system which grants pretrial liberty for money, those who can afford a bondsman go free; those who cannot stay in jail."[69]

Under Standard 10-5.3(a), financial conditions may be employed, but only when no less restrictive non-financial release condition will suffice to ensure the defendant's appearance in court. An exception is an unsecured bond because such a bond requires no "up front" costs to the defendant and no costs if the defendant meets appearance requirements.

This Standard, like the federal and District of Columbia statutes,[70] prohibits judicial officers from requiring a monetary bond in an amount beyond the reach of a defendant as a means of assuring the defendant's detention.

Standard 10-5.3(b)

This Standard explicitly prohibits the setting of financial conditions of release in order to prevent future criminal conduct or protect public safety. The prohibition is based on a fundamental principle of these Standards: concerns about risks of pretrial crime should be addressed explicitly through non-financial release conditions or, if necessary, through pretrial detention ordered after a hearing—not covertly through the setting of bail so high that defendants cannot pay it. If it appears that it may not be possible to address risks of dangerousness through other conditions of release, the judicial officer hold a pretrial detention hearing pursuant to Standard 10-5.9 to decide whether the defendant should be detained pending adjudication of the charges.

Standard 10-5.3(c)

Judicial officers should resist public pressure and media attention calling for inappropriately high bail to punish defendants or those involved in unpopular causes. Threats of unaffordable bail in order to compel defendants to cooperate with the government are also inappropriate.

Standard 10-5.3(d)

This Standard sets priorities for the types of financial bond to be used in the limited circumstances where financial conditions may be

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[69] Daniel J. Freed and Patricia Wald, *Bail in the United States* (Washington, D.C.: U.S. Department of Justice and Vera Foundation, Inc., 1964) p. 21.

[70] *See* 18 U.S.C. § 3142 (c) (2) (1984); D.C. Code Ann. § 23-1321(c)(3) (2001 Edition, 2003 Supp.).

necessary to assure the defendant's return to court. If a financial condition of release is imposed, it should be the least restrictive type of bond to ensure the defendant's appearance. The court first should consider an unsecured bond, which is simply the defendant's promise to pay the amount of the bond in the event of a failure to appear; it requires the defendant to post no money to gain release. The second option is a ten percent bond, which requires the defendant to post ten percent of the full bail amount, with the amount posted to be returned upon conclusion of the case if the defendant has appeared for court proceedings as required. Finally, if these alternatives will not suffice, the third option is a bond secured by deposit of the full amount of the bond in cash or property or by "the obligation of qualified, uncompensated sureties." Consistent with the provision in Standard 10-1.4(f) that compensated sureties should be abolished, the posting of bond through a commercial bail bond agency is not included as an option.

Standard 10-5.3(e)

This Standard emphasizes the importance of setting financial conditions through a process that takes account of the circumstances of the individual defendant and the risk that the individual may not appear for scheduled court proceedings. It flatly rejects the practice of setting bail amounts according to a fixed bail schedule based on charge. Bail schedules are arbitrary and inflexible: they exclude consideration of factors other than the charge that may be far more relevant to the likelihood that the defendant will appear for court dates. The practice of using bail schedules leads inevitably to the detention of some persons who would be good risks but are simply too poor to post the amount of bail required by the bail schedule. They also enable the unsupervised release of more affluent defendants who may present real risks of flight or dangerousness, who may be able to post the required amount easily and for whom the posting of bail may be simply a cost of doing "business as usual."

Standard 10-5.3(f)

In many jurisdictions, it is a common practice to allow defendants in cases involving minor traffic offenses and ordinance violations to post a sum of money approximately equal to the amount of the fine for the offense, as security in the event that they do not return for the scheduled court date. As a practical matter, this is the same as advance payment of the fine, with the amount posted being forfeited in the event of nonappearance but with defendant retaining the right to contest the

charge and obtain return of the amount paid if found not guilty. Standard 10-5.3(f) distinguishes this practice from the use of financial conditions of pretrial release in a criminal case and makes it clear that these Standards allow such "stipulated fines" and do not bar the use of schedules for fines paid in lieu of appearance.

Standard 10-5.3(g)

This Standard permits a financial bond to be posted by third persons (other than paid sureties) in "appropriate circumstances." A defendant may have considerable incentive to attend court when knowing that failure to do so will result in significant financial loss to family members, friends, or an organization that has assumed responsibility for the bail. However, before allowing third parties to post bail for the defendant, the court should inform them and the defendant of the responsibilities and risks they will assume in doing so.

Standard 10-5.4 Release order provisions

In a release order, the judicial officer should:

(a) include a written statement that sets forth all of the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the defendant's conduct; and

(b) advise the person of:

(i) the consequences of violating a condition of release, including the immediate issuance of a warrant for the defendant's arrest and possible criminal penalties;

(ii) the prohibitions against threats, force, or intimidation of witnesses, jurors and officers of the court, obstruction of criminal investigations and retaliation against a witness, victim or informant; and

(iii) the prohibition against any criminal conduct during pretrial release.

History of the Standard

This Standard is new.

Related Standards

NAPSA, Standards on Pretrial Release (2004), 2.6
NCCUSL, Uniform Rules of Criminal Procedure (1987), 341(h)

NDAA, National Prosecution Standards (1991), 45.7(a)

Commentary

Standard 10-5.4 requires the court to issue a written statement of the release conditions and provides general directions for what should be included in the order. The purpose of the written order is to help make sure that the defendant knows what is expected and thus increase the likelihood of compliance with conditions of release. The release order should provide clear information about the date and place of the next court appearance, about the conditions of release, and about the consequences of violating those conditions. Whenever possible, the statement should be in the defendant's native language so that the defendant can read it or, if illiterate, can understand it when it is read out loud by another person. It should include information about who to contact if there are questions about any of the conditions or if an emergency arises.

Standard 10-5.5 Willful failure to appear or to comply with conditions

The judicial officer may order a prosecution for contempt if the defendant has willfully failed to appear in court or otherwise willfully violated a condition of pretrial release. Willful failure to appear in court without just cause after pretrial release should be made a criminal offense.

History of the Standard

This Standard is based in part on former Standard 10-5.7, which recommended that "intentional failure" to appear in court be made a criminal offense. A provision of the previous Standard calling on jurisdictions to establish an "apprehension unit" has been deleted because most jurisdictions assign the responsibility for apprehending fugitives to other agencies. The provision concerning prosecution for contempt is new.

Related Standards

NAC, Corrections (1973), 4.4
NAC, Courts (1973), 4.7
NAPSA, Standards on Pretrial Release (2004), 4.2

NDAA, National Prosecution Standards (1991), 45.1(d)

Commentary

This Standard outlines two possible responses when a defendant has *willfully* failed to appear for a scheduled court date or violated another condition of release. It provides that a willful violation of release conditions may be prosecuted as criminal contempt. In addition, it encourages jurisdictions to criminalize a willful failure to appear in court without just cause.[71] Other possible sanctions (including modification of the conditions of release and initiation of a detention proceeding) and the procedures to be followed when there has been an apparent violation of conditions of release are outlined below in Standard 10-5.6

Standard 10-5.6 Sanctions for violations of conditions of release, including revocation of release

(a) A person who has been released on conditions and who has violated a condition of release, including willfully failing to appear in court, should be subject to modification of release conditions, revocation of release, or an order of detention, or prosecution on available criminal charges.

(b) A proceeding for revocation of a release order may be initiated by a judicial officer, the prosecutor, or a representative of the pretrial services agency. A judicial officer may issue a warrant for the arrest of a person charged with violating a release condition. Once apprehended, the person should be brought before a judicial officer. To the extent practicable, a defendant charged with willfully violating the condition of release should be brought before the judicial officer whose order is alleged to have been violated. The judicial officer should review the conditions of release previously ordered and set new or additional conditions.

(c) The judicial officer may enter an order of revocation and detention if, after notice and a hearing, the judicial officer finds that there is:

(i) probable cause to believe that the person has committed a new crime while on release or clear and convincing evidence that the person has violated any other conditions of release, and

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[71] *See, e.g.*, Md. Code (2001, 2003 Supp) Criminal Procedure, § 5-211.

(ii) clear and convincing evidence, under the factors set forth in Standard 10-5.8, that there is no condition or combination of conditions that the defendant is likely to abide by that would reasonably ensure the defendant's appearance in court and protect the safety of the community or any person.

(d) A defendant charged with a new offense or violations of any conditions of release may be temporarily detained pending hearing after notice of the charges for a period of not more than [five calendar days] under this Standard.

History of the Standard

This Standard is based on Second Edition, Revised Standard 10-5.8. It contains a new provision that explicitly authorizes up to five days of detention for a defendant charged with a new offense or violation of conditions of release pending a pretrial detention hearing.

Related Standards

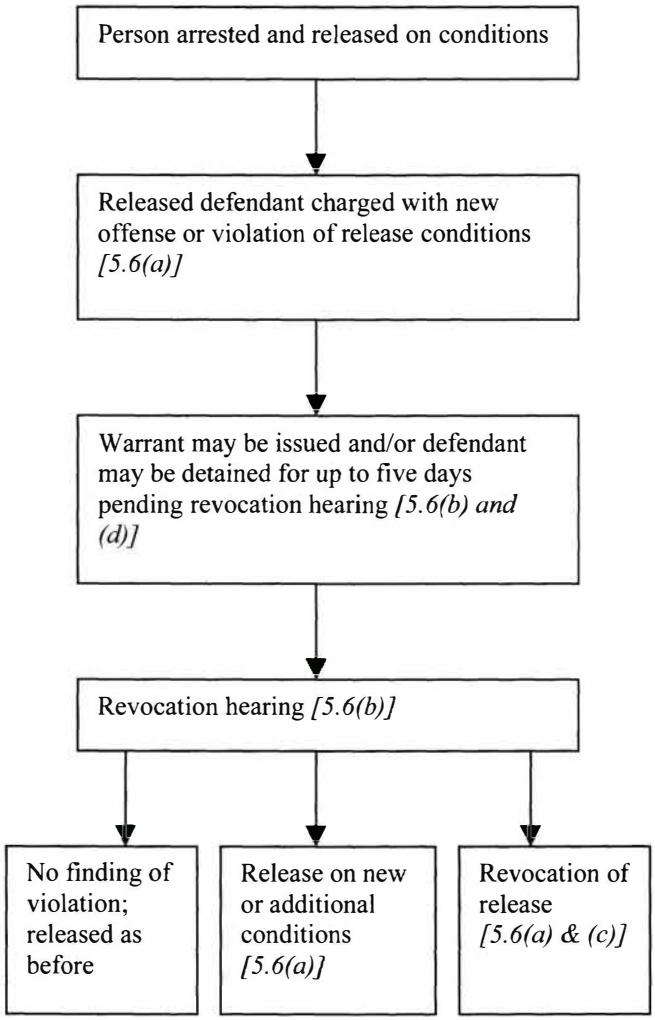
NAPSA, Standards on Pretrial Release (2004), 4.3
NAC, Courts (1973), 4.7
NAC, Corrections (1973), 4.5
NDAA, National Prosecution Standards (1991), 45.7(b), (c), (d)

Commentary

Standard 10-5.6(a)

These Standards' presumption of pretrial release is tempered by their requirement that the defendant must abide by conditions set by the court. This Standard provides a range of options for responding to a defendant's violation of conditions of release. The court can modify the release conditions to make them more restrictive or add new conditions more directly tailored to the risks posed by the defendant's release. Alternatively, the court can order a prosecution for contempt or for willful non-appearance (see Standard 10-5.5, supra) or can order that a hearing be held to determine whether the release order should be revoked and the defendant held in detention pending trial. Procedures concerning revocation are set forth in subsequent paragraphs of Standard 10-5.6.

Revocation of Release for Violation of Release Conditions



Standard 10-5.6(b)

Under subsection (b), revocation hearings may be initiated by a judicial officer, a prosecutor, or the pretrial services agency. A judicial officer may issue an arrest warrant for a person who is alleged to have violated release conditions. To avoid "judge shopping" and provide consistency and judicial economy, the Standard encourages bringing the alleged violator before the judicial officer who had issued the release order.

Violation of a release condition can involve a wide range of behaviors, and not every violation will warrant revocation of release. Imposition of additional or more restrictive conditions may suffice to reasonably ensure the defendant's appearance in court and protect the safety of the community. For example, a defendant who has failed to comply with a release condition requiring drug testing and attendance at a drug treatment program might be allowed to avoid secure detention in jail by enrolling and actively participating in a residential drug treatment facility.

Standard 10-5.6(c)

The court may consider revoking a defendant's release if, after a hearing, it finds probable cause of a new offense or clear and convincing evidence of another violation of release conditions. However, before ordering revocation, the court must determine by clear and convincing evidence that there are no different or additional release conditions that will provide reasonable assurance the person will appear in court and not endanger the community.

The predictability and seriousness of the consequences of not revoking are important considerations for the judicial officer. Jurisdictions (and even judicial officers within the same jurisdiction) may differ on just when and under what circumstances violations of conditions warrant revocation. While violations posing a threat of physical danger that cannot be met by additional conditions would be grounds for revocation in virtually all jurisdictions, violations related to re-arrests for "quality of life" offenses might not, unless the judicial officer finds repeated violations constitute a threat to the safety of the community.

Generally, "public safety" may be viewed differently in the revocation context than in the context of the original release. For example, a judicial officer who had initially released a person on his or her own recognizance (10-5.1) and who had added conditions after the person was subsequently re-arrested on similar charges (10-5.6(b), might

finally, under this Standard, revoke the release on the grounds that yet another arrest establishes clear and convincing evidence that there is no combination of conditions that the defendant is likely to abide by that will reasonably protect the safety of the community.

Standard 10-5.6(d)

Once a defendant has been charged with a new offense or violation of any condition of release, the Standard authorizes (but does not require) a period of up to five days of temporary detention pending a revocation hearing to determine whether pretrial release should be revoked or whether additional conditions should be imposed. The maximum five day period of detention for defendants charged with violation of release conditions is similar to the length of temporary detention that Standard 10-5.7 provides for cases involving defendants charged with having committed a new offense while on release in a different case.

Standard 10-5.7 Bases for temporary pretrial detention for defendants on release in another case

(a) The judicial officer may order the temporary detention of a defendant released in another case upon a showing of probable cause that the defendant has committed a new offense as alleged in the charging document if the judicial officer determines that the defendant:

(i) is and was at the time the alleged offense was committed:

(A) on release pending trial for a serious offense;

(B) on release pending imposition or execution of sentence, appeal of sentence or conviction, for any offense; or

(C) on probation or parole for any offense; and

(ii) may flee or pose a danger to the community or to any person.

(b) Unless a continuance is requested by the defense attorney, the judicial officer may order the detention of the defendant for a period of not more than [three calendar days], and direct the attorney for the government to notify the appropriate court, probation or parole official, or Federal, State or local law enforcement official to determine whether revocation proceedings on the first offense should be initiated or a detainer lodged.

(c) At the end of the period of temporary detention, the defendant should have a hearing on the release or detention of the defendant on the new charged offense. If such a hearing is not conducted [within five calendar days], the defendant should be released on appropriate conditions pending trial.

History of the Standard

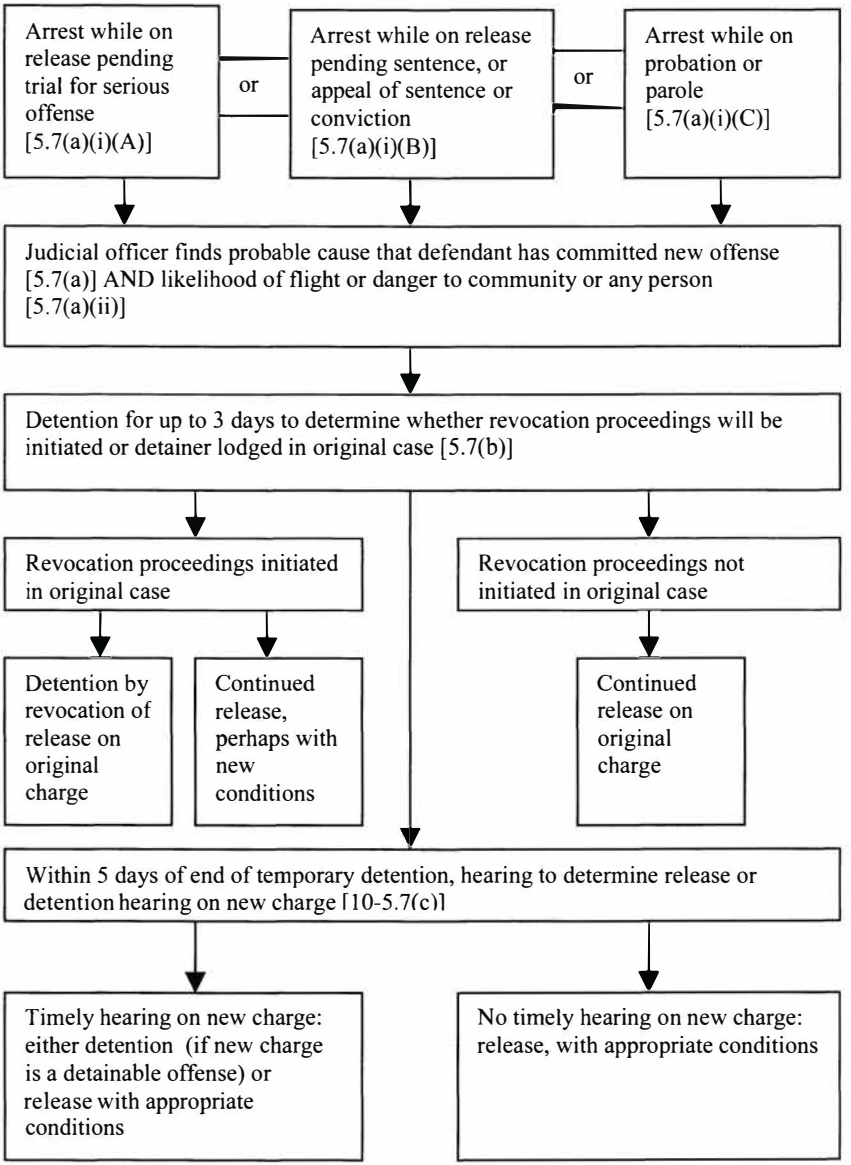
Second Edition, Revised Standard 10-5.9 authorized an arrest warrant when there was probable cause to believe a defendant awaiting trial on a previous allegation had committed a new offense. It also called for a pretrial detention hearing on the new offense within [five] calendar days of taking the defendant into custody. That Standard did not address revocation hearings or detainers with respect to the original allegation. This new Standard provides up to [three] additional days of "temporary detention" to allow time for the government to notify the appropriate officials about the new arrest. This approach is intended to enable those officials to initiate revocation proceedings or lodge a detainer in connection with the violation of the release conditions before a hearing is held to determine release or detention in connection with the new allegation. The "temporary detention" is narrower here than detention under the previous Standard in the sense that it is limited to those defendants whom the judicial officer determines may flee or pose a danger, and to those awaiting trial for serious crimes. It is broader in the sense that it applies to defendants on release pending imposition or execution of sentence, appeal of sentence or conviction, or on probation or parole. A new provision calls for releasing the defendant on appropriate conditions on the new charged offense if the hearing is not timely.

Related Standards

ABA, Criminal Justice Standards, Sentencing (3d ed. 1994), 18-7.3, 18-7.4

NDAA, National Prosecution Standards (1991), 45.7(d)

Temporary Detention for Defendants on Release in Another Case



Commentary

This Standard creates an exception to the general rule that the judicial officer should immediately consider release under Standards 10-5.1, 10-5.2, or 10-5.3. It authorizes the temporary detention of certain defendants who are arrested on new charges while on court-ordered release in other cases. Its purpose is to allow time for the jurisdiction or court that released the defendant in the original case to decide whether to modify release conditions, initiate a revocation hearing, or lodge a detainer before the arresting jurisdiction takes action on the new charges.

Standard 10-5.7(a)

This Standard outlines the limited circumstances under which a defendant who is already on release in another case can be held in temporary detention. There are three prerequisites for such detention: First, the judicial officer presiding at the first appearance following the arrest on the new charges must determine that there is probable cause to believe that the defendant committed the new offense as charged (and not merely a violation of a release condition that does not amount to a crime). Second, the judicial officer must determine that the defendant falls within one of three categories: (a) on release pending trial for an offense that the jurisdiction defines as *serious*; or (b) on release after conviction for any offense; or (c) on probation or parole for any offense. Third, the judicial officer must determine that release of the defendant would pose a risk of flight or danger to public safety.

Standard 10-5.7(b)

This Standard outlines key steps to be taken when a judicial officer conducts a first appearance proceeding in a case where the defendant is already on release in another case. In addition to the steps normally followed under Standard 4.3, the judicial officer is authorized to order temporary detention of the defendant and to direct the attorney for the government to notify the appropriate court or law enforcement officials to determine whether revocation proceedings on the first offense should be initiated or a detainer lodged. The Standard suggests the temporary detention not exceed three calendar days, unless the defendant requests a continuance.

Standard 10-5.7(c)

At the end of the [three-day] period of temporary detention, there should be a hearing to consider the defendant's release or detention on the new charge. If the new charge is not a detainable offense, the hearing to consider release conditions on that case should be immediate. However, if the new offense is subject to detention (see Standard 10-5.9), the Standard allows an additional five-day period within which to conduct the detention hearing, and calls for the release of the defendant on appropriate conditions if the hearing is not conducted within this timeframe.

Standard 10-5.8 Grounds for pretrial detention

(a) If, in cases meeting the eligibility criteria specified in Standard 10-5.9 below, after a hearing and the presentment of an indictment or a showing of probable cause in the charged offense, the government proves by clear and convincing evidence that no condition or combination of conditions of release will reasonably ensure the defendant's appearance in court or protect the safety of the community or any person, the judicial officer should order the detention of the defendant before trial.

(b) In considering whether there are any conditions or combination of conditions that would reasonably ensure the defendant's appearance in court and protect the safety of the community and of any person, the judicial officer should take into account such factors as:

(i) the nature and circumstances of the offense charged;

(ii) the nature and seriousness of the danger to any person or the community, if any, that would be posed by the defendant's release;

(iii) the weight of the evidence;

(iv) the person's character, physical and mental condition, family ties, employment status and history, financial resources, length of residence in the community, including the likelihood that the defendant would leave the jurisdiction, community ties, history relating to drug or alcohol abuse, criminal history, and record of appearance at court proceedings;

(v) whether at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending

trial, sentencing, appeal, or completion of sentence for an offense;

(vi) the availability of appropriate third party custodians who agree to assist the defendant in attending court at the proper time and other information relevant to successful supervision in the community;

(vii) any facts justifying a concern that a defendant will present a serious risk of flight or of obstruction, or of danger to the community or the safety of any person.

(c) In cases charging capital crimes or offenses punishable by life imprisonment without parole, where probable cause has been found, there should be a rebuttable presumption that the defendant should be detained on the ground that no condition or combination of conditions of release will reasonably ensure the safety of the community or any person or the defendant's appearance in court. In the event the defendant presents information by proffer or otherwise to rebut the presumption, the grounds for detention must be found to exist by clear and convincing evidence.

History of the Standard

This Standard is new.

Related Standards

NDAA, National Prosecution Standards (1991), 45.8

Commentary

These Pretrial Release Standards provide three ways defendants may be detained prior to trial: (1) in cases where there has been a violation of conditions of release, through proceedings to consider revocation of release, followed by a detention hearing (see Standard 10-5.6); (2) in cases involving an arrest for a new offense of a defendant already on release in another case through judicial findings warranting temporary detention so that release on the previous charges can be reviewed (see Standard 10-5.7); and (3) through pretrial detention hearings initiated at the time of the first appearance proceeding (Standards 10-4.3, 10-5.8, 10-5.9 and 10-5.10).

This Standard addresses the third type of detention and is a critical component of the Third Edition Pretrial Release Standards. It authorizes pretrial detention of defendants in certain limited categories of cases when there is: (1) probable cause to believe that they committed the

charged offense and (2) clear and convincing evidence that no conditions of release will reasonably ensure their appearance in court and protect the safety of the community or any person. The Standard should be read together with Standard 10-5.9, which sets forth the categories of cases that are eligible for pretrial detention and outlines the procedures to be followed in connection with a detention hearing.

Together, this Standard and Standard 10-5.9 provide a comprehensive scheme for open and explicit decision-making concerning pretrial detention of defendants who pose significant risks of flight or danger to the community. The scheme is very similar (though not identical) to the statutory scheme established by the Federal Bail Reform Act and the parallel District of Columbia statute. The federal scheme's provisions concerning detention on grounds of danger to the community were upheld by the Supreme Court in *United States v. Salerno*, a 1987 decision in which Chief Justice Rehnquist's opinion for the Court noted that the Government's interest in community safety can in "appropriate circumstances" outweigh an individual's liberty interest.[72] The opinion emphasized that the federal statute limits the cases in which detention may be sought to the most serious crimes; provides for a prompt detention hearing; provides for specific procedures and criteria by which a judicial officer is to evaluate the risk of "dangerousness"; and (via the provisions of the Federal Speedy Trial Act) imposes stringent time limits on the duration of the detention.[73] These Standards take a similar approach, though modified to leave the definition of precisely what offenses should be designated as "serious" to each jurisdiction to determine. In contrast to the federal statute, these Standards do not provide for presumptive detention for any charged offenses, except for cases involving capital crimes or offenses punishable by life imprisonment without parole as provided in Standard 10-5.8(c).

Standard 10-5.8(a)

This Standard authorizes a judicial officer to impose pretrial detention in certain limited categories of cases in order to reasonably ensure the defendant's appearance in court or to protect the safety of the community. As a threshold matter, the case must fit within the eligibility criteria in Standard 10-5.9. If the case meets these criteria, then the defendant's detention may be ordered after a hearing at which: (1) an indictment is presented or there is a finding of probable cause to believe

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[72] United States v. Salerno, 481 U.S. 739 (1987) at 748.

[73] Id. at 747.

that the defendant committed the charged offense(s); and (2) the government proves, by clear and convincing evidence, that no condition or combination of conditions of release will reasonably ensure the defendant's appearance in court or protect the safety of the community or any person. The requirement that the government show the need for detention by "clear and convincing evidence" is intended to emphasize the deliberately limited scope for using secure detention. It places a significant burden on the prosecution to present facts demonstrating why such detention is essential and why the risks of flight or dangerousness cannot be met through some type of conditional release.

Standard 10-5.8(b)

This Standard enumerates factors that the judicial officer should consider in determining whether there is any condition or combination of conditions that will reasonably ensure the defendant's appearance or protect the safety of the community. With two important differences, these correspond closely to those factors to be taken into consideration by pretrial services in conducting the pre-first-appearance investigation pursuant to Standard 10-4.2 to determine appropriate release conditions and by the judicial officer in considering whether to grant personal recognizance or to set other conditions of pretrial release under Standard 10-5.1.

The first major difference is that the Standard mandates in subsection (ii) that the court consider: "the nature and seriousness of the danger to any person or the community, if any, that would be posed by the defendant's release". Consideration of these factors requires a focus on the specific threats that would be posed by the defendant's release and the possible conditions that would negate or minimize the threat. The report of the pretrial services agency can be helpful for this purpose, but it will also be important for the judicial officer to consider evidence and arguments from the prosecution and the defense. Second, subsection (iii) calls for the judicial officer to consider "the weight of the evidence"—a factor that cannot be assessed by the pretrial services agency but may be very relevant to the release/detention decision. If the evidence against a defendant accused of a serious crime is very strong, that could heighten the defendant's incentive to flee or to endanger witnesses if released.

As described further in Standard 10-5.10 and accompanying commentary, the detention hearing is not intended to be a mini-trial at an early stage of the case. However, since the judicial officer can only order the defendant detained if there is "clear and convincing evidence" that no condition or combination of conditions of release will provide

adequate assurance of court appearances and public safety, it is appropriate to require a showing by the prosecution that there is a sound factual basis for ordering the defendant to remain in detention.

Standard 10-5.8(c)

These Standards do not preclude consideration of pretrial release for any offense category. However, Standard 10-5.8(c) creates a rebuttable presumption that a defendant will be detained pretrial when the crime charged is either a capital offense or an offense punishable by life imprisonment without the possibility of parole and the government has established probable cause that the defendant committed the crime. To rebut this presumption, the defendant must present information to establish that there are conditions of release that will reasonably ensure the defendant's appearance and safety of the public. If the defendant satisfies this burden, the burden shifts back to the government to prove by clear and convincing evidence that detention is required as for any other offense under the terms of Standard 10-5.8(a).[74] Failure of the defendant to contest the presumption will result in detention. The provision does not address the quality or quantity of the information necessary to rebut the presumption, nor does it follow the D.C. or Federal model.

Standard 10-5.9 Eligibility for pretrial detention and initiation of the detention hearing

(a) The judicial officer should hold a hearing to determine whether any condition or combination of conditions will reasonably ensure the defendant's appearance in court and protect the safety of the community or any person. The judicial officer may not order the detention of a defendant before trial except:

(i) upon motion of the prosecutor in a case that involves:

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[74] The Standard is similar to 18 U.S.C. § 3142(e) which also creates a presumption of detention for specified offenses and imposes a burden upon the defendant to produce evidence which can rebut the presumption. However, the range of offenses for which the rebuttable presumption of detention arises is much narrower under this Standard than under the federal statute. In the federal system, the presumption favoring detention becomes a factor to be considered by the district court after the defendant meets the burden of production. *See* United States v. Abad, 350 F.3d 793, 797 (8th Cir. 2003); United States v. Mercedes, 254 F.3d 433 (2d Cir. 2001).

(A) a crime of violence or dangerous crime; or

(B) a defendant charged with a serious offense on release pending trial for a serious offense, or on release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, or on probation or parole for a serious offense involving a crime of violence or dangerous crime; or

(ii) upon motion of the prosecutor or the judicial officer's own initiative, in a case that involves:

(A) a substantial risk that a defendant charged with a serious offense will fail to appear in court or flee the jurisdiction; or

(B) a substantial risk that a defendant charged in any case will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate a prospective witness or juror.

(b) If the judicial officer finds that probable cause exists, except for a defendant held under temporary detention, the hearing should be held immediately upon the defendant's first appearance before the judicial officer, unless the defendant or the prosecutor seeks a continuance. Except for good cause shown, a continuance on motion of the defendant or the prosecutor should not exceed [five working days]. Pending the hearing, the defendant may be detained.

(c) A motion to initiate pretrial detention proceedings may be filed at any time regardless of a defendant's pretrial release status.

History of the Standard

This Standard is derived from Second Edition Revised Standard 10-5.4, which authorized "preventive detention" for three specific categories of defendants upon a finding by a judicial officer that no conditions of release would protect the community or the administration of justice: (1) defendants charged with a violent felony while on release for another violent felony; (2) defendants charged with a violent felony who had been convicted of another violent felony within the past [ten] years; and (3) defendants who committed an offense or violated a condition of release while on release in connection with the current criminal charge. New Standard 10-5.9 authorizes "pretrial detention" of certain categories of defendants upon a finding that no conditions of release will reasonably protect the community and ensure the defendant's appearance in court. The categories of defendants eligible for a detention hearing under this

Standard are different in some respects from the categories in the Second Edition Standards, and are described in Standard 10-5.9(a).

Related Standards

NAPSA, Standards on Pretrial Release (2004), 2.9
NCCUSL, Uniform Rules of Criminal Procedure (1987), 345

Commentary

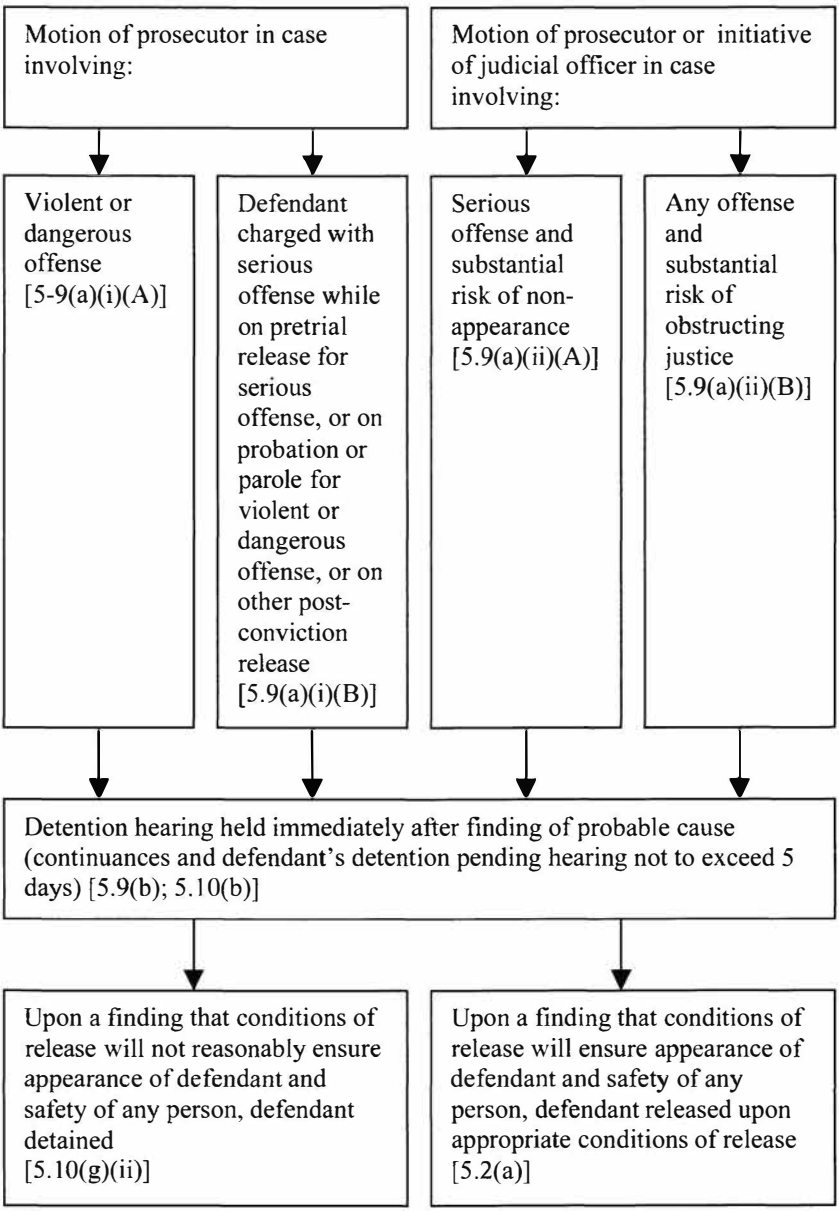
This Standard describes the categories of cases in which a defendant may be subject to pretrial detention and outlines the procedures for initiating a detention hearing.

Standard 10-5.9(a)

Standard 10-5.9(a) restricts threshold eligibility for pretrial detention to four categories of defendants. The categories are intended to encompass those defendants most likely to present a danger or fail to appear, and only defendants who fall within these categories are subject to consideration for pretrial detention under Standards 10-5.8 and 10-5.10.

For detention of the first two categories of defendants, the judicial officer's consideration of detention must be triggered by a motion of the prosecutor. The first category consists simply of defendants charged with a crime of violence or a dangerous crime. The second category consists of defendants charged with a "serious" offense who are already on release in connection with a different case. Within this category, defendants on pretrial release are eligible for detention in the new case only if the previous release was in connection with a case involving a serious offense. If the previous release was after conviction and while awaiting imposition or execution of a sentence or the outcome of an appeal, the seriousness of the previous offense is irrelevant to consideration of detention in the new case. However, if the defendant was on probation or parole, the underlying conviction must be for an offense is both "serious" *and* involves a crime that is violent or dangerous. The definitions of "serious offense" (which clearly can encompass some offenses that are not violent or physically dangerous to others), "crime of violence" and "dangerous crime" are left to individual jurisdictions to determine.

Pretrial Detention Process



For the third and fourth categories of detention-eligible cases, consideration of detention can be initiated either on motion of the prosecutor or on the judicial officer's own motion. The third category consists of defendants charged with "serious" offenses who pose a substantial risk of not appearing in court. Examples of cases in this category would include ones where a defendant is charged with criminal fraud or drug trafficking and may have access to large amounts of money as well as having motivation to abscond. In this instance, the posting and forfeiting of a large amount of financial bail would be a cost business for the defendant and there are no other conditions that would ensure the defendant's return to court.

The fourth (and broadest) category consists of defendants in any case (not necessarily one involving a "serious" offense or a violent or dangerous crime) who pose a substantial risk of obstructing justice or threatening, injuring, or intimidating prospective witnesses or jurors. The "substantial risk" criterion for ordering detention pursuant to Standard 10-5.9(a)(ii)(A) and (B) requires that there be a showing of facts pointing to unacceptable behavior by the defendant (such as intimidating witnesses) if released. The facts could be found in the risk assessment prepared by the pretrial services agency and/or in evidence provided by the prosecution.

Standard 10-5.9(b)

This Standard deals with the timing of the detention hearing. Once the judicial officer finds that that there is probable cause to believe that the defendant committed the charged offense and determines that the defendant is "eligible" for such a hearing—i.e., falls within one of the four "eligibility" categories set out in Standard 10-5.9(a)—then the detention hearing should take place immediately unless the defense or the prosecutor requests a continuance. If a continuance is requested, the judicial officer may postpone the hearing for no more than [five working days] unless good cause is shown for a longer period. The defendant may be detained until the detention hearing is actually held.

Standard 10-5.9(c)

This Standard allows the government to move for a pretrial detention hearing at any time prior to the trial regardless of the defendant's pretrial release status. This is particularly appropriate when circumstances change or new facts come to light (for example, if the prosecutor received information indicating that a released defendant had been threatening or harassing witnesses) during the pretrial period.

Standard 10-5.10 Procedures governing pretrial detention hearings: judicial orders for detention and appellate review

(a) At any pretrial detention hearing, defendants should have the right to:

(i) be present and be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed;

(ii) testify and present witnesses on his or her own behalf;

(iii) confront and cross-examine prosecution witnesses; and,

(iv) present information by proffer or otherwise.

(b) The defendant may be detained pending completion of the pretrial detention hearing.

(c) The duty of the prosecution to release to the defense exculpatory evidence reasonably within its custody or control should apply to the pretrial detention hearing.

(d) At any pretrial detention hearing, the rules governing admissibility of evidence in criminal trials should not apply. The court should receive all relevant evidence. All evidence should be recorded. The testimony of a defendant should not be admissible in any other criminal proceedings against the defendant in the case in chief, other than a prosecution for perjury based upon that testimony or for the purpose of impeachment in any subsequent proceedings.

(e) In pretrial detention proceedings under Standard 10-5.8 or 10-5.9, where there is no indictment, the prosecutor should establish probable cause to believe that the defendant committed the predicate offense.

(f) In pretrial detention proceedings, the prosecutor should bear the burden of establishing by clear and convincing evidence that no condition or combination of conditions of release will reasonably ensure the defendant's appearance in court and protect the safety of the community or any person.

(g) A judicial order for pretrial detention should be subject to the following limitations and requirements:

(i) Unless the defendant consents, no order for pretrial detention should be entered by the court except on the conclusion of a full pretrial detention hearing as provided for within these Standards.

(ii) If, on conclusion of a pretrial detention hearing, the court determines by clear and convincing evidence that no

condition or combination of conditions will reasonably ensure the appearance of the person as required, and the safety of any other person and the community pursuant to the criteria established within these Standards, the judicial officer should state the reasons for pretrial detention on the record at the conclusion of the hearing or in written findings of fact within [three days]. The order should be based solely upon evidence provided for the pretrial detention hearing. The court's statement on the record or in written findings of fact should include the reasons for concluding that the safety of the community or of any person, the integrity of the judicial process, and the presence of the defendant cannot be reasonably ensured by setting any conditions of release or by accelerating the date of trial.

(iii) The court's order for pretrial detention should include the date by which the detention must be considered *de novo*, in most cases not exceeding [90 days]. A defendant may not be detained after that date without a pretrial detention hearing to consider extending pretrial detention an additional [90 days], following procedures under Standards 10-5.8, 10-5.9, and this Standard. If a pretrial detention hearing to consider extending detention of the defendant is not held on or before that date, the defendant who is held beyond the time of the detention order should be released immediately under reasonable conditions that best minimize the risk of flight and danger to the community.

(iv) Nothing in these Standards should be construed as modifying or limiting the presumption of innocence.

(h) A pretrial detention order should be immediately appealable by either the prosecution or the defense and should receive expedited appellate review. If the detention decision is made by a judicial officer other than a trial court judge, the appeals should be *de novo*. Appeals from decisions of trial court judges to appellate judges should be reviewed under an abuse of discretion standard.

History of the Standard

This Standard on pretrial detention hearings is based on Second Edition, Revised Standard 10-5.10 pertaining to procedures governing preventive detention hearings. Subsection (d) provides that the rules of evidence in criminal trials should not apply, a change from former subsection (c). Rather than precluding the admissibility of the defendant's testimony in "any other judicial proceedings" against the

defendant, this new Standard precludes it only in "any other criminal proceedings" and includes a new provision explicitly allowing it to be admitted for impeachment in any subsequent proceedings. A new provision requires that, when there is no indictment, the prosecutor must establish probable cause to believe that the defendant committed the predicate offense; this is a change from the previous requirement that the prosecution establish a "prima facie case" that the defendant committed the predicate offense. Second Edition, Revised Standard 10-5.10 provided for a preventive detention order upon a determination "by clear and convincing evidence that the defendant represents a danger to the community." This revised Standard also addresses the issue of possible flight, providing for pretrial detention after a determination "by clear and convincing evidence that no condition or combination of conditions of release will reasonably ensure the appearance of the defendant and the safety of the community or any person." The provision for including in the detention order the date by which the detention must be considered *de novo* is new, as is the requirement that appeals be *de novo* if a judicial officer other than a trial court judge issues the detention order. Finally, the requirement that an appellate court review a trial court decision under an abuse of discretion standard is new.

Related Standards

ABA, Criminal Justice Standards, Discovery (1996), 11-2.1
ABA, Criminal Justice Standards, Sentencing (1994), 18-7.3, 7.4
NAC, Corrections (1973), 4.5(3)
NAPSA, Standards on Pretrial Release (2004), 2.10
NCCUSL, Uniform Rules of Criminal Procedure (1987), 345
NDAA, National Prosecution Standards (1991), 45.8

Commentary

Standard 10-5.10 specifies the procedures to be followed at the required pretrial detention hearing. The Standard is drawn in large part from the Federal and District of Columbia statutes governing pretrial detention hearings and appellate review of detention orders. The broad purpose is to make sure that a decision to deprive a defendant of liberty during the pretrial process is made only after a fair hearing has been held and a determination made that there is no other way of assuring that the defendant will appear for court dates and that public safety will be protected.

Standard 10-5.10(a)

Standard 10-5.10(a) sets out the basic procedural rights of a defendant at a pretrial detention hearing: the defendant can be present; can be represented by counsel (and can have counsel appointed if unable to afford a retained lawyer; can testify; can confront and cross-examine witnesses; and can proceed by proffer without having to produce witnesses. The Standard does not contemplate a formal evidentiary proceeding. The defendant may proceed by proffer and is not required to produce witnesses to meet the burden of production. Proceeding by proffer is consistent with current practice which allows for less formal evidentiary rules at this early stage in the proceedings. Thus, it has been noted that "Bail hearings are 'typically informal affairs, not substitutes for trial or even for discovery. Often the opposing parties simply describe to the judicial officer the nature of their evidence; they do not actually produce it." [75]

Standard 10-5.10(b)

This Standard leaves the custody status of the defendant pending completion of the detention hearing to the discretion of the judicial officer. Detention may be ordered but is not mandatory.

Standard 10-5.10(c)

This Standard requires the prosecution to disclose exculpatory evidence in its possession to the defense for use at the detention hearing. The disclosure requirement is not intended to be a substitute for other laws or rules regulating discovery in criminal cases, and the detention hearing is not a forum for litigation of disclosure issues. Rather, this provision focuses on evidence in the possession of the prosecution that could heighten the likelihood of defendant's release.

Standard 10-5.10(d)

This Standard eliminates the requirement in the previous edition that the rules of evidence apply to detention hearings and states explicitly that those rules should not apply. The provision was changed to prevent detention hearings from becoming "mini-trials." It also enables consideration of information acquired by the pretrial services agency and presented to the court and the parties, some of which could be subject to exclusion as hearsay if the rules of evidence were in force. Allowing the

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[75] United States v. LaFontaine, 210 F.3d 125, 131 (2d Cir. 2000) (quoting United States v. Acevedo-Ramos, 755 F.2d 203, 206 (1st Cir. 1985) (Breyer, J.).

court to receive and weigh the importance of all relevant evidence is consistent with both the federal and District of Columbia statutes governing detention hearings.[76]

This Standard continues the requirement of the Second Edition, Revised Standards that all evidence presented at the pretrial detention hearing be recorded. The proceedings are thus preserved for review at subsequent stages of the pretrial process and by an appellate court.

The sole purpose of a pretrial detention hearing is to determine whether a defendant eligible for pretrial detention is to be detained or released. In order to reduce any chilling effect on defendants' right to testify, the Standard prohibits using their testimony as evidence in the government's case-in-chief in subsequent criminal proceedings.[77] Such testimony can, however, be used for impeachment purposes and, as provided in previous editions, in subsequent perjury prosecutions.[78]

Standard 10-5.10(e)

This Standard addresses the common situation of a defendant arrested without an indictment having been filed. As noted in the commentary accompanying Standard 10-4.3 (b), a showing of probable cause to believe the defendant has committed the offense charged is a predicate to the imposition of any significant restraint on liberty. This Standard is consistent with that principle, and requires a determination of probable cause as an integral part of the detention proceeding any time there has not already been an indictment.

Standard 10-5.10(f)

This Standard, consistent with Standard 10-5.8 (a), places the burden on the prosecution to prove, by clear and convincing evidence, that pretrial detention is necessary because no condition or combination of conditions of release will provide reasonable assurance that the defendant will return to court and that public safety will not be endangered. The "clear and convincing evidence" criterion is a stringent

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[76] See 18 U.S.C. § 3142(f)(2)(B) (1984); D.C. Code Ann. § 23-1322(d)(4) (2001 Edition, 2003 Supp.).

[77] *Cf.* United States v. Simmons, 390 U.S. 377 (1968) (holding that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection).

[78] See United States v. Kahan, 415 U.S. 239 (1974) (acknowledging the appropriateness of a perjury conviction based on false statements given during a hearing to determine eligibility for appointment of counsel).

one, and is intended to emphasize that secure detention should be used only when facts show that it is necessary to prevent flight or assure the safety of the community.

Standard 10-5.10(g)

Pretrial detention orders should not be *ex parte*. This Standard includes the admonition that no detention order should be entered until a full hearing has been concluded. Within a few days of the conclusion of a hearing resulting in a written or oral detention order, the judicial officer should make a written record of the reasons for detention. The written record is important not only as a means of verifying the fact and date of the order but also as a basis for subsequent review in the event there is a challenge to the detention order. Additionally, the requirement of articulating reasons for the detention order will, over time, contribute to a body of case law regarding appropriate factual grounds for ordering detention. The Standard suggests in brackets that the record be made within three days.

Even when pretrial detention is ordered, the detention should not be for a period that is longer than necessary. Standard 10-5.10(g)(iii) limits the permissible period of pretrial detention by requiring that the judicial order include a date by which detention must be considered *de novo*. The Standard suggests 90 days from the date of the detention order, but brackets this to acknowledge that there may be circumstances that warrant a somewhat different period for some jurisdictions. Any extended detention ordered at a timely de novo hearing should also be limited and, again, the Standard suggests 90 days. If a de novo hearing to consider extending detention is not held before the date set for such a hearing in the original judicial order, the defendant must be released immediately under reasonable conditions that best minimize the risk of flight and danger to the community.

Standard 10-5.10(h)

The order granting or denying detention should be immediately reviewable at the request of either the prosecution or the defense. If a judicial officer other than a trial judge made the detention decision, the appeal should be *de novo*. If a trial judge made the detention decision, an appellate court should review it under an "abuse of discretion" standard, paying great deference to the trial judge's findings of credibility and facts.

Standard 10-5.11 Requirement for accelerated trial for detained defendants

Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice. These accelerated time limitations should be shorter than current speedy trial time limitations applicable to defendants on pretrial release. The failure to try a detained defendant within such accelerated time limitations should result in the defendant's immediate release from detention under reasonable conditions that best minimize the risk of flight and danger to the community or any person pending trial, unless the delay is attributable to or agreed to by the defendant.

History of the Standard

This Standard is based on Second Edition, Revised Standard 10-5.11. The provision that the defendant's immediate release from detention be "under reasonable conditions that best minimize the risk of flight and danger to the community pending trial, unless the delay is attributable to or agreed to by the defendant" is new.

Related Standards

ABA, Criminal Justice Standards, Speedy Trial and Timely Resolution of Criminal Cases (3d ed. 2006), 12-2.1, 12-2.7
NAC, Corrections (1973), 4.10
NAC, Courts (1973), 4.11
NAPSA, Standards on Pretrial Release (2004), 4.4
NDAA, National Prosecution Standards (1991), 62.1, 63.4

Commentary

While the procedures recommended in these Standards are expected to result in greater use of pretrial release, pretrial detention will continue to be necessary in some cases. If a person is to be deprived of liberty while awaiting trial, the government has an obligation to bring the case to trial within a relatively short period. This Standard urges jurisdictions to establish laws or rules that provide for accelerated judicial processing of detainees' cases to shorten the period of hardship and to minimize the disadvantages of detention. For example, the ABA Standards on Speedy Trial and Timely Resolution of Criminal Cases provide for a presumptive

speedy trial time limit of [90] days for persons held in pretrial detention and [180] days for persons on pretrial release.[79]

Previous editions of the Pretrial Release Standards provided that the government's failure to meet the accelerated time frame for adjudication should result in the immediate release of the defendant. This Standard also provides for immediate release of detainees whose cases have been delayed past that timeframe through no fault of their own. However, it diverges from the suggestion of prior Editions that the proper corrective action is outright release. Rather, it calls for release "under reasonable conditions that best minimize the risk of flight and danger to the community pending trial." Since detention is to be ordered only for defendants considered to pose serious risks of flight or crime, release of such defendants under the conditions most likely to lower those risks presents a more prudent course of action than outright release. The Third Edition Standards on Speedy Trial and Timely Resolution of Criminal Cases takes a similar approach.[80] Violation of court-imposed conditions can lead to revocation of release under Standard 10-5.6.

Standard 10-5.12 Re-examination of the release or detention decision: status reports regarding pretrial detainees.

(a) Upon motion by the defense, prosecution or by request of the pretrial services agency supervising released defendants alleging changed or additional circumstances, the court should promptly reexamine its release decision including any conditions placed upon release or its decision authorizing pretrial detention under Standards 10-5.8 through 10-5.10. The judicial officer may, after notice and hearing when appropriate, add or remove restrictive conditions of release, short of ordering pretrial detention, to ensure court attendance and prevent criminal law violation by the defendant.

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[79] ABA Standards on Speedy Trial and Timely Resolution of Criminal Cases (3d Ed., 2006), Standard 12-2.1. Under this standard, the speedy trial time limits should run from the date of the accused person's first appearance in court after the filing of a charging instrument or the issuance of a citation or summons. The speedy trial time limits may be extended under certain limited circumstances set forth in Standards 12-2.2 and 12-2.3.

[80] *Ibid.*, Standard 12-2.7 (a).

(b) The pretrial services agency, prosecutor, jail staff or other appropriate justice agency should be required to report to the court as to each defendant, other than one detained under Standards 10-5.8, 10-5.9 and 10-5.10, who has failed to obtain release within [24 hours] after entry of a release order under Standard 10-5.4 and to advise the court of the status of the case and the reasons why a defendant has not been released.

(c) For pretrial detainees subject to pretrial detention orders, the prosecutor, pretrial services agency, jail staff, or other appropriate agency should file a report with the court regarding the status of the defendant's case and detention regarding the confinement of defendants who have been held more than [90 days] without a court order in violation of Standards 10-5.10 (g) (iii) and 10-5.11.

History of the Standard

This Standard is an expanded version of Second Edition, Revised Standard 10-5.6. Revised subsection (a) authorizes the pretrial release agency, as well as the prosecutor and defense, to move for a reexamination of the release decision and authorizes the judicial officer to add or remove restrictive conditions of release. Under new subsection (b), the required report concerning individuals not released in a timely manner following entry of a release order may be made by the pretrial services agency, jail staff, or other appropriate agency, as well as by the prosecutor. Subsection (c) now provides that the prosecutor, pretrial services agency, jail staff, or other appropriate agency should file a report on the status of any defendant held in detention for more than 90 days without a court order.

Related Standards

ABA, Criminal Justice Standards, Special Functions of the Trial Judge (3d ed. 2000), 6-1.11

Federal Rules of Criminal Procedure, 46(g)

NAC, Courts (1973), 4.5(4)

NCCUSL, Uniform Rules of Criminal Procedure (1987), 341(i)

NDAA, National Prosecution Standards (1991), 45.9

Commentary

Standard 10-5.12(a)

Subsequent to the initial appearance, additional information may become available or the circumstances relating to the defendant's eligibility for pretrial release may change. Thus, it may be appropriate to revise the pretrial release or detention decision one or more times during the pretrial stages of the adjudicatory process. This Standard recognizes the judicial officer's obligation to provide notice and hold a hearing to consider and act upon requests from the defense, prosecution or pretrial services agency to add or remove restrictive conditions of release. However, it explicitly precludes issuance of detention orders unless such orders are issued in accordance with the provisions of Standards 10-5.8 through 10-5.10.

Standard 10-5.12(b)

This Standard presumes that, once judicial release orders are issued for defendants in custody, those defendants should be released within twenty-four hours. It assigns a clear responsibility for an appropriate agency to identify defendants who have not been released in a timely fashion and to report to the court the reasons for their continued custody. Generally, the appropriate agency would be the pretrial services agency, but could also be the prosecutor, jail staff, or other agency.

Standard 10-5.12(c)

The status of defendants confined pursuant to detention orders must also be monitored to ensure that they are not held beyond the period of the orders. This Standard requires that the court be informed immediately if a defendant is being held beyond the time the trial was – or should have been – scheduled.

Standard 10-5.13 Trial

The fact that a defendant has been detained pending trial should not be allowed to prejudice the defendant at the time of trial or sentencing. The court should ensure that the trial jury is unaware of the defendant's detention.

History of the Standard

This Standard is based on Second Edition, Revised Standard 10-5.12. It has been revised to make it the court's duty to ensure that the trial jury is unaware of the defendant's detention.

Related Standards

ABA, Criminal Justice Standards, Prosecution Function (3d ed. 1993), 3-5.6(c)

ABA, Criminal Justice Standards, Trial by Jury (3d ed. 1996), 15-3.2

Commentary

In *Estelle v. Williams*,[81] the U.S. Supreme Court held that compelling a defendant to stand trial wearing jail clothing is unconstitutional because it violates the presumption of innocence and the right to equal justice embodied in the Fourteenth Amendment. This Standard incorporates the underlying rationale of that decision and expands it to other indications of detention, such as allowing jurors to view defendants in shackles. However, the Standard does not preclude necessary restraints on defendants based not on the fact of their detention but on their disruptive conduct in the courtroom.[82]

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[81] 425 U.S. 501, 504-06 (1976).

[82] *See* Illinois v. Allen, 397 U.S. 337, 343-44 (1970); Woodard v. Perrin, 692 F.2d 220 (1st Cir. 1982).

Standard 10-5.14 Credit for preadjudication detention

Every convicted defendant should be given credit, against both a maximum and minimum term or a determinate sentence, for all time spent in custody as a result of the criminal charge for which a sentence of imprisonment is imposed.

History of the Standard

This Standard is identical to Second Edition, Revised Standard 10-5.13 except for the deletion of the clause "or as a result of related offenses" at the end of the former Standard.

Related Standards

ABA, Criminal Justice Standards, Sentencing (1994), 18-3.21(f), 19-9.1

NAC, Corrections (1973), 5.8

NAPSA, Standards on Pretrial Release (2004), 4.5

Commentary

The fair administration of criminal justice requires that persons convicted after periods of time spent in pre-adjudication detention receive credit for the time they served before adjudication. This principle, reflected here as in previous Editions, is also consistent with the ABA Standards for Criminal Justice, Sentencing Standard 18-3.21(f)(i), which provides that individuals must be credited for "time spent in custody prior to trial or plea, during trial [and] pending sentence . . .." For these Standards, custody means total confinement in a jail or other correctional facility. Jurisdictions may wish to consider whether some relatively restrictive conditions of pretrial release (e.g., house arrest, part-time custody, treatment in a residential facility) might also be credited against an eventual sentence.[83]

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[83] Federal law, 18 USC 3585(b), allows credit against a sentence for "official detention" pretrial. Resolving a conflict within federal circuits, the U.S. Supreme Court has held that "official detention" means detention in a facility controlled by the U.S. Bureau of Prisons and that pretrial commitment to a full-time community treatment facility is not grounds for credit against a sentence. Reno v. Koray, 515 U.S. 50 (1995). However, the District of Columbia and some states appear to provide credit for time spent in residential treatment facilities pursuant to court order. *See, e.g.*, Shelton v. United States,

Standard 10-5.15 Temporary release of a detained defendant for compelling necessity

Upon a showing by the defendant of compelling necessity, including for matters related to preparation of the defendant's case, a judicial officer who entered an order of pretrial detention under Standards 10-5.8 through 10-5.10 may permit the temporary release of a pretrial detained person to the custody of a law enforcement or other court officer, subject to appropriate conditions of temporary release.

History of the Standard

This Standard is a modified version of Second Edition, Revised Standard 10-5.14, which authorized the temporary release of a preventively detained defendant on motion by defense counsel "including a showing of compelling necessity related to the preparation of the defendant's case." The Standard has been rewritten to authorize the release of a pretrial detainee upon a showing by the defendant of "compelling necessity, including for matters related to preparation of the defendant's case." The previous Edition's six-hour maximum period of temporary release has been eliminated.

Related Standards

NCCUSL, Uniform Rules of Criminal Procedure (1987), 346

Commentary

This Standard recognizes that there may be instances that warrant a temporary release of detained defendants, whether on humanitarian grounds such as a funeral of a close relative or on strategic grounds such as trial preparation. Defendants attempting to secure such release bear the burden of showing that there is a "compelling necessity" for it. The elimination from this Edition of a maximum six hour time period for the temporary release is intended to allow the court flexibility in setting the length, as well as other appropriate conditions, of the release.

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721 A.2d 603 (D.C. C.A. 1998) (five year post-plea/pre-sentence confinement under D.C. Sexual Psychopath Act qualifies for credit against ultimate sentence).