PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL RELEASE AND DIVERSION

RELEASE

APPROVED: JULY 1978

THE BOARD OF DIRECTORS
NATIONAL ASSOCIATION OF
PRETRIAL SERVICES AGENCIES

A project of The National
Association of Pretrial Services Agencies

This project has been carried out under a grant from the U.S. Department of Justice Law Enforcement Assistance Administration (76-DF-99-0062). Points of view expressed herein do not necessarily represent the official views of the U.S. Department of Justice or the Law Enforcement Assistance Administration.

PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL RELEASE AND DIVERSION

PRETRIAL RELEASE

Approved—By The Board Of Directors Of
The National Association Of Pretrial Services Agencies.

July, 1978

NATIONAL ASSOCIATION OF PRETRIAL
SERVICES AGENCIES
1010 VERMONT AVE. N.W.
WASHINGTON, D.C. 20005
(202) 638-3080

Foreword

The 1960's and 1970's have borne witness to radical changes in the criminal justice system. Rising crime rates and diminishing funds have combined to pressure the system to make the most of its scarce resources. In the midst of this change two significant reforms have occurred.

The now famous Vera experiment which proved that alternatives to surety bond were at least as successful at producing defendants in court as the traditional bail bond practices sparked wide-ranging reform in bail administration. This reform culminated in 1966 in the enactment of the Federal Bail Reform Act. Most states quickly followed the federal lead enacting statutes which were aimed at providing a more even-handed approach to the thorny problems posed by pretrial release considerations. Elimination of discriminatory practices based on ability to pay was the true cornerstone of bail reform.

At the same time, as more and more criminal cases—many of dubious merit—clogged the courts there arose a need to develop alternate methods of dealing with antisocial acts. In many cases the best interests of society and the individuals directly concerned were not well served by the traditional manner of processing. And so diversion was born.

One of the truths about reform—any reform—is that it does not come easy and does not come without cost. Programs that seem just, complete, appropriate, cost-effective, and the like, begin to show deficiencies as they grow. Both bail reform and diversion have been victims of this truth. Means to insure equal treatment, program effectiveness, and due process have been sorely lacking.

During the past decade conscientious observers of the system have begun to speak out about its failings. Judges, Prosecutors, Defenders, and Law Enforcement Officers have looked introspectively at themselves and at their system and have begun to ask not only what is wrong but what can be done about it. From this introspection has emerged a consensus that in order to deliver justice we must first understand what justice is, what its components are, and how it can be measured.

To date the American Bar Association and the National Advisory Commission on Criminal Justice Standards and Goals have led the way in attempting to define some standards against which we can all measure

whether we are coming any closer to being able to administer justice. Prosecutors, Defenders, Police, and others have made various attempts to refine what has been written to suit their own needs.

This effort by the National Association of Pretrial Services Agencies is designed to establish standards for the implementation of sound release and diversion practices. It is an attempt to define what we believe to be achievable goals along the way toward realizing true justice. To the extent that we can we have followed the form and the language of the works of those who have written before us. Where such was not possible we have attempted to fashion standards that do not conflict with our own beliefs of what constitutes true and equal justice.

The project has taken some time. It is by no means finished. Without the many hours of dedication of Madeleine Crohn, James Droege, Barbara Blash, Gordon Zaloom, Janet Gayton, Carol Mercurio, Paul Herzich, John Bellassai and John Youngs we would not have been able to complete as much as we have. In addition to the excellent comments that have been received from many people in many disciplines the suggestions of our own review panel have proved invaluable. But the formation of standards and their implementation is an ongoing process. This project represents only the first step.

Finally, this beginning would not have been possible without the support of NAPSA, the Pretrial Services Resource Center, and The Law Enforcement Assistance Administration of the United States Department of Justice. While the standards do not represent the view of any one group they represent a substantial investment of time and energy by many. I am grateful to them for their support and to Lois Exter for her help in bringing these words to paper.

Bruce Beaudin
Project Director

July 1978

CONTENTS

		Page
Foreword	.....	iii-iv
Table of Contents	.....	v-vii
Introduction	.....	1-3
STANDARD I:	A Presumption In Favor Of Pretrial Release On A Simple Promise To Appear Should Apply To All Persons Arrested And Charged With A Crime.....	5
Commentary:	.....	5-8
STANDARD II:	Release Should Be Accomplished At The Earliest Time And By The Least Restrictive Procedure Possible	9
Sections:	A-G	9-10
Commentary:	.....	10-14
STANDARD III:	There Should Be A Presumption That An Accused Should Be Released On Personal Recognizance At Initial Appearance	15
Sections:	A-F.....	15-16
Commentary:	.....	16-19
STANDARD IV:	The Presumption Of Release On Personal Recognizance Must Be Overcome In Order To Impose Restrictive Conditions.....	21
Sections:	A-F.....	21-22
Commentary:	.....	22-24
STANDARD V:	The Use of Financial Conditions of Release Should Be Eliminated.....	25
Commentary:	.....	25-28

STANDARD VI: Compliance With Conditions Of Release Should Be Monitored 29
Sections: A-C 29-30
Commentary: 30-33
STANDARD VII: If The Court, Using Procedures And Criteria Consistent With This Standard, Finds That No Condition(s) of Release Will Reasonably Minimize Risk Of Flight To Avoid Prosecution Or Risk Of Danger To The Community, It May Order The Defendant Detained Prior To Trial 35
Sections: A-F 35-37
Commentary: 37-49
STANDARD VIII: A Pretrial Services Agency Should Establish Specific Goals To Ensure Equal And Just Administration Of Laws Governing Release 51
Sections: A-C 51
Commentary: 51-52
STANDARD IX: Pretrial Services Agencies Should Structure Their Functions To Meet The Needs Of Their Own Jurisdiction As Well As Needs Of Other Jurisdictions 53
Sections: A-D 53
Commentary: 53-56
STANDARD X: The Pretrial Services Agency Should Provide Direct Services To Pretrial Releasees And The Court And Should Coordinate Other Services With Other Agencies For The Benefit Of Pretrial Releasees 57
Sections: A-C 57-58
Commentary: 58-62
STANDARD XI: The Pretrial Services Agency Should Develop A System For Evaluating The Nature And Degree Of Risk Posed By The Release Of Defendants Not Released On Citation; It Should In Every Case File A Written Report With The Court Stating Information Gathered At The Initial Inquiry, By Whom Verified, Recommendations Concerning Release And Reasons For Those Recommendations 63
Sections: A-B 63
Commentary: 63-65

STANDARD XII: Information Obtained During The Course Of The Pretrial Services Agency's Investigation And During Post-Release Supervision Of Defendants Should Remain Confidential With Limited Exceptions.... 67
Sections: A-E 67-68
Commentary: 68-70
STANDARD XIII: The Pretrial Services Agency Should Maintain Information That Permits Ongoing Monitoring Of The Effectiveness Of Pretrial Release Practices. In Addition, The Agency Should Conduct Periodic Studies To Determine Whether These Practices Need To Be Reassessed 71
Sections: A-B 71
Commentary: 71-73

Appendices

Appendix A: The Process 75-80
Appendix B: Review Panel 81-82
Appendix C: Outline For A Management Information System..... 83-88

INTRODUCTION

After more than a decade of bail reform, the continued reliance on financial conditions of release as the primary vehicle for pretrial release produces an anomaly in our criminal justice system that is difficult, if not impossible, to defend. Persons who are presumed innocent, not yet convicted of any crime, continue to be confined to detention facilities that are maintained generally in violation of minimal Constitutional standards.[1] Recent statistics show that over half of the persons incarcerated in America are awaiting adjudication of the charges against them.[2] Further, it has been shown that more people are detained prior to trial than are confined following conviction.[3] In too many cases, the system intended to provide for the release of defendants results in arbitrary and unnecessary detention.

Responsible reform does not suggest that all defendants should be released. The traditional system of requiring money to effect release is not only inherently discriminatory against poor defendants,[4] but is also an ambiguous and ineffective means of ensuring reappearance. By the act of setting high bail amounts, the court effectively authorizes the release of a defendant should he have the financial resources to post bail. Yet, experience has shown that release in certain cases is not the court's intention. The traditional bail system reduces the court's role to that of a gambler, betting on whether or not a bondsman will agree to secure release for the defendant.[5] In addition to relinquishing its decision-mak-

[1] Alberti v. Sheriff of Harris County, 406 F.Supp. 649 (S.D.Tex. 1975).

[2] Law Enforcement Assistance Administration, United States Department of Justice, 1970 National Jail Census 1 (1971); *see also* W. Thomas, Jr., Bail Reform In America 31 (1976).

[3] Freed, *The Imbalance Ratio*, 1 Beyond Time 25-34 (Fall, 1973); *see also* Thomas, *supra* note 2, at 123.

[4] Pugh v. Rainwater, 557 F.2d 1189 (5th Cir. 1977) (rehearing *en banc*, January, 1978).

[5] Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963).

ing power the court's use of the money bail system frequently ignores its power to impose conditions of release which limit the defendant's behavior.[6]

Fortunately, major inroads are being made to remedy the problems caused by traditional monetary pretrial release practices. Notably, the establishment of pretrial services agencies in virtually every major urban area has done much to increase the use of more equitable forms of pretrial release. As the number of these agencies has grown, as the agencies have matured, and as the major shortcomings of the traditional system have become increasingly evident, the need has arisen for standards to guide pretrial services agencies, policy-makers, and the courts towards greater consistency and effective delivery of pretrial release services.

Several excellent efforts to define standards and goals for pretrial release have been made. Among these are the American Bar Association's Project on Minimum Standards for Criminal Justice,[7] the National Advisory Commission on Criminal Justice Standards and Goals,[8] and the Uniform Rules of Criminal Procedure of the National Conference of Commissioners on Uniform State Laws.[9] Although there have been recent court decisions and program developments which modify some of the standards written thus far, as general statements of goals and objectives, it is difficult to improve upon the combined product of these efforts. Pretrial services agencies, charged with the duty of translating these goals into reality in the complex environment of the criminal justice system, have been given very little guidance to help them to achieve the desired results.[10] Pretrial services programs, court systems, and funding organizations have been given few quantitative measures or operational indicators of whether the goals set forth for pretrial release are being met.

The desire of pretrial services program directors to fill this need through exchanging information and insights based on their experiences was the major reason for the formation of the National Association of Pretrial Services Agencies [hereinafter NAPSA]. Early organizational efforts culminated in the first annual NAPSA Conference held in San Francisco in 1972. Since that time NAPSA has sponsored national conferences each spring, and has served as a liaison among pretrial services agencies throughout the year.

Because NAPSA has been the primary focal point for exchange of information among program administrators, a significant contribution to the development of standards and goals for pretrial release has been derived

[6] United States v. Leathers, 412 F.2d 169, 170 (D.C. Cir. 1969).

[7] ABA Standards Relating To Pretrial Release (Approved Draft, 1968).

[8] National Advisory Commission On Criminal Justice Standards and Goals, Report On Courts 66-86 (1973); National Advisory Commission On Standards And Goals, Report On Corrections 98-140 (1973).

[9] National Conference Of Commissioners On Uniform State Laws, Uniform Rules Of Criminal Procedure 95-231 (Approved Draft, 1974).

[10] For an example where guidance is given see American Bar Association, How To Implement Criminal Justice Standards For Pretrial Release (1976).

from the experience accumulated by NAPSA members. Based on that experience, the standards here suggest tangible guidelines and procedures to aid in the solution of problems for individual programs and courts within each jurisdiction.

For many reasons the Performance Standards and Goals for Release and Diversion focus mainly on operational concerns. The standards are based on experience and supported, where possible, with empirical data. In addition, the standards attempt to provide a clear statement of the goals of pretrial services agencies. To the degree that data was available, the standards are specific. In areas which are highly controversial or in which reliable data are limited, the standards suggest alternative approaches.

The standards are intended to represent realistically achievable goals rather than unattainable ideals without sacrificing fundamental principles of justice. It is understood that some jurisdictions may be unable to achieve all of the goals suggested. The overriding purpose of the Performance Standards and Goals for Release and Diversion is to provide a sound rationale for the reduction of inequity and ambiguity in pretrial release and diversion practices. It is intended that jurisdictions should, at a minimum, attempt to implement procedures which increase the accountability of pretrial practices.

Written with program administrators and policy-makers in mind, the Performance Standards attempt to define some of the legal, philosophical, and practical tenets for program operations and to offer suggestions for implementation of the standards. Data from national surveys, topic-specific research, articles, court decisions, and recommendations from experts have been analyzed, summarized, and included as background information.

The Performance Standards should be viewed as a continuing process rather than an end product. Pretrial release is an area of the criminal justice system which has seen rapid growth, constant change, and much controversy in the past fifteen years and many of the theoretical and programmatic issues remain unresolved. These standards are intended to serve as a practical guide at present and as a basis for continued analysis and discussion of fundamental principles and operational procedures for pretrial services agencies in the future.

I. A PRESUMPTION IN FAVOR OF PRETRIAL RELEASE ON A SIMPLE PROMISE TO APPEAR SHOULD APPLY TO ALL PERSONS ARRESTED AND CHARGED WITH A CRIME.

COMMENTARY, Standard I

Presumption In Favor of Pretrial Release On Promise To Appear.

A strong presumption in favor of pretrial release on the defendant's promise to appear or personal recognizance is supported by constitutional principles, policy considerations, and practical experience.

(1) Constitutional Principles.

Due Process: The presumption that an accused is innocent until proven guilty is fundamental to due process. Pretrial release is a vital concomitant of that presumption since otherwise to be imprisoned before trial would be punishment of an accused without any adjudication by a court as to guilt or innocence.[1]

When a fundamental right such as liberty is involved, procedural due process requires an opportunity for a fair hearing before an impartial judicial officer. The decision to restrict liberty must be supported by evidence and nonarbitrary conclusions. In addition, the presumption of innocence requires that the prosecutor sustain the burden of showing the necessity for conditions more restrictive than release on personal recognizance.[2] The traditional setting of an amount of money bail based primarily on the nature of the charge denies the accused a fair hearing and a decision based upon all relevant factors.

Equal Protection: Equal protection of the law requires that all defendants be provided with the same opportunity for consideration for release without invidious discrimination based on race, sex, or economic status. The traditional money bail system, which bases release upon financial capability thereby discriminating against the poor, may well be in violation of the equal protection clause[3]. Reliance upon money as the primary criterion and condition for release is not rationally related to the purpose of bail:

> Since the function of bail is limited to assuring the presence of the defendant at trial . . . It is obvious that money amounts set solely by the

[1] Stack v. Boyle, 342 U.S. 1, 4 (1951); DeChamplain v. Lovelace, 510 F.2d 419 (8th Cir. 1875); Alberti v. Sheriff of Harris County, 406 F. Supp. 649 (S.D.Tex. 1975).

[2] DeChamplain v. Lovelace, 510 F.2d 419 (8th Cir. 1975); *cf.* Morrissey v. Brewer, 403 U.S. 471 (1972).

[3] Bandy v. United States, 82 S.Ct. 11 (1961); Pugh v. Rainwater, 557 F.2d 1189 (5th Cir. 1977) (rehearing *en banc*, January, 1978); Alberti v. Sheriff of Harris County, 406 F. Supp. 649 (S.D.Tex. 1975); Ackies v. Purdy, 322 F. Supp. 38 (S.D. Fla. 1970); *cf.* Tate v. Short, 401 U.S. 395 (1971).

> charge have no relation to the function of bail. A poor man with strong ties to the community may be more likely to appear than a man with some cash and no community involvement. So, not only is there no compelling interest in incarcerating the poor man because he cannot make the master bond bail, but the classification fails to meet the traditional test for equal protection: 'Equal protection does not require that all persons be dealt with identically, but does require that a distinction made have some relevance to the purpose for which the classification is made.'[4]

The United States Court of Appeals for the Fifth Circuit in *Pugh* v. *Rainwater*, 557 F.2d 1189 (1977) (rehearing *en banc*, January, 1978), held that the Florida bail system invidiously discriminated against indigent defendants because it did not give priority to release on personal recognizance. Although the statute made available nonfinancial alternatives, judges were left with unbridled discretion to set money bond. The Court held that a judge who sets money bail for an indigent creates a suspect classification. Such a situation requires strict scrutiny to protect the fundamental rights of a defendant to be presumed innocent and to prepare an adequate defense. While the state has a compelling interest in assuring appearance at trial, money bail is not necessary to promote that interest; it can promote its interest through alternative forms of release that do not discriminate on the basis of wealth.

The court further stated:

> Because it gives the judge essentially unreviewable discretion to impose money bail, the rule retains the discriminatory vice of the former system: When a judge decides to set money bail, the indigent will be forced to remain in jail. We hold that equal protection standards are not satisfied unless the judge is required to consider less financially onerous forms of release before he imposes money bail. Requiring a presumption in favor of non-money bail accommodates the State's interest in assuring the defendant's appearance at trial as well as the defendant's right to be free pending trial, regardless of his financial status. 557 F.2d at 1201.

And:

> Our holding is not that money bail may never be imposed on an indigent defendant. The record before us does not justify our telling the State of Florida that in no case will money bail be necessary to assure the defendant's appearance. We hold only that equal protection standards require a presumption against money bail and in favor of those forms of release which do not condition pretrial freedom on an ability to pay. 557 F.2d at 1202.

Right to Bail That is Not Excessive: In explaining the meaning of the eighth amendment of the Constitution the United States Supreme Court has stated: "The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to

[4] Ackies v. Purdy, 322 F.Supp. 38, 42 (S.D.Fla. 1970).

sentence if found guilty. . . Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment."[5]

Bail setting practices that impose financial conditions of release on an indigent defendant when less restrictive nonfinancial conditions would ensure such a defendant's appearance would seem to violate the eighth amendment; for as the Supreme Court has stated in *Bandy* v. *United States*[6]: "Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release." 81 S.Ct. at 197.

(2) Policy Considerations.

A presumption of release implies detention of as few defendants as possible. Detention prior to trial is seldom accomplished without substantial cost to both the defendant and to society.

The financial burden of pretrial detention on society is great. In addition to the cost of jail itself, tax revenue is lost when defendants are unemployed, and welfare costs increase to provide support for the families of incarcerated defendants.

Detention prior to trial frequently results in job loss. The detained defendant is unable to support his family which then may become dependent upon welfare for support. The released defendant, able to maintain employment, is in a better position to pay fines if convicted, to pay an attorney, and to persuade the court to grant probation on the basis of continued employment. Further, the released defendant is in a far better position to communicate with and aid his attorney in the preparation of his defense than the person who remains in custody.

The adverse effect of detention on case outcome has been observed and documented in numerous studies.[7] In litigation challenging the constitutionality of the bail system, this disparity was alleged to result in a denial of procedural due process of law.[8]

Youthful or first-time arrestees may be exposed to the potentially criminalizing and dangerous effects of jail. The released defendant on the other hand, is not threatened by a degrading and punitive environment. The pretrial detainee charged with a non-serious offense suffers a damaging loss of self-image and a social stigma which may lead him into later criminal activity.

These direct and indirect costs that result from detention provide more than adequate justification for the policy of minimizing pretrial detention.

---

[5] Stack v. Boyle, 342 U.S. 1, 4-5 (1951).

[6] 81 S.Ct. 197 (1961).

[7] Ares, Rankin and Sturz, *The Manhattan Bail Project*, 38 N.Y. U.L. Rev. 67, 84 (1963); Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. Rev. 641, 654 (1964).

[8] Bellamy v. The Judges and Justices Authorized to Sit in the New York City Criminal Court, 32 N.Y.2d 886, 32 N.Y.S. 2d 812 (1973).

(3) Practical Experience.

Fifteen years of experience with the use of non-financial release has demonstrated its effectiveness on a purely practical basis. While the rates of release vary among jurisdictions, many have extended the concept to a majority of arrestees without significantly increasing failures to appear in court. The cities of Washington, D.C. and Des Moines, Iowa, both release nearly half of all felony defendants on their own recognizance or on other nonfinancial conditions.[9] To date, research studies have shown little relationship between the rate of release and the rate of failure to appear or between the type of release used and appearance rates.[10]

Finally, a policy favoring release prior to trial, if that release maintains community safety and assures appearance, makes sense and prevents injustice in the ultimate disposition of cases. Defendants are legally presumed to be innocent while awaiting trial and, in fact, many are eventually found not guilty or have their charges dismissed. Only about 13% of all persons arrested are sentenced to confinement after conviction.[11] A system which keeps two to three times as many defendants in confinement before trial as after trial is seriously imbalanced from the perspective of either economics or justice. Professor Daniel Freed noted that in Connecticut, the overwhelming majority of persons in jail for any reason were pretrial detainees; release from jail most frequently occurred immediately after plea or conviction.[12] In other words, ". . . determined guilt rather than presumed innocence appears to offer a more likely road to release from custody. . ."[13]

In conclusion, it is clear that the presumption in favor of pretrial release on personal recognizance is compelled by legal principles and warranted by economic considerations.

---

[9] W. Thomas, Jr., Bail Reform In America 45 (1976).

[10] *Id.* at 87-105.

[11] President's Commission Of Law Enforcement And Administration Of Justice, The Challenge Of Crime In A Free Society 262-263 (1967).

[12] Freed, *The Imbalance Ratio;* 1 Beyond Time 25-34 (Fall 1973.

[13] *Id.*

II. RELEASE SHOULD BE ACCOMPLISHED AT THE EARLIEST TIME AND BY THE LEAST RESTRICTIVE PROCEDURE POSSIBLE.

A. Law Enforcement Officers, Authorized By Statute, Should Be Required To Issue Citations In The Field To All Persons Charged With Misdemeanors, Unless:

1) The accused fails to give proper identification;
2) The accused refuses to sign the citation;
3) Arrest or detention appears necessary to prevent imminent bodily harm to the accused or another person;
4) The accused does not show sufficient evidence of ties to the community;
5) The accused has previously failed to appear or failed to respond to a citation; or
6) Arrest or detention appears necessary to carry out legitimate investigative action in accordance with law enforcement agency regulations.

Should A Citation Be Withheld Pursuant To One Of The Exceptions, The Law Enforcement Officer Should Be Required To Indicate In Writing His Reasons For Failure To Issue A Citation.[1]

B. Law Enforcement Officers, Authorized By Statute, Should Be Permitted To Issue Citations In The Field To All Persons Charged With Non-Serious Felonies, Unless:

1) The accused fails to give proper identification;
2) The accused refuses to sign the citation;
3) Arrest or detention appears necessary to prevent imminent bodily harm to the accused or another person;
4) The accused does not show sufficient evidence of ties to the community;
5) The accused has previously failed to appear or failed to respond to a citation; or
6) Arrest or detention appears necessary to carry out legitimate investigative action in accordance with law enforcement agency regulations.

C. Law Enforcement Officers, Jail Officials, Or Pretrial Services Agencies, Authorized By Statute, Should Be Permitted To Issue Citations At the Stationhouse When Circumstances Have Prevented Release In The Field Pursuant To IIA and IIB Where Those Problems Have Been Resolved. When A Person Is Charged With A Serious Felony And In-

[1] These standards adopt the definition for "citation" articulated in the ABA Standards Relating To Pretrial Release 1.4A (Approved Draft, 1968): "A written order issued by a law enforcement officer requiring a person accused of violating the law to appear in a designated court or governmental office at a specified date or time. The form should require the signature of the person to whom it is issued."

quiry Shows That He Has Ties To The Community, And That There Is Little Likelihood Of Imminent Bodily Harm To The Accused Or Another Person And Little Likelihood Of Failure To Appear In Response To The Citation, Then A Citation May Be Issued.

D. Judicial Officers Authorized By Statute Should Be Required To Issue A Summons To Appear In Lieu Of An Arrest Warrant In All Misdemeanor Cases And Should Be Permitted To Issue A Summons To Appear In Lieu Of An Arrest Warrant In Felony Cases, Unless, In Either Situation, The Judicial Officer Has Good Reason To Believe That There Is Substantial Likelihood That The Accused Will Fail To Respond To The Summons. Should An Arrest Warrant Issue The Judicial Officer Should Be Required To State In Writing His Reasons For Failing To Issue A Summons To Appear.[2]

E. All Citations Issued Either In The Field Or At The Stationhouse And All Summons To Appear Should Be Considered Formal Release Orders And Should:

1) Inform the accused of the offense with which he is charged;
2) Specify the date, time, and exact location of the required court appearance;
3) Advise the accused of all rights applicable to trial and of the law concerning representation by counsel and the accused's right to counsel;
4) Advise the accused that he is ordered to: appear in court as required and refrain from criminal activity; and
5) Advise the accused of the potential consequences of failure to comply with these conditions.

F. All Citations and Summons To Appear Should Order The Accused To Appear Before A Judicial Officer Within Ten Days Of Issuance Of That Citation Or Summons.

G. Violations Of A Citation Order To Appear Should Carry The Same Sanctions As Violations Of A Court Order Of Release. Failure To Respond To A Summons To Appear Should Carry The Same Sanctions As Violations Of A Court Order Of Release.

COMMENTARY, Standard II

General. The policy articulated in sections A-D of Standard II should be implemented by statute at the state level. Statewide application for the use of citation release and summons to appear eliminates problems of unequal treatment for persons charged with the same offense from jurisdiction to

[2] These Standards adopt the definition for "summons" articulated in the ABA Standards Relating To Pretrial Release 1.4(b): "An order issued by a court requiring a person against whom a criminal charge has been filed to appear in a designated court at a specified date and time."

jurisdiction within the same state. Statewide applicability would produce no additional hardships on either urban or rural communities since greater time and money than is necessary are currently being expended in both types of communities to detain arrestees without or with a warrant. Although a statewide statute is preferred, this standard can be implemented by ordinance or administrative order and/or court rule.

For the benefit of both the accused and the criminal justice system, release should be effected at the earliest possible time following arrest or contact with the law enforcement officer. The use of citation release in the field or at the stationhouse and the use of summons to appear by the court offer relatively inexpensive alternatives to traditional procedures.

A. Issuance Of Citation In Field On Misdemeanor Mandatory.

For those who are arrested and charged with misdemeanors, citations issued by law enforcement officers in the field constitute the quickest and least restrictive form of release. Costs to the jurisdiction are reduced in that no additional personnel are required to effect release and the police officer's time out of service is minimized by avoiding the need to transport the arrestee to a central booking facility.[1]

The issuance of a citation in the field to all persons charged with misdemeanor offenses is urged principally to relieve the law enforcement officer of the responsibility of deciding for which kinds of offenses he should issue a citation. In practice, when law enforcement officers have had to use this discretion, they have been reluctant to do so and failure to exercise discretion has been called into question by their superiors.[2] Although this problem may arise under the policy stated in Standard II B, nevertheless, for a majority of offenses; *i.e.* misdemeanors, citation release is mandated.

Mandatory issuance of a field citation is not absolute. The main thrust of citation release is to expedite release while reasonably assuring appearance at court. Obviously, there are some situations where that appearance is not reasonably assured and where further investigation and/or detention for a hearing before a judicial officer is in order.

1. Where the identity of the accused is in doubt, it may be unclear that the person who is being charged is being charged under the correct name. Such a situation provides the wrongly identified person little incentive to appear in court.
2. If the accused fails to sign the citation, he is failing to acknowledge receipt of the citation and in effect disavows any liability for failing to appear in court. An officer has no choice in this situation other than to take the accused into custody.

---

[1] *See* W. Thomas, Jr. Bail Reform In America 200-209 (1976); National Advisory Commission on Criminal Justice Standards And Goals, Report On Courts 71 (1973); ABA Standards Relating To Pretrial Release 38 (Approved Draft, 1968).

[2] *See generally* W. LaFave, Arrest: The Decision To Take A Suspect Into Custody 168 *et seq.* (1965); for a brief history of the use and lack of use of citations, see Thomas, *supra* note 1, 200-209.

B. Issuance Of Citation In Field On Non-Serious Felonies Permissible.

Although mandatory issuance of citations is limited to misdemeanor cases, there are other situations in which citation release is in order. The logic behind mandatory citation release in misdemeanors is the fact that the maximum sentence is ordinarily one year and therefore fear of punishment will cause only infrequent failures to appear. In felonies, this may not be the situation. Nevertheless, strength of community ties (*e.g.* the accused properly identifies himself, has proof of residence and/or employment in the area and/or has identified family members with whom he is in regular contact or the fact that the accused is known by the arresting officer as an area resident) may warrant the issuance of a citation in non-serious felonies. Law enforcement officers should be authorized to effect citation release at their discretion in these situations. As guidance for law enforcement officers, the exceptions stated in Standard II A apply to Standard II B. The rationales stated in the Commentary to II A apply here as well.

1. Where there may be danger to the accused or society if the accused is released, a judicial hearing may be required to fashion conditions to minimize that danger.
2. Where the accused does not show sufficient evidence of community ties, there may be little reason to expect the accused to appear in court. A transient may very well leave the jurisdiction with little incentive to return, especially in misdemeanor cases that are not extraditable. He may discern that there is no positive reason to respond to that citation release order. Failure(s) to appear previously certainly cast doubt on the accused's willingness to appear on this citation.
3. In some situations, arrest and detention may be necessary to facilitate further investigation. The officer may feel that there is a danger that evidence may be destroyed if the accused is released; he may also want the defendant detained for a line-up or additional questioning.

C. Issuance Of Citation At Stationhouse.

Release at the scene of an arrest may not always be possible. There may be insufficient data available to justify release or the charge may be too serious. If upon further investigation additional facts become available and if these facts would have supported an initial decision to release, then stationhouse release should be permitted.

Stationhouse citation release permits easier verification of information presented by the defendant. For those charged with misdemeanors or non-serious felonies who were not released on field citation, identification and community tie information may be clarified. A belligerent arrestee who has refused to sign the citation may have composed himself and be willing to sign in the more neutral premises of the stationhouse. Conflicts about previous failures to appear may also be resolved at the stationhouse therefore permitting citation release. In addition, placing the release authority in an impartial decision-maker—the supervisory officer,

the jail official, or the pretrial services officer—should permit a more detached and objective release decision.

Citation release at the stationhouse should be permitted in serious felonies as well. When inquiry at the stationhouse and/or investigation in the field indicates little likelihood of nonappearance or danger to the community, then that release should be effectuated. In certain cases where arrest occurs at night, the citation may order the accused to return to the stationhouse or appear in court in the morning.

D. Issuance of Summons To Appear.

Among the factors that the judicial officer should consider in deciding whether to issue a summons are: previous failure(s) to respond to a citation or a summons; the fact that the whereabouts of the accused is unknown and delivery of a summons is impractical; evidence that there is a reasonable likelihood that the accused will flee to avoid prosecution; and, whether the accused has insufficient ties to the community to assure his appearance.

As is the situation with the use of citations, utilization of summons to appear in lieu of an arrest warrant also results in substantial cost-savings in eliminating the need for personnel necessary to execute an arrest warrent and in saving the time spent on the booking and release process.

E. Contents Of Citation.

It is important that citations and summons to appear be considered formal release orders so that no doubt exists that the court has jurisdiction over the accused at the first instance and that the accused must answer to the court for any failure to comply with the order.

It is essential that the citation or summons to appear:

1. Note the offense charged. In many situations either the arresting officer in citation cases may not inform the arrestee of the charge or in the confusion surrounding arrest, the accused may not have heard the officer. If the charge is written on the citation the accused should then be aware of the offense with which he is charged. The accused who receives a summons to appear will know the charge only if it is specified in the summons itself;
2. Inform the accused when and where he is due for his initial appearance in court. Not only does this minimize the possibility that the accused may appear in the wrong court and/or at the wrong time, but also is tangible evidence that the accused was informed of his court date;
3. Advise the accused of his rights. In accordance with *Miranda*,[5] the defendant must be informed of his right to remain silent, his right to be represented by counsel, and his right to have counsel appointed if he is indigent;
4. Advise the accused that he must appear in court when scheduled and must refrain from criminal activity while the case is pending. If the

[5] Miranda v. Arizona, 304 U.S. 536 (1966).

accused were to violate these conditions, the court would have great difficulty in enforcing sanctions without notice to the accused of what behavior is expected of him. Including these requirements in citations and summons to appear obviates this problem.

F. Scheduling Of Initial Appearance.

The initial court appearance in all citation and summons to appear cases should be scheduled within ten days of arrest so that the accused can be apprised of the formal charges against him, so that counsel can be appointed if the defendant is indigent, and so that defense preparation can begin within a reasonable period of time after arrest.

G. Violation Of Citation Order Or Summons To Appear.

This Standard maintains that persons released on citation should be responsible for complying with basic conditions of release as if released on personal recognizance by the court itself. Accordingly, the accused should appear in court as scheduled and should refrain from criminal activity. (See COMMENTARY, Standard III F for rationale for these conditions).

Sanctions for failing to appear should also be applicable for failure to respond to a summons to appear.

In both situations the court should impose sanctions in accordance with Standard VI C.

III. THERE SHOULD BE A PRESUMPTION THAT AN ACCUSED SHOULD BE RELEASED ON PERSONAL RECOGNIZANCE AT INITIAL APPEARANCE.

A. A Person Arrested And In Custody Should Be Taken Before A Judicial Officer Without Unnecessary Delay. When A Judicial Officer Is Available, That Delay May Not Exceed Six Hours. A Judicial Officer Should Be Available At Least Twelve Consecutive Hours Every Day Of The Week For The Purpose Of Conducting Initial Appearances.

B. Counsel Should Be Appointed No Later Than The Time Of Initial Appearance For Those Appearing As A Result Of A Citation Or Summons To Appear Or For Those In Custody Should Any Of These Accused Be Unable To Afford Counsel.

C. The Initial Appearance Should Be Conducted In A Formal Manner Without Undue Haste And The Judicial Officer Should Advise The Accused Of The Following:

1. The nature of the offense charged;
2. That he has the right to remain silent and that anything he says may be used against him;
3. That he has the right to counsel and if financially unable to afford counsel, the court will appoint counsel forthwith; and
4. That he has a right to communicate with counsel, family or friends.

D. Prior To Or Contemporaneous With The First Appearance, An Inquiry Into The Facts Relevant To The Pretrial Release Decision Should Be Conducted By An Independent Investigating Agency If These Means Are Practicable. The Inquiry Should Explore The Following Factors:

1. Length of residence at past and present address, and nature of contact at present address;
2. Family ties and relationships in the community;
3. Employment status and history;
4. Financial condition and means of support;
5. Physical and mental condition, including abuse of drugs or alcohol;
6. Identity of references who could verify information and assist the defendant in complying with conditions of release;
7. Prior criminal record and history of delinquency; and,
8. Prior record of failures to appear and compliance with conditions of release.

The Inquiry Should Exclude The Details Of The Present Charge. Such Information Should Be Provided By Law Enforcement Officials. The Investigating Agency Should Make Recommendations Regarding The Release Decision. A Report Reflecting The Results Of The Inquiry As

Well As The Recommendations Should Be Made Available To All Parties At Or Prior To The First Appearance. No Inquiry Need Be Conducted If The Prosecutor Advises That He Does Not Oppose Release On Personal Recognizance. No Inquiries of Persons Initially In Court As A Result Of A Citation Or Summons To Appear Need Be Conducted Unless The Judicial Officer Requests Said Inquiry.

E. All Persons In Court For Their Initial Appearance Should Be Presumed To Be Entitled To Release On Personal Recognizance. Unless Other Factors Affecting The Accused's Reliability Are Raised, Those In Court As A Result Of A Citation Or Summons To Appear Should Be Released On Their Own Recognizance. In The Situation Of Those Remaining In Custody, The Judicial Officer Should Take Into Account The Following Factors In Considering The Release Decision:

1. Length of residence at past and present address, and nature of contact at present address;
2. Family ties and relationships in the community;
3. Employment status and history;
4. Financial condition and means of support;
5. Physical and mental condition, including abuse of drugs or alcohol;
6. Identity of references who could verify information and assist the defendant in complying with conditions of release;
7. Prior criminal record and history of delinquency;
8. Prior record of failures to appear and compliance with conditions of release;
9. Nature and circumstances of the offense charged as related to likelihood of nonappearance; and,
10. Weight of the evidence and likelihood of conviction.

F. All Persons Released On Personal Recognizance Should Be Required To Adhere To Two Basic Conditions Of Release:

1. To appear as required by the court; and
2. To refrain from criminal activity.

COMMENTARY, Standard III

A. Timely Initial Appearance.

This Standard attempts to define more closely the requirements in jurisdictions that presentation before a judge occur "within a reasonable period" or "without unnecessary delay." The six hour maximum limit within which an accused is to be presented to a judicial officer has been suggested in order to allow a reasonable time for law enforcement officials to do the necessary paperwork, identification and reasonable custodial interviewing. The requirement concerning availability of judicial officers for initial appearances has been made because no accused should have to wait more than twelve hours for that initial appearance. Both time re-

quirements should be easily met in rural and metropolitan areas alike. Compare with ABA Standards Relating To Pretrial Release §4.1 [hereinafter cited as ABA STANDARDS-RELEASE] which provides for presentation "without unnecessary delay" and with NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON COURTS §4.5 [hereinafter cited as REPORT ON COURTS] where presentation before a judicial officer within six hours is required.

B. Appointment of Counsel.

The appointment of counsel prior to or at the initial appearance is essential. The accused may knowingly but unwittingly waive his rights or plead guilty if he does not have the advice of counsel. Counsel can also assist in the release decision as well as raise factual information which even the pretrial services agency has not been able to discover. This is certainly a critical stage in the proceedings against the accused. An adverse decision on the release issue may confine him to jail for months. *Argersinger* may in fact require counsel.[1] This Standard is consistent with ABA STANDARDS-RELEASE §4.2 and REPORT ON COURTS §4.5.

C. Conduct Of Initial Appearance And Advising Of Rights.

The first appearance in court is an important one for the defendant who must continue through subsequent procedures in the criminal justice system. It is here that he finds out what he is charged with and what his rights are; it is here that he finds out when and where his next scheduled court appearance is. Frequently the defendant is frightened or confused. Unless the court is conducted in a dignified manner with disturbances at a minimum, the defendant may well not understand what his charge is or where he goes next. For this reason, it is essential that court be conducted so that the defendant can hear what is said to him and that the judicial officer take time to explain the charge, the defendant's rights and when and for what proceeding he is scheduled next. Even with counsel present, especially if counsel is appointed for the limited purpose of the initial appearance, the defendant could misunderstand when his next court date is. If this happens the primary requirement of his release may be defeated. He may not appear at his next scheduled court date.

The judicial officer should make sure that the defendant understands his rights, particularly the right to remain silent.

D. Pretrial Release Inquiry.

In accordance with Standard VIII A every jurisdiction should establish a pretrial services agency. In smaller jurisdictions responsibility for conducting the release decision inquiry might be assigned to a single person.

This inquiry should focus on factors which will assist the judicial officer in making the release decision. Community ties is a prime area for in-

[1] Argersinger v. Hamlin, 407 U.S. 29 (1972) where the Court held that no sentence involving loss of liberty can be imposed where there has been a denial of counsel. Cf. Kirby v. Illinois, 406 U.S. 682 (1972) and United States v. Ash, 413 U.S. 300 (1973) which, when read together, suggest that the initial appearance is a critical stage requiring assistance of counsel.

vestigation. One who has lived in the area for a long time, or has close family ties in the community, or has stable employment is probably less likely to leave the jurisdiction and is more likely to appear in court than one who has none of those characteristics. One who is a drug addict or alcoholic may be a poor appearance risk. A defendant on probation or parole who faces almost certain incarceration if convicted may choose not to remain in the jurisdiction. In addition, if a defendant has in the past failed to appear or violated his conditions of release, perhaps he is not a good risk to appear again or to comply with his conditions of release. The inquiry should include names of persons the investigating agency can contact to verify community tie information.

The inquiry should not deal with the details of the present charge. Not only is there the problem of the defendant's incriminating himself, but the details may impede the investigating agency's ability to conduct an impartial inquiry and to make objective recommendations concerning likelihood of appearance at future court dates. Other than determining whether the defendant lives with the complaining witness (and this information is only gathered to assist the agency in making appropriate recommendations), the investigating agency should defer to the police or prosecutor the task of informing the judicial officer of the details of the charge.

Recommendations based on articulated objective criteria should be made and included in the report which states the results of the inquiry. (See Standard XI).

Although the report and recommendations are to be submitted to the judicial officer, copies should be made available as soon as possible to both the defense and the prosecution to enable them to comment on any information included in the report.

Although the Standard suggests that a full inquiry should not occur in some cases (to permit speedy release) the judicial officer should require the releasee to report immediately upon release to the pretrial services agency so that it can gather information appropriate to its function of providing notices of court appearances.

E. Presumption Of Release On Personal Recognizance At Initial Appearance.

The presumption of release on personal recognizance fully articulated in COMMENTARY, Standard I, applies equally here. Information concerning most of the factors which the judicial officer should consider in making the release decision, *i.e.*, ties to the community, physical and mental condition, prior criminal history and prior failures to appear, should be supplied by the independent investigating agency. Why these factors may be relevant is suggested in COMMENTARY, Standard III D. In addition, the police or the prosecutor should inform the judicial officer of the nature and circumstances of the offense and the weight of the evidence. The judicial officer with this information is made aware of whether anything about the offense indicates likelihood of flight. The weight of the evidence should be evaluated only to predict whether a de-

fendant is facing such certain conviction that he might decide never to return to court. Of course, all these factors are important. In many cases, defendants with few community ties return to court. Still others with strong ties and equally strong cases against them appear again and again.

In the situation where a defendant has been arrested and released on a citation, or responds as directed to a summons to appear, the court should consider the appearance of the defendant adequate evidence that the defendant will continue to appear as required, and should release the defendant on his recognizance unless other factors affecting the evaluation of the defendant's reliability are brought to light.[1] If other factors are presented, the court should weigh the defendant's compliance with the court's order to appear in considering release conditions.

F. Requirement of Adherence To Basic Conditions.

All persons released prior to trial should be required to adhere to two conditions of release: that they appear as required by the court and that they refrain from criminal activity. The first condition bears directly on the purpose of bail, *viz.*, to assure appearance in court. The second condition is simply a reiteration of a "condition" all persons are required to obey—criminal acts are illegal. By stating these as express conditions of release, however, the court is allowed rapid and unquestioned recourse in the event of violation of the conditions. Neither condition imposes any restriction on the defendant's legal liberties.

[1] *See* J. Galvin, 2 Instead Of Jail: Pre-And Post-Trial Alternatives to Jail Incarceration 12-30 (1976).

IV. THE PRESUMPTION OF RELEASE ON PERSONAL RECOGNIZANCE MUST BE OVERCOME IN ORDER TO IMPOSE RESTRICTIVE CONDITIONS.

A. The Presumption Of Release On Personal Recognizance May Be Overcome By A Determination By A Judicial Officer, After A Due Process Hearing, That More Restrictive Conditions Are Required To Assure The Appearance Of The Defendant At Trial Or To Protect The Safety Of Any Person Or The Community.

B. At The Initial Appearance, The Prosecution Should Have The Burden Of Rebutting The Presumption Of Release On Personal Recognizance And Should Prove By Clear And Convincing Evidence Any Need For Restrictive Conditions Of Release.

C. If The Court Finds That the Presumption Of Release On Promise To Appear Has Been Overcome By Evidence Demonstrating Probability Of Nonappearance Or Danger To The Community, The Court Should Impose The Least Restrictive Condition Or Combination Of Conditions Reasonably Calculated To Assure The Appearance Of The Defendant Or To Reduce Potential Danger To The Community. The Court May Impose From The Following The Least Restrictive Conditions Directly Related To The Nature Of Risk Posed By The Release Of The Defendant:

1. Require that the defendant telephone or personally check in with a supervising agency, such as the pretrial services agency;
2. Require that the defendant participate in social services (such as counseling) to stablize his behavior;
3. Require that the defendant remain within the jurisdiction during the pendency of the case;
4. Place the defendant in the care and/or custody of a responsible third party who will assure the defendant's appearance in court; and/or who will supervise the defendant during the release period;
5. Place the defendant in the custody of a public agency (such as the pretrial services agency, an organizational custodian or probation) which will closely supervise the defendant during the release period;
6. Require that the defendant seek (or maintain) employment;
7. Require that the defendant enroll (or maintain enrollment) in an educational program;
8. Require that the defendant refrain from the use of alcohol or drugs, undergo treatment for drug addiction or alcoholism and/or submit to periodic testing;
9. Require that the defendant stay away from the complaining witness or other persons;
10. Require that the defendant stay away from a specific geographic area; or stay within the jurisdiction;
11. Require that the defendant adhere to a curfew;

12. Require that the defendant not possess firearms or other weapons during the release period;
13. Require any other condition or combination of conditions which are reasonably calculated to assure the defendant's appearance in court and/or to reduce potential danger to the community.

D. If More Restrictive Conditions Than Release On Promise To Appear Are Required, A Written Order Describing The Conditions Of Release Should Be Signed By The Judicial Officer. The Order Should State The Reasons For The Conditions And The Evidence Relied Upon. A Clear Warning Of The Sanctions For Violation Of Release Conditions Should Be Provided To The Defendant At The Time Of The Hearing. All Should Become Part Of The Court Record.

E. Imposition Of Restrictive Conditions Of Release Should Be Subject To An Expedited Appeal.

F. All Persons Released On Conditions Should Be Required To Adhere To Two Basic Conditions Of Release:

1. Appear as required by the court; and
2. Refrain from criminal activity.

COMMENTARY, Standard IV

A. Overcoming The Presumption Of Release On Personal Recognizance And Requirement Of A Due Process Hearing.

Although there is a strong presumption of unconditional pretrial release, it is only a presumption and not an absolute right. Therefore, it may be overcome by showing a necessity for more restrictive conditions of release or detention in individual cases. The right to bail and constitutional right of equal protection have never been interpreted as granting an absolute right to pretrial release to *all* defendants accused of a crime.

In order to overcome this presumption there ought to be a finding by a judicial officer that more restrictive conditions are required. Such a finding should take place *only* after a hearing with procedural safeguards. Due process requires no less. In making the release decision (a procedure which in many ways resembles a sentencing hearing) courts should exercise at least as much care for those persons presumed innocent as for those found guilty. A major evil of the traditional money bail system which routinely permits bail to be set from a schedule of amounts based solely on the nature of the charge is the unavailability of a process that permits consideration of all relevant factors. A true due process hearing requires that the decision be individualized, supported by sound reasons and evidence, and subject to prompt appeal. The due process requirements suggested in this Standard may, in a practical sense, be the most important aspect of the pretrial release standards.

It would be an unfortunate paradox indeed, if people continued to be deprived of their liberty while awaiting trial in the face of the presumption of innocence and in the absence of procedural safeguards, while at the same time others could not be denied welfare benefits,[1] or have parole revoked[2] without a hearing, reasonable conclusions, and supporting evidence, as required by the Supreme Court.

B. Burden of Proof on Prosecutor.

Consistent with the presumption of innocence, the burden for providing the need for restrictive conditions of release should fall on the prosecution. Many facts, especially the evidence against the accused, are peculiarly known to the prosecution. Other facts concerning danger to the complaining witness or even community tie deficiencies may be known only to the prosecution through police investigation.

Liberty is a fundamental right and the decision to restrict that liberty is a formidable one. It is for this reason that the burden of proof should be clear and convincing evidence. It is unfair to the accused to have his freedom restricted using a lesser burden (*e.g.* "a preponderance of the evidence"); it is unfair to ask the prosecution to use a greater burden (*e.g.* "beyond a reasonable doubt") for a preliminary matter only peripherally related to innocence or guilt and which in the initial appearance hearing cannot result in detention.

C. Imposition of Least Restrictive Condition(s).

After the court finds that the presumption of release on personal recognizance has been overcome, it may impose restrictive conditions. The Court, however, should be limited to imposing only the least restrictive condition(s) reasonably calculated to assure appearance in court or to reduce potential danger to the community. The standard suggests imposition of the least restrictive condition(s) in that any condition imposed is a restriction on a person's liberty. Accordingly, such conditions should be kept to a minimum while still reducing risk of nonappearance and danger. In addition, in deference to the fact that the defendant is presumed innocent, the rationales of rehabilitation and punishment often applied to convicted persons at the time of sentencing are inappropriate here; imposition of the least restrictive condition(s) should reflect that.[3]

The court in setting conditions should make a two stage determination. Initially, the court should ascertain whether the risk relates to risk of flight or danger to the community. Next, the court should consider the nature of the risk involved. If the court decides to set restrictive conditions, the conditions should be directly related to that risk. For example: A condition that a defendant not leave the jurisdiction does not address the problem posed by a defendant who moves from place to place within the

[1] Goldberg v. Kelley, 397 U.S. 254 (1970).

[2] Morrissey v. Brewer, 403 U.S. 471 (1972).

[3] United States v. Cramer, 451 F.2d 1198 (5th Cir. 1975).

same locale. While risk of non-appearance might be great because of the difficulty of notifying such a defendant of court dates, a condition that he live at a particular address and/or notify the agency responsible for notification of any move is much more relevant to insuring appearance than a condition not to leave the jurisdiction. While both conditions relate to risk of flight it is clear that the first is much more appropriate to the specific nature of the risk posed than the second.

The list of conditions provided in the Standard is not an exclusive list but is offered for the purpose of giving examples of conditions which could be imposed. For instance, a defendant who in a prior case missed a court date due to confusion over what day he was due back might be required to telephone the pretrial services agency regularly for information about court dates. As another example, the court might place in the custody of an organizational custodian an eighteen-year-old who has no relatives in the area so that the custodian can assist him in getting to court. Also, the court could impose on the accused addict-robber the condition that he receive treatment for narcotic addiction. The theory behind such a condition would be that if the addiction is controlled the need to rob can be reduced.

D. Requirement of Written Order.

If restrictive conditions are imposed, the judicial officer should sign a written order which sets out: conditions of release; reasons for the conditions; the evidence relied upon; and a warning of sanctions for violating the conditions. The defendant should be given a copy of the order. The order should be written so that a review of conditions and/or appeal from the order may be expedited. For courts not of record, the written order may be the only evidence of the hearing available to be reviewed. In addition, the written order is necessary for an expedited appeal because transcripts may require days, weeks, or even months to prepare before the restrictive conditions imposed could be reviewed by the appellate court.

Finally, a written order enumerating any condition(s) set and provided to the defendant gives that defendant continued reference to what is expected of him while on pretrial release. Similarly, it informs any supervising authority, whether it be a custodian or pretrial services agency, what conditions should be monitored.

E. Right to Expedited Appeal.

Because restrictive conditions involve some deprivation of liberty and may work undue hardship on the defendant, imposition of these conditions should be subject to an expedited appeal.

F. Requirement of Adherence to Basic Conditions.

The two basic conditions of release, applicable to anyone released on citation or released on personal recognizance by the court, also apply here. (See Standard II G and Standard III F and their respective Commentaries).

V. THE USE OF FINANCIAL CONDITIONS OF RELEASE SHOULD BE ELIMINATED.

COMMENTARY, Standard V

The negative effects of reliance on traditional money bail have been discussed extensively in COMMENTARY, Standard I. In summary, these include inherent discrimination against the poor (a questionable Constitutional basis for classifying defendants into released and detained groups) and removal of the release decision from the court to the hands of profit-motivated individuals.[1]

The constitutional policy, and practical advantages of nonfinancial release over the traditional money bail system, together with the successful use of nonfinancial pretrial release conditions as an effective method for assuring court appearances support the elimination of money bail as a condition of release. Development of alternative forms of nonfinancial release ranging from field citations to highly restrictive forms of supervised release has provided the courts with a sufficient array of nonfinancial release mechanisms to address the needs and risks posed by all defendants. Further, the availability of detention orders, as outlined in Standard VII enables the court to detain high risk defendants without the hypocrisy of resorting to the imposition of high money bail. The adoption of totally nonfinancial release systems in place of money bail increases the equity of the pretrial release system, and brings pretrial release considerations more directly in line with the expressed purposes of bail.

Until the use of financial conditions is statutorily prohibited, the use of money in the form of cash deposit with the court will probably continue to be used when available nonfinancial conditions are not deemed adequate to assure the defendant's appearance in court. Under no circumstances should courts permit an individual or organization to act as surety for the defendant for compensation or profit and legislatures should act to outlaw compensated sureties. The gross deficiencies of the professional bail bondsman system have been well articulated by the Supreme Court. In upholding the constitutionality of the Illinois Ten Percent Cash Bail provisions in *Schilb* v. *Kuebel*,[2] Mr. Justice Blackmun noted:

> Prior to 1964 the professional bail bondsman system with all its abuses was in full and odorous bloom in Illinois. Under that system, the bail bondsman customarily collected the maximum fee (10% of the amount of the bond) permitted by statute and retained that entire amount even though the accused fully satisfied the conditions of the bond. Payment of this substantial 'premium' was required of the good risk as well as the bad. The results were that a heavy and irretrievable burden fell upon

[1] For further elaborations on the abuses and problems of the traditional money bail system see National Center For State Courts, An Evaluation Of Policy-Related Research On The Effectiveness Of Pretrial Release Programs 4-15 (1975) and W. Thomas, Jr., Bail Reform In America 11-19 (1976).

[2] 404 U.S. 357 (1971).

> the accused, to the excellent profit of the bondsman, and that professional bondsman, and not the courts, exercised significant control over the actual workings of the bail system. (citations omitted) 404 U.S. at 359-360.

Mr. Justice Douglas, in his dissenting opinion, observed that:

> The commercial bail bondsman has long been an anathema to the criminal defendant seeking to exercise his right to pretrial release. In theory, the courts were to set such amounts and conditions of bonds as were necessary to secure the appearance of defendants at trial. Those who did not have the resources to post their own bond were at the mercy of the bondsman who could exact exorbitant fees and unconscionable conditions for acting as surety. Criminal defendants often paid more in fees to bondsmen for securing their release than they were later to pay in penalties for their crime.
>
> Moreover, the commercial bond system failed to provide an incentive to the defendant to comply with the terms of the bond. Whether or not he appeared at trial, the defendant was unable to recover the fee he had paid to the bondsman. No refund is or was made by the professional surety to a defendant for his routine compliance with the conditions of his bond. 404 U.S. at 373-374.

Control over release from jail once surety bond is set is no longer the total decision of the court. Bondsmen can pick and choose who will be released, the good risks, in their judgment, being the ones who can afford the premium. As Justices Blackmun and Douglas so artfully point out, the defendant has no financial incentive to return to court; the money paid to the bondsman remains in the bondsman's pocket regardless of whether the defendant returns to court or not. Especially in the case of an indigent, the use of money to effect release diverts it from such other uses as payment of a fine if convicted, payment of a lawyer or support of the defendant and his family.

Under a system of deposit bail, the defendant is required to post an amount up to 10% of the face value of the bond with the court. If the defendant fails to appear as required, the deposit may be lost, and the defendant held liable for the full value of the bond. If the defendant appears as required, the deposit is returned to the defendant, less a small service fee in some cases. Cash deposit bail should be set no higher than that amount reasonably required to assure the defendant's appearance in court.

The judicial officer should consider the defendant's financial ability to post the bond as well as the factors articulated in Standard III E. In no case should a defendant be detained prior to trial on the basis of his inability to meet financial conditions of release. To insure that this does not occur, any defendant who remains in dentention for 72 hours because he cannot post bond should be presented before a judicial officer for a bond review. If it is found that a defendant cannot afford to post bail, the judicial officer should reduce the amount to a level affordable by the defendant, or impose nonfinancial conditions that will assure appearance.

In any deposit bail system, deposit bail amounts should not be set according to a bail schedule based on the nature of the charge, except for the purpose of stationhouse release for defendants who do not qualify for citation release under Standard II. The use of bail schedules negates the individuality of the release decision. Instituted in an effort to speed the release decision, most bail schedules rely only on the nature of the offense charged and do not consider other factors more relevant to the probability of appearance. The deposit bail system alleviates many of the deficiencies of the traditional surety bail system. The release decision remains totally within the control of the court, whereas it is the bondsmen, under traditional surety bail systems who—in effect—determine whether or not the defendant is released. With deposit bail, in the event of default, the defendant is liable for the full face amount of the bond, thus providing for a more direct deterrent effect. Finally, the defendant is given back his deposit if he makes all his scheduled court appearances. The money can then be put to more constructive use.

A deposit bail system involving private third party uncompensated sureties could also be instituted.[3] In this system, a private third party—often a friend or relative—posts the 10% deposit. The deposit is posted in the uncompensated surety's name; it is he to whom the deposit is returned if the defendant appears as required and it is he who is financially liable for the remainder of the bond if the defendant fails to appear. This system assures the continued interest of the third party in assisting the defendant in his return to court. The obvious disadvantage of utilizing this system alone is the fact that a defendant who could post his own deposit bail may well languish in jail for want of a private third party who will take that responsibility upon himself. Such a system also bears a strong resemblance to the present surety system except that no one person would usually act as surety in more than one case. Perhaps the best alternative, until money bond is totally eliminated, is to use a combination of the two deposit bail systems permitting the defendant to choose one or the other.

It may be necessary for the court to retain a nominal fee from the deposit bail for the administrative costs of the deposit bail system. This procedure has been ruled constitutional by the Supreme Court.[4] Although use of this procedure is not encouraged, it should be allowed. Usually the administrative fee is 1% of the face value of the bond; where the face value is significant, the fee no longer is nominal. Since the administrative costs are the same for both high and low deposit bonds, perhaps a flat fee would be more equitable. Some jurisdictions may find that an administrative fee is not necessary. The court retains the deposits should defendants fail to appear, receives interest on funds escrowed during the period of release and may recover judgments for the face amount of the bail (although perhaps with infrequent success). This income may be adequate

[3] This system has proved worthwhile in Philadelphia where as the incidence of the posting of bail monies by an uncompensated third party has increased the failure to appear rate has declined significantly. Interview with Dewaine Gedney, Director, Pretrial Services Division, Philadelphia, Pennsylvania (March 7, 1978).

[4] Schilb v. Kuebel, 404 U.S. 357 (1971).

to render administrative fees unnecessary. Because there is a potential source of revenue in implementing a deposit system great care should be exercised to avoid the natural inclination to over-use such a system. Financial conditions serve little purpose other than to produce revenue for some one. Widespread use of a deposit system may do nothing more than substitute a government bondsman for what presently exists.

Until the use of financial conditions is eliminated, as long as cash deposit bail continues to be utilized, under no circumstances should any financial conditions be used to ensure the safety of the community or should the amount of cash deposit bail set be based on the risk of danger to the community posed by the release of the defendant.

Much has been said about the merits of nonfinancial conditions as motivators for appearance. They are as effective as, if not more effective than, financial conditions in bringing people to court. But what about their impact on rearrest and pretrial crime? It is known from experience that bondsmen like repeaters. Repeaters are reliable, pay their premiums, and appear. There is no proportional relationship at all between release on financial conditions (as distinct from release on personal recognizance) and additional crime. The defendant under the traditional surety bond system knows that if he pays and appears he will get out as many times as he is arrested. Society pays for the alleged crime; the bondsmen become richer. It must be asked if this would be true if the deposit bail system were used instead of compensated surety. Suppose a defendant were required to post a deposit to ensure against future criminal acts. Such a condition would be of dubious constitutionality. The condition—no more crime or no more arrests—is not totally within the defendant's control. There is also a problem of depriving the defendant of property without due process if a deposit to secure appearance is taken as punishment for some other crime.

VI. COMPLIANCE WITH CONDITIONS OF RELEASE SHOULD BE MONITORED.

A. Each Jurisdiction Should Establish Procedures To Aid Defendants In Complying With Release Conditions.

1. Each jurisdiction should establish a system of written notification of scheduled court appearances.

(a) Any defendant scheduled to appear in court should be notified in writing of the date, time, and exact location of the court appearance. Notification should be accompanied by the name and telephone number of the person(s) to contact regarding any questions about the date and time of the court appearance.
(b) Courts should implement a system of continuous calendaring by setting a date and time for the next appearance at each court appearance.
(c) Notice of the date, time, and location of court appearances should be clearly written on all citations, summons to appear, and release orders.

2. If the court requires participation in supportive services as a condition of release, it should implement a system for referrals of defendants to appropriate service agencies.

B. Each Jurisdiction Should Establish Procedures To Monitor, Investigate, And Report The Compliance Or Noncompliance Of Released Defendants With Conditions Of Release.

1. Notice of a defendant's noncompliance with any or all conditions of release should be provided as soon as possible to the Court, the Prosecutor, The Defense Attorney and the Defendant.
2. A defendant's compliance with conditions of pretrial release should be made available to the court as part of the presentence report.

C. Appropriate Sanctions For Noncompliance With Release Conditions Should Be Established And Enforced.

1. Sanctions for noncompliance should only be imposed after notice to the defendant and opportunity to answer allegations.
2. Willful failure to appear should be a criminal offense, with any sentence imposed to be served consecutively to the sentence(s) imposed as a result of conviction of the underlying charges.
3. A sentence for a crime committed while on pretrial release should be served consecutively to the sentence imposed as a result of conviction of underlying charges.
4. Revocation of release should be ordered only after the court finds that:

— The initial release conditions were reasonably calculated to decrease risk of flight or danger to the community; and

— The violation(s) of conditions evidence a substantial increase in the risk of flight or pretrial crime; and
— No other conditions or sanctions are available which would minimize that risk and permit the continued release of the defendant; and
— States those findings and reasons therefore in writing.

(a) Upon a verified application showing that a condition of release has been violated and the continued liberty of the defendant will pose a serious threat to another person, will result in pretrial crime, or will result in flight from prosecution, the court may issue a warrant for the arrest of the defendant without a hearing but a hearing must be held within 72 hours after the defendant is in custody. In situations where the risk is not imminent, the judicial officer should issue a summons to appear in lieu of the warrant.
(b) At the revocation hearing, the defendant should be represented by counsel, have the right to disclosure of evidence, to confront and cross-examine witnesses, the opportunity to appear in person and with counsel, and to present witnesses and evidence. Rules for admissibility of evidence should be the same as are in effect at a preliminary hearing. The burden should rest with the prosecutor to establish by clear and convincing evidence each of the aforementioned findings.
(c) All persons whose release has been revoked should be afforded the safeguards suggested for those detained pretrial. (They are enumerated in Standard VII C-G.) A defendant whose release is revoked should be brought to trial within 60 days of the revocation or again be released on nonfinancial conditions.

5. The court's contempt power may be used to compel compliance with conditions of release.

COMMENTARY, Standard VI

A. Assisting Defendants In Complying.

Conditions of release are imposed in an effort to reduce the probability of nonappearance or pretrial crime, and therefore should be strictly enforced. Clear notice of the sanctions for violations of conditions should be afforded the defendants by the court. Conditions of release should be accompanied by the means to facilitate compliance. Defendants must be informed of where and when they are to appear to comply with the condition of appearance. This requires a system of written notification to defendants which details the date, time, and exact location of required appearances and provides a telephone number for the defendant to call if he has questions regarding the time and location of the appearance.

In many jurisdictions the function of providing notice is carried out by a pretrial services agency and is often accompanied by telephone contact

with the defendant to confirm that he understands when and where to appear. In other localities this function is discharged by the courts often by means of computers. Regardless of which agency actually provides notification, it should be the ultimate responsibility of the court to assure that adequate notice is provided, that notifications are clear and easy to understand and are provided well in advance of the appearance.

A number of jurisdictions use "continuous calendaring" whereby the time and place of a defendant's next court appearance is set before he leaves court and he is notified at that time. This insures that the defendant knows of pending court appearances and that his attorney is also informed of the next scheduled court date. When the attorney is present, this procedure avoids the need for additional continuances due to the attorney's conflicting calendar.

Finally, all release orders, including field and stationhouse citations, summons to appear and court orders, should include the time and date of the next scheduled court appearance as well as a list of the conditions of release and sanctions for noncompliance.

Courts requiring participation in supportive services such as drug or alcohol counseling, employment aid, vocational guidance, psychological counseling, *etc.*, should establish referral systems to aid a defendant in locating and enrolling in services appropriate to meeting the conditions of his release. If the defendant is unable to afford the services required by the conditions of his release, the referral system should also include financial aid.

B. Monitoring Compliance.

Setting conditions of release would be a futile exercise without an ability to monitor compliance with those conditions and to punish disobedience and reward compliance. In most jurisdictions, the function of monitoring is performed by a pretrial services agency. It can also be performed by other court agencies such as a probation department. Monitoring has a twofold function: (1) the reporting of any serious noncompliance and (2) the reporting of information on the presentence report—which may impact on a defendant's sentence (*e.g.*, favorable compliance on pretrial release may support placing a defendant on probation instead of imposing a jail sentence).

In monitoring compliance with conditions of release, the responsible agency should have some discretion in evaluating the seriousness of any noncompliance. Factors that should be considered include the nature of the condition, the reason for noncompliance, and the degree of violation. For example, failing to telephone the pretrial services agency on a specific day because the defendant was out of town, as explained by a prompt call the next day, would not represent a serious violation of a condition to telephone daily. On the other hand, repeated failure to check in would be considered a serious violation.

C. Sanctions For Noncompliance.

1. Conditions of release imposed by the court should be treated seriously and rigorously enforced; otherwise, they should not be im-

posed at all. When a violation is alleged, standard procedures for handling the allegation should be established. At a minimum such procedures should include:

(a) Submission of a written report by the monitoring agency to the court;
(b) Distribution of a written notice of the allegation to the defendant, his attorney, and the prosecutor; and
(c) Authority for the court to order a hearing with written notice of the hearing date and the alleged violations distributed to the defendant, his attorney, and the prosecution. (A warrant may be issued for the defendant's arrest, and if executed, a hearing should be held within 72 hours of the arrest.)

Noncompliance with conditions may involve either serious violations or minor infractions. Sanctions imposed for violations should be tailored to the seriousness of the violation. Three general types of sanctions are available to the court:

(a) remedial sanctions: requiring the defendant to participate in drug or alcohol abuse treatment, to obtain or maintain employment, to obtain marital or psychological counseling, and involvement in other programs designed to stabilize the defendant's behavior and minimize the probability of his nonappearance or pretrial crime;
(b) restrictive sanctions: requiring the defendant to obey a curfew, to restrict his movement, travel and associations, and if necessary, revocation of release; and
(c) punitive sanctions: imposition of jail sentences, fines, conviction for contempt of court, consecutive jail sentences and other penalities.

2. Failure to appear in court disrupts the court process. Willful failure to appear is the most significant violation of pretrial release conditions, and when it occurs, the court should be authorized to impose punitive sanctions including jail sentences. If the defendant is convicted and sentenced on the original charge, any sentence for a willful failure to appear should run consecutive to the other sentence and in addition to any remedial or restrictive conditions imposed. Unintentional failure to appear that results from confusion or from circumstances beyond the defendant's control should be handled as would any other violation of a condition of release.
3. As in the case of nonappearance, conviction for a crime committed while on pretrial release is a serious breach of conditions and warrants the penal sanction of a sentence consecutive to any other sentence on the original charge.
4. Because revocation of release deprives the defendant of his liberty, the court should be required to make positive findings of fact. First, it must find that the initial release conditions were reasonably calculated to decrease risk of flight or danger and that the conditions were directly related to some specific indicator of that risk. Such a finding is necessary in order to avoid making a mockery of nonfinancial release by

permitting the court initially to set unrelated conditions in the hope that the defendant may violate them and have his release subject to revocation. Such a finding is necessary in order to avoid using revocation as an alternative method of pretrial detention. The court must also find that the violation(s) indicates a substantial increase in the likelihood of flight or pretrial crime. To permit a court to revoke the defendant's nonfinancial release in the situation, for example, where the defendant fails to telephone the pretrial agency for two consecutive weeks but appears in court in the meantime would defeat the purpose of nonfinancial release. Finally, the court must find that no other conditions or sanctions would diminish the supposed risk. For example, if the court finds that a defendant has violated the condition that he stay away from the complaining witness in a case; the court could minimize the danger to the complaining witness by ordering the condition that the defendant live in a halfway house. The findings of the court and the reasons behind them should be stated in writing in order to expedite appeal. Revocation procedures should be expeditious and due process safeguards should be employed. The prosecutor should have the burden of proving the findings by clear and convincing evidence.

Since revocation of release in effect becomes pretrial detention and results in the same deprivation of liberty as those detained pretrial, many of the same safeguards should apply to both. Accordingly, one whose release is revoked should have automatic review of his order of revocation (See Standard VII C), should have the right to an expedited appeal (See Standard III D), should have his case brought to trial within 60 days of revocation or again be released on nonfinancial conditions (Compare with Standard VII E), should be confined in a place other than that designated for convicted persons (See Standard VII F), and should have the time spent in detention prior to trial credited against the minimum and maximum of the sentence imposed, if any, upon conviction (See Standard VII G). (See COMMENTARY, Standard VII C-G for the rationale for these procedures).

5. The court has the inherent power to hold anyone in contempt for a violation of its order. Consequently, the court should use its contempt power against any defendant who violates court-ordered conditions of release. Such a procedure has a number of benefits:

(a) There exists a record of the violation in the defendant's criminal history file;

(b) The punishment can cover a wide range of alternatives from imprisonment for a substantial period to observing the court process and writing a paper about it;

(c) Imposition of sentence is carried out in a summary fashion permitting the "lesson" to be brought home with force.

VII. IF THE COURT, USING PROCEDURES AND CRITERIA CONSISTENT WITH THIS STANDARD, FINDS THAT NO CONDITION(S) OF RELEASE WILL REASONABLY MINIMIZE RISK OF FLIGHT TO AVOID PROSECUTION OR RISK OF DANGER TO THE COMMUNITY, IT MAY ORDER THE DEFENDANT DETAINED PRIOR TO TRIAL.

A. In Order To Invoke Pretrial Detention Provisions, The Court Should Find That There Is Substantial Probability That The Defendant Committed The Offense For Which He Is Before The Court And Must Find By Clear And Convincing Evidence That:

1. The defendant is charged with a felony in the instant case, poses a substantial risk of flight to avoid prosecution, *and:*

   (a) has been convicted of, or has a pending charge of, unlawful flight to avoid prosecution; *or*
   (b) has expressed intent to flee the jurisdiction; *or*
   (c) has committed overt acts which reasonably infer an intent to flee the jurisdiction; *and,*

there is no condition or combination of conditions of release which will reasonably minimize the substantial risk of flight; *or*

2. The defendant is charged with a crime of violence[1] in the instant case, poses a substantial threat to the safety of the community; *and*

   (a) has been convicted of a crime of violence within the past ten years; *or*
   (b) is on probation, parole or pretrial release for a crime of violence; *or*
   (c) has exhibited a pattern of behavior consisting of present and past conduct which, although not necessarily the subject of criminal prosecution and/or conviction, poses a substantial threat to the safety of the community; *and,*

there is no condition or combination of conditions of release which will reasonably minimize the substantial risk of danger to the community; *or*

---

[1] Although each jurisdiction is free to make its own determination of what constitutes a crime of violence, these Standards define the term "crime of violence" as murder, forcible rape, taking indecent liberties with a child under the age of sixteen years, mayhem, kidnapping, robbery, burglary of any premises adapted for overnight accommodation of persons, voluntary manslaughter, extortion accompanied by threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon, or an attempt or conspiracy to commit any of the foregoing offenses as defined by any Act of Congress or any State law, if the offense is punishable by imprisonment for more than one year. (This definition is adapted from that included in the Court Reform and Criminal Procedure Act of 1970, 23 D.C. Code § 1331 (1970)).

3. The defendant poses a threat to the integrity of the judicial process by threatening or intimidating witnesses or jurors or by concealing or destroying evidence and there is no condition or combination of conditions of release which will reasonably minimize that threat to the integrity of the judicial process.

B. Detention Prior To Trial May Only Be Ordered After A Hearing Before A Judicial Officer.

1. Upon motion by the prosecutor with notice to the defendant and his counsel, the court may hold a pretrial detention hearing at any time the defendant is before the court. The prosecutor should submit with the motion an affidavit setting forth the facts showing probable cause for pretrial detention. A continuance sought by the defendant may be granted for up to five calendar days; a continuance sought by the prosecutor may be granted upon good cause shown for up to three calendar days. The defendant may be detained pending the hearing.

If the defendant is not in custody, the court may issue a warrant for the arrest of the defendant and a hearing should be held within three calendar days after the defendant is taken into custody unless the defendant seeks a continuance. The continuance, if granted, should not exceed five calendar days. The defendant may be detained pending the hearing.

2. At the detention hearing, the defendant should be represented by counsel, have the right to disclosure of evidence, to confront and cross-examine witnesses, the opportunity to appear in person and by counsel, and to present witnesses and evidence. The burden of going forward and the burden of proof by clear and convincing evidence should rest with the prosecutor. Rules for admissibility of evidence should be the same as are in effect at a preliminary hearing.

3. Testimony of the defendant given during the pretrial detention hearing should not be admissible on the issue of guilt in any other judicial proceeding.

4. A verbatim record of the hearing and written statement of the reasons for detention and the evidence relied upon should be included in the court record which should establish the need for detention by clear and convincing evidence.

C. The Status Of All Persons Detained Pretrial Longer Than Ten Days Should Be Reviewed Biweekly By A Judicial Officer Who Should Release The Defendant On The Least Restrictive Conditions Possible If He Finds That A Subsequent Event Has Eliminated The Basis For Such Detention. Information Provided For the Review Should Include The Date And Location Of The Detention Hearing, The Reason For Detention And The Current Status Of The Defendant.

D. All Persons Ordered Detained Prior To Trial Should Have The Right To An Expedited Appeal Of The Detention Order.

E. All Persons Ordered Detained Prior To Trial Should Have Priority On The Court Trial Calendar. The Case Of A Detained Defendant Should Be brought To Trial Within 60 Calendar Days Of The Detention Order Or Within 90 Calendar Days Of Arrest, Whichever Is Less, Unless The Trial Is In Progress Or The Trial Has Been Delayed At The Request Of The Defendant Other Than By The Filing Of Timely Motions (Excluding Motions For Continuances). If The Above Time Limits Have Expired, The Defendant Should Be Released From Custody On The Least Restrictive Conditions Possible.

F. To The Maximum Extent Practicable, Persons Subject To Pretrial Detention Should Be Confined In A Place Other Than That Designated For Convicted Persons. Conditions Of Pretrial Detention Should Be Adjusted To Minimize The Punitive Aspects Of Detention. Persons Detained Pretrial Should Be Entitled To The Same Rights As Persons Convicted Of Crime. In Addition, The Following Procedures Should Be Implemented To Reduce The Detrimental Effects Of Pretrial Detention:

1. Persons in detention should have access to their attorneys during regular working hours.
2. Detainees should have liberal visitation rights with family and friends, including contact visits.
3. The detention facility should permit the greatest possible privacy for each defendant.
4. Each defendant should have access to social, employment, psychiatric, or medical treatment and other services.

G. Time Spent In Dentention Prior To Trial Should Be Credited Against Any Minimum And Maximum Term Imposed Upon Conviction.

COMMENTARY, Standard VII

General. If the courts apply the presumption in favor of pretrial release on a promise to appear and if the use of money bond is eliminated, a great majority of defendants should be released pretrial. However, there is a small number of defendants who pose a substantial threat of flight or danger to the community no matter what conditions are set. Can the system guarantee the reappearance of an alleged gambler who has connections to organized crime and appears for presentment with his passport and airplane tickets to South America in his pocket? Should the court release the alleged robber who has been charged with one other robbery, who was apprehended at the scene during the commission of those crimes and who is a life-long resident of the community with his entire family in the area? This Standard addresses problem cases like these. How would the traditional bail system handle these? In the former case, the court most likely would set a high money bond. But there should be significant doubt that the money bond, no matter how high, would keep this

defendant in the jurisdiction. He has access to large amounts of money and the prospect of a long prison term may be incentive to flee, the bail money not being worth a significant period of incarceration. Others that might fall into the same category are alleged narcotics dealers and bank robbers. Illegal aliens facing deportation may also pose the same problem if released. Under these Standards, the court should not use money bond in the first place since the use of money bond would be abolished. Under this Standard, the court could detain the defendant pretrial, thus *guaranteeing* his appearance in court. Would the alleged robber be released under the traditional theory of bail? Probably not. Many judges would set a high money bond. In *Stack* v. *Boyle*, 342 U.S. 1, (1951), the Supreme Court stated that "the right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty... (and that) the modern practice of requiring a bail bond .... serves as additional assurance of the presence of an accused."[1] Thus, it would seem that the only constitutional use of money is to guarantee appearance.

In the case of the alleged robber, the judicial officer may well argue as justification for setting a high money bond that the defendant if convicted faces a long period of incarceration and is therefore likely to flee. This argument seems specious in light of the fact that the alleged robber has significant ties to the community. Perhaps, the real motivation for setting the money bond is the judicial officer's reasonable fear that if the defendant is released he will commit further crime; in effect, the judicial officer is implementing *sub rosa* pretrial detention. It is done without procedural safeguards; it is done with unbridled discretion by the judicial officer without a full evidentiary hearing, without clear standards, and without giving the defendant an opportunity to challenge the grounds for the detention, in short—with no accountability. The practice which permits the judicial officer to set an illegal high money bond justified ostensibly by risk of flight considerations when in fact the high money bond is to ensure the detention of a dangerous defendant should be eliminated. The judicial officer states nonappearance while he thinks danger. This is not only dishonest but unfair. It detains the dangerous defendants who are poor and permits the release of dangerous defendants who are wealthy. The indigent alleged robber with community ties may languish in jail for months and months as a result of those pending robbery charges; the upper middle-class alleged arsonist with community ties is free pending trial despite other pending arson charges and the threat he poses to the safety of the community. Under these Standards, the court should not use money bond in the first place since the use of money bond would be eliminated. Under this Standard, the court could detain the defendant, openly and honestly, thus *guaranteeing* that the defendant poses no threat of crime to the community. Under this Standard, rich and poor are treated alike, defendants have procedural safeguards prior to their detention and the right to be tried within a reasonable period.

[1] 342 U.S. 1, 4-5 (1951).

The arguments for and against pretrial detention are legion, and these arguments reflect practical, policy and constitutional considerations. Those who oppose pretrial detention might argue that there is no need for it in that the amount of crime committed by pretrial releasees is insufficient to warrant pretrial detention. They point to studies which show that the felony rearrest rate for defendants released in felony cases is between seven and eight percent.[2]

However, there is much dispute about the accuracy of any statistical study of pretrial releasees.

> The essential problem is that accurate statistics showing the true rate at which those free on bail commit crimes simply cannot be obtained. The problem in amassing crime-on-bail statistics is threefold: First, there is a low solution or clearance rate of crimes committed and reported to the police. In 1969, the nation's police cleared only 27 percent of all reported robberies, 19 percent of buglaries and 56 percent of forcible rapes. As a result, statistics that deal with crime on bail, and which necessarily must start from the point of arrest or indictment, can never accurately reflect all the crime that is committed on bail simply because many crimes go unsolved. Second, the total amount of crime actually committed is estimated to be higher than the reported rate, by as much as 50 percent for some crimes. Again, this would bias any statistics showing crime committed on bail. Third, there is the existing *sub rosa* practice by which courts incarcerate many defendants because they deem them dangerous, and this militates against an accurate estimate of the potential rate of crime on bail, at any one time, because many of those who presumably would be able to commit additional offenses are not released". (footnotes omitted).[3]

Accordingly, any study's rate of rearrest would have to be inflated to some degree to take into consideration these factors.

The NBS Report and D.C. Crime Commission study may be at variance with other reports. The Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia found that nine percent of the persons released during the first six months of 1967 were *reindicted* (as opposed to rearrested) for offenses allegedly committed within six months of pretrial release[4] and during 1968, seven percent were *reindicted* (as opposed to rearrested) while on pretrial release.[5]

---

[2] National Bureau of Standards, Compilation and Use of Criminal Court Data in Relation To Pre-Trial Release of Defendants: Pilot Study 514 (1970) (hereinafter cited as NBS Report); Report of the President's Commission on Crime in the District of Columbia (hereinafter cited as the D.C. Crime Commisson).

[3] Hess, *Pretrial Detention and the 1970 District of Columbia Crime Act*—The Next Step in Bail Reform, 37 Brooklyn L. Rev. 277, 283-284 (1976). The Hess article has an excellent discussion of the difficulty of statistical analysis in this area.

[4] Report of the Judicial Council Committee to Study the Operations of the Bail Reform Act in the District of Columbia (45) (1968).

[5] Report of the Judicial Council Committee to Study the Operations of the Bail Reform Act in the District of Columbia (19) (1969).

A Metropolitan Police Department study of armed robbery defendants who had been indicted and released over the period July, 1967 to July, 1968 found that about thirty percent were indicted for at least one felony on release.[6]

Still another study conducted by the United States Attorney's Office showed that of "557 persons indicted for robbery in 1968, 242 of the 345 persons released prior to trial (70.1%) were rearrested while on pretrial release. This 70 percent recidivism is even more significant in light of the fact that the 212 defendants detained prior to trial were undoubtedly the most dangerous of the study group of 557."[7]

As Hess notes in his article: "It is submitted that the available statistics lead to two conclusions: first, that there is a significant problem of crime committed on bail; and second, that accurate statistics are impossible to obtain, causing figures that are produced to be underestimated, perhaps to a considerable extent."[8]

Much has been written concerning the lack of an empirical basis for the prediction of danger; the results of two research studies suggest that only one out of twenty persons who could have been detained under the District of Columbia detention law actually were rearrested for dangerous or violent crimes.[9] Theoretically, nineteen defendants who would not commit crime on bail could be detained in order to prevent one dangerous or violent crime.[10] The same difficulty may apply to the prediction of flight, although expression of intent to flee or taking acts to further flight certainly provides great predictability.

This Standard does not suggest that all who could be detained should be detained. The court in deciding to detain a defendant must find that the defendant poses either a substantial risk of flight or substantial threat to the safety of the community, that there is a substantial probability that the defendant committed the instant offense and that no condition(s) will minimize that risk. The judge is permitted to use discretion in detaining defendants. Although it can be argued there are currently no accurate predictive tools to be used in making the pretrial release decision, nevertheless, the potential for danger is a factor in every release decision made. In addition, since the Judiciary Act of 1789, Courts have been making predic-

---

[6] *Hearings on Preventive Detention*, Subcommittee on Constitutional Rights, Senate Committee on the Judiciary, 91st Cong., 2nd Sess. 726 (1970).

[7] Report of House District Committee, H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 89 (1970).

[8] Hess, *supra* note 3, at 289; see NBS Report, *supra* note 2, at 2 where the National Bureau of Standards in evaluating how the then only proposed pretrial detention plan for Washington, D.C. would work [the portion of this Standard which deals with detaining dangerous defendants closely parallels the D.C. Statute, Court Reform and Criminal Procedure Act of 1970, 23 D.C. Code §1322 (1970)]; the study found that of those who could have been preventively detained had the act been law, but who were released, five percent committed dangerous or violent crime; Note, *Preventive Detention: An Empricial Analysis*, 6 Harv. C.R.-C.L. Rev. 291, 309 (1971) where a similar study using data on defendants in Boston arrived at the same figure.

[9] See NBS Report, *supra* note 2, at 2; Note, *supra* note 8, at 291.

[10] W. Thomas, Jr. Bail Reform In America 239 (1976).

tions of potential danger posed by the release of defendants charged with capital offenses. Courts have been making predictions of likelihood of flight with all defendants. At least, in any decision on potential danger (and potential flight), this Standard will add non-arbitrariness to current *sub rosa* pretrial detention; it will categorize to some extent those who should be held and those who should be released. It will add procedural safeguards for those detained under the current system. It will add accountability to the release decision, for a judicial officer who detains a defendant pretrial must state his reasons and the decision may be reviewed on appeal.

Persons who oppose the implementation of detention procedures point to its relative ineffectiveness in Washington, D.C., the only jurisdiction in the United States which has provision for pretrial detention in both capital and noncapital cases. In a study of the use of the law, the virtual non-use of the statute was annotated: "The law was invoked with respect to only 20 of a total of more than 6,000 felony defendants who entered the D.C. Criminal Justice system."[11]

In addition, the study revealed that ". . .a variety of techniques ranging from continued reliance on money bail, to use of the five-day hold provision, to administrative changes in several criminal justice agencies have been used to asure the detention of defendants thought to be dangerous."[12]

Until recently, the law remained in moderate disuse. "Up until December of 1975, nearly four years after the effective date of the Act, fewer than fifty (50) such requests were made."[13] As of December 31, 1977, the United States Attorney had sought pretrial detention in forty (40) cases over the preceding sixteen and one-half months.[14] It is difficult to evaluate a law that has not been utilized.

In theory, prosecutors had to be selective in using the statute because its very use might be the very case which would test the constitutionality of the detention provision, according to the United States Attorney for D.C. in 1971.[15] It is hard to believe that, *assuming arguendo*, the fear of the law's being overturned as unconstitutional was legitimate, it would warrant limiting the selection of cases in which it was invoked to one-third of one percent of all felonies coming through the system in the ten-month period

---

[11] N. Bases & W. McDonald, Preventive Detention In The District of Columbia: The First Ten Months 69 (1972).

[12] *Id.* at 72.

[13] *Proposed Amendments To Title 23 of the District of Columbia Code: Hearings on H.R. 7747 Before The Subcommittee on Governmental Efficiency and the District of Columbia of the Senate Committee on Governmental Affairs*, 95th Cong., 1st Session (1977-1978) (Statement of Bruce D. Beaudin, Director of the D.C. Bail Agency, January 31, 1978).

[14] *Proposed Amendments To Title 23 of the District of Columbia Code: Hearings on H.R. 7747 Before The Subcommittee on Governmental Efficiency and the District of Columbia of the Senate Committee on Governmental Affairs*, 95th Cong., 1st Session (1970-1978) (Statement of Earl J. Silbert, United States Attorney for the District of Columbia, January 31, 1978).

[15] N. Bases & W. McDonald, *supra* note 11, at 89 in a letter from United States Attorney Harold H. Titus, Jr. which was appended to the report.

in 1971.[16] The moderate increase in the number of requests for pretrial detention by prosecutors in 1976 and 1977 may indicate a departure from the narrow selectivity of 1971.

In the District of Columbia detention statute there is a provision for a defendant who is currently on probation or parole to be detained for five days upon rearrest. During the five days, probation and parole officials should decide whether or not to revoke.[17] Under a D.C. Court of Appeals ruling, prosecutors were required to exhaust the five-day hold provision of the statute for possible revocation of probation or parole before they could move for a pretrial detention hearing.[18] The United States Attorney for the District of Columbia wrote in 1976 that if probation or parole is not revoked, "the courts interpret this as an indication that the defendant is not that dangerous and pretrial detention [sic] is therefore most difficult to obtain".[19] This statement by the United States Attorney is difficult to contradict since it is speculative; prosecutors were hesitant to ask for a pretrial detention hearing because they thought they might receive an adverse ruling. Regardless, the prosecutor's statement does not address at all why his office did not invoke the law against those not on probation or parole, but who qualified for a detention hearing. Prosecutors also were reluctant to ask for preventive detention because they found the pretrial detention provisions "as imposing virtually insurmountable, complex obstacles"[20] but the United States Attorney for the District of Columbia has stated that the provisions were "erroneously perceived" as obstacles.[21]

The United States Attorney's Office in the District of Columbia has taken the position that the provision in the detention statute which requires that a detained defendant be considered for release on the least restrictive alternative at the expiration of sixty days unless trial has commenced[22] is unrealistic.[23] There is no doubt that this time limit works a hardship on the resources of the prosecutor but it stands to reason that the cases the community is most concerned about—those posing danger to the community—should warrant increased attention. In the celebrated Hanafi Muslim case, in which twelve Hanafi Muslims captured three buildings in the heart of the District of Columbia in March of 1977 and held hundreds of hostages, the leader of the Muslims, Hamaas Abdul

[16] *See* N. Bases & W. McDonald, *supra* note 11, at 69 which explains that the law was invoked in 20 of the total of more than 6,000 felony cases in that period. However, 6,000 is the total number of felony defendants, not how many would have qualified for a pretrial detention hearing.

[17] The Court Reform and Criminal Procedure Act of 1970, 23 D. C. Code §1322(e) (1970).

[18] Briscoe v. United States, No. 5800 (D.C. App. May 11, 1971).

[19] Silbert, Pre-trial Detention: Trying to Find A Common Sense Solution, Washington Post, April 8, 1976, (D.C. Section) at 2.

[20] Silbert, *supra* note 19.

[21] *Id.*

[22] 23 D.C. Code §1322(b)(1).

[23] Silbert, *supra* note 14; Silbert, *supra* note 19.

Khaalis was initially released at presentment through negotiations with the prosecutor made prior to releasing hostages. He was subsequently detained after a pretrial detention hearing twenty days later for reasons unimportant here. The point is, in this case, with multiple defendants, multiple lawyers, extensive evidence to prepare, numerous witnesses, *etc.*, trial commenced sixty days later. Even in a case this complex, the system was able to focus its resources to permit the commencement of trial within the statutory time period.

Finally, prosecutors have argued at the detention hearing they must disclose evidence and produce witnesses and that they fear for the safety of the witnesses.[24] This may have been necessary in some cases to prove that there was a "substantial probability" that the defendant commited the offense for which he was present before the judicial officer; in other cases, he could prove that there was "substantial probability" by proffer.[25] At any rate, in the District, only rarely did the prosecutor have to make that choice: either to present witnesses or to have the defendant released on conditions. The reason that he did not have to make that choice was that the defendant was more often detained pretrial *sub rosa* without the necessity of disclosing witnesses. In fact, there was no incentive to ask for pretrial detention. Detention was accomplished with the use of money bond.[26] Whatever the reasons were for the failure of the prosecutor to invoke preventive detention the conclusion that pretrial detention has proven ineffective in the District of Columbia cannot be drawn. It was underutilized primarily because there were easier ways to detain people: through the use of high money bonds and by invoking the provisions relative to parole and probation. Whether the statute is effective or not will not be apparent until it is utilized as was envisioned by its proponents.

The constitutionality of pretrial detention has been argued for some time and has been the subject of much scholarly debate.[27] Although there has been no determinative decision by the Supreme Court and predictions on how the Supreme Court might rule are speculative, this Standard takes the position that its provisions are constitutional.

Although it is not within the scope of this Commentary to give an exhaustive review of the constitutional issues involved, a brief examination of the eighth amendment might be helpful. Much of the current debate focuses on this amendment, which provides that "Excessive bail should

---

[24] Greene, Freeing Dangerous Suspects Assailed, Washington Post, April 1, 1976, at A1, A7.

[25] 23 D.C. Code §1322(b)(2)(c).

[26] N. Bases & W. McDonald, *supra* note 11, at 72.

[27] *See* Altman & Cunningham, *Preventive Detention*, 36 Geo.Wash.L. Rev. 178 (1967); Foote, *The Coming Constitutional Crisis in Bail*: I & II, 113 U.Pa.L.Rev. 959, 1125 (1965); Hess, *Pretrial Detention and the 1970 District of Columbia Crime Act—The Next Step in Bail Reform*, 37 Brooklyn L.Rev. 277 (1971); Hickey, *Preventive Detention and The Crime of Being Dangerous*, 58 Geo. L.J. 287 (1969); Meyer, *Constitutionality of Pretrial Detention* (pts. 1&2), 60 Geo. L.J. 1139, 1381 (1972); Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 Va.L.Rev. 1223 (1969); Tribe, *An Ounce of Detention: Preventive Justive in the World of John Mitchell*, 56Va. L. Rev. 371 (1970); Note, *Preventive Detention Before Trial*, 79 Harv. L. Rev. 1489 (1966).

not be required. . ."[28] The controversy has swelled over whether this provision means that there is an absolute right to bail or that if a statute permits bail, then that bail should not be excessive. On the one hand, the Supreme Court in *Stack* v. *Boyle*, 342 U.S. 1 (1951) stated that:

> From the passage of the Judiciary Act of 1789 . . . to the present Federal Rules of Criminal Procedure . . . federal law has unequivocally provided that a person arrested for a non-capital offense *shall be admitted to bail.* 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 this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning* . . . . The modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment (emphasis added). 342 U.S. at 4-5.

This passage seems to indicate the Supreme Court's view that the right to bail secures the presumption of innocence and therefore is an absolute right.

Yet, on the other hand, the Supreme Court noted in *Carlson* v. *Landon*, 342 U.S. 524 (1952) in deciding whether aliens subject to deportation could be held without bail:

> The bail clause was lifted with slight changes from the English Bill of Rights Act. In England *that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail.* When this clause was carried over into our Bill of Rights, *nothing was said that indicated any different concept.* The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. *Indeed, the very language of the Amendment fails to say all arrests must be bailable* (emphasis added). 342 U.S. at 545-546.

Thus, the Supreme Court in *Carlson* seems to be saying that there is no right to bail in all cases and leads to the conclusion that the eighth amendment prohibits imposing excessive bail in cases in which the law provides for release on bail. The language in *Carlson* appears to be consistent with other history surrounding the establishment of the eighth amendment. As Dr. Hermine Herta Meyer notes:

> It is, however, clear from the history of the American Bill of Rights that the framers did not wish to freeze an inflexible right to bail into the United States Constitution, because none of the proposals for the amendment of the Constitution made by the states or by important statesman suggested a constitutional right to bail, although a number of them suggested an excessive bail clause. Accordingly, Congress, almost

[28]U.S. Const. amend. VIII.

simultaneously, enacted a statutory right to bail in noncapital cases in the Federal Judiciary Act of 1789, but included only the excessive bail clause in the Constitution. (footnotes omitted).[29]

It is beyond the scope of this Commentary to argue the constitutionality of this Standard as it relates to the fourteenth amendment; [30] although it is believed that a pretrial detention statute consistent with this Standard would survive attack on the basis that it violates due process of law and/or the equal protection clause.

Suffice to say, this Standard comports with substantive due process in that it is a reasonable means[31] to achieve a necessary goal,[32] *i.e.*, preventing pretrial crime. It comports with procedural due process in that the Standard provides for notice[33] and a hearing[34] conducted with essential fairness[35] (with counsel present, opportunity to confront witnesses and opportunity to present evidence.)

Suffice to say, this Standard comports with the equal protection clause and presents the position that preventing pretrial crime is a "compelling governmental interest,"[36] that a statute providing for pretrial detention consistent with this Standard and dividing defendants into classifications of those detained and not detained is not "invidious discrimination"[37] is not "wholly unrelated to the objective of [the] statute."[38] and is thus not violative of the equal protection clause.

A. Criteria for Pretrial Detention.

As noted above, it is anticipated that most defendants will be released pretrial and that the use of pretrial detention will be minimal. It is for this reason and for the reason that current *sub rosa* pretrial detention has elements of arbitrariness and unaccountability that this Standard delineates the specific restrictive findings which must be made prior to an order for pretrial detention.

Basically, a pretrial detention hearing is initiated for those defendants who pose a substantial risk of flight, a substantial threat to the safety of

---

[29] Meyer, *supra* note 26, at 1455.

[30] ". . .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 law." U.S. Const. amend. XIV.

[31] *See generally* Frank v. Maryland, 359 U.S. 360, 371 (1959).

[32] *See generally* Zemel v. Rusk, 381 U.S. 1, 14 (1965).

[33] *See generally* Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1943).

[34] *See generally* Powell v. Alabama, 287 U.S. 4-5 (1932).

[35] *See generally* Hanrah v. Larche, 363 U.S. 420 (1959).

[36] *See generally* Shapiro v. Thompson, 394 U.S. 618, 634, 639 (1969).

[37] *See generally* Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

[38] *See generally* Reed v. Reed, 404 U.S. 71, 76 (1971).

the community or a threat to the integrity of the judicial process. In all three situations, the court must find that there is a substantial probability that the defendant committed the offense for which he is presently before the court. The "substantial probability" standard is suggested because since an individual's liberty is at stake, any lesser standard would be inadequate. "Beyond a reasonable doubt" is not recommended because such a standard would in fact necessitate a full-blown trial.

Finally, a finding of substantial probability is necessary to prevent the detention of any individual on a police charge based only on probable cause.

1. In addition, the court must find by clear and convincing evidence that the defendant poses a substantial risk of flight. The court should review prior behavior, specifically a conviction for, or pending charge of, unlawful flight to avoid prosecution, or present intent to flee—either expressed or implied. It should be noted that the Standard is directed at risk of flight, not nonappearance. Nonappearance, although a disruption of the judicial process, is not viewed as an intentional attempt to deprive the jurisdiction of the ability to prosecute. Imposition of additional conditions of release should be used to minimize the possibility of nonappearance. This part of the Standard is limited to cases where the defendant is charged with a felony; misdemeanors are excluded, reflecting the fact that most jurisdictions in making them non-extraditable do not consider their prosecution of the utmost importance. Assuming that the court has found all of the above in accordance with Standard VII A(1)(a)(b) or (c), the court still should not automatically order pretrial detention. It must also find that no condition or combination of conditions will reasonably minimize the substantial risk of flight.

2. The court can also order detention when it finds by clear and convincing evidence that the defendant poses a substantial threat of danger to the community.

This part of the Standard is limited to defendants charged with "crimes of violence" and its rationale is to prevent commission of additional crimes of violence.

While Standard VII A(2)(a) and (b) deal with past behavior involving convictions for, or pending charges of crimes of violence, (c) is directed at behavior involving crime which may not have led to adult criminal prosecution. VII A(2)(c) would permit the detention of a psychotic defendant charged with rape who might previously have been found not guilty by reason of insanity or who might have been found "involved" in juvenile prosecutions for the same or similar offenses.

Again, where the risk can be minimized by the imposition of conditions, the court should not order pretrial detention.

3. Finally, the court can order pretrial detention when it finds by clear and convincing evidence that the defendant poses a threat to the integrity of the judicial process. This part of the Standard is self-explanatory and is necessary for the orderly administration of criminal justice.[39]

[39] Carbo v. U.S., 82 S.Ct. 662 (1962); U.S. v. Gilbert, 425 F.2d 490 (D.C. Cir. 1969); Blunt v. U.S., 322 A.2d 579 (D.C.C.A. 1974).

The court may find that the risk may be minimized by the use of conditions.

B. Requirement of A Hearing.

The court should hold a pretrial detention hearing prior to ordering detention.

1. The hearing should be initiated by the prosecutor who should make a motion for the hearing. The hearing can be held anytime the defendant is before the court, and should be held within five days of the motion; depending on whether continuances are granted it could be held in less than five days. In light of the burden of going forward and the burden of proof resting with the prosecutor, the court should not initiate the hearing *sua sponte;* the Standard reflects this. Because the defendant could be detained for up to five days prior to the hearing, this Standard requires the prosecutor to file with the motion an affidavit showing probable cause for pretrial detention. Provision for the defendant to be detained pending the hearing is made so that the purpose of detention under this Standard might not be thwarted pending that hearing.

2. This part of Standard VII is included to give the defendant procedural safeguards prior to an order of detention. Both burdens rest with the prosecutor because there is a presumption of release on promise to appear.

3. Any testimony given by the defendant should be inadmissible on the issue of guilt. It would be unfair to make the defendant choose between remaining silent and challenging pretrial detention through his own testimony.

4. A verbatim record and statement of reasons and evidence relied upon should be included with the order to facilitate appeal. This requirement is intended to obviate the problem of appeal now existing with *sub rosa* pretrial detention where an unarticulated finding of danger to the community is made. In jurisdictions where this hearing is conducted by a court not of record, there should be, at a minimum, the statement provided for in this Standard.

C. Review of Status of Pretrial Detainees.

There should be an ongoing process of review of all persons detained pretrial. Such review should take into consideration any change in circumstances which might warrant release on less restrictive conditions and, at the same time, should make sure that the prescribed time limits are complied with.[40]

D. Right to Accelerated Appeal.

The right to an expedited appeal is provided for because of the serious nature of pretrial detention.

---

[40] *See* Fed. R. Cr. P. 46(g).

E. Requirement of Trial Within Specified Period.

The sixty day time limit has been included so that those detained pretrial do not languish in jail; the ninety day time limit has been included so that if detention is ordered at some point after presentment, the defendant is brought to trial within a reasonable period or is released. Unlike provisions in the Speedy Trial Act,[41] if the prescribed time expires, the defendant must be released on the least restrictive conditions necessary, but the case need not be dismissed.

F. Conditions of Detention for Pretrial Detainees.

This Standard takes the position that, because pretrial detainees are in a completely different situation from those convicted of crimes, they should be housed in different locations. Where this is not practicable, they should be held in areas within the same facility separate from convicted inmates.

Regardless of the place of confinement it must be remembered that pretrial detainees are confined only for:

> safe custody, not for punishment. Therefore, in this dubious interval between the commitment and the trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only.[42]

Or as the United States Court of Appeals for the Second Circuit, in *Rhem* v. *Malcolm* 507 F.2d 333 (1974), noted in differentiating between pretrial detainees and convicted inmates:

> Here we are concerned only with the confinement of pretrial detainees and not convicted inmates. The difference between these two categories and the necessity for different treatment have been frequently emphasized. Pretrial detainees are no more than defendants waiting for trial, entitled to the presumption of innocence, a speedy trial and all the rights of bailees and other ordinary citizens except those necessary to assure their presence at trial and the security of the prison. In providing for their detention, correctional institutions must be more than mere depositories for human baggage and any deprivation or restriction of the detainees' rights beyond those which are necessary for confinement alone, must be justified by a compelling necessity. (citations omitted) 520 F.2d at 397.

Accordingly, this Standard suggests that the detainees have at least the same rights as those convicted of crimes and additional rights as well. The list of rights articulated in the Standard is not intended to be exhaustive but only suggests the direction the treatment of pretrial detainees should take.

---

[41] 18 U.S.C. 3161-3174 (Supp. IV 1975).

[42] 4 Blackstone Commentaries 30.

G. Credit for Time Serviced Prior to Trial.

This Standard provides for credit for time spent in detention against any minimum and maximum term imposed upon conviction. It is consistent with the ABA Standards Relating To Pretrial Release §5.12 (Approved Draft, 1968) and the ABA Standards Relating To Sentencing Alternatives and Procedures. This Standard is also consistent with provisions of the Bail Reform Act of 1966, 18 U.S.C. 3568.

VIII. A PRETRIAL SERVICES AGENCY SHOULD ESTABLISH SPECIFIC GOALS TO ENSURE EQUAL AND JUST ADMINISTRATION OF LAWS GOVERNING RELEASE.

A. Each Jurisdiction Should Establish An Agency For Providing The Courts With The Information Necessary For Fixing Appropriate Conditions Of Release.

B. One Purpose Of The Pretrial Services Agency Should Be To Facilitate The Use of Nonfinancial Release Condtions To Insure That No Person Is Confined In Pretrial Custody Due To His Inability To Comply With Financial Conditions Of Release.

C. To Meet This Goal, The Pretrial Services Agency Or Its Equivalent Should Strive To Achieve The Following Objectives:

1. **Develop programs to permit judicial officers to maximize the rate of nonfinancial release for persons arrested and accused of crime;**
2. **Ensure the speedy release from custody or detention of persons awaiting trial;**
3. **Ensure the integrity of program standards to reduce inequities in the pretrial release system;**
4. **Minimize failures to appear in court;**
5. **Minimize the potential danger to the community posed by the release of certain persons;**
6. **Maximize program efficiency.**

COMMENTARY, Standard VIII

A. Establishment of Agency.

Virtually every major urban jurisdiction today contains some type of pretrial services agency designed to promote the use of nonfinancial release and/or deposit bail. Many smaller areas, while not having formal pretrial services agencies, have one or two persons on various staffs who have as their primary concern release on recognizance. Although it appears that separate programs have the greatest impact (perhaps because of their larger budgets), the cost of a separate agency is often beyond the capacity of small jurisdictions. It is recommended that even the smallest jurisdiction make at least one person available to monitor the use of nonfinancial release, even if that person must serve dual functions within the jurisdiction.

B. Purpose of Agency.

A pretrial services agency is considered to be any organization or individual whose purpose it is to facilitate the use of nonfinancial release; as such, it should work to improve the quality of justice through assuring the fairness and effectiveness of pretrial release practices. Pretrial release programs should provide those services necessary to enable the system to use

these standards effectively. By its actions, the pretrial services agency should promote the concept that a presumption of release on promise to appear results in fair and viable systems of pretrial release.

C. Objectives To Be Pursued.

1. Support development of programs designed to maximize the rate of nonfinancial release. The pretrial services agency should continually work toward expansion of the use of nonfinancial release. The agency should monitor its own operations to assure optimal use of existing resources and aid the jurisdiction in the development of additional programs (such as summons to appear, citations, *etc.*) which will increase the frequency of use of nonfinancial release.

2. Promote Speedy release. Maximum cost savings and minimum imposition on the arrestee or accused are achieved through release of the accused at the earliest possible time after arrest. Pretrial services agencies should adapt operations to maximize their efficiency and speed, and should promote the use of forms of nonfinancial release which allow early release of the accused.

3. Seek to reduce inequities. By facilitating the use of pretrial release practices which are inherently less discriminatory than the traditional money bail system, the pretrial services agency should work towards the reduction of inequities. Along with such efforts, however, it is essential that the agency monitor its own operations to assure that the criteria it uses for determining appropriate conditions of release are themselves non-discriminatory.

4. Minimize failures to appear. The primary purpose of bail is to assure the appearance of the defendant at trial. It is essential that pretrial services agencies orient their operations—criteria for recommendations, notification systems, defendant supervision—toward this goal. Through the imposition of appropriate conditions of release for high risk defendants, and through comprehensive notification and defendant follow-up, pretrial services agencies can balance their mandate of maximizing the rate of nonfinancial release with maintaining low failure to appear rates.

5. Minimize the potential danger posed by the release of certain persons. Pretrial services agencies can lessen the risk of crime committed by persons on pretrial release by effectively evaluating a defendant's background and recommending appropriate release conditions for high risk defendants. Although there is disagreement on this objective, it must be conceded that public support for, and judicial confidence in, pretrial release depends on minimization of pretrial crime by persons released.

6. Maximize program efficiency. The pretrial services agency must operate efficiently if it is to attain the highest release rate and the lowest failure to appear rate. The objective of achieving operational efficiency is basic to bolstering credibility in the community and in the criminal justice system as well.

IX. PRETRIAL SERVICES AGENCIES SHOULD STRUCTURE THEIR FUNCTIONS TO MEET THE NEEDS OF THEIR OWN JURISDICTION AS WELL AS NEEDS OF OTHER JURISDICTIONS.

A. The Pretrial Services Agency, Regardless Of Its Position In The Organizational Structure Of The Criminal Justice System, Should Provide Unbiased, Factual Information.

B. Pretrial Services Agencies Should Adapt Their Own Organizational System And Staffing To Fit The Needs Of The Jurisdiction.

C. Pretrial Services Agencies Should Work With Other Agencies To Assure Continued Utility To The System And Integration Within The System.

D. Pretrial Services Agencies Should Work With Pretrial Services Agencies In Other Jurisdictions When Information About, Or Supervision Of, An Accused Is Necessary In Those Other Jurisdictions.

COMMENTARY, Standard IX

A. Pretrial Services Agency As Fact-Finder.

Pretrial services agencies should operate as neutral components of the criminal justice system and should strive to avoid any bias toward the defense or the prosecution. They should convey unbiased information to the court. It should be clear that if a pretrial agency slants the factual information reported to the court, the court will place less credence in the report and the agency's recommendations. To maintain this objectivity, the pretrial services agencies should limit the scope of their operations and influence to matters directly related thereto. The only exception to this principle should be when the agency itself makes release decisions (such as issuance of citation at the stationhouse); in such cases, the program acts on behalf of the court and must operate within the authority delegated by the court. The pretrial services agency should be structured to insure independence. Whether it be located as part of a defender office, a prosecutor office, a probation office or the like it should define its own standards of operation. A program situated within a component of the system which has a vested interest may tend to adopt the attitude of its umbrella organization.[1]

Although alternative housing for pretrial services agencies has been discussed in several articles and monographs,[2] the two most significant

[1] *See* Friedman, *The Evolution of A Bail Reform*, 7 Policy Sciences 281-313 (1976) which annotates the reduction in the number of persons released in Manhattan when the independent Manhattan Bail Project closed its doors in 1964 and its responsibilities were assumed by the New York City Office of Probation.

[2] *See, e.g.*, J. Galvin, 5 Instead of Jail: Pre- and Post-Trial Alternatives To Jail Incarceration 23-42 (1976); W. Thomas, Jr., Bail Reform in America 127-133 (1976); F. Dill, Bail and Bail Reform: A Sociological Study (1972) (Ph.D. dissertation at University of California, Berkley).

factors affecting organizational placement of the pretrial services agency appear to be jurisdictional practices and funding. Position and structure are generally determined by the characteristics of the jurisdiction; therefore no specific recommendations have been made on these subjects. Rather, it is suggested that answers to the following questions are relevant to program development:

— To what degree will the program reflect the opinions, attitudes, or biases of its supervisory organization, and to what degree might such a reflection compromise the program's potential effectiveness and its neutral posture?

— How will the nature of the supervisory organization affect the program's credibility: will association between the supervisory structure and the agency in the minds of other persons aid or detract from program credibility?

— How will the nature of the supervisory structure affect the program's access to needed information?

— What are the effects of different supervisory structures on program funding? On a long-range basis, will the nature of the supervisory structure tend to enhance or impede the agency's chances of becoming a permanent component of the criminal justice system?

— Is the supervisory structure a flexible one? Can the program grow in effectiveness and overall role in the criminal justice system, or might it become stagnant for fear of expansion or change?

B. Staffing Of Pretrial Services Agency.

Because the needs of jurisdictions vary widely, no specific recommendations on program staffing have been made. The following considerations which are based on the experiences of program administrators and the observations of researchers in the field, may be helpful in the design of program staffs:[3]

1. In all but the smallest of pretrial services agencies it appears essential that the upper management of the agency be full-time professional staff, with experience not only in criminal justice but knowledge of the pretrial release field as well.

2. The remaining staff of the pretrial services agencies may be either full or part-time, depending on budget and staff resource needs. Part-time staff allow substantial flexibility in assignments and a larger pool of talent from which to select permanent staff. At the same time, a part time staff may pose a significant supervision problem if the part-time work encompasses irregular hours and may also require proportionately more training time per staff person than full-time personnel. Full-time staffs may be less likely to have a high turn-over rate. Part-time staffs, frequently drawn from the student population at local colleges and graduate schools turn over more quickly. Accordingly, a full-time staff lends continuity

[3] *See generally* Galvin, *supra* note 2, 23-42; National Center For State Courts, An Evaluation of Policy—Related Research On The Effectiveness of Pretrial Release Programs 50; Thomas, *supra* note 2, 132-133.

and stability to the program. The operational effectiveness of the full-time staff should be closely monitored because the intense nature of the work and the built-in repetition of interviewing may have a deteriorating effect.

3. Regardless of the composition of the staff, the personnel of the pretrial services agency should be committed to the basic principles of the use of nonfinancial release. While no specific education or employment backgrounds are recommended, persons whose backgrounds or attitudes might compromise the procedures, philosophies, or neutral posture of the agency are generally less desirable than persons without such views or backgrounds.

4. All staff of the pretrial services agency have some degree of interaction with other personnel of the criminal justice system. The lines of authority and responsibility must be sharply defined in order that the role of the representative is clearly known to the staff and other agencies as well.

5. Many agencies make extensive use of volunteer staffs. The use of volunteers may pose some difficulties such as unreliability and high turnover; however, careful selection of volunteers can result in an inexpensive but highly effective work-force. Again, commitment to the basic principles of nonfinancial release is critical.

C. Functioning Within The System.

The pretrial services agency should cooperate with other agencies providing pretrial services, *e.g.*, diversion programs and community treatment facilities. Only through this cooperation can the system offer nonduplicative services and assure that equal services are provided to all defendants.

In addition, it is essential that the pretrial services agency inform the community of the benefits the community receives through the very existence of the agency as well as through increased use of nonfinancial release. Meetings with law-makers are critical. Contact with the press is helpful. Presence on community organizations or speaking at community meetings is advantageous. Community support is vital to the life of the agency. Although community approval of every agency position is certainly not necessary, without community support the agency will not continue to exist.

Finally, trouble-shooting meetings with the courts, the police, the prosecution and the defense bar are necessary to assure that the release process is smooth and fair.

D. Functioning With Other Jurisdictions.

Pretrial services agencies should make arrangements to call upon each other for factual investigations and supervision of defendants arrested and charged in foreign jurisdictions. (While agreements of this nature may occur on an *ad hoc* basis certainly an Interstate Compact of some sort would be more appropriate.) Judicial officers are much more likely to release transients on nonfinancial conditions if a background check has been made and agreement for the supervision of that transient has been

forthcoming from a pretrial services agency where the transient lives.

In some states, New York, California, Michigan, Colorado, and Ohio, for instance, statewide organizations have been formed to assist with the implementation and development of pretrial release and pretrial services. On a national level, pretrial services agencies should keep informed of the current professional and legal developments in the field, and in turn, should contribute to such activities.

X. THE PRETRIAL SERVICES AGENCY SHOULD PROVIDE DIRECT SERVICES TO PRETRIAL RELEASEES AND THE COURT AND SHOULD COORDINATE OTHER SERVICES WITH OTHER AGENCIES FOR THE BENEFIT OF PRETRIAL RELEASEES.

A. The Pretrial Services Agency Should Provide Services Necessary To Assure Efficient Use Of Nonfinancial Release. These Services Should Include, But Not Be Limited To:

1. Availability of personnel for interviewing arrestees at any time;
2. Collection and verification of information pertinent to release decisions;
3. Communication of a written summary of interview information and recommendations to judicial officers or agencies responsible for making release decisions;
4. Appearance in court by staff representatives to answer questions concerning the agency's report and recommendations and to explain conditions of release and sanctions for non-compliance;
5. Notification to defendants of upcoming court dates;
6. Maintenance of a system to track developments in the court process for defendants;
7. The monitoring of compliance with release conditions and preparation of reports reflecting compliance or noncompliance for appropriate officials; and
8. Maintenance of lists of detained persons and assistance in developing alternative release plans for defendants ineligible for unconditional release on recognizance.

B. The Pretrial Services Agency Should Also Provide Other Services Not Directly Related To The Release Decision But Which Are Appropriate To Its Role, Its Access To Information, And Its Relationship To Defendants. Such Services, However, Should Be Limited To Those Which Do Not Conflict With The Agency's Primary Responsibility Of Providing Neutral Aid To Facilitate Nonfinancial Release And Which Do Not Infringe Upon A Defendant's Rights. Such Services May Include, But Not Be Limited To:

1. Development of appropriate access to community services;
2. Assistance in searching for and returning fugitives;
3. Assistance to corrections officials in the compilation of pre-sentence reports or direct submission of those reports by providing information relating to compliance with release conditions by defendants on pretrial release.

C. The Pretrial Services Agency Should Cooperate With Other Agencies Providing Services To Defendants To Assure That Comprehensive Services Are Available. Such Cooperation May Include But Not Be Limited To:

1. Assistance to other programs which may intervene in the case process at a later point (*e.g.*, diversion programs) through the provision of any information which is not considered confidential to the pretrial release program;
2. Arrangements with other pretrial services programs for cross-jurisdictional supervision and provision of services to defendants and for the exchange of information relevant to the release decision and compliance with conditions of release.

COMMENTARY, Standard X

A. Provision Of Services Necessary To Efficient Use Of Nonfinancial Release.

Pretrial services agencies should strive to deliver comprehensive services to defendants in order to maximize the use of nonfinancial release and to serve better the criminal justice system. These services should include, but not be limited to:

1. Availability of personnel for interviewing arrestees twenty-four hours a day, seven days a week so that no accused remains in custody because of bureaucratic deficiencies on the part of the pretrial services agency.

2. Collection and verification of relevant release information. The agency should collect information about the defendant's community ties (including residence, employment and family status), criminal record, pending charges and post-conviction status from the defendant and from police and court records. Information acquired from the defendant should be verified by the pretrial services agency prior to submission of a report and recommendation. The verification required may vary depending on the seriousness of the charges and nature of information. In all instances, places where the defendant can be contacted, *i.e.*, address and telephone number, should be verified, if only through documents found on the defendant's person. Information regarding the defendant's criminal history should be verified through police and court records. The report submitted to the court should contain information about convictions only. For persons under twenty-one years of age, information about juvenile convictions for criminal offenses and failures to appear should be gathered but should not be made part of the public record in keeping with the letter and spirit of laws in most jurisdictions protecting the confidentiality of that information. Accordingly, any information concerning juvenile convictions should be submitted to the judicial officer either *in camera* or at a bench conference. To the extent that a judicial officer bases his release decision on this information and records this fact in writing, that record should be sealed and not be made public. In all cases, the pretrial services agency should verify the defendant's bail status, probation and parole status, if any, and any history of failures to appear in court. (See Standard III D and COMMENTARY, Standard III D for further examination of the pretrial investigation).

3. Communication of written report and recommendation to the court. Information obtained in the pretrial services agency's investigation should be presented to the court concisely in writing. Recommendations based on the agency's evaluation may be presented, and may cover not only the type of release recommended for the defendant, but conditions of release as well. The information and/or recommendation should be presented to the court at or before the time initial release decisions are made. A copy of the agency's recommendation should be made available to defense counsel and the prosecution and be filed in the court jacket to provide a record and aid in subsequent review proceedings.

4. Appearance in court by staff representatives. An agency representative should be available at the time of initial release decision to present the agency's recommendation verbally to the court. He should be able to answer any questions by the court or other parties, and explain to the defendant the conditions of release and the sanctions for noncompliance.

5. Notification. To comply with one of the basic conditions of release, appearance in court, defendants need to know when and where they are to appear. While some court systems maintain comprehensive notification systems, the function of defendant notification is often carried out or supplemented by the pretrial services agency. Written notification should include the date, time, and exact location of the court appearance as well as the telephone number and name of a person to call if the defendant has questions regarding the time and place of appearance. In courts using continuous calendaring, the pretrial services agency should record the scheduled court date and check with the defendant after court to assure he understands the date and time of his next appearance. Written notification may be supplemented by telephone contact with the defendant within a few days prior to court appearance.[1]

6. Maintenance of Case-Tracking System. The pretrial services agency should maintain a case-tracking system which includes information on charges, court appearances, failures to appear, adjudication, and sentencing, as well as time spans between arrest, notification of charges, release, and case disposition. Without this information, the pretrial services agency could not answer questions from individual defendants nor could it monitor the overall efficiency of the system.

7. The monitoring of compliance. The pretrial services agency should monitor compliance with all conditions of release, including appearance in court and any other court-imposed conditions of release. Every effort should be made to minimize failures to appear. In the process of notification of court appearances, the agency should stress the importance of appearing as scheduled. If it becomes known that a defendant will not be able to appear as scheduled (for instance, due to illness), the agency should verify that the defendant's attorney will attempt to reschedule the court date. When a defendant fails to appear in court, the pretrial services agency should immediately attempt to locate the defendant and persuade him

[1] *See generally,* S. Clarke, J.L. Freeman, and G. Koch, The Effectiveness of Bail Systems: An Analysis of Failure to Appear in Court and Rearrest While on Bail (1976).

to return to court, and should cooperate with other individuals in efforts to locate the defendant.

If it appears that the defendant has not complied with a condition of release, the agency should weigh the seriousness of the violation prior to submitting a report to the court. If the violation is minor, and the situation can be remedied without recourse to the court, every effort should be made to resolve the situation. In cases of serious violations, the agency should submit a report in writing to the court, as well as to the defendant, his attorney, and the prosecution. If a warrant is issued for the defendant's arrest, the agency should cooperate with persons executing that warrant.

8. Aid to persons in detention. The agency should compile a list of all persons detained after their first court appearance to ensure that the court, prosecution, and defense counsel are aware of the detention. For those persons detained pretrial—whether it be the result of an initial detention hearing, a hearing after failure to post cash deposit bond or revocation, monitoring is particularly important. In those jurisdictions which do not follow Standard V and its COMMENTARY—either in eliminating all financial conditions or providing for a detention hearing if cash deposit bond is not posted—monitoring is equally important. Not only do circumstances change so that nonfinancial release might be a possibility upon review, but in jurisdictions that have speedy trial provisions for those detained pretrial (such as suggested in Standard VI C (4) and Standard VII E), attention must be given in order to insure priority on the court calendar. The pretrial services agency should undertake the responsibility of insuring that records are kept of scheduled review dates for persons who are detained prior to trial; that automatic bi-weekly review of the status of persons in detention over ten days takes place; that the court is provided with the necessary information for the review; and that all hearings following temporary detention orders—which are to occur within 72 hours of the temporary detention order—take place as scheduled. (See generally Standard VI C and Standard VII).

(a) Information provided to the court for monthly review should include each defendant's name, date of last court appearance, reason for detention, date first ordered detained, and date of next scheduled court appearance (if known).

(b) Before any court hearing for purposes of review of release conditions, the agency staff should attempt to gain any additional information or verification which may alter conditions of release set by the court. This should include locating persons who, or organizations which, might serve as custodians for third-party release as well as investigation of the propriety of alternative conditions of release which might enable the safe release of the defendant during the pretrial period.

(c) The pretrial services agency should assist in the development of release plans for high risk defendants by locating appropriate treatment programs, facilitating any evaluation conducted of defendant needs, *etc.* The agency should be available to provide information bearing on release decisions to the court.

B. Provision Of Other Services.

In addition to those activities directly related to the release of defendants prior to trial, the pretrial services agency is often in an excellent position to provide other kinds of services to the jurisdiction. Provision of such services can aid the agency in enhancing its utility to the jurisdiction and its credibility with the courts. In determining whether or not to expand its services, however, the agency should examine proposed activities to assure that they will not detract from its primary objective of facilitating nonfinancial release in the greatest number of instances possible.

1. Many defendants on pretrial release need some type of social services, such as aid in obtaining employment, alcohol or drug abuse treatment, psychiatric or family counseling, housing, medical aid, vocational and educational guidance, day care, *etc.* The pretrial services agency should, at a minimum, maintain a list of referral agencies. In conjunction with these activities the agency should establish relationships with those agencies to permit referral of defendants who express need for such services and of persons who are charged with meeting a condition of release that is related to participating in some type of service. Some pretrial services agencies have developed limited capability for providing services in-house, such as general counseling and employment aid.

2. Failures to appear evoke different responses from different pretrial services agencies. Some agencies do not provide information to persons with the responsibility for executing warrants, while others maintain staffs with the power to arrest fugitive defendants. At a minimum, pretrial services agencies should adopt a policy of providing information to aid in returning defendants to the court. In all instances, the agency should attempt to locate and persuade defendants to return to the court voluntarily. Those agencies which have the power of arrest and which maintain staffs capable of searching for and retrieving fugitive defendants bypass some of the confidentiality problems which can arise as a result of law enforcement personnel seeking aid in locating defendants. (See Standard XII).

3. Defendants' behavior while on pretrial release may be of substantial aid to the court in determining appropriate sentences after conviction. If a defendant has complied with conditions of release, the court may consider that compliance justification for probation rather than incarceration. In keeping with its policy on confidentiality the pretrial services agency should make information on the degree of compliance available to persons conducting presentence investigations, and may actually aid in the investigation itself. The information collected by the pretrial services agency during its interview prior to recommendation often includes that needed to make a determination of eligibility for representation by appointed counsel. Since the release agency is usually the first organization to acquire such information after the individual's arrest, some jurisdictions may deem it appropriate for the agency to aid the public defender's office and the court by doing the indigency screening. The Standards do

not adopt that point of view. Because the defendant's income and assets are difficult to verify, they may become issues of contention and may jeopardize the ability of the agency to collect and verify other information. In many instances the fact of employment is relevant to the release issue while the amount of income is not. Bearing in mind the agency's primary goal—collection and verification of information for release purposes—where the income amount is in dispute the credibility of the agency and its ability to resolve conflicting information may be called into question. Reduced credibility with the system is too great a price to pay for the degree of assistance this procedure offers to the court.

C. Cooperation With Other Agencies.

1. The pretrial services agency's efforts are but some of the factors affecting the period prior to adjudication of a defendant's case. In addition to the programs of the pretrial services agency, other intervention programs—such as pretrial diversion—may be involved with the defendant. Whenever possible, the pretrial services agency (which is usually the first agency aside from law enforcement that the defendant is in contact with) should aid these other programs by providing non-confidential information, coordinating screening for eligibility, explaining available services to defendants, coordinating service delivery, *etc.*

2. Many defendants have charges pending in more than one jurisdiction. In such instances, the pretrial services agency should establish agreements with other pretrial services organizations to permit cross-jurisdictional supervision of defendants. These kinds of inter-agency compacts can mean the difference between detention and release for a defendant. In addition, the compact should include the potential for exchange of information on a regular basis. This information should be non-confidential, and may pertain either to specific defendants or to general agency operations and services. (See Standard XII).

XI. THE PRETRIAL SERVICES AGENCY SHOULD DEVELOP A SYSTEM FOR EVALUATING THE NATURE AND DEGREE OF RISK POSED BY THE RELEASE OF DEFENDANTS NOT RELEASED ON CITATION; IT SHOULD IN EVERY CASE FILE A WRITTEN REPORT WITH THE COURT STATING INFORMATION GATHERED AT THE INITIAL INQUIRY, BY WHOM VERIFIED, RECOMMENDATIONS CONCERNING RELEASE AND REASONS FOR THOSE RECOMMENDATIONS.

A. The Pretrial Services Agency In Developing A System For Evaluation Of Risk Posed By Defendants Should Provide In That Recommendation Scheme That:

1. No group of defendants should be excluded from consideration merely because of the offense charged;
2. Criteria for release recommendations should not discriminate directly or indirectly against a class of defendants based on age, sex, race, economic status or other factors not related to risk of nonappearance or pretrial crime;
3. Release recommendations be based upon objective criteria;
4. Evaluations of defendants and release recommendations be individual.

B. The Pretrial Services Agency Should Submit Release Recommendations To The Court Along With Information Obtained In The Initial Inquiry; If Information Is Not Available To The Agency On All Factors Relevant To The Release Decision, Its Recommendation For Release Conditions Should Be Qualified To That Effect.

1. Since the agency should not inquire into the details of the charge, the agency should state in its report that its recommendations are not based on the nature and circumstances of the charge.
2. Since the release recommendations may depend on whether information is verified, such verification or lack thereof should be articulated in the report.
3. The report should state whether the recommendation is conditional or whether any other information is currently unavailable to the Agency.

COMMENTARY, Standard XI

A. Establishing A Recommendation Scheme.[1]

Because the bases for recommendations may vary due to the nature and needs of individual jurisdictions these Standards do not propose a specific

[1] For suggestions on what to consider in establishing a recommendation scheme, see S. Clarke, J.L. Freeman, and G. Koch, The Effectiveness of Bail Systems: An Analysis of Failure to Appear in Court and Rearrest While on Bail 21-24 (1976); R. Wilson, A Practical Procedure for Developing and Updating Release On Recognizance Criteria (1975).

recommendation scheme. Nevertheless, there are certain guidelines which should be followed in establishing a system for evaluating the nature and degree of risk posed by the release of defendants.

1. The offense charged may have no effect on the likelihood of appearance in court or of committing pretrial crime. For example, there is no empirical evidence that a person charged with murder may pose a greater risk of failure to appear or danger to the community than a defendant charged with petit larceny. In fact, in some situations, the reverse may be true. The alleged murderer who turns himself in to the police may be less likely to flee than one arrested on a larceny charge while trying to flee from a department store. Accordingly, no person should be excluded from release consideration solely on the basis of the offense charged.

2. Release recommendations should not discriminate against a class of persons based on age, sex, race, economic status or other factors irrelevant to risk of nonappearance or pretrial crime. The recommendation criteria should be equitable and consistent with the equal protection clause of the fourteenth amendment.

3. Evaluations of defendants and release recommendations should be individualized and should take into consideration factors relevant to appearance and pretrial crime as applied to the individual defendant. As Justice Jackson stated in his concurring opinion in *Stack* v. *Boyle*[2] where twelve defendants charged with conspiring to violate the Smith Act were uniformly held on $50,000 bail:

> Each defendant stands before the bar of justice as an individual. Even on a conspiracy charge defendants do not lose their separateness or identity. . . . Each accused is entitled to any benefits due his good record and misdeeds or a bad record should prejudice only those 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. 342 U.S. at 9.

4. In order to remove individual bias, release recommendations should be based upon objective criteria. This is the only way to remove arbitrariness and approach equal treatment for all defendants.[3] Although it is virtually impossible to develop criteria to cover every set of circumstances, borderline cases—those cases which the criteria do not address—should be resolved on an ongoing basis with the result that more refined objective criteria ensue. In addition, the existence of an objective criteria recommendation scheme permits utilization of untrained volunteers in emergency situations. It also eases, somewhat, the training problems associated with a high staff turnover rate.

---

[2] 342 U.S. 1 (1951).

[3] *See* Alberti v. Sheriff of Harris County, 406 F.Supp 649 (S.D. Tex. 1975) where the court ordered local judges to adopt an objective point system to prevent the denial of release on recognizance based on a "hunch."

B. Submitting Release Recommendations.

The release recommendations of the pretrial services agency should be submitted to the court with the agency's report about the information established during the initial inquiry. (See Standard III D). The report should also state what information relevant to the release consideration was unavailable to the agency in making the recommendation.

1. The position taken in these Standards is that the pretrial services agency should not inquire into any of the details of the charge other than to inquire whether or not the defendant lives with the complaining witness. (See *COMMENTARY*, Standard III D). Since the risk of danger to the community may be a valid consideration in making the release decision, the agency should inform the court that in making its recommendation, the agency did not consider that risk (if it in fact did not).
2. The report should also include whether the information was verified and, if verified, by whom it was verified. This is necessary because the agency's recommendation criteria may be dependent upon verification and the court may feel that verification increases the likelihood of reliability of the information obtained.
3. In some situations, information relevant to the release decision and therefore relevant to the agency's recommendation is unavailable despite the exercise of due diligence by the pretrial services agency. Nevertheless, a conditional recommendation should be made together with acknowledgement of the fact that relevant information was unavailable to the agency.

XII. INFORMATION OBTAINED DURING THE COURSE OF THE PRETRIAL SERVICES AGENCY'S INVESTIGATION AND DURING POST-RELEASE SUPERVISION OF DEFENDANTS SHOULD REMAIN CONFIDENTIAL WITH LIMITED EXCEPTIONS.

A. The Pretrial Services Agency Should Exercise Judgment In What Information Is Obtained From The Defendant And The Disclosure Of That Information.

1. The pretrial services agency should obtain from the defendant only that information which is directly related to release considerations. The agency should not seek to determine the circumstances surrounding arrest.

2. The pretrial services agency should exercise judgment in disclosing information that:

(a) will be submitted to the court for the purpose of setting conditions of release;
(b) may be used to provide notices of court appearances;
(c) may be used to notify the court of violations of conditions of release, including failure to appear;
(d) may be given to other service programs, *e.g.*, diversion, custodian, *etc.*;
(e) may be given to law enforcement officials attempting to serve process for failures to appear;
(f) may be used in pre-sentence reports.

3. At the time of the initial interview, the defendant should be clearly advised as to the above uses to which the information offered will or may be put.

B. No Information Other Than That Which is Public Information Should Be Released To Any Individual Or Organization Outside The Criminal Justice System Without The Express Permission Of The Defendant At Or Near The Time The Information Is To Be Released.

C. The Pretrial Services Agency Should Establish A Written Policy Regarding Defendants' Access To Their Own Files.

D. Information Contained In Agency Files Should Be Made Available For Research Purposes To Qualified Personnel Provided That No Single Defendant Be Identified In The Research Report By Name, Docket Number, Or Any Other Label Which Might Allow Identification.

E. Pretrial Services Agency Staff and Files Should Not Be Subject To Subpoena For Purposes Of Providing Information Relating To The

Agency's Investigation Or Monitoring Of The Defendant, Except When Such Information Is Necessary To The Prosecution Of Non-compliance With Conditions Of Release.

COMMENTARY, Standard XII

General. Pretrial services agencies collect and have access to a substantial amount of information on defendants' backgrounds. Frequently this information includes matters of a highly personal nature. While the agency is obligated to provide that information directly related to release decisions, it should maintain a general policy of confidentiality to retain credibility with defendants and the criminal justice system. No information obtained during the course of the agency's investigation or during the monitoring of conditions should be admissible on the issue of innocence or guilt.[1] Information which is released by the agency should not include, under any circumstances, highly personal material such as psychiatric evaluations.

A. Information Obtained From The Defendant And Disclosure To Other Criminal Justice Systems.

1. The interview of the defendant should focus on the defendant's ties to the community and other background information which might impact on the release decision. Questions about the circumstances surrounding the arrest other than to determine whether the defendant lives with the complaining witness should not be asked. (See COMMENTARY, Standard III D).

2. Judgment should be exercised in disclosing information that:

(a) will be submitted for bail-setting purposes in order to make certain extraneous prejudicial information is not submitted. For example, a series of arrests without convictions disclosed by the defendant should not be included in the report;

(b) may be used to provide notification of court appearances. While such disclosure may be essential to courts which notify defendants, it should not be disclosed to police officers investigating possible defendant involvement in other crimes;

(c) may be used to notify the court of violation(s) of conditions, including failure to appear. Again, extraneous prejudicial material should not be included;

(d) may be given to other service programs such as diversion programs. Diversion programs, for example, may have no need to know of prior civil commitments to mental hospitals;

(e) may be given to the police executing warrants for failure to appear. The pretrial services agency probably should not disclose references who verify the information obtained at the initial interview for fear that defendants will be unwilling to offer credible references knowing that they

[1] Minn. v. Winston, 219 N.W.2d 617 (Minn. 1974); 18 U.S.C. 3154 (Supp. IV 1975).

may be questioned by the police at a later date. In addition, disclosure of the name and address of such a reference who became an "unwitting participant" through the defendant and who may never have been contacted may lead to unwarranted intrusion upon the privacy of innocent third parties; and

(f) may be used in presentence reports. The pretrial services agency should restrict the information to general behavior and the defendant's compliance with release conditions, omitting any personal matters such as the details of a psychiatric report (unless, of course, the defendant consents.)

3. The defendant should be advised as to the uses to which the information offered may be put in order to make a knowing and intelligent waiver of his right to remain silent. The pretrial services agency should make it clear to the defendant that it will not ask for, nor should the defendant offer, details about the arrest or charge.

B. Nondisclosure To Outside Organizations.

The pretrial services agency should refrain from releasing any information which is not public to any individual or organization outside the criminal justice system without the express permission of the defendant at or near the time the information is to be released. This policy should extend to community organizations and social service agencies, as well as to the general public. Requests for information from welfare agencies attempting to locate fathers or domestic relations staff trying to confirm jurisdictional residence for individuals should be resisted.

C. Written Policy Of Disclosure.

The agency should establish a written policy on the extent to which defendants and/or other criminal justice personnel shall have access to defendant files. In general, defendants should be allowed access to their files in the presence of their attorneys. Forms should be drafted, signed by the defendant and his attorney, and placed in the agency files. At any time information is given a note describing the information, the date, the time, the person giving and the person to whom it is given should be made and put in the file.

D. Research Use Of Defendant Information.

Information in defendants' files may be used for purposes of research, management information, and evaluation, provided that no individual defendant can be identified by any label (name, docket number, *etc.*) in the report of the research. Access to agency files for research purposes should be limited to qualified personnel, and no person should be allowed to remove defendant files from the pretrial services agency office. In addition, no person or agency should be permitted access to agency files except under close supervision and purusant to a written agreement setting out the purposes of the research and the conditions under which access has been granted.

E. Agency Personnel And Files Should Generally Be Immune From Subpoena.

Except for subpoenas for information relating to the prosecution of noncompliance, pretrial services agency staff should not be subject to subpoena for purposes of providing testimony relating to the agency's initial interviewing or monitoring of the defendant. The agency should not be subpoenaed to any proceeding where a determination of innocence or guilt on the charge is being made. Finally, agency personnel should not be subject to subpoena for purposes of impeaching the defendant at trial with information given in his original interview with the agency.

XIII. THE PRETRIAL SERVICES AGENCY SHOULD MAINTAIN INFORMATION THAT PERMITS ONGOING MONITORING OF THE EFFECTIVENESS OF PRETRIAL RELEASE PRACTICES. IN ADDITION, THE AGENCY SHOULD CONDUCT PERIODIC STUDIES TO DETERMINE WHETHER THOSE PRACTICES NEED TO BE REASSESSED.

A. The Pretrial Services Agency Should Provide Jurisdiction-Wide Information Regarding Pretrial Release Practices.

B. The Pretrial Services Agency, To The Extent Possible, Should Engage In Research For The Purpose Of Planning.

COMMENTARY, Standard XIII

A. Providing Information On Pretrial Release Practices.

In any criminal justice system it is desirable to have one component that has access to all relevant information on pretrial practices in the system. Courts, police and corrections may all have access to the same information, but it logically falls to the pretrial services agency to be the component that reviews that information and becomes the catalyst for change; the other agencies focus their efforts over a broader and/or different spectrum of activity. The pretrial services agency's focus is on pretrial matters.

The raw data should be collected through an extensive management information system[1] or through periodic data collection. Efforts should be made to collect specific information at the time and place it is most readily available; care should be taken to avoid collection of information which is readily available in accurate form elsewhere in the system. In addition, the raw data should be maintained in a useable format. Whether the recording of data is through a management information system or periodic data collection, there are certain basic data directly related to the agency's goals and objectives and to the assumptions implicit in establishing a pretrial services agency. Accordingly, the pretrial services agency should collect or have access to the collection of the following data:[2]

[1] See Appendix C for a sample management information system that describes the relationship among objectives, assumptions, and the related data to be collected to measure the performance of the agency.

[2] The uses for each category are too numerous reasonably to articulate and explain in the Commentary. For example, the number of persons arrested would be needed to calculate the percentage released on nonfinancial release or detained pretrial (to see what the release practices of the jurisdiction are and to see whether agency services impact on release practices), to calculate the percentage who fail to appear (to see whether the agency is minimizing the failure to appear rate), *etc.* See Appendix C for uses of each category.

1. The number of persons arrested and charged with a criminal offense by misdemeanors and felonies (and further subdivided into the offense charged);
2. The number of persons released prior to trial on each form of release;
3. The number of persons detained prior to trial according to charge and the length of detention;
4. The number of persons who failed to appear at a scheduled court appearance (subdivided by charge and form of release);
5. The number of persons rearrested for criminal offenses (subdivided by initial charge and rearrest charge, and form of release[3]);
6. The number of persons convicted of criminal offenses and the types and lengths of sentences imposed (subdivided by charge and form of release or derention); and
7. The time spans between arrest, initial release from detention and case disposition.

The pretrial services agency should not only collect this information but monitor it as well to ensure that the operations of the agency achieve the agency goals expressed in these standards. It should review that information to ensure that pretrial release practices in the jurisdiction achieve the overall release goals articulated in these standards.[4]

Accordingly, the agency can serve as a catalyst for change in the system. Needless to say, performance statistics may offer strong support for change.

As a by-product, collection of this data can enhance agency credibility by providing a valuable information service to other components of the system; if it is collecting accurate information which would otherwise be unavailable or not in compiled format.

B. Information Gathering for Planning Purposes.

The pretrial services agency should not only monitor statistical data to see if goals are achieved, but should evaluate its own program in terms of agency action and desired impact on the system. Without this evaluation it would be impossible to ascertain whether the pretrial services agency caused the observed changes; without this evaluation it would be impossible to formulate plans about the most effective means for achieving a specific goal.

A frequent discussion in the area of program evaluation centers on the advantages and disadvantages of in-house versus consultant evaluators. In-house staff may have a greater understanding of program operations while consultants can often offer a fresh and unbiased viewpoint. Both approaches work, as long as the quality of the research is high.

Of more importance, however, is the role of the evaluation in relation to program operations. Program evaluations should be viewed as an aid to the improvement and refinement of agency procedures. To conduct an

[3] This figure should not include those rearrested for violation of conditions.

[4] For example, collection of some data would be necessary to ensure periodic review of pretrial detainees consistent with Standard VII C.

evaluation that will be useful to the program, the evaluator must demonstrate a thorough knowledge of agency operations, goals, and objectives. Active interaction between the evaluator and the staff, as well as feedback from the evaluator on a regular basis, increases the evaluator's utility.

Feedback from the management information system and program evaluation can provide useful tools for program planning. Existing agencies should continually reexamine their operations to determine whether or not they are optimizing service to the criminal justice system and to defendants. One of the largest areas of need in terms of research is in the planning of new programs. Frequently, new projects are funded, only to find that they are duplicating an existing service. While it is often not possible to conduct extensive research for program planning, some statistical evaluation of jurisdictional need and optimal program structure is necessary. The kinds of basic information listed earlier in this section can provide the framework for program planning if extensive discussions among planners and the courts, prosecutor's office, defense attorneys, law enforcement, and corrections officials occur.

Appendix A

—The Process—

At previous annual conferences of the National Association of Pretrial Services Agencies (hereinafter NAPSA), the membership expressed the need to develop standards for pretrial release and diversion that would reflect the experience and concerns of persons working in the field. After preliminary work by volunteer committees, NAPSA received a grant from the Law Enforcement Assistance Administration to develop standards and goals with a view toward improving the performance of courts and agencies providing pretrial services. The task of initial research and drafting of the Standards was assigned to two committees, one for release and the other for diversion. To elicit the views of the membership, a final working draft with commentaries was completed in April, 1977. It was distributed for review and comments at the NAPSA Annual Conference in Washington, D.C., May 10-13, 1977. This appendix outlines the response of the membership at that conference to the Conference Initial Draft of the Pretrial Release and Diversion Standards and Goals.

CONFERENCE REVIEW PROCEDURES

1. *Preliminary Review:* A few weeks prior to the Annual Conference, each pre-registered conference attendee was mailed the Introduction and Standards, without the Commentary to the Standards. The complete Conference Draft, including Introduction, Standards, and Commentary, was included in the Conference Notebook, and distributed to each conference participant at registration.

2. *Discussion Groups:* The conference program scheduled group discussions of the Standards and Goals on two consecutive mornings. Four workshops on pretrial release standards and four workshops on diversion standards were held simultaneously. Each workshop consisted of approximately twenty persons and was conducted by a Facilitator and Resource Person. The task of the Facilitator was to guide the discussion in a neutral fashion and to record and summarize the content of the discussion. A Resource Person who had participated in the development of the Conference Draft was present to clarify language of the draft, to participate in the discussion, and to obtain direct feedback on the substantive content of the Standards. A Workshop Coordinator met with the Facilitators in a training session prior to the workshops and again after each morning's discussion to collect and summarize the Facilitators' notes.

3. *Written Comments:* In addition, each Facilitator distributed a short form designed to elicit comments from each workshop participant. Participants were asked to express their opinions in more detail and to review any issues not sufficiently covered in the workshop discussions. These forms were distributed on the morning of the first workshop and

collected at the end of the conference. The written comments were synthesized into a report and submitted to the Standards and Goals Project committee. In addition, the regular conference evaluation form included space for comments on the Standards and Goals workshops. These comments were also forwarded to the Standards and Goals committee. Finally, the project committee received supplemental comments through individual correspondence.

Although the response of the conference participants was a valuable contribution, a number of problems were encountered in the administration of the feedback process. First, the format of the Conference Draft and the time available for reading the entire document were not conducive to complete review by the membership: many persons were able to read only the Standards, thus missing a number of critical issues covered in the Commentary. Second, the workshop setting, though productive as far as stimulating discussion, did not allow time to cover all major issues; the discussions tended to focus on a few highly controversial issues and on the opinions of a vocal few. Third, the review procedures did not produce the quantity of written responses initially anticipated.

In spite of these difficulties, however, the overall response to the Standards and Goals Workshops was positive. Many conference participants felt that they had ample opportunity to comment on the Standards and that they were making an important contribution to the development of NAPSA policy.

Responses To The Conference Draft.

There were a number of major areas in which Conference participants concurred with positions taken in the Standards and Goals Conference Draft. It was the consensus of the participants that there should be a presumption of release on a promise to appear for all defendants, that the primary concern of pretrial release systems should be assurance of appearance in court, that no defendant should be detained prior to trial on the basis of inability to meet financial conditions of release, and that due process should be required for hearings in which bail was set or in which revocation of release was considered. In a few other areas, however, Conference participants adopted positions of philosophy or methodology contrary to those expressed in the Conference draft.

One of the major disagreements among Conference participants was the overall approach taken in developing the standards and goals. The question which arose most frequently throughout the discussions was "Should the Standards and Goals reflect what we feel would be an 'ideal' system of pretrial release or diversion, or should the Standards and Goals be developed within the parameters of what we feel is achievable in the near future?"

On the one hand, many persons felt that with respect to goals particularly, NAPSA should articulate what it feels pretrial systems should be—regardless of political or practical realities. By doing this, it was thought, the document would articulate the ultimate objectives of reform of pretrial practices.

On the other hand, many Conference participants argued that approaching the Standards from the posture of the ideal world would limit their utility as timely guidelines for action. By being more realistic, they argued, the Standards might have greater impact on policy decisions currently being faced by the courts, legislators, and pretrial services agencies.

In the course of discussions, it was clear that both positions—the "ideal world" and a reality-orientation—often had merit. For example, after discussing what a "Goal" is and what a "standard" is, it was suggested that the elimination of financial conditions of release could be articulated as a goal, with the related standards addressing what could be done towards achieving that goal. Thus, the use of deposit bail could be addressed as an interim measure more desirable than commercial surety bail, but less desirable than a pretrial release system based solely on nonfinancial release. As a compromise, some felt that the standards could state the ideal with the commentary suggesting what avenues could be pursued to reach that ideal.

The areas of conflict discussed by the participants were in many ways predictable, they were areas that have long been debated by judges, legislators, administrators and pretrial services programs. Among the controversial release issues confronted were:

1. *Money Bail:* One of the most controversial discussions centered on the use of money bail. In the Conference Draft, this Standard maintained that the use of financial conditions of release should be minimized, and that if financial conditions were to be used, they should be in the form of cash deposit bail with the court as opposed to commercial surety bail. While it was noted in the Commentary to the Standard that the use of deposit bail did not eliminate potentially discriminatory effects of financial conditions of release, it did offer a greater degree of equity than reliance on bail bondsmen. The premise in including such a standard was that current pretrial release practices probably preclude total elimination of financial conditions of release. A large number of Conference participants took issue with the Standard, disagreeing not with the comments made regarding the use of deposit bail versus commercial surety bail, but with the word "minimize". It was felt that the *goal* should be the elimination of money bail altogether, since it is a form of compromise between traditional practices and complete use of non-financial release. By setting the Standard as "minimizing" the use of financial conditions, NAPSA would be falling short of its obligation to be in the forefront of bail reform. Almost all participants agreed that regardless of which position the Standard took—whether to eliminate money bail or to minimize the use of financial conditions—at a minimum, compensated sureties should be prohibited.

2. *the Use of Pretrial Detention:* The use of the bail process to protect society has been one of the main areas of controversy in the pretrial release field. As might be expected, agreement on this question—either in terms of standards or goals—was not forthcoming.

The Conference Draft of the Standards and Goals dealt with the pretrial detention issue from a very realistic standpoint: that is, that since the courts will continue to detain certain defendants because they pose

some type of threat to the safety of the community, the Standards should delineate procedures for such detention which assure, to the greatest degree possible, accountability and due process.

This posture met with substantial disagreement. Some conference participants felt that pretrial detention should not be discussed in the Standards and Goals at all since the argument is so far from resolution and involves major constitutional issues. A great many other participants maintained that the inability of the courts to predict accurately which defendants will commit crimes while on release forces the use of highly subjective judgment, thereby resulting in unequal treatment of defendants. Third, there was a basic philosophical difference among participants, some feeling that the United States Constitution limits the purpose of bail to assuring appearance in court, while others maintained that the Eighth Amendment does not imply such limitation.

These differences consumed much of the workshop discussions. Alternative theoretical routes were explored and various strategies discussed in an effort to find some common grounds. None of the workshops on pretrial release reached agreement with respect to pretrial detention. Even where participants agreed with some of the procedures suggested in the Conference Draft of the Standards and Goals, they disagreed with the basic concept of pretrial detention.

It was noted that should the Standards recommend the elimination of financial conditions of release, some mechanism should be recommended to allow for the detention of defendants suspected of posing a threat to community safety if released. Even among those who agreed with this statement, considerable dispute arose over the definition of "dangerous". Should the court consider the current charge and/or the circumstances surrounding the arrest? Should such determinations be based on psychiatric evaluations? Should juvenile records be considered in evaluating danger? In that same vein, what type of action is meant by "dangerous"—does that include any criminal act, or only those acts which result in serious bodily harm to another person? Should harmful acts which may not be normally prosecuted as criminal acts (such as suicide) be included? Should the designation of dangerousness apply to persons who might be expected to embezzle money as well as to those who might be expected to commit armed robbery? Should corporation officials charged with criminal conduct because their companies pollute the environment be detained prior to trial on the basis that they may be expected to continue to pollute and therefore are a threat to society?

These arguments—both the general philosophical discussions and the specific disagreements over definitions—produced a great deal of heated discussion. Regardless of personal opinion, it was apparent to Conference participants that there were merits to both sides of the issues involved. Thus, it could not be expected that the Standards and Goals could reflect a consensus of participants' views: the theoretical differences were too great to bridge.

3. *The Role of the Pretrial Services Agency:* The third major area of dispute among conference participants was the role of the pretrial services agency with respect to the adjudication process. In the Conference Draft

of the Standards and Goals it was recommended that the pretrial services agency maintain a neutral posture, serving as advocate for neither the defendant nor the prosecution. The pretrial services agency was viewed as a mechanism for serving the goal of delivery of equal justice, with its operations and policies being directed toward promoting the rational use of nonfinancial release.

Although not nearly as controversial an issue as pretrial detention, many participants disagreed with the above. A substantial number felt that pretrial services agencies should consider themselves advocates for the defendant, promoting the use of release on recognizance in as many cases as possible, and providing the courts with only that information which aids in a decision to release on recognizance. By losing sight of defendant advocacy, it was maintained, pretrial services agencies would lose sight of their reform orientation, and evolve into little more than another layer in the criminal justice bureaucracy.

In contrast, other participants—particularly those working with older and larger pretrial services agencies—felt that neutrality was critical to the establishment of credibility with the courts and prosecutor. This credibility in the long run, would enable the agency to have a greater degree of influence and therefore obtain release for more defendants.

This difference was not resolved at the workshops and led into a discussion of pretrial services agency operations. It was felt that the Standards did not adequately address the "hows" and "whys" of day-to-day activities: what types of information should a pretrial services agency collect; Who should have access to that information? What sorts of recommendations should agencies make—or should agencies make any recommendations at all? What kinds of supervision should be imposed upon defendants? What is the role of supervised release, and should social services such as employment aid or alcohol counseling be required of defendants on pretrial release? Again, the opinions varied, often in line with the kinds of operations used in conference participants' own programs.

4. *Use of the Standards and Goals:* A final major area of question was what individual NAPSA members should do with the Standards and Goals. Should the Standards be viewed as guides for designing daily program operations, should they be used for lobbying at state legislatures, should they be used in court cases bearing on pretrial release? Perhaps the most critical question confronting the conference participants was what to do if the Standards were in contradiction with state statutes, local court rules, or local jurisdiction practices.

For the most part, discussion of these issues revolved around using the Standards as reference material for influencing policy decisions on the local level. In this area the participants appeared to agree that the Standards as a whole would be useful in such lobbying, even if they were in contradiction with their own personal opinion on one or two points.

5. *Other Specific Comments:* While the issues discussed thus far represent the major areas of controversy or concern, many more specific comments were offered regarding the wording of key phrases, clarification of specific provisions, pretrial services agency operations, and overall organization.

Final Review Procedures.

After all of the comments generated at the 1977 Conference were collated they were forwarded to the Project Director who then met with the assistant Coordinator for Release and staff. A new draft was prepared and submitted for comment to the Board of Directors of NAPSA and to the Special Review Panel described in Appendix B.

In early March comments from all those who had submitted them were reviewed by the Project Director and a consultant writer. The final draft was prepared and printed in July.

Conclusion.

As has been mentioned, this final draft represents only the first step in what should become an ongoing evaluative process. As the Standards are analyzed and used and as time changes needs they should be updated. A careful effort has been made to insure the best interests of society as represented by the courts and the accused but it is certain that where rights are in conflict, perfect balance is difficult to achieve. It should be our continuing goal to seek to achieve that balance.

Appendix B

—Review Panel—

1. Honorable Peter Bakakos—Judge, Circuit Court, Cook County, Chicago, Advisory Board National Association of Pretrial Services Agencies (NAPSA).
2. John T. Bellassai, Esquire—Director, Superior Court Narcotics Pretrial Diversion Project.
3. Honorable Irwin Brownstein—Judge, New York State Supreme Court, Advisory Board NAPSA, Board of Trustees Pretrial Services Resource Center (PSRC).
4. Honorable John A. Calhoun—Commissioner of Youth Services, Boston, Mass.
5. Robin Farkas—Senior Vice President, Alexander's Inc., New York, Advisory Board NAPSA, Board of Trustees PSRC.
6. Daniel J. Freed, Esquire—Professor Yale Law School, New Haven, Connecticut, Advisory Board NAPSA.
7. Honorable Joseph Glancey—Judge, Philadelphia Municipal Court, Advisory Board NAPSA.
8. Barry Glick—Police Foundation, Advisory Board NAPSA.
9. Richard D. Hongisto—Sheriff, Cleveland, Ohio, Advisory Board NAPSA.
10. Arnold Hopkins, Esquire—Director of Probation and Parole for the State of Maryland, Advisory Board NAPSA, Board of Trustees PSRC.
11. Wayne Jackson—Chief, Division of Probation, Administrative Office of U.S. Courts, Advisory Board NAPSA.
12. Robert Leonard, Esquire—Prosecutor, Flint, Michigan.
13. Barry Mahoney, Esquire—National Center for State Courts, Denver, Board of Trustees PSRC.
14. Martin J. Mayer, Esquire—Director Criminal Justice Planning Unit, Los Angeles.
15. Doris Meissner, Esquire—Assistant Director, Department of Justice, Advisory Board NAPSA.
16. Norval Morris, Esquire—Dean, University of Chicago Law School, Advisory Board NAPSA.
17. Donald Murray—Director, National Association of Counties.
18. Sheldon Portman, Esquire—Defense Attorney in private practice.
19. Roberta Rovner-Pieczenik—Research Attorney.
20. Herman Schwartz, Esquire—Professor of Law, Advisory Board NAPSA.
21. Herbert Sturz, Esquire—Executive Director, Vera Institute of Justice, New York, Advisory Board NAPSA.
22. Wayne Thomas, Esquire—Attorney in private practice.
23. Anthony Travisono—Executive Director, American Correctional Association.

24. Preston Trimble, Esquire—District Attorney, Norman, Oklahoma, Advisory Board NAPSA, Board of Trustees PSRC.
25. Rick Tropp, Esquire—Advisory Board NAPSA.
26. Guy Willetts—Chief, Pretrial Services, Administrative Office, U.S. Courts.
27. Franklin Zimring—Professor, University of Chicago, Advisory Board NAPSA.

Appendix C

Outline for A Management Information System

OBJECTIVE	DATA REQUIRED FOR PERFORMANCE INDEX	ASSUMPTION	POSSIBLE ANALYSES FOR TESTING ASSUMPTION
Development of programs designed to maximize the rate of nonfinancial release for persons arrested and accused of a crime.	Rate of release on each form of bond for all arrestees: 1. Number of persons arrested for a criminal offense; 2. Number of persons who need pretrial release; a. Number of persons whose cases are disposed of at first court appearance; b. Number of persons whose cases are disposed of through bond forfeiture; c. Number of persons whose charges are dropped within 24 hours; 3. Number of persons released prior to trial on each form of bond; 4. Number of persons detained prior to trial.	The intervention of the pretrial release agency will result in more frequent use of nonfinancial release than would otherwise be the case. The increased use of nonfinancial release results in lower pretrial detention rates than would otherwise be the case.	Comparison between the frequency of use of nonfinancial release prior to agency establishment with rate of use following agency establishment. Comparison of the frequency of nonfinancial releases for persons screened by the pretrial release agency with the frequency of nonfinancial release for a similar group of defendants not screened by the pretrial release agency (randomized control group). Comparison of the rate of detention and lengths of detention for defendants screened by the agency versus those not screened by the agency (either a control group or defendants processed prior to agency implementation).

CONTINUED

1 OF 2

OBJECTIVE	DATA REQUIRED FOR PERFORMANCE INDEX	ASSUMPTION	POSSIBLE ANALYSES FOR TESTING ASSUMPTION
Speedy release of defendants from pretrial detention.	Speed of release: Length of time between booking and release for all persons arrested and charged with a crime who are released on some form of pretrial release, divided into each form of bond (for defendants released on nonfinancial release, separate those screened by the agency from those released without agency intervention).	The intervention of the pretrial release agency will reduce the average amount of time between booking and release prior to trial.	Comparison between agency-screened defendants and defendants released without agency intervention on the amount of time spent in custody between booking and release (either randomized control group or defendants processed prior to agency establishment).
		The combined effect of maximizing the use of nonfinancial bonds and increasing the speed of release will reduce the amount of time spent in pretrial detention by defendants.	Comparison of the percent of time between booking and case disposition spent in pretrial custody between defendants screened by the agency and those not screened by the agency.
Reduction of the inequities in the pretrial release system.	Distribution of the characteristics of persons released on each form of pretrial release and of persons detained prior to trial, including (but not limited to): 1. Age 2. Sex 3. Race/ethnic group 4. Economic bracket 5. Marital status.	The intervention of the pretrial release agency will result in a reduction of discrimination (either intentional or inadvertent) against any class of defendants. Classification of defendants for purposes of pretrial release will not be based on factors irrelevant to the probability of appearance.	Comparisons among various release groups of the percent of defendants in each group falling within each of the defendant classifications noted under "Data Required for Performance Index." Comparisons among each release group and detained defendants along these classifications. Subsequent assessment of any systematic difference between the groups to determine if the differences are merely coincidental with other differences relating to probability of appearance.

OBJECTIVE	DATA REQUIRED FOR PERFORMANCE INDEX	ASSUMPTION	POSSIBLE ANALYSES FOR TESTING ASSUMPTION
Minimization of failures to appear as required by the court.	Number of defendants who miss any court appearance (broken into groups based on type of pretrial release and offense category). Number of appearances missed by persons on pretrial release (broken into groups based on type of pretrial release and offense category). Number of persons and number of appearances missed by persons in detention prior to trial. Rate of return for persons missing any court appearance. Number of persons who remain at large over 30 days.	The intervention of the pretrial release agency will result in maximum use of nonfinancial release without any significant increase in the rate of failure to appear.	Comparison of the failure to appear rates between persons released on nonfinancial bases and those released on traditional forms of bond. Comparison of the failure to appear rate of persons released through agency intervention versus that of a similar group of defendants released without agency intervention.
Minimization of the number of crimes committed by persons on pretrial release.	Number of released defendants rearrested for a criminal offense during pretrial period, broken into felony and misdemeanor rearrests.	Persons released through the intervention of the pretrial services agency will be no more likely to commit a crime while on pretrial release than persons released without agency intervention.	Comparison of the rates of rearrest and conviction on the second charge between persons released through the intervention of the pretrial services agency and those released without agency intervention.
	Number of rearrested defendants who are convicted of the second offense.	The intervention of the pretrial services agency will result in the maximization of release rates without a negative impact on pretrial crime rates.	Comparison of the rates of rearrest and conviction on the second charge between persons released through the intervention of the pretrial services agency and a comparable group of defendants not served by the agency (either a control group or archival comparison group).

OBJECTIVE	DATA REQUIRED FOR COST-BENEFIT STUDY[1]	ASSUMPTION	POSSIBLE ANALYSES FOR TESTING ASSUMPTION
Favorable ratio between program costs and program benefits.	**A. Jail Savings.** Cost of detention prior to trial (marginal, per-defendant jail costs and fixed costs; should also include associated costs such as transportation of defendants from jail to court).	The cost of the pretrial services agency is justifiable in terms of both dollar savings to the defendant, the taxpayer, and the criminal justice system and reduction of inequities in the pretrial release system.	Comparison of the costs of detention of the persons who would have been detained prior to trial without intervention by the pretrial services agency and average length of that detention (should include both persons detained the entire pretrial period as well as persons detained for some portion of that period whose release was effected sooner than would have been possible without agency intervention) with costs of program operation.
	B. Other criminal justice systems savings. Cost of public defender per case (averages, based on type of case).		Comparison of the costs of appointed counsel for those released to the cost of counsel for those detained.
	(For jurisdictions in which the pretrial services agency has implemented stationhouse release): The cost of release through court appearance or magistrate.		Comparison of the costs for detaining those not released until their court appearance to the costs of releasing those same persons on citation.
	C. Savings to the defendant. Cost of release through a bondsman.		Comparison of the costs of the average bond premiums to the costs of per cent deposit or personal recognizance release.
	Dollars lost through lack of employment.		

[1] Cost-benefit studies should only be conducted following sound research which numerically delineates what would have happened had the pretrial services agency not intervened. Since these studies are highly complex, only a general outline with some examples is presented.

OBJECTIVE	DATA REQUIRED FOR COST-BENEFIT STUDY	ASSUMPTION	POSSIBLE ANALYSES FOR TESTING ASSUMPTION
	D. Savings to the taxpayer. Number of families who would have been forced to rely on welfare for support as a result of detention of the defendant. Estimated tax revenue lost as a result of job loss because of detention.		Comparison of wages lost by those defendants detained to wages earned by those released through program intervention. Comparison of welfare costs for families of detained defendants to welfare costs for families of those defendants not detained. Comparison of taxes lost because of unemployed detained defendants to potential revenue had defendants been released, employed, and contributed to the tax base.
	E. Other benefits.		Comparison of those who were sentenced to probation terms to those who received jail sentences, where intervention of program services accounted for the difference.
	F. Program costs (include both fixed and marginal program costs).		

In addition to the kinds of data listed on the preceding pages it is suggested that collection of the following data will permit analysis so necessary to the proper functioning of a true management information system:

1. Disposition of cases (adjudication and sentences) for all persons arrested and accused of a crime, divided into offense categories and release-type categories (including detained defendants);
2. Compliance with conditions of release;
3. Time spans between arrest, notification of charges, release from custody prior to trial, and case disposition;
4. Basic defendant background information, including—
   a. Age, race, sex,
   b. Marital status, extent of family ties in community,
   c. Economic bracket, employment,
   d. Prior criminal history,
   e. Education,
   f. Length of residence in community,
   g. Status at time of arrest (on probation, parole, *etc.*),
   h. Type of attorney (public defender, court appointed, private, *etc.*).

END