Standards on Pretrial Release: Revised 2020

National Association of Pretrial Services Agencies
napsa.org

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About NAPSA

The National Association of Pretrial Services Agencies (NAPSA) is the professional association for pretrial release and pretrial diversion practitioners. Incorporated in 1973, NAPSA's mission is to promote pretrial justice and public safety through rational and evidence-based pretrial decision making and practices.

NAPSA's core strategic approach is to provide evidence-based Standards and education to individuals and agencies. The Association has as its main goals:

- to serve as a national forum for ideas and issues about pretrial services;
- to promote the establishment of agencies to provide such services;
- to encourage responsibility among its members;
- to promote research and development in the field;
- to establish a mechanism for exchange of information; and
- to increase professional competence through the development of professional Standards and education.

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Introduction

> *The Standards are…aspirational, to be sure, but they are not unrealistic. They point the way toward criminal justice processes that are fairer, more rational, more open, more accountable, and more effective.*[1]

This revised 2020 Edition of the National Association of Pretrial Services Agencies' (NAPSA) *Standards on Pretrial Release* continues the mandate of previous Editions—to describe the components of an effective, legal, and evidence-based bail system. It also updates the Standards with the developing body of knowledge about best and promising practices in the pretrial field and changes to the legal definition of and the requirements for fair and reasonable bail decision-making. Revisions from past Editions include:

1. A focus on a systems approach to improving bail decision making, with broader and more defined roles for the court, prosecution, and defense.
2. Greater recognition and advocacy of pretrial services agencies as an essential element of effective bail systems.
3. A call to ban the use of money as a type of bail, a requirement of pretrial supervision or a means of detention.
4. Support for empirically developed and validated pretrial risk assessments to help predict the likelihood of return to court and arrest-free pretrial behavior and to assist in identifying conditions appropriate to specified risk factors.

This Edition also sets a higher bar on what is realistic for justice systems to accomplish. Previous Editions accepted budgetary and other limitations as reasons for jurisdictions to not adopt essential features of a legal and effective bail system. However, based on the experiences of numerous jurisdictions since the publication of the Third Edition and the shifting attitudes nationwide about fair and effective bail practices, this Edition stresses that this higher expectation is in reach of most—if not all—justice systems. Nowhere is this more evident than in our stance against financial bail and conditions of supervision that impose a cost to the defendant. This contrasts with the Third Edition's Standard 2.5(a), that allowed for financial conditions "when no other conditions of release will provide reasonable assurance that the defendant will appear for court proceedings." Since the drafting of that Standard, research has made even clearer the untenable issues associated with a money-based bail system. Judicial officers often set financial bail based on nothing more than an arrest charge, with little or no regard for the individual defendant's risk of flight or rearrest. Since 2000, 95 percent of the growth in the need for jail resources—the most expensive asset of the criminal justice system—is from the increase in un-convicted detainees.[2] Today, almost 63 percent of jail inmates are pretrial detainees held on financial bails they cannot afford.[3] Individuals held in jail before trial, even for short periods of

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[1] National Association of Pretrial Services Agencies. (2004). *Standards on Pretrial Release, Third Edition*. Washington, D.C.: National Association of Pretrial Services Agencies. at 3 and 7.
[2] *Id.* at 1.
[3] Minton, T.D. and Zeng, Z. (2015). *Jail Inmates at Midyear 2014*. Washington, D.C.: United States Department of Justice, Bureau of Justice Statistics. NCJ 248629.

detention, have worse outcomes, such as higher risk of unemployment,[4] higher rates of sentencing disparity,[5] and a greater likelihood of reoffending.[6]

Moreover, effective and fair options exist beyond an antiquated money bail system. Jurisdictions have limited setting financial bail beyond a defendant's ability to pay—or, in the cases of Washington, D.C. and New Jersey, effectively eliminated money from the bail decision—with no reduction in release, appearance or safety rates. Courts also have challenged jurisdictions to reconsider the use of financial bonds that appear tied more to local culture than informed practice. The California Court of Appeals noted:

> *"But the problem this case presents does not result from the sudden application of a new and unexpected judicial duty; it stems instead from the enduring unwillingness of our society, including the courts ... to correct a deformity in our criminal justice system that close observers have long considered a blight on the system."*[7]

This Edition strengthens NAPSA's advocacy of pretrial services agencies as necessary components of high functioning bail systems. Previous Editions outlined the key functions pretrial services agencies perform for their justice systems. This Edition describes those functions in greater detail and gives a stronger justification for coordinating them under a single organization. This Edition also breaks from previous Standards that approved of pretrial services agencies functioning "under a variety of different organizational arrangements."[8] Instead, NAPSA strongly endorses independent pretrial services agencies with control over their mission, budgets, staffing, and structure. Even pretrial agencies under "parent" organizations should function independently enough to fulfill the pretrial agency's strategic objectives.

Finally, this Edition takes a more system-based approach to improving bail practices. NAPSA's primary focus always will be to advocate best and promising practices for pretrial services agencies. However, we recognize that minimizing unnecessary and unjust pretrial detention, enhancing public safety and court appearance, and administering the bail process fairly requires collaboration among pretrial services, the judiciary, prosecution, defense, law enforcement, and corrections. This systemic focus acknowledges that for most of America's justice systems, real bail reform requires a holistic change in local culture and attitudes about pretrial release, the rights of pretrial defendants, and what truly is needed to reasonably assure court appearance and public safety. Proper implementation of this

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[4] Schönteich, M. (2010) *The Socioeconomic Impact of Pretrial Detention*. New York, NY: Open Society Foundation.

[5] Leipold, A.D. (2005). "How the pretrial process contributes to unfair convictions." *The American Criminal Law Review*, 42 Amer. Crim. L. Rev. 1123, 1123-1165 (2005); Gerstein, C. *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 Mich. L. Rev. 1513 (2013). Available at: http://repository.law.umich.edu/mlr/vol111/iss8/4.); Stephenson, M. (2016). Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes. Available at https://www.econ.pitt.edu/sites/default/files/Stevenson.jmp2016.pdf.

[6] Lowenkamp, C., VanNostrand, M., and Holsinger, A. (2013). *The Hidden Cost of Pretrial Detention*. New York, NY: Laura and John Arnold Foundation.

[7] *See In re Humphrey*, 228 Cal. Rptr. 3d 513 (Cal. Ct. App. 2018).

[8] NAPSA (2004) at 11.

reform must include all elements of an effective pretrial justice system, properly defined and functioning well.[9]

Standards Outline

Each Standards "part" describes a critical component of a comprehensive, fair and effective bail decision-making system. These include the guiding principles and legal foundations of a bail system, the essential elements of a fair and effective system, legal and evidence-based requirements for bail decision-making, and the essential components for a pretrial services agency. These components include:

PART I: Guiding Principles for Pretrial Decision Making

- The legally-acceptable goals of bail setting: maximizing pretrial release, court appearance, and public safety.
- Bail that is individualized to a defendant's likelihood of court appearance and risk to public safety.
- A presumption of own recognizance release with the requirements to appear in court as required and not engage in criminal activity.
- When own recognizance (OR) release is inappropriate, least restrictive supervision to provide reasonable assurance of court appearance and public safety.
- Abolition on all financial conditions of bail.
- Pretrial detention limited to defendants who pose an unmanageable risk to commit a dangerous or violent crime or abscond from court proceedings and respectful of a defendant's due process rights.
- A defendant's retention of other constitutional rights besides reasonable bail.
- Bail decisions that do not impose a disparate or discriminatory outcome based on race, ethnicity, gender, sexual identity, disability or religious affiliation.
- A recognition of the rights of victims at the pretrial stage.
- Assurance of adequate funding of all critical bail functions.

PART II: Essential Elements of a Pretrial Justice System

- Options for law enforcement to facilitate release or alternative options for lower-risk defendants.
- Bail statutes that include a presumption of non-financial release, exclusion of financial conditions, and preventive detention with full due process protections for a limited and well-defined category of defendants.
- No local requirements for bail that are more restrictive than allowed by state statute.
- Prosecutor's review of all cases prior to initial appearance to consider if filing charges is warranted and, if so, appropriate charges to file, a defendant's eligibility for diversion, and recommendations for bail.
- Representation at initial appearance by active and engaged counsel.

[9] Pilnik, L., Hankey, B., Simoni, E., Kennedy, S., Moore, L.J., Sawyer, J. (2017). *Essential Elements of an Effective Pretrial System and Agency*. Washington, D.C.: National Institute of Corrections. NIC Accession Number: 032831. p. vii.

- Regular review of release and detention decisions throughout adjudication.
- Dedicated pretrial services agencies.
- Validated risk assessments to assist the court in making bail decisions.
- Pretrial supervision individualized and tailored to a defendant's assessed risk levels and geared to promoting court appearance and public safety.
- Performance measurement and feedback of pretrial system practices.

PART III: Pretrial Release and Detention Decisions

- Guidelines for releasing defendants before the initial court appearance.
- Procedures for pretrial services agencies prior to the initial court appearance, including transparency of proceedings.
- An initial appearance to determine bail within 24 hours of arrest.
- A probable cause determination within lawful time limits before imposing any significant restraint on pretrial liberty.
- Options at initial appearance to release the defendant pretrial or begin preventive detention proceedings.
- Representation by counsel at initial appearance.
- A statutory presumption of own recognizance release, unless the defendant's risk of flight or danger to the public warrants a greater level of supervision.
- Preventive detention is allowable only after a finding that the defendant poses an unmanageable risk to commit a dangerous or violent offense or to abscond from court proceedings.
- Placement on an accelerated calendar for all detained defendants.
- Subsequent review of release and detention decisions.
- Specific findings needed to revoke a defendant's bail.

PART IV: Pretrial Services Agencies

- Purposes, management and functions of a pretrial services agency.
- Pretrial services agency organization and management.
- Procedures for defendant background investigations.
- Procedures for applying validated risk assessment, making bail recommendations to court, and monitoring and supervising released defendants.
- Confidentiality and release of information guidelines.

Part 1: Guiding Principles for Pretrial Decision Making

Standard 1.1: The goals of bail are to maximize release, court appearance and public safety.

Related Standards:
National Association of Pretrial Services Agencies (2004) Standard 1.1.
NAPSA (1978) Standard I and Standard VII.
American Bar Association *Standards for Criminal Justice, Pretrial Release Standards (3rd Ed.* 2007) Standard. 10-1.1.

Commentary:

This Standard defines bail as the least restrictive pretrial release option needed to reasonably assure a defendant's future court appearance and the public's safety. This definition conforms to the consensus in federal and state statutes and case law that describes the function of bail.[10] Where bail is allowed, maximizing release for bail-eligible defendants and providing reasonable assurance of future appearance and public safety are its only legitimate goals.

Maximizing release: Justice systems should maximize release for bail-eligible defendants. As articulated by the United States Supreme Court, "in our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[11] As this principle has been reinforced in present statutory language and court opinions related to bail, this Standard emphasizes that bail decisions inherently are *release* decisions, outlining the terms and conditions the court believes are the least restrictive needed to reasonably assure court appearance and public safety. The Supreme Court of the United States noted the following in *Stack* v. *Boyle* (342 U.S. 1): "This traditional right to freedom before conviction permits the unhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction. Unless the right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[12]

Maximizing appearance: Historically, the objective of bail was to provide a reasonable assurance of a defendant's appearance at future court proceedings.[13] As noted in *Stack*:

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[10] See *United States* v. *Salerno*, 481 U.S. 739 (1987). *Stack* v. *Boyle*, 342 U.S. 1 (1951). *Ex parte Milburn*, 34 U.S. 704 (1835). *Taylor* v. *Tainter*, 83 U.S. 366 (1872). *United States v. St. Clair*, 42 F.2d 26 (8th Cir. 1930).
[11] See *Salerno*, 481 U.S. at 755. See also Ky. Rev. Stat. Ann. § 431.510 (2019). Or. Rev. Stat. §§ 135.255, .260, .265 (2019). 725 Ill. Comp. Stat. Ann. 5/110-7 to -8 (2019). Wis. Stat. § 969.12(2) (2019). Conditions of Release, Kan. Stat. Ann. Kansas Statutes, § 22-801 (2019). D.C. Code § 23-1321(c)(3)-(4) (2019).
[12] See *Stack,* 342 U.S. at 4.
[13] See *Ex parte Milburn*, 34 U.S. at 710. (Bail "is not designed as satisfaction for the offen[s]e, when it is forfeited and paid, but as a means of compelling the party to submit to the trial and punishment, which the law ordains for his offen[s]e."); *Taylor* v. *Tainter*, 83 U.S. at 371–72 (people released on bail were required to

"fixing of bail for any individual defendant must be based upon Standards relevant to the purpose of assuring the presence of that defendant."[14]

Maximizing public safety: The bail decision should consider whether a defendant's release would pose a significant risk of harm to a specific individual or to the public. Virtually all states, the District of Columbia, and the federal courts allow danger as a legitimate consideration in bail-setting, permitting the court to set bail only if the defendant's release will not constitute an unmanageable "danger to any person or the community."[15] State and federal case law over the past several decades have recognized danger as a proper consideration, and the Supreme Court has specifically written that "preventing danger to the community is a legitimate regulatory goal."[16]

Standard 1.2: Bail should be individualized to a defendant's risk of failure to appear at scheduled court appearances and risk to public safety.

Related Standards:
NAPSA (2004) Standard 2.4(b).
ABA (2007) Standard 10-1.2

Commentary:

Terms and conditions of bail must be appropriate to the defendant for whom they are set. Courts should only impose conditions that address a defendant's specific risk of flight or to public safety. Bail also should not be set based on a single factor (i.e.; charge for bail schedules) nor defendant category (i.e.; defendants that assess at a certain level on a risk assessment) while ignoring further lawful individualizing factors.[17] The Supreme Court noted the following in *Stack*:

> *Each defendant stands before the bar of justice as an individual…defendants do not lose their separateness or identity…Each accused is entitled to any benefits due to his good record, and misdeeds or a bad record should prejudice only those who are guilty of them. The question when application for bail is made relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance.[18]*

come back to court to ensure a fair trial); *United States v. St. Clair*, 42 F.2d at 28. ("Bail is to procure release of a prisoner by securing his future attendance.").

[14] *Stack,* 342 U.S at 5.

[15] New Jersey Criminal Justice Reform Act, P.L. 2014, 2014 N.J. ALS 31 (citing sec. 1 on the release or detention of a defendant pending trial).

[16] See *United States* v. *Edwards*, 430 A.2d 1321 (D.C. 1981); *Salerno*, 481 U.S. 739.

[17] As of the drafting of these Standards, the body of case law on the topic of individualized bail decisions has upheld the general principle that bail must address the individual defendant's aggravating and mitigating factors. See, *e.g.*, *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978); *Pierce v. City of Velda City*, 2015 WL 10013006, (E.D. Mo. June 3, 2015); *Jones v. City of Clanton*, 2015 WL 5387219, (M.D. Ala. Sept. 14, 2015); *United States v. Vujnovich*, No. 07-20126-01, 2008 WL 687203, (D. Kan. Mar. 11, 2008); *United States v. Arzberger*, 592 F. Supp. 2d 590, 601 (S.D.N.Y. 2008).

[18] *Stack*, 342 U.S. at 9.

While striking down Harris County's cash-based bail system, the United States Court of Appeals for the Fifth Circuit noted that "the results of this flawed procedural framework demonstrate the lack of individualized assessments when officials set bail."[19] The court further noted how uniform schemes of bail can lead to disparate results among similarly-situated defendants:

> *"In sum, the essence of the district court's equal protection analysis can be boiled down to the following: take two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy, and one is indigent. Applying the County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree."*[20]

Standard 1.3: A presumption in favor of release on one's own recognizance with the requirements to appear in court at scheduled court appearances and not engage in criminal activity should apply to all defendants.

Related Standards:
NAPSA (2004) Standard 1.2
NAPSA (2020) Standard 1.1, 3.2(c)(i)
ABA (2007) Standards 10-1.2 and 10.1-4

Commentary:

Release of a defendant on their own recognizance has been a fundamental principle of these Standards since their inception in 1978 and is consistent with the legal tenets of the presumption of release pretrial and the presumption of innocence. Moreover, favoring release on recognizance as the first consideration in bail setting allows jurisdictions to maximize release as prescribed in Standard 1.1. As noted in the NAPSA Standards (2004) "The presumption in favor of release implies detention of as few defendants as possible**."**[21] Defendants who are released on their own recognizance should have no other requirements to effectuate their release.[22] Requiring defendants to appear for all

[19] *See O'Donnell, et al. v. Harris County,* No. 17-20333 at 5 (5th Cir. Feb. 14, 2018).
[20] *Id.* at 21.
[21] NAPSA (2004). Standard 1.2.
[22] An unsecured appearance bond allows a defendant to avoid posting money to be released but imposes a financial penalty for a failure to appear or to comply with release conditions. Due to the financial penalties that may be incurred, NAPSA does not recognize "unsecured" bond as a release on recognizance.

scheduled court dates and not to commit new offenses are acceptable conditions of bail because "neither condition imposes any restriction on the defendant's legal liberties."[23]

Standard 1.4: If the Court determines that release on own recognizance is insufficient, it may impose the least restrictive nonfinancial condition or conditions to reasonably assure court appearance and public safety. Conditions aimed at punishment, rehabilitation or any other purpose are prohibited.

Related Standards:
NAPSA (2020) Standard 1.1, 3.2(c)(ii)
ABA (2007) Standards 10-1.4 and 10-5.2

Commentary:

All defendants should be released under the least restrictive bail option that reasonably assures court appearance and public safety. The Eighth Amendment and similar state provisions provide a constitutional safeguard against excessive bail, which is usually equated to money bail. For example, in *State v. Brown,* defendant Brown received a money bond (in addition to several nonfinancial conditions) that resulted in his prolonged detention. In its opinion, The New Mexico Supreme Court noted: "the district court failed to explain in the record any rational connection between the facts in the record and the ruling of the court" and the court found "the district court unlawfully failed to release defendant pending trial on the least restrictive of the bail options and release conditions necessary to reasonably assure defendant's appearance and the safety of the community."[24]

Bail conditions should neither be punitive[25] nor intended to rehabilitate the defendant. Federal and state courts have found that bail set intentionally to detain a defendant pretrial to be prohibited due to improper purpose.[26] Additionally, conditions aimed at rehabilitation are not consistent with the "two constitutionally valid purposes for limiting pretrial freedom—court appearance and public safety."[27] Courts may offer rehabilitative programming to defendants voluntarily but cannot order these conditions unless they are

[23] National Association of Pretrial Services Agencies. (1978). *NAPSA Release and Diversion Standards*. Washington, D.C.:NAPSA. (Citing commentary for Standard III(F)).
[24] See *State v. Brown*, 338 P.3d 1276, 1288 (N.M. 2014).
[25] See *Roberts* v*. State*, 123 S.E. 151 (Ga. 1924). The purpose of a pretrial bond is to prevent punishment before a conviction and to secure the appearance of the person in court for trial.
[26] See, e.g., *Galen v. County of Los Angeles*, 477 F.3d 652 (9th Cir. 2007) ("The court may not set bail to achieve invalid interests.") (citing *Wagenmann v. Adams*, 829 F.2d 196, 213 (1st Cir. 1987) (affirming a finding of excessive bail where the facts established the state had no legitimate interest in setting bail at a level designed to prevent an arrestee from posting bail)); *State v. Brown*, 338 P.3d 1293. ("Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release.").
[27] Schnacke, T.R. (2014). *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*. Washington, D.C.: National Institute of Corrections. NIC Accession Number: 028360. Besides excessive bail, the requirement for least restrictive conditions also is tied to the Due Process and Equal Protection Clauses, which require an examination of alternatives to survive certain levels of legal scrutiny.

specifically and reasonably tied to the defendant's risk of missed court appearances or to public safety.[28]

Standard 1.5: Financial conditions of bail should be prohibited.

Related Standards:
NAPSA (1978) Standard V
ABA (2007) Standard 10-1.4(d), 10-5.3(a), 10-5.3(d)

Commentary:

A developing body of research[29] shows the inequities and negative outcomes associated with money bail. Recent court rulings and litigation also have challenged the constitutionality of financial bail conditions that result in the detention of an otherwise bailable defendant.[30] Any allowance for money bail only perpetuates the inequalities and disparities it promotes. For these reasons, NAPSA has returned to its original position under the first Edition of these Standards: "The use of financial conditions of release should be eliminated."[31] This conforms to the views held by several national associations—including the American Bar Association (ABA) and the National Association of Counties (NACo)—that recommend the elimination of secured financial release in favor of bail systems that utilize validated risk assessment and community-based supervision.[32] In its December 2015 Statement of Interest in the case of *Varden v. City of Clanton* (Case No. 2:15-cv-34-MHT-WC), the United States Department of Justice asserted that a system that fixed bond amounts based on charges, without considering a defendant's individual characteristics and financial means, should be found unconstitutional. It added that "[n]ot only are such schemes offensive to equal protection principles, they also constitute bad public policy."[33]

Many jurisdictions have successfully adopted practices, either through state law or court rule, that severely restrict or effectively eliminate the use of money in the bail decision. These practices increased the number of bailable defendants released without reductions

[28] See *U.S. v. Scott*, 450 F.3d 863, 872 (9th Cir. 2006) ("The government in this case has relied on nothing more than a generalized need to protect the community and a blanket assertion that drug-testing is needed to ensure Scott's appearance at trial. Both are insufficient.").
[29] The Council of State Gov'ts, Pretrial Criminal Justice Research (2013), https://csgjusticecenter.org/courts/publications/pretrial-criminal-justice-research/.
[30] See *Varden v. City of Clayton*, No. 2:15-cv34-MHT-WC (M.D. Ala. Feb. 13, 2015); *O'Donnell v. Harris*, 4:16-cv-01414 (S.D. Tex. May 19, 2016).
[31] NAPSA (1978). p. 25.
[32] Pretrial Justice Institute (2011). *Responses to Claims About Money Bail for Criminal Justice Decision-Makers*. Washington, D.C.: Pretrial Justice Institute.
[33] Statement of Interest of the United States, *Varden* v. *City of Clanton*, No. 2:15-cv-34-MHT-WC (M.D. Ala., Feb. 13, 2015); U.S. Department of Justice Dear Colleague Letter Regarding Law Enforcement Fines and Fees (Mar. 16, 2016).

to court appearance or public safety rates. Kentucky,[34] Oregon,[35] Illinois,[36] and Wisconsin[37] ban for-profit bail. Kansas's bail laws state as their purpose "… to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges… when detention serves neither the ends of justice nor the public interest."[38] Bail laws for the Federal courts and Washington, D.C. forbid financial conditions that result in a defendant's pretrial detention. Under the D.C. statute:

> *(3) A judicial officer may not impose a financial condition under paragraph (1)(B)(xii) or (xiii) of this subsection to assure the safety of any other 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, except as provided in § 23-1322(b).*
> *(4) A person for whom conditions of release are imposed and who, after 24 hours from the time of the release hearing, continues to be detained as a result of inability to meet the conditions of release, shall upon application be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended, and the person is thereupon released, on another condition or conditions, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed.*[39]

In 2011, Kentucky also passed HB 463, which requires the state pretrial services division to use an empirically valid risk assessment instrument to assess defendants' likelihood of returning for trial without threatening public safety. In the first two years after HB 463 passed, the number of defendants released on unsecured bonds increased from 50 percent to 66 percent while the court appearance rate rose from 89 percent to 91 percent.[40]

Following enactment of General Order 18.8A restricting the use of secured bail for defendants charged with non-violent felonies, data from the Cook County (Chicago, IL) Court show that from October 1, 2017 to December 31, 2019, seven of 10 felony defendants secured nonfinancial release, with 83 percent making all scheduled court dates and 82 percent remaining arrest-free pending trial.[41]

In 2017, New Jersey revised its constitution and bail statute in part to prohibit setting bail beyond a defendant's means unless the court found by clear and convincing evidence that the amount set was the least restrictive means to reasonably assure court appearance. Following this change, in 2018, there were 102 money-based releases out of 44,383 case

[34] Ky. Rev. Stat. Ann. § 431.510 (2019).
[35] Or. Rev. Stat. §§ 135.255, .260, .265 (2019).
[36] 725 Ill. Comp. Stat. Ann. 5/110-7 to -8 (2019).
[37] Wis. Stat. § 969.12(2) (2019).
[38] Conditions of Release, Kan. Stat. Ann. Kansas Statutes, § 22-801 (2019).
[39] D.C. Code § 23-1321(c)(3)-(4) (2019).
[40] Administrative Office of the Courts Kentucky Court of Justice, *Pretrial Reform in Kentucky* 16–17 (2013). Available at https://www.acluga.org/sites/default/files/pretrial-reform-in-kentucky-kentucky-pretrial-services-2013.pdf.
[41] Circuit Court of Cook County Model Bond Court Dashboard (Oct.-Dec. 2018), http://www.cookcountycourt.org/Portals/0/Chief%20Judge/Model%20Bond%20Court/Q3%202019/2019%20Q3%20MBC%20Public%20Facing%20Dashboard%2011.15.19.pdf.

filings statewide. In a report detailing the first two years of this bail reform effort, the New Jersey Courts stated:

> *"New Jersey has moved away from a system that relied heavily on monetary bail. Two years into its existence, CJR [Criminal Justice Reform] has begun to remove many of the inequities created by the prior approach to pretrial release. At the same time, court appearance rates for CJR defendants remain high while the rate of alleged new criminal activity for CJR defendants remains low. CJR defendants are no more likely to be charged with a new crime or fail to appear in court than defendants released on bail under the old system."*[42]

In 2018, Philadelphia District Attorney Larry Krasner adopted a "No Cash Bail" policy reform under which the DA's office stopped requesting cash bail for defendants charged with a variety of misdemeanor and non-violent felonies. In 2019, a research team from the George Mason University evaluated the effects of Philadelphia, Pennsylvania's move away from cash bail:

> *"This policy led to an immediate 23% increase (12 percentage points) in the fraction of eligible defendants released with no monetary or other conditions (ROR), and a 22% (5 percentage points) decrease in the fraction of defendants who spent at least one night in jail, but no detectable difference for longer jail stays. The main effect of this policy was therefore to reduce the use of collateral to incentivize court appearance. In spite of this large decrease in the fraction of defendants having monetary incentives to show up to court, we detect no change in failure-to-appear in court or in recidivism, suggesting that reductions in the use of monetary bail can be made without significant adverse consequences. These results also demonstrate the role of prosecutors in determining outcomes over which they have no direct authority, such as setting bail."*[43]

Practices that perpetuate money bail, such as bail schedules or bail that results in de facto detention, are being challenged through litigation. In *Pierce v. City of Velda* 4:15-cv-570-HEA the United States District Court, Eastern District of Missouri issued the following declaratory judgement:

> *"The use of a secured bail schedule to set the conditions for release of a person in custody after arrest for an offense that may be prosecuted by Velda City implicates the protections of the Equal Protection Clause when such a schedule is applied to the indigent. No person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond. If the government generally offers prompt release from custody after arrest upon posting a bond pursuant to a schedule, it cannot deny prompt release from custody to a person because the person is financially incapable of posting such a bond."*[44]

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[42] Grant, G. (2019). *Criminal Justice Reform: Report to the Governor and the Legislation*. Trenton, NJ: New Jersey Courts.

[43] Ouss, A. and Stevenson, M. (2019). *Evaluating the Impacts of Eliminating Prosecutorial Requests for Cash Bail*. George Mason Legal Studies Research Paper No. LS 19-08. Available at SSRN: https://ssrn.com/abstract=3335138 or http://dx.doi.org/10.2139/ssrn.3335138

[44] *See Pierce v. City of Velda*, 2015 U.S. Dist. LEXIS 176261 at *1 (E.D. Mo. June 3, 2015).

In *O'Donnell v. Harris County* (4:16-cv-01414), the United States District Court for the Southern District of Texas ruled that detaining misdemeanor-charged defendants due to their inability to pay was a violation of their equal protection and due process rights, observing that "Harris County's policy is to detain indigent misdemeanor defendants before trial, violating equal protection rights against wealth-based discrimination and violating due process protections against pretrial detention without proper procedures or an opportunity to be heard."

Jurisdictions that use money bail often argue that moving to a "bail/no bail" system would be prohibitively expensive or rob their justice systems of funding via bail fees. This argument was best answered in *In re Humphrey*, 19 Cal. App. 5th 1006 (2018):

> *"We are not blind to the practical problems our ruling may present. The timelines within which bail determinations must be made are short, and judicial officers and pretrial service agencies are already burdened by limited resources…Nevertheless, the highest judicial responsibility is and must remain the enforcement of constitutional rights, a responsibility that cannot be avoided on the ground its discharge requires greater juridical resources than the other two branches of government may see fit to provide. Judges may, in the end, be compelled to reduce the services courts provide, but in our constitutional democracy the reductions cannot be at the expense of presumptively innocent persons threatened with divestment of their fundamental constitutional right to pretrial liberty."*[45]

Regrettably, courts continue to rely on financial bail to detain otherwise releasable defendants. For example, in 1990, 60 percent of felony defendants in large urban counties secured own recognizance or conditional release pretrial. By 2009, this figure dropped to 23 percent.[46] This practice of "intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether."[47] The imposition of money bail is a release decision and therefore should never be used to detain a defendant who poses a risk to flee or to public safety. This *sub rosa* preventive detention practice does not carefully limit the use of pretrial detention as described in Standard 1.6 nor safeguard against the release of a defendant perceived to be dangerous. In fact, money bail does little to protect the public. For example, in nearly all states, bail cannot be (or are not in fact) forfeited upon arrest for a new crime pretrial. Pretrial agencies, that operate in jurisdictions where financial conditions of release are allowed legally should not recommend such conditions.[48]

Pretrial supervision or conditions that impose a cost on defendants (such as supervision fees and costs for drug testing or electronic monitoring) lead to the same unfair and inequitable results as financial bail. Jurisdictions that impose fee-based pretrial supervision or release conditions should re-examine these practices. A defendant's

[45] *In re Humphrey*, 228 Cal. Rptr. 3d at 534.
[46] Subramanian, R., Delaney, R., Roberts, S., Fishman, N., and McGarry, P. (2015). *Incarceration's Front Door: The Misuse of Jails in America*. New York, NY: Vera Institute of Justice at pp. 29-30.
[47] *State v. Brown*, 338 P.3d at 1290.
[48] Financial conditions of release may include the payment of cash bonds, the use of charge-based bond schedules, and the use of property as collateral.

continued release or compliance with release conditions should not depend on their socioeconomic status.

Standard 1.6: Pretrial detention should be authorized but limited only to when the court finds by clear and convincing evidence that a detention-eligible defendant poses an unmanageable risk of committing a dangerous or violent crime during the pretrial period or willfully failing to appear at scheduled court appearances. Detention prior to trial should occur only after a hearing that guarantees a defendant's due process and equal protection rights and includes explicit consideration of less restrictive options.

Related Standards:
NAPSA (2020) Standards 1.5, 2.2 and 3.4
ABA (2007) Standards 10.1-6 and 10.5-8

Commentary:

In a risk-based bail system, some defendants will be found to pose too great a risk to public safety or to abscond from court proceedings to be released under any set of conditions.[49] However, given a defendant's strong liberty interest pretrial, detention is allowable only if the government establishes a compelling reason to justify detention and demonstrates that the defendant's detention is necessary to further that purpose.[50] In *Salerno*, the Supreme Court upheld the constitutionality of the Bail Reform Act of 1984 and wrote in favor of the following procedural due process protections found within that act:

1. A finding that the defendant meets the carefully limited population of individuals eligible for detention.
2. A finding of probable cause that the defendant committed the alleged offense.
3. A prompt detention hearing, with the maximum length of pretrial detention limited by stringent speedy trial provisions.
4. Before detention, a "full-blown" adversary hearing in which the government must convince a neutral decision maker by clear and convincing evidence that no condition or combination of conditions suffice to mitigate the high risk.
5. A right to counsel, to testify or present information by information or proffer, and to cross-examine government witnesses.
6. Statutory enumerated factors to guide judicial discretion, and a requirement that judges include written findings of fact and reasons for detention.
7. Immediate appellate review.[51]

Detainees retain the right to active and effective counsel at the detention hearing and may testify in their own behalf, present information, and cross-examine witnesses. If detention

[49] Keilitz, S. and Sapia, S. (2017). "Preventive Detention." *Pretrial Justice Brief 9*. National Center for State Courts' Pretrial Justice Center for Courts. https://www.ncsc.org/~/media/Microsites/Files/PJCC/Preventive%20Detention%20Brief%20FINAL.ashx.
[50] See *Westbrook v. Mihaly*, 471 P.2d 487, 500-01 (Cal. 1970); *In re Antazo*, 473 P.2d 999, 1004-06 (Cal. 1970); Serrano *v. Priest*, 487 P.2d 1241, 1249 (Cal. 1971); *People v. Olivas*, 551 P.2d 375, 384 (Cal. 1976).
[51] *Salerno*, 481 U.S. at 751-752.

is ordered, the court must provide written findings of fact and a written statement of reasons for a decision to detain.

This Standard reiterates the position that detention due to a defendant's inability to post a financial condition of bail may not meet the legal requirements for such detention. Money-based detention fails to meet the due process requirements outlined in *Salerno* and other case opinions. Further, research has found that financial-based detention "ultimately may serve to compromise public safety" and undermines the legitimacy of the justice process by encouraging guilty pleas, regardless of actual guilt or innocence.[52]

Standard 1.7: Besides a liberty interest, pretrial defendants retain other constitutional rights and protections, including the right to counsel, the right against self-incrimination, the right to due process of law, and the right to equal protection under the law.

Related Standards:
NAPSA (2020) Standard 2.5

***Commentary*:**

Besides the right to non-excessive bail and liberty interest, pretrial defendants retain other constitutional rights and protections, including the right to counsel and to a fair trial,[53] the right against unreasonable searches and seizures (including arrests),[54] and the right against self-incrimination.[55] These rights apply to state and local courts through the Fourteenth Amendment.[56]

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[52] Heaton, P., Mayson, S., and Stevenson, M. "*The Downstream Consequences of Misdemeanor Pretrial Detention*," 69 Stan. L. Rev. 711, 711-794 (2017).

[53] U.S. Const. amend. VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defence.

[54] U.S. Const. amend. IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[55] U.S. Const. amend. V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[56] U.S. Const. amend. XIV, § 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Standard 1.8: Bail decisions should not impose disparate or discriminatory practices or outcomes based on race, ethnicity, gender or sexual identity, disability, or religious identity/affiliation.

Commentary:

The bail decision is one of the most important in case processing. Bail decisions resulting in inappropriate detention can increase the likelihood of conviction and the length of an imposed sentence[57] As well as increase the likelihood of future recidivism.[58] Therefore, it is crucial that bail decisions not allow disparate treatment of individuals based on arbitrary or inappropriate factors, such as race, ethnicity, gender, sexual identity, disability or religious identity/affiliation.

Bail setting can vary widely even amongst judges within the same jurisdiction. Court rules often list specific factors that a judicial officer should consider but provide little guidance on how those factors should be defined or weighted. At bail setting, many judicial officers lack objective information about a defendant's likelihood of court appearance or arrest-free behavior to make a fully informed decision. Thus, decision makers here have to rely on subjective factors and observations of the defendant that can be influenced by implicit bias, attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. For example, numerous studies detail how bail practices can lead to disparate outcomes for minority defendants.[59] One author concluded; "[w]hether the racial divide documented in these studies is the product of racial animus or subtle implicit bias by bail officials, the pattern of disadvantage suffered by minority defendants in bail determinations should be addressed with reforms to the bail determination process."[60] The bail decision can be made more equitable and effective with the inclusion of a validated pretrial risk assessment instrument, that can "predict pretrial misconduct and risk of re-

[57] Cohen, T.H. and Reaves, B.A. (2007). *Pretrial Release of Felony Defendants in State Courts: State Court Processing Statistics*. Washington, D.C.: Bureau of Justice Statistics.; Harrington, M.P. and Spohn, C. (2007). Defining Sentence Type: Further Evidence against Use of the Total Incarceration Variable. Journal of Research in Crime and Delinquency. Volume: 44 issue: 1, page(s): 36-63; Heaton, et. al. 2017; Lowenkamp, C., VanNostrand, M., and Holsinger, A. (2013). Stevenson, M. and Mayson, S.G. (2017). *Pretrial Detention and Bail* Academy for Justice, A Report on Scholarship and Criminal Justice Reform. U of Penn Law School, Public Law Research Paper No. 17-18. Tartaro, C. and Sedelmaier, C. M. (2009). "A tale of two counties: The impact of pretrial release, race, and ethnicity upon sentencing decisions." *Criminal Justice Studies*, 22(2), 203-221.; Ulmer, J.T. (2012). "Recent developments and new directions in sentencing research." *Justice Quarterly* 29: 1-40.; Holsinger, A.M. *Exploring the Relationship Between Time in Pretrial Detention and Four Outcomes: Research Brief.* Boston, MA: Crime and Justice Institute.

[58] Gupta, A., Hansman, C., and Frenchman, E. (2016). *The Heavy Costs of High Bail: Evidence from Judge Randomization*. http://www.columbia.edu/~cjh2182/GuptaHansmanFrenchman.pdf; Heaton, et. al., 2017; Lowenkamp, et al., 2013.

[59] Jones, C.E. (2013). "Give Us Free: Addressing Racial Disparities in Bail Determinations." *Journal of Legislation and Public Policy*, 16: 919-961. Kang., J. et al., Implicit Bias in the Courtroom, 59 UCLA L. REV. 1125, 1146 (2012). Rachlinski, J.J. et al., Does Unconscious Racial Bias Affect Trial Judges?, 84 NOTRE DAME L. REV. 1195, 1221 (2009). Gottredson, S. and Moriarty, L. "Statistical Risk Assessment: Old Problems and New Applications," 52 *Crime & Delinquency* 178, 178-200 (2006); Andrews, D.A. Bonta, J. and Wormith, J. "The Recent Past and Near Future of Risk and/or Need Assessment," 52 *Crime & Delinquency* 7, 7-27 (2006).

[60] Jones (2013). at p. 944.

offense more effectively than professional judgement alone."[61] Standards 2.8 and 4.4(c) discuss these assessment instruments in more detail.

Standard 1.9: Jurisdictions should establish procedures to ensure that the rights of victims are recognized at the pretrial stage. The rights afforded victims should include, but are not limited to, notification of all pretrial hearings, all bail decisions, conditions of release related to the victim's safety, the defendant's release from custody, and instructions on seeking enforcement of release conditions.

Related Standards:
NAPSA (2020) Standard 1.1
ABA (2007) Standard 10-6.1

Commentary:

Victim safety can be enhanced and victim's concerns better addressed when victims:
- are apprised promptly of a case's progression;
- are notified when a defendant secures pretrial release; and
- can obtain adequate protection orders with processes to follow if a defendant violates these orders.

The Standard does not designate a particular agency as responsible for victim notification, recognizing that jurisdictions can achieve this in various ways. In most jurisdictions, the prosecutor's office is in the best position to accomplish the goal of this Standard.

Standard 1.10: Jurisdictions should ensure adequate funding of all functions related to bail decision making, including representation by counsel, defendant screening, assessment, monitoring and supervision, and data collection.

Related Standards:
ABA (2007) Standard 10-1.9

Commentary:

The justice system has the responsibility to uphold constitutional guarantees—a responsibility that supersedes potential budgetary constraints imposed by the executive or legislative branches. To ensure the constitutional requirement of reasonable bail, justice systems must prioritize funding of activities that are central to maximizing pretrial release, court appearance, and public safety. These should include:
- options for law enforcement besides arrest for appropriate arrestees;
- bail decisions made within 24 hours of arrest for persons detained following arrest;
- risk assessment of these defendants before the initial court appearance;
- prosecutorial screening of cases before the initial court appearance;

[61] Center for Effective Public Policy et al. (2010). *A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems: Third Edition.* Washington, D.C.: National Institute of Corrections.

- defense appointment and representation at or before the initial court appearance; and
- pretrial monitoring and supervision strategies.

For many jurisdictions, developing the system called for by these Standards will require expenditures in new information technology and in the personnel needed to support effective pretrial proceedings and community supervision. However, jurisdictions that follow this approach could realize substantial cost avoidance[62] and reinvestment opportunities through better front-end decision-making. While there are real costs involved in the supervision of large numbers of released defendants, over the long term these costs pale when compared to the human cost of unnecessary and potentially unconstitutional secure detention.[63]

[62] For example, according to the Administrative Office for the United States Courts, pretrial detention in the Federal system costs $89 a day compared to $11 a day for pretrial supervision. See Memorandum to Chief Probation Officers from Matthew G. Rowland, Costs of Community Supervision, Detention, and Imprisonment. August 1, 2018.

[63] See Schönteich (2010); Leipold (2005); Gerstein (2013); Stephenson (2016); and Lowenkamp, et. al. (2013).

Part 2: Essential Elements of a Pretrial Justice System

Standard 2.1: An array of options should be available to law enforcement before the initial court appearance to facilitate release of lower-risk defendants or as choices besides traditional arrest and case processing when appropriate.

Related Standards:
ABA (2007) Standards 10-1.3, 10-2.1, 10-2.2, 10-2.3

Commentary:

Justice systems should include nonfinancial release options to effectuate the prompt release of appropriate arrestees before the initial bail hearing. These include release options available to law enforcement in lieu of arrest and provided to pretrial services or other justice agencies through delegated court authority. Earlier release of lower-risk arrestees helps prioritize law enforcement and corrections resources at arrest and booking to individuals whose bail determination requires a judicial decision. Certain non-arrest options also may keep an arrest from a person's criminal record, lessening the collateral consequences that incur. Recommended options for release include:

1. *Citation in Lieu of Arrest*: A citation (or summons) is a written order issued by law enforcement that requires a person to appear in court at a designated date and time. [64] Law enforcement has long used citations instead of physical arrest for minor offenses and misdemeanors not involving a victim. A 2016 study by the International Association of Chiefs of Police found that nearly 87 percent of law enforcement agencies used some form of citation release.[65]
2. *Non-arrest options*: Many law enforcement agencies have options besides arrest for individuals with severe mental health, substance abuse or other issues. For example, crisis intervention teams include enforcement officers trained to recognize and respond to individuals with severe mental health issues and make referrals to community-based mental health and social services in lieu of arrest. Law Enforcement Assisted Diversion (LEAD) are pre-booking diversion programs that address low-level drug and prostitution crimes.[66]
3. *Delegated release authority*: Courts can grant other justice agencies delegated release authority to screen and release arrestees before or after a formal booking. Staff of these

[64] As of the writing of these Standards, 19 states have legislation authorizing law enforcement to issue citations after arrest. Louisiana, California, and Oregon permit citations for some felonies. Colorado also allows for summons in certain felony cases. Laws in 10 states create a presumption that citations be issued for certain crimes and under certain circumstances. *See* National Conference of State Legislatures, *Citation in Lieu Arrest*, http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx (last visited Sept. 15, 2019).
[65] International Association of Chiefs of Police. *Partnerships in Pretrial Justice,* https://www.theiacp.org/sites/default/files/2018-08/IACP_ParnersinPretrialJustice_Final.pdf (last visited Sept. 15, 2019).
[66] More about LEAD programs can be found at https://nicic.gov/lead-law-enforcement-assisted-diversion.

agencies determine release based on criteria developed with other stakeholders and/or with the use of a validated risk assessment.[67]

Standard 2.2: Bail statutes should include: a presumption for nonfinancial release with a progression from release on one's own recognizance to nonfinancial release conditions to reasonably assure court appearance and public safety; the exclusion of financial conditions; and pretrial detention for the limited number of defendants who present an unmanageable risk to commit a dangerous or violent crime while on pretrial release or to willfully fail to appear at scheduled court appearances.

Related Standards:
NAPSA (2020) Standard 1.2, 1.3, 1.4, 1.5 & 3.4
ABA (2007) Standard 10-1.2, 10-1.4, & 10-1.6

Commentary:

A jurisdiction's legal framework for bail decision-making includes the statutes, applicable case law, and constitutional provisions that establish rules for bail. This framework should facilitate the purposes of bail: maximizing release, court appearance, and public safety. This is best accomplished when a framework includes:

1. A presumption of nonfinancial release on the least restrictive conditions necessary to reasonably assure future court appearance and public safety.
2. Prohibition on the use of financial conditions of release or detention.
3. Provisions for detention without bail for a clearly defined and limited population of defendants who pose an unmanageable risk to public safety or risk to flee. Detention without bail must include robust due process protections for detention-eligible defendants.

All three components are interrelated and must be present within a legal framework to achieve maximized rates of release, appearance, and public safety.[68] Courts are far less likely to utilize formal and legal preventive detention with the necessary accompanying due process hearings and findings when the option exists to set high money bail to achieve *sub rosa* detention. Presumptive nonfinancial release tied to real and practical supervision options discourages courts from applying pretrial detention to an overly-large defendant population.

These Standards assert that the components of least restrictive nonfinancial release and due process-based pretrial detention are achievable only with a prohibition on the use of financial conditions. One author notes:

> *If a proper bail/no bail balance is not crafted through a particular state's preventive detention provisions, and if money is left as an option for conditional release, history has shown that judges will use that money option to expeditiously detain otherwise*

[67] A description of delegated release authority in California can be found at: https://www.ncsc.org/~/media/Microsites/Files/PJCC/23BPretrialLegalBrief82315.ashx.p.10.
[68] Pilnick, et al. (2017). p. 11.

> *bailable defendants. On the other hand, if the proper balance is created so that high-risk defendants can be detained through a fair and transparent process, money can be virtually eliminated from the bail process without negatively affecting public safety or court appearance rates.*[69]

Presumption of least restrictive nonfinancial release: To ensure the constitutional safeguard against excessive bail, federal and state bail statutes expressly or implicitly mandate release on the least restrictive conditions needed to reasonably assure court appearance and public safety. These Standards recommend that a jurisdiction's pretrial legal foundation favor release on a defendant's own recognizance unless a judicial officer believes this would be insufficient to reasonably assure court appearance or public safety. The law subsequently should favor a progression (from least to most restrictive) of conditions consistent with an individual's assessed risk of nonappearance or rearrest.

The Bail Reform Act of 1984 includes an example of this presumption of release on the least restrictive conditions:

> ***(a) IN GENERAL. —****Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—*
> ***(1)*** *released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;*
> ***(2)*** *released on a condition or combination of conditions under subsection (c) of this section;*
> ***(3)*** *temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or*
> **(4)** *detained under subsection (e) of this section.*[70]

Restrictions or prohibition on the use of secured financial conditions of release: Since the beginning of the 20th century, secured financial bail—money or collateral that a defendant, their family or a private surety must pay prior to release—has been the predominant form of bail.[71] The reliance on secured financial conditions has led to significant issues within America's justice systems, including:

1. *Detention due to defendants' inability to pay bail:* The overuse of secured financial conditions has fueled the over incarceration of pretrial defendants. Nationally, almost 63 percent of jail detainees are un-convicted defendants, mostly on pretrial status.[72] Since 2000, 95 percent of the growth in jail resources is from the increase in un-convicted detainees.[73]
2. *The diminishing of judicial authority in bail setting:* Secured financial conditions diminish judicial discretion by allowing a commercial surety or the defendant to

[69] Schnacke (2014). *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform.* Washington, D.C.: National Institute of Corrections. at. p. 52.
[70] Release or detention of a defendant pending trial, 18 USCS § 3142.
[71] Schnacke, T. R. (2014). *Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial*. Washington, D.C.: National Institute of Corrections.
[72] Minton and Zeng. (2015).
[73] *Id.* at 1.

determine release or detention. Often, judges set low money amounts, assuming these will facilitate release. However, a 2013 report on New Jersey's jail population found that 12 percent of pretrial detainees in the state were held on bonds of $2,500 or less.[74] A Bureau of Justice Statistics data series on felony case filings in America's largest urban counties found "on any given day, five out of six defendants provided with a financial release condition are unable to make the bond amount set by the court."[75]

3. *The inability to guarantee detention of truly dangerous defendants:* Historically, secured financial conditions have been tied exclusively to court appearance. Also, under most legal foundations, bonds cannot be forfeited after a new arrest, nor do sureties have a responsibility or an incentive to provide supervision or support to reduce the likelihood of new arrests. Research shows that nearly half of the most high-risk defendants are released on money bail. Just as it is unnecessarily costly to incarcerate low-level defendants who cannot afford money bond, we pay a price for letting higher-level individuals buy their freedom without oversight.[76]
4. *The collateral consequences of unnecessary detention:* Individuals held in jail before trial, even for short periods of time, have worse outcomes than those released pretrial, including higher risk of unemployment,[77] sentencing disparity,[78] and recidivism,[79] and other results.[80] A study by Arnold Ventures looked at 153,407 defendants in Kentucky and found that longer stays in pretrial detention increased the likelihood that a defendant would fail to appear in court, engage in new criminal activity, and recidivate after disposition. Even a small amount of time in jail had a significant effect: "When held 2-3 days, low-risk defendants are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours."[81] Generally, outcomes were worse for low-risk defendants, and the foundation noted a hypothesis of failures occurring due to increased periods of defendants' separation from their communities.
5. *Racial disparities from the use of secured financial bail*: Pretrial incarceration based on secured financial bail has been shown to affect defendants of color disproportionately related to their representation in a jurisdiction's population or in a local criminal justice system.[82]

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[74] Lowenkamp, VanNostrand, and Holsinger. (2013).
[75] Cohen, T. H. and Reaves, B. A. (2008). *Pretrial release of felony defendants in state courts*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics.
[76] Pretrial Justice Institute (2017). *Pretrial Justice: How Much Does It Cost*? Washington, D.C.: Pretrial Justice Institute. (Citing Laura and John Arnold Foundation (2013). "Research Summary: Developing a National Model for Pretrial Risk Assessment," New York, NY: Laura and John Arnold Foundation).
[77] Schönteich. (2010).
[78] Leipold (2005). pp. 1123-1165.
[79] Lowenkamp, VanNostrand, and Holsinger. (2013).
[80] Holsinger, A.M. (2016). *Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes. Research Brief*. Boston. MA: Crime and Justice Institute. Available at http://www.crj.org/assets/2017/07/13_bond_supervision_report_R3.pdf.
[81] *Ibid.*
[82] DeMuth, S. and Steffenmeier, D. *The Impact of Gender and Race-Ethnicity in the Pretrial Release* Process 222-242 (Society for the Study of Social Problems, Inc. 2004); Arnold, D., Dobbie, W., and Yang, C.C. *Racial Bias in Bail Decisions*, The Quarterly Journal of Economics, Nov. 2018, at 1885–1932; Wooldredge, J. *Distinguishing race effects on pretrial release and sentencing decisions,* Justice Quarterly, Feb. 2012, at 41-75.

Preventive detention: A very limited subset of pretrial defendants may present an unmanageable risk of rearrests on dangerous or violent offenses or court nonappearance.[83] In these narrow circumstances, preventive detention—detention without bail—is both appropriate and necessary. An effective pretrial justice system provides limited authority for preventive detention accompanied by proper due process safeguards.[84]

Traditionally, jurisdictions have relied heavily on secured financial conditions as a proxy for detention. Courts across the country impose financial conditions that are presumptively unaffordable for a defendant with the unexpressed intent to protect the public from future crime. These *sub rosa* preventive detention practices are largely immune from appellate review, circumvent procedural protections, not limited by risk or offense, and ultimately do not guarantee the detention of the defendant perceived to be dangerous.

Preventive detention, when used properly and with extreme care, provides justice systems with a transparent and rational means to address high-risk individuals. Jurisdictions that use or contemplate preventive detention must limit significantly its application and adopt the safeguards emphasized by the U.S. Supreme Court in *Salerno*. For example, to satisfy substantive and procedural due process, preventive detention must occur only after a full adversarial hearing where the defense may rebut the government's assertion of dangerousness and the government must demonstrate by clear and convincing evidence that no conditions or condition combinations "will reasonably assure" public safety or court appearance.[85]

These Standards recommend that courts will use a slightly different and more exacting process than the one reviewed in *Salerno* by requiring that defendants not be detained pretrial unless the risk is not only high and unmanageable, but also entails a risk to commit either a dangerous or violent crime or to willfully flee to avoid prosecution.

[83] Less than one percent of felony defendants in Cook County (Chicago,), IL. who appeared in bond court and were released between October 1, 2017 and September 30, 2019 were charged with a new violent offense while in the community. http://www.cookcountycourt.org/Portals/0/Chief%20Judge/Model%20Bond%20Court/Q3%202019/2019%20Q3%20MBC%20Public%20Facing%20Dashboard%2011.15.19.pdf. Between 2009 and 2015, one percent of Federal pretrial defendants were rearrested for a violent offense. (Cohen, et. al. at p. 25). From Fiscal Years 2013-2017, 1.6 percent of pretrial defendants in Washington, D.C. were rearrested for a violent charge. Pretrial Services Agency for the District of Columbia. (2018). *Congressional Budget Justification and Performance Budget Request Fiscal Year 2019*. Washington, D.C.: Pretrial Services Agency for the District of Columbia. at p. 25. Downloaded from https://www.psa.gov/sites/default/files/FY2019%20PSA%20Congressional%20Budget%20Justification.pdf

[84] See *Salerno*, 481 U.S. at 741.

[85] *Ibid.*

Standard 2.3: Jurisdictions should not establish local requirements for bail that are more restrictive than allowed by state statute.

Related Standards:
NAPSA (2004) Standard 3.3
ABA (2007) Standard 10-4.2

Commentary:

Jurisdictions should not limit a defendant's eligibility for screening, assessment or bail beyond what is statutorily allowable. This includes denying bail or restricting the types of bail allowed to bail-eligible defendants based on charge, crime classification or other arbitrary factors. The NIC publication *A Framework for Pretrial Release, Essential Elements of an Effective Pretrial System and Agency* further supports this concept with Essential Element #4: "Defendants eligible by statute for pretrial release are considered for release, with no locally-imposed exclusions not permitted by statute." It warns jurisdictions that local administrative orders, policy decisions or other practices, that exclude or detain defendants based on charge may violate state or federal law. The New Mexico Supreme Court underscored this point in *State v. Brown*: "Neither the constitution nor our rules of criminal procedure permit a judge to base a pretrial release decision solely on the severity of the charged offense."[86]

NAPSA Standard 3.3 (2004) emphasizes in its commentary that "all cases" should be subject to a pretrial investigation and that these services should be rendered for any defendant "in custody and charged with a criminal offense, regardless of their apparent seriousness." The ABA Standards on Pretrial Release (2007), Standard 10-4.2 also supports an investigation "in all cases in which the defendant is in custody and charged with a criminal offense."

Standard 2.4: An experienced prosecutor should review all cases before the initial court appearance. This review should include decisions to file or decline to file charges, the consideration of appropriate charge(s), the defendant's eligibility for diversion, and recommendations for bail.

Related Standards:
National District Attorneys Association (2009) *National Prosecution Standards*, Third Edition, Standard 4-5.2
ABA (2015) *Criminal Justice Standards for the Prosecution Function* 3.1-9

[86] *State v. Brown*, 338 P.3d at 1292.

Commentary:

Experienced and well-trained prosecutors should screen arrest filings before initial appearance to determine the most appropriate charges or action.[87] Screening outcomes can range from dismissing or lowering an arrest charge, offering defendants a referral to a diversion program or problem-solving court or preparing an appropriate bail recommendation at the initial court appearance. Early screening can help:

- reduce needless pretrial detention based on charging decisions;
- aid prosecution in determining the most appropriate recommendations for pretrial release or detention;
- dispose weaker cases sooner and target resources to higher level cases; and
- identify defendants eligible for diversion and other alternatives to adjudication.

Standard 2.5: Jurisdictions should ensure that defendants are represented by counsel at the initial pretrial court appearance and all subsequent court appearances. Defense counsel should be fully active and engaged and have sufficient information about the defendant and charge and adequate opportunity to consult with the defendant before the initial appearance.

Related Standards:
ABA (2007) Standard 10.4-3 (iii)
American Bar Association (2017) *Criminal Justice Standards for the Defense Function, 4th Edition*. Standards 4-2.1 and 4-2.3
National Legal Aid and Defender Association (1989) *Standards for the Administration of Assigned Counsel Systems: Black Letter*, Standard 2.5.

Commentary:

Using the ABA's *Pretrial Release Standards* (2007) as a guide, jurisdictions should ensure, through statute or rule of court, that all defendants are appropriately represented by counsel, either private or publicly funded and assigned, at all hearings, including the initial appearance hearing.[88] As noted by the ABA's *Ten Principles of a Public Defense Delivery System*, defense counsel must be assigned as soon as possible after arrest, detention, or a request for counsel is made, usually within 24 hours. It is the defense counsel's

[87] National District Attorney's Association. (2009). *National Prosecution Standards*. Alexandria, VA: National District Attorney's Association. Standard 4-5.2 (Prosecutors should "work very closely with law enforcement and the courts to establish Standard procedures to assure the filing of accurate charges without unnecessary delay, but with sufficient time for prosecutor input."); American Bar Association (2007). *Standards for Criminal Justice, Third Edition: Pretrial Release*. Washington, D.C. Standard 3.1-9 ("[Prosecutors should] act with diligence and promptness to investigate, litigate, and dispose of criminal charges, consistent with the interests of justice.").

[88] American Bar Association (2007). Standard 10-4.3(b) ("ABA policy, however, clearly recommends that provision of counsel at first appearance should be Standard in every court."). See also ABA (1992). *Providing Defense Services,* Standard 5-6.1 (recommending that counsel be provided to defendants "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.").

responsibility to adequately defend their client, which requires access to defendants prior to all hearings in order for consultation to occur.[89]

Additionally, defense counsel should be provided with and review all charging affidavits, pretrial release risk assessment results, and any other information available to the judicial officer to make a bail determination. Finally, defense counsel should use the information provided to them to make a vigorous defense of the accused's rights.

Standard 2.6: Jurisdictions should ensure procedures to review pretrial release and detention decisions throughout the pendency of the case.

Related Standards:
ABA (2007) Standard 10.5-12

Commentary:

When the court sets bail, it has a continuing responsibility to ensure the defendant's timely release.[90] To facilitate this function, the pretrial services agency—or other designated agency—should notify the court no later than three days after the initial court appearance when money bail results in a defendant's continued detention. The agency also should provide the judicial officer reviewing the bail with:

- non-financial options appropriate to the defendant's assessed risk level;
- new information that would aid in facilitating a defendant's release; or
- information that would affect the defendant's status while on release.

Pretrial services agencies should facilitate a process where defense counsel and/or the prosecutor's office can notify the agency of any change in circumstances that would affect the defendant's bail status. Information such as a withdrawal or reduction of a charge or a new charge being filed against a defendant would precipitate a bail modification hearing. When this information is received the pretrial agency should present this information to the court for consideration regarding the defendant's current status on bail.

Pretrial services agencies should have internal processes to review the status of released defendants under pretrial supervision. This review at a minimum should include a check for new criminal arrests both in state and out of state, the defendant's next court dates and compliance with conditions of release.

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[89] See American Bar Association (2017). *Criminal Justice Standards for the Defense Function, 4th Edition*. Washington, D.C.: American Bar Association. Standard 4-2.3 Right to Counsel at First and Subsequent Judicial Appearances: "A defense counsel should be made available in person to a criminally-accused person for consultation at or before any appearance before a judicial officer, including the first appearance."

[90] See, e.g., Release Prior to Trial, D.C. Code § 23–1321(c) (4) (A person for whom conditions of release are imposed and who, after 24 hours from the time of the release hearing, continues to be detained as a result of inability to meet the conditions of release, shall upon application be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, on another condition or conditions, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed.).

Standard 2.7: All jurisdictions should establish a dedicated pretrial services agency.

Related Standards:
ABA (2007) Standard 10-1.10
NAPSA (2020) Standards 4.1 - 4.7

Commentary:[91]

Fair and effective bail decision-making requires an assessment of the likelihood of court appearance and arrest-free behavior, monitoring and supervision options that promote these behaviors, notification to courts about compliance, and performance measurement to gauge outcomes and improve processes.[92] These key elements function best when consolidated under a single organizational structure: a pretrial services agency.

The case for dedicated pretrial services agencies is grounded in organizational theory, the opinions of leading criminal justice organizations, and the law. Operationally, pretrial functions have an interdependent and reciprocal relationship—the results of one function effect or become the input of another. For example, risk assessment results inform recommendations on release or detention, which influence monitoring and supervision strategies. The input from these activities become the performance metrics needed to improve procedures. Organizational theory recognizes interdependent and reciprocal relationships as the most complex and difficult to manage, requiring the highest level of communication and coordination among those performing the tasks. [93] These are best achieved and managed under a single entity, with a single management mission and philosophy. A dedicated pretrial services agency ensures that these elements are operationalized and realistic. For example, courts can make bail decisions based on empirically validated factors and have real supervision options related to risk level and which have been shown to help mitigate pretrial misconduct. These services and support are best done under a single organizational structure.

Standards adopted by leading criminal justice organizations strongly endorse the establishment of pretrial services agencies. The ABA noted the following:

> *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 to review the status and release eligibility of detained defendants for the court on an ongoing basis.*[94]

[91] Commentary here is based on Pilnik, et. al. (2017), pp. 31-33.
[92] These functions are described in more detail in Part 4: Pretrial Services Agencies.
[93] Thomas, J.D. (1967). *Organizations in Action*. New Brunswick, NJ: McGraw-Hill Publishing. Aiken, M. and Hage, J. (1968). "Organizational Interdependence and Intra-organizational Structure." *American Sociological Review*, 1968 Dec; 33(6): 912-930.
[94] ABA. 2007. Standard 10-1.10 (the role of the pretrial services agency).

Leading criminal justice organizations, such as the American Probation and Parole Association,[95] the American Jail Association,[96] the American Council of Chief Defenders,[97] the International Association of Chiefs of Police,[98] the Association of Prosecuting Attorneys,[99] and the Conference of Chief Justices[100] have drafted statements and resolutions supporting pretrial services agencies and recognizing their importance to effective justice systems. For example, the 2010 American Probation and Parole Association *Resolution on Pretrial Supervision* reads in part:

> *NOW THEREFORE BE IT RESOLVED, that the Board of Directors of the American Probation and Parole Association supports the role of pretrial supervision services to enhance both short-term and long-term public safety, provide access to treatment services and reduce court caseloads, and submit that such a role cannot be fulfilled as successfully by the bail bond industry.[101]*

Recognizing the importance of an independent pretrial services function, nearly half of states, the District of Columbia, and the federal system authorize or encourage pretrial services agencies.[102] These statutes generally describe pretrial services agency missions as informing the judiciary on bail decisions—particularly identifying defendants that can be released pretrial and those eligible and appropriate for detention—and providing supervision options that make release decisions realistic and practical. The Colorado statute notes the following:

> *"To reduce barriers to the pretrial release of persons in custody whose release on bond with appropriate conditions reasonably assures court appearance and public safety, all counties and cities and counties are encouraged to develop a pretrial services program in consultation with the chief judge of the judicial district in an effort to establish a pretrial*

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[95] American Probation and Parole Association, *Pretrial Supervision Resolution* (June 2010), https://www.appa-net.org/eweb/Dynamicpage.aspx?webcode=IB_Resolution&wps_key=3fa8c704-5ebc-4163-9be8-ca48a106a259.

[96] American Jail Association, Resolution on Pretrial Justice, adopted Oct. 24, 2010, https://www.americanjail.org/files/About%20PDF/_AJA%20Resolutions%20-%20January%202017.pdf.

[97] American Council of Chief Defender, *Policy Statement on Fair and Effective Pretrial Justice Practices* (June 4, 2011), http://nlada.net/sites/default/files/na_accdpretrialstmt_06042011.pdf.

[98] International Association of Chiefs of Police, Law Enforcement's Leadership Role in the Pretrial Release and Detention Process (Feb. 2011), http://www.pretrial.org/wp-content/uploads/2013/02/IACP-LE-Leadership-Role-in-Pretrial-20111.pdf.

[99] Association of Prosecuting Attorneys, Policy Statement on Pretrial Justice (2011), https://www.pretrial.org/download/policy-statements/APA%20Pretrial%20Policy%20Statement.pdf.

[100] Conference of Chief Justices, *Resolution 3: Endorsing the Conference of State Court Administrators Policy Paper on Evidence Based Pretrial Release*, adopted Jan. 30, 2013, https://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/01302013-pretrial-release-Endorsing-COSCA-Paper-EvidenceBased-Pretrial-Release.ashx.

[101] American Probation and Parole Association (2010).

[102] National Council of State Legislatures, Pretrial Release Laws: Recent State Enactments (June 30, 2014), http://www.ncsl.org/documents/cj/PretrialHandoutNCSL.pdf. Examples of legislation include: Organization and administration of pretrial services, 18 U.S.C. § 3153 (2019); Va. Code Ann. § 19.2-152.2 (2019) (discussing the purpose and establishment of pretrial services and services agencies); Pretrial Services Act, 725 ILCS 185/0.01 (2019).

> *services program that may be utilized by the district court of such county or city and county."*[103]

The Illinois statute specifically describes the benefits of pretrial services agencies to fair and effective bail decision-making:

> *§ 19.2-152.2. Purpose; establishment of pretrial services and services agencies.*
> *It is the purpose of this article to provide more effective protection of society by establishing pretrial services agencies that will assist judicial officers in discharging their duties pursuant to Article 1 (§ 19.2-119 et seq.) of Chapter 9 of this title. Such agencies are intended to provide better information and services for use by judicial officers in determining the risk to public safety and the assurance of appearance of persons age 18 or over or persons under the age of 18 who have been transferred for trial as adults held in custody and charged with an offense, other than an offense punishable by death, who are pending trial or hearing. Any city, county or combination thereof may establish a pretrial services agency and any city, county or combination thereof required to submit a community-based corrections plan pursuant to § 53.1-82.1 shall establish a pretrial services agency.*

The Illinois Supreme Court reiterated the importance of pretrial services agencies in a follow-up *Policy Statement on Pretrial Services Agencies*:

> *The Illinois Supreme Court supports models of urban and rural pretrial practices that address the unique needs of our complex system of justice while maintaining public safety and defendant accountability. The models, however, are anchored in the principle that release decisions must be individualized and based upon a defendant's level of risk. This is the essence of due process.*[104]

This Standard recommends that a pretrial services agency be a separate, independent entity. Jurisdictions may incorporate pretrial services agencies within a larger "parent" organization, if the agency retains:

- a clearly-defined, pretrial service related function as its purpose;
- staff assigned only to pretrial-related work with pretrial defendants; and
- management that can make independent decisions on budget, staffing, and policy.

[103] Colo. Rev. Stat. §16-4-106 (2019).
[104] Illinois Courts Connect, *Illinois Supreme Court adopts statewide policy statement for pretrial services (*May 25, 2017), http://www.illinoiscourts.gov/Media/enews/2017/052517_SC_adopts_policy.asp.

Standard 2.8: Stakeholders making bail decisions should use validated risk assessments to inform those decisions.

Related Standards:
NAPSA (1978) Standard XI
NAPSA (2004) Standard 3.4
NAPSA (2020) Standard 1.2, 1.8, and 4.4(a)

Commentary:

Since the first Edition of its *Release Standards*, NAPSA has recommended that pretrial services agencies use risk assessment instruments to fashion appropriate bail recommendations.[105] Previous Standards also identified assessing pretrial risk as a major point for further research.[106] Since the drafting of the Third Edition Standards, the pretrial services field has generated a wealth of knowledge around the science of pretrial risk prediction. These include the development of empirically-derived pretrial risk assessments[107] and a consensus about the factors most associated with future court appearance and public safety. Consistent with "fourth generation" risk assessments, these assessments also help pretrial services agencies match monitoring and supervision strategies to assessed risk levels and factors to promote pretrial success.

This Standard recommends that all justice systems incorporate validated risk assessments into their bail decision-making protocols. Jurisdictions may develop a validated risk assessment based on research on their local defendant populations or choose a validated

[105] NAPSA (1978). Standard XI.
[106] NAPSA (2004) at 62-63. ("Some pretrial services programs have developed risk assessment instruments that are used to gauge the extent of the risks of nonappearance and threat to public safety that would be posed by release of the defendant, but this is an area in which it is clear that further work is needed. In recent years there has been a considerable amount of research on risk assessment and the development of appropriate monitoring and supervision strategies for persons on probation and parole, and it should be possible for researchers focused on pretrial release issues to draw on that body of work.").
[107] VanNostrand, M. (2003). *Assessing Risk Among Pretrial Defendants in Virginia: The Virginia Pretrial Risk Assessment Instrument*. Richmond, VA: Virginia Department of Criminal Justice Services. Lovins, B. and Lovins, L. (2016). *Riverside Pretrial Assistance to California Counties (PACC) Project Validation of a Pretrial Risk Assessment Tool Report*. Southgate, KY: Correctional Consultants Inc. Laura and John Arnold Foundation (2013). Developing a National Model for Pretrial Risk Assessment. Houston, TX: LJAF Foundation. Lowenkamp, C.T. and Whetzel, J. (2009). *The Development of an Actuarial Risk Assessment Instrument for U.S. Pretrial Services*. Federal Probation, Volume 73 Number 2. Levin, D. (2011). Development of a Validated Pretrial Risk Assessment Tool for Lee County, Florida. Washington, D.C.: PJI. Austin, J.F. and Allen, R. (2016). *Development of the Nevada Pretrial Risk Assessment System Final Report*. Washington, D.C.: JFA Institute. JFA Institute and Pretrial Justice Institute (2012). *The Colorado Pretrial Assessment Tool (CPAT)*. Washington, D.C.: PJI. Myburgh, J., Camman, C., and Wormith, J.S. (2015). *Review of Pretrial Risk Assessment and Factors Predicting Pretrial Release Failure*. University of Saskatchewan: Centre for Forensic Behavioural Science and Justice Studies. Hedlund, J., Cox, S.M., and Wichrowski, S. (2003). *Validation of Connecticut's Risk Assessment for Pretrial Decision Making*. Central Connecticut State University, Department of Criminology & Criminal Justice. Mamalian, C. A. (2011). *State of the science of pretrial risk assessment*. Washington, DC: Pretrial Justice Institute. Bechtel, K., Lowenkamp, C. and Holsinger, A. (2011). *Identifying the predictors of pretrial failure: A meta-analysis. Final Report.*

pretrial risk assessment available in the public domain. These tools should distinguish defendants by clearly-defined risk levels based on observed performance (i.e.; observed differences in court appearance and public safety rates) among the classified groups. However, jurisdictions should be mindful that a "higher level" designation only identifies defendants that exhibit a lesser probability for success, not necessarily a likelihood of failure. For example, a study of federal defendants found that nearly 85 percent of those designated as "high risk" made all scheduled court appearances and remained arrest free pretrial.[108]

There are several advantages to incorporating a validated risk assessment instrument into a pretrial services agency's bail recommendation procedures and a justice system's bail determination protocols.[109]

1. Actuarial risk assessment has been demonstrated in justice, business, social science, and medical settings to predict outcomes better than professional judgment alone.[110] Actuarial prediction involves an empirical selection of factors related to the observed outcome. These risk factors are weighted consistently in each assessment, according to their observed correlation to pretrial failure. This differs from decisions based on professional judgment, where factors and their influence may differ by decision maker or case. Lacking Standardized metrics, risk categorization may result in inconsistent, disparate, and potentially arbitrary recommendations.[111]

[108] VanNostrand, M. and Keebler, G. (2009). "Pretrial Risk Assessment in the Federal Court." *Federal Probation*, Vol. 72 (2).

[109] A broader discussion here may be found at Summers, C. and Willis, T. (2010). *Pretrial Risk Assessment Research Summary*. Arlington, VA: CSR, Incorporated.

[110] See Andrews, D. and Bonta, J. (1998). *The psychology of criminal conduct*. Cincinnati, OH: Anderson Publishing; Andrews et al., *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, Criminology, Aug. 1990; Grove, W. and Meehl, P.E. *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical Statistical Controversy*, Psychology. Public Policy, and Law, 1996; Gendreau, P., Little, T. and Goggin, C. *A META-ANALYSIS OF THE PREDICTORS OF ADULT OFFENDER RECIDIVISM: WHAT WORKS!*, Nov. 1996; Grove, W.M. et al., *Clinical Versus Mechanical Prediction: A Meta-Analysis*, Psychological Assessment 2000; Finch, L. and Harris, K., C-SPAN (Oct, 18, 2016), https://www.c-span.org/video/?c4625856/kamala-harris-2006. Lowenkamp and Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, Topics in Community Corrections, 2004, at 3, 6; Andrews, Bonta, and Wormith (2006); Lowenkamp, Latessa and Holsinger, *The Risk Principle in Action: What Have We Learned From I3,676 Offenders and 97 Correctional Programs?*, Crime and Delinquency, Jan. 2006, at 77, 89; Andrews and Bonta, *The Risk-Need-Responsivity Model of Assessment and Human Service in Prevention and Corrections: Crime-Prevention Jurisprudence*, The Canadian Journal of Criminology and Criminal Justice, 2007; Andrews and Dowden, *The Risk-Need-Responsivity model of assessment and human service in prevention and corrections: Crime-prevention* jurisprudence, Canadian Journal of Criminology and Criminal Justice, 2007; Smith, P., Gendreau, P., and Swartz, K. *Validating the Principles of Effective Intervention: A Systematic Review of the Contributions of Meta-Analysis in the Field of Corrections*. Victims & Offenders, Feb. 2009; Ægisdóttir, S. et al. "The Meta-Analysis of Clinical Judgment Project: Fifty-Six Years of Accumulated Research on Clinical Versus Statistical Prediction, 34 341, 341–82; Kleinberg, J., Lakkaraju, H., Leskovec, J. Ludwig, J., and Mullainathan, S. Human Decisions and Machine Predictions, The Quarterly Journal of Economics, Volume 133, Issue 1, February 2018, Pages 237–293, https://doi.org/10.1093/qje/qjx032.

[111] Cooprider, K. *Pretrial Risk Assessment and Case Classification: A Case Study.* Federal Probation, June 2009.

2. Validated risk assessments help assure that risk calculations are based on factors shown by research to be predictive of pretrial misconduct and consistent among staff and similarly-situated defendants.
3. Assessment instruments can increase the standardization and transparency of bail setting, increasing the public's confidence in how bail decisions are made and their outcomes.[112] The legitimacy of criminal justice system is enhanced when stakeholders make consistent, reliable and accurate decisions, using unbiased and proven factors. Two authors noted: "Every day many thousands of predictions are made by parole boards, college admission committees, psychiatric teams, and juries…. To use the less efficient of two prediction procedures in dealing with such matters is not only unscientific and irrational, it is unethical."[113] Risk assessments make clear to justice stakeholders and the public the significance of each factor used in the pretrial services agency's decision-making and recommendations. This is preferable to recommendations made by staff judgement, where factors used and how they are weighted for bail determinations are vague or inconsistent.[114]
4. Risk assessments can help maximize the rate of pretrial release—a central purpose of the bail decision—by increasing stakeholder confidence in pretrial release outcomes. Appearance and safety outcomes can be compared by risk levels and factors to ascertain the efficacy of the assessment. Assessments also can help systems identify defendants appropriate for early release options, such as citations and summonses.
5. Assessments can help pretrial services agencies and courts target monitoring, supervision, and support resources to defendants with a greater likelihood of failure. Data from jurisdictions employing validated risk instruments show that these assessments can distinguish defendant groups by the likelihood of court appearance, arrest-free behavior and even compliance with conditions of pretrial supervision.[115] Therefore, agencies can recommend—and the court can order—own recognizance or monitoring for low-to-moderate level defendants while focusing more intensive and costly conditions on medium-to-high level defendants.
6. Risk assessments help reinforce the ideas of maximized pretrial release and carefully limited pretrial detention by illustrating pretrial "risk" is less prevalent than perceived

[112] Schnacke, T.R. (2018). *Changing Bail Laws: Moving From Charge to "Risk:" Guidance for Jurisdictions Seeking to Change Pretrial Release and Detention Laws*. Center for Legal and Evidence Based Practices. http://www.clebp.org/images/Changing_Bail_Laws_9-23-2018_TRS_.pdf. p. 2.
[113] Grove and Meehl (1996)
[114] Cooprider. (2009). Lowenkamp and Whetzel. (2009).
[115] See Cohen, T.H., Lowenkamp, C.T., and Hicks, W.E. (2018). "Revalidating the Federal Pretrial Risk Assessment (FPRA): A Research Summary." *Federal Probation*, Volume 82, Number 2, pp. 23-29 at 26. Latessa, E., Lovins, B., Makarios, M. (2013). *Validation of the Indiana Risk Assessment System: Final Report*. Cincinnati, OH: University of Cincinnati School of Criminal Justice Center for Criminal Justice Research. pp. 17-19. Indiana Office of Court Services (2019). *Pretrial Release: An Indiana Court Pilot Project.* Indianapolis, IN: Indiana Office of Court Services. p. 2. Debora, J.L. and Meils, J. (2019). *Assessing Risk Among Pretrial Defendants in El Paso County: Validation of the El Paso Pretrial Risk Assessment Instrument and Revision Recommendations*. El Paso, TX: County of El Paso, TX. p. 12. VanNostrand, M., and Rose, K. (2009). *Pretrial Risk Assessment in Virginia. Report for the Virginia Department of Criminal Justice Services, Richmond*. Richmond, VA: Department of Criminal Justice Services. Collins, K. (2018). *Allegheny County Pretrial Services Outcome Reports*. (Pittsburgh, PA: Allegheny County internal report).

in most justice systems.[116] This helps bail determinations to be based on empirical factors related to pretrial outcomes rather than a decisionmaker's perception of risk.[117]

7. Since the current generation of risk assessments instruments are better at predicting court appearance and arrest-free behavior than traditional bail-setting methods, they can help jurisdictions move more easily from a money-based to a risk-based bail system.
8. Validated risk assessments can help minimize predictive bias based on an individual's race, gender, or ethnicity.

Any pretrial risk assessment instrument must be: :

- constructed on empirical data from a pretrial defendant population;
- transparent about its risk factors and their weighting;
- validated to the defendant population to ensure its effectiveness in determining the likelihood of pretrial misconduct; and
- tested to ensure racial and ethnic neutrality.

In adopting these criteria, this Standard recognizes that adding a poorly constructed or improper assessment to a bail system actually can contribute to unfair and counterproductive bail decisions. "Borrowing" risk assessments from other jurisdictions with no subsequent local validation, basing assessments on subjective stakeholder opinion that is absent research, adopting tools from other criminal justice disciplines for use pretrial, and accepting opaque screening criteria all are fatal—and entirely avoidable—flaws to assessing defendant risk. Most disturbing, improperly selecting or implementing a risk assessment can give poor bail practices the false veneer of being "evidence based."

Of particular importance—and a major topic of concern within the pretrial field at the time of these Standards' revision—is the safeguard against racial and ethnic disparity.[118] Most pretrial risk assessments use prior failures to appear, criminal convictions, and prior incarcerations as their main risk factors and each of these factors has an historic and

[116] Schnacke, T.R. (2018).

[117] See Slovic, P. "Perception of risk." *Science*. 17 Apr 1987, Vol. 236, Issue 4799, pp. 280-285 DOI: 10.1126/science.3563507.

[118] See Skeem, J.L. and Lowenkamp, C.T. *Risk, race, and recidivism: Predictive bias and disparate impact*, Criminology: An Interdisciplinary Journal, 2016, http://ssrn.com/abstract=2687339; Angwin, J. et al., *Machine Bias: There's software used across the country to predict future criminals. And it's biased against blacks,* (2016) ProPublica, https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing. *See also* McCoy, C. *Caleb Was Right: Pretrial Decisions Determine Mostly Everything*, 12 Berkeley J. Crim. L. 135 (2007) (discussing a New Jersey commission's finding that "one of the main factors accounting for the imprisonment rate disparities was that minority offenders had much longer prior criminal records than white offenders and linking it to aggressive enforcement of drug laws in urban centers.). *See also* Breaux, J. and Ho, H. *Could risk assessment contribute to racial disparity in the justice system?* Urban Institute: Urban Wire:: Crime and Justice (Aug. 11, 2014), https://www.urban.org/urban-wire/could-risk-assessment-contribute-racial-disparity-justice-system (making similar arguments in the context of sentencing and probation revocation).

pervasive association with racial and ethnic bias.[119] Mitigating or aggravating factors considered in most pretrial services agency recommendations or the court's bail decision (such as residence and employment) also may have some degree of bias. However, a body of research on risk assessments applied in other justice areas indicates that racial bias may not be as problematic as critics assert. For example, an evaluation of the Federal Post Conviction Risk Assessment—using data from 35,000 federal prisoners—found that the risk assessment predicted post-release arrests similarly across African-American and White offender populations.[120] A 2010 meta-review of forensic risk assessments found eight evaluations that examined race, ethnicity and the predictive accuracy of risk and need assessments. Five meta-analyses found that predictive accuracy did not vary by the race or ethnicity of the sample. Three remaining meta-analyses found predictive accuracy increased as the number of White individuals increased. However, the authors cautioned that these studies did not conduct pairwise comparisons between ethnic groups and that post hoc analyses were necessary to clarify these findings.[121]

A similar body of research is developing in the pretrial field, most of which suggests that assessments tools here can be neutral on race and ethnicity.[122] For example:

1. An evaluation of PSA results in Kentucky found no racial disparity in risk assessment results. statewide assessment. [123]
2. Multiple validations of the Virginia Pretrial Risk Assessment Instrument consistently have found the assessment to be racially neutral.[124]
3. A revalidation of the Federal Pretrial Risk Assessment found that instrument neutral on race and outcomes.[125]
4. An evaluation of the PSA in Yakima County, Washington found that implementation of the assessment increased release rates of Latino, African American, and Native American defendants.[126]

[119] See Laura and John Arnold Foundation. *The Public Safety Assessment–Court Analysis of Race and Gender*. New York, NY: LJAF. Mona J.E., Danner, VanNostrand, M. and Spruance, L.M. (2016). *Race and Gender Neutral Pretrial Risk Assessment, Release Recommendations, and Supervision: VPRAI and Praxis Revised*. St. Petersburg, FL: Luminosity, Inc.

[120] See Skeem and Lowenkamp (2016).

[121] Edens, J.F., Campbell, J.S., and Weir, J.M. "Youth Psychopathy and Criminal Recidivism: A Meta-Analysis of the Psychopathy Checklist Measures." Law and Human Behavior February 2007, Volume 31, Issue 1 pp. 53-57. Skeem, J.L, Edens, J.F., Camp, J., and Colwell, L.H. "Are There Ethnic Differences in Levels of Psychopathy? A Meta-Analysis Law and Human Behavior." Law and Human Behavior, October 2004, Vol. 28, Issue No. 5, pp. 505-527.

[122] See Flores. A.W., Bechtel, K. and Lowenkamp, C.T. *False Positives, False Negatives, and False Analyses: A Rejoinder to "Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And It's Biased Against Blacks,"* Federal Probation, Sept. 2016.

[123] DeMichele M, Baumgartner P, Wenger M, Barrick K, Comfort M. Public safety assessment: Predictive utility and differential prediction by race in Kentucky. Criminal Public Policy. 2020;1–23. https://doi.org/10.1111/1745-9133.12481.

[124] Danner, VanNostrand, and Spruance (2016). Laura and John Arnold Foundation (2014).

[125] Cohen, Lowenkamp, and Hicks. (2018).

[126] Valentine, E., & Redcross, C. (2018). *Impact Evaluation of the Public Safety Assessment and Other Pretrial Reforms in Yakima County, Washington*. Retrieved from osf.io/sy9we.

It is noteworthy that the single empirical source for claims of inherent racial/ethnic bias in assessments is a study by the organization ProPublica of the COMPAS risk assessment instrument in Broward County, Florida.[127] However, two subsequent independent studies have refuted ProPublica's results and found several methodological flaws in the organization's analysis.[128]

To help ensure race and ethnic neutrality, jurisdictions adopting risk assessments must validate them on the defendant population on which they are used. Validation should gauge the local correlation of race and ethnicity to pretrial failure and risk levels. The effective use of properly validated risk and needs assessment can potentially help to limit racial bias in decision making in the criminal justice system by providing an evidence-based assessment of criminogenic risk factors and needs.[129]

Stakeholders also should ensure that risk assessments are used for their intended purposes. Recidivism-based assessments should not be used to predict failure to appear. Needs assessments for substance abuse and mental health needs should not be used as global assessments of new criminal arrests or condition compliance. Proper assessment use also requires training of staff who administer it and stakeholders that use the results for decision making. Actuarial assessments do not fully eliminate racial and socio-economic bias. However, they can lessen that bias better and more consistently than clinical judgement.[130]

While an established evidence-based practice in other fields and criminal justice settings, the efficacy of actuarial risk assessments in the pretrial services field is still unknown.[131] Therefore, pretrial services agencies should not use these assessments as the only

[127] Angwin, J., Larson, J., Mattu, S., and Kirchner, L. (2016).
[128] Flores, Bechtal, and Lowenkamp (2016). Dieterich, W., Mendoza, C. and Brennan, T. (2016). *COMPAS Risk Scales: Demonstrating Accuracy Equity and Predictive Parity*. Northpointe.
[129] Mayson, S.G. (2018). *Bias In, Bias Out* 128 Yale Law Journal (2019 Forthcoming); University of Georgia School of Law Legal Studies Research Paper No. 2018-35. Available at SSRN: https://ssrn.com/abstract=3257004. Goel, S., Shroff, R., Skeem, J.L. and Slobogin, C. (2018). *The Accuracy, Equity, and Jurisprudence of Criminal Risk Assessment*. Available at SSRN: https://ssrn.com/abstract=3306723 or http://dx.doi.org/10.2139/ssrn.3306723.
[130] See Kleinberg, J., Ludwig, J., Mullainathany, and S. Sunsteinz, C.R. Discrimination in the Age of Algorithms. Journal of Legal Analysis 2018: Volume 10 at p. 2.: "Our central claim here is that when algorithms are involved, proving discrimination will be easier—or at least it should be, and can be made to be. The law forbids discrimination by algorithm, and that prohibition can be implemented by regulating the process through which algorithms are designed. This implementation could codify the most common approach to building machine-learning classification algorithms in practice and add detailed recordkeeping requirements. Such an approach would provide valuable transparency about the decisions and choices made in building algorithms—and also about the tradeoffs among relevant values." Downloaded from https://academic.oup.com/jla/article-abstract/doi/10.1093/jla/laz001/5476086.
[131] Stevenson, M. Assessing Risk Assessment 4 (George Mason Univ. Law & Econ. Research Paper, Working Paper No. 17-36, 2017) (on file with Harvard Law School Library). Van Nostrand, M. (2007). *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services. Report for the Crime and Justice Institute and the National Institute of Corrections*. Washington, DC: U.S. Department of Justice, National Institute of Corrections. Levin, D. (2007). *Examining the Efficacy of Pretrial Release Conditions, Sanctions and Screening with the State Court Processing Statistics Dataseries*. Washington, DC: Pretrial Justice Institute. VanNostrand and Rose. (2009).

determinant of bail recommendations (nor should courts use them as the only factor in bail decisions or to replace judicial decision-making). Rather, as discussed in Standard 4.1(iii), risk assessment results should be one of several pieces of relevant information used to determine the least restrictive means needed to maximize release, appearance and public safety rates.

Standard 2.9: Pretrial supervision should be individualized to a defendant's assessed risk level and risk factors and based on the least restrictive conditions necessary to reasonably assure the defendant's future court appearance and arrest-free behavior.

Related Standards:
NAPSA (2020) Standard 1.2
NAPSA (2004) Standard 3.5
ABA (2007). Standard 10-5.2

Commentary:

Pretrial supervision should adhere to the legal requirement of the least restrictive means needed to reasonably assure court appearance and public safety and the "risk principle" of matching supervision levels to individual assessed risk level. Research indicates that this practice improves supervision compliance and outcomes.[132] Additionally, the risk principle cautions against placing conditions more appropriate to higher-risk defendants onto low risk defendants. This practice results in a waste of resources and can lead to higher levels of technical condition violations. Conversely, inadequate supervision of high-risk defendants can yield missed court appearances or new criminal arrests pretrial.

Evidence-based supervision practices such as court notification, response to defendant conduct under supervision, and prompt notice to court of violations of release conditions can positively impact court appearance and public safety for medium to higher risk defendants. Drawing on data from two sites, Arnold Ventures studied the likelihood of new criminal arrest and failure to appear for defendants released pretrial with and without supervision. The study found that moderate-and high-risk defendants under supervision were more likely to appear in court and that those supervised pretrial 180 days were more likely to remain arrest-free.[133] Multivariate statistical analysis, controlling for gender, race, time at risk in the community and defendant risk indicated that supervision significantly reduced the likelihood of failure to appear. The study also found that effects of pretrial supervision on appearance rates were consistent over differing time-to-disposition periods.

[132] Lowenkamp and Latessa. (2004). Lowenkamp, C.T., Latessa, E.J., and Holsinger, A.M. (2006).
[133] Lowenkamp, C.T. and VanNostrand, M. (2013). *Exploring the Impact of Supervision on Pretrial Outcomes*. New York, NY: Laura and John Arnold Foundation.

Standard 2.10: Jurisdictions should engage in performance measurement and feedback of pretrial system practices.

Commentary:

Jurisdictions should establish strategic goals and objectives that reflect their mission, consistent with maximizing release rates, court appearance and public safety. To gauge the effectiveness of a jurisdiction's performance in relation to its goals, various performance metrics can be used. The NIC publication *Measuring What Matters: Outcomes and Performance Measures for the Pretrial Field*[134] lists recommended metrics for pretrial agencies and systems. Pretrial services agencies, at a minimum, should measure appearance rate, safety rate, concurrence rate, success rate and pretrial detainee length of stay.[135] Although the pretrial services agency should take the lead in collecting, compiling and reporting of data, not all the metrics are reflective solely of the agency's performance, but rather an indication of the jurisdiction's performance in relation to its goals concerning pretrial release. For instance, the concurrence rate is determined by how often a judicial officer adopts the recommendation made by pretrial services. The decision to adopt the recommendation is outside the direct control of the pretrial services agency and therefore not necessarily reflective of the agency's performance. Regardless, all metrics should be used to measure progress, track trends, and expose discrepancies between stated goals and actual practices. Performance measurements should be shared with stakeholders and used to inform decisions and drive policy.

[134] National Institute of Corrections. (2012). *Measuring What Matters: Outcomes and Performance Measures for the Pretrial Field.* Washington D.C.: National Institute of Corrections.
[135] *Ibid.*

Part 3: Pretrial Release and Detention Decisions

Standard 3.1: Prior to the Initial Court Appearance

3.1(a): Jurisdictions should develop guidelines that authorize criminal justice agencies to review and, where appropriate, release arrestees before the initial court appearance. These guidelines should identify the criteria for determining that release.

Related Standards:
NAPSA (2020) Standard 2.1 and 2.2
ABA (2007) Standard 10-2.1

Commentary:

Standard 2.1 describes release options available to law enforcement prior to a defendant's first appearance. Standard 3.1(a) encourages expanding these release options to other criminal justice agencies such as pretrial services or the jail authority. According to Standard 2.1 courts can grant other criminal justice agencies delegated release authority to screen and release arrestees before or after formal booking. Staff of these agencies determine release based on criteria developed with other stakeholders or with the use of a validated risk assessment.

Delegated release can significantly reduce costs associated with unnecessary detention of individuals charged with minor offenses or who are deemed low risk. Release after booking also provides an opportunity to verify the defendant's identity, obtain a criminal history and check for outstanding warrants. In developing delegated release policies, jurisdictions should identify specific criteria to be used for release eligibility, such as type of charge, existence of outstanding warrants, and/or risk score. Jurisdictions should also identify a person or person(s) who have the authority to veto the release of an individual for specific articulable reasons. Defendants released before first appearance should have a court date set promptly and receive written notification of that date. Jurisdictions should ensure that the court has the statutory authority to delegate release or that it is not expressly prohibited from doing so. Any policies regarding delegated release should be in writing through a memorandum of understanding, local administrative order, or other authorizing document.

To help facilitate release here, law enforcement and court personnel should allow defendants contact with family and friends following arrest and before the first judicial hearing. These are helpful to obtaining counsel for first appearance, verifying residence, employment, and other demographic information, and securing living arrangements pending release. Access to means of communication should be coordinated with appropriate law enforcement, corrections or court security.

3.1(b): Prior to the initial pretrial court appearance, pretrial services agencies should:

(i) collect and verify background and criminal history information on all bail-eligible defendants;

(ii) assess the likelihood of future court appearance and arrest-free behavior while on pretrial release, using factors shown by research to predict the likelihood of these outcomes; and

(iii) as part of an adjusted actuarial approach, use aggravating or mitigating factors found during the background investigation to formulate appropriate bail recommendations.

Related Standards:
ABA (2007) Standard 10-1.2, 10-1.4a, 10-1.9, 10-1.10, and 10-4.2
NAPSA (2020) Standard 1.8 and 2.8

Commentary:

This Standard provides the framework for pretrial services agencies to assist judicial officers make informed decisions on bail-eligible defendants. To help determine a defendant's likelihood of court appearance and arrest-free behavior and to identify release conditions, if any, needed to foster these outcomes, a pretrial agency should complete a standardized investigation. The information collected should be used in an adjusted actuarial pretrial risk assessment to gauge pretrial risk and formulate recommendations for appropriate release conditions to mitigate the assessed risk.

(i) A pretrial services agency's background investigation should include, at the least:

- A criminal records check (preferably national) that notes adjudications and pending cases, the defendant's current status with the justice system (probation, parole, pretrial status, etc.), and previous willful failures to appear.
- Verification of information from the pretrial interview. At a minimum, information obtained from a defendant that contributes to the risk assessment calculation or final recommendation should be verified.

(ii) Pretrial services agencies should use a validated risk assessment to help determine the defendant's likelihood of court appearance and arrest-free behavior during the pretrial period. Standard 2.8 contains a full discussion regarding the use of validated risk assessment tools.

(iii) Based on the developing body of knowledge about pretrial risk assessment—and the legal requirement for individualized bail decision-making—this Standard recommends that pretrial services agencies use an *adjusted actuarial risk assessment approach* to gauge the likelihood of court appearance and arrest-free behavior pretrial.[136] After scoring the risk

[136] See Latessa, et. al. (2009). Quinsey, V.L., Rice, M.E., and Harris, G.T. (1995). Actuarial Prediction of Sexual Recidivism. Journal of Interpersonal Violence, Mar. 1, 1995; Hanson, R. K. S*ex Offenders: Scientific, Legal, and*

assessment, pretrial agency staff may adjust the estimate of risk (but not the actual risk assessment score) to account for potentially mitigating or aggravating factors outside the assessment instrument to tailor the agency's bail recommendation to the particular individual. To ensure that this approach does not take on the "subjective, impressionistic"[137] dimensions of decision-making based purely on clinical judgment, pretrial services agencies should limit deviations from risk assessment results in its recommendations to specific and clearly defined circumstances approved by the agency and its stakeholder partners. For example, the agency's recommendation procedures may include an approved list of considerations that can raise or lower the supervision level recommended by the risk instrument.[138] Agencies also should set as a performance measure an annual cap on the number of recommendations that deviate from risk assessment results as a percentage of risk assessments performed. This Standard recommends an appropriate range for recommendations that deviate from the risk assessment, with overrides for lower and higher supervision levels being about equal.[139] Finally, all deviations from the risk assessment results must require a supervisor's review and approval.

Standard 3.2: Initial Court Bail Determination

3.2(a): Defendants who have not been released pursuant to 3.1(a) should be brought immediately before a judicial officer for an initial bail determination.

Related Standards:
ABA (2007) Standard 10-4.1

Commentary:

Defendants still detained after arrest or formal booking should be brought before a judicial officer for bail determination within 24 hours of arrest. This hearing may occur before a judicial officer such as a magistrate judge or commissioner or as part of the initial formal court appearance. If the hearing is the defendant's initial appearance in court, pretrial services staff, prosecutor, and defense counsel should be present and engaged.

Policy Perspective: The Science of Sex Offenders: Risk Assessment, Treatment, and Prevention: What Do We Know About Sex Offender Risk Assessment? 4 Psychol. Pub. Pol'y & L. 50, 53 (1998).
[137] Grove, W. and Meehl, P. (1996).
[138] Hanson, R.K. (1998) Predicting sex offender re-offense: Clinical application of the latest research. Presentation sponsored by Sinclair Seminars and given in Richmond, VA.
[139] Andrews, D., Bonta, J. and Hoge, R. (1990). *Classification for effective rehabilitation: Rediscovering psychology*. *Psychology*, Crim. Just. & Behav., Mar. 1, 1990*;* Austin, J. *The Proper and Improper Use of Risk Assessment in Corrections*, Fed. Sentencing Reporter, Feb. 2004 (recommending a 5-15 percent "override" range); Latessa, et al. (2009).

While the 24-hour period may seem ambitious, it is in fact already being met in many jurisdictions and is statutorily required in others.[140] A well-functioning criminal justice system should seek to make prompt and meaningful initial appearance a reality in all cases, as part of a process of continuing improvement.[141]

3.2(b): At the initial bail hearing, the court should determine if there is probable cause to believe the defendant committed the crime charged before setting bail, ordering conditions of pretrial release or the defendant's temporary detention.

Related Standards:
ABA (2007) Standard 10-4.3
NAPSA (2004) Standard 2.1 and 2.2

Commentary:

Consistent with the U.S. Supreme Court's holding in *Gerstein v. Pugh*, 420 U.S. 103,[142] the court should determine whether, on the basis of the allegations made in the charging instrument and any supporting documents or other materials, there is probable cause to believe that the defendant committed the crime charged. If the judicial officer determines the probable cause, they should decide pretrial release or detention in accordance with these Standards. This Standard assumes that any condition other than an order for the defendant to make all scheduled court appearances and refrain from criminal behavior pretrial would qualify as a "significant restraint of liberty" within the meaning of the Gerstein decision. In particular, these Standards regard frequently-imposed conditions of pretrial supervision such as drug testing, regular reporting to a supervising authority, or electronic surveillance as significant restraints.

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[140] See, for example, the descriptions of the operations of the Kentucky Pretrial Services Program, Pretrial Services Agency for the District of Columbia, the Monroe County (FL) pretrial services program, and the Philadelphia (PA) pretrial services program in *NIJ 2001 Report, supra* note 9, pp. 11-17. *See, e.g.*, Md. Rule 4-212 (Maryland requires by court rule that the first appearance [presentment] take place "without unnecessary delay and in no event later than 24 hours after arrest".); *People ex rel Maxian v. Brown,* 570 N.E.2d 223 (N.Y. 1991) (In New York, the State's highest court has held that the provision in the Code of Criminal Procedure that an arrested person is to be arraigned "without unnecessary delay" should be interpreted as meaning that a delay of arraignment of more than 24 hours is presumptively unnecessary.); Model Code of Pre-Arraignment Proc. § 310.1 (Am. Law Inst. 1975) (providing that the first appearance of an accused person should take place within a maximum period of 24 hours after the arrest); NIJ (2001). at 11-17 (providing the descriptions of the operations of the Kentucky Pretrial Services Program, the District of Columbia Pretrial Services Agency, the Monroe County (FL) pretrial services program, and the Philadelphia (PA) pretrial services program in.).

[141] See Fla. R. Crim. Proc. 3.130 (2019) (requiring every arrested person shall appear before a Judicial Officer within 24 hours of arrest).

[142] See *Gerstein v.* Pugh, 420 U.S. 103, 114 (1975) ("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) (2019); *Gerstein*, 420 U.S. at 114 ("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.").

With respect to the timing of the probable cause determination, the Supreme Court held in *County of Riverside v. McLaughlin*, Id., that the promptness requirement articulated in the *Gerstein* case should be interpreted to place a maximum limit of 48 hours from arrest on the time that a person can be held in custody before a probable cause determination is made by a judicial officer. NAPSA (2004) Standard 2.2 (g) asserts:

> *If, at the first appearance, the prosecutor requests the pretrial detention of a defendant under Standards 2.8 through 2.10 (see these revised Standards, sections 3.4, a-k), 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 pretrial detention following procedures under Standards 2.7 (revised in Standards 3.4 (b)) or to conduct a pretrial detention hearing under Standard 2.10 (revised in Standard 3.4 (g)).*

3.2(c): At the initial bail determination, after a finding of probable cause, the court may

(i): release the defendant on their own recognizance with the conditions to appear for all scheduled court appearances and not commit any new criminal offense; or

(ii): order additional conditions of release designed to address a defendant's risk factors related to future court appearance or to public safety; or

(iii): temporarily hold a defendant pursuant to Standard 3.4(b), pending a formal pretrial detention hearing pursuant Standard 3.4.

Related Standards:

NAPSA (2004) Standards 1.2, 2.3 and 2.4
ABA (2007) Standard 10-1.4, 10-5.1, 10-5.2, 10-5.7
NDAA (2009) Standards 4-4.2 and 4-4.4

Commentary:

A "bail/no bail" dichotomy[143] requires a hierarchy of bail options available to the court to address the varying levels of risk a defendant may pose for missed court appearances or new arrests pretrial. This scheme supports the application of the "bail/no bail" "dichotomy articulated by Tim Schnacke in *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*. In a properly structured hierarchy, there is no place for financial conditions of bail.

The court should always favor a presumption of release on recognizance. If the court finds this option to be insufficient in assuring court appearance and/or public safety, it may then consider release with nonfinancial conditions aimed at mitigating any individualized risk. Lastly, the court may order temporary detention if it finds the defendant detention-eligible by statute and the risk posed by the defendant's release to be unmanageable by any condition or combination of conditions. Detention is the most restrictive bail option; therefore, bail laws and court rules should clearly identify the limited circumstances in

[143] See Schnacke, T.R. (2014) in *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*.

which this option may be exercised and should include procedural requirements aimed at safeguarding due process and protecting against unwarranted pretrial detention.

This progression of release options is a re-iteration of the NAPSA (2004) Standard 1.4(a)(b) and reflects both the ABA Standard 10-1.4 and National District Attorneys Association Standards 4-4.2 and 4-4.4, which support release of the defendant on the least restrictive option. See Standards 1.2, 1.3, and 1.4 for a more thorough discussion of options (i) and (ii).

3.2(d): Defendants should be represented by counsel at the initial pretrial court appearance. If the defendant does not have counsel, the judicial officer should appoint or provide counsel. Defense counsel should have the opportunity to consult with their client prior to the initial pretrial court appearance.

Related Standards:
NAPSA (1978) Standard III.B and III.C
NAPSA (2020) Standard 1.7 and 2.5
ABA (1992) *Standards for Criminal Justice: Providing Defense Services, 3d ed.,* Standard 5-6.1

Commentary:

The initial pretrial court appearance is the Court's opportunity to set bail or review the decision made at the bail determination hearing. Defendants not securing release following the initial bail determination should have an initial pretrial court hearing within 24 hours of the first bail hearing.

NAPSA has advocated for defendants' right to counsel at first appearance since its initial Release Standards in 1978 (Standards III.B and III.C). Since the release of the Third Edition Standards in 2004, the U.S. Supreme Court ruled in *Rothgery v. Gillespie County*, *Texas* 554 US 191 (2008) that the adversarial process begins at first appearance, thus triggering the defendant's right to counsel under the Sixth Amendment. Providing defense counsel at first appearance protects the accused from self-incrimination and assures due process is observed. The *ABA Standards for Criminal Justice: Providing Defense Services*, 3d ed., 1992 also supports the assignment of counsel at first appearance. Standard 5-6.1 reads, in part, "Counsel should 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 earliest."

Attorneys who understand the importance of the bail decision on case outcomes, are knowledgeable about available release options and have an opportunity to consult with the defendant before the proceeding can more effectively advocate for their client. The impact of having defense counsel present at first appearance should not be underestimated. One study found large differences in bail outcomes based on defendant representation. Defendants represented by counsel at bail hearings were:

- 2.5 times more likely to be released on recognizance;

- 4 times as likely to have their bail reduced; and
- almost 2 times as likely to be released within one day of their arrest (defendants with attorneys spent an average of 2 days in jail, compared with 9 days for those without attorneys).[144]

Consultation with the defendant should occur before the initial pretrial court hearing and be conducted in a space that respects the confidentially of the communication. Counsel should secure a copy of the arrest report or charging document and pretrial services agency report to assist in client communication and recommendation for bail.

Since the ruling in *Rothgery*, jurisdictions nationwide have struggled to make its requirements meaningful. Access to the defendant, increased time at first appearance, and lack of resources are just a few of the challenges that jurisdictions must overcome to implement this obligation. These issues, while difficult, are not legitimate reasons to deprive defendants of a constitutional right. To overcome some of these obstacles, jurisdictions have employed various methods to provide adequate representation of defendants. Two of these methods are vertical and horizontal representation. Vertical representation entails the same attorney continuously representing the client from the first appearance until completion of the case. Conversely, horizontal representation involves a different attorney handling the case as it moves from one proceeding to the next.

3.2(e): At the initial court appearance, the Court should ensure that the defendant receives a copy of the charging document and is informed of the charge(s). Unless waived by defense counsel, the Court should advise that the defendant:
(i) is not required to say anything and that anything the defendant says may be used against them;
(ii) has a right to counsel at all court proceedings, and that if the defendant cannot afford a lawyer, one will be appointed;
(iii) may communicate with his or her attorney;
(iv) if necessary, has the right to an interpreter at all proceedings;
(v) if not a United States citizen, may be affected adversely by collateral consequences of the charge, such as deportation, and has the right to contact their respective embassy or consulate; and

***Related Standards*:**
ABA (2007) Standard 10-4.3(a) (b) (vi)

Commentary:

This Standard outlines the procedural requirements for a first court appearance before a judicial officer. Courts should ensure that the defendant knows the charge(s) and the potential consequences of a conviction and should advise the defendant of the basic rights enumerated in this Standard. If the defendant does not have defense counsel, the Court

[144] Colbert, D.L., Paternoster, R. and Bushway, S. "Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail."23 Cardozo L. Rev. 1719, 1721 (2002).

should one, at least for the purposes of the first appearance. The Court also should ensure that the hearing is conducted in language that is understandable to the defendant. If needed, the Court should grant the defendant access to a court-appointed interpreter.

3.2(f): The Court should provide the defendant with written notice of the nature, time and place of the next scheduled court proceeding.

***Related Standards*:**
ABA (2007) Standard 10-4.3

Commentary:

This Standard emphasizes the importance of written notice of pending court appearances to help ensure a defendant's appearance at these matters. The Court should provide written notice—in the language the defendant best understands—of scheduled court appearances. Notice should include the date of the next hearing, the hearing type, time, and location.

3.2(g): The initial pretrial court appearance should be in a court of record, and open to the public. Prosecution or law enforcement should make a reasonable effort to notify victims of the hearing's time and location.

Commentary:

Most states have laws providing for the initial court appearance on criminal cases to be open to the public and the U.S. Supreme Court has strongly reinforced the presumption of openness in its decisions.[145]

The initial appearance should be conducted so that interested parties, whether for the defendant or the victim, can attend and observe the proceedings. This should be held in a court of record, as having such a record enables review of the initial bail or detention decision during subsequent hearings or upon appeal. If the initial pretrial court appearance is conducted in a court of non-record, at a minimum the judicial authority must state in writing the reasons for pretrial detention and/or reasons for conditions of any release.

[145] See *Press-Enterprise Co. v. Superior Ct.,* 478 U.S. 1 (1986); *El Vocero de P.R.* v. *Puerto Rico,* 508 U.S. 147 (1993).

Standard 3.3: Release Decisions

3.3(a): All defendants should have a statutory presumption of release on personal recognizance with the requirement that the defendant attend all court proceedings and not commit any criminal offense while released. This presumption may be rebutted by evidence of a substantial risk of failure to appear for scheduled court appearances or risk to public safety that warrants a greater level of monitoring or supervision. In these cases, courts may impose conditions of supervision to address these specific risks. Conditions must be the least restrictive needed to address the identified risk.

Related Standards:
ABA (2007) 10-5.1

Commentary:

The Federal Bail Reform Act of 1966 created for defendants charged with non-capital federal crimes a presumption in favor of release on their own recognizance and a legal Standard for the use of the least restrictive non-financial conditions of release in the event conditions were needed.[146] Since the Act's passage, most states have revised their bail laws to include a similar presumption of own recognizance release. In 1984, the Federal Bail Reform Act added community safety, to accompany appearance, as a legal purpose of bail in the federal courts.

A presumption of nonfinancial pretrial release is now a near universal feature of bail statutes nationwide. This presumption reflects foundational American principles [147] that require governments to assume release on recognizance as the first option to bail and impose further restrictions on liberty only with compelling justification that these are necessary to reasonably assure court appearance and public safety. It also is a practical recognition that unnecessary detention imposes major burdens on defendants and the public.

When conditions are appropriate to assure the defendant's return to court or for public safety, they should be the least restrictive necessary to achieve these goals. As outlined in the Federal Bail Reform Act and other bail statutes, before conditions are set, a judicial officer must find that a defendant's potential risk of failure to appear or to public safety require specific conditions of supervision to meet these factors. Conditions for any purpose besides court appearance or public safety are inappropriate.

[146] Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214.
[147] These include the Eight Amendment's admonition that "[e]xcessive bail shall not be required and the Fourteenth Amendment's Due Process Clause that restricts the setting of conditions of supervision and pretrial detention to "serve a compelling governmental interest."

3.3 (b): In setting conditions of release, the court should consider information in the charging document and information provided by the pretrial services agency, prosecution, defense counsel, and victim, if obtained. Courts should not deny release solely because the defendant refused to provide information to the pretrial services agency.

Commentary:

When making a release or detain decision the judicial authority should use all information available to them at the time of the initial appearance. At a minimum the judicial authority should have the charging document and a pretrial services agency report with risk assessment and pretrial investigation results and bail recommendation. Additional information gathered by defense counsel, prosecution or victim should be used, if available, to help inform the bail decision.

3.3(c): Release orders should include, in writing, all court-imposed conditions of bail in a manner clear enough to serve as a guide for the defendant's conduct. Release orders also should advise the person of:
(i) the consequences for failure to appear for scheduled court events;
(ii) the consequences of rearrests while on release;
(iii) the possible consequences for noncompliance with court-ordered conditions;
(iv) 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;
(v) the date and time of the defendant's next scheduled court appearance and location for that appearance;
(vi) the authority the pretrial services agency may have, consistent with the laws and rules governing the exercise of judicial authority in the jurisdiction, to modify the initially established conditions of release; and
(vii) acknowledgement of the defendant's understanding and receipt of conditions of release and next scheduled court appearance.

Related Standards:
NAPSA (2004) 2.6
ABA (2007) Standard 10-5.4

Commentary:

Courts should provide all released defendants with a written copy of the release order to ensure that the defendant is informed of the next court appearance, conditions of bail, and the sanctions for missing a court date, new arrests pretrial or condition violation.

Since the release order is meant to clearly state the defendant's obligations regarding court appearance, arrest-free behavior, and compliance with court-ordered conditions, the order should be written in the language the defendant best understands. The Court should be alert to possible problems with reading comprehension and, when necessary, provide

individuals person who can reliably interpret the contents of the order to the defendant. Courts also should develop release orders and other court instructions in the languages common to their defendant population.

No matter what language is used for the written order and other related materials provided to the defendant, these materials should include information about whom to contact regarding questions about the release or in an emergency.

Standard 3.4: Detention Decisions

3.4(a): Jurisdictions should define and justify the criteria for legal pretrial detention, keeping in mind that "liberty is the norm and detention should be the carefully limited exception." Detention without bail should target a limited and carefully defined defendant population and require the government to show by clear and convincing evidence that a defendant fitting the detention eligible category poses an unmanageable risk to commit a dangerous or violent offense or to willfully fail to appear for court proceedings.

Related Standards:
ABA (2007) Standard 10-5.8

Commentary:

Legally valid preventive detention targets a limited subset of defendants for whom no condition or combination of conditions will reasonably assure the safety of any other person or the public or the defendant's appearance at scheduled court dates. This "unmanageable" risk should be defined through:

- The nature and circumstance of the instant offense charged, particularly whether the offense is a crime of danger or violence as defined by state statute.
- The weight of the evidence against the defendant.
- The defendant's prior criminal history, including whether the defendant is on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence.
- The defendant's previous history of missed court appearances.

3.4(b): At the initial pretrial court appearance, the Court may order the temporary detention of the defendant pending a formal pretrial detention hearing if:
(i) the Court finds probable cause for the crime charged;
(ii) the defendant meets the jurisdiction's detention eligibility criteria; and
(iii) the Court finds by a preponderance of the evidence that the defendant poses an unmanageable risk to commit a dangerous or violent offense or to willfully fail to appear for scheduled court appearances.
In making these determinations, the court may consider the charging document, information obtained from the pretrial services agency, and arguments presented by prosecution and defense counsel.

Related Standards:
NAPSA (2020) Standard 1.6
ABA (2002), Standard 10-5.7

Commentary:

(i): Upon a probable cause finding that the defendant committed the charged offense, the Court may hold a detention hearing immediately as part of the first appearance proceeding or, upon a motion by the prosecutor or defense, schedule a continuance. Continuances should not exceed five (5) working days unless good cause is shown for a longer period. The defendant may be detained pending the full detention hearing, but the fact that the defendant's liberty is being denied during this period means that the "good cause" showing must be very strong. The provision for continuance of the detention-hearing should not be used as mechanism for lengthening detention without a hearing.

(ii): State bail laws should describe the categories of detention-eligible defendants, thus narrowing the universe of individuals that can be detained to categories where there are sound policy reasons for considering detention. This Standard recommends that detention eligibility begin with a probable cause finding that the defendant committed a crime of violence as defined by statute. Detention also may apply to defendants who are charged with a serious crime in the current case and are already on release in another case, but generally only if the prior release was in connection with a serious crime. A third category of eligibility are defendants charged with a serious offense and higher risks of failure to appear.

(iii): The "unmanageable risk" criterion requires a showing by the preponderance of the evidence that the defendant's release pretrial would pose a risk of court appearance or to public safety that could not be mitigated reasonably by any bail type or condition of bail.

3.4(c): Unless a continuance is requested by the defense, the formal pretrial detention hearing should be held within five working days of the initial pretrial court appearance. For good cause shown, the Court may grant the prosecution an additional two working-day continuance.

Related Standards:
ABA (2007) Standard 10-5.10 (b)

Commentary:

This Standard recommends a five-working day period for continuances of detention hearings requested by the prosecution, unless good cause is shown for a longer period. The defendant may be detained during the continuance, but the fact that the defendant's liberty is being denied during this period means that the "good cause" showing must be very strong. The provision for continuance of the detention hearing should not be used as mechanism for lengthening detention without a hearing.

3.4(d): At the formal pretrial detention hearing, defendants should have the right to:
(i) be present and be represented by counsel;
(ii) testify and present witnesses on their behalf;
(iii) confront and cross-examine prosecution witnesses;
(iv) present information by proffer or otherwise.

Related Standards:
ABA (2007) Standard 10-5.10(a)

Commentary:

This Standard is based on pretrial detention statutes such as those of the District of Columbia, the Federal Courts and New Jersey and provisions outlined in *Salerno* and re-stated in *In re Humphries*. Defendants maintain specific basic rights at a pretrial detention hearing—to be present; to be represented by counsel (with counsel to be appointed if the defendant cannot retain counsel); to testify and present witnesses; to confront and cross examine prosecution witnesses; and to "present information by proffer or otherwise."

3.4(e): At the formal pretrial detention hearing, the rules governing admissibility of evidence in criminal trials should not apply. All proceedings 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 but may be used for a prosecution for perjury based upon that testimony or for the purpose of impeachment in any subsequent proceedings.

Related Standards:
ABA (2007) Standard 10-5.10(d)

Commentary:

The rules of evidence should not apply at the pretrial detention hearing, meaning that the court should receive all evidence that may be relevant to the release/detention decision. This enables consideration of information acquired by the pretrial services agency in its investigation prior to first appearance, much of which could otherwise be subject to exclusion as hearsay.

Limitations on the subsequent use of a defendant's testimony at a pretrial detention hearing reflects the view that such testimony at this stage is solely for the purpose of the pretrial release/detention determination. (Often, such testimony will simply confirm what the defendant told the pretrial services officer during the interview conducted as part of the investigation prior to first appearance).

3.4(f): The prosecution must provide defense counsel with exculpatory evidence reasonably within its custody or control prior to and at the formal pretrial detention hearing.

Related Standards:
ABA (2007) Standard 10-5.10(c)

Commentary:

Prosecutors should provide exculpatory evidence in their possession at the time of the pretrial detention hearing to the defense. This is not a full-scale disclosure requirement, and the pretrial detention hearing is not intended to be a forum for litigation of disclosure issues. Rather, this provision refers to evidence in the hands of prosecutors that could heighten the likelihood of the defendant's release.

3.4(g): At the formal pretrial detention hearing, the Court must make the following findings to detain the defendant:
(i) probable cause to believe that the person committed the alleged offense;
(ii) the defendant meets the jurisdiction's criteria for pretrial detention; and
(iii) by clear and convincing evidence, the defendant poses an unmanageable risk to commit a dangerous or violent offense or to willfully fail to appear for scheduled court appearances.

Related Standards:
ABA (2007) Standard 10-5.8, 10-5.10 (e)(f).

Commentary:

This Standard outlines the findings Courts must make before ordering a defendant's detention pretrial. These conform to the best current scholarship on detention models and pretrial risk, and court cases currently shaping the overall discussion of risk-based detention.

The requirement of "clear and convincing evidence that no condition or combination of conditions will provide reasonable assurance that the defendant will appear for court proceedings or protect the safety of the community or any person" is—deliberately—a high Standard. It reflects the high value placed on individual liberty in the American legal system and is identical to the Standard adopted by the ABA Third Edition *Pretrial Release Standards*.[148] However, this Standard goes further by requiring courts to consider the nature and severity of risk and its level and manageability in order to detain pretrial. This requirement better reflects the history of bail, fundamental legal principles, and current pretrial research, which has allowed us to assess and articulate better concepts surrounding defendant risk as well as the type of risk necessary to trigger secure detention."

Factors for the Court's consideration include:

- The nature and seriousness of the danger to any person or the community, if any, that would be posed by the defendant's release," thus requiring a focus on the specific threat that would be created by releasing the defendant from secure detention and the possible availability of conditions that would eliminate or minimize the threat.
- Weight of the evidence, considering evidence and arguments presented by both the prosecutor and defense.

3.4(h): The Court should state in writing within three working days of the formal pretrial detention hearing the factual basis for its finding that, by clear and convincing evidence, the defendant poses an unmanageable risk to commit a dangerous or violent offense or to willfully fail to appear for scheduled court appearances.

Related Standards:
ABA (2007) 10-5.10 (g) (ii)

Commentary:

This Standard imposes requirements on a judicial order for pretrial detention, including:

- the order should be made only after a full hearing (unless the defendant consents to waiver of the hearing);
- the judicial officer should state the reasons for detention on the record at the conclusion of the hearing or in written findings made within three (3) working days, and in doing so should include the reasons for concluding that the specific risks identified cannot be met through use of conditions of release or an accelerated trial date;
- the order should be based solely on the evidence provided at the detention hearing; and
- the order should indicate the date by which detention must be considered at a *de novo* pretrial detention hearing, ordinarily to be held within 90 days.

[148] ABA (2007). Standard 10-5.8.

If the new pretrial hearing is not held on or before the date established in the original detention order, the defendant should be released under conditions that best minimize the risk of flight and danger to the community. The objective of this provision is to ensure continued attention to cases involving defendants in secure detention and protect the defendant's right to a speedy trial.

3.4(i): Detained defendants should have their cases placed on an accelerated calendar. Jurisdictions should establish a finite time period from the detention order to the start of trial. The time period may be extended, based on a motion by the prosecutor and good cause found by the Court. Good cause may include, but not be limited to:
(i) the unavailability of an essential witness;
(ii) the necessity for forensic analysis of evidence;
(iii) the ability to conduct a joint trial with a co-defendant or co-defendants,
(iv) severance of co-defendants that permits only one trial to commence within the time period;
(v) complex or major investigations or complex or difficult legal issues;
(vi) the inability to proceed to trial because of action taken by or at the behest of the defendant;
(vii) an agreement between the government and the defense to dispose of the case by a guilty plea on or after the scheduled trial date; or
(viii) the breakdown of a plea on or immediately before the trial date and allowing reasonable time to prepare for an expedited trial after the circumstance giving rise to a tolling or extension of time no longer exists.

Accelerated time limitations should be shorter than current speedy trial time limitations applicable to defendants on pretrial release. 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.

Related Standards:
ABA (2007) 10.5-11

Commentary:

Pretrial detention is a significant deprivation of liberty and should be sharply limited in duration. When a defendant is held in detention before trial, it should be incumbent upon the government to resolve the case timely.

These Standards do not prescribe a detention timeframe, but should be read as consistent with the ABA Standards that recommend a period of 90 days from arrest as a presumptive

time limit period for defendants in detention.[149] The sanction for failure to bring a detained defendant to trial or otherwise resolve the case within the time period should be release of the defendant from detention under conditions that minimize the risks of nonappearance and dangerousness.[150]

3.4(j): If requested by the prosecution or defense, the court with an appellate jurisdiction should perform an expedited review of a pretrial detention order. If the detention order is made by a judicial officer other than a trial court judge, the appeals should be de novo. Appeals from decisions of the trial court judges to the court with appellate jurisdiction should be reviewed under an abuse of discretion Standard.

Related Standards:
ABA (2007) 10-5.10(h)

Commentary:

Given its importance, the detention decision is subject to prompt review by the defense or the prosecution. This Standard provides that if the detention decision is made by a judicial officer other than a trial court judge, the appeal should be *de novo*, generally to a trial court judge. If the decision was made by a trial court judge, the appeal should be to an appellate court which, absent constitutional or other legal issues, should consider whether the decision amounted to an abuse of discretion. The provisions of these Standards that require a record of the first appearance and detention hearing proceedings and call for the judicial officer to state reasons for a detention order should facilitate the appellate review.

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

Related Standards:
ABA (2007) 10-5.10 (g)(iv)

Commentary:

The finding that a defendant presents an unmanageable risk to public safety pretrial should not diminish nor negate the presumption that they are presumed innocent of the alleged

[149] *ABA Standards on Speedy Trial and Timely Resolution of Criminal Cases*, Standard 12-2.1 (b) (Aug. 2004). The same Standard provides for a presumptive limit of [180] days for persons on pretrial release. It should be noted that other provisions of these Standards provide for some extensions and exclusions of time in computing the allowable periods of time under some circumstances.
[150] *Id.* at Standard 12-2.7. (Under this ABA Standard, the consequence for failing to bring a defendant to trial within the time allowed under the speedy trial rule or statute is dismissal of the charges with prejudice.).

offense. All stakeholders involved in the defendant's adjudication should respect the presumption of innocence during all pretrial court proceedings.[151]

Standard 3.5: Subsequent Review of Release and Detention

3.5(a): The judicial officer may at any time modify the defendant's bail status to address the defendant's conduct pretrial or changes in the defendant's likelihood to appear in court as required or to remain arrest free if released. Court orders setting or modifying conditions of release should be in writing and provided to the defendant. Only the Court can amend the substance of a condition but may permit the pretrial services agency discretion to administer conditions of supervision.

Related Standards:
ABA (2007) Standard 10-5.6

Commentary:

A judicial officer may modify the defendant's bail status whenever there is a material change in the defendant's circumstances that impacts the likelihood of court appearance or arrest-free behavior. Modifications may include release for defendants initially detained or revision and addition or subtraction of bail conditions for those who are released.

The court should provide every defendant with a written copy of any release order that modifies bail status or requirements. This helps ensure against miscommunication of what is expected of the defendant while on pretrial release. The written document should contain the defendant's next court appearance and plain language about the conditions of release and potential consequence for violating a condition.

Imposing, modifying or retracting conditions of bail can only be done by the Court. For example, in *People* v. *Rickman* 178 P.3d 1202 (Colo. 2008), the Supreme Court of Colorado wrote, "Absent statutory authorization, a court may not delegate its authority to set bond conditions."[152] However, the pretrial services agency, in agreement with the court and other stakeholders, may determine how it monitors and supervises conditions. For instance, the court may set a condition of random drug testing, but the pretrial agency may determine the frequency and nature of the testing.

[151] For a more detailed discussion of the presumption of innocence and its relationship to bail, see Baradaran, S. (2012). *Restoring the Presumption of Innocence*, 72 Ohio L. J. (2011), http://moritzlaw.osu.edu/students/groups/oslj/files/2012/01/Baradaran.pdf. Schancke, T. (2016). *The Presumption of Innocence and Bail*. (2016), http://www.clebp.org/images/10-19-2016_presumption_of_innocence_and_bail.pdf.

[152] This may be done through a Local Administrative Order (LAO), Memorandum of Understanding (MOU), or other written form of agreement.

3.5(b): The prosecutor, defense or the pretrial services agency may request a hearing to consider changes to a defendant's release or detention status, including reduction of supervision for positive behavior or to address an alleged violation of conditions of release, willful failure to appear in court or an arrest on a new offense.

Related Standards:
ABA (2007) 10.-5.6(b)

Commentary:

Excluding defendants held under applicable preventive detention statutes, prosecution, defense or pretrial services agency may request review of a defendant's bail status when: 1) there is a verifiable change in the defendant's risk level; 2) there is a change in a defendant's eligibility for pretrial detention; or 3) a defendant's conduct while on pretrial release warrants review. Jurisdictions should adopt a prompt process of judicial review of bail in response to these requests. If appropriate, the judicial officer can revise bail conditions to address concerns about nonappearance or public safety.

3.5(c): The Court's response to noncompliance to bail requirements may include modification of release conditions, revocation of release, an order of detention, or prosecution on new criminal charges. In making its ruling, the court should consider the seriousness of the violation, whether it appears to have been willful or if it increased the risk to public safety or of failure to appear for scheduled court appearances.

Related Standards:
ABA (2007) 10-5.6

Commentary:

The Court's modification of a defendant's supervision should include only those revisions needed to reasonably assure court appearance and public safety. These may include increasing the level of current supervision conditions (such as increasing a defendant's requirement to report to the pretrial services agency), or additional supervision requirements targeted to court appearance and public safety. If the Court determines that no condition or combination of conditions will reasonably assure court appearance or public safety, it should order a hearing to consider revocation of the defendant's release.

3.5 (d): Before revoking the defendant's release status, the judicial officer should determine that there is:
(i) probable cause to believe that the person committed a crime while on release; or
(ii) clear and convincing evidence that the defendant willfully failed to appear for a scheduled court appearance; or
(iii) clear and convincing evidence that the defendant violated any other condition or conditions of release; and
(iv) clear and convincing evidence there is no condition or combinations of conditions that would reasonably assure future court appearance or public safety.

Related Standards:
ABA (2007) Standard 10-5.6(c)

Commentary:

A defendant's continued release pretrial should depend on the defendant's record of court appearance, arrest-free behavior, and compliance to court-ordered conditions. Courts may revise or revoke a defendant's release status if it finds clear and convincing evidence that the defendant violated a condition or conditions of release or willfully failed to appear for a scheduled court appearance or probable cause for a new rearrest and that no condition or combination of conditions will reasonably assure future court appearance or public safety. These findings must be made following a formal court hearing and the Court's decision made in writing.

3.5(e): In any court proceeding involving possible modification or revocation of conditions of release, the defendant should be represented by counsel.

Related Standards:
NAPSA (2020) Standard 1.7

Commentary:

Defendants should be represented by counsel at any proceeding where there is potential for jail or loss of liberty.[153] Representation by counsel helps ensure that due process and procedural protections are observed for all defendants. Defendants may waive their right to counsel. However, the waiver must be found to be "knowing, voluntary and intelligent."[154]

[153] See *Argersinger v. Hamilton*, 407 U.S. 25 (1972).
[154] See *Iowa v. Tovar*, 541 U.S. 77 (2004).

3.5(f): A designated justice agency should identify to the court any defendant that has failed to obtain release within 24 hours of a release order or whose pretrial detention exceeds the limit outlined by statute or court order.

Related Standards:
ABA (2007) Standard 10-5.12(b)(c)

Commentary:

A specified agency should notify the Court of defendants who fail to obtain release within 24 hours of issuance of a release order and defendants detained longer than allowed by statute or court order. While this Standard does not identify a particular agency for these tasks, these usually are functions assumed by high functioning pretrial services agencies.

3.5 (g): Upon a showing by defense counsel of compelling necessity, including for matters related to preparation of the defendant's case, a judicial officer may permit the temporary release of a pretrial detained person, subject to appropriate conditions of temporary release.

Related Standards:
NAPSA (2004) Standard 4.6
ABA (2007) Standard 10-5.15

Commentary:

As noted in NAPSA Standard 4.6 (2004) Commentary: "This Standard provides a mechanism to ameliorate the impact of pretrial detention on the defendant under limited circumstances." If the defendant's counsel can make a showing of "compelling necessity," the judicial officer who ordered the defendant detained may permit temporary release of the defendant. The burden is clearly on the defense to prove the need for such release, which may be for matters relating to preparation of the defendant's case (for example, a site visit to a particular location, providing an opportunity to review the scene with counsel) or for other reasons such as a funeral or family medical emergency.

Part 4: Pretrial Services Agencies

Standard 4.1: Purpose, Management, and Functions of a Pretrial Services Agency

4.1(a): The purposes of a pretrial services agency are to:
(i) assist judicial officers to make prompt, fair, and informed bail decisions that promote future court appearance and enhance public safety; and
(ii) provide the Court with practical, risk-based monitoring, supervision, and support options for defendants that require oversight while on pretrial release.

Related Standards:
NAPSA (2020) Standard 1.1 and 2.7

Commentary:

Pretrial services agencies should be structured to assist Courts make informed bail decisions that promote future court appearance and public safety and to provide practical non-financial release options consistent with assessed risk levels. These purposes help "reduce barriers to the pretrial release of persons in custody whose release on bond with appropriate conditions reasonably assures court appearance and public safety"[155] and allow justice systems to operationalize bail statute mandates. The agency's structure should include as operational areas, risk assessment, risk management and integration into supervision of behavioral health treatment and other services that promote the functions of bail.

[155] See Colo. Rev. Stat. § 16-4-106 (2019).

4.1(b): A pretrial services agency should adopt the following core functions to support its purposes:

(i): collect and verify defendant background and criminal history information for all defendants eligible for pretrial release;

(ii): assess a defendant's likelihood of future court appearance and crime-free behavior while on pretrial release, using factors shown by research to predict the likelihood of pretrial failure;

(iii): use a defendant's background interview and investigation, criminal history, risk assessment results, and other information to: formulate appropriate risk assessment results; recommend appropriate conditions of pretrial release and supervision; and supervise and monitor defendants released pretrial.

(iv): monitor and supervise released defendants, in accordance with court-imposed conditions. Those options may include behavioral health services and treatment;

(v): notify the Court, prosecution, and defense of a defendant's compliance with release conditions and recommend appropriate changes to pretrial release status and conditions; and

(vi): review the status of detained defendants to determine their eligibility for pretrial release.

Related Standards:
ABA (2007) Standard 10-1.10
NAPSA (2020) Standard 2.7, 2.8 and 4.1(a)

Commentary:

Enabling legislation for pretrial services agencies,[156] professional standards encouraging their adoption by criminal justice systems, and the consensus of justice system experts[157] typically describe the functions enumerated in Standard 4.1(b) as critical to these agencies' operation. These functions support the goals for pretrial services agencies described in Standard 4.1(a) and the mission statements and outcome measures of most high-functioning agencies.

(i): The pretrial services agency should complete investigations on all defendants charged with a criminal offense who are in custody at the time of their initial court appearance and

[156] See Organization and administration of pretrial services, 18 U.S.C. § 3153 (2019); Purpose; establishment of pretrial services and services agencies, Va. Code Ann. § 19.2-152.2 (2019); 725 Ill. Comp. Stat. 185/0.01 (2019); Detention prior to trial, D.C. Code, § 23-1322 (2019); Colo. Rev. Stat. §16-4-106 (2019). A full listing of pretrial services agency enabling legislation can be found at National Council of State Legislatures, *Pretrial Release Laws: Recent State Enactments* (2014), http://www.ncsl.org/documents/cj/PretrialHandoutNCSL.pdf.

[157] See Pilnik, et. al. (2017). New Jersey Supreme Court. (2014). *Report of the Joint Committee on Criminal Justice*. https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf (Report to the New Jersey legislature recommending a move from a "resource-based" pretrial system to a risk-based one, which also discussed several other jurisdictions' laws, practices and history related to pretrial justice.). Schnacke. (2014). VanNostrand. (2007).

eligible for bail consideration according to controlling statute.[158] Agencies should complete investigations before the initial appearance to ensure that the court has the information available to make an informed bail decision. At a minimum, the investigation should include a pretrial interview with the defendant, verification of the information given in the interview, and a complete criminal national, state, and local record check.

Neither the agency nor the Court should limit a defendant's access to a pretrial investigation. A pretrial services agency also should not deny a recommendation for release due to a defendant's declining to cooperate in the pretrial investigation.

(ii): A major function for pretrial services agencies is assessing a defendant's likelihood of future court appearance and arrest-free behavior pending adjudication. These Standards recommend that agencies make these assessments using an actuarial risk assessment, preferably one designed from data on the agency's local defendant population. Actuarial risk assessment in criminal justice predict the likelihood of specific misconduct—such as failure to appear and rearrest—using factors empirically known to predict the likelihood of that misconduct. "fourth generation" risk assessments attempt not only to predict risk, but also to suggest appropriate strategies to manage an individual's risk while they are under the justice system's authority.

(iii): While actuarial risk assessments are the consensus best method to gauge the likelihood of future pretrial misconduct, these tools "cannot anticipate every possible case or scenario."[159] For some defendants, other factors than those used in the risk assessment—for example, substance use disorder or addiction, mental health services need, residency requirements or individual factors that might impede future court appearance—may be significant mitigating or aggravating considerations to the pretrial services agency's recommendation and the Court's bail decision. To address these limited instances, pretrial services agencies should adopt an "adjusted actuarial" approach to drafting bail recommendations. Under this approach, staff may override risk assessment results in limited and clearly-defined circumstances. Recommendations that deviate from the risk assessment results should come from a list of pre-selected considerations that can raise or lower the assessed level of risk. To guard against overuse of these factors, agencies should set as a performance measure an annual cap on the number of recommendation deviations as a percentage of risk assessments performed.

(iv): Federal and state bail statutes as well as current Standards define the purpose of pretrial supervision as promoting future court appearance and behaviors that enhance public safety. To be legitimate, pretrial supervision levels and conditions must be tied to these objectives. Further, to satisfy the requirements in Federal and most state bail laws, and supported by pretrial release Standards, supervision levels and conditions must be the least restrictive needed to reasonably assure court appearance and public safety.

[158] Pretrial services agencies also may interview defendants that have secured release, if ordered by the Court or requested by the prosecution or defense.
[159] Latessa, E., et al. (2009).

Pretrial supervision also must conform to the "risk principle," the community corrections evidence-based practice that supervision levels match an individual's assessed risk level. Research shows that matching supervision levels to risk greatly improves supervision compliance and outcomes. The risk principle warns against low risk defendants being ordered to comply with conditions more appropriate for high risk defendants (a waste of resources and potential cause of technical violations) and conversely, inadequate supervision of high-risk defendants, which can lead to missed court appearances or new arrests pretrial.

Standard 4.2: Pretrial Services Agency Organization and Management

4.2(a): The pretrial services agency should have a governing and organizational structure designed to meet its mission and objectives. To enable neutral performance of its functions, the agency should be structured to ensure independence in the adversarial process. Agency operations should be consistent with maximizing release rates, court appearance, and public safety.

Related Standards:
ABA (2007) Standard 10-1.10
NAPSA (2020) 2.7 and 2.10

Commentary:

To best achieve its core functions, a pretrial services agency should have a governing and organizational structure that oversees risk assessment, risk management, service integration and performance measurement. As noted in Standard 2.7, the agency should be a separate independent identity outside the influence of the adversarial process. This ensures superior management of the agency's core functions and mission statement, better staff direction and motivation, and makes a single stakeholder responsible and accountable for the pretrial functions and outcomes. If the pretrial services agency is "housed" under a larger parent organization, the structure should include the following elements:

- A clearly defined operationalized mission statement.
- Leadership that can make independent decisions on policy, staffing and budget
- Staff assigned to pretrial work only with pretrial defendants.
- Leadership that is included in any criminal justice stakeholder groups and policy discussions.

4.2(b): The pretrial services agency should have policies and procedures that enable it to function as an effective institution in its jurisdiction's criminal justice system. The agency should:

(i) establish goals for effectively assisting in pretrial release decision-making, supervision of defendants on pretrial release, and the pretrial services agency's operations;

(ii) have staff dedicated to and knowledgeable about pretrial principles and functions;

(iii) develop and regularly update strategic plans designed to enable the accomplishment of established goals;

(iv) develop and regularly update written policies and procedures describing the performance of key functions;

(v) develop and maintain financial management and accounting systems, prepare and monitor an operating budget, and provide the financial information to support operations and funding requests;

(vi) develop and operate a management information system to support defendant identification, risk assessment, identification of release conditions, compliance monitoring and supervision, detention review functions, outcome and performance measurement, and research essential to an effective pretrial services agency;

(vii) establish procedures to measure the performance of the jurisdiction and of the pretrial services agency in relation to the goals set;

(viii) identify strategies that ensure that the agency can work with defendant populations that have special needs, such as hearing impairment, language barrier, and mental health and disability;

(ix) meet regularly with community representatives to ensure that agency practices meet the needs of the community served; and

(x) develop, in collaboration with the court, other justice system entities, and community groups, policies to manage the risks posed by released defendants, including strategies for use of behavioral health treatment (including substance disorder treatment and mental health services), employment and other social services.

Commentary:

This Standard provides a general outline of a pretrial services agency's essential management and operational functions. These functions ensure that the pretrial agency functions as an effective and independent entity within the criminal justice system.

(i): Every pretrial services agency should have strategic goals derived from its mission statement and based on the core functions of such agencies. The mission statement should be a general statement of what the agency wants to achieve. From this mission, strategic goals, objectives and performance metrics can be developed to measure agency progress in achieving its mission. The setting of mission, goals, and objectives can assist agencies in being more efficient, identifying areas in need of improvement or where practices are not aligned with policy.

(ii): Line staff are the individuals with whom the court interacts most often, so it is important that these staff are knowledgeable about their jurisdiction's bail laws and court rules. Providing staff with continuous education and training opportunities are ways in which staff can increase their knowledge of pretrial practices and advancements within the field. Additionally, NAPSA offers the Certified Pretrial Services Professionals (CPSP) Level One certification for pretrial practitioners. This certification provides a knowledge base regarding the history and fundamental principles of pretrial justice. Training is an essential component of staff betterment and should be a mandatory requirement of a pretrial agency.

(iii): Pretrial agencies should engage in the formulation or review of a strategic plan. Strategic plans assist agencies in identifying internal strengths and weaknesses as well as external opportunities and threats. Recognizing emerging issues early allows agencies to more effectively plan for the allocation or acquisition of resources. Strategic planning also can assist agencies in formulating both short and long-term goals so that continual progress towards the mission is reinforced.

(iv): Every agency should have a written policy and procedure manual that communicates Standards of conduct and what is expected of employees. A well written manual can protect an agency from possible litigation, inconsistencies, and should be required reading for all new employees. Manuals should be easily accessible in various mediums, so they are available in the event of an emergency. Manuals should be sufficiently detailed to address day to day operational activities and should be able to serve as a source of guidance whenever an employee has questions or when a supervisor is unavailable. Policy and procedure manuals are an essential component for quality assurance and consistency of staff performance. Manuals should be updated/reviewed on a regular basis or at least annually.

(v): Every pretrial agency should have an independent operating budget. The agency director should be involved in the preparation of the budget as well as in the approval of all expenditures. This autonomy reinforces the independent nature of the agency and ensures that resources are used solely for purposes tied to the agency's mission.

(vi): The agency's management information system should meet the specific pretrial agency needs outlined in this Standard. Preferably, the agency's information system can integrate court, jail, and law enforcement data to reduce redundant data entry and data entry error. Data systems also must comply with federal and state statutes regarding the storage, dissemination, and transfer of data. This is of particular importance with criminal history data, personally identifiable information (PII) or information protected under the Health Insurance Portability and Accountability Act (HIPPA) or 42 CRF Part 2.

(vii): Data systems should support outcome and performance measures described in Standard 2.10 and other metrics the pretrial services agency identifies. In addition, agencies should maintain procedures for the quality assurance of data to ensure the integrity of reported outcomes.

(viii): Pretrial agencies should work with the appropriate law enforcement authority to develop protocol for gaining access to, and interviewing defendants that may be segregated due to a disability. Pretrial agencies also should develop strategies to manage supervised defendants that require special accommodations. The National Center for State Courts has available on its website[160] numerous resources on the Americans with Disabilities Act, gender and racial fairness and language access. Pretrial agencies should use these resources to ensure that any policies or strategies developed are in accordance with state guidelines and federal law.

(ix): For pretrial agencies to serve the defendants within their jurisdiction effectively, there must be an understanding of the needs within that community. Meeting with community representatives from agencies that are outside of the traditional criminal justice stakeholder group can provide valuable insight as to the needs within the community. Faith-based organizations, health providers, housing authorities, and individuals currently or formerly under pretrial supervision can assist pretrial agencies draft strategies that address these needs.

(x): In some cases, a pretrial agency cannot provide all the services required to effectively manage the risks associated with a defendant. In these cases, the pretrial agency should develop agreements with appropriate agencies to provide these services. Policies for referring, monitoring, and reporting defendant compliance can be formed through local agreements such as memoranda of understanding or contract if the pretrial services agency pays for needed services. Agreements should include provisions for the payment of services (whether that be by the pretrial agency, private insurance, Medicaid or other appropriate source), the service agency's available capacity to serve clients, and the scope of services to be provided. In some instances, a release of information may be required to communicate information between parties.

4.2 (c): The pretrial services agency should develop and implement appropriate policies and procedures for staff recruitment, selection, and retention.

Commentary:

This Standard calls for pretrial services agencies to develop policies and procedures for staff recruitment, selection, training and career advancement. Staff selection should reflect the diversity and cultural differences of a jurisdictions' general population. All policies and procedures concerning recruitment, selection, training, and career advancement should reflect the mission of the pretrial services agency.

Compensation for pretrial services agency staff should be commensurate with other criminal justice system professionals.

[160] Available at https://www.ncsc.org/Topics/Access-and-Fairness.aspx.

Standard 4.3 Background Investigations

4.3(a): The pretrial services agency should conduct background investigations that solicit social background, criminal history, and other information relevant to the court's bail decision. At minimum, the investigation should include a check of the defendant's criminal history, an interview with the defendant, and application of a validated risk assessment. The investigation should occur prior to the first formal court hearing for defendants still in custody and upon request of the Court for those released prior to that hearing.

Related Standards:
NAPSA (2004) Standard 3.3

Commentary:

This Standard defines background investigation as an interview of the defendant, verification of interview information, criminal history check, and risk assessment using a validated instrument.

The purposes of the pretrial interview are to: 1) provide information needed for the agency's validated risk assessment instrument; 2) gather information on mitigating or aggravating factors relevant to the agency's bail recommendation and the court's bail decision; and 3) obtain demographic and other information about the defendant for effective supervision. As described by the National Institute of Corrections:

> *"The interview provides context to information found in an arrest record or provided by a screening tool or risk assessment instrument. The interview also provides an opportunity to gather essential facts such as contact information. Information obtained in an interview may also help identify opportunities for diversion/problem-solving courts, and an interview may be required by statute or as part of a specific risk assessment tool."*[161]

In a report describing its pretrial services agency, Allegheny County, Pennsylvania describes fundamentals in its pretrial investigation practices: "(u)sing a Standardized risk assessment tool has added objectivity to the process, but bail investigators must still make important judgments about aggravating, mitigating, or changing circumstances [not present in the actuarial risk assessment].[162]

A complete and accurate history of a defendant's arrests, convictions, and status with the justice system is essential to informed bail recommendations and decision-making. Research has shown that criminal history related risk factors have a stronger correlation to pretrial misconduct. Therefore, it is imperative that pretrial services agencies make every attempt to obtain unreported dispositions contained on any criminal history report. Criminal history checks should include statewide as well as national (NCIC or III) data

[161] Pilnick, et al (2017). p. 36.
[162] Barron, B. (2014). *Pretrial Decision making: How a model Pretrial Services Program changed Allegheny County's Criminal Justice System.* Pittsburgh, Pa: Allegheny County Department of Human Services.

bases. Pretrial services agencies must also be familiar with, and adhere to, any dissemination and disposal requirements for criminal justice information.

Under the adjusted actuarial risk assessment approach, the pretrial investigation also can identify aggravating and mitigating factors appropriate to the pretrial services agency's bail recommendation and the court's subsequent bail decision. As described in NAPSA (2004) Standard 3.3(a) Commentary: "With good information up front, a judicial officer will be better able to make a release/detention decision that responds to the possible risks of nonappearance and pretrial crime and to the needs of the defendant."

4.3(b): Before conducting an interview, pretrial services agency staff should inform defendants of the staff's agency affiliation and advise them:
(i) that interviews are voluntary, and that the defendant can decline the interview or not answer specific questions;
(ii) that interview information will be shared with the Court, prosecution, and defense for the purpose of pretrial decision-making;
(iii) that the pretrial services agency will use interview information to help develop its bail recommendation to the court and that the court may use the information to inform its pretrial release decision;
(iv) that opting out of the pretrial interview or declining to answer specific questions will not preclude the defendant from release consideration by the agency;
(v) that penalties may be imposed for false statements made during the interview to include prosecution for perjury or impeachment; and
(vi) of any other purposes for which the information may be used.

Commentary:

Before beginning the interview, the pretrial services officer should advise the defendant about the nature of the interview (in particular, that it is voluntary and is intended to assist in the making of an appropriate bail decision) and about how interview information can be used (besides assisting the Court with the bail decision) and by whom. Other uses of interview information might include prosecution for perjury or to impeach the defendant's future testimony.[163] Defendants also must be informed when state law allows pretrial interview information to be used on the question of guilt in the current case or as possible sentencing enhancements.

The pretrial officer should inform the defendant about the information asked in the interview, for example, the defendant's contact information, possible behavioral health issues that might affect court appearance or public safety, prior criminal history. and any factors that might hinder court appearance. Agencies should provide a written copy of the advisement to the defendant about how the information will be used and obtain a verbal or written acknowledgment.

[163] Some jurisdictions have developed formal written policies to ensure appropriate confidentiality and set limits on disclosure of information acquired during the pretrial agency's interview. See, e.g., Ky. RCr Rule 4.06.

4.3(c): Pretrial interviews should not include questions relating to the current offense, arrest or the defendant's alleged guilt or innocence, except questions about the defendant's residence upon release and relationship to the complaining witness.

Commentary:

This Standard emphasizes that pretrial services interviewers should not ask the defendant questions about the current charge nor the circumstances of the defendant's arrest. This information may impede the agency's ability to conduct an impartial investigation and present recommendations about appropriate release options. Collection of arrest and charge-related information also may expose agency staff to subpoena to testify concerning the defendant's statements.

Interviewing staff may ask questions about the location of an arrest and the identities of complaining witnesses to help determine the need for supervision conditions related to address and location restrictions and stay away orders from specific individuals.

4.3(d): The pretrial services agency should corroborate defendant-provided information independently.

Commentary:

Pretrial services agency staff should make every attempt to verify interview information. This verification may include telephone contact with family, friends, co-workers, or other references the defendant gives when interviewed.[164] Key information to be verified include the defendant's name, address, age, means of support (including the employer's name), marital and family status, and length of residence in the jurisdiction. Depending on the circumstances of the case, the staff also may verify a defendant's potential needs, such as mental health services or substance abuse assessment or treatment.

[164] To ensure that agency staff can contact references, staff should ask defendants for the names of at least three potential references, each having a separate phone number or other means of contact.

Standard 4.4: Validated Risk Assessment

4.4(a): The pretrial services agency's validated risk assessment should use information available to the pretrial services agency at the time of the initial bail decision and be easily defined and quantified.

(i) The risk assessment must classify defendants into distinct risk and supervision categories based on the assessment's scoring.

(ii) Pretrial services agencies should have clear policy on how staff may recommend a release or detention level that does not match a defendant's assessed risk level.

Related Standards:
NAPSA (2020) Standard 2.8 and 3.1(c)

Commentary:

All data used for the risk assessment must be readily available to the assessing agency at each bail decision-making point. Pretrial services agencies should ensure that their investigation protocols (interview/verification, criminal history check, and information obtained from other stakeholder agencies) gather information needed for the validated risk assessment, as well as mitigating and aggravating factors relevant to the bail decision.

(i): The risk assessment should distinguish defendants by clearly-defined risk levels based on observed performance (i.e.; observed differences in court appearance and public safety rates) among the classified groups. (See Standard 2.8). The pretrial services agency's recommendation scheme should designate a specific supervision level to each specific appearance and safety risk level.

(ii): Under an adjusted actuarial risk assessment and recommendation system (see Standard 3.1(c)), pretrial services agency must:

1. Limit acceptable deviations from the risk assessment's results to specific and clearly defined circumstances approved by the agency and its stakeholder partners. Recommendations that deviate from the risk assessment results also should not classify defendants more than one additional classification past the risk assessment result. For example, staff should not re-classify a defendant designated as "low risk" to "high risk."
2. Set as a performance metric the number of deviations as a percentage of recommendations completed. This Standard recommends an override range of 5-15 percent, with deviations to lower and higher supervision levels being about equal.
3. Require a supervisor's approval for all recommendations that deviate from the risk assessment result.

4.4(b): The pretrial services agency should have clear policy that ensures consistency and reliability of assessment scoring and results among assessment users.

Commentary:

This Standard stresses the need for pretrial services agencies to have policy and procedure that prioritizes staff training and quality assurance for the completion of pretrial risk assessments. Staff training on risk assessment should include, not only training on the specific risk assessment that the program utilizes, but also training on pretrial risk assessment in general. This should include the latest research on pretrial risk assessment and the methodology used in creating the assessment.

The most efficient and accurate way to utilize a pretrial risk assessment is to have it integrated into a case management system that automatically scores the assessment and makes a recommendation regarding release based on that score. This eliminates human error and aids the program in ensuring quality assurance and inter and intra-rater reliability. Quality assurance is defined as the maintenance of a desired level of quality, especially by means of attention to every stage of the process of delivery. Intra- rater reliability is the degree of agreement among repeated administrations of the risk assessment by a single rater and inter-rater reliability is the degree of agreement among multiple raters. When conducting pretrial risk assessments, it is imperative that policy, procedure and training is consistent and that the pretrial program monitors the consistency and accuracy of the factors that are utilized in the risk score and recommendation.

4.4(c): The pretrial services agency should review its risk assessment routinely to verify its validity to the local pretrial defendant population.

Commentary:

Applied to pretrial risk assessments, "validation" gauges how well the assessment predicts future missed court appearances or rearrests (particularly across racial and ethnic subgroups and risk levels) and which risk factors are statistically significant to failure. More detailed validations may identify revisions that could eliminate or diminish possible biases against defendant subgroups, and additional factors that may enhance the instrument's predictive power.[165]

A pretrial services agency should conduct regular validation studies of its risk assessment instrument. While there is no hard and fast rule here, this Standard recommends that

[165] Hedlund, Cox, and Wichrowski. (2003); Lovins and Lovins. (2016).

pretrial services agencies conduct validations at least every two to three years.[166] The validation should address the following empirical questions:

- Does the risk assessment predict pretrial failure accurately, especially among the identified risk-level subgroups?
- Are the instrument's risk factors the most correlative in the jurisdiction to pretrial failure?
- Does the risk instrument create or exacerbate existing racial disparity in bail decisions or pretrial outcomes?

Standard 4.5: Pretrial Recommendations

4.5(a): The pretrial services agency should prepare for the Court, prosecution, and defense counsel a written report that summarizes results from its background investigation, criminal history search, and validated risk assessment. The report should include a recommendation for appropriate conditions to address identified court appearance and public safety-related risk factors.

Commentary:

Upon completion of the pretrial services agency's investigation, a written report summarizing its findings should be prepared. The extent of the information to be shared within the report should be discussed and agreed upon by all relevant parties.[167] Information contained within the report may be considered public information or subject to Freedom of Information Act (FOIA) requests depending on applicable state laws or statutes. Information also may be subject to other reporting restrictions such as those governing criminal history or protected health information.

The written report should be made easily accessible to the court, the prosecution and defense counsel. Reports should contain the pretrial services agency's recommendation regarding the release decision and any conditions necessary to mitigate identified risks. Recommended conditions of release should be least restrictive and reasonably tied to risk of failure to appear or rearrest.

[166] This especially is true for jurisdictions implementing bail reforms that may change the size and composition of the pretrial release population, which may affect how well the assessment predicts pretrial outcomes. This may prompt a need to revisit the local policies and practices regarding recommendations to the judicial officer about release.

[167] For instance, some jurisdictions may only want to see the aggregate score of the risk assessment while other jurisdictions may wish to see the entire assessment.

4.5(b): The pretrial services agency's recommendation should reflect the defendant's identified risk of failure to appear and risk to public safety, based on the results of the pretrial investigation. The agency's recommended supervision level and conditions should be the least restrictive necessary to address identified risks.

Commentary:

The pretrial services agency's recommendation is its suggested strategy to promote court appearance and public safety. It links assessments of flight and danger risks and the mitigating and aggravating factors found during the pretrial investigation to appropriate bail options that address the specific risk and supervision needs identified. Recommendations that meet this Standard's requirements:

1. Are individualized to the defendant's determined risk level and specific risk factors and outline the least restrictive intervention needed to assure court appearance and community safety;
2. Have as a goal to promote court appearance and public safety. Rehabilitation, punishment or victim restitution are not considerations;
3. Conform to the risk principle and the ideal of least restrictive conditioning. This requires that recommended risk levels or conditions be specific to an individual's risk level and risk factors, and not the Standard conditions of monitoring or supervision; i.e.; no "blanket" conditioning; and
4. Contain no automatic recommendations against release. The agency should refer defendants to appropriate supervision or services when it believes supervision objectives are beyond its internal resources.

4.5 (c): The pretrial services agency may not deny a recommendation for release due solely to a defendant's refusal to participate in the agency's screening procedures.

The pretrial interview is voluntary, and all defendants have the right to decline to speak with pretrial services staff. Neither this right—nor the defendant's right to be considered for reasonable bail—should be abridged by the pretrial services agency recommending against release solely because of the defendant's declining an interview.

Standard 4.6: Monitoring, Supervision, and Support

4.6(a): The goal of pretrial monitoring, supervision, and support is to promote court appearance, public safety, and compliance with court-ordered conditions. Monitoring, supervision, and support should include:
(i): the least restrictive interventions needed to promote pretrial success;
(ii): notification of upcoming court appearances;
(iii): assignment to pretrial specific monitoring or supervision staff and communication with assigned staff to report circumstances that may affect the defendant's reporting to court as required, public safety or compliance to court-ordered conditions;
(iv): monitor defendants' compliance with court-ordered conditions, including addressing initial compliance or infractions of court-ordered conditions administratively;
(v): inform the court of new arrests or defendant conduct that may warrant a modification of bail;
(vi): recommend lower or higher levels of supervision when appropriate; and
(vii): facilitate the return to court of defendants who miss scheduled court dates.

Related Standards:
NAPSA (2020) Standards 1.4, 2.2, 2.9, & 3.5(a)
NAPSA (2004) Standard 1.4(a)(b)
ABA (2007) Standards 10.1-4

Commentary:

Data from pretrial services agencies that maintain appearance and public safety rates show that most defendants appear for all scheduled court appearances and remain arrest-free pretrial.[168] Moreover, data from agencies that use validated pretrial risk assessments suggests that the majority of defendants score at a "low" or "moderate" risk level.[169] Data also suggests that "pretrial failure" is not as severe as perceived. Frequently, failures to appear are not willful abscondences from court, but rather involve circumstances that can be resolved without significant change to a defendant's bail status.[170] Most rearrests pretrial are on misdemeanor and low-level felony offenses, not dangerous or violent

[168] See Cohen, Lowenkamp, and Hicks (2018).
[169] See Harris County Pretrial Services (2019) *Harris County Pretrial Services 2018 Annual Report*. Houston, TX: Harris County Pretrial Services. p. 12. Indiana Office of Court Services (2019). Debora and Meils (2019). https://www.in.gov/judiciary/iocs/files/pretrial-informative-handout.pdf (last visited Sept. 29, 2019).. VanNostrand and Rose (2009).
[170]Corey, E. and Lo, P. (2019). "The 'Failure to Appear' Fallacy." *The Appeal*. https://theappeal.org/the-failure-to-appear-fallacy/. Bernal, D. (2017). "Taking the Court to the People: Real World Solutions for Nonappearance." 59 Ariz. L. Rev. 547, 547 (2017). Bierie, D.M. (2014). *Fugitives in the United States*, 42 J Crim Just 327, 330. U.S. Department of Justice, *Investigation of the Ferguson Police Department* *55 (Mar 4, 2015). Cohen and Reaves. (2007). Gouldin, L.P. "Defining Flight *Risk*, 85 U. of Chicago L. Rev. 677 (2018).

charges that would denote a defendant's heightened threat to public safety.[171] Given the relatively low level of risk and high level of success found in defendant populations, the aim of monitoring, supervision, and support interventions should be to promote defendants' success pretrial.

(i): Besides conforming to the level of pretrial success recorded in many jurisdictions, release on the least restrictive conditions needed to reasonably assure court appearance and public safety is an express or implied mandate in the Federal bail statute and bail laws of most states and the District of Columbia. (See NAPSA (2020) Standard 2.2.). Further, the risk principle posits that monitoring, supervision, and support levels match an individual's assessed risk level. (See NAPSA (2020) Standard 2.9.).

(ii): Notification to defendants of upcoming court appearances is a proven way to improve court appearance rates.[172] Notification may include telephone calls, email, or text messaging. If an agency employs multiple methods for court notification, the defendant should determine the best method of contact. Regardless of the system used, court notifications should include the date and time of the next scheduled court appearance, the court address and, if available, the Judge's name and courtroom.

(iii): This Standard does not endorse a single supervision technique nor optimum defendant-to-case manager ratio to promote pretrial success. However, it does recommend that pretrial services agencies designate a single staff as the point of contact with defendants to help resolve issues that may affect the defendant's appearance for scheduled court dates or continued arrest-free behavior. The designated point of contact also would:

- develop supervision or service plans, depending on the level of supervision and court-ordered conditions;
- impose appropriate administrative responses to defendant conduct under monitoring or supervision; and
- request supervision modifications to the court.

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[171] Reaves, B.A. (2013). *Felony Defendants in Large Urban Counties, 2009 - Statistical Tables*. Washington, D.C.: United States Department of Justice, Bureau of Justice Statistics. NCJ 243777. Hickert, A. O., Worwood, E. B., and Prince, K. (2013). *Pretrial release risk study, validation, & scoring: Final report*. Salt Lake City, UT: Utah Criminal Justice Center, University of Utah.

[172] See Herian, M.N. and Bornstein, B.H. (2010). "Reducing Failure to Appear in Nebraska: A Field Study." *The Nebraska Lawyer*, 13, no. 8: 11. Nice, M. (2006). *Court Appearance Notification System: Process and Outcome Evaluation*, A Report for the Local Public Safety Coordinating Council and the CANS Oversight Committee. White, W.F. (2006). *Court Hearing Call Notification Project*, Coconino County, AZ: Criminal Coordinating Council and Flagstaff Justice Court. Jefferson County Criminal Justice Planning Unit. (2006). *Jefferson County Court Notification Program Six Month Program Summary*, Jefferson County, CO. Crozier, T.L. (2000). The Court Hearing Reminder Project: "If You Call Them, They Will Come," King County, WA: Institute for Court Management Court Executive Development Program. Rouse, M. and Eckert, M. (1992). *Arraignment-Date Notification and Arraignment Appearance of Defendants Released on Desk Appearance Tickets: A Summary of Preliminary Findings.* New York, NY: New York City Criminal Justice Agency. Eckert, M. and Rouse, M. (1991). *The 1991 Court-Date Notification Study: A Preliminary Report on CJA Notification Procedures and Their Impact on Criminal Court Failure-to-Appear Rates*, *February 4, 1991 Through March 27, 1991*, New York, NY: New York City Criminal Justice Agency.

(iv): Pretrial services agencies should verify and, when appropriate, respond to a defendant's conduct on court-ordered supervision. The agency's response procedures should include administrative options the agency may apply without requesting court action. These should be developed with the court's approval and shared with prosecutors, defense attorneys, and defendants. Administrative responses should be:

- certain—the defendant knows the supervision program's response scheme beforehand;
- swift—responses are prompt and timely to the defendant's behavior;
- proportionate—responses are appropriate to the defendant's behavior;
- fair—defendants perceive the response as fair and just compared to the behavior; and
- individualized—responses must consider the defendant's risk of future noncompliance or pretrial failure.

Additionally, the pretrial services agency and the court should agree on specific definitions of "infractions" that the agency can address in-house (for example, an initial missed in-person contact with a case manager) and defendant conduct that reaches the level of "violation" that require court action (for example, a defendant losing contact with the agency). Both parties also should define "success," or when a specific supervision condition of supervision or the level of supervision may be reduced or eliminated. This will help assure that conditions and levels of supervision continue to be the least restrictive needed to achieve the goals of court appearance and public safety.

(v): Pretrial services agencies should inform the court if the defendant is arrested while on supervised release. Not all new arrests should result in the revocation of the defendant's release, but the court should be made aware of all new arrests, nonetheless. In each case, the pretrial services agency should recommend to the court what it believes are appropriate modifications to bail to reasonably assure future arrest-free behavior and court appearance.

(vi): The pretrial services agency should recommend bail modification based on the defendant's conduct under supervision. Consistent with Standard 4.6(a)(iv), defendants that meet the stakeholder-defined level of compliance with a release condition or should be recommended by the pretrial services agency for reduction or elimination of that condition or supervision level. Conversely, defendants in violation of conditions or supervision levels should receive a recommendation consistent to their continued conduct. These could include suggested modifications of conditions or termination from pretrial supervision.

In making bail modification recommendations, the pretrial services agency should consider the defendant's history of court appearance and arrest-free behavior in that pending case. The pretrial services agency should recommend detention only if the defendant has failed to appear for court or has been rearrested and the agency believes the risk for future failure is unmanageable. The pretrial services agency should not recommend detention for defendants that have made all scheduled court appearances and have not been rearrested pretrial regardless of their compliance with other conditions of bail.

(vii): When a defendant fails to appear for a scheduled court date, the pretrial services agency should make every attempt to facilitate the defendant's return. Sometimes the failure is inadvertent – due for example to a miscommunication about the exact time or location of the court event - and can be remedied quickly by a call to the defendant that will result in the defendant's appearance the same day. While some courts immediately issue a bench warrant whenever a defendant fails to appear, others will wait for a short time to enable the pretrial services agency to make follow up contact with the defendant. Either way it is important for the pretrial services agency to act in a timely fashion and facilitate the defendant's return to court as soon as possible.

4.6(b): The Court, through its release order or a comprehensive administrative order, may authorize the pretrial services agency to modify release conditions to conform to defendant behavior. The agency may modify conditions within the range set by the Court and under the jurisdiction's laws and rules governing the exercise of judicial authority. The pretrial services agency should notify the court, the prosecutor, and the defendant's attorney promptly of any modifications and the reason(s) for them. The pretrial services agency should keep a record of all condition modifications.

Related Standards:
NAPSA (2019) Standard 2.1

Commentary:

The Court should define the authority, if any, provided to the pretrial services agency regarding the modification of release conditions. Examples of modifications include the frequency and types of regular check-ins and the increase or decrease of drug screening frequency. However, authority to modify conditions should specifically be addressed by individual release or administrative order. Further, both the defense and prosecution should be notified when a defendant's original conditions are modified by the pretrial services agency.

4.6(c): The pretrial services agency should coordinate supervision or services of other agencies, or individuals that serve as third party custodians for released defendants, and advise the Court about the third party's availability, reliability, and capacity according to approved court policy relating to pretrial release conditions.

Commentary:

This Standard focuses on the coordination function that pretrial services agencies should play as the primary party responsible for the oversight of defendants on supervised release. There will be instances in which it may be appropriate to refer a defendant to another agency for specialized services, for instance when a defendant has a substance use disorder or mental health disorder. Pretrial staff should be knowledgeable about the capabilities and services of agencies to which it refers defendants. Understanding resource allocation, availability and eligibility will assist in making the most appropriate referral for

the defendant's specific situation. When defendants are released under conditions that include participation in such services, the pretrial agency should actively monitor the defendant's compliance through periodic contacts with the agency providing the service. This will, in most cases, require a release of information to be signed by the defendant. The pretrial agency should track aggregate data on the effectiveness of these programs/services as they relate to positive pretrial outcomes.

4.6(d): The pretrial services agency should assist other jurisdictions by providing courtesy supervision for released defendants who reside in its jurisdiction.

Commentary:

There are instances in which an individual may be arrested in a jurisdiction other than the one in which they reside. In these situations, it may be desirable to have the supervision of the defendant "transferred" to a pretrial agency near where the defendant lives. Pretrial agencies should accommodate requests for courtesy supervision whenever possible and when resources are available. Both the 'releasing' and the 'supervising' agencies should have a thorough understanding of what is expected either through a memorandum of understanding or another written document. This may include, at a minimum, the frequency, type and nature of the reporting, specific conditions, what constitutes a violation, and reporting of and/or addressing violations. The 'releasing' agency should also provide the 'supervising' agency with any information that may assist in the successful supervision of the defendant. This may include the result of a pretrial risk assessment or pretrial investigation. Care should be taken in maintaining the confidentiality of any information being shared, see Standard 4.7(c).

4.6(e): Defendants who violate a condition of release, including failing to appear in court, may be subject to a warrant for arrest, modification of release conditions, an order of detention, or prosecution on criminal charges. In considering what actions to recommend to the court when a defendant appears to have violated conditions of release, pretrial services agencies should take account of the seriousness of the violation, whether it appears to have been willful, and the extent to which the defendant's actions resulted in impairing the effective administration of court operations or caused an increased risk to individual or public safety.

Commentary:

A bright line test for whether a warrant of arrest should be requested is whether or not the violation will compromise the integrity of the judicial process, or whether it will negatively impact public safety. If the violation can be managed safely in the community, without threat to the integrity of the judicial process, then a pretrial services agency may decide to inform the court and parties in writing of the violation and offer to continue supervision with a graduated sanction or response to the violation. This type of response should not be unilaterally decided upon, but should be carefully discussed in all possible permutations, with system stakeholders and decision makers prior to practice.

Standard 4.7: Confidentiality of pretrial services agency information

4.7(a): The pretrial services agency should have written policies regarding access to defendant information contained in the agency's files. These policies should mandate that information obtained during the pretrial investigation, monitoring, and supervision should remain confidential and not be subject to disclosure, except in limited circumstances. Subject to applicable legal requirements, policy should provide for disclosure to:

(i) the Court, the prosecutor, and defense for bail, review of compliance with conditions of pretrial release, and sentencing;

(ii) other agencies or programs to which the defendant has been referred by the Court or the pretrial services agency;

(iii) a corrections department or jail to classify defendants in custody;

(iv) law enforcement agencies, upon a reasonable belief that the information will help apprehend a specific individual for whom a warrant has been issued or when there is reasonable articulable suspicion that the defendant is involved in new criminal behavior;

(v) a probation department or other criminal justice supervisory agency for a court-ordered investigation or following a new criminal arrest; and

(vi) individuals or agencies designated by the defendant upon specific written authorization of the defendant.

Related Standards:
NAPSA (2004) Standards 1.3 (b) and 3.8(b)

Commentary:

The pretrial services agency must have written policies and guidelines that outline the confidentiality of agency defendant-related data, when the agency may share this data with an outside entity, and the procedures the agency must follow when sharing this information. Optimally, these policies and guidelines are reinforced by statute or case law that provides for the confidentiality of pretrial services agency information.[173] This Standard suggests a basic approach that all defendant-based information held by the pretrial services agency remain confidential and subject to disclosure only under very limited and well-defined circumstances. Agencies also should notify defendants verbally and in writing when personally identifying information is shared with another entity and how that information will be used. Notifications should include language that explains and ensures that information being shared includes defendant consent.

(i): Reports prepared by the pretrial services agency to inform bail decision-making or to report the defendant's compliance or noncompliance to court-ordered conditions should be provided to the court, prosecutor, and defense counsel to assist all parties in making

[173] See, e.g., Organization and administration of pretrial services, 18 U.S.C. § 3153(c) (2019); D.C. Code Ann. § 23-1303(d) (2019) (noting utilization of pretrial services agency information).

informed recommendations and decisions. Information should be provided in time to be useful to these parties when bail is considered or being reviewed.

(ii): The Court or the pretrial services agency may refer the defendant to substance use disorder treatment, mental health services or other community services providers as a condition of supervision or as a complement to supervision requirements. In these instances, the information the pretrial services agency obtains from these organizations may be considered confidential under the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[174] HIPAA's "Privacy Rule" assures protection of individual health information while allowing the flow of health-related information to promote health care and to protect the public's health and wellbeing. The rule strikes a balance that permits important uses of information, while protecting the privacy of people who seek care and healing. Generally, this means that while data can be provided to the Court to inform on supervision compliance, it may not otherwise be made public.

Central to the Privacy Rule is the principle of "minimum necessary use and disclosure." A covered entity must make reasonable efforts to use, disclose, and request only the minimum amount of protected health information needed to accomplish the intended purpose of the use, disclosure, or request.[175] Therefore, pretrial services agencies should consider the following when determining their obligation to identify, collect, and share HIPAA-protected data.

- Who in the defendant population is covered by the Policy Rule? This includes identified defendants, contracted health professionals, and identification of what pretrial records are covered.
- What are "required disclosures?" According to HIPAA, a covered entity must disclose protected health information in only two situations: (a) to individuals (or their personal representatives) specifically when they request access to, or an accounting of disclosures of, their protected health information; and (b) to HHS when it is undertaking a compliance investigation or review or enforcement action.[176]
- What constitutes a "permitted disclosure," or an "authorized disclosure" of protected health information?[177]

Pretrial services agencies should have in place practices and procedures for training and management of employee use; maintain reasonable and appropriate administrative, technical, and physical safeguards to prevent intentional or unintentional use or disclosure of protected health information in violation of the Privacy Rule; and have a "Documentation and Record Retention" policy according to the timeframe specified in the act.

[174] Summary of the HIPAA Privacy Rule (2003), https://www.hhs.gov/sites/default/files/privacysummary.pdf (last visited Sept. 28, 2019).
[175] See 45 C.F.R. § 164.502(a)(1) (2019).
[176] See 45 C.F.R. § 164.502(a)(2) (2019).
[177] See 45 C.F.R. § 164.502(a)(1) (2019).

In general, State laws that are contrary to the Privacy Rule are preempted by the federal requirements, which mean that the federal requirements will apply.[178] The Privacy Rule provides exceptions to the general rule of federal preemption for contrary State laws that (1) relate to the privacy of individually identifiable health information and provide greater privacy protections or privacy rights with respect to such information, (2) provide for the reporting of disease or injury, child abuse, birth, or death, or for public health surveillance, investigation, or intervention, or (3) require certain health plan reporting, such as for management or financial audits.

Sometimes a court may issue a subpoena for protected health information. A HIPAA-covered health care provider or health plan may share protected health information if it has a court order. This includes the order of an administrative tribunal. However, the provider or plan may only disclose the information specifically described in the order. A subpoena issued by someone other than a judge, such as a court clerk or an attorney in a case, is different from a court order.[179]

Information gathered on pretrial defendants by a HIPAA-covered provider or plan may disclose information to a party issuing a subpoena only if the notification requirements of the Privacy Rule are met. However, before responding to the subpoena, the provider or agency program should receive evidence that there were reasonable efforts to:

- Notify the person who is the subject of the information about the request, so the person has a chance to object to the disclosure, or
- Seek a qualified protective order for the information from the court.[180]

(iii) – (vi): Defendant-related information maintained by a pretrial services agency may be of use to other law enforcement stakeholders besides the court, prosecution, and defense; for example, in criminal investigation (law enforcement), booking (corrections) or to determine program eligibility (pretrial diversion or community corrections). The potential value of pretrial services agency information to other criminal justice partners encourages the practice of data sharing—provided that effect confidentiality procedures are in place. Information about the defendant's employment, residence, substance abuse history, and physical and mental health problems is highly personal and sensitive. Therefore, pretrial services agencies must build in safeguards against misuse. Additionally, since much of the information is collected initially from defendants who may not have had contact with defense counsel beforehand, and since many defendants would be uncooperative if they knew that the information would be readily available to others, it is important that pretrial services agencies develop realistic policies to ensure appropriate confidentiality and establish limits on information sharing.

The pretrial services agency should have policy—preferably backed by statute—to prohibit re-disclosure of information by other stakeholders. Re-disclosure is permitted when necessary to achieve the purpose for which the information was originally disclosed (for

[178] See 45 C.F.R. § 164.504(f) (2019).
[179] https://www.hhs.gov/hipaa/for-individuals/court-orders-subpoenas/index.html.
[180] See 45 C.F.R. § 164.512(e) (2019); Office of Civil Rights (OCR) Frequently Asked Questions.

example, if the law enforcement agency to which the information was initially disclosed in execution of an arrest warrant for commission of a crime to contact another agency to actually make the arrest), but not otherwise. Re-disclosure should not become a vehicle for development of data bases unrelated to the purposes of disclosing information.

4.7 (b): Agency information may not be used to determine a defendant's guilt or innocence.

Confidentiality guidelines should prohibit the use of agency information by the court, prosecutor or defense to determine the defendant's guilt or innocence. Specifically, the prosecution should be barred from using information to establish guilt in the pending case.[181] Ensuring this confidentiality is essential to preserve the pretrial services agency's neutrality as related to other criminal justice stakeholders and encourage defendants to participate in pre-bail investigations and pretrial supervision.

4.7(c): The defendant or the defendant's attorney should have access to information in the defendant's file upon request, but the pretrial services agency may provide for exceptions to such disclosure, including denial of access to information secured upon a promise of confidentiality or information which, if disclosed, could endanger the life or safety of any person or would constitute an unwarranted invasion of privacy.

A defendant and their counsel should have open access to information in the defendant's file upon request, except when disclosure would breach the confidentiality of the information provider. This exception protects against possible retribution against a person who provided information about the defendant in the agency's initial investigation, post-release monitoring or supervision.[182]

[181] See 18 U.S.C. § 3153 (c) (2019); D.C. Code Ann. § 23-1303 (d) (2019). The District of Columbia statute provides that information in the agency's report to the court or in its files "shall not be admissible on the issues of guilt in any criminal proceeding." There are, however, some exceptions, including use of such information in proceedings arising out of the defendant's willful failure to appear for scheduled court proceedings and in perjury proceedings. The provision clearly bars the prosecution from using such information in its case in chief but has been interpreted to permit use of it for purposes of impeachment if the defendant gives trial testimony that is inconsistent with a statement made to the pretrial services agency. *See, e.g.*, *Herbert v. United States*, 340 A.2d 802 (D.C. 1976); *Anderson v. United States*, 352 A.2d 392 (D.C. 1976). Minnesota's Rules of Criminal Procedure provide that, "Any information obtained from the defendant during the course of the [pre-release] investigation and any evidence derived from such information shall not be used against the defendant at trial." Mn. Rules of Crim. Proc. Rule 6.02, sub. 3.

[182] Because third parties are not a party to an arrest, the Agency should not retroactively release (i.e., after dissemination through arraignment) any identifying information about a third party for any record, sealed or unsealed, except by subpoena for a copy of the agency interview or data-collection form, which may contain such information.

4.7(d): Defendant information generated, collected or maintained by a third party under contract or agreement with the pretrial services agency shall be the sole property of the pretrial services agency. Information generated under contract or agreement may only be released to other parties by the pretrial services agency.

(i) Entities receiving information from a pretrial services agency may not disclose that information to another entity unless the disclosure meets the purpose for which such information was disclosed by the pretrial services agency.

(ii) Information from a pretrial services agency's files may be provided for research to qualified personnel, under a written agreement that sets forth the terms of the research and addresses:

(a) the purpose of the research;

(b) the type of data sought and how the agency or researcher will select cases for research;

(c) the specific data sought from the agency's files; and

(d) procedures to ensure that defendants' identities are not disclosed to research investigators or other parties.

Related Standards

NAPSA (2004) Standard 3.8(d)

Commentary

This Standard encourages pretrial services agencies to work with outside entities to validate agency operations to legal and evidence-based requirements of the pretrial field and the principles of a high functioning organization. The pretrial services agency also may participate in research or evaluation focused on another system actor; for example, the courts. In this arrangement, data remain the property of the pretrial services agency and contractors or researchers may not share such data without the agency's consent. In these relationships, pretrial services agencies must ensure that the purposes of the research are clear, that the agency knows how the research will be conducted and what information will be collected, and how the contractor/researcher will protect the security and confidentiality of the data.

Pretrial services agencies should never release personal identifying information or case identifying data to contractors/researchers. These data should be replaced with generic "dummy variables" to safeguard defendant confidentiality.

It should be agency policy that a signed and dated data-sharing agreement is necessary for every release of records, detailing the items and records to be released, and the restrictions on use. Data-sharing agreements should include:

- detail about how the data will be used;
- a guarantee that the use of the data will be limited to the stated purposes of the research or evaluation;
- the names and job titles of all staff members who will have access to the records;

- assurances of no secondary disclosure of the information provided without the express written consent of the pretrial services agency; and
- explanation of how the outside entity will protect data security and confidentiality (e.g. through passwords or other protections).

When records are provided through ongoing electronic transmissions, recipients must certify that they will not attempt to search for sealed records, and that unsealed records will not be copied or stored. In some cases, the data-sharing agreement may require that the data sharing will be time-limited; either the data given to the researcher will be destroyed after a certain time period, or the identifiers will be removed.[183] All data-sharing agreements should prohibit those who receive de-identified agency records from attempting to identify the records.

The pretrial services agency should keep electronic copies of all signed and dated data-sharing agreements (both active and completed). The agency should maintain a database listing all data-sharing agreements for data transmissions and one-time releases of records (identified or de-identified, sealed or unsealed). The agency should update the database regularly to incorporate new listings and to indicate whether each release is still active or has been completed or terminated.

[183] Identifiers are information that can identify of a specific defendant alone or when used with other data.

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